

New Title IX: One Year Later

Ellen H. Spalding
Karczewski | Bradshaw | Spalding



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ATTORNEYS • COUNSELORS

1

Title IX

"No person in the United States shall, on the basis of sex, 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(a)



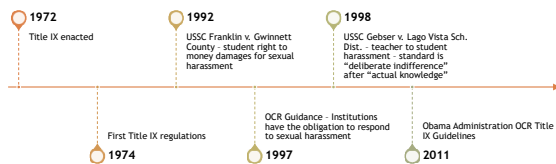
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2

Timeline



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3

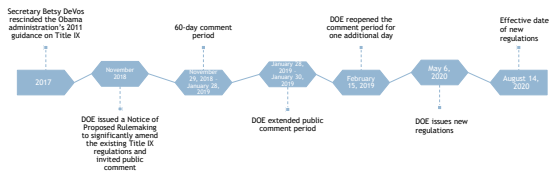
2011 Obama Administration Guidelines

- Provided guidance on the unique concerns that arise in sexual violence cases, such as the role of criminal investigations and a school's independent responsibility to investigate and address sexual violence.
- Provided guidance and examples about key Title IX requirements and how they relate to sexual violence, such as the requirements to publish a policy against sex discrimination, designate a Title IX coordinator, and adopt and publish grievance procedures.
- Discussed proactive efforts schools can take to prevent sexual violence.
- Discussed the interplay between Title IX, FERPA, and the Clery Act as it relates to a complainant's right to know the outcome of his or her complaint, including relevant sanctions facing the perpetrator.
- Provided examples of remedies and enforcement strategies that schools and the Office for Civil Rights (OCR) may use to respond to sexual violence.



4

How did we get here?



5



6

Likely no, but...

- They may not going away tomorrow either.
- President Biden issues executive order where he states he seeks to “immediately” end the DeVos Title IX regulations
- Regulations went through a formal rule-making process and cannot easily be revoked
- In March, President Biden ordered DOE Secretary Cardona to review the DeVos Title IX regulations within 100 days.
- Changes could come as late as 2024
- What does all of this mean for schools?

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This just in...

- Office of Civil Rights announced in an April 6, 2021 letter
 - May 2020 regulations currently remain in effect
 - Will immediately begin process of re-working/replacing Title IX regulations
- 3 step process announced
 - Public hearing
 - Q&A document to provide clarity on existing rules
 - Anticipated notice of proposed rulemaking to amend the rules
 - Additional notice/comment period

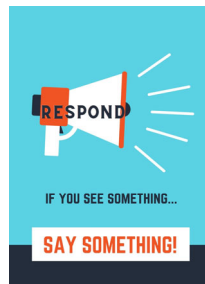
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8

How does Title IX require school districts to respond to allegations of sexual harassment?

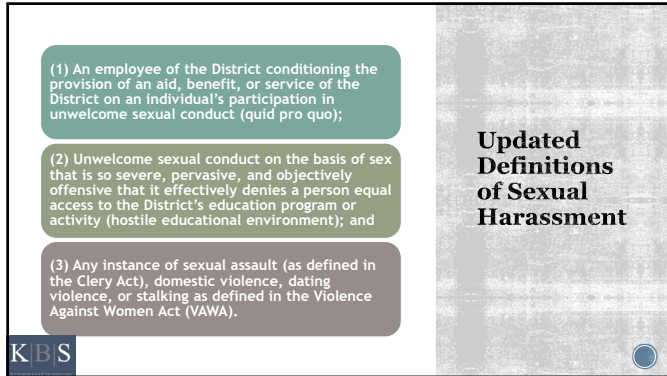
- A school district
 - ◊ With **actual knowledge** of sexual harassment
 - ◊ In an **education program or activity** of the school district
 - ◊ Against a person in the United States
 - ◊ Must respond **promptly** in a manner that is **not** deliberately indifferent.



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9



(1) An employee of the District conditioning the provision of an aid, benefit, or service of the District on an individual's participation in unwelcome sexual conduct (quid pro quo);


(2) Unwelcome sexual conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the District's education program or activity (hostile educational environment); and

(3) Any instance of sexual assault (as defined in the Clery Act), domestic violence, dating violence, or stalking as defined in the Violence Against Women Act (VAWA).

Updated Definitions of Sexual Harassment

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Hostile Environment: What changed?

OLD

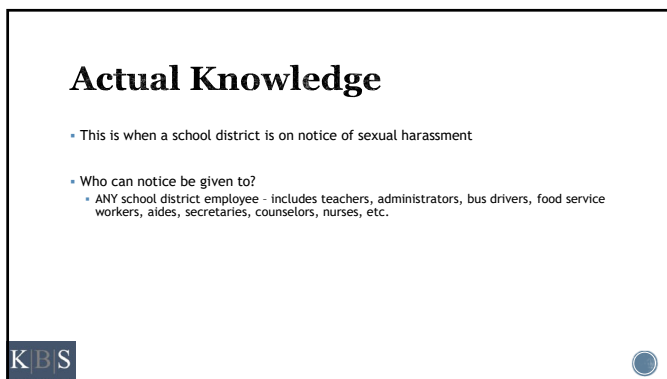
- Unwelcome Conduct
- Determined by a Reasonable Person
- To be severe, pervasive, **or** persistent
- And to **interfere with** or **limit** a student's ability to participate in or benefit from school services, activities, or opportunities

NEW

- Unwelcome Conduct
- Determined by a Reasonable Person
- To be so severe, pervasive, **and** persistent
- That it **effectively denies** a person's equal access to the recipient's education program or activity

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Actual Knowledge

- This is when a school district is on notice of sexual harassment
- Who can notice be given to?
 - ANY school district employee - includes teachers, administrators, bus drivers, food service workers, aides, secretaries, counselors, nurses, etc.

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Deliberately Indifferent

Old

- The school must take immediate action to:
 - eliminate the sexual harassment/sexual violence
 - Prevent its reoccurrence
 - And
 - Address the effects

New

- Failure to respond in light of reasonably known circumstances

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The new Title IX formal complaint process

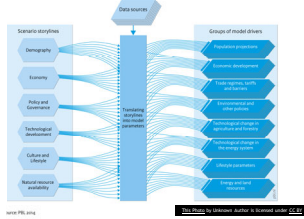
- The new regulations require districts to adopt a grievance process to respond to formal complaints of sexual harassment in the District's educational program.
- The regulations require specific steps to be taken by individuals with particular, specialized roles in the process.
 - The roles are: (1) Title IX Coordinator; (2) Investigator; (3) Decision-Maker; (4) Appeal Decision-Maker; and (5) Informal Resolution Facilitator.
- The formal complaint process must promote "unbiased, impartial determinations of fact based on relevant evidence."

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scenario development and model drivers for IMACE 3.0



**Get you
a
process!**

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The process (in a nutshell)

- Report comes in
- Title IX Coordinator offers supportive measures to both parties
- Formal Complaint?
- If so, Title IX Coordinator assigns investigator and decision maker
- Investigator gives equal opportunity to both

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16

Create a flowchart

- <https://titleix.colostate.edu/procedures-flowchart/>
- <https://www.vcsd.k12.ny.us/wp-content/uploads/2020/08/TITLE-IX-FC-8.13.20.pdf>
- https://s3.amazonaws.com/scschoolsfiles/1550/title_ix_sexual_harassment_complaint_process_flowchart.pdf (Big Sandy ISD)
- <https://resources.finalsite.net/images/v1610748719/slcschoolsorg/muv2eylnysbdtx4d604w/title-ix-flowchart-english.pdf>
- <https://drive.google.com/file/d/1BDqPt8uyPn0gNbOcU3a5n6HAKq-0W3gT/view> (Northwest ISD)

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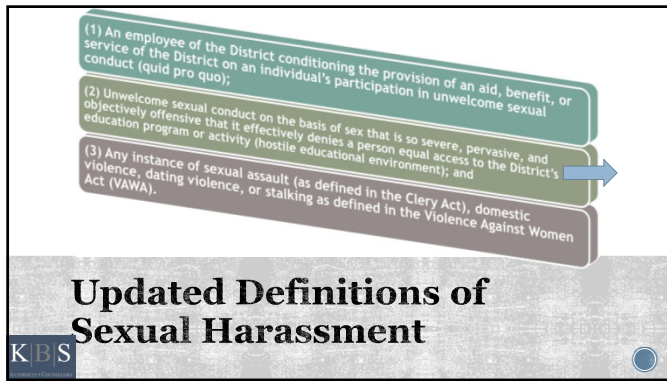
17



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18



Updated Definitions of Sexual Harassment

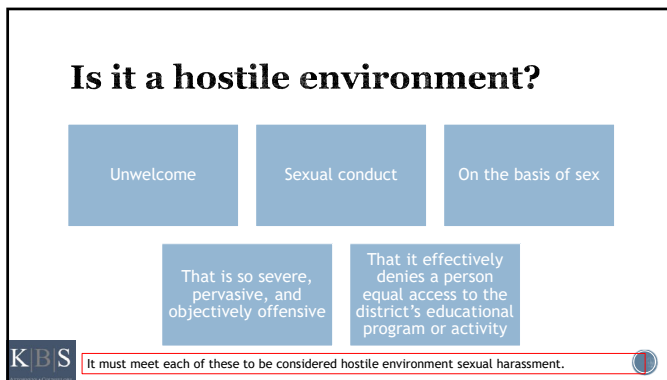
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Is it a hostile environment?

Unwelcome Sexual conduct On the basis of sex

That is so severe, pervasive, and objectively offensive That it effectively denies a person equal access to the district's educational program or activity

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It must meet each of these to be considered hostile environment sexual harassment.

20



Is it a hostile environment?

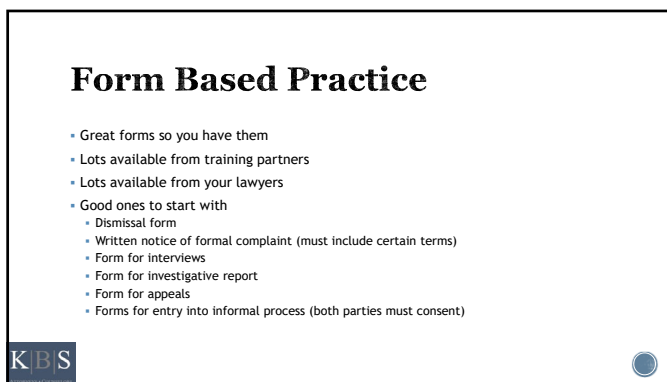
- If it is alleging a hostile environment and does not meet each of those conditions, it is not sexual harassment as defined by Title IX
 - Ensure it does not meet either of the other tests (quid pro quo, stalking/assault etc.)
- And should be dismissed
- Many complaints are dismissed at this stage.

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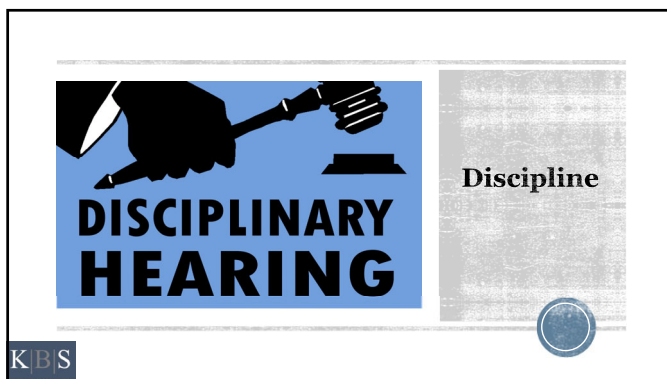
21



22



23



24

Supportive Measures

- Must be given to both victim and alleged perpetrator
- Must not be punitive
 - Can provide for emergency removal
 - Immediate threat to physical health and safety
 - Undertake an individualized safety and risk analysis to determine whether there is an immediate threat
 - Make affirmative determination of immediate threat based on individualized safety and risk analysis
 - Provide respondent notice and opportunity to challenge the emergency decision immediately following removal
- Read and revise, as necessary, your stay away agreements
- Read and revise, as necessary, your administrative leave letters

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Informal Resolution

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26

Informal Resolution

- Any time after the formal complaint has been filed prior to reaching determination
- Both parties must agree
- Not available if the allegation is an employee harassed a student
- Skilled resolution facilitator



27




Law Enforcement Investigations

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28

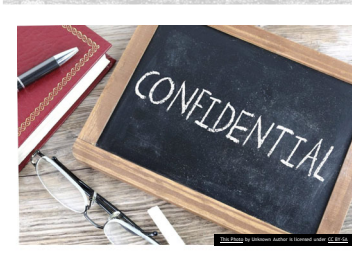
Who goes first?



- Criminal Justice System and Title IX serve different purposes
- Regulations allow a school district to provide for a “short-term” delay of Title IX process for “good cause”
 - Law enforcement investigation may be good cause
 - Can not have a long or indefinite delay
- Must still respond
 - Contact with complainant and respondent
 - Supportive measures
 - Do not be deliberately indifferent

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FERPA and Confidential Information

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Two federal laws that may conflict...

- Must provide the parties an equal opportunity to inspect and review evidence
- Evidence may contain FERPA protected information
- DOE finds no conflict between FERPA and Title IX
 - "A recipient should interpret Title IX and FERPA in a way to avoid conflicts"
- Title IX allows non-disclosure agreements
- Work toward consent
- Is it an education record?
- Can some information be redacted?

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32

Bostock v. Clayton County

- USSC Title VII case regarding sex discrimination - 2020
- Court held:
 - Title VII prohibits employers from discriminating against any individual "because of such individual's race, color, religion, sex, or national origin."
 - Looking to the ordinary meaning of each word, the Court found that an employer violates Title VII when it intentionally fires an individual employee based, at least in part, on sex.
 - Discrimination on the basis of sexual orientation or gender identity requires an employer to intentionally treat employees differently because of their sex.
 - Title VII clearly prohibits this
 - The Court gave no weight to legislative history because the language of the statute unambiguously prohibits the discriminatory practice.
 - When the statute was adopted in 1964, it was likely not anticipated that Title VII would apply to discrimination against homosexual or transgender status.

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Adams v. School Board **(11th circuit)**

- St. Johns County, Florida
- Drew Adams, a transgender student, was identified as female on his birth certificate. He came to realize he was transgender. He transitioned to living life as a boy both socially and legally.
- School recognized Drew as a boy.
- However, Drew was not allowed to use the boys' restroom. He was provided with a gender neutral restroom.
- Drew sued alleging a violation of his equal protection rights under the 14th Amendment to the US Constitution and under Title IX.



34

Adams v. School Board

- District Court and Appeals Court ruled in favor of Drew.
- The school district had violated his rights under the US Constitution and Title IX by not allowing Drew to use the boys' restroom; a gender neutral bathroom was not an adequate solution.
- 45 amicus briefs filed



35

Adams v. School Board

- Excluding Drew from the boys' restroom amounted to sex discrimination which is prohibited by Title IX
- "No person in the United States shall, on the basis of sex, 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."
- Used *Bostock* as analogous. *Bostock* has "great import"
- Title IX protects students from discrimination on transgender status.
- If a student is treated differently because of transgender status and this causes harm, violation of Title IX



36

Adams v. School Board

- What did the Court find was "harm"?
 - Experts testified that anxiety of gender dysphoria is alleviated by using restrooms consistent with their gender identity
 - He was separated from his peers in single-stall restroom facilities
 - Drew testified it felt like the "walk of shame" to walk past communal restrooms for the gender neutral restroom
- "Every court of appeals to consider bathroom policies like the School District's agrees that such policies violate Title IX."

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37



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38

Executive Order

- January 20, 2021: President Biden Executive Order 13988
- Directs federal agencies that enforce federal laws prohibiting sex discrimination to also prohibit discrimination on sexual orientation and gender identity in: employment, housing, education, health care, and credit
- "In *Bostock v. Clayton County*..., the Supreme court held that Title VII's prohibition on discrimination 'because of...sex' covers discrimination on the basis of gender identity and sexual orientation. Under *Bostock's* reasoning, laws that prohibit sex discrimination - including Title IX of the Education Amendments of 1972...along with their implementing regulations - prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary."

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39

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ELLEN H. SPALDING
PARTNER

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