

# Title IX for Student Success

Creating a School District Responsive to  
Sexual Harassment

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# Today's agenda

- Definition of Title IX (TIX)
- Scope of TIX
- TIX Enforcement
- Damages, Deliberate Indifference and Retaliation under TIX
- Definition of Sexual Harassment and Hostile Environment Analysis
- TIX Notice and Response
- Risk Assessment
- Supportive Measures
- TIX Jurisdiction
- Investigation Procedures and Best Practices
- TIX Takeaways

# Title IX Defined

➤ Title IX is a Federal **Civil Rights law** stating:

“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 education program or activity receiving financial assistance.”

➤ 37 small words: huge impact.

# History and purpose of tix

- ▶ **Congress recognized that**, in spite of the Civil Rights Act of 1964, women continued to received unequal treatment in schools.
- ▶ **How it started:** to remedy a “long and unfortunate history of sex discrimination”. *United States v. Virginia. 518 U.S. 515, 531 (1996) quoting Frontiero v. Richardson, 411 U.S. 677, 684 (1973).*
- ▶ **How it is going:** improved access to educational opportunities and providing “equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.” *United States v. Virginia. 518 U.S. 515, 531 (1996)*

## Scope of Title IX

- Applies to institutions receiving federal financial assistance from the Department of Education, including state and local educational agencies.
  - ▶ Approximately 16,500 local school districts, 7,000 postsecondary institutions, as well as charter schools, for-profit schools, libraries, and museums.
  - ▶ Also included are vocational rehabilitation agencies and education agencies of 50 states, the District of Columbia, and territories and possessions of the United States.

# Scope of Title IX cont.

- ▶ Title IX obligations apply to:
  - ▶ recruitment, admissions, and counseling;
  - ▶ financial assistance;
  - ▶ athletics;
  - ▶ sex-based harassment;
  - ▶ treatment of pregnant and parenting students;
  - ▶ discipline;
  - ▶ single-sex education;
  - ▶ retaliation;
  - ▶ and employment.

## Who enforces Title IX?

- Title IX is a civil rights law and falls under the jurisdiction of the U.S. Department of Justice.
- DOJ enforces laws to ensure equal access to education, as well as the Equal Protection Clause of the 14<sup>th</sup> Amendment.
- DOJ coordinates enforcement of Title IX across agencies to include the Department of Education and Office of Civil Rights.

# Monetary Damages under Title IX

## ▶ ***Gebser v. Lago Vista ISD (1998)***

- ▶ 524 US 274 (1998)
- ▶ Sexual relationship between teacher and student in a high school.
- ▶ Student brought suit against school district.
- ▶ **Lower Court:** Ruled in favor of ISD - no money damages.
- ▶ **Question:** Whether an education program can be required to pay monetary damages to a plaintiff under Title IX?
- ▶ **SCOTUS:** Yes, money damages are available if Plaintiff meets two part test:
  - ▶ 1. Party must show that a school official, with the ability to institute corrective measures, knew of the conduct.
  - ▶ 2. A party must show that despite knowledge of the conduct, the school failed to respond appropriately.



# Title IX and Student-to-Student Harassment

- ▶ *Davis v. Monroe County Board of Education (1999)*
  - ▶ 526 US 629 (1999)
  - ▶ Grandmother sued school district on behalf of her 5<sup>th</sup> grade granddaughter.
  - ▶ Claimed school refused to stop harassment that had been reported multiple times.
  - ▶ **Lower Court:** School not responsible because it is a student harasser.
  - ▶ **Question:** Whether an educational entity can be held responsible under Title IX for student-on-student harassment?
  - ▶ **SCOTUS:** Yes, the entity can be held responsible. Title IX grants an implied right to education. Established the “deliberate indifference” standard. Damages may be awarded under this standard.

# District's Obligation/Response Under TIX

- ▶ The District must respond promptly to Title IX sexual harassment in a manner that is **not deliberately indifferent**, which means in a way that is not clearly unreasonable in light of the known circumstances.

# Your District's Obligation under TIX

- ▶ **Stop** the Reported Conduct
- ▶ **Prevent** it Recurrence
- ▶ **Remedy** its Effects
- ▶ **Hold Accountable** through  
Corrective or Disciplinary  
Action

# Title IX Prohibits Retaliation

- ▶ *Jackson v. Birmingham Board of Ed.*
  - ▶ 544 US 167 (2005)
  - ▶ High school basketball coach claimed he was fired for reporting unequal treatment of girl's basketball team by school district.
  - ▶ Brought suit under Title IX.
  - ▶ Lower Court: No private right of action for reporting on behalf of others.
  - ▶ Question: Whether Title IX provides a right of action for retaliation for reporting unlawful sex discrimination?
  - ▶ **SCOTUS: Yes, can't protect against discrimination if it does not protect those who report discrimination. Retaliation against Jackson constituted internal discrimination on the basis of sex.**

# Sex Discrimination = Gender Discrimination?

- *J.L v. Mohawk Consolidated SD (2010)*
- *Pratt v. Indian River CSD (2010)*
- *Putnam v. Somerset ISD (2010)*
  - ▶ Dept. of Ed negotiated settlement agreements.
  - ▶ Title IX prohibits discrimination against a student whose appearance/behavior does not conform to gender stereotypes.
  - ▶ **Title IX protects students who are harassed due to actual or perceived sexual orientation.**
    - ▶ Premise was that sexual orientation is about sex and notions of gender and protected by Title IX.

# What is sexual harassment?

- Any instance of *quid pro quo* harassment by a public school employee;
- Any **unwelcome conduct** that a reasonable person would find so severe, pervasive, and objectively offensive that it denies a person equal educational access;
- Any instance of **sexual assault** (as defined in the Clery Act), **dating violence, domestic violence**, or **stalking** as defined in the Violence Against Women Act (VAWA).
- ***Remember - sexual harassment is evaluated on the manner it was received, not the manner in which it was intended.***

# Sexual Harassment codified

Under the 2020 regulations, the definition of sexual harassment was codified:

## OLD DEFINITION:

- Unwelcome Conduct of as Sexual Nature, which is sufficiently severe, persistent or pervasive so as create a hostile work or learning environment.

## NEW DEFINITION:

- Unwelcome Conduct of as Sexual Nature, which is sufficiently severe, persistent and pervasive so as create a hostile work or learning environment.
- **Definition may change again in the 2023 proposed regulations.**

## Hostile Environment Analysis under TiX

- Unwelcome conduct determined by
  - a reasonable person, placed in a substantially similar situation,
  - to be so severe, pervasive, persistent **and** objectively offensive that
  - it effectively denies a person equal access to the recipient's education program or activity.



# Elements of Sexual/gender-based Harassment

- A form of sex discrimination involving conduct of a sexual nature.
- Unwelcome sexual conduct that creates an intimidating, hostile or offensive workplace.
- Occurs when submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment or academic progress.
- Sexual harassment does not have to be of a sexual nature - it can include offensive remarks about a person's sex. i.e. dumb ho, stupid bitch, fairy
- Includes any retaliatory conduct in response to reporting such conduct.

# Examples of verbal sexual harassment

- Threats or suggestions of loss of job, academic credit or privileges or withholding of a benefit unless sexual favors are given
- Threats or suggestions that a person will “get ahead” if sexual favors are given
- Repeated requests to have lunch, dinner, a drink or to just “hang out” or “hook up”
- Calling someone “doll,” “babe,” or “honey”
- Making sexual innuendoes
- Telling sexually-oriented jokes or stories
- Making sexually-oriented comments about a person’s appearance, clothing, or body.
- Turning innocent discussions to sexual topics
- Cat-calling

# Examples of non-verbal sexual harassment

- Elevator eyes
- Staring (at someone or particular body parts)
- Displaying sexual and/or derogatory materials about men or women, including sharing pictures and videos on social media or on your phone
- Invading an individual's personal space
- Making sexual gestures with hands and/or body movements

# Examples of Physical sexual harassment

- Massaging a person's neck, shoulders, etc.
- Brushing up against another person
- Hugging, kissing, patting, or stroking someone
- Pinning someone into a corner
- Touching oneself in front of another
- Dry humping, tea bagging, etc.
- Adjusting a person's clothing, i.e. crotch
- Ass-slapping
- Sexual assault
- **Non-consensual sexual contact that is severe, persistent, pervasive and objectively offensive.**

If the conduct interferes with a person's ability to access educational or work opportunities - it may be sexual harassment.

# Title IX Notice and Response

- When a Responsible Employee is made aware of conduct which may constitute sexual harassment, school/district must take specific action.
  - Conduct must be immediately reported to TIXC.
  - Promptly contact Complainant to discuss available supportive measures.
  - Supportive Measures: **individualized services to restore or preserve equal access to education, protect student and employee safety, or deter sexual harassment.**
  - Supportive measures must be offered even if a complainant does not wish to initiate or participate in a grievance process.
  - Explain to Complainant the process of filing a complaint and the TIX investigation process.

## Privacy & Confidentiality

- ▶ These cases may not be discussed outside of the Title IX process.
- ▶ Title IX trumps FERPA, so information/evidence/sanctions is required to be shared among the Parties.
- ▶ Investigators must recuse if they have a real or perceived conflict of interest.
  - ▶ Perceived conflicts may be worse - you can work around real conflicts.

## Supportive measures

- Non-punitive, non-disciplinary
- No fee or charge
- Must offer to complainant and respondent
- Goal is to restore or preserve access to the education program or activity
- Should be designed with the goal of protecting the safety of the parties and deterring further conduct.
- Examples: No contact orders, schedule changes (not just for Complainant), escort, job changes, counseling services, deadline extensions, leave of absence, etc.

# Title IX Jurisdiction

- Districts do not have jurisdiction and must dismiss under TIX when alleged conduct:
  - Would not constitute sexual harassment under the regs, even if proven;
  - Did not occur in the recipient's education program or activity;
  - Did not occur against a person in the US;
    - *Even if no jurisdiction under TIX, does not mean that the conduct is not addressed.*
    - *Conduct should be addressed under another policy and procedure.*
    - ***Do Something.***



# Risk Assessment

- ▶ Prior to a student or employee removal, the team, lead by the Title IX Coordinator, must conduct a risk assessment.
- ▶ Use an objective standard for determining whether or not the individual poses a risk to the health and safety of the campus during the pendency of the investigation.
- ▶ No punitive conduct, prior to the conclusion of the Title IX investigation, without conducting this assessment.

# What about Special Education Students?

- ▶ Special Education students can be found responsible under Title IX.
- ▶ IDEA and Title IX are two voluminous and parallel running federal laws.
- ▶ Always check to see if the student is a special education student.
- ▶ If a student has an IEP, notify the case manager that the student is a party to a Title IX investigation.
- ▶ Determine if accommodations are required for the student to meaningfully participate in the investigation.
- ▶ Proceed with investigation.
- ▶ If special education student found responsible, must conduct an MDR prior to the administration of sanctions.

# Investigation Procedures

- Notify Parties, in writing, that a TIX investigation is being conducted.
  - Identify an investigator - check conflicts and biases.
  - Serve written allegations on Respondent.
    - Both Parties have a right to all information, so Complainant will receive allegations contemporaneously.
  - Notice of Allegations should state “presumption that the Respondent is not responsible for conduct”, as well as specify the investigation procedure, right to respond in writing to allegations, provide witnesses, etc.
- ▶ Recommend Standard Operating Procedures that correspond with policy.

# What is Informal Resolution?

- ▶ An option for resolving a formal complaint that does not involve a full investigation.
- ▶ Methods (*mediation, restorative justice, facilitation, etc.*) used vary depending on circumstances and wishes of the Parties.
- ▶ In some cases, it may be used as an alternative to proceeding with investigation and determination.
- ▶ Cases involving a student *Complainant vs an Employee Respondent*, or sexual assault, are not eligible for informal resolution.

# Investigation best practices

- Record interviews, or keep extensive notes, and include them as exhibits in the investigative report.
- Include credibility assessments in investigation report.
  - Parties are entitled to the investigation report and exhibits.
- Use Witness 1, 2, 3, etc. (instead of names) so that reports require less redaction later.
- Be sure that written determination is delivered to the Parties contemporaneously.
- Be sure that written determination includes appeal rights, process for appeal and acceptable reasons for appeal.
- Respondent is entitled to due process - do not hide the ball - if new allegations emerge during the investigation, serve the allegations in writing and allow Respondent a chance to respond.
- Be flexible and willing to allow any evidence or witnesses necessary to conduct a fair, unbiased investigation.
- If you cannot be neutral, do not investigate.
- **Keep confidentiality.**

# Informal Resolution

## Informal Resolution

- ▶ May be offered in certain matters
- ▶ Both parties must agree in writing to participate.
- ▶ May include training, restrictions, etc.
- ▶ Be sure Parties understand that Informal Resolution concludes their case, but supportive measures may be ongoing.
- ▶ Talk it over with Title IX Coordinator.

## Standard of Evidence

The **PREPONDERANCE OF EVIDENCE** standard in reviewing evidence and determining if a violation of District Policy has occurred.

**“More likely than not”**

# Impact of Title IX

## ▶ 1970

- ▶ 8% of women age 19 and older were college students.
- ▶ 14% of men were college students
- ▶ 59% of women were high school grads.



# Impact of Title IX cont.

2009

- ▶ 87% of women were high school grads
- ▶ 28% of women had a college degree

2011

- ▶ Title IX covered 49 million students in elementary/secondary schools
- ▶ 20 million in post-secondary schools (not including employees)

2018

- ▶ Women represented 51% of matriculants from U.S. medical and law schools.

# Effect of Title IX cont.

## ▶ 1971-72

- ▶ Approximately 250,000 women participated in high school sports.
- ▶ Approximately 3,750,000 men participated.

# Effects of Title IX cont.

## ▶ 2010-2011

- ▶ Approximately 3,250,000 women participated in high school sports.
- ▶ Approximately 4,500,000 men participated in high school sports.

# Title IX Takeaways

- TIX enforcement is critical to ensuring a safe, discrimination-free environment in your school/district.
- TIX compliance is not optional.
- TIX regulations are highly prescriptive - TIXC and investigators must bring their A-game.
- K-12 schools are still trying to get TIX right - get help - ask questions.
- Make sure your policy is in place and everyone understands their obligation to report.
- Develop standard operating procedures - what happens when TIX and HR overlap? Who takes the lead? Discuss, make a plan, train investigators and decision-makers.

# Got Questions?



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