

A photograph of a school hallway with orange lockers, a clock, and a sign that says "INFORMATION".

Marple Newtown School District

New Title IX Regulations Introductory Presentation
August 18, 2020

Presenters: Lianne Mikula, Esq.
Peg Pennepacker, CAA



**KEEP
CALM
AND DON'T
SHOOT THE
MESSENGER**

Why?, Why?, Why?...

What?

New Title IX Regulations have been issued by the U.S. Department of Education affecting all educational institutions that receive Federal financial assistance. Title IX is a federal civil rights law that prohibits discrimination based on sex in education.

How?

The changes apply to the manner and methodology in the way schools process and investigate complaints of sexual harassment/sexual assault. There must be ongoing training, publishing and publicizing to all members of the school community about Title IX.

Who?

The Marple Newtown School District will now take the necessary steps to update policies and processes, train all school district personnel and do what is required by law in order to provide a safe and respectful environment for all students to learn.

General Concepts About Title IX of the Education Amendments of 1972

- Title IX does not only pertain to sports. Title IX is not a sports law.
(The OCR considers athletics an education program.)
- Title IX is the first comprehensive federal law that prohibits sex discrimination in education programs and activities that receive Federal financial assistance.
- Title IX does not only protect females. It protects all students (boys & girls), faculty and staff.
- ***Title IX covers sexual harassment/sexual assault in schools.*** (5-6-20 New Regs.)
- **Title IX requires schools to maintain policies, practices and programs that do not discriminate against anyone based on sex.**
- *Title IX is at the heart of efforts to create gender equitable schools. Males and females are expected to receive fair and equitable treatment in all arenas of public schooling.*

Duty to Prohibit Discrimination in Education

Educational Institutions have a responsibility to protect every student's right to learn in a safe environment free from unlawful discrimination and to prevent unjust deprivations of that right.

The Office for Civil Rights (OCR) enforces several federal civil rights laws that prohibit discrimination in programs or activities that receive federal financial assistance from the Department of Education.

It is the mission of the OCR to ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights.

The 'Genesis' for Title IX

- **Title VI of the Civil Rights Act of 1964**

- "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

- **Title VII of the Civil Rights Act of 1964** (42 U.S.C. §2000e-3(a))

- Prohibits discrimination in the terms, conditions or privileges of employment on the basis of an employee's race, sex, color, religion, sex or national origin.

- **1965 - Executive Order 11246**

- Prohibited federal contractors from discriminating on basis of race, color, religion, national origin. "Sex" was added in 1968.

Genesis for Title IX: "*Too Strong For A Woman*"

Dr. Bernice Sandler

- June 23, 1972 37 word statute

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 subjected to discrimination under any education program or activity receiving Federal financial assistance.”

Title IX of the Education Amendments of 1972

Implementing Regulations at:

20 U.S.C. § 1681 & 34 C.F.R. Part 106

- Title IX is a civil rights statute enacted in 1972 to prohibit discrimination based on sex in education programs and activities.
- Historically, people have commonly thought of Title IX as addressing gender equity in sports but, Title IX has always had a *mandate* to address sex discrimination in hiring, admissions and other aspects of a school's education programs or activities.
 - Today, Title IX's reach is much broader!

What Does Title IX Cover?

Sex Discrimination

- Program Equity
- Recruitment, Admissions and Access
- Pregnancy
- Athletics
- Employment, Recruitment & Hiring
- Extra-curricular activities
- Housing
- Access to Course Offerings
- Salaries & Benefits
- Financial Assistance
- Facilities
- Funding
- *Sex, Gender, Gender Identity*
- **Sexual Harassment** ----->

Sexual Harassment

- **Stalking**
- **Domestic Violence**
- **Dating Violence**
- **Sexual Assault (Hazing)**
- **Sexual Violence**
- **Sexual Exploitation**
- **Sexual Intimidation**
- **Sexual Misconduct**
- **Bullying and Cyberbullying**
- **Retaliation**



The New Title IX Regulations and Athletics

Title IX and Athletics Compliance:

- There are no recommended changes to Title IX compliance relative to athletics programs.
- The duties and obligations that schools have regarding the application of Title IX in athletics remains the same.

I. PARTICIPATION OPPORTUNITIES

**Effective
Accommodations of
Athletic Interests and
Abilities**

("The Three-Prong Test")

II. TREATMENT

**Equivalence of
Other Athletics
Benefits and
Opportunities**

("The Laundry List")

Past Guidance Issued by the Department

- Withdrawn:
 - 2011 Dear Colleague Letter (DCL)
 - 2014 Q&A on Title IX and Sexual Violence
 - 2016 DCL on Transgender Students
- Still in effect:
 - 1975 Regs, as amended
 - 2001 OCR Revised Sexual Harassment Guidance (has force and effect of law; conflicts with 2020 Regs)
 - 2003 DCL on Title IX and Free Speech
 - 2010 DCL on Harassment and Bullying
 - 2013 DCL on Pregnant and Parenting Students
 - 2015 DCL on the role of Title IX Coordinators
 - 2017 Q&A on Campus Sexual Misconduct issued as interim guidance, still in place

Historical Case Law

There are significant cases that the Department of Education highlighted in the preamble of the Final Regulations that are referenced as the basis for the amendments on how schools should implement Title IX.

- *Cannon v. University of Chicago*, 441 U.S. 677 (1979)
- *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992)
- *Gebser v. Lago Vista Independent School District* (Gebser), 524 U.S. 274 (1998)
- *Davis v. Monroe County Board of Education* (Davis), 526 U.S. 629 (1999)

Cannon v. University of Chicago

The court in *Cannon* stated:

Title IX has two primary objectives:

- ✓ To avoid use of federal funds to support discriminatory practices
- ✓ To provide individuals with effective protection against discriminatory practices

- **Enforcement:** Those two purposes are enforced both by administrative agencies that disburse federal financial assistance to recipients, and by courts in private litigation.
- The *Cannon* court recognized that **judicial and administrative** enforcement both help ensure “the orderly enforcement of the statute” to achieve Title IX’s purpose.

Franklin v. Gwinnett County Public Schools

- In *Franklin v. Gwinnett County Public Schools*, the U.S. Supreme Court analyzed the conditions under which a school district will be liable for money damages for an employee sexually harassing a student.
- The U.S. Supreme Court in *Franklin* acknowledged that sexual harassment and sexual abuse of a student by a teacher may mean the school itself engaged in intentional sex discrimination.

Gebser v. Lago Vista Independent School District

The *Gebser* court began its analysis stating that while Franklin acknowledged that a school employee sexually harassing a student may constitute the school itself committing intentional discrimination on the basis of sex, the *Gebser* court held that where a school has **actual knowledge** of an employee sexually harassing a student **but responds with deliberate indifference** to such knowledge, **the school itself has engaged in discrimination**, subjecting the school to money damages in a private lawsuit under Title IX.

Davis v. Monroe County Board of Education

Davis is a case concerning sexual harassment of a fifth-grade student by another student.

- The U.S. Supreme Court **did not adopt** the Title VII definition of sexual harassment (severe, persistent, **or** pervasive) for use under Title IX defining actionable sexual harassment for Title IX purposes as conduct that is “severe, pervasive **and** objectively offensive.”
- The Department stated that it’s persuaded by the Supreme Court’s reasoning that elementary and secondary “[S]chools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults...The Department does not wish to apply the same definition of actionable sexual harassment under Title VII to Title IX because such an application would equate workplaces with educational environments.”

The New Title IX Regulations

- On May 6, 2020, the U.S. Department of Education issued the 2,033-page document that amended the regulations implementing the Title IX of the Education Amendments of 1972 and which contained the new **Final Regulations**.
- Steps that led to the Final Regulations:
 - In November 2018, the U.S. Department of Education issued proposed changes to Title IX procedures as called the Notice of Proposed Rulemaking or NPRM.
 - U.S. Department of Education received over 124,000 comments during a 6-month public comment period following the release of the NPRM.
 - 18 months later, the final regulations were issued.

Prelude to the New Regulations for K-12 School



U.S. Department of Education

Student Loans

Grants

Laws

Secretary DeVos Announces New Civil Rights Initiative to Combat Sexual Assault in K-12 Public Schools

FEBRUARY 26, 2020

Contact: (202) 401-1576, press@ed.gov

WASHINGTON — U.S. Secretary of Education Betsy DeVos announced today a new Title IX enforcement initiative, led by the Department's Office for Civil Rights (OCR), to combat the troubling rise of sexual assault in K-12 public schools. This initiative will enhance OCR's enforcement of Title IX in both elementary and secondary public schools and strengthen the ability of schools to respond to all incidents of sexual harassment and assault. The new initiative also builds on the Department's work to implement the "Pass the Trash" provisions of the Every Student Succeeds Act (ESSA), which prohibits schools from simply moving employees who have committed acts of sexual misconduct.

"We hear all too often about innocent children being sexually assaulted by an adult at school. That should never happen. No parent should have to think twice about their child's safety while on school grounds," said Secretary DeVos. "That's why I've directed our OCR team to tackle the tragic rise of sexual misconduct complaints in our nation's K-12 campuses head on. Through compliance reviews and raising public awareness about what's actually happening in too many of our nation's schools, we can build on the good work we're already doing to enforce Title IX and protect students. We cannot rest until every student can learn in a safe, nurturing environment where their civil rights are protected."

OCR's recent resolution of two sexual harassment complaints involving [Chicago Public Schools](#) illustrates the systemic and significant deficiencies that require OCR's intentional and focused examination.

In fact, according to the most recent available Civil Rights Data Collection (CRDC) for the 2015-2016 school year, there were approximately 9,700 incidents of sexual assault, rape or attempted rape reported in public elementary and secondary schools.

OCR's initiative to examine sexual assault will include the following activities:

- **Compliance Reviews:** OCR will conduct nationwide compliance reviews in schools and districts, examining how sexual assault cases are handled under Title IX, including sexual incidents involving teachers and school staff. OCR will work with school districts to identify and correct compliance concerns.
- **Public Awareness and Support:** OCR will focus on raising awareness of the issue of sexual assault in K-12 schools, including making information available to educators, school leaders, parents and families.
- **Data Quality Reviews:** OCR will conduct Data Quality Reviews (DQRs) of the sexual assault/offenses data submitted by school districts through the CRDC. As a part of conducting DQRs, OCR will partner with the National Center for Education Statistics (NCES) and will work with districts to ensure that incidents of sexual assault/sexual offenses are being accurately recorded and reported through the CRDC.
- **Proposed CRDC Data Collection:** OCR has proposed, for the 2019-2020 data collection, to collect more detailed data on sexual assault. The proposed data collection includes incidents perpetrated by school staff or school personnel. If adopted, the inclusion of this data would make the CRDC collection the first universal collection to gather such data systemically by school.

"The number of K-12 sexual harassment and violence complaints filed with OCR is nearly fifteen times greater than it was a decade ago. This disturbing change is a matter of serious concern and requires immediate attention," said Assistant Secretary for Civil Rights Kenneth L. Marcus. "Secretary DeVos has directed OCR to focus our enforcement, technical assistance, and data-gathering activities on this issue, and we are going to make it a priority going forward."

Today's actions follow the Department's Office of Elementary and Secondary Education's announcement that it will publish an extensive study of measures taken by states and school districts to prevent the phenomenon known as "Pass the Trash." The study examines best practices for prevention and raises awareness of the requirement under Section 8546 of ESSA, which prohibits state education agencies, school districts, schools and school employees from assisting an individual in obtaining new employment if the individual has engaged in sexual misconduct with a student or minor. Further, laws, and too often, teachers who have engaged in

Trends in Litigation



Most of the alleged harassers were male



(9% of the alleged harassers were not identified by gender)

The alleged harassment occurred in a variety of locations:

In 33% of claims, the location was either unidentified or in a variety of single locations such as an office, stairwell, playground, or library

22% School bus

12% Classroom

8% Off campus

20% Bathroom

5% Locker room

Betsy DeVos' New Title IX Rules Will Shake Up How K-12 Schools Handle Sexual Harassment

The overhaul of campus sexual assault regulations will ramp up the paperwork schools must do to comply with Title IX

Published May 7, 2020 • Updated on May 7, 2020 at 12:53 am



Why Did the Department Issue the New Final Regulations?

- The new Title IX regulation holds schools accountable for failure to respond **equitably and promptly** to sexual misconduct incidents and ensures a more reliable adjudication process that is fair to all students.
- Secretary of Education Betsy DeVos stated:
"Too many students have lost access to their education because their school inadequately responded when a student filed a complaint of sexual harassment or sexual assault... This new regulation requires schools to act in meaningful ways to support survivors of sexual misconduct, without sacrificing important safeguards to ensure a fair and transparent process. We can and must continue to fight sexual misconduct in our nation's schools, and this rule makes certain that fight continues."

What Are the Final Regulations?

- These Final Regulations specify how recipients (defined as schools, LEAs, postsecondary institutions) of federal financial assistance must respond to allegations of sexual harassment consistent with Title IX's prohibition against sex discrimination.
- Final Regulations, *unlike past guidance* issued in 2011 and 2014 from the Office for Civil Rights within the Department, **have the full effect of law and override any past guidance.**

“These Final Regulations impose, for the first time, legally binding rules on recipients with respect to sexual harassment.”

What the Final Regulations Require and Key Terms

The Final Regulations Require Schools to:

1. Respond Promptly and Supportively to persons alleged to have been victimized by sexual harassment.
2. Resolve allegations of sexual harassment promptly and accurately under a predictable, fair grievance process that provides due process protections to the alleged victim and alleged perpetrators of sexual harassment.
3. Effectively implement remedies for victims.

Key Terms Repeated in the Regulations:

- Prompt
- Equitable
- Supportive Measures
- **Due Process**
- Remedies

Schools must keep these terms in mind as they create and implement their policies and procedures.

The 'IX' Commandments

Thorough	Reliable	Impartial	Investigation (prompt & fair)
Prompt	Effective	Equitable	Process
End the Discrimination STOP	Prevent its Recurrence PREVENT	Remedy the effects upon the 'victim' & community REMEDY	Remedies

Terminology (words or phrases you need to know)

Recipient (School District)

Complainant (~~victim~~)

Respondent (~~perpetrator~~)

Grievance Process

Sexual Harassment

Sexual Assault

Dating Violence & Domestic Violence

Stalking

Retaliation

Consent

Notice

Education Program or Activity

Deliberate Indifference

Informal Resolution Process

Emergency Removal Process

Administrative Leave

Formal Complaint

Standard of Proof

Actual Knowledge

The Title IX Team

- Title IX Coordinator
- Deputy Coordinators
- Investigators
- Decision-Makers
- Appeal Decision-Makers
- Informal Resolution Facilitator

- Advisor
- Advocate
- Responsible Employee
- Legal Counsel



Title IX Coordinator

The roles and responsibilities of the school district's Title IX Coordinator are extensive.

- Title IX Coordinators are a school district's primary resource for identifying sex discrimination, including sexual harassment. Having a Title IX Coordinator in place is not only required law, it is also essential for helping schools fulfill their mission of providing students with the best possible education.
- School districts must notify all students, parents, or legal guardians of elementary and secondary school students and employees the name and contact information of the employee or employees designated as the Title IX Coordinator.
- Title IX Coordinators should be focused on systemic policy, process, and prevention programs including assessing school climate and current program effectiveness; collaboration and cooperation with school officials, parents/ guardians, and community partners; and ensuring other members of the Title IX Team have the appropriate knowledge, skills, training, and resources necessary to successfully their responsibilities.

Deputy Coordinators

- Deputy Coordinators are individuals designated to assist with management and implementation of population – or function-specific compliance strategies and programs.
- Depending upon structure, size and report volume, the school district may choose to designate a Deputy Coordinator for any of the following populations: students, employees, third parties (vendors, contractors, volunteers, etc.), prevention personnel, and athletics.
- Deputy Coordinators are considered thought-leaders on the Title IX Team and should be organizationally situated at the school district level to effect broad-scale change and garner stakeholder buy-in.



Investigators

- Assigned by the Title IX Coordinator.
- Must be impartial, unbiased and free from conflicts.
- Oversees the prompt, thorough gathering of all facts based on the filing of formal complaint.
- Effectively communicates with all participants throughout and involved in the investigation.
- Provide notice of any good faith delays.
- Understands relevance to create an investigative report that fairly summarizes relevant evidence.



Decision-Maker

- Oversees the administrative determination proceeding or, when applicable, reviews appeals.
- The Decision-Maker has the authority to determine whether or not school district policy was violated, in accordance with the specified standard of proof.
 - Must be impartial, unbiased and free from conflicts
 - Must receive training on any technology to be used at a live hearing, and on issues of relevance of questions and evidence, including when questions and evidence about a complainant's sexual predisposition or prior sexual behavior are not relevant.
 - Title IX Coordinator and Investigators cannot serve as the Decision Maker.



Appeal Decision-Maker

- If a school district offers an opportunity to appeal the Decision-Maker's original decision, the case will then be assigned to an Appeal Decision-Maker.
- The Appeal Decision-Maker cannot have otherwise been involved in the case up to the point of receiving an appeal request.
- Appeal Decision-Makers must be appropriately trained and be free from conflicts of interest or disqualifying bias for or against any party involved in the reported incident.
- The Title IX Regs require school districts to offer an appeal to the parties and, require that the parties have an equal opportunity to appeal.



Informal Resolution Facilitator

- Serves as a mediator and oversees the informal resolution process seeking a resolution to a formal complaint that both parties agree, in writing, to resolve using restorative justice or mediation practices.
- Must be impartial, unbiased and free from conflict.



Advisor

An Advisor is an individual selected by a party to assist them throughout the resolution process.

The Advisor can be anyone, including an attorney or a parent.

While school districts cannot restrict who an individual selects as their Advisor, parties should be instructed as to the potential issues related to choosing an Advisor who has a conflicting role within the process, such as being a witness, co-responding party, etc.

In situations involving minors, it is common for a parent/guardian to serve as the Advisor.

Advocates

Advocates are individuals who may or may not be employed by a school district for the purpose of providing confidential support and resources independent of or in conjunction with a sex or gender-based discrimination, misconduct, and/or retaliation resolution process.

Advocates are typically trained to provide crisis response services and connection to law enforcement, legal, health, and other emergency services.

Are often involved in helping to ensure the provision of supportive measures for the parties such as academic adjustments, employment adjustments, safety planning, coordination of medical or mental health services, etc.

(i.e.: school social workers, school psychologists, etc.)





Responsible Employee

- Responsible Employees have the responsibility to promptly notify the Title IX Coordinator when they receive information that may involve a possible violation of Title IX.
- Under the Title IX Regulations, all school district employees are deemed Responsible Employees and are therefore required to report all information they learn regarding a potential Title IX issue to the Title IX Coordinator.
- This obligation is separate from child abuse reporting statutes and requirements, and where these duties overlap, employees must make notifications that satisfy both state law and Title IX.



Legal Counsel

- The involvement of Legal Counsel in Title IX-related matters will vary to a degree depending upon the culture of the school district.
- In any Title IX instance, Legal Counsel should be serving in an advisory capacity rather than an investigatory or decision-making role.
- Legal Counsel will be helpful in navigating intersecting, overlapping, and conflicting laws, policies, and regulations.

Impartiality

- Recipients are not required to use outside unaffiliated Title IX personnel to avoid conflicts and may use their own employees to comply with the final regulations.
- Administrative hierarchy, employment relationships and professional experiences or affiliations are not automatically prohibited conflicts of interest.
- Recipients have discretion to describe how best to implement the prohibition on conflicts of interest or bias, including providing a process for parties to assert claims of conflict of interest or bias during the investigation.

Unbiased and Free from Conflicts

- School districts must conduct reliable, prompt, fair and impartial investigations.
- Investigators and Decision-Makers must be appropriately trained consistent with the regulations and, be free from conflicts of interest or disqualifying bias for or against any party involved in the reported incident.
- As part of the Department's emphasis on "due process", the regulations require recipients to ensure that coordinators, investigators, and decision-makers (including appeal decision-makers) do not have conflicts of interest or bias for or against Complainants and Respondents generally, or for or against an individual party. This requirement extends to any materials used to train coordinators, investigators, decision-makers, and other involved in the process.

**CONFLICT
OF
INTEREST**

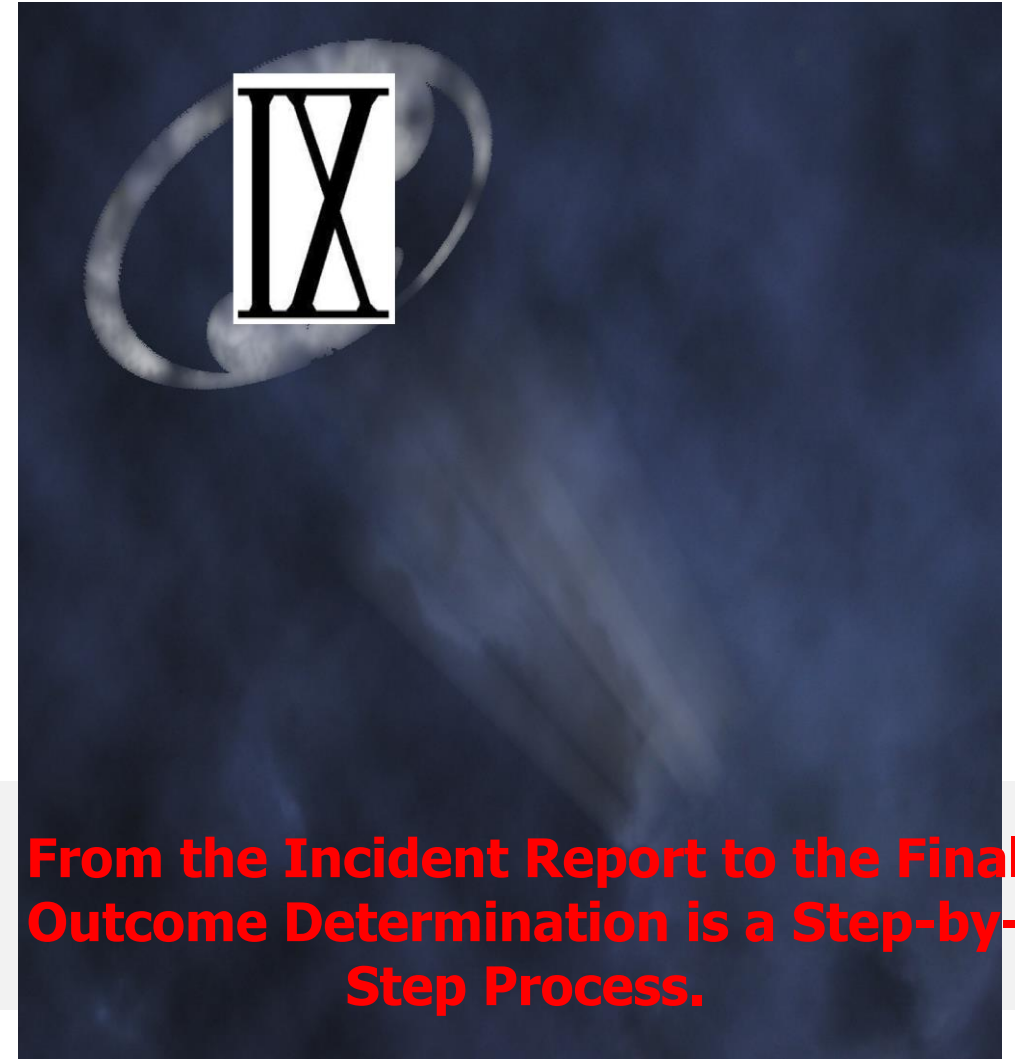
Implicit Bias

The unconscious attribution of particular qualities to a member of a certain social group. Implicit stereotypes are shaped by experience and based on learned associations between particular qualities and social categories, including race and/or gender.

Explicit Bias

The attitudes and beliefs we have about a person or group on a conscious level. Much of the time, these biases and their expression arise as the direct result of a perceived threat.

When the Recipient Receives a Title IX complaint or believe that they are dealing with a Title IX 'Situation'...



From the Incident Report to the Final Outcome Determination is a Step-by-Step Process.



The Title IX Team Goes Into Action!

Begin the Processing Steps:

- Notification
- Publication
- Implementation
- *Communication
- **Documentation**
- Conclusion

Investigation/Resolution Timeline

1

Investigate

Notice of
allegations
Notice of all
interviews with
sufficient time
to prepare

2

Opportunity to
inspect
and review
evidence
directly related to
allegation &
provide
written response

(10 days)

3

Investigative
Report

4

Opportunity to
review final
report and
provide written
response

(10 days)

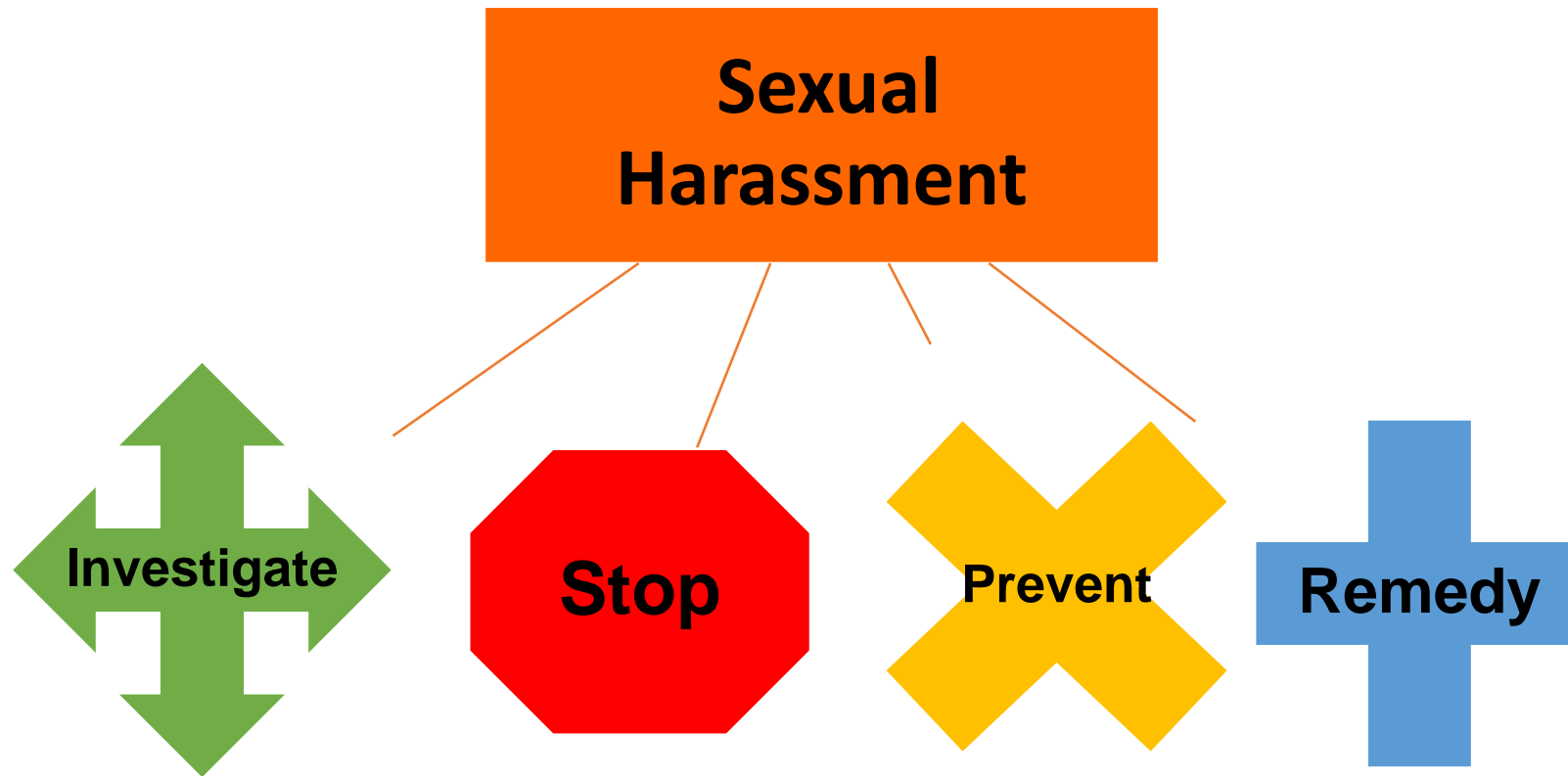
5

Q & A
Resolution/
Hearing

6

Appeal

Bottom line...
A School's Obligations Under Title IX



The “Do Both” Requirement

- Title IX requires schools to “do both:”
 - Respond meaningfully to allegations of sexual harassment
(including sexual assault)
 - Provide due process protections for both parties
- The Department believes that recipients **can and must** “do both.”



Response Obligations

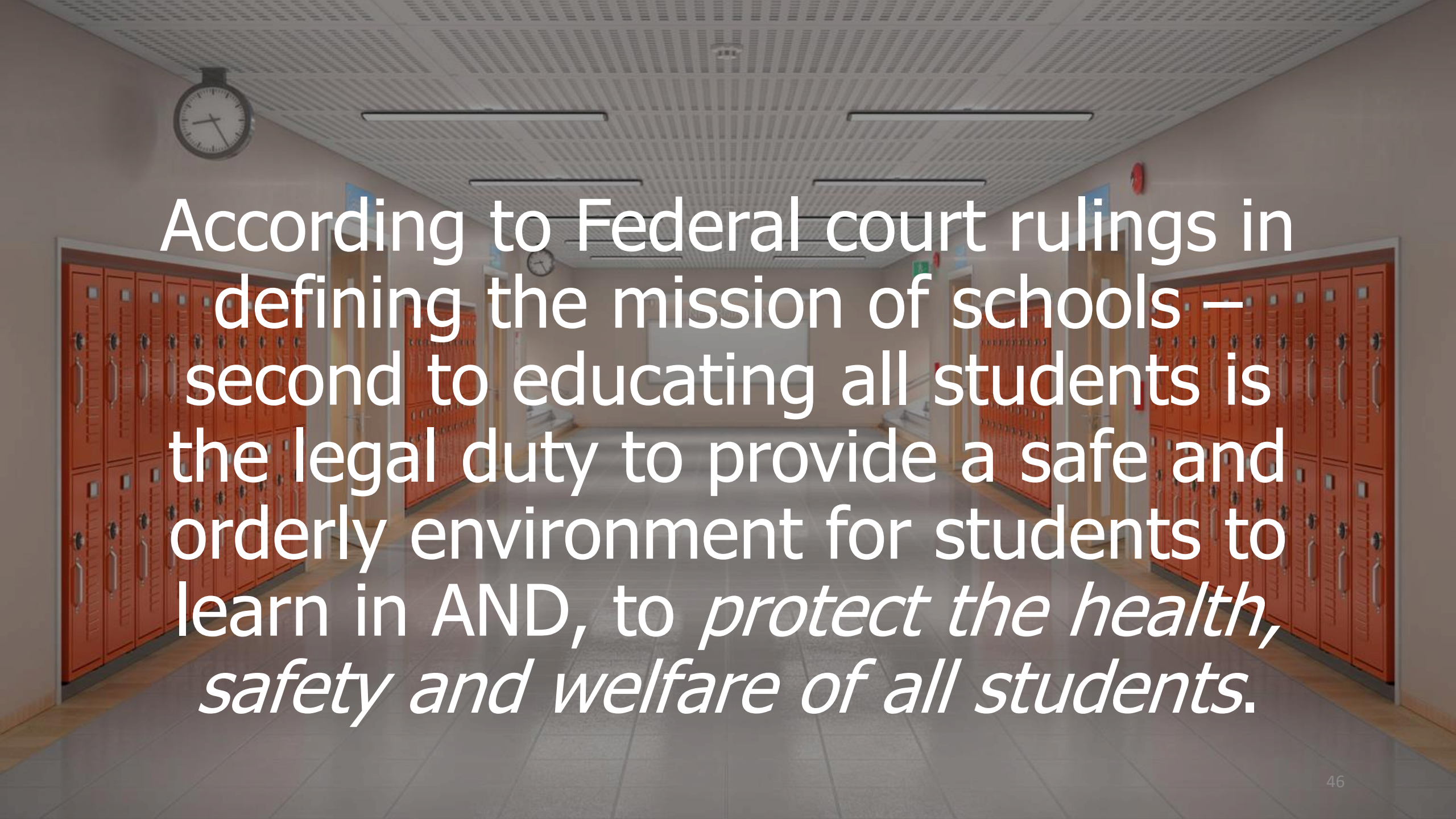
Actual knowledge of sexual harassment or a report of sexual harassment triggers the recipient's response obligations:

- Must be prompt
- Must not be deliberately indifferent
- Must provide supportive measures
- Must be confidential
- Must initiate grievance process
- Must conduct an investigation

2020 New Title IX Regulations

The final regulations **represent the Department's interpretation of a recipient's legally binding obligations, rather than best practices, recommendations or guidance.**

"These final regulations focus on precise legal compliance requirements governing recipients. The final regulations leave recipients the flexibility to choose to follow best practices and recommendations contained in the Department's guidance or, similarly, best practices and recommendations made by non-Department sources, such as Title IX consultancy firms, legal and social science scholars, victim advocacy organizations, civil libertarians and due process advocates, and other experts." (pg. 18)

A photograph of a school hallway with rows of orange lockers on both sides. A round analog clock is mounted on the wall to the left. The hallway is brightly lit with fluorescent lights. The text is overlaid in the center of the image.

According to Federal court rulings in defining the mission of schools – second to educating all students is the legal duty to provide a safe and orderly environment for students to learn in AND, to *protect the health, safety and welfare of all students.*



Title IX is...



LAW



AN EDUCATED TEAM IS AN
EFFICIENT
TEAM

K-12 Schools Must take a Proactive approach.

Educate, Educate, Educate

Collaborate/Communicate

Learn about the law; don't fear the law.

Seek assistance.

Be Brave; Be Persistent; Do the right thing for all students!





**KEEP
CALM
AND
WE ARE HERE
TO HELP YOU**

*Thank you for your
time and attention
today!*

Lisanne Mikula, Esq.

lmikula@dioriosereni.com

610-565-5700

Peg Pennepacker, CAA

pegpennepacker@gmail.com

814-470-7101