

# Title IX Training

Heidi J. Alder

## **Title IX states:**

“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.”

**Legal History  
and  
Background  
on Title IX as It  
Relates to  
Sexual  
Harassment**



Cannon v.  
University of  
Chicago  
441 U.S. 677  
(1979)



Supreme court says title IX includes an implied right of action, meaning people can sue under it.

Franklin v.  
Gwinnett  
County Public  
Schools  
503 U.S. 60  
(1992)



- Sexual harassment constitutes sex discrimination under title IX
- Title IX not only provides equitable remedies to require fair treatment, it also provides for damages awards (i.e., District can be sued for money)

Gebser v. Lago  
Vista  
Independent  
School Dist.  
524 U.S. 274  
(1998)

A school is not liable for monetary damages for teacher-student sexual harassment unless a school district official who “at a minimum has authority to institute corrective measures on the district’s behalf” has actual notice of, and is deliberately indifferent to, the teacher’s misconduct.



Davis v.  
Monroe  
County Board  
of Education  
536 U.S. 629  
(1999)

A school board may be held liable in cases of *student-on-student harassment*, but only where the district is *deliberately indifferent to sexual harassment*, of which the district has *actual knowledge*, and that harassment is so *severe, pervasive*, and *objectively offensive* that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.



Department  
of Education  
The Office  
for Civil  
Rights



# OCR Guidance

- From 2001-2017, OCR issued several guidance documents regarding sexual harassment and Title IX, heavily focused on the rights of the victim and the obligation of schools to take prompt and effective steps reasonably calculated to end any harassment and prevent harassment from occurring again.
- Schools were required to engage in prompt, thorough, and impartial investigation while providing interim supportive measure to the victim, informing the victim of the progress of the investigation, and informing the victim of the outcome of the investigation.
- Victim was the focus.

# Changes to the regulations

- Responding to complaints that the Department of Education's guidance did not adequately protect the rights of those accused of sexual harassment or sexual violence, in 2017, the U.S. Department of Education Secretary Betsy DeVos rescinded the Obama-era guidelines which encouraged colleges and universities to more aggressively investigate campus sexual assaults.
- In October, 2018, DOE proposed new regulations for the first time since 1997.
- The regulations were open to public comment, and the DOE received over 124,000 responses.
- The regulations were published May 6, 2020, and made effective August 14, 2020.

# #DearBetsy

Don't release the Title IX rule during COVID-19.  
Don't release the Title IX rule during COVID-19.

- DOE published draft rule in November 2018 and opened for public comment
- DOE received over 124,000 comments
- Final rule, including commentary is 2,033 pages
- Effective date: August 14, 2020

# Overview of the new regulations

- Definition of sexual harassment has changed—it is reserved for only very serious sexual conduct
- Respondents will get written notice before first investigative interview
- Parties will be able to have a parent and/or attorney at interview (an “advisor”)
- Gag orders prohibited
- The person who investigates the allegation and the person who makes the final decision must be different people
- Both parties have extensive opportunity to respond to evidence presented against them
- Appeal must be offered

# New Definition of Sexual Harassment

## Quid Pro Quo

- When an employee conditions some benefit in exchange for unwelcome sexual conduct

## Hostile Environment

- Conduct that is so **severe**, **pervasive**, AND **objectively offensive** that
- It denies equal access to educational program

## Violence Against Woman Act Big 4

- Sexual assault
- Dating violence
- Domestic violence
- Stalking

# Quid Pro Quo

- Principal promises bad evaluation if teacher doesn't give him massage
- Teacher offers student higher grade if student kisses her
- Coach implies athlete will start if she lets him sit close and rub her legs
- \*MUST BE BY AN EMPLOYEE\*



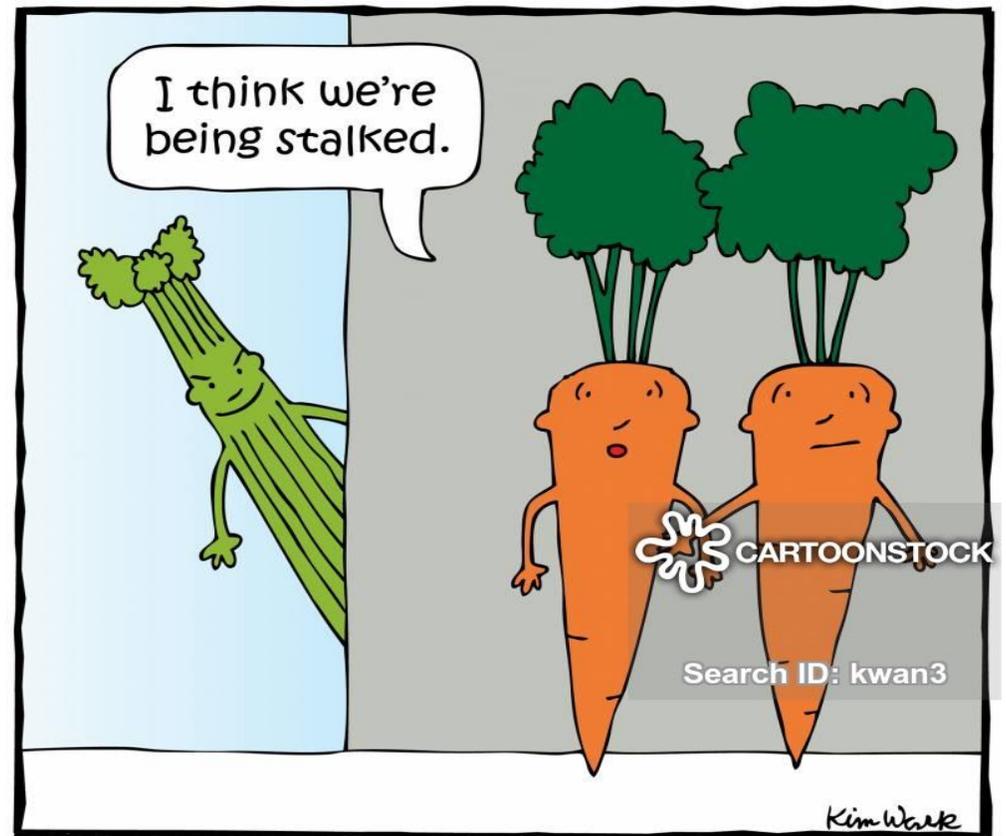
# Hostile Environment

## MUST MEET ALL FOUR ELEMENTS

- Severe = reasonable person considers it severe
  - Most physical contact will be considered severe
  - Non-physical contact associated by threats of violence
- Pervasive = pattern or widespread dissemination
- Objectively Offensive = reasonable person is offended
  - “I know it when I see it”
- Denies Access = undermines or detracts from educational experience
  - Could include dropping out of activities, grades dropping, skipping certain classes (or all classes), staying in for lunch, opting for online school

# Violence Against Women Act Big 4

- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking



# Sexual Assault Defined

“any sexual act directed against another person, without the consent of the that person including instances where the person is incapable of giving consent, such as forcible rape, forcible sodomy, sexual assault with an object, forcible fondling\*.”

- \*NOTE: Fondling requires that the touching be *for the purposes of sexual gratification*.

# Sexual Assault in Schools

- Butt slaps (“Ass Grab Game”)?
- Playing doctor?
- Crowded hallway?
- Squirrel tapping (grabbing or touching male genitalia over the pants in a joking manner)?



# Sexual Intent?

## Factors In Determining Intent:

- Age and maturity of students?
- Disability?
- Experience or understanding?
- Control or coercion?
- Attitude of both students?
- Concealment?
- Where did it happen?
- How long did it last?

# Dating Violence

“violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the Complainant. The existence of such a relationship shall be determined based on the Complainant’s statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship”

**\*For the purposes of this definition dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse. Importantly, sexual harassment under the dating violence prong does not have to be sexual in nature.**

# Stalking

“engaging in 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”

- **Must be two or more acts (on district property or during school sponsored activities), including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person’s property.**

# Changes to Policy and Procedure

## THEN

- Sexual harassment was often included in a general Non-Discrimination Policy
- Schools were expected to investigate immediately and take prompt disciplinary action
- Respondents were often suspended during the course of the investigation
- All sexual conduct, however minor, was treated as sexual harassment
- LEAs were expected to handle off-campus allegations if there was any nexus to the school

## NOW

- It is best to have a separate Sexual Harassment Policy
- Cannot begin investigative interviews right away
- Respondents cannot be suspended unless under an “emergency removal” process
- Only Sexual Harassment must be addressed under Title IX— BUT that doesn’t mean you can ignore everything else.
- Unless the alleged harassment occurred AT school or a school-sponsored event (and in the US), the LEA does not have jurisdiction to investigate.

# The Players

**Know who your players are. If you don't have them, assign them.** You'll need:

- Title IX Coordinator
- Investigator(s)
- Decision Maker(s)
- Informal Resolution Facilitator
- Appellate person

NOTE: Your Title IX Coordinator MAY also be an investigator, but you cannot have your investigator or the Title IX Coordinator be the decision-maker. The Informal Resolution Facilitator could also take on any of the other roles. The person reviewing appeals should also be independent.

This is a big ask of small LEAs with limited administrators. Work with each other to contract for services for any of these roles. The only service you cannot contract out is the Title IX Coordinator.

# Train Your Players

- The regulations require the following training:
- For Title IX Coordinator, the Investigator(s), the Decision-Maker(s) and any person who facilitates an informal resolution process:
  - training on the definition of sexual harassment
  - The scope of the LEA's education program or activity
  - How to conduct an investigation and grievance process
  - How to serve impartially, including avoiding prejudgment of the facts, conflicts of interest, and bias
- For Investigator(s):
  - Training on issues of relevance to create an investigative report that fairly summarizes relevant evidence
- For Decision-Maker(s):
  - Training on issues of relevance of questions and evidence
- All training must:
  - NOT rely on sex stereotypes and
  - Promote impartial investigations and adjudications of complaints of sexual harassment

# Train Your Staff to Report

- Previously, a school was not deemed to have “actual knowledge” of sexual harassment unless someone with authority knew.
- Now, the new regulations impute actual knowledge to an LEA when **ANY EMPLOYEE** knows.
- Make sure your employees know:
  - What to report
  - When to report it (immediately!)
  - And to whom they report
- You may train your staff on the new definition of sexual harassment, OR you may just tell your staff if you know of or even suspect any conduct that is sexual in nature occurring at our schools, report it!

# Develop a Policy

Your policy should include the following components:

- A clear statement prohibiting sexual harassment at school and at school-related
- Definitions (see previous slides)
- General provisions (see next slide)
- Grievance procedures (see next few slides)
- Training requirements



# General Provisions

(These should be part of your Title IX Policy)

- Complainants and Respondents are to be treated equitably by providing remedies to a Complainant where a determination of responsibility for Sexual Harassment has been made against the Respondent, and by following these grievance procedures before imposing any disciplinary sanction or other actions are taken against the Respondent.
- These grievance procedures require an objective evaluation of all relevant evidence, both inculpatory and exculpatory evidence. Credibility determinations may not be based on a person's status as a Complainant, Respondent, or Witness.
- All individuals designated as Title IX Coordinator, Investigator, Decision-Maker(s), or any person designated to facilitate an Informal Resolution Process shall not have a conflict of interest or bias, and shall receive training
- A Respondent is presumed not Responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.
- The District will ensure reasonably prompt timeframes for conclusion of the grievance process, including for filing and resolving appeals and informal resolution processes, HOWEVER, the process may be delayed for good cause, including, among other things, involvement of law enforcement
- The standard of evidence for all complaints of sexual harassment through this process is preponderance of the evidence.
- Both the Complainant and Respondent shall have the right to appeal the Decision-Makers' decision
- Supportive Measures will be made available to the Complainant and Respondent throughout the grievance process. Examples of Supportive Measures are listed in Section V.C of this Policy

Grievance  
Procedures  
(Also part of your  
Title IX Policy)



## Step 1. “Actual Knowledge”\*

\*Actual knowledge means ANY employee to have ANY information

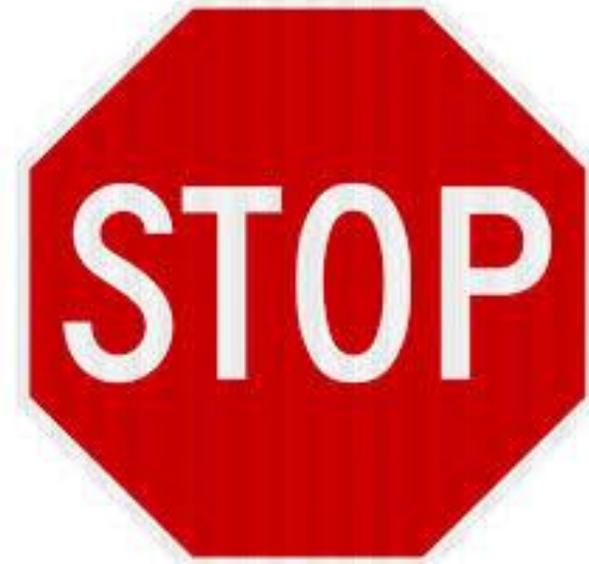
- LEA employee becomes aware of conduct that could amount to Sexual Harassment through direct report or observation.
  - Student/witness reports what they saw or heard
  - Complainant/victim reports
  - Parent calls with a complaint
  - NOTE: **ANY** employee who becomes aware of conduct that **COULD** amount to Sexual Harassment—either through observation or a personal report—is **REQUIRED** to report to immediate supervisor who then reports to administrator.

OR

- Formal Complaint filed
  - Student or employee files a Formal Complaint with the Title IX Coordinator or principal, who then forwards it to Title IX Coordinator

**STOP  
EVERYTHING!**

Before proceeding with an investigation of any allegation of a sexual misconduct or a suspension, **STOP**, and follow the next few slides.



## Step 2. Initial Screening—Not Required, but Suggested

- Building Principal conducts screening interview with student (if student)
  - What happened?\*
  - Where did it happen?
  - Has Respondent done this before? When and where?
  - Are you in a dating relationship with the Respondent?
  - Have you reported to police or CJC?
  - Do you intend to? We may have to if you don't.
- \*This is NOT an investigative interview. You may not want to take a written statement, as it will then become evidence. This is just to determine which process we follow.
- IMPORTANT: In consultation with your SRO, determine whether to involve law enforcement

# Example of Initial Screening, Cont.

(Building Principal, in consultation with Title IX Coordinator, determine whether to report to Title IX)

1. Does the allegation involve an employee offering a benefit in exchange for a sexual favor?  
If yes → Call TIXC.  
If no → Go to next question.
2. Does the allegation involve conduct that is severe\*?  
If yes → Go on.  
If no → Go to question 6
3. Does the allegation involve conduct that is pervasive\*?  
If yes → Go on.  
If no → Go to question 6
4. Does the allegation involve conduct that is objectively offensive\*?  
If yes → Go on.  
If no → Go to question 6
5. Is the complaint being denied access to educational benefits as a result of the conduct?  
If yes → Call TIXC.  
If no → Go on to next question.
6. Is the alleged conduct sexual assault\*\*?  
If yes → Call TIXC.  
If no → Go on to next question.
7. Is the alleged conduct dating violence?  
If yes → Call TIXC.  
If no → Go on to next question.
8. Is the alleged conduct stalking?  
If yes → Call TIXC.  
If no → Go on to next question.
9. Is the alleged conduct domestic violence?  
If yes → Call TIXC.  
If no → HANDLE CONDUCT UNDER CODE OF CONDUCT POLICY. **DO NOT IGNORE!!!**

\*Severe, pervasive and objectively offensive are not clearly defined. For your purposes, if SOMEONE might think the conduct was severe or objectively offensive, report. If the conduct happened more than once or involved more than one person, report.

\*\*Sexual assault: unwanted touching with an intent to receive sexual gratification

## Steps 3. Meeting with Complainant

3. Title IX Coordinator meets with potential Complainant and explains how to file a Formal Complaint and offers supportive measures (see next slide)

## Supportive Measures May Include...

- counseling,
- extensions of deadlines or other course-related adjustments,
- modifications of work or class schedules,
- altering work arrangements for employees or student-employees,
- school safety plan,
- mutual restrictions on contact between the parties,
- changes in work locations,
- leaves of absence,
- increased security and monitoring of certain areas of the school, and
- other similar measures

Respondent should also be offered Supportive Measures once the investigation begins.

## Step 4. Formal Complaint

4. Formal Complaint is filed\*
  - a) This can be done by the Complainant OR by the Title IX Coordinator
  - b) Your LEA should determine in advance under what circumstances the Title IX Coordinator should file

\*NOTE: Unlike previously, an investigation cannot begin without a written formal complaint. Consider creating a fillable pdf Complaint Form.

## Step 5. Emergency Removal

5. Consider whether “emergency removal” for the Respondent is warranted.
  - a) Appropriate when it is determined, based on an individualized safety and risk analysis that an immediate threat to the physical health or safety of any student justifies removal.
  - b) The basis for removal must be documented.
  - c) Respondent must have an opportunity to appeal an emergency removal.

\*Earlier this month the Supreme Court denied a student’s application for a stay of an emergency removal from a high school during a Title IX investigation. The case was one of “first impression” challenging a public high school’s emergency removal of a student in reliance on the new Title IX regulations.

## Step 6. Notice of Initial Allegations

6. Send formal notice of allegations and investigation to both parties, which must include:
    - a) Complainant's specific allegations
    - b) Presumption of "no responsibility" for Respondent
    - c) Information regarding the process
    - d) Standard of evidence that will be applied
    - e) Directives not to retaliate
    - f) Information about and offer of the informal resolution process\*
- \*There is no specific requirements for the informal resolution process. Each LEA should come up with its own process. Consider using this process as often as possible in the K-12 setting, especially K-6.

## Step 7. Interviews

7. At least 2-3 days prior to the initial interview (and all subsequent interviews) with either party, send notice of interviews, including:
  - a) The date, time, and location of the meetings
  - b) The purpose of the meeting
  - c) The participants expected at the meeting
  - d) A provision that that party may bring an advisor (may be an attorney) to the meeting
  - e) provision that the party may bring documents, evidence, or other information the party would like the investigator to consider.

NOTE: Some LEAs choose to combine steps 6 and 7.

## Step 8. Ten Day Review of Evidence

8. Prior to conclusion of the investigation, the parties are entitled to see all the evidence, in hard copy or electronic format. Parties are given 10 days to respond to the evidence. This could be in the form of a draft investigative report or just the raw evidence.



## Step 9. Investigative Report

9. Investigator/s puts together an final Investigative Report (Report of Investigation) that is distributed to both parties simultaneously and also provided to decision-makers.



## Step 10. "Cross Examination Questions" (2d Ten Days)

10. Upon receipt of the investigative report, each party is offered an opportunity to "cross examine" each other or any witness through either a live hearing (NOT REQUIRED FOR K12) or written questions.
  - a) Decision-makers will screen questions before forwarding them to the party or witness.
  - b) No set time limit in the regulations to submit questions and review responses but before a final decision is made, parties must have at least 10 days for this part.

## Step 11. Final Determination

11. Decision-maker(s) will then issue a written determination, which must include:
  - a) Identification of the allegations
  - b) A description of the procedural steps taken from receipt of formal complaint through investigation (including any notifications to the parties, interviews with parties and witnesses, site visits, and methods used to gather evidence)
  - c) Findings of fact supporting the determination
  - d) Conclusions regarding the application of the Sexual Harassment Policy or any other policy that might apply
  - e) Statement of rationale for the result as to each allegation
  - f) Any recommended disciplinary sanctions
  - g) Any remedies to restore or preserve equal access to the LEA's program
  - h) Procedures for appeal

## Step 12. Appeal

12. Offer an appeal: appeal opportunities must be offered to both parties for the following:
  - Procedural irregularity that affected the outcome of the matter
  - New evidence that was not reasonably available at the time the decision was made
  - The Title IX Coordinator, the investigator(s), or decision-maker(s) had a conflict of interest or bias for or against either party

End of Process



PRACTICE  
CASES

Let's see how we do!

# Practice Case 1

- A high school student attends a party at a friend's house over the weekend.
- At the party, the student is sexually assaulted by another person who attended the party.
- The student reports the sexual assault to the local police department and to her voice coach, who is a part time Prep Specialist at the elementary in the area.
- Because she knew the police were involved, the Prep Specialist does not report to her principal.

# Case 1 Analysis

- Is the LEA responsible for knowing about the alleged assault?
- Does the LEA have Title IX jurisdiction over the sexual assault?
- Some other policy?
- What are the next steps

## Practice Case 2

- A Sophomore girl reports to coach that several girls on the volleyball team have been picking on her in the locker room, in the commons after practice, and on bus rides to away games including:
  - “snapping her bra,”
  - calling her sexually charged names like “whore and slut”
  - And posting unflattering pictures of her bending over on social media

## Case 2 Analysis

- Does the LEA have Title IX jurisdiction over the sexual assault?
- Some other policy?
- What are the next steps?

## Practice Case 3

- A male drill coach has been rumored to be holding “pool parties” at his house for some members of his drill team over the summer.
- A student tells him she can’t come over anymore because she feels uncomfortable “with the way he looks at her.”
- The student reports to an Admin that the Drill Instructor told her that if she mentioned the pool parties to anyone, she’d not get a spot on the upcoming team.

## Case 3 Analysis

- Does the LEA have Title IX jurisdiction over the sexual assault?
- Some other policy?
- What are the next steps?

## Practice Case 4

- 9<sup>th</sup> grade girl broke up with her boyfriend in October.
- The ex-boyfriend, also a 9<sup>th</sup> grader, has been exchanging sexually explicit photos of the girl with his friends for months.
- On at least two occasions, the boy follows the girl between classes and has been reported by another witness touching or attempting to touch the girl's breasts from behind as she hurried away.
- Boy has also left threatening voicemails on girl's phone about what he'll do to her if they don't get back together
- The girl's attendance and grades have been falling for some months now.
- Her dad is on the phone and is irate having just learned of the boy's alleged involvement.

## Case 4 Analysis

- Does the LEA have Title IX jurisdiction over the sexual assault?
- Some other policy?
- What are the next steps?

## Practice Case 5

- You get a call from a mom who says her daughter has been sexually harassed in English class. That's all she knows.
- When you call the daughter down to ask her what's going on, she denies anything is happening.
- She seems quieter than usual and it seems to you that she is hiding something, but she insists "everything's cool" and wants to go back to class.

## Case 5 Analysis

- Does the LEA have Title IX jurisdiction over the sexual assault?
- Some other policy?
- What are the next steps?

# Forms You're Going to Want

- Formal Complaint Form
- Notice of Allegations
- Notice of Dismissal
- Notice of Emergency Removal
- Notice of Administrative Leave
- Notice of Interview for parties/Follow-up Notice
- Cover Letter for sending evidence to parties
- Investigative Final Report (consider creating a template)
- Final Determination (consider creating a template)
- Request for Appeal Form
- Sample Letter Denying Appeal
- Sample Letter Granting Appeal
- Appeal Determination Template
- Template Documenting Supportive Measures
- Informal Resolution Information
- Informal Resolution Consent Form
- Informal Resolution Agreement

QUESTIONS?

