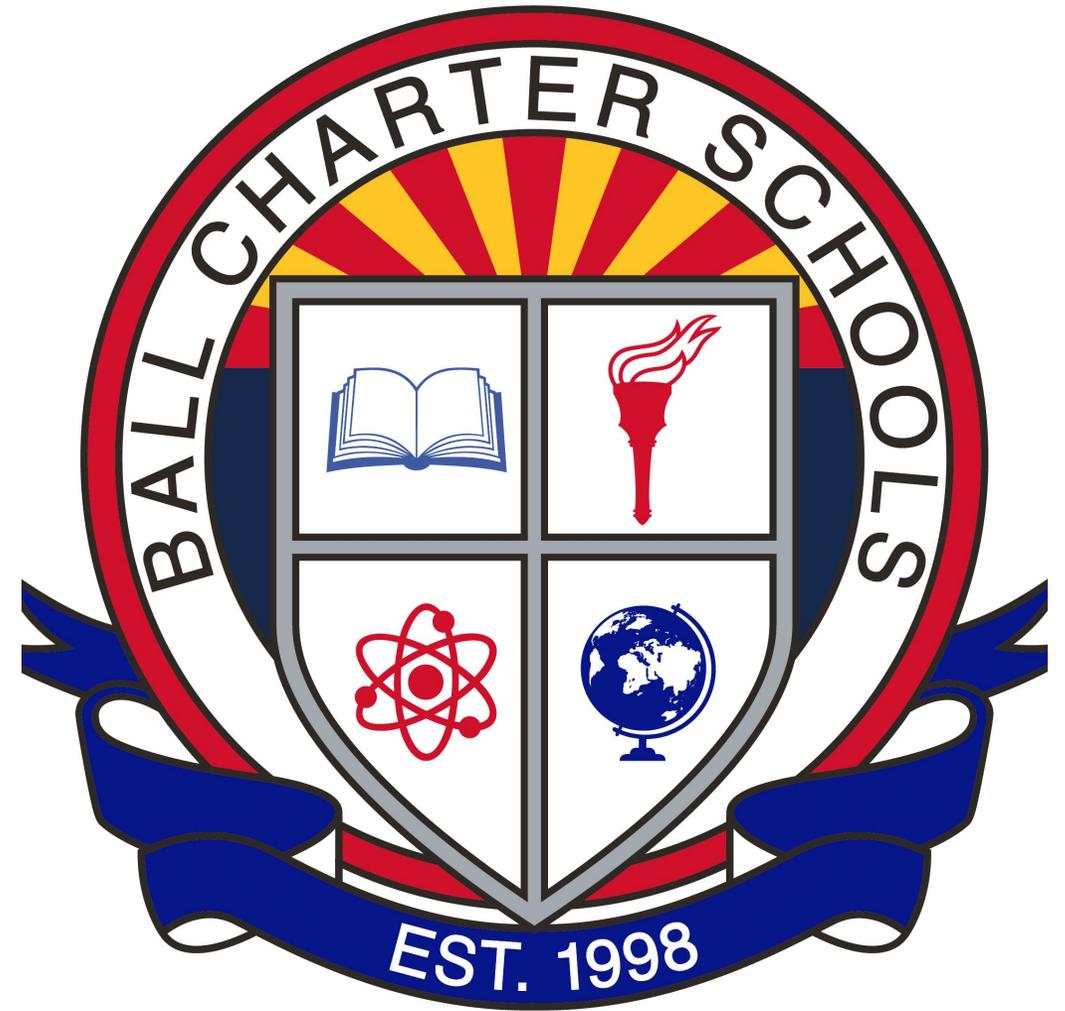


The New Title IX Regulations:

Source: Osborn Maledon P.A

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What is Title IX?

- No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal financial assistance.
- 20 U.S.C. § 1681, adopted in 1992

Title IX Prohibits Sex Discrimination

Sexual harassment is one form of sex discrimination.

The new regulations now define “sexual harassment”:

- Employee quid pro quo
- Hostile environment
- Violence Against Women Act offenses:
- Sexual violence
- Dating violence
- Domestic violence
- Stalking

Two Key Cases

- Gebser v. Lago Vista Independent School District, 524 U.S. 274 (1998)
- School may be liable under Title IX for employee on student sexual harassment if: School official with authority to institute corrective measures as actual notice of allegations that an employee is engaging in sexual misconduct involving the student and the school acts in a deliberately indifferent manner.

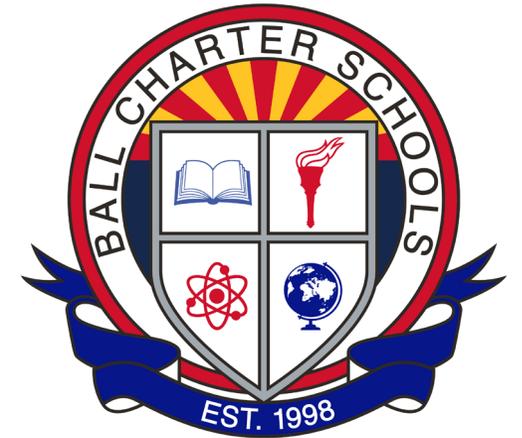
Two Key Cases

- Davis v. Monroe County Board of Education, 526 U.S. 629 (1999)
- School may be liable under Title IX for student on student sexual harassment if:
 - Unwelcome conduct as determined by a reasonable person that is so severe, pervasive and objectively offensive that it effectively denies a person's equal access to the school's resources and opportunities.

Must appoint a Title IX Coordinator

- Ball Charter Schools have appointment a Title IX coordinator. Please reach out to Parker Galope with questions.

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Formal Complaint v. Actual Knowledge

Schools must respond to sexual harassment reports (actual knowledge) OR formal complaints. Any kind of notice triggers responsibility to act.

- A “formal complaint” is a document that is filed by a complainant OR filed and signed by the Title IX Coordinator that alleges sexual harassment and that requests that the school investigate the allegations.
- A “complainant” is the alleged victim (even if they do not file a formal complaint).
- A “respondent” is the alleged perpetrator.

Initial Responses to Notice

Schools must:

- Treat complainants and respondents equitably, including offering supportive measures to both complainants and respondents.
- Follow a grievance process before disciplining or sanctioning a respondent.

Even if no formal complaint is filed, the Title IX Coordinator must:

- Contact the complainant to discuss the availability of “supportive measures”
- Consider the complainant’s wishes with respect to supportive measures inform the complainant of the availability of supportive measures with or without the filing of a formal complaint; and explain the process for filing a formal complaint.

Definition of “Supportive Measures”

- Non-punitive, individualized services offered as appropriate and without charge to a complainant OR a respondent before or after filing a formal complaint or if no formal complaint is filed.
- Must be designed to restore or preserve educational access without “unreasonably” burdening the other party.

Examples of supportive measures:

- Counseling
- Course modifications
- Schedule changes
- Increased monitoring or supervision

A supportive measure that completely removes a respondent from an activity would likely be considered punitive and thus improper.

Emergency Removal

A student may be removed on an emergency basis when necessary to protect the student or another individual from immediate threat to physical health or safety.

- The decision must be based on an individualized safety and risk analysis.
- May not be solely for emotional or mental health reasons.
- After the removal, the school must give student notice and an opportunity to challenge the removal.
- Consider the interplay of other laws related to removal, including IDEA (a change in placement?) and Section 504.

Informal Resolutions

Informal resolutions are prohibited unless a formal complaint has been filed.

- Informal resolutions are prohibited when the complainant is a student, and the respondent is an employee.
- Informal resolutions are allowed if:
- Both parties are provided written notice of their rights; and both parties have provided voluntary, written consent to participate in the informal resolution.

Formal Complaint Process

New requirements for investigating, dismissing a determining responsibility related to formal complaints.

- Must treat parties equitably. Must evaluate all evidence objectively. Must presume that the respondent is not responsible. Must provide reasonably prompt time frames for completion.
- Must describe the possible outcomes. Must state whether using the preponderance of the evidence or clear and convincing standard of evidence to determine responsibility.
- Must ensure no conflict of interests by involved parties. Must describe the appeal process. Must describe the supportive measures that are available. Must not require, allow or use evidence that is privileged.

Written Notice

The written notice must include:

- notice of the grievance process, including any informal resolution process;
- notice of the allegations, in sufficient detail to allow the respondent to prepare a response (names of known parties, conduct alleged, date and location of conduct, if known);
- a statement that the respondent is presumed to be not responsible for the conduct all•
notice of the grievance process, including any informal resolution process;
- notice of the allegations, in sufficient detail to allow the respondent to prepare a response (names of known parties, conduct alleged, date and location of conduct, if known);
- a statement that the respondent is presumed to be not responsible for the conduct alleged;
- a statement that responsibility will be determined at the conclusion of the grievance process;
- notice of the parties' rights to have an attorney or non-attorney advisor and to inspect and review evidence; and
- notice of any provision in the code of conduct or school policies that prohibits knowingly making false statements or providing false evidence during the grievance process.
- a statement that responsibility will be determined at the conclusion of the grievance process;
- notice of the parties' rights to have an attorney or non-attorney advisor and to inspect and review evidence; and
- notice of any provision in the code of conduct or school policies that prohibits knowingly making false statements or providing false evidence during the grievance process.

Schools must provide written notice to the parties in sufficient time to allow the respondent to prepare a response before any initial interview.

Who Investigates?

Your Title IX Coordinator can investigate OR you can use someone else to investigate.

You must use a different person to investigate if the Title IX Coordinator has a conflict.

- They signed the formal complaint. They have a bias against one or both of the parties.

Investigation

When you investigate a formal complaint, you must:

- Ensure that the burden of proof is on the school, including for gathering any evidence.
- Provide an equal opportunity for the parties to present witnesses and evidence.
- Not restrict either party's ability to discuss the allegations or gather and present evidence.
- Provide the parties with the same opportunities for attorney/non-attorney advisors to be present during interviews or proceedings.
- Provide written notice of the date, time, participants, purpose and location of each interview or other meeting to allow the party to prepare or participate.

Dismissal

Formal Complaints must be dismissed if:

- The complaint does not state an allegation of sexual harassment, even if all facts are found to be true;
- The sexual harassment, even if it did occur, did not occur in a school program or activity; or
- The sexual harassment did not occur in the United States.

Formal Complaints may be dismissed if:

- If the complainant notifies the Title IX Coordinator that s/he wants to withdraw the Complaint;
- If the respondent's employment or enrollment with the school ends; or
- If circumstances prevents the gathering of evidence sufficient to render a determination (passage of time since conduct, complainant refuses to cooperate, etc.).

Investigation

- You need to act promptly, but there is no set deadline in the regulations.
- Make certain that you comply with the timeline in your school's Title IX Policy.
- You can delay for "good cause" (law enforcement, witness unavailability, etc.), but let both parties know in writing.

Investigative Report Process

- The investigator must provide the parties and their advisors with an equal opportunity to review all evidence –including evidence that is not going to be included in the report – at least 10 days before the report is finalized.
- The parties may prepare written responses to the evidence, and the investigator must consider the responses before finalizing the report.
- Then, the investigator must finalize a written report that fairly summarizes the relevant evidence.
- The investigator must provide the final report to the parties at least 10 days before a determination of responsibility.

Making Decisions About Formal Complaints

- The final report now goes to the Decision Maker. The Decision Maker cannot be the same person as the Title IX Coordinator or investigator.
- This means, you need at least three different people to handle sexual harassment complaints:
 1. The Title IX Coordinator
 2. The Decision Maker
 3. Someone to decide any appeals
 - [And maybe 4. An investigator (or two) if the Title IX Coordinator has a conflict.]

Before a Final Decision

- Before making a decision, the Decision Maker must give both parties an opportunity to submit written questions that they want the other party or a witness to answer.
- The answers must be given to both parties.
- The Decision Maker must allow limited follow up questions from the parties.
- The Decision Maker is a question “gate keeper” of sorts: can exclude a question but then must explain why the question is not relevant.

“Final” Decision

The Decision Maker must review the investigative report and the answers to any written questions and then issue a written decision.

- The written decision must include:
- The allegations; the procedural steps taken; the Decision Maker’s findings of fact; the application of the code of conduct to the facts;
- A statement of and the rationale for the result of each allegation, including determination of responsibility, any disciplinary sanctions imposed and whether remedies to restore or preserve equal access to the educational program will be provided; and a description of appeal rights.

“Final” Decision

- If the Decision Maker decides that the respondent engaged in sexual harassment, they must consider not only proper discipline, but appropriate measures for the complainant.
- These can be similar to supportive measures, but now they can be punitive toward the respondent.

Appeals of “Final” Decisions

- Appeal rights must be offered to both the complainant and respondent for dismissals and final determinations.
- The bases for an appeal are the following: procedural irregularity; new evidence that was not reasonably available earlier; conflict of interest on the part of the Title IX Coordinator, the investigator, or the Decision Maker.
- The school can offer other bases for appeal to the complainant and respondent on equal terms.
- Must give written notice that an appeal has been filed to both parties.
- Both parties have an equal opportunity to submit a written statement in support of or challenging the Decision Maker’s decision.

Remember: The person who hears the appeal cannot be the same person as the Decision Maker.