

TITLE IX

THE NEW REGULATIONS
EFFECTIVE AUGUST 14, 2020



NEW TITLE IX REGULATIONS

- On May 5, 2020, the Department of Education released the new Title IX regulations. The DOE started the revision process in November 2018.
- The regulations became effective on August 14, 2020.
- The regulations give OCR three main points on which to assess whether an institution has committed a violation:
 - Did actionable sexual harassment occur?
 - Did the institution have actual knowledge of actionable sexual harassment?
 - Did the institution respond appropriately, or with deliberate indifference, when they had actual knowledge of actionable harassment?

LIMITING WHAT CONSTITUTES TITLE IX SEXUAL HARASSMENT

Only the following behaviors or actions rise to the level of Title IX Sexual Harassment:

- ❑ Any instance of quid pro quo harassment (victim is offered a reward, or threatened for refusing, to participate)
- ❑ Any unwelcome conduct that a reasonable person would find so severe, pervasive **AND** objectively offensive that it interferes with the educational process
- ❑ Any instance of sexual assault (as defined by the Clery Act) or dating violence, domestic violence, or stalking (as defined by the Violence Against Women Act).

We can still use other policies to address sexual harassment that is disruptive to the working and learning environment but does not fall within these definitions.

WHAT CONSTITUTES TITLE IX SEXUAL HARASSMENT CONTINUED...

Or vs. And – Severe, Pervasive, Offensive

- Under the prior guidance, a single incident, if severe or offensive enough, might meet the definition of sexual harassment. For example, an isolated incident of derogatory offensive language could have been sufficient to support a Title IX complaint.
- Now with the new definition of “severe, pervasive **and** objectively offensive”, such an incident would likely not reach the threshold for sexual harassment under Title IX.
- Additionally, the new regulations state that procedures cannot restrict the right of academic freedom or freedom of expression.

EMPLOYEES AND TITLE IX PROCEDURES

The new regulations clarify how Employees may use and/or be subject to the Title IX process.

- All Respondents in formal Title IX complaints, including Employees, would be subject to the requirement for live hearings with cross examination in order to determine responsibility.
- KCTCS' Anti-Harassment/Discrimination Policy may also apply to sexual harassment allegations involving employees. Employee complaints may be subject to both Title IX and Title VII (which have different legal standards).
- Once a determination of responsibility is made, existing processes would govern sanctions—employment policies and procedures for employees, and the Code of Student Conduct for students.
 - Employees and students will still be subject to all the due process rights available under the law, including appeals to the Board of Regents for tenured employee terminations and student suspensions/expulsions.

OTHER LEGALISTIC CHANGES

Jurisdiction - KCTCS can address matters through its Title IX Sexual Misconduct Procedure only if the conduct occurs in its education program or activity against a person in the United States. Under the new regulations, KCTCS cannot use the Sexual Misconduct Procedure to address an alleged incident that occurs outside the United States, such as during business travel or study abroad programs. We still may address these reports through other policies.

- Scenario 1—Two students meet at a concert at a local live music venue. The next day, one of the students comes to you to report nonconsensual sexual activity after the concert was over. Is this Title IX sexual harassment/misconduct?
- Scenario 2—Two students meet at a concert on campus sponsored by the Student Activities Committee. The next day, one of the students comes to you to report nonconsensual sexual activity after the concert was over. Is this Title IX sexual harassment/misconduct?
- Scenario 3—After a study abroad trip, a student reports to you that they were fondled by a faculty member on the trip. Is this Title IX sexual harassment/misconduct?

OTHER LEGALISTIC CHANGES

Actual Knowledge - For purposes of future litigation, the new regulations address when the institution has “actual knowledge” of a violation of Title IX. This change is aimed at limiting liability for the institution by reducing the number of people responsible for acting on behalf of the institution.

However, the definition still supports faculty being required to report information they receive to the Title IX Coordinator.

The regulations state that the institution has actual knowledge of sexual harassment or allegations of sexual harassment when notice is given to:

1. the Title IX Coordinator or
2. “any official* of the recipient who has authority to institute corrective measures on behalf of the recipient.”

*if an official with authority is the alleged respondent, the institution is **not** considered to have actual knowledge

FORMAL COMPLAINTS

In order for the institution to take action against a respondent, the new regulations require the filing of a formal complaint.

Formal complaints

1. Can only be filed by someone participating or attempting to participate in the education program or activity of the institution—reconcile with parent or other party filing on behalf of complainant;
2. May be “signed” by the complainant or the Title IX Coordinator—however, Coordinator signature does not make the Coordinator the complainant;
3. Can be filed either in a document or through electronic submission in an online portal.

Reports of prohibited conduct may not necessarily be formal complaints. Supportive measures are still available upon receipt of reports/informal complaints, but institutions may not take formal action without a formal complaint.

DISMISSING COMPLAINTS

The new regulations outline when dismissal of Title IX complaints is required, and when it is permitted. Dismissal may occur at any time during the investigation or hearing process.

- A complaint must be dismissed if:
 - Conduct does not meet the definition of sexual harassment even if proven
 - Conduct did not occur in an institution's program or activity
 - Conduct did not occur in the United States
 - A complaint may be dismissed if:
 - Complainant withdraws the complaint
 - Respondent is no longer enrolled as a student or employed by the institution
 - Specific circumstances prevent gathering evidence sufficient to reach a determination
1. Written notice of dismissal must be provided simultaneously to both parties.
 2. Dismissals may be appealed by either party.
 3. Dismissal does not preclude action from being taken under other applicable policies/procedures.

INFORMAL RESOLUTIONS

The new regulations allow KCTCS to offer informal resolutions to allegations.

- Both parties must give voluntary, informed, written consent to attempt informal resolution.
- Informal resolutions include options such as mediation or restorative justice.
- Informal resolution *cannot* be offered or facilitated in complaints that an employee sexually harassed a student.

DUE PROCESS ELEMENTS

The new regulations established many procedural elements to ensure equity for both Complainant and Respondent during the investigation and hearing process in formal complaints.

- The parties involved cannot be restricted in discussing the allegations.
- Written notices of all interviews, meetings, or hearings must be sent with enough advance notice to give the participant time to prepare.
- The institution must promptly send both parties simultaneous written notices of dismissal and the reason(s) for dismissal.
- Each party gets 10 days to inspect all evidence gathered during an investigation.
- The investigation report must be shared simultaneously with both parties.

DUE PROCESS ELEMENTS

CONTINUED...

Live Hearing Requirement

Probably the biggest change in the Title IX regulations is that live hearings are required to adjudicate a formal Title IX complaint. The hearing involves full due process, making it like a formal court hearing. This will include:

- Having a hearing officer to conduct the hearing and assess the relevance of cross-examination questions. (CPE is spearheading a personal service contract to establish a group of trained hearing officers that public institutions can hire as needed.)
- The hearing must permit live cross-examination of the parties and witnesses by the parties' advisors; Complainant and Respondent may not directly question one another.
- Parties to the allegations may have advisors. If a person is unable to obtain an advisor for the live hearing, KCTCS must provide one at no cost to the party to conduct cross-examination. Kentucky has stringent rules about the "practice of law" so this likely will have to be an attorney during the hearing.

APPEAL PROCESS

The new regulations provide for an appeal process for either party based on:

- A procedural irregularity
 - Newly discovered evidence
 - Title IX personnel had a conflict of interest
- Of course, pursuant to state laws, students maintain their right to appeal suspensions and expulsions to the Board of Regents.
- Employees determined responsible would be subject to the usual processes for discipline or termination, so ultimately, after many layers of process, they would be eligible for any appeals, such as to the Board of Regents or the independent third-party appeal process.

SUPPORTIVE MEASURES

The regulations formalize that institutions should offer non-disciplinary, non-punitive individualized services, called supportive measures, when a report is made, whether it continues through a formal process or not. Supportive measures are to be made available to both complainant and respondent in Title IX reports.

KCTCS will continue to offer supportive measures to affected parties. Available supportive measures include:

- counseling
- extensions of deadlines or other course-related adjustments
- modifications of work or class schedules
- campus escort services (where available)
- mutual restrictions on contact between the parties
- changes in work locations
- leaves of absence
- increased security and monitoring of certain areas of the campus
- other similar measures.

PUBLIC NOTICE

- KCTCS must now prominently publicize the identity and contact information of the Title IX Coordinator. We are obligated to notify applicants for admission and for employment and prominently display it on our websites.
- All trainings offered to the Title IX Coordinators, employees, investigators, hearing officers, and students must be posted for public view on our websites.

QUESTIONS & ANSWERS?

Contact the Office of General Counsel when you have Questions

Pam Duncan, Interim General Counsel

pam.duncan@kctcs.edu

859-256-3217

Terri DeAtley, Director of Policy Administration & Legal Analysis

terri.deatley@kctcs.edu

859-256-3294

Val Parks, Director of Employee Relations

val.parks@kctcs.edu

859-256-3466