


New Title IX Regulations for K-12 Schools




PRESENTED BY ATTORNEY
KATHLEEN CONN, PH.D., J.D., LL.M.

OF COUNSEL
THE LAW FIRM OF
KING, SPRY, HERMAN, FREUND & FAUL, LLC
BETHLEHEM, PENNSYLVANIA

1

Introductions

- Kathleen Conn, Ph.D., J.D., LL.M., is Of Counsel with KingSpry. After a career as a HS teacher, K-12 Curriculum Supervisor, and ES Principal in K-12 public schools. Before moving to Allentown, she was a Professor in the Graduate Education Department at Neumann University.
- She is an experienced investigator and gives training sessions in Lehigh Valley school districts.



2

What We Shall Talk About Today

- Title IX and Why We're Here This Morning
- Reasons for Changes from Prior Guidance
- How to Determine Whether Title IX Applies!
- An Overview of the 2020 Title IX Regulations, and the Most Important Changes for K-12 Schools
- Duties of the Title IX Coordinator and **Designees**
- Supportive Measures
- Grievance Procedures
- Investigations
- Continuing Duties for Appeals and Final Resolutions

3

What is Title IX?

- Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in all federally-funded school districts, which is basically **all K-12 schools**
- Title IX states:
 - *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.*

4

Who Is Protected?

- **All students** in United States educational institutions which receive Federal financial assistance
- **All employees** of those institutions
- The comments to the new Regulations explicitly state that all individuals, including LGBTQ individuals, are protected



5

Discrimination on the Basis of Sex

- The Supreme Court interpreted discrimination on the basis of sex as “sexual harassment”
- Generally, sexual harassment is considered to be conduct of a sexual nature that a reasonable person would consider to be unwelcome
- It can be verbal, written, or physical
- Sexual harassment can be male-on-female, same sex, child-to-child, adult-to-child, or child-to-adult
- *But now it has a more specific definition!*

6


Two Ways of Enforcing Title IX

<p>Judicially – In Court</p> <ul style="list-style-type: none"> • By suing the school district • Where the plaintiff must show that a school district official had actual knowledge and was deliberately indifferent to sexual harassment • The goal: money damages 	<p>Administratively</p> <ul style="list-style-type: none"> • By reporting to the Office for Civil Rights (OCR) • Where OCR/DOJ will work with the school district to see that it complies with Title IX • The goal: systemic change
--	--

7

The Office for Civil Rights (OCR)

- OCR is a sub-agency of the United States Department of Education
- Agencies have the power to interpret a law by making Regulations, also called Rules, which then have the force of law
- However, the agency must go through a process in making those Rules, called “notice-and-comment” rulemaking



8

Why New Regulations?

- Under the Obama administration, schools received “significant guidance” which was communicated through “Dear Colleague Letters”
- However, these letters did not have the force of law, because they were not adopted by “notice-and-comment” rulemaking
- When Betsy DeVos took over the U.S. Department of Education, changes were made




9

New Regulations/New Rule

- On September 22, 2017, DeVos's Acting Assistant Secretary of Education at OCR rescinded two Obama-era DCLs that said schools had to stop all sexual harassment that they know or "should know" was occurring, and that ALL students, including LGBTQ students, were protected under Title IX
- OCR promised to issue new regulations that had the force of law

10

Following the Process

- OCR published the proposed regulations in the Federal Register on November 29, 2018 and the 38-page document was open for email comments by the public for approximately 2 months
- OCR received 124,149 comments, and some of those were signed by groups of people
- In May 2020, OCR published its 2,033-page analysis and discussion of the public comments, and about a week later, published the document as the "Final Rule" in the Federal Register

11

Significant Changes for K-12

- **A new Definition of Sexual Harassment**
 - (1) An employee of the school district conditioning the provision of an aid, benefit, or service of the school district on an individual's participation in unwelcome sexual conduct; also called *quid pro quo* harassment
 - (2) 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 school district's **education program or activity**; or
 - (3) Sexual assault, dating violence, domestic violence, or stalking.

12

Important Words in the Definition

- **The qualification of “severe, pervasive, and objectively offensive” applies only to “unwelcome conduct”**
- That qualification does not apply to incidents of *quid pro quo* sexual harassment, sexual assault, dating violence, domestic violence, or stalking.
- A single incident of these other offenses is sufficient to constitute sexual harassment.

13

Important Words in the Definition

- In the past, it was confusing to figure out if the school district had a duty to respond when sexual harassment occurred outside the school
- The words “**effectively denies a person equal access to the school district’s education program or activity**” mean that the school district has a duty to respond only if the harassment occurs as part of the school district’s operations; in locations, events, or circumstances where the school has substantial control over the harasser and substantial control over the context in which the harassment occurs

14

Important Words in the Definition

The school district has a duty to respond under Title IX only if :

(1) The sexual harassment occurs as part of the school district’s operations – i.e., its education program or activities, and

(2) In locations, events, or circumstances where the school has substantial control over the harasser and substantial control over the context in which the harassment occurs

15

And What About the Complainant?

- **An individual shall have status as a complainant only if the individual is participating in, or attempting to participate in, the school's education program or activity, at the time of the alleged sexual harassment**
- Remember: A Title IX lawsuit is a lawsuit alleging that the school district is liable

16

So, Before You Leap into Deep Water . . .

- **A Title IX investigation is indeed the deep water:**
 - Written notices to both parties and advisors throughout the entire process
 - An investigation by a trained Title IX Coordinator (or designee)
 - Several alternative grievance procedures
 - A trained independent decision-maker
 - A third independent trained person to handle any appeals
 - Retention of all records for 7 years!

17

Significant Details

- Therefore, the school district has no duty **under Title IX** to respond to off-campus sexual harassment that occurs, e.g., at an off-campus party in a private home
- The school can apply sanctions under the district code of conduct, but is not required to take action under Title IX
- Also, Title IX only applies to students who are physically in the United States.



18

Mandated Reporters

- **Important Note!**
- Employees who are Mandated Reporters under Pennsylvania law may have added duties, e.g., reporting to Childline
- Participating in a Title IX investigation does not satisfy obligations under the PA Mandated Reporter Law



19

Look at the Definition Again

- **Definition of Sexual Harassment**
- (1) An employee of the school district conditioning the provision of an aid, benefit, or service of the school district on an individual's participation in unwelcome sexual conduct; also called *quid pro quo* harassment
 - (2) 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 school district's **education program or activity**; or
 - (3) Sexual assault, dating violence, domestic violence, or stalking.

20

Reporting Sexual Harassment

- In the past , the school district's actual knowledge of sexual harassment required that a school official with authority to take corrective action had been notified of the sexual harassment
- Under the new Rule, if a complaint of sexual harassment is made to the Title IX Coordinator or to **any person in the district**, the district is considered to have actual knowledge
- **And any individual can make the complaint**, even anonymously

21

Reporting Sexual Harassment

- A student, parent, caregiver, friend, or a witness of sexual harassment may report sexual harassment
- This new provision is of special help to younger students who may tell a teacher or even a recess monitor
- **Any person who receives a report of sexual harassment must promptly inform the Title IX Coordinator**



22

The Title IX Coordinator

- Each school district shall have a Title IX Coordinator who is trained in this policy and the Coordinator's contact information must be published widely – to everyone in the district, students and all staff, and in the community
- When the Title IX Coordinator receives a complaint of sexual harassment, he/she must immediately give **supportive measures** to the complainant and to the respondent

23

Supportive Measures

- Supportive measures are non-disciplinary, non-punitive individualized services offered as appropriate and as reasonably available, without fee or charge, to both the complainant and the respondent
- The complainant's wishes have to be considered
- Such supportive measures must be made available before or after the filing of a formal complaint or where no formal complaint has been filed, in the cases of both student and employee complainants

24

Supportive Measures

- Supportive measures shall be designed to protect the safety of all parties and the educational environment, or to deter sexual harassment
- Such measures may include:
 - ✦ Counseling,
 - ✦ Extensions of deadlines or other curriculum-related adjustments,
 - ✦ Modifications or changes of work or class schedules or locations,
 - ✦ Campus escort services,
 - ✦ Mutual restrictions on contact between the parties
 - ✦ Leaves of absence,
 - ✦ Increased security and monitoring of certain areas of the campus

25

Supportive Measures

- The Title IX Coordinator must respect the complainant's wishes, and the measures must be kept confidential
- This is where requirements under IDEA, Section 504, or ADA may be met, for students or for employees
- Emergency removal may apply to the alleged respondent if he/she is a danger to health or safety
- Faculty alleged to be respondents may be placed on administrative leave

26

Title IX Coordinator Duties

- The Title IX Coordinator must receive training
- Because of the many duties of the Coordinator, the new regulations allow more than one Coordinator
- Duties
 - Notifications to complainant and respondent
 - Interviews with all parties who have information about the complaint
 - Conducting the investigation
 - Scheduling the live hearing, if one will be held
 - Writing the investigative report

27

Title IX Coordinator Duties, cont.

- Advise the complainant of the option of informal resolution of complaints, e.g., by mediation
- Conduct an investigation in a formal complaint
- Write the investigative report
- Dismiss complaints on written notice from the complainant or complaints that do not meet the definition of sexual harassment above
- Keep all records for **seven years**

28

Essentials of the Grievance Process

- Title IX Coordinator (or designee) as investigator
- Equal treatment of complainants and respondents
- Supportive measures for both complainants and respondents
- Objective evaluation of all relevant evidence
- No credibility determinations based on status in the investigation
- Remedies for a complainant where respondent is determined to be responsible

29

Essentials of the Grievance Process

- Formal Resolution Process
- Informal Resolution Process
- Optional Live Hearings
- **Informal Resolution is NOT available for employee-on-student harassment**
- Complainant must sign a formal complaint before the Grievance Process can begin

30

Essentials of the Grievance Process

- Training for all employees involved
- Presumption of innocence of respondent
- Prompt time frames for resolution of the case
- Allowance for temporary delays for good cause, e.g., law enforcement involvement, rape kit analysis
- Written notices of all stages for both parties and advisors
- No misuse of legally recognized privilege, e.g., physician-patient confidentiality or rape shield laws
- All training materials available upon request by members of the public

31

Informal Resolution of Complaints

- An **informal resolution process** may be initiated after filing of a formal complaint by both complainant and Title IX Coordinator, e.g. mediation or restorative justice
- Both parties must voluntarily agree in writing
- The parties may switch to an informal process even after a formal resolution has begun, and may end the informal process and return to the formal process at any time before agreeing to a resolution

32

Informal Resolution of Complaints

- All who conduct informal resolutions must be trained
- The informal resolution process may NOT be used in cases of faculty-on-student sexual harassment or in cases of any adult employee-on-student sexual harassment



33

Formal Resolution of Complaints

- After the Title IX Coordinator receives a formal complaint, the Coordinator must give certain written notices to all known parties:
 - Notice of the allegations
 - Notice about the grievance process, including any informal resolution process
 - Notice that the allegations of sexual harassment potentially constitute sexual harassment, and give parties sufficient time to prepare a response before any initial interview

34

Formal Resolution of Complaints

- A statement that the respondent is presumed not responsible for the alleged conduct
- Notice that the parties may have an advisor of their choice, who may be, but is not required to be, an attorney, with them, and that they and their advisors may inspect and review evidence
- Notice that knowingly making false statements or knowingly submitting false information is prohibited

35

Formal Resolution of Complaints

- Prior to completion of the investigative report, the Title IX Coordinator must send to each party and the party's advisor the evidence subject to inspection and review
- The parties must have at least 10 days to submit a written response, which the investigator will consider
- The Title IX Coordinator shall create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a live hearing (if a hearing will be scheduled), send to each party and the party's advisor, if any, the investigative report for their review and written response

36

Dismissal of a Formal Complaint

The Title IX Coordinator may dismiss a formal complaint if the conduct alleged in the formal complaint:

- Would not constitute sexual harassment even if proved
- Did not occur in the district's education program or activity
- The complainant requests dismissal of the complaint in writing
- If the conduct did not occur against a person physically in the United States
- If the respondent is no longer enrolled or employed by the school district
- Specific circumstances prevent the Title IX Coordinator from gathering sufficient evidence

37

Live Hearings

- **Live hearings are mandatory for postsecondary institutions, but optional for K-12 institutions**
- The actual wording in the new Title IX Regulations, 34 C.F.R. § 106.45 b(6)(ii) is:
- "For recipients that are elementary and secondary schools, . . . the recipient's grievance process **may, but need not,** provide for a hearing."

38

Live Hearings

- The Live Hearing would occur after the Title IX Coordinator has sent the investigative report to the parties
- If a live hearing is scheduled, either party to the formal complaint may request that the parties and their advisors be in separate rooms and communicate via technology and not in person
- Advisors to the parties, but not the actual parties, may question and cross-examine parties and witnesses on relevant issues and evidence, and credibility determinations

39

Live Hearings

- If a party does not have an advisor who can be present, the school district must provide an advisor of the district's choice without fee or charge to that party, who may be an attorney
- An audio or audiovisual recording or transcript of any live hearing must be created, and copies must be available to the parties for inspection and review



40

The Investigation

- Must be conducted by a trained investigator who can be the Title IX Coordinator or designee, even a contracted investigator from outside the district who is unbiased and free from conflict
- No timelines are specified in the new regulations, but the investigation must be prompt and unbiased
- Respondent must be considered not responsible until determined to be responsible

41

Think Before You Act

- Before starting the Title IX investigation, is this really a Title IX case?
- If the parent/caregiver is not in the loop, should he/she be?
- Are you making any premature assumptions on the basis of previous knowledge about the parties?
- Do you know the district's standard of evidence, and what you are looking for?



42

Questioning the Parties/Witnesses

- Don't come on like Joe Friday, with a bright overhead light, pen and pad
- Try to be low key, try to gain the trust of the person you are interviewing
- Stress that you are looking for the truth
- Let the person you are interviewing start where they want to start
- Focus with questions, but do not interrupt

43

Some Possible Questions

- When did this all happen? Where?
- What did you see (or hear)? Did that upset you?
- Who else was present? What were they doing?
- What did you say or do?
- Did you tell anyone?
- Do you know of any similar incidents?
- Do you know of anyone else who has information?
- Is there anything you think I should know?

44

Sample Details of Investigative Report

- | | |
|---|---|
| <ul style="list-style-type: none">• Date of complaint and who reported• Do you have the signed complaint forms?• Date of the incident(s) that were investigated• Why was the investigation started and what was being investigated• Who was performing the investigation• When did the investigation begin | <ul style="list-style-type: none">• Summary of parties' reports• Summary of witnesses' reports• What documents were gathered• Where were the evidence/documents found• What policy/procedure applied• Who were the witnesses• What facts were gathered from parties/witnesses• Summary of factual evidence |
|---|---|

45

What to Maintain on File

- **EVERYTHING!**
- **And for 7 years**



46

After the Investigative Report

- The Title IX Coordinator must schedule the live hearing if one will be held
- If not, the Title IX Coordinator must send the final investigative report to the parties and advisors
- Each party must have the opportunity to submit written questions to any party or witness, receive answers, and allow for additional limited follow-up questions from each party, all to be handled by the Title IX Coordinator
- **AND** the Title IX Coordinator must hand over the report to a person not previously involved in the case, an **independent decision-maker**

47


The Independent Decision-Maker

- The trained independent decision-maker shall determine whether sexual harassment occurred, assign responsibility, and impose disciplinary sanctions as appropriate.
- The same standard of evidence must be used in adjudicating all formal complaints of harassment
- But the district can choose whether to use the **preponderance of the evidence standard** (that is, it is more likely than not the harassment occurred) or the **clear and convincing evidence standard** (substantial evidence needed)

48

Standards of Evidence

- **Preponderance of evidence**
 - More likely than not
- **Clear and convincing evidence**
 - Substantial evidence
 - This is where a live hearing may be what is needed to test credibility or clear up conflicting testimony



49


The Standard of Evidence

- Critically important note: It is essential that all determinations of responsibility under a Title IX complaint be made using the same standard of review, the preponderance of evidence **OR** the clear and convincing evidence standard
- It is also recommended that districts use the same standard of evidence in adjudicating ALL questions of determinations of responsibility, i.e., guilt or innocence of any kind of charges/allegations

50

Final Decision

- The decision-maker who takes over after the investigative report is created and communicated to the parties must issue a written determination of the final decision
- **This must be a comprehensive report that includes:**
 - The charges
 - The description of the process
 - Factual findings supporting the outcome
 - The sanctions, if any, that will occur
 - Remedies, if any, for the complainant
 - Information about the appeals process



51

The Decision-Maker

- The decision-maker must simultaneously send both parties a written determination explaining the reasons for the outcome of the investigation
- This **two-person method of determining responsibility** is a new requirement



52

The Appeal Step

- **If there is an appeal, a third person who has not been part of the case before now, must take over the appeal**
- So this is the DEEP WATER: three trained persons to handle each complaint



53

Limited Reasons for Appeal

- An appeal can be filed by either party in cases of a:
 - **Procedural irregularity** that may have affected the outcome
 - **New evidence** became available that may have affected the outcome
 - **Provable bias or conflict of interest** of the Title IX Coordinator
- A new third person must decide the appeal and make the determination known to both parties in writing simultaneously
- The Title IX Coordinator must enforce the outcome

54

Retaliation

- Retaliation against anyone who participates in the proceeding is prohibited
- However, First Amendment rights must be respected



55

Publications Required

- This policy must be promulgated throughout the district and community
- The name and contact information for the Title IX Coordinator must be prominently displayed on the district website and in every district building, as well as a notice of nondiscrimination on the basis of sex
- The policy must be available for review and periodic updates

56

Action Required!

- Deadline for policy adoption was August 14, 2020
- Forms for reporting sexual harassment must be examined and, if necessary, be revised to comply with these new regulations
- All staff must be trained in the requirements of the new Rule, because ALL employees of the district are, under the new Rule, mandated reporters: from the cafeteria worker, to the bus driver, the custodian, to the classroom teacher, to the librarian, to the counselor

57

Action Required Now

- Reporting forms needed
- Trainings for administrators, faculty, staff, students, and parents and community members
- Notice on website added
- Notices printed for all buildings in the district
- Lots of work to be done in a short time period
- All this while planning what “school” will look like during the Covid-19 pandemic!

58

Please Call on Us!

- KingSpry attorneys have experienced a deluge of requests for policy reviews, staff trainings, and development of new forms for reporting, notifications, etc.
- We are prepared to break down and customize all training materials and reporting forms for administration, faculty, staff, students, and parents and community members

59

Questions?

- Thank you for your attention!
- I’ll be happy to take questions and, if you think of something later, I can take questions by email
- Also, for questions and comments about this presentation, contact Kathleen Conn, at kconn@kingspry.com

60

Moving On . . .

- If you need additional trainings for staff, students, parents, contact me
- Or the Head of the Education Group at KingSpry, John Freund at jef@kingspry.com
- We shall be conducting additional training sessions for Title IX Coordinators under the auspices of Greyfriars
