



# Title IX – The New 2020 Regulations

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# U.S. Department of Education Title IX Regulations

- ▶ Adopted May 6, 2020
- ▶ 34 C.F.R. Part 106
- ▶ Regulations along with public comment – 2033 pages
- ▶ Explicit recognition for the first time in USDOE regulations that sexual harassment, including sexual assault, is sex discrimination

# Title IX – The Law

- ▶ No person in the United States
- ▶ On the basis of sex
- ▶ Shall 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
  - ▶ 20 U.S.C §1681

# Title IX Key Dates

- ▶ 1972 – Title IX enacted
- ▶ 1980 – ED OCR takes over Title IX enforcement
- ▶ 1992 – U.S. Supreme Court recognizes student right to seek money damages for sexual harassment – *Franklin v. Gwinnett County Schools*
- ▶ 1997 – OCR issues guidance on sexual harassment imposing obligation on educational entities to respond to complaints
- ▶ 1998 – U.S. Supreme Court sets standard for teacher-on-student harassment liability (“deliberate indifference” after “actual notice” of misconduct) – *Gebser v. Lago Vista Sch. Dist.*
- ▶ 1999 – U.S. Supreme Court adds to *Gebser* standard a definition of “sexual harassment” – *Davis v. Monroe Co. Bd. of Educ.*

# The Standards of Liability Under Supreme Court Decisions - *Gebser*

- ▶ School Board liability for damages under Title IX for *employee-on-student sexual harassment* if:
  1. A school district employee with *authority to correct* on behalf of the district
  2. Has *actual notice* of the employee's misconduct; and
  3. Is *deliberately indifferent* to the employee's misconduct

# The Standards of Liability Under Supreme Court Decisions - *Davis*

- ▶ School Board liability for damages under Title IX for *student-on-student sexual harassment* if:
  1. The *Gebser* standards of notice and deliberate indifference are satisfied
  2. The school has substantial control over (a) the context in which the harassment occurred and (b) the harasser; and
  3. The conduct is “*sexual harassment*,” which is conduct (a) “so severe, pervasive, and objectively offensive” (b) that it “effectively denies equal access to an institution’s resources or opportunities.” [Hostile Educational Environment standard]

# New Regulations – Forms of Sexual Harassment

- ▶ Employee *quid pro quo*
- ▶ Hostile educational environment (new definition)
- ▶ Violence Against Women's Act - four categories:
  - ▶ Sexual Assault - 20 U.S.C. 1092(f)(6)(A)(v)
  - ▶ Domestic Violence - 34 U.S.C. 12291(a)(8)
  - ▶ Dating Violence – 34 U.S.C. 12291 (a)(10)
  - ▶ Stalking – 34 U.S.C. 12291(a)(30)

# New Regulations – Definition of Sexual Harassment

- ▶ Unwelcome conduct
- ▶ Determined by a reasonable person (objective standard)
- ▶ To be so severe, pervasive, and objectively offensive that it effectively denies a person's equal access to the recipient's education program or activity
  - ▶ This definition of sexual harassment tracks the *Davis* case and its definition of sexual harassment



# New Regulations: What is Different About the Definition of Sexual Harassment

## Former OCR Guidance

- ▶ Unwelcome conduct
- ▶ Determined by a reasonable person
- ▶ To be severe, pervasive, or persistent, and to interfere with or limit a student's ability to participate in or benefit from school services, activities, or opportunities

## New Definition in Final Rule

- ▶ Unwelcome conduct
- ▶ Determined by a reasonable person
- ▶ To be so severe, pervasive, and objectively offensive that it effectively denies a person's equal access to the recipient's education program or activity

## *Quid Pro Quo*

- ▶ Defined as an employee of the educational entity (recipient of funding) conditioning an aid, service, or benefit of the recipient on an individual's participation in unwelcome sexual conduct
- ▶ In *quid pro quo* sexual harassment, severity and harm are presumed
- ▶ The new regulations change OCR guidance regarding who may commit *quid pro quo* sexual harassment – only an employee; not a volunteer or a student

# Meaning of “In a Program or Activity”

- ▶ Any location, event or circumstance over which the recipient exhibits substantial control over both the alleged harasser and the “context” in which the harassment occurred
- ▶ How will this be applied in the context of technology and off-campus conduct? What are the expectations regarding social media misconduct and/or cyberbullying?

# Reports of Sexual Harassment

- ▶ Who? Any person may report regardless of whether the person is the alleged victim
- ▶ How? Reports can be made by mail, telephone, email, other contact information listed for the Title IX Coordinator, or *by any means that results in the Title IX Coordinator receiving the report*
- ▶ When? Reports can be made at any time, including during non-business hours, by using the telephone number, email address, or mail to the office address listed for the Title IX Coordinator

# When is the Division Obligated to Respond to Sexual Harassment

- ▶ *Actual Knowledge* is the standard
- ▶ 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*

# What is “Actual Knowledge” and How has the Standard Changed

## OCR Guidance

- ▶ School has the responsibility to respond promptly if a school **knows or should have known** about the sexual harassment

## Regulation (Final Rule)

- ▶ School with **actual knowledge** of sexual harassment in a program or activity against a person in the United States must respond promptly and in a manner that is not deliberately indifferent

## Who Must Have “Actual Knowledge”

- ▶ Title IX Coordinator
- ▶ Any official of the recipient who has authority to institute corrective measures on behalf of the recipient
- ▶ Any employee of an elementary and secondary school

# What is “Deliberate Indifference” Under the New Regulations

## OCR Guidance

- ▶ School must take immediate action to eliminate the sexual harassment or sexual violence, prevent its recurrence, and address its effects

## New Definition in the Final Rule

- ▶ Failure to respond reasonably in light of known circumstances



# Legal Liability Concerns

JUDICIAL INTERPRETATIONS

## *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998)

- ▶ Establishes private right of action for money damages in employee-on-student harassment
- ▶ A recipient of federal funding may be liable in damages where the recipient's *deliberate indifference* to the misconduct results in discrimination on the basis of sex.
- ▶ “[A]n official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient’s behalf has *actual knowledge* of discrimination and fails adequately to respond.”

# *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999)

- ▶ Establishes private right of action for money damages in student-on-student harassment
  - ▶ Where the school acted with *deliberate indifference* to known acts of harassment in its programs or activities; and
  - ▶ Where the harassment was *so severe, pervasive and objectively offensive that it effectively barred the victim's access to an educational opportunity or benefit*
  - ▶ The misconduct that gives rise to liability is not the underlying harassment but the deliberate indifference the school demonstrated to the harassment
  - ▶ The harasser must be subject to the school's disciplinary authority: during school hours and on school grounds.
    - ▶ From a risk management perspective, may need to address misconduct that occurs off-campus
  - ▶ "Deliberate indifference": response is "clearly unreasonable in light of the known circumstances"

# Factors Affecting Sexual Harassment Definition

- ▶ “Severe, pervasive, and objectively offensive” misconduct is harder to establish the younger the children involved. *Gabrielle v. Park Forest-Chicago Heights, Illinois Sch. Dist.*, 163 F.3d 817 (7<sup>th</sup> Cir. 2003)
- ▶ In determining if a victim has been denied access to an educational opportunity or benefit, the ability of the student to receive an education, as reflected in the student’s grades, is a factor. *Hawkins v. Sarasota County Sch. Bd.*, 322 F.3d 1279 (11<sup>th</sup> Cir. 2003)

# Who is required to have “Actual Knowledge”

- ▶ Remember the *Gebser* standard: actual notice by an official who at a minimum has authority to address the alleged discrimination and institute corrective measures on the recipient's behalf.
- ▶ In cases of teacher/staff-on-student harassment, the *Gebser* standard will likely prevail – more limited number of folks
- ▶ In cases involving peer-to-peer harassment, actual knowledge by any number of employees may trigger the obligation to intervene and to avoid a claim of deliberate indifference.
- ▶ In the majority of Federal Circuits (including the 4<sup>th</sup>), the plaintiff has not been required to prove actual notice to an “appropriate person” as required under the *Gebser* standard

# Deliberate Indifference – Difficult to Prove

- ▶ *Davis* standard: A recipient is deliberately indifferent only “where its response to the harassment or lack thereof is *clearly unreasonable in light of the known circumstances*”
- ▶ Courts will focus on issues: (1) Did the school investigate properly? (2) If so, did the school implement measures to remediate the harassment? (3) If so, was the remediation effective?
- ▶ It is not necessary to conduct flawless investigations or perfect solutions. *Fitzgerald v. Barnstable Sch. Committee*, 504 F.3d 165 (1<sup>st</sup> Cir. 2007).

# Deliberate Indifference – Failure to Follow Policies or Regulations/Guidance

- ▶ The failure to follow DOE regulations does not typically establish deliberate indifference. See *Gebser*.
- ▶ The failure to follow Division policies does not, in itself, establish deliberate indifference. See *Sanchez v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156 (5<sup>th</sup> Cir. 2011)
- ▶ The failure to follow OCR “Dear Colleague Letters” or other OCR guidance documents does not, standing alone, constitute deliberate indifference.

# Procedural Requirements



## Two Steps Possible

**Complaint** = filed by victim (“complainant”) or initiated/signed by Title IX Coordinator

**Report** = (everything else)

Third-party or complainant provides responsible party (*any employee in K-12 setting*) actual knowledge suggesting harassment

What is “reasonable” depends on step in the process

**Response after receipt of actual knowledge/initial report**

*vs.*

**Response after formal complaint**

# Response to Report

- ▶ Prompt
- ▶ Reasonable
- ▶ *Treat complainant(s) and respondent(s) “equitably”*
  - ▶ *Supportive measures to both*
  - ▶ *Grievance process required before any punitive measures*
- ▶ Title IX Coordinator must promptly contact complainant
  - ▶ Discuss available supportive measures
  - ▶ Explain process for filing formal complaint
  - ▶ Offer supportive measures whether or not formal complaint is filed
- ▶ Impact on respondent
  - ▶ Cannot impose any punitive measures without grievance process
  - ▶ Supportive measures also available to respondent

## ... Supportive Measures ...

- ✓ Counseling
- ✓ Course modifications ... ?
  - ✓ Extension of deadlines
- ✓ Schedule changes ... ?
- ✓ Increased monitoring/supervision ...?
  - ✓ Mutual restrictions on contact between parties
- ✗ Transfer out of class
- ✗ Removal from activity
  - ✗ Complete vs. temporary

# “Emergency Removal”/Admin Leave

- ▶ Emergency Removal of Respondent
  - ▶ Based on individualized analysis of safety and risk
  - ▶ Supported by determination there is immediate threat to physical health or safety of *any* student or other individual arising from the allegations
  - ▶ Procedural due process *after* removal (notice, opportunity to challenge removal)
  - ▶ However, IDEA, 504, ADA rights remain intact
- ▶ Administrative Leave for Employee
  - ▶ Permissible during pendency of the grievance process following formal report
  - ▶ However, 504, ADA rights remain intact

# Response to Complaint (immediate)

- ▶ Written notice to known parties
  - ▶ Sufficient time to allow respondent to prepare response *before any initial interview*
- ▶ Include:
  - ▶ Notice of grievance process, including any informal resolution process\*\*
    - ▶ \*\* only available with formal complaint
  - ▶ Sufficient detail about allegations to allow respondent to prepare response: names of known parties, conduct alleged, date and location of alleged conduct
  - ▶ Statement that respondent is presumed not responsible until conclusion of grievance process
  - ▶ Notice that parties have right to attorney or non-attorney advisor *to inspect and review evidence*
  - ▶ Notice of any policy that prohibits knowingly making false statements/false evidence
- ▶ Must supplement notice if new allegations added/opened for investigation

# Response to Complaint (overall)

- ▶ *Treat complainant(s) and respondent(s) “equitably”*
  - ▶ Supportive measures for both
  - ▶ *only after* grievance process complete
    - ▶ “remedies” for complainant if founded ... can be punitive, disciplinary, burden to respondent
    - ▶ Sanctions/discipline for respondent
- ▶ *Presumption favors respondent*: presume respondent **not** responsible
- ▶ “Reasonably prompt time frames” – delay only with “good cause” and written notice
- ▶ Objective evaluation of all evidence: inculpatory **and** exculpatory
  - ▶ Credibility determinations cannot be based on witness status (as complainant, respondent, third-party)
- ▶ Avoid conflict of interest/bias for investigator/decision-makers
- ▶ Avoid requiring any party to waive a privilege

# Response to **Complaint** (dismissal)

- ▶ **Must** dismiss if:
  - ▶ Would not constitute sexual harassment, even if all allegations are true
  - ▶ Did not occur in our program/activity
  - ▶ Did not occur in the United States
- ▶ **May** dismiss if:
  - ▶ Complainant requests to withdraw complaint (in writing)
  - ▶ Respondent's enrollment or employment ends
  - ▶ Specific circumstances prevent us from gathering evidence sufficient to reach determination (passage of time, lack of cooperation by complainant)
- ▶ Even upon dismissal, the behavior may still be addressed under other policies
- ▶ Must provide notice of dismissal of a complaint (and reasons) to all parties



# Response to Complaint (investigation)

- ▶ Burden of gathering evidence and sufficient proof to support finding is **on us**
  - ▶ Cannot use treatment records without consent of the patient
- ▶ Provide equal opportunity for parties to present witnesses (including experts) and evidence
- ▶ Cannot restrict either party from discussing the allegations or gathering/presenting evidence
  - ▶ ...vs. “retaliation”...?
- ▶ All parties have same opportunity to have others (attorney or others) present
  - ▶ **Can** restrict the participation of the parties’ advisors \*\* *include in policy or notices or both*
- ▶ Notice to parties expected to participate in any meeting of date, time, participants, location, and purpose of all meetings, with sufficient time for the party to prepare

# Response to Complaint (access to evidence)

- ▶ During investigation: equal opportunity for all parties to inspect/review *any/all* evidence obtained that is directly related to allegations – so each party can meaningfully respond to evidence prior to conclusion of investigation
  - ▶ Inculpatory
  - ▶ Exculpatory
  - ▶ Evidence investigator does not intend to rely on/use
- ▶ During hearings: all evidence must be available to the parties for inspection, review, and use during hearings
- ▶ Prior to report: send to each party/advisory all such evidence
  - ▶ Parties have 10 days to submit written response
  - ▶ Written response must be considered prior to completing report

## Response to Complaint (report)

- ▶ Must fairly summarize relevant evidence
- ▶ At least 10 days prior to a hearing or other time of determination regarding responsibility, provide each party and advisor a copy for review and written response

# Response to Complaint (hearing)

- ▶ *Not required*
- ▶ In lieu of hearing, after receipt of the report (prior to the determination of responsibility):
  - ▶ each party can submit written questions the party wants asked of any witness/party
  - ▶ Investigator provides answers
  - ▶ Allow additional time for follow-up questions
- ▶ Provide explanation why any question is excluded as irrelevant
- ▶ Questions/evidence about a complainant's sexual predisposition or prior sexual behavior are not relevant unless (1) offered to prove someone other than respondent committed the conduct alleged or (2) concern prior sexual behavior with the respondent and are offered to prove consent

# Response to Complaint (decision)

- ▶ Decision maker cannot be *Title IX Coordinator or investigator*
  - ▶ (Superintendent)
- ▶ Must issue written determination of responsibility
  - ▶ Identify allegations potentially constituting harassment
  - ▶ Describe procedural steps taken
  - ▶ Make findings of fact and conclusions based on policy/code of conduct
  - ▶ State result and rationale for *each allegation*
    - ▶ Determination of responsibility
    - ▶ Discipline/sanctions on respondent
    - ▶ Remedies designed to restore or preserve equal access to our educational program/activity
- ▶ Explain procedures and possible bases for appeal

# Response to Complaint \*\* policy language

- ▶ Describe range of possible discipline (on respondent) and remedies (for complainant) upon “determination of responsibility”
- ▶ State standard of evidence to be used for all formal complaints: preponderance vs. “clear and convincing”
- ▶ Include procedures and basis for either party to appeal
- ▶ Describe possible range of “supportive measures” available to both

# Alternative Response to Complaint (Informal Resolution)

- ▶ Provide parties notice of specific rights (see regulation)
- ▶ *All parties* voluntarily consent in writing
- ▶ Alternatives to formal investigation: mediation
- ▶ Not available if respondent is employee

# Appeal after Dismissal or Determination

- ▶ Appeal
  - ▶ Available to either party
  - ▶ Grounds:
    - ▶ Procedural irregularity
    - ▶ New evidence not reasonably available earlier
    - ▶ Conflict of interest by Title IX Coordinator, investigator, decision maker
  - ▶ Option to allow other grounds
  - ▶ Presents question and written arguments of parties to a different decision maker
- ▶ Record retention: 7 years
  - ▶ Investigations, hearing transcripts, determinations
  - ▶ Training materials
    - ▶ \*\* also must be available on website



# Retaliation

- ▶ Still prohibited
  - ▶ Can include filing second complaints for code violations arising from the same core facts; filing complaint of false statement based solely on “losing” in the Title IX process
  - ▶ Exercise of First Amendment rights is *not* retaliation
- ▶ Complaints of retaliation *may* be addressed through Title IX grievance process ... or another process

# Additional Documentation

- ▶ In each case – report or complaint – document (either in final report/determination or elsewhere)
  - ▶ Basis for a conclusion or response was not deliberately indifferent
  - ▶ Taking measures designed to restore or preserve equal access to our programs/activities
  - ▶ Reasons why supportive measures were not provided to complainant

# Training

- ▶ Title IX Coordinator, investigator, decision-maker, facilitator of informal resolution process:
  - ▶ Definition of sexual harassment
  - ▶ How to conduct investigation, grievance process (hearings, appeals, informal resolution)
  - ▶ How to serve impartially – including avoidance of pre-judgment, bias, conflict of interest
  - ▶ Use of technology used in process
  - ▶ Relevance of questions/evidence
  - ▶ How to create report that fairly summarizes relevant evidence
- ▶ All other employees
  - ▶ Definition of sexual harassment (examples of red flags)
  - ▶ Obligation to report and liability risks
  - ▶ How/where to report concerns

# Additional Requirements

- ▶ Title IX Coordinator: name, office address, email address, phone number (in policy, on website)
- ▶ Nondiscrimination statement: “As required by Title IX, \_\_PS does not discriminate on the basis of sex in its education programs/activities. Nondiscrimination on the basis of sex extends to admission and employment. Inquiries about the application of Title IX to \_\_PS may be referred to the Title IX Coordinator or the United States Department of Education’s Assistant Secretary in the Office of Civil Rights.”
  - ▶ \*\* combine with other nondiscrimination statements
  - ▶ New requirements in state law

# Questions?

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