



CLIENT ALERT

Title IX Q&A: Current 2020 Regulations and Proposed Amendments

On October 20, 2022, Krokidas & Bluestein attorney Bettina Toner presented a webinar entitled “Title IX Changes on the Horizon: What Massachusetts Charter Schools Should Know.”¹ Below is a summary of questions participants asked at the conclusion of that presentation and responses. As a reminder, the United States Department of Education (“USDOE”) issued amended regulations implementing Title IX that went into effect in August 2020 (“2020 Regulations”). Those regulations remain effect. However, in June 2022, USDOE issued proposed amendments to the 2020 regulations that are expected to be, but have not yet been, implemented.

Scope of Title IX:

1. *Under the current 2020 regulations, is “unwanted, sex-based conduct” evaluated from an objective or subjective perspective?*

Under the 2020 regulations, prohibited conduct includes *quid pro quo* harassment by a school employee, any instance of sexual assault, dating violence, domestic violence or stalking and “any unwelcome conduct that a reasonable person would find so severe, pervasive and objectively offensive” that it denies a person equal educational access. In other words, only the objective perspective is relevant under the current 2020 regulations.

However, this might change. Under the proposed regulations, the definition of sexual harassment would continue to include *quid pro quo* harassment and sexual assault, stalking and dating/domestic violence but would modify the hostile environment prong to cover “unwelcome sex-based conduct that is sufficiently severe or pervasive that, based on the totality of the circumstances and evaluated subjectively and objectively, it denies or limits a person’s ability to participate in or benefit from” the school’s education program or activity.

2. *Do Title IX protections apply to both students and staff?*

Yes, Title IX protects both students and staff from sex-based discrimination, including harassment. Employees of the school have additional protections against discrimination under Title VII of the Civil Rights Act of 1964. Both students and employees have additional anti-discrimination protections under Massachusetts state law.

- 3. What is the difference in the application of Title IX to former students or former staff under the current Title IX regulations and the proposed amendments?*

USDOE has advised that the 2020 regulations do not permit former students and staff who are not participating in or attempting to participate in the school's education program or activity to file a formal Title IX Complaint. The proposed Title IX regulations would permit former students and employees and possibly visitors to the school to avail themselves of the school's Title IX grievance process.

Confidential Employees:

- 4. Please elaborate on the role of a Confidential Employee. Is specific training required for staff serving as a Confidential Employee?*

The proposed regulations would require that each elementary and secondary school employee not designated as a "Confidential Employee" be obligated to notify the Title IX Coordinator of any conduct that may constitute sex discrimination under Title IX. A Confidential Employee is a staff person designated to take confidential reports of sexual misconduct, including sexual harassment, sexual assault (including rape and acquaintance rape), domestic violence, dating violence, relationship violence, or stalking, without having to report the victim's identity or other confidential information to the Title IX Coordinator. The proposed regulations do not specify training requirements specific to the Confidential Employee. However, a Confidential Employee should receive the same Title IX training required of all staff and be familiar with the definition of sexual harassment, the school's sexual harassment policy and grievance procedures.

Parental Involvement:

- 5. Is the Title IX Coordinator required to obtain a parent's consent to investigate a formal Title IX complaint filed by a student? What if a parent wants to pursue a Title IX complaint and investigation but the student does not?*

The 2020 regulations are clear that the complainant's wishes with respect to whether the school investigates should be respected unless the Title IX Coordinator determines that signing a formal complaint to initiate an investigation over the wishes of the complainant is not clearly unreasonable in light of the known circumstances. While there may be times where a Parent has information that will factor into the Title IX Coordinator's decision about whether to initiate the formal complaint process over a complainant's wishes, generally it is for the student to decide whether or not to file a formal complaint and to engage in the grievance process.

Accommodations:

- 6. Under the proposed Title IX regulations, would a small room with partitions within the room be sufficient lactation space for two or more persons?*

The proposed regulations would require that schools provide “clean, private space for lactation” for both students and employees. Whether or not a particular space provides sufficient privacy would be a fact-specific inquiry. Schools would be required to provide employees with reasonable break time for lactation so it may be sufficient to offer one private room so long as it is reasonably available to students and staff that need to use it. If the demand would result in unreasonable wait times for the lactation space, the school could reasonably be expected to arrange for additional lactation space.

Informal Resolution:

- 7. Do the current or proposed regulations specify the steps that must be taken for informal resolution if the school offers that option?*

USDOE guidance¹ on the 2020 amendments has indicated that if a school elects to offer any kind of informal process, such as mediation or restorative justice, the school must obtain the complainant’s and the respondent’s voluntary, written consent before using that informal resolution process. Beyond the consent requirement, schools have the freedom to allow the parties to choose an informal resolution mechanism that best suits their needs. However, schools must make clear that either party may withdraw from the informal resolution process and resume the formal grievance process at any time prior to agreeing to a resolution.

If a school offers an informal resolution process it must ensure that all persons who facilitate informal resolutions are free from conflicts of interest and bias and are trained to engage impartially without prejudging the facts at issue. For example, schools that choose to offer restorative justice as a means of an informal resolution should ensure that the restorative justice facilitators are well-trained in effective processes. A school may use trauma-informed techniques during the informal resolution process if staff involved are adequately trained in the techniques used.

Staff Training and Reporting Obligations:

- 8. When does Title IX annual training need to be conducted for staff?*

The 2020 regulations require that Title IX staff, including the Title IX Coordinator, Investigators and Decision-makers, receive training on the definition of sexual harassment, the scope of the school’s education program and activities, how to conduct an investigation and the grievance process, including hearings, appeals and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest and bias. Decision-makers must also receive training on issues of relevance, including how to apply the rape shield protections provided for complainants. All staff should be trained on how to identify sexual harassment, what to report and to whom. The 2020 regulations do not specify

¹ See “Questions and Answers on the Title IX Regulations on Sexual Harassment” dated July 2021, updated June 28, 2022, available at <https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>.

a required time of the school year for training; however, many schools find it useful to include Title IX training as part of professional development done at the beginning of each school year.

9. *When must a school report a Title IX allegation to the Department of Children and Families (“DCF”)?*

Title IX does not alter a school employee’s obligation to comply with mandated reporting requirements under Massachusetts state law (M.G.L. ch. 119, § 51A) including notification to DCF when the employee reasonably believes a student is experiencing physical or emotional abuse or neglect. The Massachusetts Department of Elementary and Secondary Education and DCF issued joint guidance² in October 2021 reminding schools of their mandated reporting obligations and recommending that school personnel consult with the school's legal counsel if they have questions about whether specific allegations trigger their mandatory duty to report or which laws, regulations, or policies may govern their response to the specific allegations, noting that:

Generally, school authorities have a legal obligation to protect the safety and civil rights of students. For example, under the federal law prohibiting sex discrimination in schools that receive federal funds (Title IX), schools must take steps to prevent and respond to allegations that a student has sexually harassed or sexually assaulted another student. Similarly, certain types of allegations may trigger a school's legal obligations under the Massachusetts anti-bullying law and regulations, as well as the school's bullying prevention and intervention plan.

Decision-making and Discipline:

10. *The proposed regulations provide additional guidance on consideration of a student’s age, maturity and level of independence. May schools consider these factors under the current 2020 regulations?*

Although the 2020 regulations and USDOE guidance are silent on the relevance of age, maturity and level of independence, as a practical matter, consideration of those factors will often come into play when determining if the alleged conduct is so sufficiently severe, pervasive and objectively offensive that it denies an individual the ability to participate in or benefit from the school’s education program or activities. For example, unwanted touching by a high school senior is not likely to be considered in the same light when it is exhibited by a first grader. Therefore, under the 2020 regulations, we believe it is permissible for a decision-maker to consider the age, maturity and level of independence of the respondent when making a determination of whether there has been a violation of Title IX.

11. *Under the proposed regulations, is a school still prohibited from disciplining a student until the completion of the Title IX process?*

² See <https://www.doe.mass.edu/lawsregs/advisory/child-abuse.html>

Yes, the 2020 regulations require that schools follow their Title IX-compliant grievance procedures before the imposition of any disciplinary sanctions or other actions that are not supportive measures against a respondent. The proposed regulations maintain the same general requirement that disciplinary action against a respondent may not be taken prior to the completion of the Title IX grievance process. However, there may be situations where a student is alleged to have violated other provisions of the student code of conduct or other laws in addition to Title IX or there may be a situation where a student's continued presence at school is unsafe. In complex situations, we advise consulting with counsel on how to navigate the Title IX and safety considerations.

If you have any questions about Charter Schools' obligations under 2020 regulations or USDOE's proposed regulations, please contact Attorney Bettina Toner (btoner@kb-law.com).