

New Title IX Training: the Investigator

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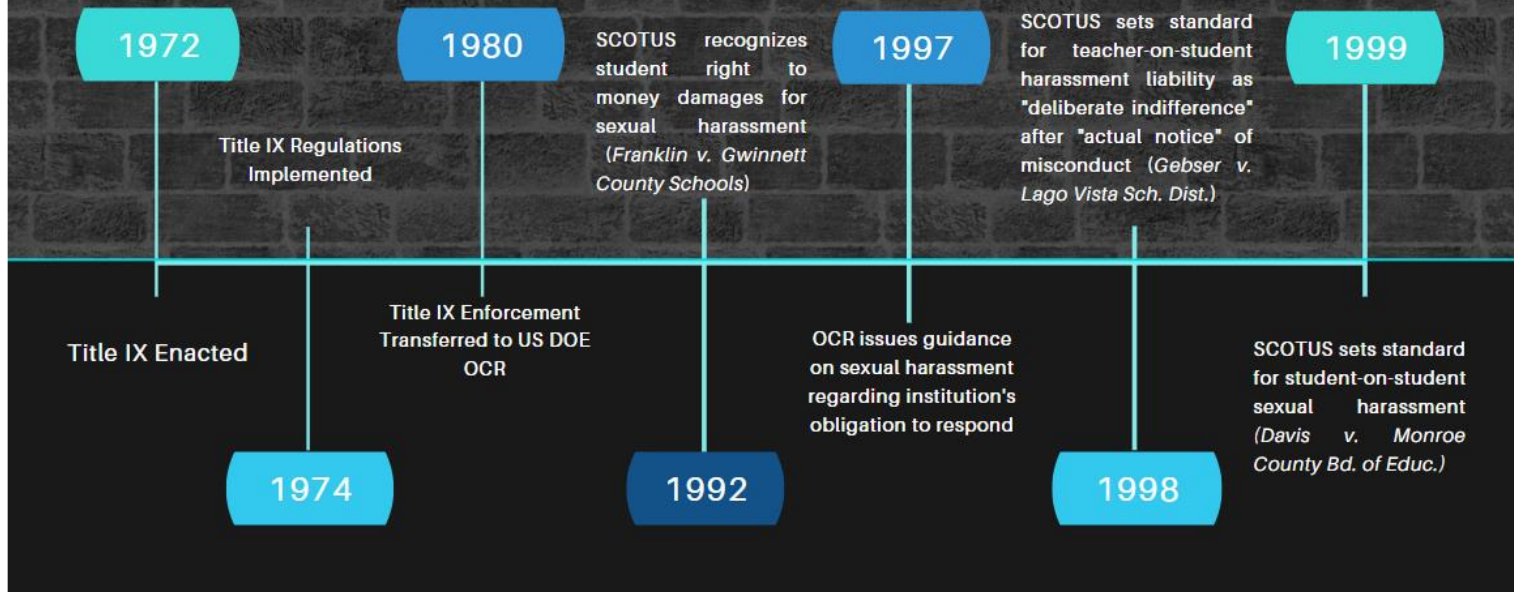


Where the heck are we going?

- The Title IX Investigator: Who they are and what they do
- Overview of Grievance Process
- Roles and Responsibilities under the new Title IX rules
- Investigator Training Requirements
- Sexual Harassment-new definitions
- Review forms to help navigate all of the above
- ...and much, much more!

Title IX Timeline

A Brief History



1974

1992

1998

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

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



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).





Response to a
"Report"

Response to a
"Formal Complaint"



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

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.



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



- 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

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: General Rules



- 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- Notice of Interviews

- Written notice of interviews and meetings
 - Purpose, time/date/location and participants
 - Advance notice “with sufficient time for the party to prepare”
- Right to be accompanied by any advisor (attorney)
 - But school may have rules re: participation



Investigations-Notice of Evidence

- Prior to conclusion...
- Provide each party w/ opportunity to inspect & review all evidence
 - Directly related to allegations in formal complaint
 - Includes evidence not relied upon/exculpatory
 - Electronic or hard copy
- Each party has 10 days to respond in writing
- Investigator must consider each party response

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

Handoff to the Decision-maker: Opportunity to submit questions

Hearing is optional at K-12

Written, relevant questions may be asked of any party or witness

Answers provided to both parties

Limited follow-up questions and answer must also allowed

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

Final Determination Decision-maker

- 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



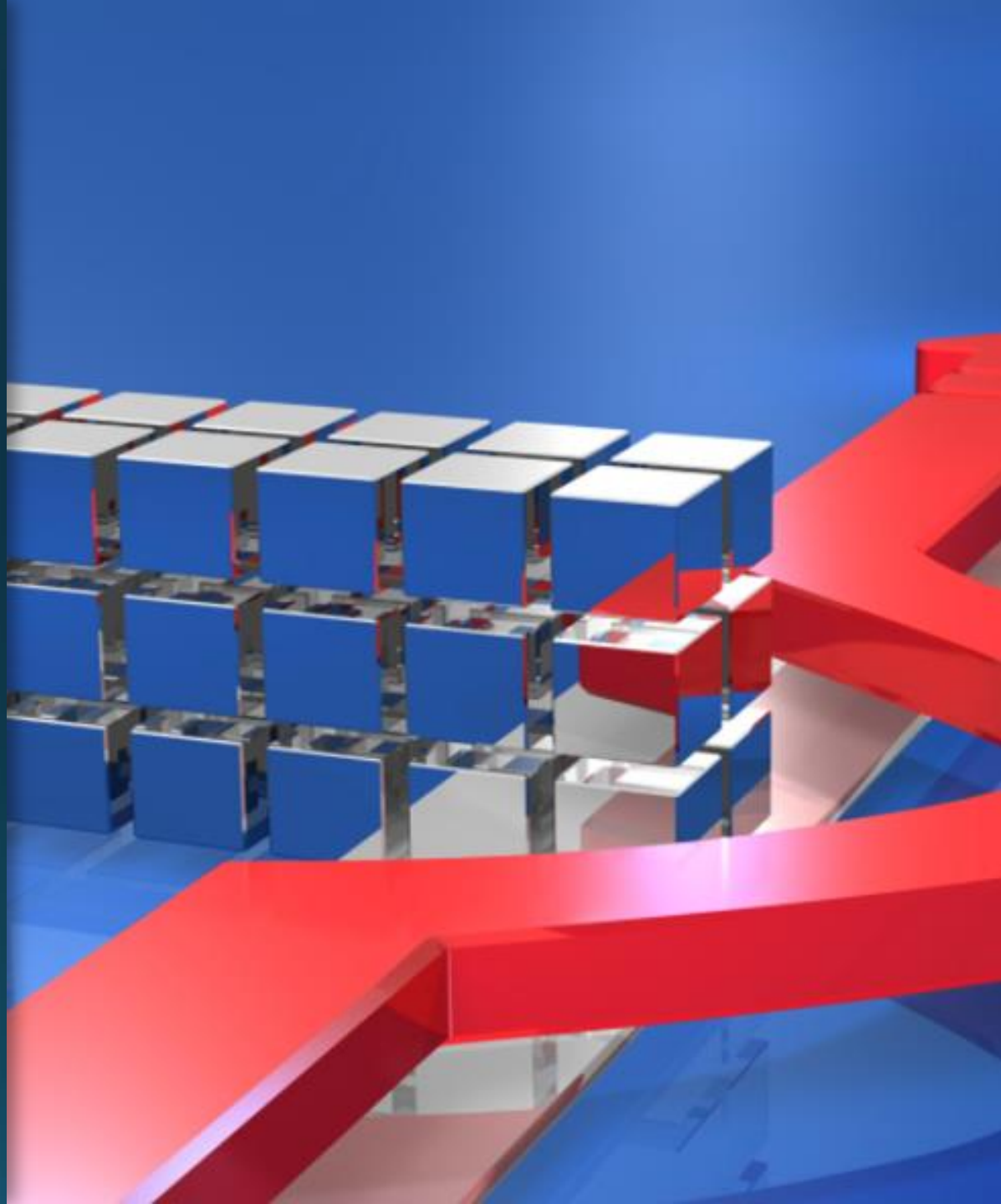
Appeal

- 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

- Informal resolution?
 - Who conduct? You?
- 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
 - All your notes...
 - Training materials, appeals & informal resolution

Retaliation prohibited

- 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



Whew...so what have we learned?

- There are 3 different definitions of sexual harassment
- A report v. formal complaint
- Title IX Investigators will be VERY important
- Complainants and Respondents treated equally
- Notices of interviews, evidence and report
- Guard against conflict of interest and bias
- Compliance will be a team sport
- Role of the Investigator
- _____
- _____
- _____
- _____
- Title IX Investigators are underpaid!



Thank you so much...

...for your kind attention