

TITLE IX TRAINING

PART I

presented by
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INTRODUCTION



Title IX Training: Part I
Jennifer E. Gornall, Esq., Neal R. Devlin, Esq., and Julia M. Herzing, Esq.
September 2020

Speakers

- Jennifer E. Gornall, Esq.
- Julia M. Herzing, Esq.
- Neal R. Devlin, Esq.

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Training Overview

PART I / DAY 1

- Title IX Overview
 - Historical Context
 - New Regulations
 - Training Requirements
- Title IX Sexual Harassment
- Title IX Compliance
 - Underlying Intent of Regulations
 - Roles of Title IX Appointees
- Reporting and Responding to Sexual Harassment
 - Jurisdictional Issues
 - Initial Response to Report

PART II / DAY 2

- District Initial Response to Report
- Formal Complaint
- Informal Resolution Process
- Grievance Process
- Investigation
- Investigative Report
- Impartiality / Conflicts of Interest
- Evidence / Relevance

PART III / DAY 3

- Confidentiality
- Emergency Removals
- Recordkeeping
- Hypotheticals

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TITLE IX OVERVIEW



Title IX – the Law

Title IX of the Education Amendments of 1972 provides the following:

- No person in the United States shall, on the basis of sex, be excluded from the 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(a).



Evolution of Title IX

- Title IX has evolved since its original enactment.
- Note the original statutory language makes no reference to prohibiting “sexual harassment.”
- The 1990s was a pivotal time for the development of “sexual harassment” theory pursuant to three seminal cases by the United States Supreme Court:

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Evolution of Title IX

- Franklin v. Gwinnett County Schools (1992) – SCOTUS first recognizes that “sexual harassment” constituted “sex discrimination” and that a student-victim has the private right to sue and collect money damages for sexual harassment.

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Evolution of Title IX

- Gebser v. Lago Vista Indep. Sch. Dist. (1998) – SCOTUS holds a school district itself can be liable for money damages under Title IX for teacher-on-student sexual harassment if:
 - (a) an employee with the “authority to address the alleged discrimination and to institute corrective measures;”
 - (b) has “actual notice” of misconduct of the teacher; and
 - (c) is “deliberately indifferent” to the teacher’s misconduct.
- Gebser established the premise that school districts can be held liable under Title IX when there “is an official decision by the recipient not to remedy the violation.”

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Evolution of Title IX

- Davis v. Monroe (1999) – SCOTUS holds a school district can be liable for money damages under Title IX for student-on-student sexual harassment if:
 - (a) the Gebser standards of actual notice and deliberate indifference are met and further defines “deliberate indifference” as “clearly unreasonable in light of the known circumstances;”
 - (b) the school has substantial control over the context in which the harassment occurs and over the harasser; and

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Evolution of Title IX

– (c) the conduct is “sexual harassment,” which is “so severe, pervasive *and* objectively offensive” that it “effectively bar[red] the victim’s access to an educational opportunity or benefit.”

- **NOTE:** SCOTUS did *not* adopt the Title VII definition of sexual harassment (“severe, persistent or pervasive”) for Title IX purposes.

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Office of Civil Rights Guidance

- **Battle of Presidential Administrations:**
 - 2001 OCR Sexual Harassment Guidance – created a higher standard than established by SCOTUS.
 - Instituted a “knew or reasonably should have known” standard instead of actual notice.
 - Allows sexual harassment to simply “deny or limit” a student’s ability to participate in or receive services or opportunities, a lower standard than the “severe, pervasive and objectively offensive” to the extent they “effectively deny” access to the opportunities and services offered by the school district.
 - Required school districts to “eliminate the hostile environment and prevent its recurrence.”

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Office of Civil Rights Guidance

- April 4, 2011 OCR “Dear Colleague Letter” – among other things, lowered the standard to determine responsibility for allegations of sexual harassment. Resulted in many accused students asserting denial of fair and due process.
- September 2017 – OCR rescinds 2011 DCL and announces new rulemaking (e.g., process for updated Title IX regulations).

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Office of Civil Rights Guidance

- November 2018 – OCR issued proposed new regulations for notice and comment. US Department of Education received over 124,000 comments.
- May 2020 – new Title IX regulations issued, effective date August 14, 2020.

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SEXUAL HARASSMENT



Overview: What is “Harassment”?

- Harassment is a form of unlawful discrimination in that it is characteristic-based treatment that adversely affects the workplace.
- School districts have a legal duty to take steps reasonably calculated to prevent and stop harassment, including having anti-harassment policies, providing training to employees, and addressing complaints.
- Any acceptance or perceived tolerance of harassment presents significant risk to school districts under state and federal laws, including Title IX.

What is “Harassment”?

- Harassment can include actions, words, jokes, or comments based on or because of an individual’s protected characteristic(s).
- Harassment also can include passive acts, such as alienating someone through omission or withholding necessary information or assistance.

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What is “Title IX Sexual Harassment”?

“Title IX Sexual Harassment” means conduct on the basis of sex that satisfies one or more of the following:

1. A school employee conditioning the provision of an aid, benefit, or service on an individual's participation in unwelcome sexual conduct (i.e. *quid pro quo* harassment); or
2. 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 school’s education program or activity; or
3. Sexual assault, dating violence, domestic violence, or stalking (as defined by the Clery Act and Violence Against Women Act)

34 C.F.R. §106.30 (Definitions)

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Title IX Sexual Harassment First Prong: Quid Pro Quo Harassment

- A school employee conditioning the provision of an aid, benefit, or service on a student's participation in unwelcome sexual conduct
 - “Making educational benefits or opportunities contingent on a person's participation in unwelcome conduct on the basis of sex strikes at the heart of Title IX's mandate that education programs and activities remain free from sex discrimination.”

[OCR Final Rule, 85 FR 30026, 30148 \(5/19/2020\)](#)

Title IX Sexual Harassment First Prong: Quid Pro Quo Harassment

- Applies whether the “bargain” was express or implied.
- Need not be “severe or pervasive”
 - “Abuse of authority in the form of even a single instance of *quid pro quo* harassment is inherently offensive and serious enough to jeopardize equal educational access.”

[OCR Final Rule, 85 FR 30026, 30148 \(5/19/2020\)](#)

Title IX Sexual Harassment Second Prong: Hostile Environment

- 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 school's education program or activity

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Title IX Sexual Harassment Second Prong: Hostile Environment

- Schools should be aware of the different “hostile environment” standards under Title VII and Title IX.
 - Title VII of the Civil Rights Act of 1964
(Title VII) prohibits employment discrimination based on race, color, religion, sex, or national origin.
 - Title IX of the Education Amendments of 1972
(Title IX) prohibits discrimination on the basis of sex, including sexual harassment, in education programs and activities. Applies to public and private education institutions that receive any federal funds.

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Title IX vs. Title VII

- **Title VII**

- Sexual harassment is illegal if it creates an environment that is hostile or intimidating or if it interferes with a person’s work performance.
- Must be both subjectively and objectively offensive.
- The Supreme Court has said that, in order for this type of harassment to violate **Title VII**, it must be “**sufficiently severe or pervasive** to alter the conditions of [the victim’s] employment and create an abusive working environment.”

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Title IX vs. Title VII

- **Title IX Sexual Harassment:**

- 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 school’s education program or activity

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Title IX Sexual Harassment Second Prong: Hostile Environment

- “Severe, pervasive, and objectively offensive”
 - Differs from the Title VII “severe *or* pervasive” standard.
 - Adopts the *Davis* standard for sexual harassment under Title IX.
 - “[S]chools are unlike the adult workplace and ... children may regularly interact in a manner that would be unacceptable among adults... The Department does not wish to apply the same definition of actionable sexual harassment under Title VII to Title IX because such an application would equate workplaces with educational environments.”

[OCR Final Rule, 85 FR 30025, p. 30037 \(5/19/2020\)](#)

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Title IX Sexual Harassment Second Prong: Hostile Environment

- **Objectively Offensive**
 - “[A] plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities.” *Davis v. Monroe*
 - Reasonable Person Standard
 - Does the conduct create an environment that a **reasonable person** would find hostile or abusive?”
 - “[T]he objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff’s position, **considering all the circumstances.**” *Oncale v. Sundower Offshore Services, Inc.*, 523 U.S. 75 (1998)

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Title IX Sexual Harassment
Third Prong: Sexual Assault, Etc.

- Sexual Assault
 - An offense that meets the definition of rape, fondling, incest, or statutory rape as defined in the FBI's Uniform Crime Reporting System
- Dating Violence
 - Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.
 - Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.

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Sexual Assault, Dating Violence, Domestic Violence, or Stalking

- Domestic Violence
 - A felony or misdemeanor crime of violence committed by:
 - A current or former spouse or intimate partner of the victim;
 - A person with whom the victim shares a child;
 - A person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner;
 - A person similarly situated to a spouse of the victim; or
 - Any other person against an adult or youth victim who is protected from that person's acts under local domestic or family violence laws.
- Stalking
 - A course of conduct directed at a specific person that would cause a reasonable person to fear for the person's safety or the safety of others or suffer substantial emotional distress.

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RETALIATION



Retaliation Prohibited

- No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX ... or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under [Title IX].

34 C.F.R. §106.71(a)



Retaliation

- Retaliation based on the exercise of rights under Title IX is prohibited.
- Filing charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination or sexual harassment for the purpose of interfering with any right or privilege secured by Title IX, constitutes retaliation.
- Complaints alleging retaliation may be filed according to the grievance procedures for sexual harassment.

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Retaliation

- Specific circumstances
 - The exercise of rights protected under the First Amendment does not constitute “retaliation.”
 - Charging an individual with a code of conduct violation for making a materially false statement in bad faith does not constitute “retaliation.”
 - Note, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

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Compliance with Title IX Mandates



Underlying Intent of New Regulations: a Balance of Interests

- The new regulations attempt to ensure a fair process for both the complainant (alleged victim) and respondent (alleged perpetrator).
 - Complainants are assured every report of sexual misconduct will be taken seriously, that they have the ability to trigger the use of a fair and unbiased grievance process through the filing of a “formal complaint,” and that they will have prompt access to supportive measures regardless of whether they pursue the formal process.
 - Respondents are also entitled to supportive measures and are assured they will not be subjected to discipline for any alleged Title IX violation unless they are found responsible after the implementation of a fair and unbiased grievance process.



Underlying Intent of New Regulations: a Balance of Interests

- School districts are held accountable for failure to respond equitably and promptly to sexual misconduct reports.
 - School districts are only liable under Title IX if the school district is “deliberately indifferent” (e.g., responds in a “clearly unreasonable” manner) to “actual knowledge” of sexual harassment. §106.44(a).
 - Remember Gebser’s premise: that school districts can be held liable under Title IX when there “is an official decision by the recipient *not* to remedy the violation.”
 - It would be highly unlikely for a school district’s response to be deemed “clearly unreasonable” if it provides supportive measures to the complainant and respondent, properly trains its employees, and implements and follows a Title IX compliant grievance process.

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Underlying Intent of New Regulations: a Balance of Interests

- OCR “will not deem a [district’s] determination regarding responsibility to be evidence of deliberate indifference by the [district], or otherwise evidence of discrimination under Title IX by the [district], solely because [OCR] would have reached a different determination based on an independent weighing of the evidence.” 34 C.F.R. §106.44(b)(2).

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Compliance with Title IX Mandates

- Designation of a Title IX Coordinator.
 - Must “prominently display” Title IX Coordinator’s name/title, office address, email address and telephone number on district’s website.
- Notification to applicants, students, employees, parents, guardians, unions, etc., that the school district does not discriminate on the basis of sex, which policy must be prominently displayed on the district’s website.

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Compliance with Title IX Mandates

- Publication of a Title IX compliant policy which establishes grievance procedures that provide for the prompt and equitable resolution of student and employee complaints.
- Ensure all employees of school district are trained to identify sexual harassment and understand they have a duty to report it to the Title IX Coordinator or building level Title IX designee.

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Compliance with Title IX Mandates

- Ensure Title IX Coordinators, investigators, decision-makers and informal resolution facilitators receive training on the following topics:
 - Definition of Title IX sexual harassment
 - The scope of the school district’s “education program or activity”
 - How to conduct an investigation and grievance process including hearings, appeals and informal resolution processes
 - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest and bias
 - Technology to be used at a live hearing
 - Issues of relevance of questions and evidence, including when questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant
 - Issues of relevance to allow decision-makers to create an investigative report that fairly summarizes the relevant evidence
 - All training materials must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment

Compliance with Title IX Mandates

- **NOTE:** All training materials used to train the Title IX officials must be posted on the District’s publicly accessible website.
§106.45(b)(10)(i)(D).
- Failure to do any of the above would likely support a finding that the school district’s response to a report of sexual harassment is clearly unreasonable (or deliberately indifferent).

Roles of Title IX Appointees

- The new Title IX regulations create very specific roles for those individuals involved in the investigation and grievance process who are responsible for implementing the Title IX due process protections and grievance process.
 - Who is appointed to fulfill what role depends on the size and the make-up of individual school districts.
 - Note that individuals who have received comprehensive Title IX training can act in more than one role
 - It is advisable to appoint multiple individuals to fill multiple roles to enable the school district to avoid conflicts of interest and/or bias.

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Roles of Title IX Appointees

TITLE IX COORDINATOR

- Has the main responsibility for ensuring district compliance with Title IX regulations.
- Must be authorized to coordinate compliance efforts.
- School districts can appoint more than one Title IX Coordinator.
- Must identify name/title, office address, email address and telephone number on website and in all handbooks and policies.
- CAN be an investigator but CANNOT be an initial or appeal decision-maker.
- Our recommendation is for the Title IX Coordinator NOT to be the Superintendent, if possible, so the Superintendent can act in the role of appeal decision-maker.

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Title IX Coordinator Duties

- Upon the district's receipt of a report of sexual harassment, must promptly contact the complainant (alleged victim of Title IX sexual harassment) to discuss the availability of "supportive measures" with or without the filing of a formal complaint and explain the process for filing a formal complaint.
- Must consider the complainant's wishes regarding supportive measures.
- Must offer supportive measures to the respondent (alleged perpetrator of Title IX sexual harassment).
- Responsibility for coordinating the effective implementation of supportive measures.

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Title IX Coordinator Duties

- Must ensure the school district treats complainants and respondents "equitably." With regard to the respondent, this means the Title IX Coordinator must ensure the school district follows a Title IX compliant grievance process before the imposition of any sanctions other actions that are not supportive measures against the respondent.
- Has the ability to initiate the Title IX formal complaint process even if the complainant decides not to proceed with a formal complaint.
- Is responsible for the effective implementation of any remedies.

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Roles of Title IX Appointees

INVESTIGATOR

- May be the Title IX Coordinator, if necessary, but we recommend keeping those roles separate.
- School districts should have more than one investigator.
- Must receive training on how to conduct an investigation and on issues of relevance to create an “investigative report” that fairly summarizes the evidence.
- Depending on the size of the school district, Assistant Principals or Building Principals would be good choices as investigators.
- Strongly recommend the use of Human Resource Director in cases involving employees.

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Roles of Title IX Appointees

INITIAL DECISION-MAKER

- May NOT be the Title IX Coordinator nor the investigator. Possibly the Building Principal or central Administrative employee.
- Is responsible for reviewing the “investigative report.”
- Is responsible for sending the investigative report to the complainant and respondent and allow for the exchange of relevant questions.
- Must draft a “written determination regarding responsibility.”
- Must ensure s/he is free from conflicts of interest and bias.

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Roles of Title IX Appointees

APPEAL DECISION-MAKER

- May NOT be the Title IX Coordinator, the investigator nor the initial decision-maker.
 - It makes the most sense for the Superintendent to be the Appeal Decision-Maker.
 - We do not recommend using your Solicitor as the Appeal Decision-Maker because it would preclude counsel's involvement in the process leading up to that point.
 - School boards likely will not have had appropriate Title IX training to act in role of Appeal Decision-Maker.
 - If your Superintendent is the Title IX Coordinator – consider using a Superintendent from a neighboring school district who has had Title IX training as the Appeal Decision-Maker.

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Appeal Decision-Maker, cont.

- Is responsible for giving both parties a reasonable, equal opportunity to submit written statements in support of or challenging the outcome articulated in the initial decision.
- Must issue a written decision describing the result of the appeal and the rationale for the result.
- Must ensure s/he is free from conflicts of interest and bias.

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Roles of Title IX Appointees

INFORMAL RESOLUTION FACILITATOR

- Must be free from conflicts of interest, bias and trained to be impartial.
- Must have completed the Title IX training.
- Should be adept at facilitating or mediating between students.
- Consider utilizing Assistant Principals, Principal, Guidance Counselors and Mental Health Specialists for this role.

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Reporting and Responding to Sexual Harassment



When Must a School Respond to Title IX Sexual Harassment?

- If any employee of the school district has “actual knowledge” of “sexual harassment” in an “education program or activity” against “a person in the United States” the district must respond promptly and in a manner that is not deliberately indifferent.

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When Must a School Respond to Title IX Sexual Harassment?

- When any employee in the K-12 setting has “actual knowledge” of sexual harassment.
- An employee would have “actual knowledge” of sexual harassment if s/he “has notice of sexual harassment or allegations of sexual harassment.” Examples of notice include:

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When Must a School Respond to Title IX Sexual Harassment?

- If the employee observed or witnessed sexual harassment
- If the employee is told that sexual harassment has occurred by the complainant, the complainant's parents or another 3rd party
- If the employee receives a voice mail or an email or any other written or verbal complaint alleging sexual harassment has occurred
- NOTE: the school district does not have "actual knowledge" if the only official of the school district with actual knowledge is the respondent (the alleged perpetrator).
- NOTE: Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. 34 C.F.R. §106.30(a). In other words, the broader old OCR standard of "knew or should have known" is no longer applicable.

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When Must a School Respond to Title IX Sexual Harassment?

When the reported incident occurred "against a person in the United States." §106.44(a)

- This is a "jurisdictional" issue.
- If the incident occurs on a school field trip to Canada, Title IX is not implicated.
- But, remember, school district must analyze whether other laws and/or other provisions of your Student Code of Conduct would apply.

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When Must a School Respond to Title IX Sexual Harassment?

When the harassment occurred in an “education program or activity” of the school district. §106.44(a), §106.30, §106.45

- Title IX Coordinator must analyze whether the reported incident occurred in the context of an education program or activity which includes “locations, events or circumstances over which the school district exercised substantial control over both the respondent and the context in which the sexual harassment occurred.”

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When Must a School Respond to Title IX Sexual Harassment?

- On property or locations either owned or leased or rented by the school district.
- During school-sponsored events, such as athletic events or field trips, even if they occur off school property (but inside the United States).
- Computer/internet networks or computer hardware/software owned or operated or used by the school district in the course of its educational services or programs.
- Area of ambiguity: off campus behavior/impact of privately-owned technology. Again, remember, even if Title IX does not apply, analyze the application of other laws and school district policies to the behavior at issue.

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Thank You!

Be sure to use the separate link for PART II tomorrow.

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