

**TITLE IX IN 2021:  
Putting it All Together**

# Title IX Says....

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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, Public Law 92-318 of the Education Amendments of 1972

# How Title IX is Enforced

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- U.S. Department of Education Office for Civil Rights
- Assurances associated with receipt of federal funding
- Private lawsuits for damages

# Time Line of Title IX Sexual Harassment Rule

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- Supreme Court recognizes private cause of action for damages for sexual harassment under Title IX (1992)
- OCR publishes guidance on sexual harassment (1997)
- Supreme Court rules that schools must have actual notice of sexual harassment to be liable (1997, 1999)
- OCR issues revised guidance (2001)
- OCR issues more “guidance (2010-2016)
- OCR Repeals All Guidance Except 2001 (2017)
- Formal Rules Adopted (May 2020)
- Sexual Harassment Rules Go Into Effect (August 14, 2020)
- Announcement that changes are coming soon (April 6, 2021)
- Public hearing on current rules (June 7-11, 2021)

# What could be meant by “discrimination”?

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- Equal Opportunities
- Freedom from Harassment and Bullying
- Freedom from “Title IX Sexual Harassment”
- Fair Treatment in Sexual Harassment Disputes
- Right to Know District Policies, Practices, and Records
- Equal Access



# Overview of Today's Discussion

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- Equal Opportunity
- Freedom from Harassment and Bullying
- Freedom from “Title IX Sexual Harassment”
- Fair Treatment in Sexual Harassment Disputes
- Right to Information
- Equal Access

# I. Equal Opportunities under Title IX





# Equal Opportunity in Academics

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- **Courses and academic programs must be offered equally to all genders**
- **Grading policies or qualifications criteria cannot be based on gender-related factors**
- **Supportive services, tutoring, and extra help must be offered equally**

# When Single-Sex Programming is Permitted

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- **Single-sex nature of activity is substantially related to the compelling objective of improving student achievement OR to meet the particular needs of students**
- **Objective must be implemented in an even-handed manner and be completely voluntary**
- **Substantially equal opportunity is provided to members of the opposite sex**

# **The Equal Opportunity Requirement in Athletics and Factors**

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- 1. Effective accommodation of both sexes**
- 2. Access to equipment and supplies**
- 3. Schedules**
- 4. Travel opportunities**
- 5. Opportunities for coaching and tutoring**

## II. Freedom from Harassment and Bullying



# Definition of Bullying

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Bullying typically has most of the following elements:

1. A desire to hurt + a hurtful action
2. A power imbalance + an unjust use of power
3. Repetition
4. Evident enjoyment by the aggressor
5. A sense of being oppressed by the target

# Legal Definition of Hostile Environment

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Unlawful harassment is

(a) unwelcome conduct

(b) based on a protected class

(c) that is so severe or pervasive as to

(d) create a hostile, intimidating, or offensive educational or working environment.

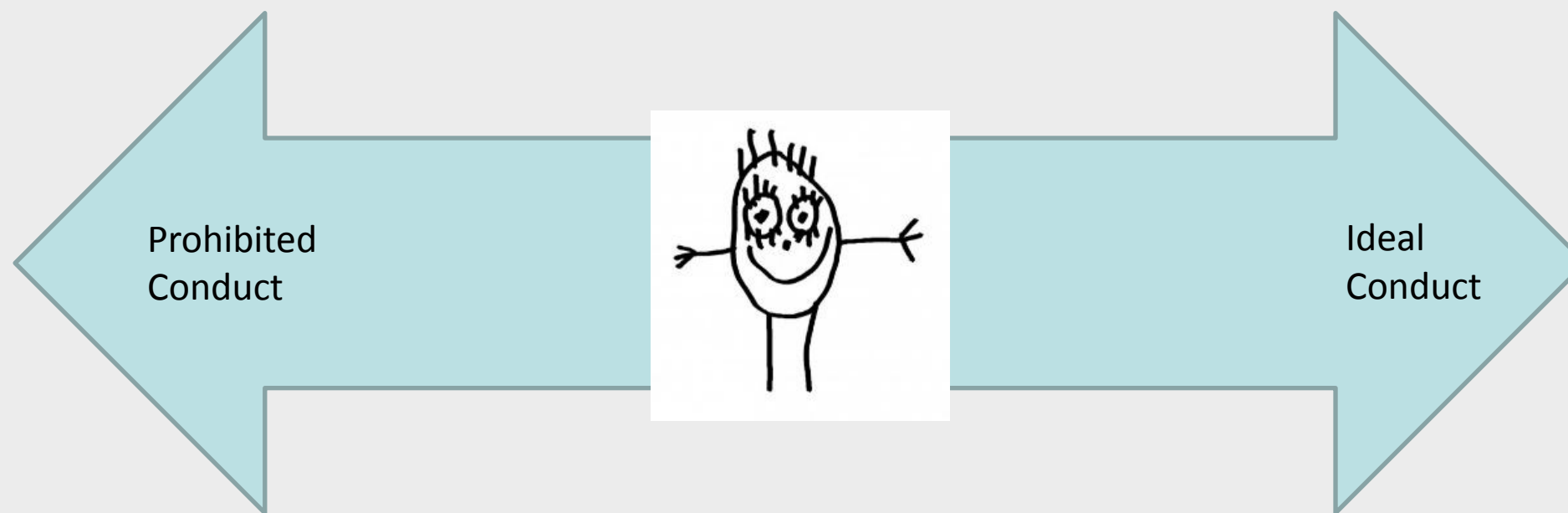
# Quid Pro Quo Harassment

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Conditioning a benefit on sexual favors or attention

- Includes the threat of poor treatment if the victim will not consent to sexual favors
- The "sexual conduct" may be verbal or physical, and the "asking" may be done either openly or implied; regardless, it must be unwelcome.
- Look out for with Supervisor-subordinate relationships; coach-athlete relationships

## Set the Stage: The Continuum of How People Interact





# Prevention of Student-Student Harassment

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- Set high expectations of respect for all,
- Address disrespectful attitudes and behaviors swiftly
- Foster a culture that it is the responsibility of ALL members of the school community
- Legal definition of harassment does not have to be met to address it
- Increase supervision in hot spot areas and shift supervision plans appropriately and quickly

# Prevent Harassment by and of Employees

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- Example setting is part of your job description
- Train everyone, regularly.
- Senior staff and board members represent the organization and therefore could create additional liability if they engage in harassment
- Address issues immediately
- Make sure employees raising concerns know the policy and how to be heard

### III. Freedom from “Title IX Sexual Harassment”



## **The sexual harassment rule in a nutshell:**

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A recipient with actual knowledge of sexual harassment in an education program or activity against a person in the United States must respond promptly and in a manner that is not deliberately indifferent.

# “Sexual Harassment”

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1. Quid pro quo. An employee conditions a benefit on unwelcome sexual conduct.
2. Hostile Environment. Unwelcome conduct that a reasonable person would view as so severe AND pervasive AND objectively offensive that it effectively denies a person access to education or employment.
3. Four Criminal Offenses: sexual assault, dating violence, domestic violence, or stalking

# The New Hostile Environment Standard

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**Title VII** -> severe OR pervasive

Title IX -> severe AND pervasive

- Severe could be a single incident
- Pervasive could be a myriad of small incidents which standing alone would not be harassment
- Both severity and pervasiveness depend on circumstances, age, maturity, and roles

# “In An Education Program or Activity”

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- Formal complaint must allege conduct at “locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs.”
- Conduct must have occurred in the United States

# What is Deliberate Indifference?

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- Deliberate indifference is Learning about an allegation and not doing anything.
- If you find yourself saying this, you may be being deliberately indifferent:
  - “there’s no proof so there’s nothing to do”
  - “boys will be boys”
  - “she was asking for it in those clothes”
  - “that’s just how they are”



## IV. Fair Treatment in Sexual Harassment Disputes

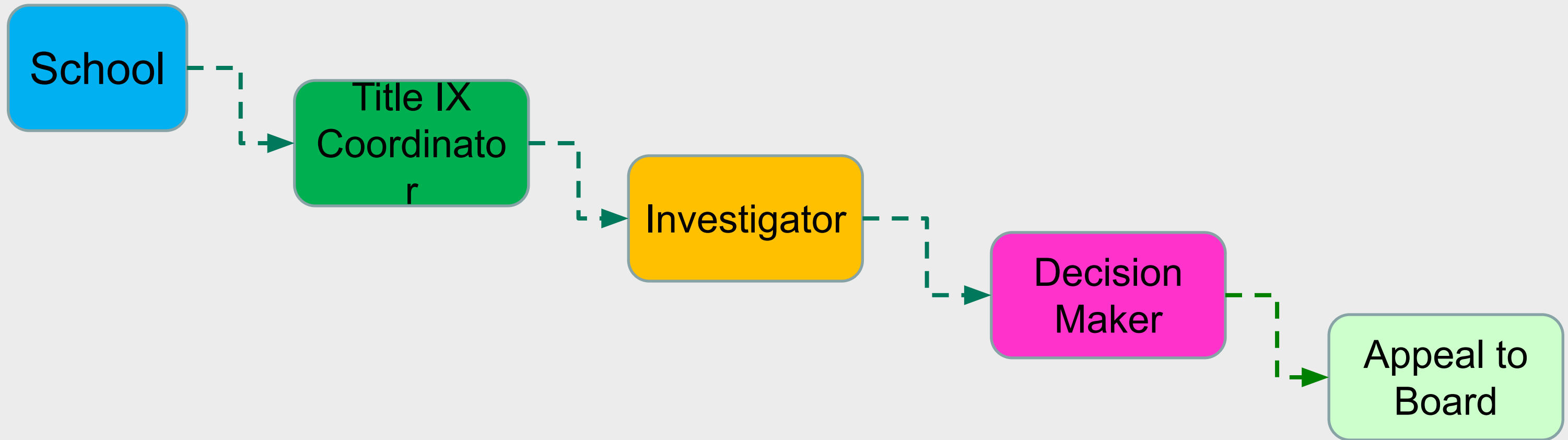


# Basic Tenants of the New Grievance Process

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- Grievance process must be followed prior to imposition of punitive measures on a respondent
- Complainant and respondent are treated equitably
- Notices are provided about everything
- Bias is eliminated

# Flowchart



# Investigation

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- Complainant and respondent must have opportunity to present evidence and/or witnesses
- Respondents and complainants are entitled to bring an adviser with them to any interviews (role of adviser may be limited by policy)
- Complainant and respondent must have opportunity to review evidence and submit written statements
- Investigator must write an investigative report.
- Investigator **MAY NOT** be decision-maker.

# Opportunity to Review Evidence

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- Before finalizing the investigative report, provide the parties a chance to review all “direct evidence” gathered.
- Redact names of other students but provide a key (for internal use).
- Parties have 10 days to review evidence and submit any additional evidence/statements to the investigator before investigative report may be finalized.
- Provide a hard copy of the evidence. Information should not be emailed.

# Decision-Maker's Decision

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- Investigative report goes to decision-maker and parties are entitled to submit written questions
- Decision-maker must monitor and manage these written questions
- Decision-maker's decision must include information about investigation, procedure, evidence (a long list of items)
- Evidentiary hearing is not required for k-12 schools but may be required prior to long-term suspension

# Appeal

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- Appeal process must be provided to both parties under Title IX, but the Board has authority to limit the grounds for appeal
- State law requires appeals under many circumstances already that are in addition to the grounds identified by Title IX

## V. Right to Know District Policies, Practices, and Records





# Record-Keeping Requirements

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- SEVEN YEARS:
- Records of each sexual harassment investigation
- Records of any appeal and results
- Records of any informal resolution and results
- All materials used to train Title IX coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process.

# Public Information Requirements

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- All training materials must be available on website
- Notice of non-discrimination must be on website and included in admissions and prospective employment materials
- Identification of Title IX Coordinator and methods for contacting must be on readily available and on website
- Policies and procedures must be public
- People must be able to find information on how to file a complaint

• FERPA

- Names are directory information, but is a change of name or preferred name?
- Sex/change of sex is not directory information
- Medical records maintained by a school district are education records
  - Education records cannot be disclosed without consent except in limited circumstances
  - Rarely would a child's gender identity meet such an exception

• Constitutional right to privacy – proving gender?

- *Whalen v. Roe* (SCOTUS 1977) - substantive due process right to informational privacy in “avoiding disclosure of personal matters,” and in “making certain kinds of important decisions”
- *Sterling v. Borough of Minersville* (3<sup>rd</sup> Cir. 2000) - police officer's disclosure of a citizen's sexual orientation gave rise to constitutional claim for the violation of privacy
- *Powell v. Schriver* (2d Cir. 1999) - compelling interest in privacy that individuals who have transitioned possess: transgender individuals “understandably might desire to conduct their affairs as if such a transition was never necessary”

• Harassment concerns

# Right to Privacy

## VI. Equal Access



# Access = Open Doors to All

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ALL children should be able to come to school.

Consider whether a policy creates a barrier to a child being able to come to school

Consider whether the policy is excluding children based on their innate characteristics

# What is “sex” Discrimination?

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## Title VII

- *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75 (1992); *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007)
  - Sex has the same definition under Title VII and Title IX
- *Price Waterhouse v. Hopkins* (SCOTUS 1989)
  - Sex stereotyping is sex discrimination
  - Failing to promote until a woman decided to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry” was sex discrimination
- *Macy v. Dep’t of Justice* (EEOC 2012)
  - Discrimination against trans\* workers is sex discrimination
- *Bostock v. Clayton* (SCOTUS 2020)
  - “For an employer to discriminate against employees for being . . . transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII's plain terms—and that should be the end of the analysis.”

## Title IX

- Department of Justice Guidance
- Office of Civil Rights Guidance
- OCR Resolution Agreements
  - Arcadia Unified School District (CA, 2013)
  - Downey Unified School District (CA, 2014)
  - Township High School District 211 (IL, 2015)
- *Grimm v. Gloucester County School Board* (4<sup>th</sup> Cir. 2020, SCOTUS cert. denied 2021)

# *Grimm v. Gloucester County School Board (4<sup>th</sup> Cir. 2020)*

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- Facts:
- transgender student who underwent transition and changed birth certificate from female to male used male bathroom without incident for 7 weeks
- School board adopted policy that transgender students were required to use an “alternative appropriate facility”
- School board also refused to change the sex on his transcript
- Question:
- whether school board violated Title IX and/or equal protection clause
- Answer from 4<sup>th</sup> Circuit in August 2020:
- “We join a growing consensus of courts in holding that the answer is resoundingly yes.”
- Petition to Supreme Court denied on June 28, 2021



# *Grimm v. Gloucester County School Board (4<sup>th</sup> Cir. 2020)*

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- Title IX
  - Bathroom policy: excluding a student because they are transgender, their sex is a but-for cause for the district's actions. No justification for different treatment, and bathroom is necessary to access school.
  - Records: district violated Title IX when it refused to update his records based on his corrected birth certificate
- Equal protection
  - Determined trans\* discrimination is sex discrimination and trans\* individuals constitute a quasi-suspect class, both of which require government policy to be “substantially related to a sufficiently important governmental interest”
  - Bathroom policy: not substantially related to student privacy – trans\* kids, like all kids, use the bathroom “by entering a stall and closing the door”; no incidents by Gavin; based on “sheer conjecture and abstraction” and “misconception and prejudice”
  - Records: district violated equal protection when it refused to update his records based on his corrected birth certificate; no justification for this treatment
- “The proudest moments of the federal judiciary have been when we affirm the burgeoning values of our bright youth, rather than preserve the prejudices of the past. . . . How shallow a promise of equal protection that would not protect Grimm from the fantastical fears and unfounded prejudices of his adult community. It is time to move forward.”

# Common Issues in Providing Equal Access to Transgender Students

- Records: right to change records when inaccurate or misleading; use “preferred name” option in PowerSchool
- Facilities: provide access based on gender identification, develop plan and protect privacy
- Parents: collaborate, be honest, report abuse

## PowerSchool

- NC DPI PowerSchool update: call name (“preferred name”) vs. legal name now default for non-legal documents, such as report cards and grade books
  - Legal name still used for student ID, NC transcript, ECATS, diploma, and other places
  - PREFERRED NAME CAN BE CHANGED AT STUDENT’S REQUEST – parent/guardian consent not needed

- Dress Code Issues: Student dress can be considered a form of speech protected by the First Amendment; Sex-based dress codes can present concerns that they discriminate based on gender

## Common Issues (Cont'd)

I hear a symphony

