

New Title IX Training: The Decision-Maker

Andrea L. Jolliffe
Hall Booth Smith, P.C.

Daniel R. Murphy
Daniel R. Murphy, P.C.



Where the heck are we going?

- The Title IX Decision-Maker: Who they are and what they do
- Brief Overview of Grievance Process
- Sexual Harassment-new definitions
- School program or activity-defined
- Training Hot Topics
 - Bias, Impartiality, Prejudgment &
- Your Decision: Forms and Procedures
- Appeals
- ...and much, much more!



34 C.F.R 106.45

*requires decision-makers to be
free of conflicts of interest and bias
and
trained to serve impartially without
prejudging the facts at issue*

Wait a minute, do we still have to worry about this??



Due to recent (political) events, what will happen to these regulations?

Let me check the TV....

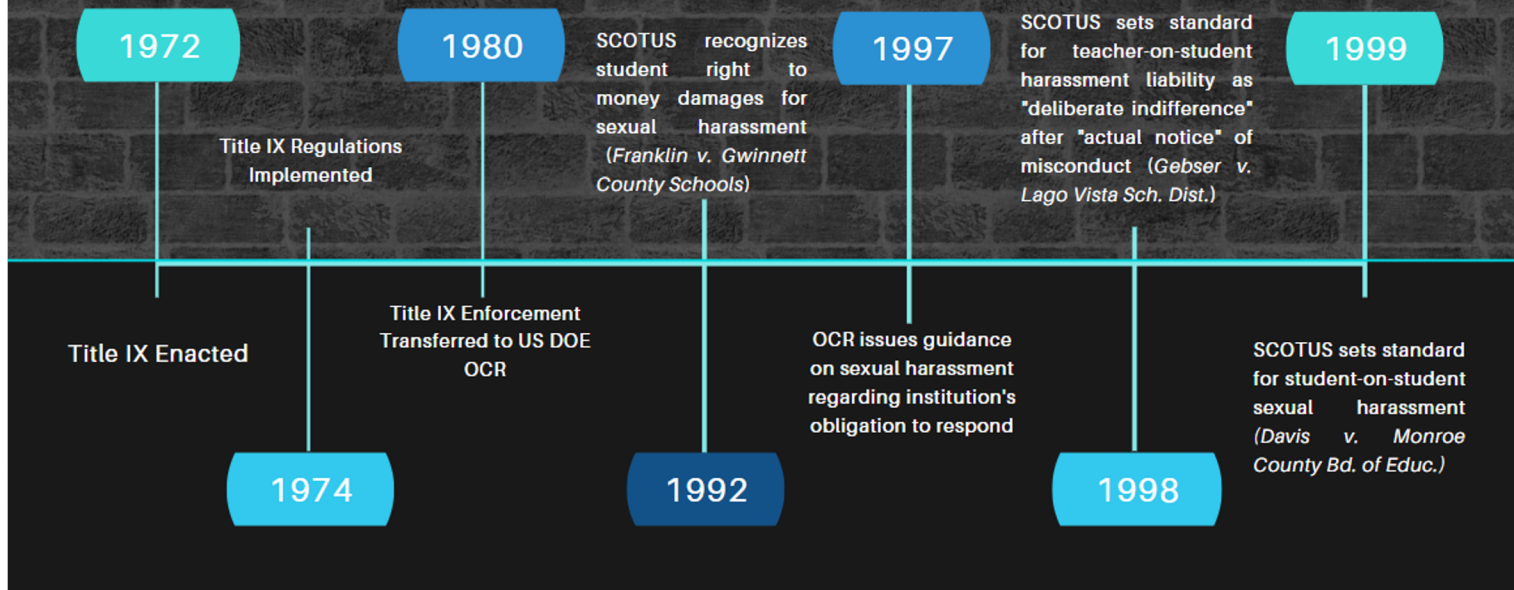
Ignore, gamble and ask for forgiveness, if necessary?

Follow these rules unless/until there are now ones??

Door number 3_____?

Title IX Timeline

A Brief History



1974

1992

1998

Constitutional Bd. of Educ.
(*Davis v. Monroe*
County Bd. of Educ.)
sets standard for student-on-student
sexual harassment



TITLE IX COORDINATOR

Coordinates compliance. 34 CFR 106.8 (a).
Responsible for effective implementation of
any remedies/supportive measures.
34 CFR 106.45 (b)(7)(iv). Cannot be decision-
maker or review any appeal.
34 C.F.R. 106.45 (b)(6)-(8).

INFORMAL RESOLUTION FACILITATOR

Offers informal resolution after formal
complaint is filed but before decision-maker
reaches a determination.
34 C.F.R. 106.45 (b)(9).



DECISION-MAKER

Cannot be the same person as the Title IX
Coordinator or the investigator(s). Facilitates
exchange of written questions after parties
receive investigative report. Explains any
decision regarding relevance of questions.
Issues a detailed, written determination.
34 C.F.R. 106.45 (b)(6)-(7).



INVESTIGATOR

Cannot be decision-maker or consider appeal.
Conducts duly noticed investigative interviews,
considers evidence provided by parties and
from other sources, provides parties equal
opportunity to inspect and review evidence and
prepares investigative report.
34 C.F.R. 106.45 (b)(5).



APPEAL

Cannot be the same person as the Title IX
Coordinator, investigator(s) or decision-
maker. Must provide parties equal
opportunity to submit a written statement and
provide a written decision on appeal.
34 C.F.R. 106.45 (b)(8).



Single-Investigator Model (RIP)



- What is (was) the single investigator model (SIM)?
- Disadvantages of SIM per the USDOE
 - Bias
 - Unfairness
 - Social pressure & false positives
- Possible advantages of SIM?
 - _____
- Panel of DM is allowed*
- Disadvantages of separate DM?
 - Staffing, costs (\$), time+, _____

Overview of Grievance Process

Federal grievance process is mandatory

USDOE-no discipline prior to completion of grievance process

Objective evaluation of all “relevant” evidence

Credibility cannot be based on party status

No conflict of interest or bias

Mandatory training requirements

Presumption that respondent is not responsible

Reasonably prompt time frames

Detailed rules for investigations

Final determination and appeal

School program or activity?

- Program or activity *includes* locations, events, or circumstances over which the recipient exercised *substantial control* over *both* the respondent and the context in which the sexual harassment occurs
- Against a person in the United States
- Is this the scope, or just a floor?
- Are online classrooms covered?
- Study abroad?
- Post-pandemic, are off-campus activities covered? Away games?

DEFINITION OF SEXUAL HARASSMENT

OLD DEFINITION

...severe, pervasive or persistent, and to interfere with or limit a student's ability to participate in or benefit from school services, activities or opportunities

Unwelcome Conduct

Determined by a reasonable person to be...

NEW DEFINITION

...so severe, pervasive, and objectively offensive that it effectively denies a person's equal access to the recipient's education program or activity.



QUID PRO QUO

Sexual harassment
is also defined to
include...

...a school employee conditioning aid, benefit
or service on an individual's participation in
unwelcome sexual conduct

Davis v. Monroe County Bd. of Educ.



STUDENT-ON-STUDENT SEXUAL HARASSMENT

School District may be liable for money damages under Title IX if:



GEBSER STANDARDS MET

The *Gebser* standards of "actual notice" and "deliberate indifference" are met.



+ SUBSTANTIAL CONTROL

The school has substantial control over the "context" in which the harassment occurs and over the alleged harasser.



DENIED EQUAL ACCESS

The conduct is "so severe, pervasive and objectively offensive" that it "effectively denie[s] equal access to an institutions resources or opportunities."



Sexual harassment is (also)...

Sexual assault, which means...

- (v) An offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.
- Forcible sex offenses
 - Rape
 - Sodomy
 - Assault w/ an object
 - Fondling
- Nonforcible
 - Incest
 - Statutory rape

Sexual Harassment: Dating violence

The term “[dating violence](#)” means violence committed by a person—

(A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and

(B) where the existence of such a relationship shall be determined based on a consideration of the following factors:

- (i) The length of the relationship.
- (ii) The type of relationship.
- (iii) The frequency of interaction between the persons involved in the relationship.





Domestic violence

- (8) The term “domestic violence” includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction.



Harassment is...Stalking

The term “stalking” means engaging in a course of conduct directed at a specific person that would cause a reasonable person to—

- (A) fear for his or her safety or the safety of others; or
- (B) suffer substantial emotional distress.

Investigations-Notice of Report

A fair summary of relevant evidence

What is relevance?

Tendency of a piece of evidence to prove/disprove a violation of Title IX

Each party 10 days to respond

Investigative report (draft) v. completed report v. final determination of responsibility



Do you want to have hearings?

Hearings are optional in the K-12 setting

High school only? > Age?

Peers?

Live-hearing, cross-examination and due process

Credibility w/ or w/o hearing?

No hearing? “plausibility” & “consistency”

Confidentiality still applies

LEA may adopt ‘rules of decorum’ IF hearings are conducted



34 C.F.R 106.45(B)(7)

*must apply the standard of evidence
designated for use in all formal complaints
of sexual harassment*



The Investigator & You:

Opportunity to submit questions

If no hearing, written, relevant questions may be asked of any party or witness

Answers provided to both parties

Limited follow-up questions and answers must also be allowed

Timing? After final report, before final determination

Relevancy in general

Relevancy of complainant's sexual predisposition or prior sexual behavior exceptions


Consent

Someone else committed the conduct

Relevancy decisions must be explained in the final determination



"OCR will not substitute its judgment for that of the recipient's decision-maker with respect to weighing of the relevant evidence at issue in a particular case."




prior
sexual history

Final Determination (by you!)

- May not be Title IX Coordinator OR investigator
- *Must be written & include...*
- *ID of alleged violations of Title IX*
- *Procedural steps taken*
- *Findings of Fact*
- *Conclusions re: Code of Conduct*
- *Statement & rational for each result*
- *Procedures for appeals*
- Becomes final after either
 - Decision on appeal, OR
 - Time to appeal expires
- Implemented by Title IX Coordinator
 - Again, not YOU!



- Dismissal mandatory if...
 - Conduct alleged is not sexual harassment per new definitions
 - Conduct not a part of a school program/activity
 - Victim not a person in the U.S.
- Dismissal discretionary when...
 - Complainant withdraws
 - Respondent no longer enrolled/employed
 - School cannot gather evidence to make final decision
 - Respondent cooperation?
- Prompt, written notice to both parties



Appeal

- Final determination or dismissal
- Grounds for appeal
 - Procedural irregularity
 - New evidence
 - Conflict of interest or bias
 - Added bases, if to both
- Different decision-maker
- Written result & rationale

- Record-keeping (7 yrs)
 - Investigations, sanctions & remedies
 - All your notes...
 - Training materials, appeals & informal resolution



Whew...so what have we learned?

- Decision-maker v. Investigator
- After you get the Investigative Report-now what?
- Hearing or no hearing?
- Your determination
 - Form and Key Elements
- Guard against conflict of interest and bias

- Compliance will be a team sport
- Role of the Decision-maker
 - _____
 - _____
 - _____
 - _____
- You are all underpaid!



Thank you so much...

...for your kind attention