

SALIENT POINTS OF 2020 TITLE IX FINAL REGULATION

The regs mandate changes to the administration of Title IX.

- Live hearings are required for all student and all employee cases involving
 - Sexual harassment involving
 - quid pro quo by an employee,
 - unwelcome conduct determined by a reasonable person to be so severe and persistent and pervasive so it effectively denies the person equal access to the school's program, activity, etc.
 - Sexual assault
 - Domestic violence
 - Dating violence
 - Stalking
- Prior to a final appeal, the presumption of innocence applies. This means both /all parties are treated equally. It also means that any interim measure cannot be punitive or disciplinary in nature. The exception to this is when there is danger or risk to our community. A risk assessment must be undertaken and well documented. Thus, barring the exception, an employee cannot be terminated or have any other sanctions, or a student disciplined/suspended/expelled at this point. This takes employees out of at-will status for the duration of the process.
- Any time after a formal complaint is filed, the parties may engage in informal resolution. This must be 100% voluntary, and can only be entered into after receiving detailed notice of allegations and explanation of the informal resolution process. Detailed signed consent and confidentiality agreement must be in place before it can go forward. This option is never available where an employee sexually harasses a student. OCR is very emphatic the person conducting this process must be trained in it. We have identified one person in Great Bend who might be able to serve in this function.
- After a rigorous investigation process, a hearing date is set. Barton is required to appoint an advisor for each party. This advisor does not have to be an attorney, even if one party has an attorney. The advisor must be willing and capable of cross-examining the other party or witnesses.
- The hearing is conducted by a hearing panel (usually 3 persons) with one serving as chair. Only the testimony at this hearing can be considered in making the decision. If a party or witness refuses to be cross-examined, the panel cannot consider that testimony, even if it is in the investigative report, unless it can get solicited from another witness. The panel can determine the order in which the hearing proceeds. Thus, the panel can ask all possible questions of the parties and witnesses. If they are exhaustive in their questioning, there may be little left for advisors to ask.
- The panel chair must rule on all questions asked by the advisors. A question is asked. Before the response can be uttered, there is a pause for the chair to rule whether it is relevant or otherwise admissible. This process is repeated for each question.
- After the hearing, the panel reaches by majority vote a decision whether the respondent is responsible or not. The decision must be in writing and set forth in detail all the bases for the decision together with supporting evidence.
- The hearing panel also determines sanctions. If Respondent is found responsible, Atixa has suggested there could be an "interim pause" between the decision and sanctions. The panel

could meet with the HR Director or VP of Student Services and obtain information about the respondent's history and record of prior offenses and sanctions, if any, which could be relevant to sanctions in this case. Title IX pre-empts FERPA here.

- All decisions are appealable by both students and employees. Again, an appeals panel hears the case, and decides to uphold the decision and sanctions, or overturns it, possibly remanding it back for further investigation or another hearing. The panel must fully document its rationale and the evidence supporting it.

The new regs require that all those involved in this process be trained (investigators, advisors, hearing panel members, appeals panel members). Atixa is recommending that all investigators and Title IX Coordinators re-do their training. Atixa has also developed trainings for hearing panel members and decision makers as well. In questions posed on the very active listserv, Atixa said training should be at least two days. My opinion is that we create an equity resolution pool, comprised of all of the above. For any live hearing, we would need at least ten people. Some might not be available, some might have a conflict of interest, etc., so we need a good size pool from which to draw.

All those involved in the Title IX process, all training materials, and all policies and procedures must eliminate all possible bias and be free of a conflict of interest.

Beginning August 14, we must post copies of **all** training materials on our website. OCR says that must include all proprietary materials.

These regulations also require posting on our website and on all materials sent out by the college that it does not discriminate on the basis of sex, and that Title IX requires it not to so discriminate. We are further required to notify everyone that a report can be made to the Title IX Coordinator at any time along with the phone number and email and mailing address of the Title IX Coordinator. Although lengthy, it appears all of this is required in order to meet disclosure requirements. A possible notice might read as follows:

Barton does not discriminate on the basis of sex in its education programs and activities, admissions and employment, and is required by Title IX not to discriminate in such a manner. Inquiries about the application of Title IX and this part to Barton are directed to contact the Title IX Coordinator at titleix@bartonccc.edu or 245 NE 30 Road, Great Bend, KS 67530, or 620-786-7441. Any person, at any time, may report sex discrimination (including sexual harassment) in person, by telephone or electronic mail, at the contact listed above. Further, Barton will adopt and publish grievance process and procedures that provide for the prompt and equitable resolution of student and employee complaints alleging sex discrimination. The implementation date for these process and procedures is August 14, 2020. They will be posted at <https://bartonccc.edu/title-ix>¹

Atixa is creating a new 1P1P, or possible 1P2P which will be available some time after June 21. 1P2P means one policy, two processes. We would follow one policy for live hearings, and the other policy for all other forms of discrimination. This must contain all of the grievance process mandated by the new regs, and should be posted on our website by August 14.

¹ Final Regulations §106.8 et seq.

All other Title IX regulations are still in effect, as well as Clery Act, VAWA, as well as case law. To my knowledge, there are currently four lawsuits to enjoin the enforcement of these regulations. It will take some time before a judge can rule on an injunction. Even if issued, we do not know if an injunction will be nation-wide or what its parameters might be.

Atixa has set special webinars that are complementary for Barton on June 22 and June 25. I have copied the information about them below. If anyone wants to attend, I will be glad to register them. They do have a limit, so we should not wait too long to register.

UPCOMING: HEARING PANELS AND DECISION-MAKER WEBINAR: BRIEFING ON THE NEW REGULATIONS-INCLUDING Q&A SESSION-JUNE 22, 2020

This webinar is a great way to provide an overview of the new regulations for your hearings panels and decision-makers. Our expert presenters will focus on ways that the new rules will impact the hearing process.

Included for Super and Premium Members only. Others can purchase in the Hearing Officer Package.

Scheduled for Monday, June 22, 2020 3:00-5:00pm. ET. This Webinar includes a 45 minute Q&A session after the presentation from 4:15-5:00pm. ET.

They will also provide a brief overview of other changes so that hearing panels and decision-makers can understand the full picture of how the process will be changing. Q&A with the presenters will be provided.

W. Scott Lewis, J.D. & Sandra K. Schuster, J.D.

UPCOMING: NEW TITLE IX REGULATIONS FOR BOARDS OF TRUSTEES AND CABINET-LEVEL ADMINISTRATORS-JUNE 25, 2020

This webinar is a great way to provide an overview of the new regulations for your board members, trustees, and cabinet officers. Our expert presenters will provide an overview of the needed changes so that boards and executive-level administrators understand their oversight obligations, compliance timelines, and risk exposure for non-compliance. Participants will understand the anticipated litigation landscape around the changes and how schools and colleges can be caught in the middle. Q&A with the presenters will be provided.

Included for Super Members only. Others can purchase in the Title IX Coordinator Package.

Thursday, June 25, 2020 12:00-1:00pm. ET.

Sandra K. Schuster, J.D.