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Title IX Rebooted:

*What Recent Changes Mean for Addressing
Sexual Harassment and Sex Discrimination in K-12 Schools*

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Agenda

Topics to be discussed



- Current Title IX Federal Regulations
- Other Laws at Play
- Upcoming Changes to the Title IX Federal Regulations



Current Title IX Federal Regulations

August 2020 Final Regulations: *What's Different?*



A **definition** of sexual harassment



A **duty** for schools to investigate complaints of **conduct that occurred within their program or activity**



Adoption of an “**actual knowledge**” and “**deliberate indifference**” standard

Under the Final Regulations, if a school district has **actual knowledge** of sexual harassment in a district education program or activity, the district must respond **promptly** in a manner that is not **deliberately indifferent**.



A **detailed grievance process** for formal complaints of sexual harassment – **specific roles** for administrators in grievance process

“Sexual Harassment”

“...Conduct **on the basis of sex** that satisfies one or more of the following:

- An **employee** of the District conditioning the provision of an aid, benefit, or service of the District on an individual's **participation in unwelcome sexual conduct** (i.e., *quid pro quo*);
- **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 programs or activities; or
- **“Sexual assault”** (20 U.S.C. 1092(f)(6)(A)(v)), **“dating violence”** (34 U.S.C. 12291(a)(10)), **“domestic violence”** (34 U.S.C. 12291(a)(8)) or **“stalking”*** (34 U.S.C. 12291(a)(30)).

What About Sexual Orientation and Gender Identity?

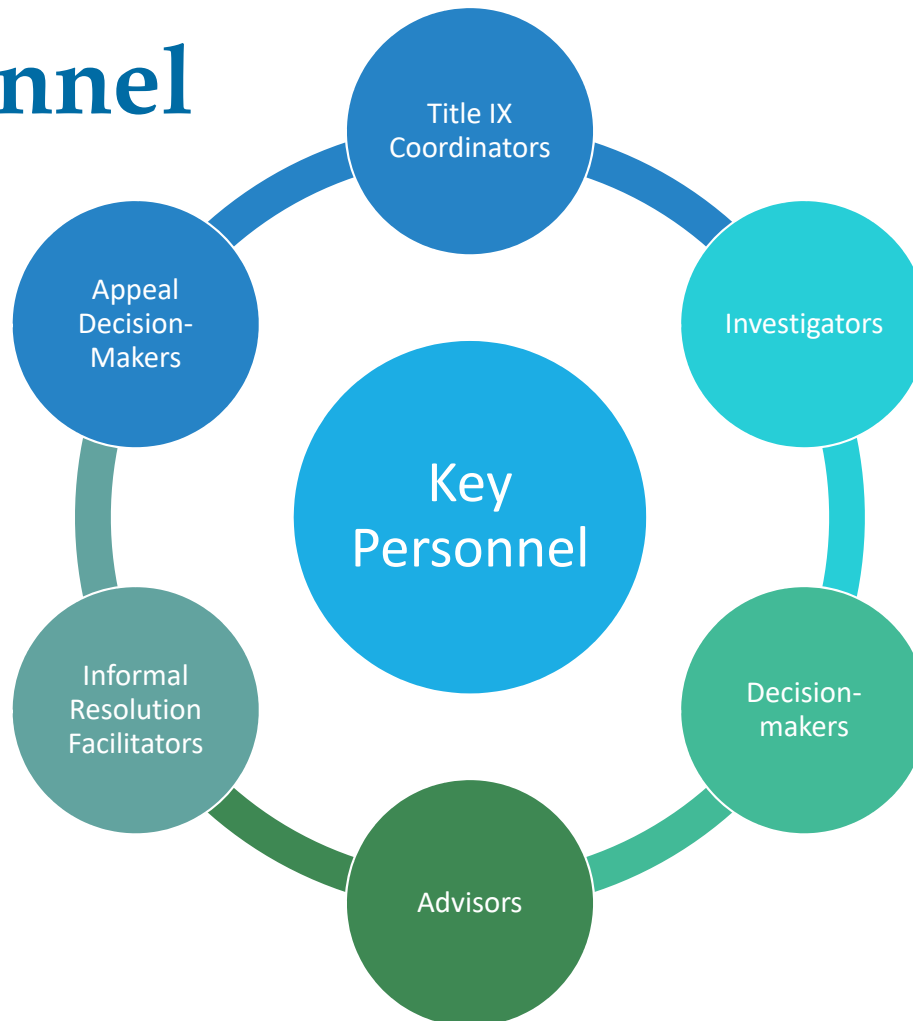


- On March 8, 2021, President Biden issued Executive Order 14021, *Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*.
- The OCR is currently reviewing the Final Regulations following this Executive Order.
- On June 16, 2021, the OCR issued a Notice of Interpretation explaining that it will enforce Title IX's prohibition on sex discrimination to include discrimination based on sexual orientation and gender identity.

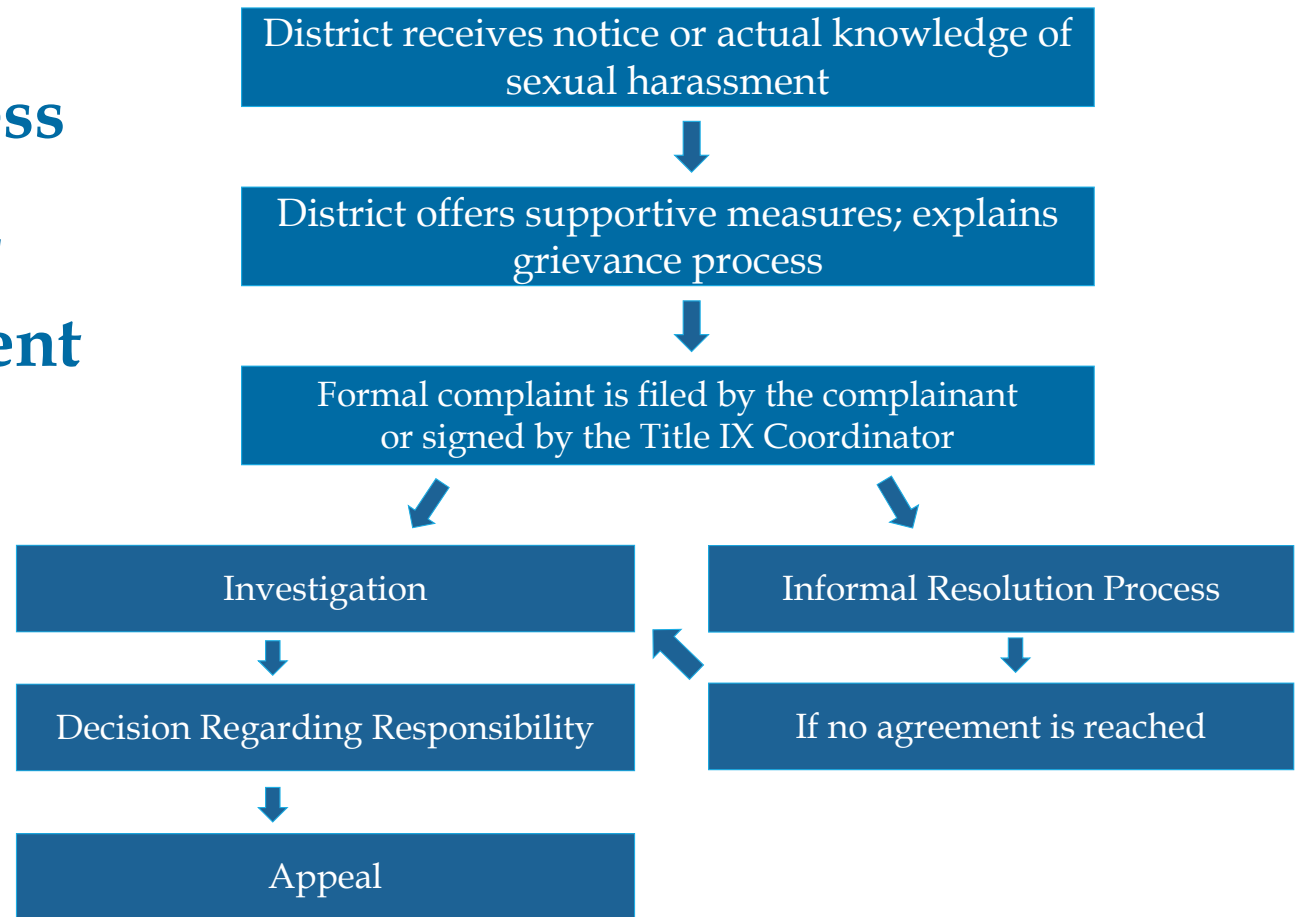
Enforcement – *State of Tennessee v. United States Department of Education*

- Twenty states sued to halt enforcement of the guidance implementing the Executive Order. The states challenged the constitutionality of the guidance, as well as whether the government followed the proper rule making practice.
- On July 15, 2022, the district court for the Eastern District of Tennessee granted a preliminary injunction after finding that the DOE did not comply with the proper rule making practice.
- The preliminary injunction means that the 20 named states are not bound by the guidance and can follow their own state laws, even if the laws do not protect against discrimination on the basis of sexual orientation and gender identity.

Key Personnel



Grievance Process for Allegations of Sexual Harassment





Other Laws at Play

Changes to Bullying Law Effective July 1, 2021 – Public Act 19-166



- No longer a requirement that both the alleged perpetrator and alleged victim be students attending school in the same district.
- Removes requirement that the act be “repetitive”
- Establishes a new harassment-like standard, which requires that the act be “**severe, persistent, or pervasive.**”

“Bullying” in Connecticut

“

An act that is direct or indirect and severe, persistent or pervasive, which (A) causes physical or emotional harm to an individual, (B) places an individual in reasonable fear of physical or emotional harm, or (C) infringes on the rights or opportunities of an individual at school.

”

“Bullying” includes:



A **written, oral or electronic communication** or **physical act or gesture**



based on any **actual or perceived differentiating characteristics**, such as **race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity or expression**, socioeconomic status, academic status, physical appearance, or mental, physical, developmental or sensory disability, or by association with an individual or group who has or is perceived to have one or more of such characteristics.

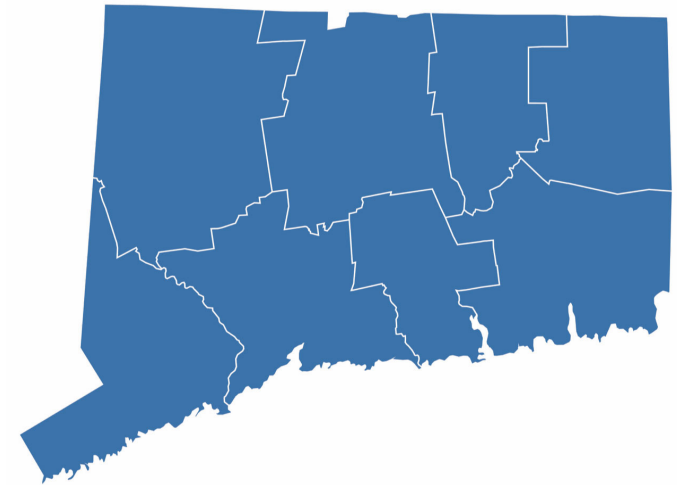


Sexual Harassment Under Connecticut Law

- Conduct in a school setting that
 - 1) is sexual in nature;
 - 2) is unwelcome; and
 - 3) denies or limits a student's ability to participate in or benefit from a school's educational program.
- Sexual harassment can be verbal, nonverbal, or physical. Sexual violence is a form of sexual harassment.

LGBTQI+ Protections Under Connecticut Law

- In October 2011, Public Act No. 11-55 added “gender identity and expression” to the state’s anti-discrimination laws.
- Protects against discrimination in employment, education, housing, public accommodation, and in any other areas in which sex discrimination is prohibited.
- Authorizes persons to file complaints with CHRO alleging discrimination.



Gender identity or expression

Conn. Gen. Stat. § 46a-51(21)

“a person’s gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person’s physiology or assigned sex at birth, which gender-related identity can be shown by providing evidence including, but not limited to, medical history, care or treatment of the gender-related identity, consistent and uniform assertion of the gender-related identity or any other evidence that the gender-related identity is sincerely held, part of a person’s core identity or not being asserted for an improper purpose.”

Equal Opportunity is Protected by Law in CT

Sec. 10-15c.

Discrimination in public schools prohibited.

School attendance by five-year-olds.



“The public schools shall be open to all children five years of age and over ... and each such child shall have ... an equal opportunity to participate in the activities, programs and courses of study offered in such public schools, at such time as the child becomes eligible to participate in such activities, programs and courses of study, without discrimination on account of race, color, **sex, gender identity or expression**, religion, national origin or **sexual orientation**”

Protected Class Harassment

- Sexual harassment may occur at the same time as other protected class harassment or bullying behavior.
- In those cases, the board of education should review its board policies regarding nondiscrimination and harassment. The investigation should address all types of harassment, not only sexual harassment.
 - The current Title IX federal regulations have the most prescriptive grievance process, so that should be followed.



Anticipated Changes to the Title IX Federal Regulations

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Background on the New Regulations

- New proposed rule was released by the Biden Administration on June 23, 2022.
- The Department of Education will consider public comments before finalizing the rule.
- Comments were due by September 15, 2022. DOE received nearly 240,000 comments. Nearly double the number of comments received in 2020.
- Stakeholders include K-12 schools, community colleges, colleges, universities, charter schools, and special educators.
- Earliest implementation date would be start of 2023-2024 academic year.

Major Highlights

Significantly expanded definition of “sexual harassment” and what must be investigated.

One grievance process for K-12, including sex-based discrimination.

- The current rule (§106.8(c)) provides a grievance process only for “sexual harassment” complaints.

Generally eliminates the litigation-type investigation requirements in K-12, but Title IX jurisdiction expands.

Proposed regulations are very similar to guidance issued during the Obama administration.

Major Highlights: LGBTQI+

- Proposed rule explicitly protects against discrimination on the basis of sexual orientation and gender identity:

“Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.” (Proposed § 106.10)

- Does not address how the definition applies to single-sex facilities (bathrooms, locker rooms) or how that definition applies to single-sex athletic teams.

Proposed Change: Definition of Sexual Harassment (§ 106.2)

- “Sex-based harassment,” not “sexual harassment”
- Quid Pro Quo
- Hostile Environment
- Specific Offenses
 - ☒ Sexual Assault
 - ☒ Dating Violence
 - ☒ Domestic Violence
 - ☒ Stalking

NOTE: Most terms defined in the proposed rule – no cross reference to other federal laws (except for cross reference for “domestic violence” to state law).

Proposed Change: Quid Pro Quo (§ 106.2)

Defined as an employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient's education program or activity explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct.

Proposed Change: Hostile Environment (§ 106.2)

Defined as unwelcome sex-based conduct that is sufficiently severe *or* pervasive, that, based on the totality of the circumstances and evaluated **subjectively and objectively**, denies *or limits* a person's ability to participate in or benefit from the recipient's education program or activity (i.e., creates a hostile environment).

Proposed Hostile Environment Factors

(§ 106.2)

The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity

The type, frequency, and duration of the conduct

The parties' ages, roles within the recipient's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the alleged unwelcome conduct

The location of the conduct, the context in which the conduct occurred, and the control the recipient has over the respondent

"Other sex-based harassment in the recipient's education program or activity"

Proposed Change: Jurisdiction

(§ 106.2)

Includes but is not limited to conduct that occurs in a building owned or controlled by a student organization that is officially recognized by a postsecondary institution, and *conduct that is subject to the recipient's disciplinary authority.*

Proposed Change: Pregnancy (§§ 106.57 and 104.40)

- Prohibits discrimination on the basis of the student's "current, potential, or past pregnancy or related conditions." Recipients shall not adopt a policy or practice concerning a student's "current, potential, or past parental, family, or marital status which treats students differently on the basis of sex."
- Requires reasonable accommodations unless the recipient can demonstrate that making the modification would fundamentally alter the recipient's program or activity.
- When "any employee" is informed of a student's pregnancy or related conditions, the employee must promptly inform the student (or guardian) about how to notify the Title IX Coordinator. The Title IX Coordinator must promptly notify the student of their rights under the regulation, including the right to reasonable modifications of policies and practices.

Proposed Change: Dismissals

(§ 106.11)

- An institution *may* dismiss but is not required to.
- A recipient has an obligation to address a sex-based hostile environment under its education program or activity, even if sex-based harassment contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States.

Proposed Change: Title IX Team

(§ 106.44(k)(4))

- Title IX Coordinator, investigator, and decision-maker can be the same person.
- Must be a different appeal decision-maker.
- Must be a different informal resolution facilitator.

What the New Regulations Could Mean for K-12 Schools

One uniform grievance procedure for civil rights violations, rather than a separate procedure for sex discrimination and sexual harassment.

- This includes complaints regarding sex discrimination in athletics; pregnant and parenting students; different treatment based on sex; retaliation; and LGBTQI+.

More conduct potentially covered under Title IX due to expansion of definition of “sex discrimination,” including “hostile environment”

What the New Regulations Could Mean for K-12 Schools

Covers off-campus conduct if the school has “disciplinary authority.”

- See authority under Connecticut bullying law and board of education’s Student Discipline policy.

One person can serve almost all roles in the grievance process. No longer need multiple employees to be involved in every Title IX matter.

Policy Implications

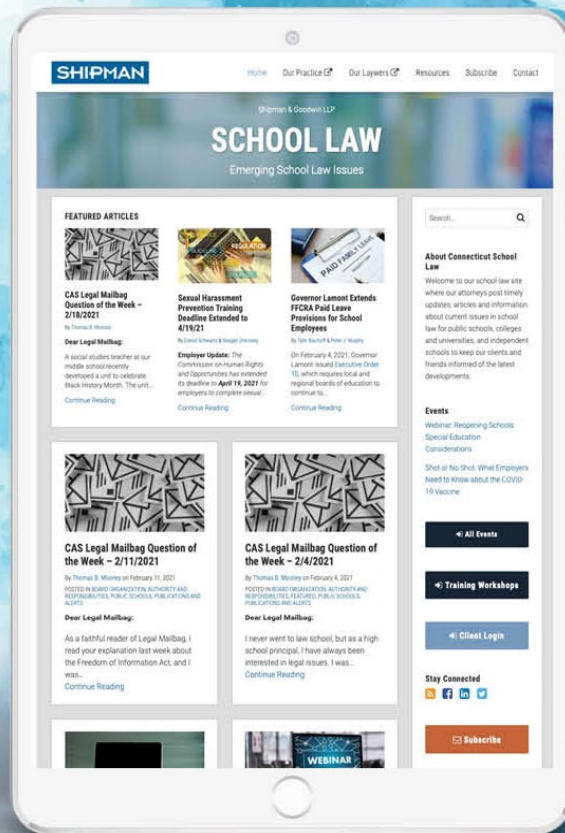
- Boards of education should have **revised their Title IX/sex discrimination/sexual harassment policies and regulations** for students and employees after the 2020 federal regulations became effective.
 - Detailed grievance process for handling claims of Title IX sexual harassment.
- When the new regulations become final, boards of education will need to **update their policies to reflect the new definitions and update their regulations to reflect the changes to the grievance process** to encompass all sex discrimination, not just sexual harassment.

Mandatory Training Requirements

- Currently, the regulations require training for the Title IX team on the grievance process for sexual harassment only.
- Proposed regulations expand the training requirement to all types of sex-based discrimination, not just sexual harassment. The following trainings will be required:
 - Title IX team on the grievance procedures
 - All employees on identifying and reporting sex-based discrimination
 - Specific training for Informal Resolution Facilitators
 - Specific training for Title IX Coordinators and designees
 - Confidential employees
 - New designation for employees with a duty of privilege under federal or state law

Important Take-Away!

Schools must follow the current regulations (became effective August 2020) until the proposed regulations become effective.



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