



# Title IX: It's About A Lot More than Sports

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# Agenda

- Title IX Overview
- Reporting Requirements
- Confidentiality
- Pregnancy
- Transgender
- Retaliation
- Updates

# Title IX of the Education Amendments Act of 1972



*“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 educational program or activity receiving federal financial assistance.”*

Title IX of the Education Amendments of 1972 Implementing Regulations at:  
20 U.S.C. §1681 & 34 C.F.R Part 106

# Title IX Overview



- Essentially Civil Rights legislation that specifically addresses gender in education
- Administered by U.S. Department of Education Office for Civil Rights (OCR)
- Concerns Much More than Gender Equity in Athletics

- Once a ***Responsible Employee*** has either actual or constructive notice of sexual harassment or sexual misconduct, the school's administration **must** take action.
- Who is considered a ***Responsible Employee***?

- ***A responsible employee*** includes any employee who:
  - Has the authority to take action to redress the harassment,
  - Has the duty to report harassment or other types of misconduct to appropriate officials, OR
  - Is someone a student could reasonably believe has this authority or responsibility

# Essential Compliance Elements



- The School ***MUST*** take immediate and appropriate steps to investigate what occurred.
- The School ***MUST*** take prompt and effective action to
  - Stop the harassment
  - Remedy the effects
  - Prevent the recurrence

# Scenario



On March 27<sup>th</sup>, Amy Doe, a freshmen student at a charter high school, sets up a time to meet with her History teacher, Mr. Casey, after school. Upon arriving, Mr. Casey can see that Amy is very upset and looks exhausted. Mr. Casey asks if everything is ok and Amy asks if she can close the door. Mr. Casey gets up, closes the door, sits back down and Amy blurts out,



# Scenario



“I was touched multiple times under my skirt and in my chest area last weekend at the football game by another student, a friend of a friend named Jeff.”

What should Mr. Casey do next?

# Scenario (Resolution)



Mr. Casey was approached by the student with a report; therefore, on basic level he is perceived to have the authority and/or responsibility to take action. Furthermore, Mr. Casey is a mandatory reporter, and as such, should know he has a clear duty to report to the appropriate school and legal authorities; the Principal, AP, or Dean, would alert the school's Title IX Coordinator and Mr. Casey would talk to law enforcement and the Title IX Coordinator as part of their concurrent, but independent investigations.

# Confidentiality



- Who can hold confidentiality?
  - Licensed Professional Counselors
  - Clergy
  - Medical Professionals

**Everyone else is required to report!!**

# Reporting



- Title IX Coordinator

- An individual should be designated as the Title IX Coordinator
- The designated individual should be trained through CDE and/or an organization like ATIXA (Association of Title IX Administrators)

- Rebekah Ottenbreit

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Office of Culturally and Linguistically Diverse Education

# Investigation



- Options for complainant
  - Criminal
    - Law Enforcement
    - District Attorney's Office
  - Institutional
    - Student Code of Conduct Policy
    - General Grievance Policy
  - Civil Court
- Title IX Coordinator will review what the most appropriate next steps are and put together an investigation team

# Title IX & Pregnancy



*“A recipient (of federal funds) shall not apply any rule concerning a student’s actual or potential parental, family or marital status which treats students differently on the basis of sex.”*

# Title IX & Pregnancy



- Specifically prohibits discrimination against a student based on pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery from any of these conditions.
- Illegal to exclude pregnant students from participating in any part of an educational program, including extracurricular activities.

# Title IX & Pregnancy



- School must excuse a student's absences because of pregnancy or childbirth for as long as the student's doctor deems the absences medically necessary. When a student returns to school, she must be allowed to return to the same academic and extracurricular status as before her medical leave began.



# Title IX & Pregnancy



- Any special services provided to students who have temporary medical conditions must also be provided to a pregnant student. Therefore, if a school provides special services, such as homebound instruction or tutoring, for students who miss school because of a temporary medical condition, they must do the same for a student who misses school due to pregnancy or child birth.

# Title IX & Transgender



- Although the 2016 Dear Colleague Letters addressing transgender students were rescinded by the current administration, the impacts for Title IX are negligible. The rationale for rescinding cited legal enforceability and further deferred to the states for enforcement. The guidance from DOJ and DOE both stated a commitment to protect LGBTQ students from harassment and discrimination. Colorado law specifically protects transgender students beyond the guidance of the rescinded Dear Colleague letters as well.

# Retaliation



- Unlawful for the school to retaliate against someone for bringing a complaint forward or participating in an investigation.
- Unlawful for respondent to retaliate against complainant or witnesses for bringing complaint forward or participating in an investigation.
- Easier to prove retaliation in many cases.

# Interim Summary



- If you have knowledge of sexual harassment or sexual assault, you must report.
- The school has obligation to investigate.
- The school will take any and all appropriate actions to
  - Stop the harassment
  - Remedy the effects
  - Prevent recurrence

# Interim Summary



- Schools are obligated to investigate reports that allege Title IX violations
- Pregnant students are in a specialized circumstance and as such entitled to special Title IX protections
- Although the Dear Colleague letters were rescinded Title IX still applies to LBGTQ
- All parties involved in a report and investigation are covered by federal protections from retaliation

# Title IX Update

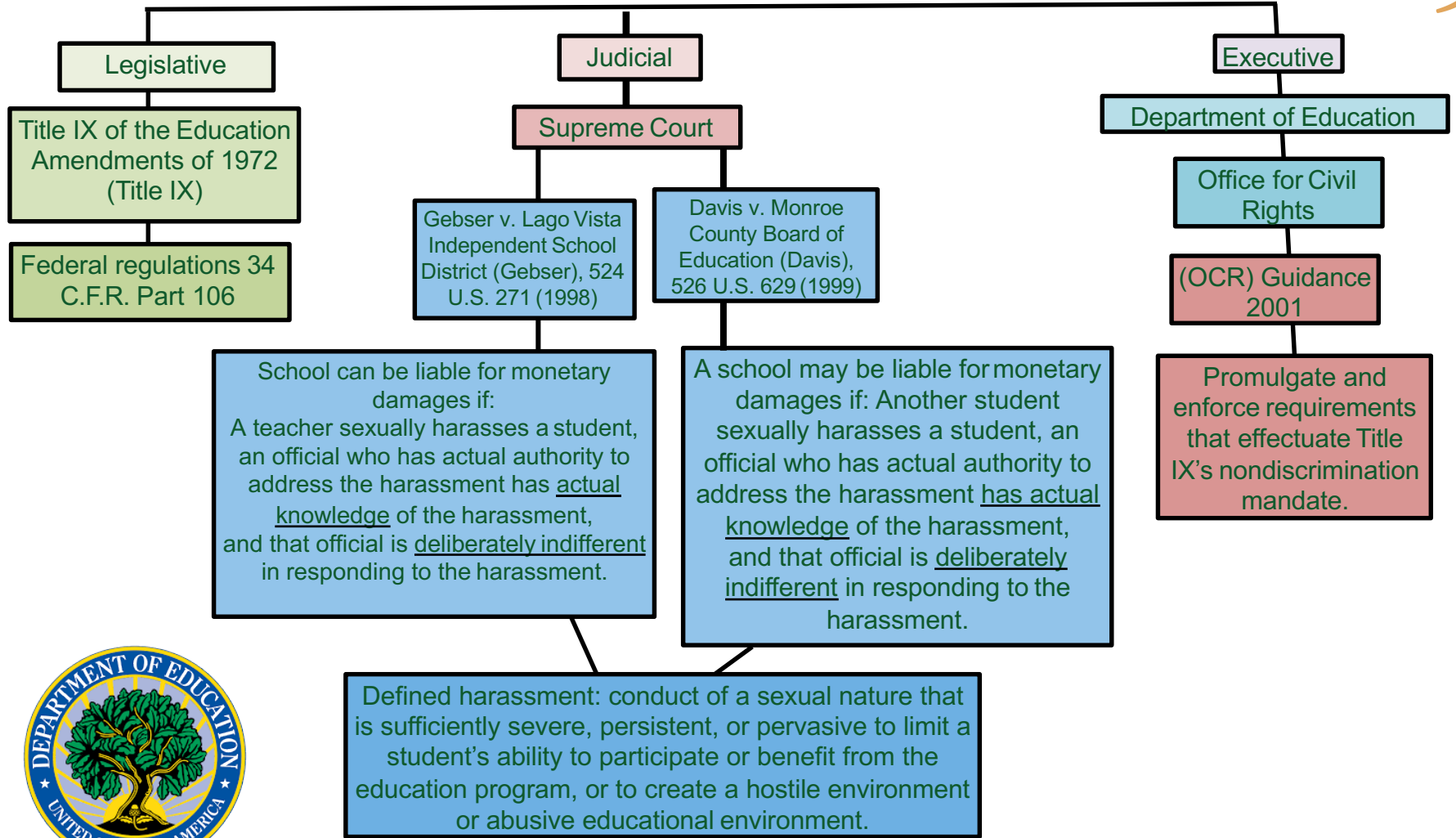


- On May 6, 2020, the United States Department of Education issued final Title IX regulations. All 2,033 pages of the new regulations went into effect on August 14, 2020, and have an impact on a number of policy documents that address sexual harassment and sex-based discrimination.
- As such, most districts need to update relevant policies and procedures impacted by the rule changes. New regulations specifically addresses Title IX investigation procedures.
- Also, training materials are required to be posted to a K-12 district's [website](#).

# New Title IX Regulations District 49

- Released May 6, 2020
- Implementation Deadline of August 14, 2020
- New Definitions of “Sexual Harassment”
- Many new mandatory due process procedural requirements
- Emphasis on neutrality, presumption of innocence
- Division of roles among Title IX Team
- Allows the informal resolution processes
- Already facing litigation

# The Law





# Role of OCR & Title IX



- The Office for Civil Rights (OCR) is responsible for establishing the compliance standards to be applied in investigations and enforcement of Title IX regarding sexual harassment.
- OCR requires that once a school has notice of possible sexual harassment of a student, the school should take immediate and appropriate steps to:
  1. investigate what occurred; and
  2. take prompt and effective action to end the harassment;
  3. remedy the effects; and
  4. prevent it from occurring again.

# Regulatory Standards

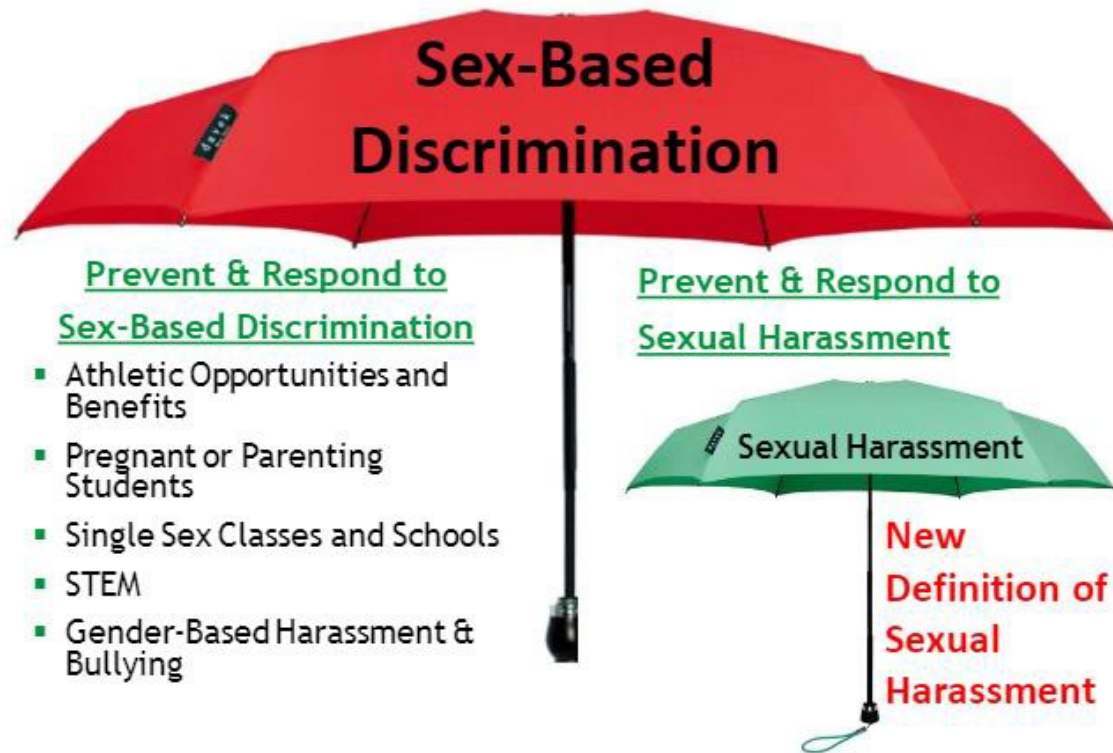


- If the district has notice of sexual misconduct, these four steps are the school's responsibility whether or not the student who was harassed makes a complaint or otherwise asks a school to take action
- OCR acknowledges that there may be circumstances where the complainant requests confidentiality or refuses to participate, thus, the school's ability to take action may be limited...however the school is still required to take all reasonable steps to investigate and respond

# Title IX and New Regulations



## Title IX Interpretation through Rule & Guidance



# Definition of Sexual Harassment

## New Definition of Sexual Harassment



1. **Quid pro quo** by an employee **OR**
2. **Davis Court**: unwelcome conduct that a **reasonable person** would determine is “**so severe, pervasive and objectively offensive**” that it effectively **denies** a person **equal access to education** **OR**
3. **Sexual assault as defined in the Clery Act**, as amended by the Violence Against Women Act, a **single instance of:**
  - **dating violence**
  - **domestic violence**
  - **stalking**



# Who May File a Complaint?



## Who is covered?

- The complainant **MUST** be a current student, someone who is attempting to enroll, or the Title IX Coordinator
  - If the respondent is no longer enrolled in the school, the school/district may end its investigation
  - If the respondent is no longer an employee of the school/district, the school/district may end its investigation
- If the complainant withdraws the complaint, the school may end its investigation
  - The Title IX Coordinator can continue the investigation if the complaint is severe, and if it makes sense to do so
    - Ex: you have multiple complaints against the same student
    - Ex: the complainant withdrew the complaint out of fear



# Notice



- “Actual Knowledge” under the Regs is defined as:
  - The Complainant notifying the TIX Coordinator; or
  - Any staff learning of the harassment in K-12
  - The Complainant notifies an official with authority
  - Complainant reports to school/campus police or security official (SRO)
- What if institution receives notice in some other way?
  - Other types of liability may still exist for failure to act with constructive notice (e.g. tort)

# When do you Investigate?



- Upon receipt of a formal, written, signed complaint
- When the Coordinator deems an investigation is warranted (and signs the formal written complaint)
- Rumors, gossip, social media, etc. can be noticed
- Under the OCR Regs - Investigating is discretionary
- Once a formal complaint is filed, duty to investigate is absolute
- At a minimum, an initial assessment (formerly preliminary inquiry) must be completed



# 2020 Regs: Report v. Complaint



- Distinguish between a “report” and a “formal complaint”
- Upon receiving a “report” (either from a would-be Complainant or a third party):
  - Reach out and provide support
  - Consider mandatory reporting obligations
  - Provide supportive and interim measures to the person alleged to have experienced the harassment. May also offer to would-be Respondent
  - Explain process to make a formal complaint
  - Must be in writing and signed by the Complainant but can be made in any format (on paper or electronic) and made at any time
  - Also explain option to report to law enforcement (VAWA requirement)
- Upon receiving a “formal complaint”
  - Conduct initial assessment to determine jurisdiction
  - Triggers obligation to follow “grievance process”, including
  - investigation and hearing



# Analyzing a Complaint



Need to proceed if any of the following are present

- **PPTVWM**
  - Pattern
  - Predation
  - Threat
  - Violence/Weapon
  - Minors (will always be reported to proper authorities)

# When does Title IX Apply?

- Emphasizes the Davis standard
  - Control over the harasser and the context of harassment
  - “education program or activity” means
    - Locations, events, or circumstances under substantial control
    - Any building owned or controlled by an officially recognized student organization
- Regulations specify “harassment...against a person in the United States”
  - Off campus/out of school conduct, study abroad programs, or school-sponsored international trips – “nothing in the proposed regulations would prevent...”

# When does Title IX Apply?

- The definition of sexual harassment arguably covers the in-program effects of out-of-program misconduct (though not the misconduct itself)
- At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed
  - OCR adopts in the discussion a fairly broad definition of what could constitute “attempting to participate”



# When does Title IX Apply?

Individuals who may be “participating or attempting to participate:”

- Students – In-school/On-campus & online/distance
- Dual Enrollment Students
- Faculty
- Staff
- Alumni
- Prospective Students or Staff (as either Complainant or Respondent)

# When does Title IX Apply?

If Respondent is not affiliated in the institution, the institution lacks authority to take disciplinary action

- Employee of an outside company (e.g. vendor, construction worker, etc)
- Guest or invitee
- Prospective Student
- Former Student
- Former Employee
- Student from another institution

# When does Title IX Apply?

- Examples where institution lacks disciplinary authority:
  - Student is sexually harassed by a student from another institution
  - A student withdraws, or an employee resigns in the midst of an investigation
- An institution must still:
  - Provide support and resources to the Complainant and the community
  - Determine if there are patterns or institutional variables that contributed to the alleged incident
  - Take what action it can (e.g. trespass the person)

# When does Title IX Apply?

## Subject Matter

- Sex/gender-based
  - Stalking
  - Hazing
  - Bullying
  - Arson
  - Vandalism
  - Theft
  - And any other policy violation that is sex/gender-based that causes a discriminatory effect
    - Retaliation
    - Gender discrimination (Equity)
    - Pregnant and parenting student

# Prompt and Equitable Procedures: Clear Timeframes



- Timeframe for each stage of the process, and process for extensions
- 60 days to resolution is a good guide; varies based on situation
- Parties are entitled to periodic status updates
- Notification of outcomes to parties permitted by FERPA, and required
- outcome and sanctions
  - Title IX rules in conflict with FERPA
  - IN WRITING!
- Entitled to status updates on appeals, too, regardless of which party appeals



# 10 Steps of an Investigation



1. Receive notice/complaint
2. Initial Assessment and Jurisdiction determination (mandatory reporting considerations)
3. Establish basis for investigation (incident, pattern, and/or culture/climate)
4. Notice of investigation to parties/Notice of formal allegation
5. Establish investigation strategy
6. Formal comprehensive investigation
  - Witness interviews
  - Evidence gathering
7. Draft investigation report
8. Confer with Title IX Coordinator to review draft and report evidence
9. Provide all evidence directly related to the allegations to parties and their advisors for inspection and review within 10 days for response
10. Complete final investigation report
  - Synthesize and analyze relevant evidence
  - Send final report to parties for review and written response at least 10 days prior to making a determination of responsibility

# Parent/Student Rights



Parent/Guardians and Students have the right under Title IX of the Education Amendments of 1972 (“Title IX”), 20 U.S.C. §1681 et seq., to:

- At any time to file a grievance at the District level with D49’s Title IX Compliance Officer.
- File a criminal complaint with your local police department or law enforcement agency.
- Protection in the form of interim measures to protect you from an accused (such as a non-contact plan).
- Remedies to address and prevent harassment based on gender/sex.
- Receive information on available resources such as counseling, advocacy, and mental health support, and other remedies to prevent harassment based on gender/sex.
- Right to an investigation at the school level and/or District level to review the evidence impartially and apply a preponderance of evidence standard when determining if a Title IX violation has occurred.
- Right to file a complaint with a federal agency charged with enforcing Title IX, the Office for Civil Rights (OCR).

# Mandatory Dismissal of Formal Complaint – OCR 2020 Regs.



The Title IX Coordinator must dismiss the complaint if:

- The conduct alleged in the formal complaint would not constitute sexual harassment as defined (in § 106.30), even if proved;
- Did not occur in the recipient's education program or activity;
- Did not occur against a person in the United States; or
- Complainant was not participating or attempting to participate in recipient's program at time of complaint

Written notice of dismissal to parties required

- Dismissal of formal complaint may be appealed

Upon dismissal, the recipient may institute action under another provision of the code of conduct or other policies

- Due process requirements for VAWA offenses in alternate process

# The Investigative Report



The investigation report is the one comprehensive document summarizing the investigation, including

- Results of interviews with parties and witnesses
- Results of interviews with experts (if any)
- Summary of other information collected, (i.e. information from police reports, including pretext calls, medical exams, video surveillance and photographs copies of text, email, and social networking messages, etc.)