



TITLE IX TRAINING

For Windsor Charter Academy
July 25, 2023

By Eric V. Hall

I. TITLE IX

- A. Federal statute
- B. Passed by Congress in 1972
- C. Applies to institutions that receive federal financial assistance
 - 1. Colleges and universities
 - 2. K-12 schools
- D. Text of Title IX
 - 1. *No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.*
 - 2. 20 U.S.C. § 1681(a)
- E. Discrimination on the basis of sex
 - 1. Discrimination – treating a person worse than others who are similarly situated
 - 2. On the basis of – sex was the cause of the adverse treatment
 - 3. Sex
 - a. Common types of sex discrimination
 - i. Athletic teams
 - ii. Sexual harassment at schools
 - b. Includes sexual orientation and transgender identity
 - i. *See Bostock v. Clayton County*, 590 U.S. 140 (2020) (Title VII case)
 - 4. Title IX does not cover discrimination against other protected classes
 - a. Not race
 - b. Not religion
 - c. Etc.
 - 5. Title IX does not cover “discrimination generally”



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- F. In the education context, Title IX is enforced by the Office of Civil Rights (OCR)
- G. Title IX Regulations, 34 C.F.R. 106
 - 1. Regulations enacted under each president
 - a. President Trump – his administration’s regulations became effective August 14, 2020
 - b. President Biden
 - i. On July 12, 2022, the Biden administration proposed new Title IX regulations
 - 1) 190 pages long
 - ii. Over 240,000 comments were received
 - 1) More than twice as many as when the Title IX regulations were last changed under Trump
 - iii. Due to the overwhelming number of comments, the Department of Education has pushed back its anticipated promulgation of the Title IX changes to October 2023.
 - 2. Current Key Regulations
 - a. 34 C.F.R. 106.30 Definitions
 - b. 34 C.F.R. 106.44 Recipient’s response to sexual harassment
 - c. 34 C.F.R. 106.45 Grievance process for formal complaints of sexual harassment

II. WINDSOR CHARTER ACADEMY TITLE IX POLICY – AC-R-2

- A. An Incident Occurs
 - 1. Examples
 - a. “Every Breath You Take” – Male on female (peers)
 - i. Employee on employee
 - ii. Student on student
 - b. “Don’t Stand So Close to Me” – Male employee on female student
 - i. Asymmetrical power dynamic
 - 2. How is it Reported?
 - a. Orally
 - i. Safe-2-Tell call
 - b. In writing
 - c. An incident can be reported to the Title IX Coordinator “by any means” (Policy page 3)



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3. Who reports it to whom?
 - a. Recipient of the report
 - i. Employee = school is on notice
 - 1) Employee “must” report incident to Title IX Coordinator (Policy page 3)
 - ii. Non-employee = school is not on notice
 - 1) Student
 - 2) Parent
 - 3) Non-employees “are encouraged” to report incident to any WCA employee (Policy page 3)
 - b. Reporter – person making the report
 - i. Complainant
 - ii. Complainant’s friend or co-worker or parent
 - iii. Anybody else
4. Where has the incident occurred?
 - a. On campus
 - b. At any WCA event
 - i. WCA basketball game – male student puts his arm around female student
 - ii. WCA Holiday Party – male employee solicits sex from female co-worker
 - iii. After-party
 - c. Location where WCA is not responsible
 - i. Home of employee or student
 - ii. Party
 - iii. On social media
5. What has occurred?
 - a. Not sex-based conduct → Not Title IX
 - b. Sex-based conduct
 - i. Title IX Sexual Harassment v. Sexual misconduct
6. Title IX “Sexual Harassment” (3 types) (Policy page 2)
 - a. *By an Employee* (Type 1)
 - i. Employee conditions aid, benefit, or service on an individual’s participation in unwelcome sexual conduct



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- ii. “quid pro quo” – “this for that”
- iii. Employee on employee
- iv. Employee on student
- b. *By an Employee or a Student (Type 2)*
 - i. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to WCA’s education programs or activities
 - 1) Unwelcome
 - 2) Reasonable person
 - 3) Severe, pervasive, and objectively offensive
 - 4) Effectively denies the complainant access to WCA
 - ii. Not “quid pro quo”
 - iii. Employee on employee
 - iv. Employee on student
 - v. Student on employee
 - vi. Student on student
 - vii. Contrast with new Colorado statute, SB 23-172
 - 1) Protecting Opportunities and Workers’ Rights Act (POWR Act)
 - 2) Will take effect on August 10, 2023
 - 3) C.R.S. § 24-34-402(1.3)
 - a) Illegal harassment means “unwelcome conduct because of that person’s class”
 - b) Conduct must be (i) subjectively offensive and (ii) objectively offensive to a reasonable person who is a member of the same protected class
 - c) To be illegal, harassment does not need to be “severe or pervasive”
- c. *Specific crimes (Type 3)*
 - i. Sexual assault
 - ii. Dating violence
 - iii. Domestic violence



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- iv. Stalking
 - v. Employee on employee
 - vi. Employee on student
 - vii. Student on employee
 - viii. Student on student
- B. People involved in the incident
- 1. Complainant
 - 2. Respondent
 - 3. Witnesses
 - 4. Parents
 - 5. Advocates, e.g., attorneys
- C. Roles within Title IX Process
- 1. Title IX Coordinator
 - a. May also be the Investigator
 - 2. Investigator
 - a. May be the Title IX Coordinator
 - b. May not be the Decision Maker
 - 3. Decision Maker
 - 4. Appellate Decision Maker
 - a. May not be the same person as the Coordinator, Investigator, or Decision Maker
 - b. This could be one person or several people
- D. Burden of Proof
- 1. On the complainant
 - a. Respondent is innocent until found responsible
 - 2. Preponderance of the evidence
 - a. More likely than not
 - b. 50.1% or more evidence that respondent is responsible
 - 3. Not “beyond a reasonable doubt”
 - a. Police/criminal process is different from Windsor process
- E. Title IX Process under the WCA Title IX Policy
- 1. WCA has “actual knowledge” of sexual harassment (Policy page 3)
 - a. Title IX Coordinator must contact the complainant **within 5 days**
 - i. Offer supportive measures



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- 1) “Supportive measures” (Policy pages 2, 3-4)
 - a) Non-disciplinary, non-punitive
 - b) Individualized services
 - c) Offered for free to complainant and respondent
 - d) Before or after complaint has been filed, or when no complaint is filed
 - e) Reasonably confidential
 - f) Support the student to help him/her continue in school
 - g) Examples given on Policy pages 3-4
 - ii. Explain the process for filing a formal complaint
2. Emergency removal of respondents (Policy page 4)
 - a. Student respondent can be removed immediately by Title IX Coordinator if he/she believes student poses an immediate threat to the physical health or safety of others
 - b. Employee respondent may be placed on administrative leave
 3. Filing a formal complaint (Policy page 4)
 - a. Complainant may file formal complaint
 - i. Or complainant’s parent or guardian may file
 - ii. File with Title IX Coordinator
 - iii. Filing means asking WCA to (1) investigate and (2) adjudicate report
 - iv. Filing requires an indication that the complainant is authorizing the formal process
 - 1) Signature – ink or digital
 - 2) Some other indication
 - v. Complainant must be “participating” (or attempting to participate) in WCA
 - 1) Complainant can’t withdraw from WCA but still file complaint
 - b. Title IX Coordinator may file formal complaint
 - i. Complainant doesn’t want to file (worried about retaliation)
 - ii. Title IX Coordinator must:
 - 1) Consider complainant’s wishes
 - 2) Evaluate whether an investigation is clearly unreasonable
 - iii. Title IX Coordinator signs formal complaint
 - 1) This does not make the Coordinator a party
 - c. Time limit to file a formal complaint (Policy page 4-5)
 - i. Technically: there is no time limit



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- ii. Practically: complainants should file as soon as possible
 - 1) Investigation is made more difficult
 - 2) Response is made more difficult or impossible
 - 3) Adjudication is make more difficult
- 4. Consolidating formal complaints (Policy page 5): Yes, this is permitted when the allegations arise out of the same facts or circumstances
- 5. Dismissal of formal complaints (Policy page 5)
 - a. Mandatory dismissal – Title IX Coordinator must dismiss a complaint when:
 - i. Allegations do not meet definition of Title IX sexual harassment
 - ii. Incident did not occur at WCA-controlled event
 - iii. Incident did not occur in the United States
 - iv. Complainant has withdrawn from WCA when she filed the complaint
 - v. Dismissal does not preclude WCA from acting under different policy
 - b. Discretionary dismissal
 - i. Complainant requests in writing that she would like to withdraw
 - 1) Entire complaint, or
 - 2) Some allegations in it
 - ii. Respondent is no longer at WCA (withdraws or quits)
 - iii. Circumstances prevent WCA from investigating
 - c. Notice of Dismissal and Right to Appeal (Policy pages 5-6)
 - i. Upon dismissal, Title IX Coordinator will send written notice to both parties
 - 1) Notice must state the reasons for the dismissal
 - ii. Either party may appeal dismissal (*see Appeal Process below*)
 - iii. Dismissal does not prohibit other actions
 - 1) Complainant can take other actions
 - 2) WCA can take other actions
 - a) Supportive measures
 - b) Discipline under other policies
- 6. Informal Resolution (Policy pages 6, 11)
 - a. WCA decides whether to allow informal resolution
 - i. BUT informal resolution is not allowed if an employee has sexually harassed a student



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- b. Allowed only after a formal complaint has been filed
 - i. Before complaint has been served on respondent?
 - c. Informal resolution process
 - i. WCA provides written notice to both parties
 - ii. Notice contains
 - 1) Allegations, and
 - 2) Requirements of informal resolution process
 - iii. Both parties must give written consent to participate in informal resolution
 - iv. Either party may withdraw from informal process at any time prior to a resolution
 - v. No investigation or adjudication under informal process
 - d. Informal Resolution Agreement
 - i. Signed by both parties (and their parents)
 - ii. Signed by the Title IX Coordinator
 - iii. Describes the resolution
 - iv. Once signed, the process is over
 - 1) This means finality. Neither party can re-start the formal process
7. Written Notice of Allegations (Policy page 6)
- a. Coordinator must provide written notice of the allegations to both parties **within 7 days of receiving the written complaint**
 - i. All the allegations
 - ii. From the formal complaint
 - b. Parties shall have **at least 3 days** from when notice is sent to prepare for the initial interview
 - c. *Supplemental* written notice must be given to both parties if WCA begins to investigate allegations that are “materially beyond” the written notice
8. Formal Grievance Process (Policy pages 6-10)
- a. Equitable treatment
 - i. Process should treat both parties equally
 - ii. WCA promises remedies to complainant if respondent is found responsible
 - iii. WCA promises due process to respondent before determination of responsibility is found
 - 1) Respondent is innocent until proven responsible
 - 2) Determination of responsibility is found **at the end** of the process



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- b. Timeframe
 - i. Goal: a prompt, impartial, and thorough investigation and resolution
 - ii. Both parties kept equally informed throughout
 - iii. Process should take between 60-90 days

- c. Delay or Extension for Good Cause (Policy page 7)
 - i. WCA may delay or extend deadlines for “good cause”
 - ii. “Good cause” may include reasons like:
 - 1) Absence of a party, a party’s advisor, or witnesses
 - 2) Concurrent law enforcement activity
 - 3) The need for language assistance
 - 4) The need to accommodate disabilities
 - iii. WCA shall provide both parties notice if a delay or extension occurs

- d. Right to Advisor of Choice (Policy page 7)
 - i. Either party may bring an advisor of his/her choice
 - 1) More than one advisor?
 - 2) Change advisors?
 - ii. Advisor may attend but not speak

- e. Prohibition on Knowingly Making False Statements (Policy page 7)
 - i. This applies to complainants, respondents, witnesses, advisors, parents – everyone
 - ii. Cannot knowingly make false statements or provide false information

- f. Investigation Procedures (Policy pages 7-8)
 - i. Investigator (Policy page 2)
 - 1) Trained to conduct Title IX investigations
 - a) Objectively evaluate credibility
 - b) Synthesize all available evidence
 - i) Inculpatory
 - ii) Exculpatory
 - c) Take into account all circumstances
 - 2) May be the Coordinator, but may not be the Decision Maker
 - 3) Need the band width to complete the job well
 - ii. Investigations should be prompt, thorough, fair, and impartial



- iii. Interviews
 - 1) WCA will provide written notice to the parties and the witness before the Investigator conduct an interview
 - 2) Complainant and Respondent (and their respective advisors) may attend every interview if they want
 - a) Advisor may not participate
 - 3) WCA may conduct follow up interviews
 - 4) Policy doesn't specify anything about:
 - a) Where interviews will take place
 - b) How they take place (in person or by Zoom)
 - c) How long they will be
 - d) Whether interviews will be recorded (audio or video)
- iv. Collecting Evidence
 - 1) WCA bears the burden of collecting enough evidence to make a determination
 - 2) Both parties will have an equal opportunity to:
 - a) Offer witnesses
 - b) Offer evidence (inculpatory and exculpatory)
 - c) Inspect and review any evidence that is directly related to the allegations in the complaint
 - 3) WCA will not collect medical records
 - a) Unless the patient consents to disclosure
 - 4) WCA will not collect privileged information
 - a) Unless the privilege-holder consents
- v. Preparing Investigative Report (Policy page 8)
 - 1) Investigator gathers evidence
 - 2) Investigator sends to both parties (and their advisors) all the evidence
 - a) If the investigator might use any piece of evidence, then it must be disclosed to the parties in advance
 - 3) Parties have **10 days** to submit a response to the evidence
 - a) What if a party submits additional evidence as part of his/her response?
 - b) This can be a delaying tactic
 - c) The Investigator must consider the parties' responses



- 4) Investigator shall prepare an investigative report that fairly summarizes all relevant evidence
 - a) Investigator decides what evidence is relevant
 - b) Investigator provides the investigative report to WCA
 - 5) WCA sends investigative report to both parties (and their advisors)
 - a) Parties have **10 days** from receiving report to respond
- g. Determining Responsibility (Policy page 9)
- i. Following 10 day review period, the Investigator shall submit to the Decision Maker (1) the investigative report and (2) all relevant evidence
 - ii. Parties' responses to the investigative report shall be given to the Decision Maker
 - iii. Decision Maker shall facilitate an exchange of written questions
 - 1) This is in lieu of live cross-examination, as you would have in court
 - 2) Parties may submit *proposed* questions for other party and witnesses.
 - a) Parties have **2 days** to submit questions after request by Decision Maker.
 - 3) Decision Maker decides whether to permit, exclude, or rephrase questions.
 - a) Decision Maker must explain in writing why he/she has decided to rephrase or exclude questions.
 - 4) Decision Maker will submit the permitted and rephrased questions to the parties and witnesses who need to answer them.
 - a) Individuals receiving questions have **3 days** to respond in writing to the questions.
 - b) Individuals may also submit limited follow up questions to the Decision Maker (within the same 3 day period).
 - c) Presumably, the Decision Maker has the same ability to decide whether to permit, exclude, or rephrase the follow up questions.
 - 5) Exchange of questions and responses must take place **within a 10 day period.**
 - 6) Decision Maker may exclude questions if they are (1) improper or (2) irrelevant.
 - a) For example, questions about the complainant's sexual predisposition or prior sexual behavior are not relevant *unless* such questions and evidence are offered to prove:



- i) That someone other than the responded committed the conduct alleged, or
 - ii) That complainant consented to the sexual activity by offering evidence or questions related to prior specific incidents between the complainant and respondent.

- iv. Decision Maker will determine whether respondent was responsible for the conduct alleged.
 - 1) The Decision Maker will evaluate all the relevant evidence.
 - 2) The Decision Maker may make credibility determinations based upon the specific evidence for the specific situation.
 - a) Not based upon a person’s status as a complainant, respondent, or witness.
 - b) E.g., not because “men are liars,” “women are liars,” “men who are accused are usually guilty,” etc.
 - 3) The Decision Maker shall use the preponderance of the evidence standard. (*See discussion above*)
 - 4) The Decision Maker shall issue a written determination.
 - a) Issued to both parties simultaneously
 - b) Issued **within 30 days** from when the Decision Maker received the investigative report from the Investigator
 - i) Given 10 days for exchange of questions, this leaves only 20 days to complete the written determination.
 - 5) If respondent is found responsible, then:
 - a) WCA can discipline him/her as it deems appropriate under the circumstances, including expulsion
 - i) Expulsion would be subject to standard expulsion process under C.R.S. § 2-33-105 & -106
 - b) WCA can offer remedies to complainant to help restore or preserve equal access to WCA
 - c) Coordinator is responsible for implementing these measures.
 - 6) If respondent is found not responsible, then WCA may decide what actions needs to be taken to ensure both complainant and respondent can access WCA



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- 7) A determination of responsibility (or not) does not affect the ability of the complainant or respondent from seeking redress through other state or federal agencies, as provided by law.
- h. Appeal Process (Policy page 10)
 - i. Either party may appeal:
 - 1) Dismissal of formal complaint, or
 - 2) Decision Maker's determination of responsibility
 - ii. Appeal must be filed **within 3 days** after receipt of the dismissal or determination
 - iii. Grounds for appeal are limited to only:
 - 1) A procedural irregularity affected the outcome,
 - 2) New evidence that was not reasonably available before that would affect the outcome, or
 - 3) Coordinator, Investigator, or Decision Maker had a conflict of interest or bias, that would have affected the outcome, against:
 - a) Complainants or respondents generally, or
 - b) The specific complainant or respondent in the particular matter
 - iv. WCA will notify both parties in writing when an appeal is filed
 - 1) Appeal document must be provided to the other party
 - 2) Each party will have **10 days** to submit a written statement either supporting or challenging the outcome
 - v. Appellate Decision Maker
 - 1) May not be the same person as the Coordinator, Investigator, or Decision Maker
 - 2) This could be one person or several people
 - 3) Will only consider the written submissions; no new evidence may be taken
 - 4) There is no formal rule about how long the Appellate Decision Maker has to decide
 - i. Conclusion of the Title IX Process (Policy page 10)
 - i. Determination of responsibility becomes final when, either:
 - 1) WCA provides the parties with the written determination of the appeal, if any, or



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- 2) The date on which the appeal would be considered untimely
- j. Retaliation Prohibited (Policy page 11)
- i. It is a violation of this Policy to take any of the following actions for the purpose of interfering with any right or privilege secured by Title IX:
 - 1) Intimidate
 - 2) Threaten
 - 3) Coerce, or
 - 4) Discriminate against an individual
 - ii. It is a violation of this Policy to take any of the foregoing actions because an individual has:
 - 1) Made a report or complaint
 - 2) Testified
 - 3) Assisted
 - 4) Participated or refused to participate in any investigation, proceeding, or interview
 - iii. It is not retaliation to charge and discipline a person under WCA's code of conduct for making a materially false statement in bad faith in the course of a Title IX proceeding
 - 1) *Except that* a determination regarding responsibility (or not), standing alone, is not sufficient to conclude any party made a materially false statement in bad faith
 - 2) For example, if the outcome is that the respondent was found "not responsible," then that determination, standing alone, is not enough to charge the complainant with "making a materially false statement in bad faith"

III. LEGAL LIABILITY

- A. This Title IX process at the School-level will not determine legal liability
- B. In any formal legal action, WCA will be legally liable
- C. *Unless* an individual caused harm through intentional or reckless conduct