

Title IX and the New Regulations: Will Your District Be Ready?

Please note: The program will begin promptly at 10:00 a.m. If you experience difficulties with the audio portion of the program, there is an audio tab in the upper right corner of the webinar program. Click on that tab, and you will be given instructions for dialing in by phone to hear the audio.

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TITLE IX

- “Federal law provides that “[n]o 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.” **Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.* [“Title IX”].**

TITLE IX

- a. Protects **both** male and female students;
- b. Prohibits sexually harassing conduct towards members of the opposite sex as well as members of the same sex;
- c. Title IX applies to sexual harassment directed **toward students** by school employees, including but not limited to administrators and teachers, or by third parties;
- d. Title IX also applies to sexual harassment **between students**, which is also known as peer sexual harassment.

TITLE IX

- Two Supreme Court cases established the appropriate standards of liability under Title IX for sexual harassment.
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- **Gebser v. Lago Vista Independent School District**, 524 U.S. 274 (1998), established the standard of liability imposed on schools when a school employee sexually harasses a student.
- **Davis v. Monroe County Board of Education**, 526 U.S. 629 (1999), established the standard for school liability when a student is sexually harassed by another student.
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TITLE IX

- In Gebser, the Supreme Court held that a school will **not** be liable for sexual harassment of a student by a school employee unless:
 - An school official with **authority to take corrective action** had **actual knowledge** of discrimination, but failed to adequately respond; and
 - The **inadequate response** must amount to **deliberate indifference** to discrimination.

TITLE IX

- Similarly, in Davis, the Court held that liability is imputed to the school *only* where:
 - a. The school has been “deliberately indifferent to sexual harassment, of which the [district had] actual knowledge”;
 - b. The harassment is so “severe, pervasive and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit”; and
 - c. The school responded in a way that was clearly unreasonable under the circumstances.

- The United States Department of Education’s Office for Civil Rights [“OCR”] has jurisdiction over alleged violations of Title IX.
- On April 4, 2011, OCR issued a “**Dear Colleague Letter**,” or “**DCL**,” in response to what OCR perceived as schools’ generally dismal handling of student-on-student sexual harassment claims, particularly those that involved sexual assaults. It has proven to be one of the most controversial DCLs that OCR has ever issued.

- OCR's April 4, 2011 DCL required schools to adopt a **“preponderance of the evidence”** standard when determining whether a student sexually harassed a peer. This is the law's lowest evidentiary threshold, below the **“clear and convincing”** standard most schools had been using. The “preponderance” standard requires only a showing that it is more likely than not that the accused individual engaged in the relevant conduct.
- The DCL also effectively allowed schools to limit the accused student's right to confront his or her accuser.

- In conjunction with the DCL, OCR disseminated a list of colleges and universities that were being investigated for their alleged failure to address and remediate sexual assault claims. Needless to say, this resulted in terrible publicity for the named institutions.
- OCR's April 4, 2011 DCL, in conjunction with the desire not to be included on OCR's list of schools under investigation, and the threat that OCR would withdraw federal funds, created substantial pressure on schools to improve their response to sexual assault claims.

- Compelling a more robust response to allegations of sexual assault was obviously an extremely positive goal, and OCR's more exacting mandates were lauded by many.
- Others, however, despite agreeing with OCR's intent, disagreed with its methods. One federal appellate judge issued a scathing assessment of the April 4, 2011 DCL, writing in part that "its extremely broad definition of "sexual harassment" has no counterpart in federal civil rights case law; and the procedures prescribed for adjudication of sexual misconduct are heavily weighted in favor of finding guilt."
- [Plummer v. University of Houston, 860 F.3d 767 \(5th Cir. 2017\)\(dissent\)](#)

Post-DCL Fallout

- Unfortunately, many schools were ill-equipped to investigate such serious claims.
- Disciplinary panels consisting of academics or even other students, and whose traditional duties had been limited to deciding claims of academic dishonesty, were suddenly required to adjudicate the equivalent of serious felonies.
- It was like asking a school nurse to start performing surgeries.

Post-DCL Fallout

- This resulted in a number of procedural debacles which, in turn, triggered a torrent of lawsuits, filed primarily by male students who claimed they were unjustly disciplined in adjudicatory processes that were prosecuted ineptly, selectively, or in bad faith.
- It was recently estimated that approximately 500 such lawsuits have been filed across the United States.

Post-DCL Fallout

- The overwhelming majority of these legal actions have claimed, somewhat ironically, that in seeking to comply with Title IX, schools have, in fact, violated Title IX either by: 1) selectively enforcing it against male students while not pursuing claims against female students, or 2) reaching an erroneous outcome as a result of an unfair or biased disciplinary process.
- The majority of the lawsuits were initially dismissed, but they have increasingly gained traction, with courts now more open to recognizing these Title IX causes of action as well as contract, negligence, and – in the case of public universities -- constitutional claims.

Post-DCL Fallout

- It is this sequence of events that has given rise to the new Title IX regulations which OCR has promulgated and which will take effect on August 14, 2020.

Definition of Sexual Harassment Under the Title IX Regulations

- Conduct on the basis of sex that satisfies one of the following:
 - An employee of the district conditioning the provision of an aid, benefit, or service on the individual's participation in unwelcome sexual conduct;
 - Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the district's education program or activity; or
 - sexual assault, dating violence or stalking.
- Per the Regulations, Title IX only applies to conduct that occurs in a program or activity over which the district exerts substantial control over both the respondent and the context.
- Does not apply if the conduct occurred against a person outside the U.S.

NOTE – just because OCR will not treat conduct as a Title IX violation, it does not mean the conduct does not violate some other section of the district's policies

When Can A District Be Liable?

- A district with actual knowledge of sexual harassment must take steps to address it.
- In elementary and secondary schools “actual knowledge” means that any employee of an elementary or secondary school had knowledge.
 - As written, this covers all employees including custodians, secretaries, food service workers, paraprofessionals, etc.
- Once the district has knowledge, it must act in a way that is not deliberately indifferent to the alleged harassment.

Various New Roles

- **Title IX Coordinator**
 - Employee who will coordinate the district's efforts to comply with its responsibilities under Title IX
- **Investigator**
 - If possible, should not be the Title IX Coordinator
- **Decision-maker**
 - Must not be the Title IX Coordinator or the Investigator
- **Appeal Decision-maker**
 - Must not be the Title IX Coordinator, Investigator or Decision-maker

The Grievance Process

- Some underlying principles for sexual harassment investigations
 - Equitable
 - Impartial
 - Thorough
 - Prompt
- New Terminology to Learn
 - Complainant
 - Respondent
 - Responsible Party
 - Supportive measures
- Standard of evidence to be used should be pre-defined in policy and consistent for investigations into staff and students
 - District chooses: “***preponderance of the evidence***” or “***clear and convincing evidence***”

The Grievance Process

- What is a formal complaint?
 - Signed by complainant or Title IX Coordinator
 - Alleges sexual harassment
 - Requests investigation

- First steps once a formal complaint is filed
 - Provide the parties with notice of the allegations, including:
 - Identity of parties
 - Conduct alleged to be sexual harassment
 - Date and location of incident
 - Provide notice of:
 - Notice of the grievance process including any informal resolution processes available
 - Statement that the respondent is presumed not responsible and that the determination of responsibility will not be made until the end of the process,
 - Ability to have advisor (including an attorney) at all stages, and
 - The section of the code of conduct that prohibits providing false statements and information during the grievance process
 - Determine if the conduct, as alleged, would violate Title IX

The Grievance Process

- Focus on due process – overview of major investigation steps
 - Each party must have equal opportunity to present witnesses, including fact and expert witnesses, and other evidence,
 - Cannot restrict the ability of either party to discuss the allegation or gather/present relevant evidence,
 - Allow each party to have an advisor of their choosing at each step,
 - The district may establish consistent restrictions on the extent to which the advisor may participate in the proceedings
 - Provide each party the opportunity to inspect and review all evidence, and
 - Prior to the completion of the formal investigation report, send to each party and his/her advisor, the evidence subject to inspection and review.
 - Each party must be given 10 days to provide written responses

The Grievance Process

- The Investigation Report

- This is a formal written report that must fairly summarize relevant evidence
- The investigator must provide both parties and their advisors a copy of the investigation report at least 10 days prior to the determination regarding responsibility so the parties may review and provide a written response

The Grievance Process

- The Decision-Making Process

- In K-12 school, an in-person hearing is NOT required prior to determining whether the respondent is responsible for sexual harassment
- The decision-maker still must:
 - Give each party the opportunity to submit relevant questions that the party wants asked for any party or witness,
 - Provide each party with the answers to those questions, and
 - Allow for follow up questions

Note that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the district, not the parties

The Grievance Process

- The Written Decision on Responsibility
- This is a formal written decision that must at a minimum:
 - Identify the allegations,
 - Describe the procedural steps taken to investigate,
 - Make findings of fact,
 - Make conclusions regarding the application of the code of conduct to the facts,
 - Contain a statement of rationale for the result as to each allegation,
 - Identify any disciplinary sanctions to be imposed,
 - Identify whether remedies will be provided to the complainant, and
 - Inform the parties of the appeal procedures.

The decision must be provided to both parties simultaneously

The Grievance Process

- The Appeal Process

- Is available to both parties,
- Must be decided by a different decision-maker,
- Both parties must be given a reasonable, equal opportunity to submit a written statement,
- The decision-maker must issue a written decision describing results of the appeal and the rationale for the result,
- The decision must be given to each party simultaneously.

- Recordkeeping

- Keep each investigation file for at least 7 years,
- Including the disciplinary sanctions, if any, and
- Including remedies and any supportive measures provided.

The Grievance Process – Administrative Dismissals

- The district MAY dismiss a formal complaint or any allegations therein, if at any time during the investigation:
 - The complainant notifies the Title IX Coordinator in writing that he/she would like to withdraw the formal complaint or allegations therein,
 - The respondent is no longer enrolled in or employed by the district, and/or
 - Specific circumstances prevent the district from gathering evidence sufficient to make a determination.

- Such dismissal does not preclude initiating discipline under another section of the district’s code of conduct

- Whether or not a formal complaint is filed, the district can always offer an informal resolution process
 - Before doing so, the district must provide the parties with a written notice disclosing:
 - The allegations,
 - The requirements of the informal process including circumstances under which it would preclude a party from resuming the formal complaint process from the same allegations,
 - Any party has the right to withdraw from the informal resolution at any time, and
 - Any consequences from engaging in the informal resolution process including whether records from it will be maintained and/or shared in the formal complaint process.

Initial Steps to Take

- **Identify:** Title IX Coordinator, Investigator, Decision-Makers and anyone designated by the district to facilitate an informal resolution process
- **Post:** the contact information of the Title IX Coordinator on the website and in the school's handbook
- **Train** them in:
 - Definition of sexual harassment under Title IX
 - Scope of the district's education program or activity
 - How to conduct an investigation and/or grievance process
 - How to serve impartially, including avoiding prejudgment, conflicts of interest and bias
- Post training materials on the district's website
- Update the district's Title IX policies and procedures

Final Thoughts

- The ACLU along with various other organizations has already filed the first legal challenge against the Regulations
- Just because conduct does not violate Title IX as set forth in the Regulations does not mean it does not violate the district's other policies
 - For example, off-campus conduct
- Beware of state laws that provide additional protections
- Do not forget district employees' obligations as mandated reporters if the alleged conduct could be considered abuse or neglect

QUESTIONS?

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