

The New Title IX Regulations: A 10,000 Foot Look



Tyler Coverdale and Coady Pruett

(402) 804-8000

tyler@ksbschoollaw.com
coady@ksbschoollaw.com

 /KSBschoollaw

 @TylerCoverdale1
@CoadyPruett



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Agenda

- How did we get here?
- The New Regulations
- The Personnel Required Under the New Regs



Title IX

- Prohibits discrimination “on the basis of sex” in education programs or activities that receive federal financial assistance.
 - 20 U.S.C. § 1681(a)
- Title IX applies to the entire school district.
 - 20 U.S.C. § 1687(2).



Title IX Over the Years

- Enacted in 1972
- *Franklin v. Gwinnett County Pub. Schs.* (U.S. 1992)
 - An implied private right of action for money damages could be sustained where a teacher allegedly sexually abused a student.



Title IX Over the Years

- *Gebser v. Lago Vista Indep. Sch. Dist.* (U.S. 1998)
 - Damages for sexual harassment of a student by a teacher can only be recovered where:
 - An official who has authority to institute corrective measures on the district’s behalf
 - Has actual notice of the teacher’s misconduct, and
 - Acts deliberately indifferent to such misconduct



Title IX Over the Years

- *Davis v. Monroe County Bd. of Educ.* (U.S. 1999)
 - A private damages actions may be sustained against a school board in the case of student-on-student harassment, BUT only where:
 - The District acts with deliberate indifference to known acts of harassment in its programs or activities; AND
 - The harassment is so severe, pervasive, AND objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.



Title IX Over the Years

- Administrative Guidance
 - 2001: Clinton Administration OCR Regulations
 - 2001-02: Bush Administration
 - 2011: Obama Administration on-campus sex assault DCLs and OCR enforcement
 - 2016: Obama Administration DCL on transgender student rights



The New Regulations

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“Our Legal Department has seen substantial growth over the last quarter, producing 21% more mumbo and 17% more jumbo.”



The New Regulations

- Effective August 14, 2020
 - Still no sign of invalidation in court
 - Focus on schools' response to allegations of sexual harassment
- Provide specific procedures and require specific personnel
 - BUT Not all alleged Title IX violations are subject to new procedures



The Players

■ 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



The Players

- Title IX Coordinator
 - Must designate a Title IX Coordinator
 - Must be an employee
 - Must notify . . . The World
- Investigator
- Decision-Maker
- Appellate Decision-Maker
- Informal Mediator



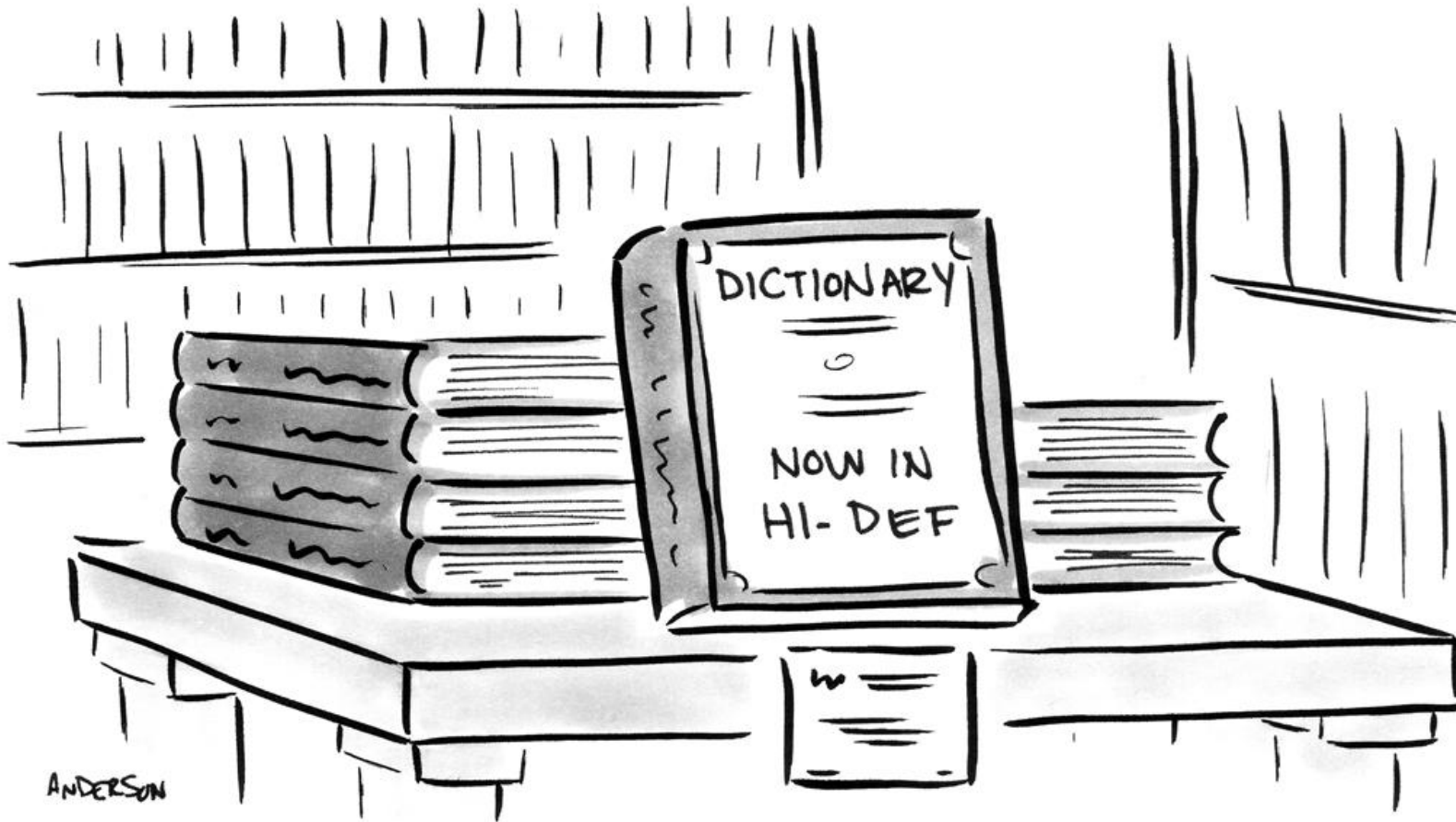
The Players

- Title IX Coordinator and Investigator **may be** the same person
- Title IX Coordinator or Investigator **cannot** be the Decision-Maker, Mediator, Appellate Decision-Maker
- Decision-Maker, Mediator, and/or Appellate Decision-Maker **cannot** be the same person



The Definitions

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Actual Knowledge Change

- Notice of **sexual harassment** or allegations of **sexual harassment** to:
 - Title IX Coordinator
 - Any official of the respondent who has authority to institute corrective measures
 - **Any employee**



Actual Knowledge

- **Actual knowledge** will not be imputed to the district *based solely* on vicarious liability or constructive notice.
- No **Actual Knowledge** when the only district employee with **actual knowledge** is the **respondent**



Formal Complaint

- A 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**



Formal Complaint

- At the time of filing, a **complainant** must be participating in or attempting to participate in the school's education program or activity
- May be filed with the Title IX Coordinator in person, by mail, by email, and "by any additional method designated" by the school



Formal Complaint

- A Title IX Coordinator who signs the **complaint** IS NOT a **complainant** or a party



Sexual Harassment

- “Quid Pro Quo” – school employee conditioning the provision of a school aid, benefit, or service on an individual’s participation in unwelcome sexual conduct
- 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 (*Gebser/Davis*)



Sexual Harassment

- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking



Responses Under the New Regulations

- Three Categories of Complaints/Allegations
 - Sex discrimination NOT involving sexual harassment
 - Sex harassment WITHOUT formal complaint
 - Sex harassment WITH formal complaint



General Response to ALL Allegations of Sexual Harassment (with or without formal complaint)

- If the school has:
 - actual knowledge
 - of sexual harassment
 - in an education program or activity
 - against a person in the United States
- The school must respond
 - promptly
 - in a manner that is not deliberately indifferent.



General Response to ALL Allegations of Sexual Harassment (with or without formal complaint)

- School is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances
 - Rejects the “known or reasonably should have known” standard imposed by rescinded guidance



General Response to ALL Allegations of Sexual Harassment (with or without formal complaint)

- Includes locations, events, or circumstances over which the school exercised
 - (1) substantial control over both the respondent, AND
 - (2) the context in which the sexual harassment occurs
- Electronic or in person
- Does not say “on campus” or “off campus”



General Response to ALL Allegations of Sexual Harassment (with or without formal complaint)

- Equitable Treatment
 - Supportive Measures
 - Follow Grievance Process that complies with procedural requirements BEFORE imposition of ANY disciplinary sanction
 - At least ten days for parties to review investigator's evidence and to submit written responses, followed by at least ten days before decision maker can issue written decision
- Title IX Coordinator communication



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**
- Offered before or after the filing of a **formal complaint** or where no **formal complaint** has been filed.



Supportive Measures

- Designed to restore or preserve equal access to the school's education program or activity without unreasonably burdening the other party
- Includes measures designed to protect the safety of all parties or the school's educational environment or deter sexual harassment.



Supportive Measures - Examples

- Counseling
- Extensions of deadlines or other course-related adjustments
- Modifications of work or class schedules
- Campus escort services
- Mutual restrictions on contact between the parties



Supportive Measures - Examples

- Changes in work or housing locations
- Leaves of absence
- Increased security and monitoring of certain areas of the campus
- Other similar measures.



General Response to ALL Allegations of Sexual Harassment (with or without formal complaint)

- **Emergency Removal**
 - individualized safety and risk analysis
 - an immediate threat to the physical health or safety of anyone
 - notice and an opportunity to challenge the decision immediately following the removal

- **Administrative Leave**



Response to Formal Complaint of Sexual Harassment

- Very specific procedures
- Tasks for Title IX Coordinator
- Investigation

- Determination of Responsibility (or not) by Decision-Maker
- Appeal
- Informal Resolution



Response to Formal Complaint of Sexual Harassment

- Equitable Treatment
- Presumption of Non-Responsibility
- All Members of Title IX Team are TRAINED*
and do not have a conflict of interest or bias



Response to Formal Complaint of Sexual Harassment

- Title IX Coordinator
 - More Notices...
 - Grievance Process
 - Allegations
 - Presumptions
 - Consider dismissal?



Response to Formal Complaint of Sexual Harassment

- School **must** dismiss the complaint if the allegations:
 - Would not constitute sexual harassment even if proved
 - Did not occur in the school's education program or activity
 - Did not occur against a person in the United States



Response to Formal Complaint of Sexual Harassment

- School **may** dismiss if
 - Complainant requests (in writing to TixC) to withdraw the formal complaint;
 - Respondent is no longer enrolled or employed by the district
 - Specific circumstances prevent school from gathering evidence sufficient to reach a determination



Response to Formal Complaint of Sexual Harassment

■ Investigation

- Burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the school and not on the parties
- Not the complainant's job to "prosecute" the case or respondent's job to "defend" the case
- Once a formal complaint is filed, the recipient-district must gather "sufficient" evidence to reach a determination
- Must be impartial and consistent



Response to Formal Complaint of Sexual Harassment

■ Investigation

- Equal opportunity for the parties to present
 - Witnesses, including fact and expert witnesses
 - Other inculpatory and exculpatory evidence
- Written notice of all hearings, interviews, other meetings
 - Sufficient time for the party to prepare to participate
- Allow parties to inspect and review ALL evidence



Response to Formal Complaint of Sexual Harassment

■ Investigation

- Provide evidence to parties (before Investigation is complete)
- Parties have at least ten days to submit written response
- Investigator must consider written responses before completing report
- Provide report at least ten days before determination regarding responsibility—parties may respond



Response to Formal Complaint of Sexual Harassment

▪ Decision Process

- After the investigation → “Hearing”
- Live Hearings are **OPTIONAL** for K-12 schools
 - (DON’T DO THEM!)
- K-12 Schools **MUST** allow exchange of written questions
 - AFTER** Investigative Report, **BEFORE** determination of responsibility
 - Allow for additional, limited follow-up



Response to Formal Complaint of Sexual Harassment

■ Decision Process

• Written Determination

- Allegations
- Procedures / Summary of Investigation
- Findings of Fact***
- Conclusions re application of Code of Conduct to facts
- Statement of rationale for result as to each allegations (including determination of responsibility, or not)
- Process for Appeal
- Provided simultaneously to both parties



Response to Formal Complaint of Sexual Harassment

▪ Appeals

- **Must** be offered for:

- Procedural irregularity that affected the outcome of matter
- New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made that could affect the outcome of the matter
- Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter



Response to Formal Complaint of Sexual Harassment

■ Appeals

- Appellate decision-maker cannot be
 - Previous decision-maker,
 - Investigator, OR
 - Title IX Coordinator
- No bias/conflict
- Received training



Response to Formal Complaint of Sexual Harassment

■ Appeals

- Equal opportunity for parties to submit a written statement in support of or challenging outcome
- Written decision on appeal



Response to Formal Complaint of Sexual Harassment

- Informal Resolution
 - Similar Training Required
 - Can't be required
 - Only in response to formal complaint
 - May be offered at any time prior to determination of responsibility.
 - BUT can't be used to resolve allegations that an EE sexually harassed a student



Prohibition on Retaliation

- Nobody may intimidate, threaten, coerce, or discriminate against any individual:
 - To interfere with any Title IX rights
 - 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



What do schools need to do?

- Revise your Title IX Policy
- Must provide Notice of Policy
- Identify members of Title IX Team:
 - Title IX Coordinator (must be EE)
 - Investigator
 - Decision-Maker
 - Appellate Decision-Maker
 - Informal Resolution Officer (Maybe?)



What do schools need to do?

- TRAIN! TRAIN! (And, then TRAIN some more)
 - “training” appears on 189 pages of the 2,000+ page commentary
 - Specific Training for:
 - All K-12 employees
 - The Whole Title IX Team
 - Investigator-Specific
 - Decision-Maker Specific
 - Frequency

ANY
QUESTIONS
?

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