



TUETH KEENEY
COOPER MOHAN JACKSTADT P.C.

Title IX

Key Concepts and Recent Updates

Presented by:

Michelle H. Basi, Esq.
Jenna M. Lakamp, Esq.

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DIFFERENT
BY DESIGN

Title IX

Title IX of the Education Amendments of 1972 (Title IX) provides that:

“[n]o 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. . . .”

Title IX

1972

- Passage of Title IX

Title IX

1979

- *Cannon v. Univ. of Chicago* (May 14, 1979)

Cannon v. Univ. of Chicago

- Plaintiff claimed she was denied admission to medical school because she was a woman.
- U.S. Court of Appeals for the Seventh Circuit held that plaintiff had “no right of action against respondents that may be asserted in federal court.”
- U.S. S. Ct.: “Petitioner may maintain her lawsuit, despite the absence of any express authorization for it in the statute.”

Title IX

1979

- Carter signs the “Department of Education Organization Act” (October 17, 1979)

1980

- ED established (May 4, 1980)
- OCR given oversight responsibilities

Title IX

1992

- *Franklin v. Gwinnett County Public Schools*

Franklin v. Gwinnett County Public Schools

- Student sued, ***alleging she had been subjected to continual sexual harassment by teacher.***
- Student sought ***money damages*** against the school district.
- District court, and Court of Appeals dismissed the case, holding that Title IX did not provide an action for money damages.
- In 9-0 decision, U.S. Supreme Court reversed, ruling that Gwinnett could seek money damages.



Title IX

1998

- *Gebser v. Lago Vista Independent School District*

1999

- *Davis v. Monroe County Board of Education*

Gebser v. Lago Vista Independent School District (1998)

- Student engaged in a secret sexual relationship with a teacher. The District had no policy in place for investigating sexual harassment complaints. When the relationship was uncovered, the teacher was fired and arrested. The student and her family brought a claim against the District alleging sexual harassment.
- Supreme Ct. ruled that educational institutions may be liable for money damages where employees harass students if school officials had **actual knowledge of harassment**, and are **deliberately indifferent** to the harassment

Davis v. Monroe Cnty. Bd. of Education (1999)

- Mother of student sued the Board of Education, claiming the District failed to prevent another student from harassing her daughter.
- Question before the Supreme Court: Can a school be held liable for student on student harassment?
- Yes! Supreme Ct. holds that educational institutions may be liable for ***student-on-student*** harassment if the conditions in *Gebser* are met.
 - deliberate indifference to harassment that is severe enough to prevent victims from enjoying educational opportunities.

Title IX

2001

- OCR issues replaces 1997 guidance regarding sexual harassment of students by other students, employees, or third parties

2005

- *Jackson v. Birmingham Bd. Of Educ.* S.Ct. rules that employee (coach) who complained of sex discrimination on behalf of his team could assert a claim for retaliation under Title IX.

Jackson v. Birmingham Bd. Of Educ. (2005)

- The district court had granted the school district's motion to dismiss; the Eleventh Circuit affirmed.
- In 5-4 decision, U.S. Supreme Court reversed.
- *NB*: "[T]he Board should have been put on notice that it could be held liable for retaliation by the fact that this Court's cases since *Cannon* have consistently interpreted Title IX's private cause of action broadly to encompass diverse forms of intentional sex discrimination; by Title IX itself, which expressly prohibits intentional conduct that violates clear statutory terms....; **by the regulations implementing Title IX, which clearly prohibit retaliation and have been on the books for nearly 30 years**; and by the holdings of all of the Courts of Appeals that had considered the question at the time of the conduct at issue that Title IX covers retaliation."



Title IX

2011

- OCR issues the April 4, 2011 DCL

2013

- VAWA Reauthorization signed into law – codifying portions of the 2011 DCL

Title IX

2014

- Creation of "White House Task Force to Protect Students from Sexual Assault."
- VAWA regulations
- DOE issues 46-page FAQ related to how institutions should address sexual violence.

2015

- OCR issues guidance regarding obligations to designate a Title IX Coordinator

2017

- OCR withdraws April 4, 2011 DCL and April 29, 2014 Q & A
- OCR issues new Q & A on Campus Sexual Misconduct

Title IX

2018

- November 2018: OCR issues draft Title IX regulations regarding sexual harassment and assault.

2019

- Notice and Comment (originally scheduled to end January 28, 2019) draws over 110,000 comments; comment period extended slightly due to technical difficulties.

Title IX

2020

- March 13, 2020: President declares national emergency concerning novel coronavirus disease (COVID-19).

2020

- May 6, 2020: Department of ED issues final regulations regarding Title IX; regulations are published in the Federal Register on May 19, 2020.

2020

- August 14, 2020: Implementation date of new Title IX regulations.



Status of New Title IX Regulations

- Several sets of litigation filed in the D.C. Circuit seeking to enjoin the regulations from taking effect on 8/14/20 – TRO denied.
- NSBA has filed a Letter for Clarification with the DOE asking for the Dept. to provide clarity of several issues:
 - Effective date – is it possible to adopt new policies and provide training in three months, during global pandemic?
 - Complaint evaluation standard – how should a coordinator know whether they need to sign a formal complaint if the alleged victim is unwilling?
 - Clarify when confidential information should be released.
- Best practice – Prepare to be compliant and document efforts.

New Title IX Regulations

- Most commentary focuses on changes to required procedures related to institutional response to “sexual harassment,” . . .
- But a few other changes. . .

New Title IX Regulations

- Requirement to specifically designate employee called “Title IX Coordinator”.
- Must notify applicants for admission and employment, students, employees, and all unions or professional organizations holding collective bargaining agreements or other contracts of Title IX Coordinator’s contact information.
- Any person may report sex discrimination (including sexual harassment) to the Title IX Coordinator.
- Dissemination requirements (including certain information that must be maintained on institutional website).
- Requirement to adopt a grievance procedure with specific provisions for addressing “sexual harassment,” as that term is defined in the Title IX regulations.

And now. . .

Requirements related to district's response to addressing "sexual harassment" (not required for all issues of sex *discrimination*).

When must a school respond to sexual harassment under Title IX?

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**.

New Title IX Regulations – District Response to “Sexual Harassment”

- Jurisdictional Changes / Definitions
- Procedural Requirements

Definition – “Sexual Harassment”

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct;
- (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 recipient’s education program or activity; or
- (3) “Sexual assault” as defined in Violence Against Women Act (VAWA) 20 U.S.C. 1092(f)(6)(A)(v), “dating violence” as defined in 34 U.S.C. 12291(a)(10), “domestic violence” as defined in 34 U.S.C. 12291(a)(8), or “stalking” as defined in 34 U.S.C. 12291(a)(30).

Definition – “Sexual Harassment”

“In a Program or Activity”

- Davis: Any location, events, or circumstance over which the recipient exhibits substantial control over both the alleged harasser and the “context” in which the harassment occurred.
- Regulations now specify “in the United States.”

Actual Knowledge

- Final Rule adopts standard from Supreme Court case law.
 - Means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school.
 - Constructive notice is not sufficient.
 - BUT note – any employee!
- “Consent” – does not compel a specific definition.

Deliberate Indifference

- Old OCR Guidance – The school must take immediate action to eliminate the sexual harassment or sexual violence, prevent its reoccurrence, and address its effects.
- Final Rule – Failure to respond reasonably in light of known circumstances.

Complaint & Investigation Procedure

DEFINITIONS

Complainant → an individual who is alleged to be the victim of conduct that could constitute sexual harassment

Respondent → an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment

Complaint & Investigation Procedure

DEFINITIONS

Formal Complaint → Document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the district investigate the allegation of sexual harassment

- Can be submitted in person, by mail, or electronically.

Signature can be physical or digital.

- Title IX Coordinator does not become a “Complainant” if he/she signs the Formal Complaint

Complaint & Investigation Procedure

DEFINITIONS

Formal Complaint → Document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the district investigate the allegation of sexual harassment

- Complainant must be participating in or attempting to participate in the educational program or activity of the institution in order to file a Formal Complaint
- A Complainant is not required to sign a Formal Complaint
 - District will have to decide if Title Coordinator will sign a Formal Complaint
 - Still provide supportive measures



Initial Response

“Supportive measures”

- Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.
- Designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment, or deter sexual harassment.
- Must be kept confidential to the extent possible.



Initial Response

“Supportive measures”

- Examples can include:
 - Counseling
 - Course Modifications
 - Schedule changes
 - Increased monitoring or supervision
 - No contact orders
- A measure that completely removes a student from an activity would likely be considered punitive.
- Exception – Emergency removals and administrative leave for employees.

Initial Response

Emergency Removal

- Need to perform analysis of safety and risk on a case by case basis.
- Establish it is necessary to protect a student or another person from immediate threat to physical health or safety.
- Must give notice to the student and an opportunity for the student to challenge.
- Must consider other protections provided to the student, such as IEP and/or 504 Plan, which could take precedence.

Additional Jurisdictional Requirements

A formal complaint must be dismissed if:

- Conduct alleged would not constitute sexual harassment as defined in the regulations
- Conduct did not occur in the education program or activity
- Conduct did not occur against a person in the United States

Could still fall under anti-harassment policy, staff conduct policy, or student code of conduct

Grievance Procedure – Basic Principles

- Must treat parties equitably by providing remedies to a complainant after a determination of responsibility against a respondent has been made and following grievance process before imposing any disciplinary sanctions, or other actions that are not supportive measures, against the respondent
- Requires an objective evaluation of all available evidence, including both inculpatory and exculpatory, and prohibits credibility determinations based on a party's status as a complainant, respondent or witness
- Any person designated as Title IX Coordinator, investigator, or decisionmaker must have undergone training and not have a conflict of interest

Grievance Procedure – Basic Principles

- Include a presumption that the respondent is not responsible for the alleged conduct until a determination has been made at the conclusion of the grievance process
- Describe or list the possible disciplinary outcomes and remedies that may be implemented following a determination of responsibility
- State whether the district uses a preponderance of evidence or clear and convincing evidence standard to determine responsibility

Grievance Procedure – Basic Principles

- Include procedures and permissible reasons for appeal
- Describe the range of supportive measures available
- Not require, allow, or use evidence or questions that constitute or seek legally privileged information, unless privilege is waived

Grievance Procedure - Notice

- Must contain sufficient detail of the who, what, where and when of the allegations
- Must inform of presumption of non-responsibility, right to advisor, right to review evidence, and prohibition of making false statements
- Must amend if investigation includes new allegations
- Must also provide written notice of all hearings, interviews, and meetings with sufficient time to prepare
- Must provide to known parties “upon receipt of written complaint”
- Must allow respondent sufficient time to prepare a response before any initial interview.

Grievance Procedure - Investigation

- Must ensure the burden of proof and of gathering evidence is on the District, not the parties
- Must provide an equal opportunity for the parties to present witnesses and evidence
- Must not restrict either party's ability to discuss the allegations or gather and present evidence
- Must provide the parties with the same opportunities to have other present during interviews or other related proceedings, including an advisor who may but is not required to be an attorney

Grievance Procedure - Investigation

- Provide, to a party who is invited or expected to attend, written notice of the date, time, participants, purpose and location of any investigative interview, hearing, or other meeting with enough time to allow the party to prepare to participate

Grievance Procedure - Investigation

- Provide both parties and their advisors, if any, an equal opportunity to review all evidence that is directly related to the allegations in the formal complaint, including evidence on which the district does not intend to rely and any exculpatory or inculpatory evidence from any source; such evidence must be provided prior to the completion of the final investigation report and in time to give the parties at least 10 days to prepare a written response

Grievance Procedure - Investigation

- Prepare a written investigation report that fairly summarizes the relevant evidence and provide the report to the parties and their advisors, if any, for their review and written response, at least 10 days before a hearing* or other determination of responsibility

Grievance Procedure - Hearing

- A live hearing is NOT required for K-12 schools
- District is required to provide each party the opportunity, after the completion of the investigative report, to submit written, relevant questions that the party wants asked of another party or witness, provide each party with the answers, and provide for limited follow up questions

Grievance Procedure - Determination

- Decision maker cannot be the investigator or the Title IX Coordinator
- Must apply the district's standard of evidence
 - Preponderance of evidence
 - Clear and convincing evidence

Grievance Procedure - Determination

- Written determination that:
 - Identifies the allegations that potentially constitute sexual harassment;
 - Describes the recipient's procedural steps taken from the receipt of the complaint to the determination;
 - Includes findings of fact supporting the determination;
 - Includes conclusions regarding application of the code of conduct to the facts;
 - Includes a statement of, and a rationale for, the result as to each allegation, including a determination of responsibility, any disciplinary sanctions, and whether remedies to restore or preserve equal access to the district's educational program or activity will be provided to the complainant; and
 - Includes procedures and permissible basis for appeals

Grievance Procedure - Appeal

- Appeals -

- Must offer ability to appeal to both parties for dismissals and final determinations when:
 - Procedural irregularity is found
 - New evidence found that was not reasonably available at the time of the initial decision
 - Conflict of interest
- May offer additional bases for appeal
- Must have a different decision maker for an appeal.

Grievance Procedure – Informal Resolution

Informal Resolutions –

- Not allowed for allegations of an employee sexually harassing a student
- Must file a formal complaint
- Parties must consent in writing to participate in an informal resolution process
- District must provide written notice disclosing the allegations and the requirements of the informal resolution process (including when the informal process precludes resuming the formal complaint process)
- At any time prior to agreeing on a resolution, either party can withdraw from the informal resolution process

Retaliation

Retaliation is specifically prohibited in Final Rule

- “For the purpose of interfering with Title IX rights” or
- “because a person has participated or refused to participate in any in a proceeding under Title IX regulations.”
- District must keep confidential the identity of a person who complains or reports sexual harassment, including parties and witnesses, except as permitted by law or to carry out the purpose of these regulations

Recordkeeping Requirements

- Records related to alleged sexual harassment must be maintained for at least 7 years.
 - Investigation records
 - Discipline/Remedies
 - Appeal records
 - Supportive measures
- Need to document for every claim:
 - Proof that response was not deliberately indifferent
 - What measures were taken to restore or preserve equal access to education
 - If no supportive measures, why that was not deliberate indifference

Next Steps

- Update policies, notices of discrimination, website, etc. ASAP
- Update job title of Title IX Coordinator
- Identify who will act as investigators, decisionmakers, and who will hear appeals
- Begin training of those individuals
- Notify staff of changes to policies and procedures
- TRAIN all employees on importance of reporting any allegations of sexual harassment to Title IX Coordinator

Questions?