

Title IX Team Training

2024-25 School Year



- The Status of TIX
- The Definition of Sex Discrimination
- The Grievance Process Step by Step
- Title IX Coordinator To Do List

Agenda

First, The Boring Legal Stuff...

- KSB School Law represents only public schools and related entities (like Educational Coops)
- We DO NOT represent school employees (including teachers), students, parents, or individual board members
- This presentation and these slides DO NOT constitute legal advice.
- Neither this presentation nor these slides should be construed to create an attorney-client relationship between you and KSB School Law or between you and us
- You should have no expectation of confidentiality or that anything that we discuss today is privileged

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The Status of TIX



"Let me see if I'm misunderstanding this correctly..."

Arkansas, et al. v. USDOE

- Case in the E.D. Missouri
- Included Arkansas, Missouri, Iowa, Nebraska, and **South Dakota**
- Preliminary injunction issued on July 24, 2024
- “United States Department of Education . . . [is] enjoined from implementing, enacting, enforcing, or taking any action in any manner to enforce the Final Rule promulgated by the Department of Education”

Arkansas, et al. v. USDOE

- Judge said USDOE exceeded its statutory authority and/or acted contrary to law in redefining “on the basis of sex” for purposes of Title IX
- More importantly, Court said “nothing in this order limits the ability of any school to adopt or follow its own policies, or otherwise comply with applicable state or local laws or rules regarding the subjects addressed herein. Rather, it simply prohibits defendants from demanding compliance with the Final Rule by the schools affected by this order, or imposing any consequences for such schools’ failure to comply with the Final Rule.”

So What Does This Mean?

- You have options!
- Schools can adopt practices and policies that are best for students so long as the policies are consistent with schools' obligations to respond to allegations of sex harassment in a way that is not deliberately indifferent
- Option 1: Adopt something like the KSB Title IX policy/forms/flowchart
 - Take the procedures from 2024 without applying 2024's definitions
- Option 2: Continue using the 2020 regulations and grievance procedure and related Title IX policy

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- **The Definition of Sex Discrimination**
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The Definition of Sex Discrimination

- In General
- Sex Harassment



What's New: Expanded scope of grievance process and definitions

- 2020 regs only required the grievance process for “sexual harassment”
- 2024 regs require the grievance process for any allegation of “sex discrimination”
 - Athletic opportunities
 - Unequal treatment (all girls in FCCLA; boys’ game always later in the evening)
 - Employment, hiring, and firing
 - “Sex-based harassment”

TITLE IX: 2020 Regs

Prohibits discrimination “on the basis of sex”

Sex Discrimination (Gen.)

Sports

Employment

Transgender
Access/Participation

Class
Assignments

Sex Based Misconduct

Sex Based
Misconduct NOT
Covered by New
Regs

Quid Pro
Quo

“Sexual
Harassment”

S, P, and
OO

Sex Assault/
Other Crimes

TITLE IX: 2024 Regs

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Gender/SO
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“Sex-Based Harassment”

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Sex Assault/
Other Crimes

“Hostile Environment”
1. Sub. and Obj. Offensive
2. Severe or Pervasive

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Sex Assault/
Other Crimes

“Hostile Environment”
1. Sub. and Obj. Offensive
2. Severe or Pervasive

Definition of Sex Discrimination

- In General
 - Sports
 - Educational Programs (classes, magnet schools, opportunities)
 - Employment
 - Pregnancy
 - Gender Identity and Sexual Orientation
- Sex Harassment
 - Quid Pro Quo
 - Sex-based crimes
 - Hostile Environment

What's New: "Sex-based harassment" instead of "sexual harassment"

- Covers *quid pro quo* harassment (same for 20/24)
- Covers specific criminal offenses (same for 20/24)
- Covers "hostile environment"
 - No longer limited to conduct that is "severe, pervasive, and objectively offensive"
 - New standard: "[T]he conduct in question must be (1) unwelcome, (2) sex-based, (3) subjectively and objectively offensive, as well as (4) so severe or pervasive (5) that it results in a limitation or denial of a person's ability to participate in or benefit from the recipient's education program or activity."

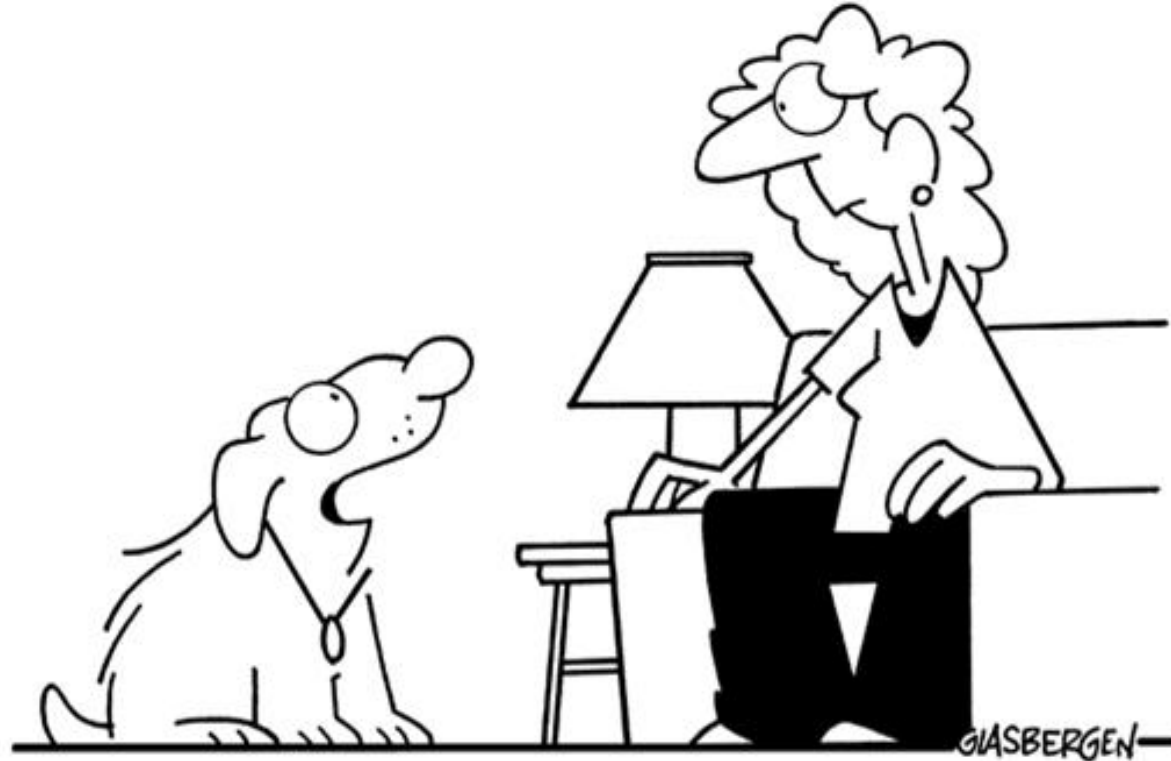
OCR vs. Court Standard

- Remember, at its core, Title IX is a **response** and nondiscrimination law
- No matter what happens with definitions in the regulations, the court standard remains (*Davis, Gebser*)
 - Liability may attach when a recipient's response is "deliberately indifferent" to known conduct "on the basis of sex" that is "severe, pervasive, and objectively offensive" such that it denies the individual access to education programs and activities
- OCR can require training, policy changes, and in theory take funding
- Courts can impose money damages and attorney fees

Why We Focus on the Courts More than on OCR

- *Doe v. Bd. of Trs. of the Neb. State Colls.*, 2022 U.S. Dist. LEXIS 76692 (D. Neb. Apr. 27, 2022)
 - College student awarded \$300,000 by a jury in her Title IX claim
 - Attorney received an award of attorney fees in the amount of \$246,000
 - Judgment reversed on appeal--not deliberately indifference
- *Asfall v. L.A. Unified Sch. Dist.*, 2020 U.S. Dist. LEXIS 214414 (C.D. Cal. 2020)
 - Plaintiff awarded \$100,00 in damages after he was terminated from his coaching position for complaining about inequitable treatment of the girls' soccer program as compared to the boys' basketball program
 - Motion for attorney fees granted in the amount of \$523,063.20

What Qualifies as General Sex Discrimination?



“Instead of getting neutered, can you just give me a lecture on abstinence?”

General Sex Discrimination

- Being treated inequitably based on sex
- Does not have to be intentional on the entity's part
- Examples
 - ***Reach Academy v. Delaware Dep't of Ed.***, 8 F. Supp. 3d 574 (Del. 2014). State of Delaware enjoined from revoking the charter of an all-girls public charter school due to poor standardized test scores when it had renewed the charter of an all boys charter school with similarly poor scores
 - ***Chipman v. Grant County Sch. Dist.***, 30 F. Supp. 2d 975 (E.D. Ky. 1998) Female students were denied admission to National Honor Society after they became pregnant out of wedlock; court found that male students who engaged in premarital sex were not excluded from NHS

A Few Pending Sports Cases

- ***A.B. v. Hawaii***, 30 F.4th 828 (9th Cir. 2022)
Class action lawsuit based on complete lack of girls' locker rooms, exclusive access by boys' swim team to school facilities while girls' team had to practice in the ocean or on dry land, and school's practice of paying coaches of boys' teams more than girls' coaches
- ***Schroeder v. University of Oregon***, 6:23-cv-01806 (D. Ore.)
Lawsuit by female athletes alleging that university violated Title IX through its "vastly superior treatment" of football players in comparison to female student athletes, including by providing male athletes "much greater" NIL opportunities
- ***Fisk v. Board of Trustees***, 2023 U.S. Dist. LEXIS 182204 (S.D. Cal 2023)
Class action alleging that San Diego State University violated Title IX by provided financial aid to male athletes at a disproportionate rate; according to the plaintiffs, in the two academic years prior to the complaint, SDSU provided female athletes \$1.2 million less than their male counterparts in athletics financial aid

What Qualifies as Sex Harassment?



**“We need better speech-recognition software.
I told my employees to celebrate their diversity.
The computer thought I said ‘perversity’!”**

Sex Harassment Includes:

- Quid Pro Quo
- Sex-based crimes
- Hostile Environment

Sex Based Crimes

- Sexual Assault
 - an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation
- Includes
 - Rape and Statutory Rape
 - Sodomy
 - Sexual Assault with an Object
 - Fondling
 - The touching of the private body parts of another person for the purpose of sexual gratification without consent
 - Dating Violence
 - Domestic Violence
 - Stalking

Specific Offenses

Department Commentary

- Specific offenses of sexual assault, dating violence, domestic violence and stalking do not have to “satisfy the elements of severity or pervasiveness or subjective and objective offensiveness in order to constitute sex-based harassment”
 - Translation: a single incident can still trigger a school’s obligation to initiate the grievance process
- Department still declines to adopt a definition of consent, left to discretion of each school (this is important to have in your Title IX policy!)

What Qualifies as Hostile Environment Discrimination?



M.W. v. Shikellamy Sch. Dist.

2022 U.S. Dist. LEXIS
27319 (M.D. Pa. 2022)

- Kindergartener had his pants pulled down by a peer on the playground
- Mother claims to have told the principal about the incident in person at parent-teacher conferences; complaint was "brushed off"
- Months later, same student pulled down kindergartener's pants during gym class and performed a sexual act on him
- The class was unattended because the gym teacher was retrieving equipment from a closet
- Parents sued claiming deliberate indifference

M.W. v. Shikellamy Sch. Dist.

2022 U.S. Dist. LEXIS
27319 (M.D. Pa. 2022)

- The school moved for SJ, arguing that this wasn't sexual harassment and it wasn't severe, pervasive and objectively offensive
- Court:
 - Taken together, the two incidents are severe, pervasive and objectively offensive
 - Evidence of deliberate indifference in principal's failure to follow up or to tell teachers to closely supervise these students

Riboli v. Redmond Sch. Dist. 2J

2022 U.S. Dist. LEXIS
19182 (D. Or. 2022)

- Sixth grade student bullied about her weight by a peer
 - Called her a “hungry hungry hippo” in the lunch room
 - Said “I bet you're excited because lunch is your favorite period”
 - “why don't you have another donut, it looks like you eat them all the time”
 - Told student she would never get a boy she liked because she was fat
- Mother reported to student’s English teacher
 - Teacher replied that she had not witnessed any such behavior herself but would keep an eye on the situation
- Student engaged in acts of self harm
- Parents sued, alleging violations of Title IX

Riboli v. Redmond Sch. Dist. 2J

2022 U.S. Dist. LEXIS
19182 (D. Or. 2022)

- Court: granted school district's motion for summary judgement
 - It is not enough to show a student has been teased or called offensive names
 - “The Court is unconvinced that these remarks, all relating to Brooklyn's weight, were made on the basis of sex or gender. S.L.'s comments, though callous and hurtful, are not sexual in nature and could be directed at any child regardless of gender.”

J.B. v. Klein Indep. Sch. Dist.

2020 U.S. Dist. LEXIS
26737 (S.D. Tx. 2020)

- Student alleged continuing sex harassment beginning in elementary school
 - Called her ugly, short, fat, stupid
 - Told kids on the playground not to play with her
 - Escalated to physical assaults
 - Elementary teachers made halfhearted, ineffective efforts to address the situation

J.B. v. Klein Indep. Sch. Dist.

2020 U.S. Dist. LEXIS
26737 (S.D. Tx. 2020)

- Alleged sex harassment continued into middle school
 - Bully called her ugly fat freak, a weirdo, big boobs, no ass
 - Comments were always about victim's weight, looks, and body
 - Bully showed up at games where victim was participating on the cheer team to bully and harass
- Three counselors, three principals and cheer sponsors knew about the situation and took no action
- Victim eventually transferred
- Family sued under Title IX

J.B. v. Klein Indep. Sch. Dist.

2020 U.S. Dist. LEXIS
26737 (S.D. Tx. 2020)

- Court
 - Allegations in elementary school did not constitute sex harassment
 - Allegations in middle school did
 - The student “was taunted with vulgar, sexually suggestive comments, every single day from sixth grade until she withdrew from school halfway through eighth grade.”
 - The harassment was severe, pervasive and objectively offensive

Haley v. Desoto Par. Sch. Bd.

2021 U.S. Dist. LEXIS
14875 (W.D. La. 2021)

- During cheerleading practice, cheerleaders began to complain about their coach's "bullying and profanity."
- In response, coach taped the girls' mouths shut and required them to perform the routine while their mouths remained taped
- Cheerleaders report the taping incident to their parents and the coach retaliated
- When the plaintiff's parent met with the principal, parent was told she would be barred from school if she pursued the claims
- Parent sued alleging multiple claims, including Title IX

Haley v. Desoto Par. Sch. Bd.

2021 U.S. Dist. LEXIS
14875 (W.D. La. 2021)

- Court:
 - “Plaintiffs allege the Defendants committed gender discrimination against their children by subjecting the cheerleaders to different treatment from the male students.... Plaintiffs support their presumption that the children were mistreated based on their gender by throwing out the blanket accusation that the mouths of ... male students [were never taped] shut. The Court finds such conclusory statements do not amount to a plausible claim to relief.”
 - Found that there was no factual basis linking the disciplinary action to the cheerleader’s gender

New York v. Niagara-Wheatfield Cent. Sch. Dist.

2022 U.S. Dist. LEXIS
86468 (W.D.N.Y.
2022)

- C.C. in middle school dressed in stereotypically male clothing and referred to as a “tomboy”
 - Throughout middle school C.C. was bullied by fellow students and called “transgendered” and “gay”
 - C.C. confided in a school counselor
- In high school, C.C. dressed more feminine to try and curtail the harassment
- Harassment did not stop
- Students called C.C. “ugly” and “fat”
- One occasion C.C. was called a “slut” and told to kill herself

New York v. Niagara-Wheatfield Cent. Sch. Dist.

2022 U.S. Dist. LEXIS
86468 (W.D.N.Y.
2022)

- As a result of the bullying, C.C. began to miss school
- C.C. and her family made repeated complaints
- School took no action including not making a safety plan
- C.C. stopped attending high school and sought to transfer to a neighboring school
- District refused to allow the transfer
- C.C. dropped out of school and never graduated

New York v. Niagara-Wheatfield Cent. Sch. Dist.

2022 U.S. Dist. LEXIS
86468 (W.D.N.Y.
2022)

- Court:
 - At least a counselor and the superintendent were aware of the harassment but took no steps
 - Continuous bullying related to a student's sexuality can support a Title IX claim
 - C.C. has sufficiently established a Title IX claim

S.C. v. Nashville

579 F. Supp. 3d 999
(M.D. Tenn. 2022)

- Fifteen-year-old student filmed without consent during a sexual activity, which she characterizes as rape. The video spread rapidly among students and online
- Principal was informed of video, began her investigation
 - Did not inform Title IX Coordinator
 - Did inform Superintendent (because a board member was involved)

S.C. v. Nashville

579 F. Supp. 3d 999
(M.D. Tenn. 2022)

- Principal involved SRO
 - Principal is heard whispering to the SRO, “Please, I cannot have this be a rape, OK? It's not a rape”
 - SRO repeatedly warned the student that if she pressed the matter, everyone involved could be charged with the creation and distribution of child pornography

S.C. v. Nashville

579 F. Supp. 3d 999
(M.D. Tenn. 2022)

- Principal suspended all the kids involved (including S.C.) for 3 days
- Student never returned to in-person instruction; elected homebound after the suspension expired
 - Student suffered a great deal of digital harassment on social media and via texts
- Family sued under Title IX

S.C. v. Nashville

579 F. Supp. 3d 999
(M.D. Tenn. 2022)

- School's defenses:
 - No “actual knowledge” because Title IX Coordinator not informed
 - No opportunity for her to be exposed to the significant harassment on campus
 - Student was quickly removed from the school
 - Student reported that her social media was deleted shortly after the event

S.C. v. Nashville

579 F. Supp. 3d 999
(M.D. Tenn. 2022)

- Court: School District was deliberately indifferent
 - Staff/Principal's knowledge was enough
 - School district did little or nothing about the post-incident harassment
 - Title IX training not all staff and not annual
- Awarded
 - \$75,000 in damages
 - Remanded remaining claims back to district court

S.C. v. Nashville

579 F. Supp. 3d 999
(M.D. Tenn. 2022)

- Ultimate settlement amount:
\$902,378.63
 - School press release said “most” of that sum was to cover attorney fees
- District settled claims with other female students who had experienced distribution of sexual videos, paying a total of \$5 million according to news reports

OK, so what does all this tell us?

- Any time you hear anything related to “sex” or “gender” you should put your Title IX Coordinator hat on and think through these definitions
- When you’re evaluating a report/complaint, you need to consider the totality of the circumstances
- Regardless of whether you use the “SPOO” or the “SORP” standard, you need to address any allegations about conduct that interferes with a student’s access to education
- When you’re unsure, contact your district’s legal counsel

- The Status of TIX
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- **The Grievance Process Step by Step**
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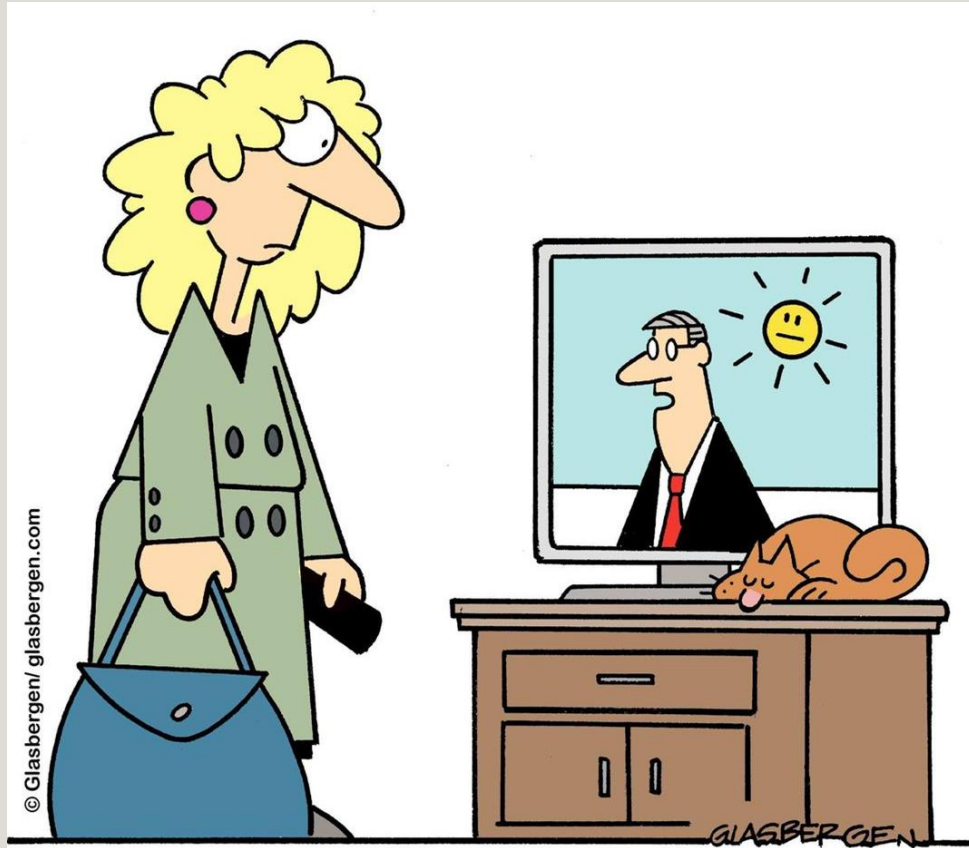
The Title IX Grievance Process

- Phase 1: Triage
- Phase 2: Investigate
- Phase 3: Decide

The Title IX Grievance Process

- Phase 1: Triage
- Phase 2: Investigate
- Phase 3: Decide

Step 1: Triage



“For those of you headed to the office, today’s forecast calls for scattered frustration, followed by a brief storm of criticism and a flurry of random distractions.”

Complaints versus Reports: The Who

- If the report is an allegation of sex harassment, “complaints” can only be filed by:
 - Victim of alleged harassment
 - The parent, guardian, or other authorized legal representative with the legal right to act on behalf of a victim
- If the Complaint is an allegation of sex discrimination, “complaint” can be made by
 - Any student or employee; or
 - Any person other than a student or employee who was participating or attempting to participate in the recipient’s education program or activity at the time of the alleged sex discrimination.

Complaints versus Reports: The What

- “Complaint means an oral or written request to the recipient that objectively can be understood as a request for the recipient to investigate and make a determination about alleged discrimination under Title IX or this part.”
- This gets back into the definition of “sex harassment”

Complaints versus Reports: The How

- “Complaint means an oral or written request to the recipient that objectively can be understood as a request for the recipient to investigate and make a determination about alleged discrimination under Title IX or this part.”
- If you receive an oral complaint:
 - Urge the person to complete a written form
 - If they refuse, create a written record of on oral complaint

Complaints versus Reports: The What

- “Complaint means an oral or written request to the recipient that objectively can be understood as a request for the recipient to investigate and make a determination about alleged discrimination under Title IX or this part.”
- The report must be seeking some “investigation” and “determination”
- What about:
 - I don’t want to make a big deal about it...
 - We just want it to stop...
 - You didn’t hear this from me, but...

If it is Just a “Report,” Should the Title IX Coordinator File a Complaint?



If it is Just a “Report,” Should the Title IX Coordinator File a Complaint?

- (Required) Factors to Consider:
 - Complainant’s request not to proceed with initiation of a complaint
 - Complainant’s reasonable safety concerns regarding initiation of a complaint
 - Risk of additional acts of sex discrimination if a complaint is not initiated
 - Severity of the alleged sex discrimination
 - Age and relationship of the parties (e.g., whether the respondent is an employee of the recipient)
 - Scope of the alleged sex discrimination (e.g., pattern, ongoing, or impacting multiple individuals)
 - Availability of evidence to assist in determining whether sex discrimination occurred
 - Recipient’s ability to end the alleged sex discrimination and prevent its recurrence without initiating grievance procedures
 - Does the conduct as alleged present an imminent and serious threat to the health or safety of the complainant or others?
 - Does the conduct as alleged prevent the recipient from ensuring equal access on the basis of sex to its education program or activity?

Other Considerations at the “Triage” Stage

- Emergency Removal (permissive)
- Informal Resolution (permissive)
- Supportive Measures (mandatory)
- Consultation with Special Education/504 Staff (mandatory, if applicable)

Emergency Removal

- 2020 regulations only permitted ER for threats of “physical” health and safety
- 2024 regulations remove the “physical” limitation
 - New regs say school can consider removal of the Respondent if he/she poses an “imminent and serious threat to the health or safety of the school community”
 - Will be able to consider threats to mental health
- Retains the requirement that a school must provide the Respondent with notice and an opportunity to challenge a removal decision immediately

Emergency Removal

- District MUST
 - undertake an individualized safety and risk analysis,
 - determine that an immediate threat to the physical or mental health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and
 - provide the respondent with notice and an opportunity to challenge the decision immediately following the removal.
- Doesn't modify rights under IDEA, Section 504, or the ADA
 - i.e. manifestation determination, etc

Emergency Removal

- Administrative Leave for Non-Student Employees
- Doesn't modify rights under Section 504 or the ADA
- Check state law and negotiated agreement for provisions on paid administrative leave

Informal Resolution

- 2020 regulations did permit informal resolution but only when a formal complaint of sexual harassment was filed, and prior to a written decision
- 2024 regulations ability to offer is expanded
 - Schools can offer informal resolution once it has knowledge of conduct that could reasonably constitute sex discrimination can offer this resolution
- Not allowed under either set of regs when the complaint includes allegations that an employee engaged in sex-based harassment of a student or informal resolution would be contrary to law.

Never Mandatory

- Never mandatory for the recipient
 - Informal resolution may be facilitated
- Never mandatory for the parties
 - Participation voluntary, shown by written consent
 - May withdraw at any time prior to resolution
- Never incentivized
 - Cannot force parties to waive right to formal process and participate in informal resolution by conditioning any right or benefit upon that waiver

Informal Resolution Process

- Must be facilitated by individual free from bias or conflict of interest, trained on how to serve impartially
- Not required to involve the parties confronting each other or even being present in the same room
 - Mediations or other processes may be accomplished by shuttle diplomacy

Informal Resolution ≠ Supportive Measures

- Informal resolution may result in discipline or other burden on respondent
 - Supportive measures must be non-disciplinary and non-punitive
- Informal resolution can call for provision of service or measures that would otherwise constitute supportive measures
 - Counseling, no contact orders, etc.
- Informal resolution may finally resolve allegations
 - Supportive measures cannot preclude formal complaint initiating grievance procedures and final resolution

Supportive Measures

- The courts have considered “supportive measures” as a component of a non-deliberately indifferent response for years
- In 2020 US DOE added “supportive measures” to the regulations
- The 2024 regulations
 - Continue a focus on “supportive measures”
 - Signaled that OCR will be more lenient if impact on complainant and respondent is not exactly the same (e.g. if the respondent has to change class schedules but the complainant doesn’t have to change class schedules)

Foster v. Bd. of Regents of the Univ. of Mich.

982 F. 3d 960 (6th Cir 2020) *en banc*

- Graduate student sexually harassed by a male friend who had unrequited romantic feelings for her
 - Unwanted touching
 - Stalking
 - Numerous text messages
- Reported to the University
- Response:
 - Issued no contact order
 - Arranged for separate schedules
 - Prohibited the male friend from attending graduation

Foster v. Bd. of Regents of the Univ. of Mich.

982 F. 3d 960 (6th Cir 2020) *en banc*

- Student sued the University under Title IX
- Court: “At each stage, the University ratcheted up protections for her.... That does not constitute deliberate indifference as a matter of law...”

Supportive Measures

- Supportive measures are individualized services to restore or preserve equal access to education in connection with an allegation of a Title IX violation
 - Must be free and nondisciplinary
- Must be offered even if a complainant does not wish to initiate or participate in a grievance process.
- Must be unique to individuals and facts
- Must offer to all parties (both complainants and respondents)
- Document the request for, offer of, and implementation of supportive measures

Students with Disabilities

- 2024 regulations require Title IX Coordinator to consult with one or more members of the student's IEP or Section 504 team to determine compliance with those laws while implementing supportive measures
- 2020 regulations still required supportive measures to be determined/approved by IEP team if it changed a student's educational placement
- Under either set of regulations, the process for offering supportive measures needs to consider IDEA and 504

Disproportionate Impact on Students with Disabilities

- 22 percent of students with disabilities reported some form of abuse over the last year
- Nearly 62 percent had experienced some form of physical or sexual abuse before the age of 17
- Only 27 percent reported the incident
- Individuals with intellectual disabilities are sexually assaulted and raped at more than 7 times the rate of individuals without disabilities

Two Sides of the Coin

- Students with disabilities may exhibit sexually aggressive or inappropriate behaviors
 - Number of Title IX and other cases related to sexual violence in which both aggressor and victim is student with a disability
- Consider school's obligation to address such behaviors
- Consider school's limitations in addressing such behaviors
- FAPE obligations entirely unaffected by Title IX (no matter what regulations are being enforced)

Roe v. Lincoln-Sudbury Reg'l Sch. Dist.

2021 U.S. Dist. LEXIS
57206 (D. Mass. 2021)

- Special education student alleged she was sexually assaulted by two male special education students during a football game
 - The boys dispute the account, and one of the boys also sued the school alleging violations of Title IX
- Student reported, school officials involved the police and recommended Jane seek medical attention
 - The police advised the school to delay its own investigation until the criminal investigation was completed
 - Eventually the school investigated, found the boys responsible, and suspended the boys

Roe v. Lincoln-Sudbury Reg'l Sch. Dist.

2021 U.S. Dist. LEXIS 57206 (D. Mass. 2021)

- Student faced challenges returning to school, interacting with the boys involved despite supportive measures
- Student's IEP team recommended a 45-day extended evaluation at an in-patient facility

Roe v. Lincoln-Sudbury Reg'l Sch. Dist.

2021 U.S. Dist. LEXIS
57206 (D. Mass. 2021)

- Family filed OCR Complaint, which noted procedural shortcomings in the Title IX investigation process
- Family then filed suit against school district alleging deliberate indifference and failure to train

Roe v. Lincoln-Sudbury Reg'l Sch. Dist.

2021 U.S. Dist. LEXIS
57206 (D. Mass. 2021)

- Court:
 - Even though the investigation didn't comply with every technical detail of the regulations, school was not deliberately indifferent
 - IEP team took action designed to continue access, even if supportive measures were not exactly what the family wanted
 - Failure to train claim fails because
 - Title IX training was an annual mandated trainings for all teaching staff.
 - Title IX Coordinator updated a presentation on the topic each year and the teachers had to attest that they reviewed it.

Respondents with Disabilities

- Consider compliance with IDEA at all stages, including emergency removals, supportive measures, discipline
- Respondent must be provided FAPE irrespective of supportive measures
- Manifestation required prior to disciplinary removals of ten days or more
- Contemplate respondent's need for new placement/services
- Consider early whether discipline or a change in placement is more appropriate to address misconduct

Quick Refresher: Manifestation Determination

- School personnel under this section may remove a child with a disability who violates a code of student conduct from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 consecutive school days (to the extent those alternatives are applied to children without disabilities), and for additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct (as long as those removals do not constitute a change of placement under § 300.536).

§300.530(b)(1)

Quick Refresher: Manifestation Determination

- For purposes of removals of a child with a disability from the child's current educational placement under §§ 300.530 through 300.535, a change of placement occurs if—
 - (1) The removal is for more than 10 consecutive school days; or
 - (2) The child has been subjected to a series of removals that constitute a pattern—
 - (i) Because the series of removals total more than 10 school days in a school year;
 - (ii) Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and
 - (iii) Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.

§300.536

Does ISS count?

- Possibly, probably, most likely, and other things lawyers say
- ISS does not necessarily count if the student is provided an opportunity to:
 - “[A]ppropriately participate in the general curriculum”
 - “[C]ontinue to receive the services specified on the child's IEP”
 - “[C]ontinue to participate with nondisabled children to the extent they would have in their current placement”
 - Dear Colleague Letter, 68 IDELR 76 (OSERS/OSEP 2016)
- If student is regularly in gen ed setting or other setting specified in IEP, how is “the ISS room” NOT a CIP...?

What about partial days?

- “[P]ortions of a school day that a child has been suspended may be considered a removal in determining whether there is a pattern of removals.” 71 Fed. Reg. 46,715 (2006).
 - No federal guidance on how to calculate
- Look to state attendance requirements and school policies for how days are counted
- Watch out for repeated partial day removals--signals team may need to explore additional supports
- If the partial day removal is linked to a code of conduct violation--count towards MDR

What about bus suspensions?

- A bus suspension qualifies as a change in placement if:
 - Student receives transportation services under IEP
 - Suspension from bus is a disciplinary measure
 - No other form of transportation is provided during the bus suspension
- If the bus suspension lasts longer than 10 days or is part of a pattern of removals, then MDR

Quick Refresher: Manifestation Determination

- Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine—
 - (i) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
 - (ii) If the conduct in question was the direct result of the LEA's failure to implement the IEP.

Quick Refresher: Manifestation Determination – The Who?

- The MDR must be conducted by “the LEA, the parent, and relevant members of the child’s IEP Team (as determined by the parent and the LEA).” 34 CFR § 300.530(e)(1).
- Campus disciplinarian can participate on the team
 - Danny K. v. Dep’t of Educ., State of Hawaii, 57 IDELR 185 (D. Hawaii 2011)
- Parents can invite participants but do not have the right to veto a school’s choice of team members
 - Fitzgerald v. Fairfax County Sch. Bd., 50 IDELR 165 (E.D. Va. 2008)

Quick Refresher: Manifestation Determination – The When?

- “[W]ithin 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct.” 34 CFR § 300.530(e)(1).
- Before the disciplinary change of placement occurs

Quick Refresher: Manifestation Determination – The What?

- The team must “review all relevant information in the student’s file, including the child’s IEP, [and] teacher observations”
- “...and any relevant information provided by the parents. ...”
 - 34 CFR § 300.530(e)(1)
- What questions to ask?
 - Was this misbehavior caused by the student's disability?
 - Was the conduct in question caused by or did it have a direct and substantial relationship to the child's disability?
 - Was the misconduct a direct result of the district's failure to implement the IEP?

Quick Refresher: Manifestation Determination

- If misconduct was not a manifestation of the student's disability:
- Must follow applicable state laws regarding student discipline
- Develop Interim Alternative Educational Setting
 - Determined by IEP team
 - Can be as same meeting as manifestation
 - Must continue to implement student's IEP

Quick Refresher: Manifestation Determination

- If misconduct IS a manifestation of the student's disability, IEP team MUST:
 - Conduct a functional behavioral assessment (provided the district had not conducted such assessment prior to the conduct at issue) and implement a BIP
 - When a behavioral intervention plan already has been developed, review the plan and modify it as necessary
 - Return the child to the placement from which he was removed, unless the parent and district agree to a change in placement as part of the modification of the behavioral intervention plan

The Title IX Grievance Process

- Phase 1: Triage
- Phase 2: Investigate
- Phase 3: Decide

The Title IX Grievance Process

- Phase 1: Triage
- **Phase 2: Investigate**
- Phase 3: Decide

A Quicker Process

- Single investigator model returns!
 - Investigator and decisionmaker probably must be the same person in most cases, because decisionmaker now makes credibility determinations
 - This separation was dumb under the 2020 rule, and the 2024 version is much better
 - Principal could be TIXC, investigator, and decisionmaker

Notice to Parties

- Who is investigating
- Names of Parties
- Basics of Allegations

Interviews

- Parties
 - No elaborate notice
 - No “advisor of choice” (but.....)
- Witnesses
 - You will have to disclose these notes, so consider using a template

Gathering and Assessing Physical Evidence

- Remember, the burden of gathering evidence rests on the institution, not on the parties
- Majority of “physical” evidence is probably digital, so think through how to document how you obtained it (good to use a form to document)
- You will need to share the evidence you gather with the parties

Sharing Evidence Gathered

- 2020 regs required investigative report, 2024 regs do not
- 2024 regs require a “reasonable opportunity” to respond to a summary of the evidence, or to the actual evidence if requested
 - Commentary: what’s “reasonable” is case by case
 - In practice, a summary may be a waste of time since the parties can ask for the actual evidence

What's Out: Wait Period and Written Questions

- No more 10-day wait periods for parties to submit a response after evidence is disclosed and between investigative report and written decisions
- No more written exchange of questions (for K-12)

Opportunity to Respond

- Baseline: *Goss v. Lopez*
 - In the discipline context, respondent must at least have notice of allegations/evidence and an opportunity to respond
- By implication, interviews of parties are separate from the opportunity to respond to the evidence
- Once evidence is disclosed and prior to written determination, consider how you will solicit responses from the parties
 - No requirement for a second interview/discussion
 - E.g.: “Provide a response within X days” in transmittal letter/email?
 - Use “reasonable” methods and timelines

Relevance

- Undefined in 2020 regs
- Defined in 2024 regs in a way that's useful regardless of injunctions
- “Relevant means related to the allegations of sex discrimination under investigation as part of the grievance procedures under § 106.45....
Questions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred, and evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred”

Relevance

- “Relevant” v. “Related to”
 - Related-to evidence relates to the allegations whether or not relevant
 - Some “related to” evidence is deemed legally irrelevant based on public policy decisions
 - Medical records
 - Sexual history
 - Check with your lawyer if this comes up – these issues are legally tricky
- Relevant evidence is all evidence that is related to the incident in question **that also goes to prove or disprove the allegations being made**
- If you decide that certain evidence is not relevant, you should make a note of that in your determination

The Title IX Grievance Process

- Phase 1: Triage
- **Phase 2: Investigate**
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The Title IX Grievance Process

- Phase 1: Triage
- Phase 2: Investigate
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The Written Decision

- Include a clear narrative of the facts
- Make it short, clear and easy to read by a non-educator
- The determination must include:
 - A statement of the standard (preponderance of the evidence)
 - Notice of the decisionmaker's rationale
 - Include credibility determinations
 - Any remedies provided to the complainant
 - Information on the appeal process

Opportunity to Appeal

- Both parties have opportunity to appeal both a decision and a dismissal of a complaint
- Check your district's policy for timeline
 - Appeals of Title IX must match appeals for similar types of complaints
 - This is an issue whether or not the 2024 regs are enjoined...
- Decisionmaker for the appeal must not have taken part in the investigation and/or decision to dismiss the complaint
- The appeal decisionmaker will notify the parties of the result of the appeal and the rationale for the result

Basis for Appeals

- Three mandatory grounds*:
 - Procedural issue
 - New evidence
 - Bias/conflict of interest
- Recipient can add grounds, but must apply them equally to both parties
 - Can you be more limited in Title IX than Title VI (race) or Section 504?
- Both parties can also appeal a recipient's determination that the allegations were subject to mandatory dismissal

Imposition of Consequences

- Discipline cannot be imposed until after appeal period has run
- NOW you must start the process under your state's student discipline law if the consequences require you to follow state and/or school discipline laws
- Don't forget all the non-exclusionary discipline options and the fact supportive measures may be "it"

- The Definition of Sex Discrimination
- **The Grievance Process Step by Step**
- Title IX Coordinator To Do List

Agenda

- The Definition of Sex Discrimination
- The Grievance Process Step by Step
- **Title IX Coordinator To Do List**

Agenda

§ 106.8(d) Training

- (d)(1) **All employees** must be trained on
 - (i) The recipient's obligation to address sex discrimination in its education program or activity;
 - (ii) The scope of conduct that constitutes sex discrimination under Title IX and this part, including the definition of sex-based harassment; and
 - (iii) All applicable notification and information requirements under §§ 106.40(b)(2) [*giving pregnant students the Title IX Coordinator's contact information*] and 106.44 [*notifying the Title IX Coordinator about reported sex discrimination/harassment*].

§ 106.8(d) Training

- (d)(2) **Investigators, decisionmakers, and other persons** who are responsible for implementing the recipient's grievance procedures or have the authority to modify or terminate supportive measures.
- In addition to (d)(1) requirements must be trained on:
 - (i) The recipient's obligations under § 106.44;
 - (ii) The recipient's grievance procedures under § 106.45, ~~and if applicable § 106.46~~;
 - (iii) How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias; and
 - (iv) The meaning and application of the term "relevant" in relation to questions and evidence, and the types of evidence that are impermissible regardless of relevance under § 106.45, and if applicable § 106.46.

§ 106.8(d) Training

- (d)(3) **Facilitators of informal resolution process.** In addition to the training requirements in paragraph (d)(1) of this section, all facilitators of an informal resolution process under § 106.44(k) must be trained on the rules and practices associated with the recipient's informal resolution process and on how to serve impartially, including by avoiding conflicts of interest and bias.

§ 106.8(d) Training

- (d)(4) **Title IX Coordinator and designees.** In addition to the training requirements in paragraphs (d)(1) through (3) of this section, the Title IX Coordinator and any designees under paragraph (a) of this section must be trained on their specific responsibilities under paragraph (a) of this section, §§ 106.40(b)(3), 106.44(f) and (g), the recipient's recordkeeping system and the requirements of paragraph (f) of this section, and any other training necessary to coordinate the recipient's compliance with Title IX.

Nondiscrimination Statements

- 2020 Regs required hard copies of the entire policy/process to:
 - Applicants for admission and employment
 - Students
 - Parents or legal guardians of elementary and secondary school students
 - Employees
 - All unions or professional organizations holding collective bargaining or professional agreements with the recipient
- 2024 Regs only require nondiscrimination statement and link
- Posting statement on website and in handbooks should be sufficient for all of these groups for 24-25
- Be sure to include identity and contact information for Title IX Coordinator

Recordkeeping: Keep Everything For Seven Years

- All Title IX reports that you don't investigate
- All Title IX complaints (both investigated and dismissed)
- All supportive measures requested, offered or discontinued
- All records related to any investigation (including appeals)
- Any informal resolution efforts and the result therefrom; and
- All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process

Requirement of Impartiality

- Regulations require any member of Title IX team to be free from:
 - conflicts of interests
 - biases against complainants or respondents generally
 - biases against an individual complainant or respondent
- Members of Title IX team must “serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias”
- Training materials cannot rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment

Requirement of Impartiality

- Grievance process must entail an objective evaluation of all relevant evidence
- Credibility determinations may not be based on a person's status as a complainant, respondent, or witness
- Both parties must have equal appeal rights, and parties may appeal on the grounds someone involved was biased or had a conflict of interest
- At each stage, each member of team must comply with these rules

Determining Conflicts and Bias

- Department specifically chose not to further define conflicts of interest or bias despite requests from commenters
 - Indicated that training on serving impartially would ensure that Title IX Team was not impermissibly biased or conflicted
- Generally, in the Title IX context...
 - A conflict of interest occurs when an individual's interests raise a serious question as to whether they can act objectively and without bias should they need to act against those interests
 - Bias is the inability to maintain objectivity, due to some inclination or prejudice towards or against an individual, characteristic, or circumstance
 - Prejudgment refers to passing judgment prematurely or without sufficient objective consideration
- Serving multiple roles does not create a conflict

Determining Bias

- Regulations require:
 - an “objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased...”
 - Schools to exercise “not to apply generalizations that might unreasonably conclude that bias exists”
 - Training for the team must “provide Title IX personnel with the tools needed to serve impartially and without bias”

Other Characteristics

- Biases or assumptions about athletes were prevalent in suits alleging bias in Title IX proceedings
- Social statuses, ability to communicate effectively, appearance all shown to affect credibility determinations and general reactions to an individual
- Biases towards an individual, including those founded on prior history or issues, cannot affect decision-making

Checklists and Forms

- Check with your attorney for checklists and forms
- KSB has a checklist and associated forms available

Questions?

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