



Putting Title IX into Play

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Objectives of Training

**Standard for Legal
Liability for Harassment
under Title IX**

The Process

(anticipated changes)

Recognizing Red Flags

Standards of Liability

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

Judicial Standard of Liability: Employee-on-Student Harassment

- ▶ 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

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

Judicial Standard of Liability: Peer-on-Peer Harassment

- ▶ 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]

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

U.S. Department of Education Title IX Regulations

- ▶ Adopted May 6, 2020
- ▶ Explicit recognition for the first time in *regulations* that sexual harassment, including sexual assault, is sex discrimination
 - ▶ Case law has long recognized this interpretation, and enforced Title IX accordingly

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
 - ▶ **Degree to which conduct affected complainant's ability to access programs/activities**
 - ▶ **Type, frequency, duration**
 - ▶ **Parties' ages, roles within program/activity, previous interactions, other factors unique to parties**
 - ▶ **Location of conduct, context in which it occurred, control over respondent**
 - ▶ **Other sex-based harassment in programs/activities**

Regulations

Forms of Sexual Harassment

- ▶ *quid pro quo* (typically would be employee-on-student; not always)
- ▶ 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)

“Sex Discrimination” interpretation

- ▶ Sex stereotypes
- ▶ Sex characteristics
- ▶ Pregnancy and related conditions
- ▶ Sexual orientation
- ▶ Gender identity
 - ▶ “different treatment or separation on the basis of sex in a way that would cause more than de minimus harm, including by adopting a policy or engaging in a practice that prevents a person from participating in an educational program or activity consistent with their gender identity”
 - ▶ “de minimus harm” undefined
 - ▶ Judicial opinions indicate access to rest rooms, locker rooms, shower facilities may be implicated

Factors Affecting Sexual Harassment Definition

- ▶ 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 (11th Cir. 2003)

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 recipient investigate properly? (2) If so, did the recipient 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 (1st Cir. 2007).

Deliberate Indifference: Failure to Follow Policies, Regulations

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

Overall Concepts

- ▶ Every employee has an obligation to report suspected sexual misconduct/harassment
- ▶ Recipient has an obligation to respond in a way that is
 - ▶ Not deliberately indifferent
 - ▶ Is reasonable under the circumstances
- ▶ Student has private right of action for failure to respond appropriately
 - ▶ Can recover monetary damages if the harassment/misconduct was so severe, pervasive, and objectively offensive that it effectively denies a person's equal access to the recipient's education program or activity
 - ▶ May 2022 (*Cummings v. Premier Rehab Keller PLLC*): SCOTUS opinion may impact (reduce or eliminate) ability of plaintiff in TIX case to recover emotional distress damages

Title IX
Process
for "sex-
based"
harassment

TIXC Intake STEPS

34 C.F.R. 106.44

1. Recipient receives report/information
2. Would these facts violate Title IX?
Yes? Title IX process
No? Other process
3. Meet with complainant
 - supportive measures
 - formal process
4. Respondent: supportive measures, process
5. Emergency removal/administrative leave
6. Formal Process iff
 - Complainant or parent files
 - TIXC believes would violate TIX
7. Informal Resolution vs. Investigate Complaint
 - If investigating, detailed written notice to parties
 - if investigating, discipline for the *sexual* misconduct must wait until TIX process completed
8. Is external reporting mandated?
9. Other steps needed to ensure conduct does not continue or recur

... 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

Greater content in proposed regulations about process

- Types of measures, confidentiality, IEP team involvement
- Burden on respondent must be temporary
- Party affected by supportive measure decision can “appeal”

Complaint

Must Retain

- **Harassment**
 - unwelcome
 - Severe
 - Pervasive (AND)
 - Objectively offensive
 - Effective denial of access
- **Quid pro quo**
- **Sexual assault, dating violence, domestic violence, stalking**



regulatory definition of sexual harassment

34 C.F.R. 106.30(a)

Must Dismiss*

- Not sexual harassment even if true, but must clarify/confirm allegations first
- Did not occur in school program or activity
 - Obligation extends to "off-campus"
- Did not occur in US

* Send written notice to all parties of dismissal and reasons; can address conduct under other policies

Notice of right to appeal

34 C.F.R. 106.45(b)(3)

May Dismiss*

- Complainant requests withdrawal**
- Respondent's employment or enrollment ends **
- Circumstances prevent gathering sufficient evidence to reach determination (passage of time, lack of cooperation of complainant, etc)

Unable to identify respondent

** don't be too quick to dismiss for these circumstances

34 C.F.R. 106.45(b)(3)

Scope of recipient's "educational program or activity"

34 C.F.R. 106.44(a)

ANY LOCATION, EVENT, CIRCUMSTANCE OVER WHICH RECIPIENT EXHIBITS SUBSTANTIAL CONTROL OVER BOTH ALLEGED HARASSER(S) AND CONTEXT IN WHICH HARASSMENT OCCURRED

- *CAN INCLUDE OFF-CAMPUS, "NON-SCHOOL" CONDUCT* ◦
- INCLUDES BUILDINGS OWNED OR CONTROLLED BY OFFICIALLY RECOGNIZED STUDENT ORGANIZATION ◦

Who does what?

Title IX
Coordinator

Investigator
Informal
Resolution
Processor

Decision Maker

Appeal Decision
Maker

PROPOSED REGULATIONS

TIX Coordinator
Investigator
Decision Maker

Informal
Resolution
Processor

Appeal Decision
Maker

Impartiality: avoid bias or conflict of interest

34 C.F.R. 106.45(b)(iii)

BIAS

- Implicit
- Stereotyping
- History of taking a particular side
- Personal history/experiences
- Against complainants or respondents “generally”
- Against individuals involved

CONFLICT OF INTEREST

- Financial or reputational interest encourage protection of recipient
- Overreaching in role: stay in your lane

NOTICE OF COMPLAINT/ GRIEVANCE PROCESS

34 C.F.R. 106.45(b)(2)

1. Notice of grievance process (and any available informal resolution process)
2. Provide sufficient detail of allegations to allow respondent(s) to prepare response
 - names of known parties
 - conduct alleged
 - date/location
3. State respondent presumed “not responsible” and determination is at end
4. Notice of right to advisor
5. Notice of right to present, inspect and review evidence
6. Notice of any code of conduct regarding false statements; retaliation prohibitions
7. Explain (or refer to policies for) range of possible discipline/remedies; preponderance standard; process for appeal; available supportive measures
8. Confidentiality protections
 - supplement if “open” case as to new allegations
 - consolidate complaints arising from same facts

investigation

STEPS

34 C.F.R. 106.45(b)(5)

1. Written notice to parties before interviews
 - Sufficient notice/time to prepare
2. Equal access to parties to present evidence
3. Allow advisors and others to parties at all meetings
 - Cannot prevent discussion outside of process
4. Do not use health record evidence without consent
5. Make all evidence available upon request during process
 - redact names?
6. Send evidence to all parties at least 10 (calendar) days before finishing report
 - Including evidence not being relied upon
 - Describe relevant evidence + allow response
7. Factor comments submitted by parties into report
8. Written report, sent to all parties at least 10 (calendar) days before hearing
9. "reasonably prompt"
10. Maintain confidentiality

Investigation Best Practices

1. Read policies, etc (*this slide show!*) before you start each time, and PLAN (timeline!)
2. Explain why you are interviewing the individual in general terms
 - maintain confidentiality if possible
 - inform *respondent* presumed not responsible, no decision has been made
3. Question all with open-ended, who, what, when, where, how Qs
 - (1) Complainant(s); (2) witnesses; (3) respondent(s)
4. Inquire along a timeline, in chronological order
5. Ask "single issue," nonleading questions (and "anything else you'd like to add?")
6. Obtain other witness contacts and any documentary evidence available from each
 - written or recorded statements?
7. Explain retaliation prohibition
 - can no longer requires *parties* to "keep confidential," but can ask Ws to
8. Compare all statements and evidence
9. Gather and include evidence that weighs on: consistency, accuracy, memory, credibility (or lack thereof), implausibility, inconsistency, unreliability, ulterior motive, lack of cooperation

Written report

34 C.F.R. 106.45(b)(5)(vii)

- ▶ “Summarize” relevant evidence – **please be specific**
 - ▶ Omit truly insignificant, irrelevant* details
 - ▶ Include both inculpatory and exculpatory evidence
 - ▶ Provide enough factual information (if available) to allow decision maker to consider: consistency, accuracy, memory, credibility (or lack thereof), implausibility, inconsistency, unreliability, ulterior motive
- ▶ Note credibility evidence
 - ▶ Cannot base credibility determination on the speaker’s status (C, W, R)
- ▶ Append and refer to documentary evidence
- ▶ Indicate consideration of comments submitted by parties in response to evidence
- ▶ Do not make findings of responsibility, just recite evidence/facts

HEARING

34 C.F.R. 106.45(b)(6)

1. *Advisor* (not party) can ask party & witnesses relevant questions and follow-up
 - Directly, orally, in real time (can be “virtual”)
 - Challenges to credibility
2. Upon request of either, must separate parties (but provide technology for seeing and hearing the others)
3. Relevance: decision maker must determine (even without objection)
 - Complainant’s prior sexual conduct limited relevance
4. If party does not have advisor, recipient must provide advisor to conduct cross-examination (free of charge)
 - May but is not required to be attorney
5. If party or witness not subject to cross-examination in hearing, all evidence provided by that individual must be disregarded
 - But, no inference drawn from absence or refusal to submit to cross-examination
6. Audio/audio visual recording or transcript available to inspection/review

“rules of
evidence”

Presumption

Throughout process, respondent(s) must be presumed
“not responsible”

- do not pre-judge any fact or question ◦
- collect and review all evidence before decision ◦



Relevance

YES

NO

- ▶ “tends to prove or disprove a fact”
 - ▶ Does this make the existence of any fact of consequence more or less likely to be true?
 - ▶ Can be either inculpatory or exculpatory
- ▶ Questions about complainant’s prior sexual conduct, unless offered to prove (1) someone other than respondent committed alleged conduct or (2) specific incidents involving respondent, to prove consent
 - ▶ Health care/treatment records
 - ▶ Protected by privilege (e.g., 5th A, attorney-client)

34 C.F.R. 106.45(b)(1)(x);
(b)(5)(i); (b)(6)(ii)

Weighing relevant evidence

CREDIBILITY

reliability of the evidence or source:

Is there bias, motive, lack of consistency?

PERSUASIVENESS

believability, relative strength

Is this evidence believable, plausible?

- To be done *only after all evidence is gathered and reviewed*
- Consider only relevant evidence in totality
- Assign weight to relevant evidence based on believability, credibility
- Direct evidence is preferred to circumstantial
- Draw *necessary/objectively reasonable* inferences

Burden of proof (and gathering evidence)

34 C.F.R. 106.45(b)(5)(i)

At all times: Recipient's

decision

STEPS

1. Review report, evidence
2. Advisos Q&A process
 - explain any Q excluded as irrelevant
3. Written decision: determine responsibility
4. Notice of right to appeal

PROPOSED REGULATIONS

investigate and evaluate relevant evidence for persuasiveness; if not persuaded sex discrimination occurred, so find

34 C.F.R. 106.45(b)(6),
(b)(7)

How to decide

34 C.F.R. 106.45(b)(1)

- ▶ Objective and unbiased
- ▶ Objective evaluation of evidence
- ▶ Conclusion about whether respondent is responsible for harassment prohibited by Title IX
- ▶ Exercise independent judgment
- ▶ No conflict of interest or bias
- ▶ Ultimate Question (for each allegation): is it more likely than not that the respondent engaged in (or is responsible for) the alleged conduct?

Standard: preponderance

34 C.F.R. 106.45(b)(1)

“more likely than not”

- remember to begin with the presumption *not responsible*; the evidence must establish respondent “more likely than not” **is** responsible ◦

Written determination

34 C.F.R. 106.45(b)(7)

- ▶ Identify allegations
- ▶ Describe procedural steps taken
- ▶ Find facts – for each fact, weigh evidence and determine whether it happened or not
 - ▶ *Consider: consistency/corroboration, accuracy, memory, credibility (or lack thereof), implausibility, inconsistency, unreliability, ulterior motive*
- ▶ Apply code of conduct to facts
- ▶ State result of each allegation and rationale
- ▶ Recommend discipline, remedies
 - ▶ Remedies designed to restore or preserve equal access to school's educational program or activity
- ▶ Notify about appeal procedure
- ▶ Provide to parties

Proposed Regs: "notice of outcome," with determination whether sex discrimination occurred, any remedies or other steps to be taken to ensure does not continue

appeal

STEPS

34 C.F.R. 106.45(b)(8)

1. Review timeliness of filing
2. Confirm bases for appeal are appropriate
 - procedural irregularity
 - new evidence not reasonably available during investigation
 - TIXC, investigator, decision maker bias, conflict of interest
3. Notice of appeal to both parties
4. Receive statement(s) from parties
5. Review evidence, investigator report, written decision
6. Decision on appeal describing result and rationale



informal resolution

STEPS

34 C.F.R. 106.45(b)(9)

1. For student-on-student cases *only*
2. Obtain voluntary, written consent
3. Provide notice of allegations, informal process "rules," and ability to resume formal process
 - Will be available even without formal complaint
 - sample terms in resolution agreement
 - record maintenance (some are, some are not)
 - information in process is confidential, cannot be shared/used
 - mediator can be witness if formal process resumed
4. Complete promptly
5. If resolved, document complaint and resolution, parties sign, retain copies



record retention

RULES

34 C.F.R. 106.45(b)(10)

1. Documents relating to every complaint
 - investigation
 - determination
 - discipline imposed
 - informal resolution
 - appeal
2. Training materials *
3. Documents relating to every report (whether or not becomes complaint)
 - supportive measures (or why not)
 - basis for conclusion response was not deliberately indifferent

Title IX Process

for Other Sex-

Based

Discrimination



case law scenarios

Rasnick v. Dickenson County Sch. Bd. (allegations: 2003)

- ▶ Elementary (computer lab) T
 - ▶ Played with student's hair
 - ▶ sent sexually explicit emails
- ▶ *Prior complaints about the teacher*
 - ▶ 1998-99: parent of 7th grade student
 - ▶ Put hand on back/shoulder
 - ▶ Touched hair
 - ▶ Told student "how pretty she was," she "ought to be a model"
 - ▶ "put his privates in her hand" (when in third grade)
 - ▶ 1999-2000: parent of another student
 - ▶ Patted student on behind
 - ▶ Leaned over student at computer; looked down shirt; "nice breast"
 - ▶ Prior P:
 - ▶ Talked with another T about allegations: she did not believe true
 - ▶ Talked with Supt: "Stay away from that; if it needs handling, I will handle; could be explosive"

Rasnick v. Dickenson County Sch. Bd. (lesson)

- ▶ Failure to investigate prior complaints, even by different admin, concerning to the judge
 - ▶ Even after change of leadership, liability can arise from overall facts and circumstances
- ▶ Superintendent's "forbidding" admins from taking action *extremely concerning*
- ▶ Suit was dismissed ... But judge was expressly chagrined about having to dismiss it (would be different outcome today)

Doe v. Russell County Sch. Bd. (allegations: 2016)

- ▶ Elementary custodian
 - ▶ Student was 9 (3d grade) when moved to the school and abuse began
 - ▶ *Convinced student's guardian to let student live with him for a year – slept in same bed/abused nightly*
- ▶ P(1) knew student lived with custodian, went on trips together
 - ▶ Did not investigate the relationship/take any action
 - ▶ Assumed the student and custodian were related
 - ▶ Required custodian to keep office door closed at all times
 - ▶ Knew custodian had other boys help gather trash
- ▶ P(2) knew custodian spent lots of time and money on student, at school and away from school
 - ▶ Knew CPS complaint was filed during student's 4th grade year
 - ▶ Participated in CPS interviews; custodian and student denied all
 - ▶ Told custodian if student was at school after instructional hours, should be supervised in after-school program
 - ▶ *Took no separate/independent action*

Doe v. Russell County Sch. Bd. (allegations: 2016)

- ▶ Ts knew *but did not report*
 - ▶ Custodian's wife jealous of student; divorcing custodian; reported to CPS
 - ▶ Custodian always had hands on student
 - ▶ Custodian "obsessive, overly friendly" with student
 - ▶ Custodian touched, gave money to other male student
 - ▶ Custodian and student slept together; went on trips; rode to/from school together; spent time alone together on school property
 - ▶ Custodian and student were caught alone together (but hidden, in the dark) in a T's classroom one summer
 - ▶ Custodian was also "courting" student's younger brother
 - ▶ Custodian passed notes to student after mother regained custody and put a stop to sleepovers
 - ▶ Custodian was allowed to remove students from classes

Doe v. Russell County Sch. Bd. (lesson)

- ▶ Even reliance on DSS' findings may not fulfill Title IX obligation
- ▶ Independent investigation *highly recommended* (alongside DSS, LE)
- ▶ Ongoing supportive measures/efforts within educational environment advisable even after complainant/respondent no longer on premises
 - ▶ Discipline for respondents *and* those with knowledge who failed to report
 - ▶ Supportive measures for complainants

Doe v. Putney (allegations: 2015)

- ▶ Student received texts from boy inviting her to skip class
 - Student declined but walked with him “to class”
 - SRO observed the two walking toward parking area, asked “where going”
 - Male student grabbed female and pulled into woods adjacent to school
 - Female student texted friends for help; friends reported “abduction” to SRO
 - SRO openly doubted veracity, advised admin of report
 - Neither SRO nor admin responded
 - In response to female’s parents calls of concerns, SRO stated “skipping school”
- ▶ Male student sexually assaulted female as these events were unfolding
 - In response to further concerns from parents, SRO and admin found students in woods
 - SRO attempted to put both in back of squad car; ultimately let female sit in front when she objected
 - Admin separated the students
 - Female reported assault to SRO; male claimed “consensual”
 - No further investigation – accepted male student at his word
 - Report affirmatively misrepresented female’s appearance as clean, not disheveled
- ▶ Woods by school was known to SRO and admins as a location students engaged in sexual misconduct
 - So many, admin had held an assembly admonishing students

Doe v. Putney (lesson)

- ▶ SRO as agent of SB and admin had 3 reports of abduction, multiple messages/direct statements of assault
- ▶ Observed visible evidence of sexual assault
- ▶ Sufficient knowledge to invoke Title IX obligations of school division
 - Likely, deliberate indifference

Questions?

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