



New Title IX Rules

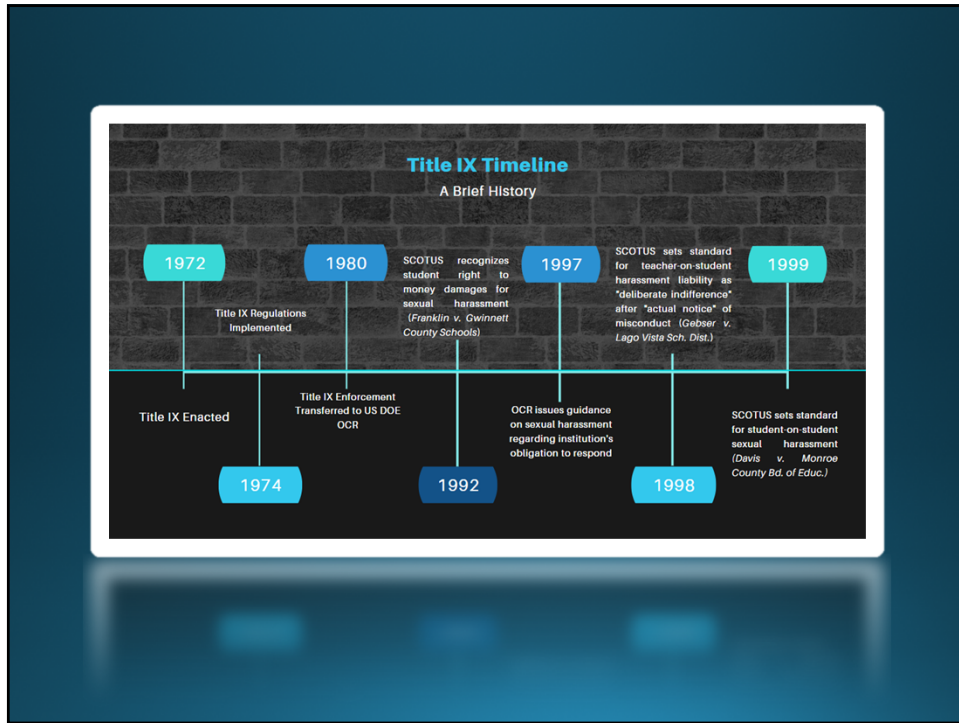
Andrea L. Jolliffe
Hall Booth Smith, P.C.

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

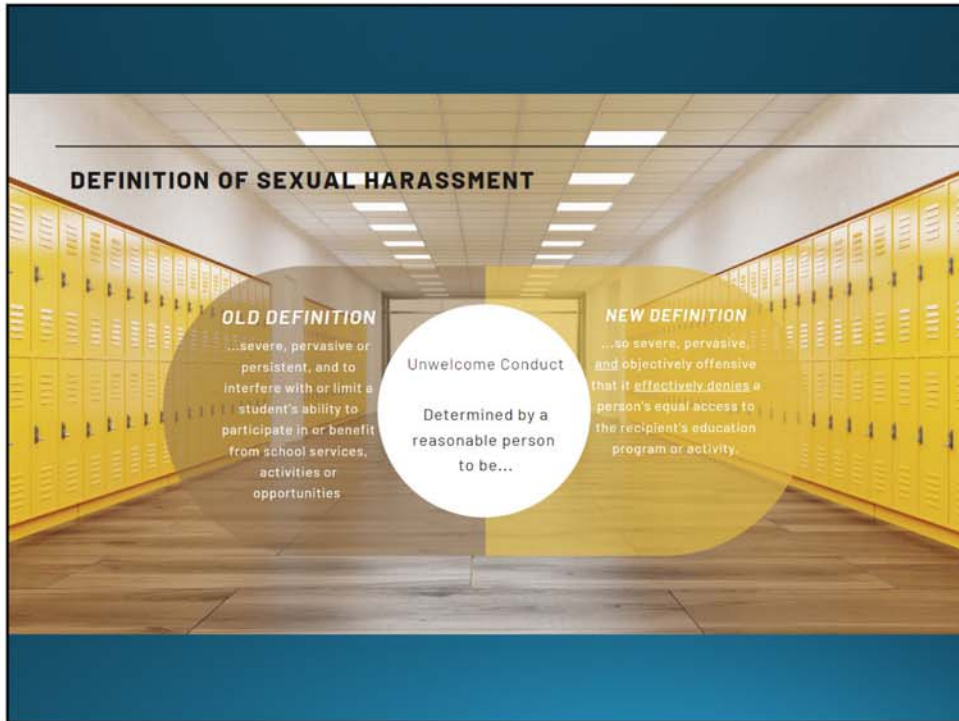


Where the heck are we going?

- Sexual harassment and other new definitions
- Actual knowledge standard
- New training requirements
- Mandatory steps for Title IX Coordinators
- Overview of Grievance Process
- Anti-retaliation rule
- ...and much, much more!



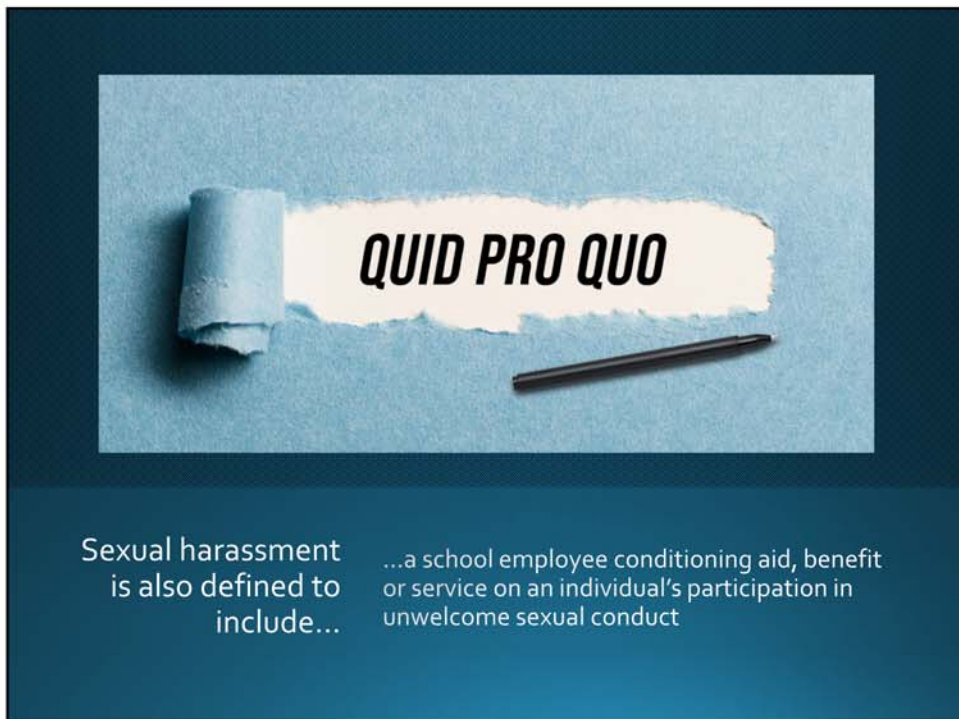
DEFINITION OF SEXUAL HARASSMENT



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

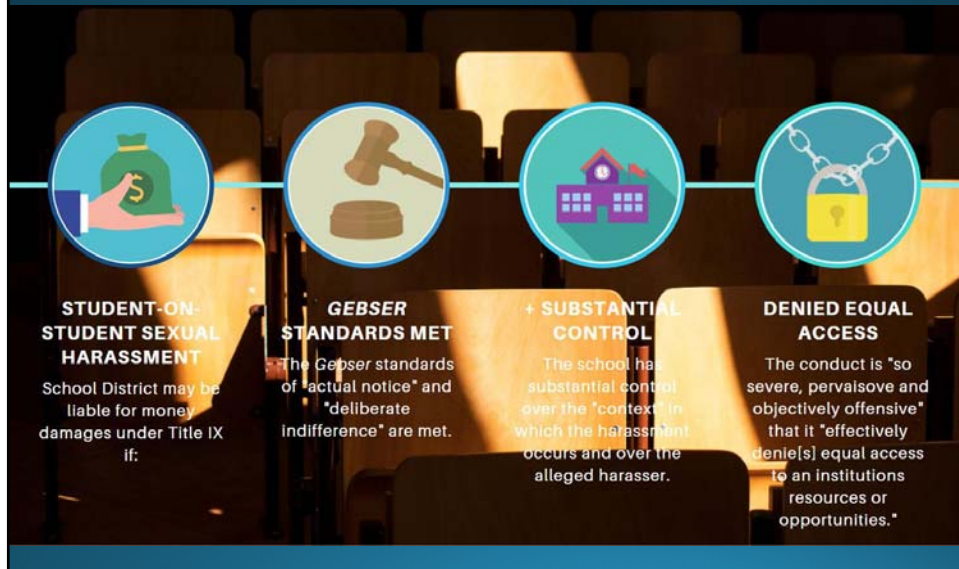


QUID PRO QUO

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.



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.

ACTUAL KNOWLEDGE

OLD RULE

A school has a responsibility to respond promptly and effectively. If a school knows or should have known about sexual harassment.

Must respond promptly

NEW RULE

A school with actual knowledge of sexual harassment in a program or activity against a person in the United States must respond promptly and in a manner that is not deliberately indifferent.



Who must know?

Notice of sexual harassment (or allegation) to...

- Title IX Coordinator
- Any official w/ authority to implement supportive measures (AP? Counselor? Teacher?)
- *Any employee of a K-12 school*

No imputed or constructive knowledge

Jurisdiction?

- 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
- Is this the scope, or just a floor?
- Are online classrooms covered?
- Post-pandemic, are off-campus activities covered? Away games?



Compare w/ Code of Ethics

Standard 2: **Conduct with Students** - An educator shall always maintain a professional relationship with all students, both in and outside the classroom. Unethical conduct includes but is not limited to:

1. committing any act of child abuse, including physical and verbal abuse;
2. committing any act of cruelty to children or any act of child endangerment;
3. committing any sexual act with a student or soliciting such from a student;
4. engaging in or permitting harassment of or misconduct toward a student that would violate a state or federal law;
5. soliciting, encouraging, or consummating an inappropriate written, verbal, electronic, or physical relationship with a student;
6. furnishing tobacco, alcohol, or illegal/unauthorized drugs to any student; or
7. failing to prevent the use of alcohol or illegal or unauthorized drugs by students under the educator's supervision (including but not limited to at the educator's residence or any other private setting).



INDIFFERENCE

Response to Sexual Harassment

- Actual knowledge of sexual harassment
- Deliberate indifference means a response that is clearly unreasonable in light of the known circumstances
- Complainants must be offered supportive measures
- Respondents must be handled via grievance process

DELIBERATE INDIFFERENCE

OLD RULE

The school must take immediate action to eliminate the sexual harassment or sexual violence, prevent its recurrence, and address its effects.

NEW RULE

Failure to respond reasonably in light of known circumstances.

Title IX Coordinator

- Promptly contact complainant re: supportive measures
- Consider complainant wishes re: supp. measures
- Inform that supp. measures available w/ or w/o formal complaint
- Explain process to file formal complaint



Bifurcated Response





Response to Complaint

- Formal complaint requires grievance process
 - What is a formal complaint?
- DOE will not find deliberate indifference or violation of Title IX based solely on different interpretation of evidence

SEXUAL HARASSMENT COMPLAINT

Given Name(s)

Given Information

Given Phone



Emergency Removal

- 911 Removal allowed
- Individual safety/risk analysis required
 - Immediate threat to physical health/safety
 - Notice & opportunity to challenge to respondent
- May not interfere w/ IDEA, 504 or ADA

Employees & Administrative Leave

- Employees may be placed on adm. leave during pendency of grievance process
 - Compare w/ student respondents...
- May not interfere with Section 504 or ADA



Grievance Process: General Rules

- Treatment of either complainant OR respondent may be discrimination
- Federal process mandatory
- Additional school procedures must apply equally to both parties



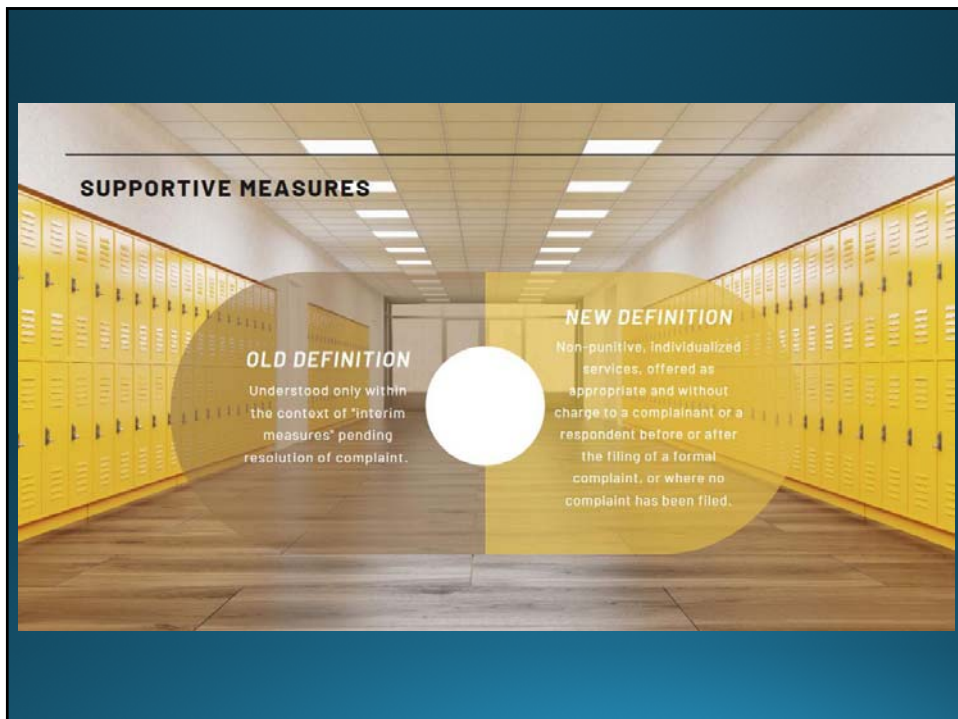
Grievance Process: Basics

- Grievance process before any disciplinary or other actions
 - Only supportive measures allowed
- Ultimate remedies may be disciplinary, punitive and/or burden on respondent
- What about related or overlapping Code of Conduct violations?
- What about short-term discipline (ISS/OSS < 10 days)?
- What about tribunals?



Supportive measures

- Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or respondent before or after the filing of a formal complaint or where no formal complaint has been filed...may include 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, changes to work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus (and similar measures).



SUPPORTIVE MEASURES

OLD DEFINITION

Understood only within the context of "interim measures" pending resolution of complaint.

NEW DEFINITION

Non-punitive, individualized services, offered as appropriate and without charge to a complainant or a respondent before or after the filing of a formal complaint, or where no complaint has been filed.



Examples of Supportive Measures

- Counseling
- Course modifications
- Academic support?
- Schedule changes
- Increased monitoring and supervision
- Non-exclusionary measures, except for emergency removals and administrative leave

Grievance Process

- Objective evaluation of all "relevant" evidence
 - Inculpatory AND exculpatory evidence
 - What is relevance?
- Credibility determinations not based on party status
 - "Of course he denied it, he's the accused!"
- No conflict of interest or bias
 - Generally, OR
 - Re: individuals involved





Grievance Process: Training

- Mandatory training for
 - Title IX Coordinator
 - Investigators
 - Decision-makers
 - Informal resolution facilitators
- Include definition of sexual harassment
- Scope of program/activity
- Conduct of investigations & grievance process
- Hearings, appeals and informal resolution
- How to serve impartially
 - No prejudgment
 - Conflict of interest
 - Bias



Grievance Process: Training Part II

- Decision Makers
 - Technology*
 - Relevancy
 - Sexual history of complainant
- Investigators
 - Relevance & creating a fair report
- Presumption respondent is not responsible
- Reasonably prompt time frames to complete
- But temporary delay for good cause
 - Absence of party/advisor/witness
 - Police activity
 - Disability/language accommodation

Grievance Process

- Describe range of sanctions and remedies
- Identify standard of evidence
 - Preponderance v. clear and convincing
 - Same for employee/student
- Appeal procedures
- Describe supportive measures available
 - Both complainant/respondent
- School may not use/seek privileged information





Notice of Allegations

- Grievance Process
- Allegations in detail
- Respondent presumed 'not responsible'
- Right to advisor, inspection of evidence
- Any Code of Conduct rule re: false statements or false info



- Dismissal mandatory if...
 - Conduct alleged is not sexual harassment per new definition
 - Conduct not in school program/activity
 - Victim not a person in the U.S.
- Other Code of Conduct response not precluded
- 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

Consolidation

- Discretionary
- Multiple respondents or multiple complainants, OR...one:one



Investigations

- Burden of proof & gathering evidence on the school
- No treatment records w/o written consent
- Equal opportunity to present witnesses & evidence
- No gag orders for any party



Investigations, Part II


- Right to be accompanied by any advisor (attorney)
 - But school may have rules re: participation
- Written notice of all proceedings (interviews/meetings)



Investigations, Part II

- Prior to conclusion
- Provide each party with opportunity to inspect & review all evidence
 - Includes evidence not relied upon/exculpatory
- Each party has 10 days to respond in writing
- Investigative report sent to all parties 10 days before final determination





Hearings

- Discretionary K-12
- But investigative report sent to party
- Allow for written questions, responses and follow-up
- Complainant “prior sexual predisposition or behavior” not relevant, except
 - ID different assailant, OR
 - W/ respondent, show consent

Final determination

- May not be Title IX Coordinator OR investigator
- Final after appeal decision or time to appeal expires
- Decision implemented by Title IX Coordinator
- *Must include...*
 - Identify allegations
 - Procedural steps
 - Notice, interviews, hearings, etc.
 - Findings of fact
 - Conclusions re: Code of Conduct to facts
 - Statement & rationale for each result
 - Appellate procedures



- 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

- Informal resolution
- Voluntary & only after formal complaint filed
 - Written notice
 - Allegations, preclusion v. return to grievance & consequences
 - Voluntary, written consent
 - N/A to yee-student cases
- Record-keeping (7 yrs)
 - Investigations, sanctions & remedies
 - Training materials, appeals & informal resolution

Retaliation is a No-No

- Neither the school nor other person may engage in retaliation
- Confidentiality of all parties, respondents, witnesses etc. required
 - Except for FERPA, other legal req. or to enforce this rule
 - FERPA health/safety exception?

So what is retaliation?

- Intimidation, threats, coercion, or discrimination, including *charges against an individual for code of conduct violations* that do not involve sex discrimination or sexual harassment, but *arise out of the same facts or circumstance as a report of complaint of sexual harassment*, for the purpose of interfering with any right or privilege secured by Title IX or this part, constitutes retaliation

Retaliation “specials”

- Exercise of 1st Amendment is not retaliation
 - Such as...?
- Charges for false statements in bad faith is not retaliation
 - But may not rest solely on finding of harassment
 - What about *other* charges??



Whew...so what have we learned?

- There are 3 different definitions of sexual harassment
- A report v. formal complaint
- Supportive measures are BIG DEAL
- Respondent (accused) students are protected
- Grievance process is elaborate and complex
 - Dismissals & appeals
- Compliance will be a team effort
- Training for everyone
 - _____
 - _____
 - _____
 - _____
- Title IX Coordinators are underpaid!

