



Putting Title IX into Play

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Objectives of Training

**Statistics/Update on
Cases involving Title IX**

**Standard for Legal
Liability under Title IX**

The Process

Recognizing Red Flags

Statistics and Outcomes

Peer-on-Peer Harassment: 1996 - 2019

- ▶ 48% of 7-12th grade students report experiencing sexual harassment
 - ▶ LGBTQ: 86% verbal harassment, 40% physical
- ▶ Survey of 100 cases (peer-on-peer)
 - ▶ Physical Assaults: 38
 - ▶ Sexual Assaults: 23
 - ▶ Forced Sodomy: 15
 - ▶ Rape: 9
 - ▶ Reported severe emotional distress: 12
 - ▶ Suicide: 5
 - ▶ Attempted: 12
 - ▶ Victim changed school setting: 21
 - ▶ *Staff participated: 11*

Outcomes: 1996 – April 2019

- ▶ Settlements
 - ▶ Range
 - ▶ \$4,000
 - ▶ \$5.75 million
 - ▶ Median: \$160,000
 - ▶ Average: \$563,924
- ▶ Verdicts
 - ▶ Range
 - ▶ \$27,000
 - ▶ \$28 million
 - ▶ Median: \$275,000
 - ▶ Average: \$2,286,500

Employee-on-Student Harassment: 2015

- ▶ Arrests: 500
 - ▶ >50% placed on admin leave or resigned immediately following arrest
- ▶ 7% of students in 8th – 11th grade report physical sexual contact with school employee
 - ▶ 3.5 million
- ▶ Total is 10% when less-than-physical contact is factored in
 - ▶ 4.5 million
- ▶ Average ages
 - ▶ Perpetrator: 36; Victim: 15
- ▶ Washington Post (2015): 35% of accused/convicted used social media to access victim
 - ▶ Technology played an important role in 3 out of 4 cases
- ▶ Colleagues often *thought* there might be “something going on”
 - ▶ Fear of reporting in case suspicions are wrong
 - ▶ Awareness report could “ruin a person’s life”

Standards of Liability

Title IX: The Law

- ▶ 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

Judicial Standard of Liability: Peer-on-Peer Harassment

- ▶ School Board liability for damages under Title IX for **student-on-student sexual harassment** if:
 1. The *Gebser* standards of notice and deliberate indifference are satisfied
 2. The school has substantial control over (a) the context in which the harassment occurred and (b) the harasser; and
 3. The conduct is “**sexual harassment**,” which is conduct (a) “so severe, pervasive, and objectively offensive” (b) that it “effectively denies equal access to an institution’s resources or opportunities.” [Hostile Educational Environment standard]

U.S. Department of Education Title IX Regulations

- ▶ Adopted May 6, 2020
- ▶ Explicit recognition for the first time in *regulations* that sexual harassment, including sexual assault, is sex discrimination
 - ▶ Case law has long recognized this interpretation, and enforced Title IX accordingly
 - ▶ *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999)
peer-on-peer
 - ▶ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998)
employee-on-student

New Regulations: Definition of Sexual Harassment

- ▶ Unwelcome conduct
- ▶ Determined by a reasonable person (objective standard)
- ▶ To be so severe, pervasive, and objectively offensive that it effectively denies a person's equal access to the recipient's education program or activity
 - ▶ This definition of sexual harassment tracks the *Davis* case and its definition of sexual harassment

New Regulations

Forms of Sexual Harassment

- ▶ *quid pro quo* (typically would be employee-on-student; not always)
- ▶ Hostile educational environment (new definition)
- ▶ Violence Against Women's Act - four categories:
 - ▶ Sexual Assault - 20 U.S.C. 1092(f)(6)(A)(v)
 - ▶ Domestic Violence - 34 U.S.C. 12291(a)(8)
 - ▶ Dating Violence – 34 U.S.C. 12291 (a)(10)
 - ▶ Stalking – 34 U.S.C. 12291(a)(30)

Factors Affecting Sexual Harassment Definition

- ▶ “Severe, pervasive, and objectively offensive” misconduct is harder to establish the younger the children involved. *Gabrielle v. Park Forest-Chicago Heights, Illinois Sch. Dist.*, 163 F.3d 817 (7th Cir. 2003)
- ▶ In determining if a victim has been denied access to an educational opportunity or benefit, the ability of the student to receive an education, as reflected in the student’s grades, is a factor. *Hawkins v. Sarasota County Sch. Bd.*, 322 F.3d 1279 (11th Cir. 2003)

Deliberate Indifference: Difficult to Prove

- ▶ Davis standard: A recipient is deliberately indifferent only “where its response to the harassment or lack thereof is **clearly unreasonable in light of the known circumstances**”
- ▶ Courts will focus on issues: (1) Did the school investigate properly? (2) If so, did the school implement measures to remediate the harassment? (3) If so, was the remediation effective?
- ▶ It is not necessary to conduct flawless investigations or perfect solutions. *Fitzgerald v. Barnstable Sch. Committee*, 504 F.3d 165 (1st Cir. 2007).

Deliberate Indifference: Failure to Follow Policies, Regulations

- ▶ The failure to follow DOE regulations does not typically establish deliberate indifference. See *Gebser*.
- ▶ The failure to follow Division policies does not, in itself, establish deliberate indifference. See *Sanchez v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156 (5th Cir. 2011)
- ▶ The failure to follow OCR “Dear Colleague Letters” or other OCR guidance documents does not, standing alone, constitute deliberate indifference.

Overall Concepts

- ▶ Every employee has an obligation to report suspected sexual misconduct/harassment
- ▶ Division has an obligation to respond in a way that is
 - ▶ Not deliberately indifferent
 - ▶ Is reasonable under the circumstances
- ▶ Student has private right of action for failure to respond appropriately
 - ▶ Can recover monetary damages if the harassment/misconduct was so severe, pervasive, and objectively offensive that it effectively denies a person's equal access to the recipient's education program or activity

Case Law Scenario

Rasnick v. Dickenson County Sch. Bd. (allegations: 2003)

- ▶ Elementary (computer lab) T
 - ▶ Played with student's hair
 - ▶ sent sexually explicit emails
- ▶ *Prior complaints about the teacher*
 - ▶ 1998-99: parent of 7th grade student
 - ▶ Put hand on back/shoulder
 - ▶ Touched hair
 - ▶ Told student "how pretty she was," she "ought to be a model"
 - ▶ "put his privates in her hand" (when in third grade)

Rasnick v. Dickenson County Sch. Bd. (allegations: 2003) Continued.

- ▶ 1999-2000: parent of another student
 - ▶ Patted student on behind
 - ▶ Leaned over student at computer; looked down shirt; “nice breasts”
- ▶ Prior P:
 - ▶ Talked with another T about allegations: she did not believe true
 - ▶ Talked with Supt: “Stay away from that; if it needs handling, I will handle; could be explosive”

Rasnick v. Dickenson County Sch. Bd. (Lesson)

- ▶ Failure to investigate prior complaints, even by different admin, concerning to the judge
 - ▶ Even after change of leadership, liability can arise from overall facts and circumstances
- ▶ Superintendent's "forbidding" admins from taking action *extremely concerning*
- ▶ Suit was dismissed ... But judge was expressly chagrined about having to dismiss it (would be different outcome today)

Title IX Process

TIXC Intake STEPS

34 C.F.R. 106.44

1. Division receives report
2. Would these facts violate Title IX?
Yes? Title IX process
No? Other process
3. Meet with complainant
 - supportive measures
 - formal process
4. Respondent: supportive measures
5. Emergency removal?
6. Formal Process iff
 - Complainant files
 - TIXC believes would violate TIX
7. Informal Resolution vs. Investigate Complaint
 - If investigating, detailed written notice to parties
 - if investigating, discipline for the sexual misconduct must wait until TIX process completed
8. Is external reporting mandated?

Complaint

Must Retain

- **Harassment**
 - unwelcome
 - Severe
 - Pervasive (AND)
 - Objectively offensive
 - Effective **denial** of access
- **Quid pro quo**
- **Sexual assault, dating violence, domestic violence, stalking**



regulatory definition of sexual harassment

34 C.F.R. 106.30(a)

Must Dismiss*

- Not sexual harassment even if true
- Did not occur in school program or activity
- Did not occur in US

* Send written notice to all parties of dismissal and reasons; can address conduct under other policies

34 C.F.R. 106.45(b)(3)

May Dismiss*

- Complainant requests withdrawal**
- Respondent's employment or enrollment ends **
- Circumstances prevent gathering sufficient evidence to reach determination (passage of time, lack of cooperation of complainant, etc.)

** don't be too quick to dismiss for these circumstances

34 C.F.R. 106.45(b)(3)

Scope of Division's Educational Program or Activity

34 C.F.R. 106.44(a)

Any location, event, circumstance over which division exhibits substantial control over both alleged harasser(s) and context in which harassment occurred

- *Can include off-campus, "non-school" conduct* ◦

Who Does What?

Title IX
Coordinator

Investigator

Informal
Resolution
Processor

Decision Maker

Appeal Decision
Maker

Notice of Complaint

34 C.F.R. 106.45(b)(2)

1. Notice of grievance process (and any available informal resolution process)
2. Provide sufficient detail of allegations to allow respondent(s) to prepare response
 - names of known parties
 - conduct alleged
 - date/location
3. State respondent presumed “not responsible” and determination is at end
4. Notice of right to advisor
5. Notice of right to inspect and review evidence
6. Notice of any code of conduct regarding false statements
7. Explain (or refer to policies for) range of possible discipline/remedies; preponderance standard; process for appeal; and available supportive measures
 - supplement if “open” case as to new allegations

Investigation

Steps

34 C.F.R. 106.45(b)(5)

1. Written notice to parties before interviews
 - Sufficient notice/time to prepare
2. Equal access to parties to present evidence
3. Allow advisors to parties at all meetings
 - Cannot prevent discussion outside of process
4. Do not use health record evidence without consent
5. Make all evidence available upon request during process
 - redact names?
6. *Send evidence* to all parties at least 10 days before finishing report
 - Including evidence not being relied upon
7. Factor comments submitted by parties into report
8. Written report, sent to all parties at least 10 days before sending to decision maker
 - within 35 days after complaint filed (VSBA)
9. “reasonably prompt”
10. Maintain confidentiality

Investigation Best Practices

1. Read policies, etc (*this slide show!*) before you start each time, and PLAN (timeline!)
2. Explain why you are interviewing the individual in general terms
 - maintain confidentiality if possible
 - inform *respondent* presumed not responsible, no decision has been made
3. Question all with open-ended, who, what, when, where, how Qs
 - (1) Complainant(s); (2) witnesses; (3) respondent(s)
4. Inquire along a timeline, in chronological order
5. Ask “single issue,” nonleading questions (and “anything else you’d like to add?”)
6. Obtain other witness contacts and any documentary evidence available from each
 - written or recorded statements?
7. Explain retaliation prohibition
 - can no longer requires *parties* to “keep confidential,” but can ask Ws to
8. Compare all statements and evidence
9. Gather and include evidence that weighs on: consistency, accuracy, memory, credibility (or lack thereof), implausibility, inconsistency, unreliability, ulterior motive, lack of cooperation

Written Report

- ▶ “Summarize” relevant evidence – **please be specific**
 - ▶ Omit truly insignificant, irrelevant* details
 - ▶ Include both inculpatory and exculpatory evidence
 - ▶ Provide enough factual information (if available) to allow decision maker to consider: consistency, accuracy, memory, credibility (or lack thereof), implausibility, inconsistency, unreliability, ulterior motive
- ▶ Note credibility evidence
 - ▶ Cannot base credibility determination on the speaker’s status (C, W, R)
- ▶ Append and refer to documentary evidence
- ▶ Indicate consideration of comments submitted by parties in response to evidence
- ▶ Do not make findings of responsibility, just recite evidence/facts

“Rules of Evidence”

Presumption

Throughout process, respondent(s) must be presumed
“not responsible”

- do not pre-judge any fact or question ◦
- collect and review all evidence before decision ◦



Relevance

YES

- ▶ “Tends to prove or disprove a fact”
- ▶ Does this make the existence of any fact of consequence more or less likely to be true?
- ▶ Can be either inculpatory or exculpatory

NO

- ▶ Questions about complainant's prior sexual conduct, unless offered to prove (1) someone other than respondent committed alleged conduct or (2) specific incidents involving respondent, to prove consent
- ▶ Health care/treatment records
- ▶ Protected by privilege (e.g., 5th A, attorney-client)

Weighing Relevant Evidence

CREDIBILITY

**reliability of the evidence or
source:**

*Is there bias, motive, lack of
consistency?*

PERSUASIVENESS

**believability,
relative strength**

*Is this evidence believable,
plausible?*

- To be done *only after all evidence is gathered and reviewed*
- Consider only relevant evidence in totality
- Assign weight to relevant evidence based on believability, credibility
- Direct evidence is preferred to circumstantial
- Draw *necessary/objectively reasonable* inferences

Burden of Proof (and Gathering Evidence)

34 C.F.R. 106.45(b)(5)(i)

At all times:
division's

Case Law Scenario

Doe v. Russell County Sch. Bd. (allegations: 2016)

- ▶ Elementary custodian
 - ▶ Student was 9 (3d grade) when moved to the school and abuse began
 - ▶ *Convinced student's guardian to let student live with him for a year – slept in same bed/abused nightly*
- ▶ P(1) knew student lived with custodian, went on trips together
 - ▶ Did not investigate the relationship/take any action
 - ▶ Assumed the student and custodian were related
 - ▶ Required custodian to keep office door closed at all times
 - ▶ Knew custodian had other boys help gather trash
- ▶ P(2) knew custodian spent lots of time and money on student, at school and away from school
 - ▶ Knew CPS complaint was filed during student's 4th grade year
 - ▶ Participated in CPS interviews; custodian and student denied all
 - ▶ Told custodian if student was at school after instructional hours, should be supervised in after-school program
 - ▶ *Took no separate/independent action*

Doe v. Russell County Sch. Bd. (Allegations: 2016)

- ▶ Ts knew *but did not report*
 - ▶ Custodian's wife jealous of student; divorcing custodian; reported to CPS
 - ▶ Custodian always had hands on student
 - ▶ Custodian "obsessive, overly friendly" with student
 - ▶ Custodian touched, gave money to other male student
 - ▶ Custodian and student slept together; went on trips; rode to/from school together; spent time alone together on school property
 - ▶ Custodian and student were caught alone together (but hidden, in the dark) in a T's classroom one summer
 - ▶ Custodian was also "courting" student's younger brother
 - ▶ Custodian passed notes to student after mother regained custody and put a stop to sleepovers
 - ▶ Custodian was allowed to remove students from classes

Doe v. Russell County Sch. Bd. (Lesson)

- ▶ Even reliance on DSS' findings may not fulfill Title IX obligation
- ▶ Independent investigation *highly recommended* (alongside DSS, LE)
- ▶ Ongoing supportive measures/efforts within educational environment advisable even after complainant/respondent no longer on premises
 - ▶ Discipline for respondents *and* those with knowledge who failed to report
 - ▶ Supportive measures for complainants

Decision

Steps

34 C.F.R. 106.45(b)(6),
(b)(7)

- ▶ Review report, evidence
- ▶ Review parties' responses to report
- ▶ Provide notice that parties can submit relevant questions (and reasonable followup questions) parties want asked of any party or witness
- ▶ Oversee Q&A process
 - explain any Q excluded as irrelevant
- ▶ Written decision: determine responsibility
 - within 10 work days of report (VSBA)
- ▶ Notice of right to appeal

How to Decide

- ▶ Objective and unbiased
- ▶ Objective evaluation of evidence
- ▶ Conclusion about whether respondent is responsible for harassment prohibited by Title IX
- ▶ Exercise independent judgment
- ▶ No conflict of interest or bias
- ▶ Ultimate Question (for each allegation): is it more likely than not that the respondent engaged in (or is responsible for) the alleged conduct?

Standard: Preponderance

“more likely than not”

- Remember to begin with the presumption *not responsible*; the evidence must establish respondent “more likely than not” **is** responsible ◦

Written Determination:

- ▶ Identify allegations
- ▶ Describe procedural steps taken
- ▶ Find facts – for each fact, weigh evidence and determine whether it happened or not
 - ▶ *Consider: consistency/corroboration, accuracy, memory, credibility (or lack thereof), implausibility, inconsistency, unreliability, ulterior motive*
- ▶ Apply code of conduct to facts
- ▶ State result of each allegation and rationale
- ▶ Recommend discipline, remedies
 - ▶ Remedies designed to restore or preserve equal access to school's educational program or activity
- ▶ Notify about appeal procedure
- ▶ Provide to parties
 - ▶ Final if no appeal filed within 5 work days (VSBA policy)

Case Law Scenario

Doe v. Putney (Allegations: 2015)

- ▶ Student received texts from boy inviting her to skip class
 - Student declined but walked with him “to class”
 - SRO observed the two walking toward parking area, asked “where going”
 - Male student grabbed female and pulled into woods adjacent to school
 - Female student texted friends for help; friends reported “abduction” to SRO
 - SRO openly doubted veracity, advised admin of report
 - Neither SRO nor admin responded
 - In response to female’s parents calls of concerns, SRO stated “skipping school”

Doe v. Putney (Allegations: 2015) Continued

- ▶ Male student sexually assaulted female as these events were unfolding
 - In response to further concerns from parents, SRO and admin found students in woods
 - SRO attempted to put both in back of squad car; ultimately let female sit in front when she objected
 - Admin separated the students
 - Female reported assault to SRO; male claimed “consensual”
 - No further investigation – accepted male student at his word
 - Report affirmatively misrepresented female’s appearance as clean, not disheveled
- ▶ Woods by school was known to SRO and admins as a location students engaged in sexual misconduct
 - So many, admin had held an assembly admonishing students

Doe v. Putney (Lesson)

- ▶ SRO as agent of SB and admin had 3 reports of abduction, multiple messages/direct statements of assault
- ▶ Observed visible evidence of sexual assault
- ▶ Sufficient knowledge to invoke Title IX obligations of school division
 - Likely, deliberate indifference

Appeal

Steps

34 C.F.R. 106.45(b)(8)

1. Review timeliness of filing
 - within 5 work days of written decision (dismissal or determination) (VSBA)
2. Confirm bases for appeal are appropriate
 - procedural irregularity
 - new evidence not reasonably available during investigation
 - TIXC, investigator, decision maker bias, conflict of interest
3. Notice of appeal to both parties
4. Receive written statement(s) from parties (VSBA)
5. Review evidence, investigator report, written decision (VSBA)
6. Decision on appeal, in writing, describing result and rationale
 - within 15 calendar days of filing of appeal

Informal Resolution

Steps

1. For student-on-student cases *only*
2. If one requests, other(s) must respond (yes/no) within 3 days (VSBA)
3. Obtain voluntary, written consent
4. Provide notice of allegations, informal process “rules,” and ability to resume formal process
5. Complete with in 10 days (VSBA)
6. If resolved, document complaint and resolution, parties sign, retain copies

34 C.F.R. 106.45(b)(9)

Record Retention

Rules

34 C.F.R. 106.45(b)(10)

1. Documents relating to every complaint
 - investigation
 - determination
 - discipline imposed
 - informal resolution
 - appeal
2. Training materials *
3. Documents relating to every report (whether or not becomes complaint)
 - supportive measures (or why not)
 - basis for conclusion response was not deliberately indifferent

Questions?

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