

2020  
Regs  
Rapid  
Response

R<sup>3</sup>

# 2020 Title IX Regulations Overview

Introductory Webinar for  
K-12 Schools and Districts

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# How Did We Get Here?

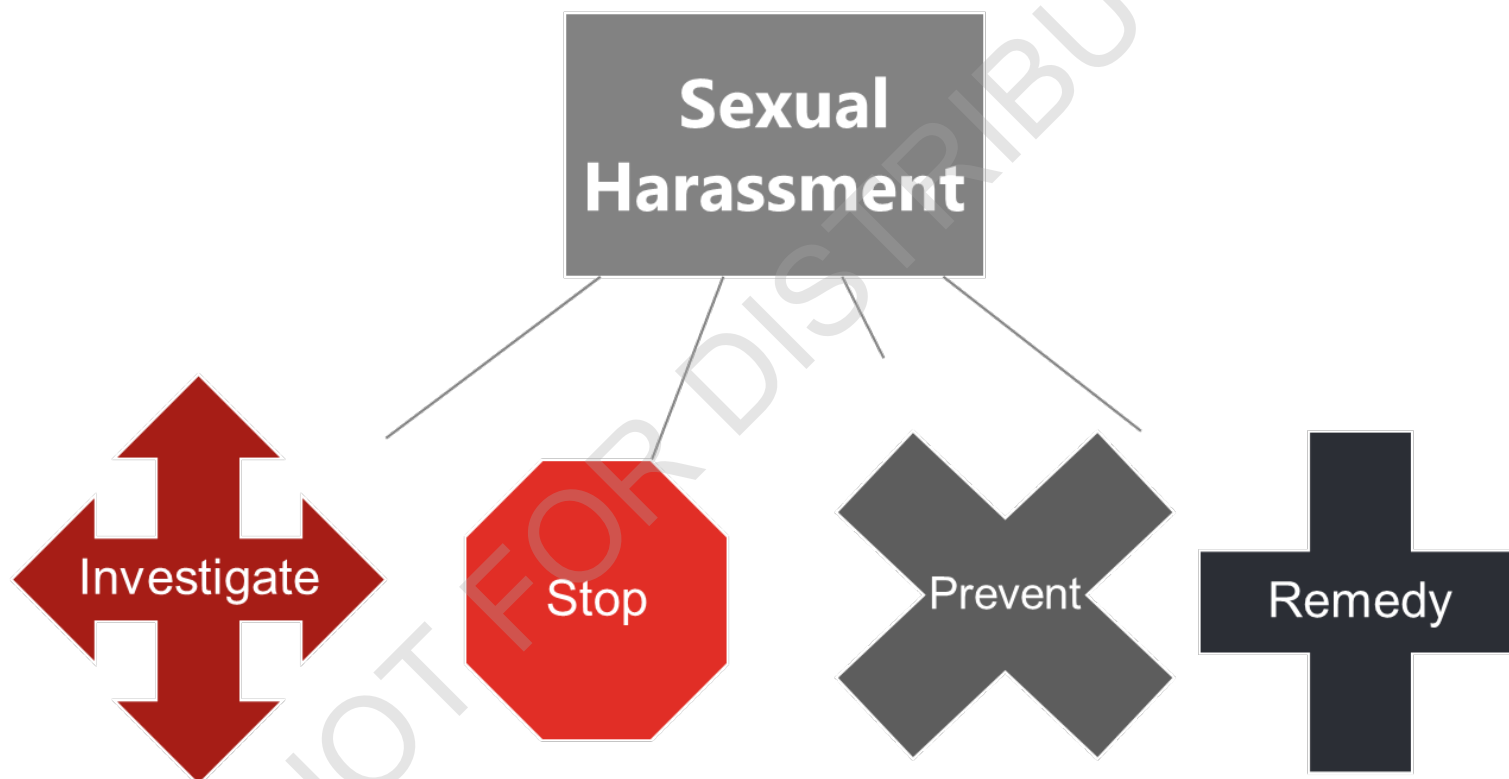
- What is Title IX?
- Obligations Under Title IX?
- History of Title IX?
- OCR and Title IX
- Lessons Learned from Higher Ed
- Overview of Regulatory Changes?
- Changes for K-12 Moving Forward
- Additional Resources



“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 educational program or activity receiving federal financial assistance.”

20 U.S.C. § 1681 & 34 C.F.R. Part 106 (1972)

# School Obligations Under Title IX



# The IX Commandments

<b>Thorough</b>	<b>Reliable</b>	<b>Impartial</b>	Investigation
<b>Prompt</b>	<b>Effective</b>	<b>Equitable</b>	Process
End the Discrimination	Prevent its Recurrence	Remedy the effects upon the victim & community	Remedies

# A Brief History of Title IX

- Title VI of the Civil Rights Act of 1964 (42U.S.C. §2000d et seq.)
  - “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” (“Sex” added by Executive Order in 1965)
- Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e-2)
  - Prohibits discrimination in the terms, conditions or privileges of employment on the basis of an individual’s race, color, religion, sex, or national origin.
- 1972: Title IX passed and signed into law by President Nixon



# A Brief History of Title IX: Significant Cases

- Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992).
- Gebser v. Lago Vista Independent School District, 524 U.S. 274 (1998).
- Davis v. Monroe County Bd. of Education, 526 U.S. 629 (1999).



# Franklin v. Gwinnett Public Schools

## 503 U.S. 60 (1992)

- Adult-on-student sexual harassment
- Supreme Court held:
  - Sexual harassment constituted sex discrimination under Title IX.
  - Private right for recovery of monetary damages under Title IX.
- *Franklin* did not address issues concerning the educational institution's liability.

# Gebser v. Lago Vista Indep. School

## 524 U.S. 274 (1998)

- Adult-on-student sexual harassment
- Three-part standard:
  1. An official of the educational institution must have had “actual notice” of harassment;
  2. The official must have authority to “institute corrective measures” to resolve the harassment problem; AND
  3. The official must have “failed to adequately respond” to the harassment and, in failing to respond, must have acted with “deliberate indifference.”

# Davis v. Monroe County Bd. Of Ed. 526 U.S. 629 (1999)

- Student-on-student sexual harassment
  - Finding in favor of Davis, the Supreme Court applied same standards to find the institution liable for damages as in the *Gebser* case:
    - The institution must have “actual notice” of the harassment; and the institution must have responded to the harassment with “deliberate indifference.”
- Additionally, court held:
- Harassment must be “severe, pervasive, and objectively offensive,” and the indifference “systemic,” to the extent that the victim is deprived of educational opportunities or services.
  - Justice O’Connor added a framework to determine deliberate indifference – stating that deliberate indifference constitutes a response that is “clearly unreasonable in light of the known circumstances.”



# Remedies Under Title IX

- An individual may assert a Title IX claim against the school by:
  - Lawsuit: Suing the school in court and seeking monetary damages or injunctive or declaratory relief.

And/Or

- OCR Complaint: Filing an administrative complaint, a grievance with U.S. Dept. of Ed. Office for Civil Rights (or other applicable federal agency).

# A Brief History of Title IX: OCR and Title IX

- The Office for Civil Rights (OCR) under the Department of Education is responsible for establishing the compliance standards to be applied in investigations and enforcement of Title IX regarding sexual harassment.
  - Provides regulatory and sub-regulatory guidance.

# OCR and Title IX

- Key Regulatory and Sub-Regulatory Guidance from OCR
  - 1997 Guidance on Sexual Harassment.
  - 2001 Revised Sexual Harassment Guidance.
  - 2011 Dear Colleague Letter (The "DCL").\*
  - Questions and Answers on Title IX and Sexual Violence (April 2014).\*
  - 2015 Dear Colleague Letter, Dear Coordinator Letter & Resource Guide.
  - 2016 Guidance on Transgender Students.\*
  - 2017 Interim Guide: Q&A on Campus Sexual Violence.
  - 2018 Proposed Title IX Regulations
  - 2020 Final Title IX Regulations

\*Since rescinded



# OCR Enforcement Mechanisms

- OCR administratively enforces Title IX by:
  - Conducting investigations of complaints filed with the U.S. Dept. of Education.
  - Engaging in “voluntary compliance” investigations.
- Technical Assistance
  - To help institutions, students, and parents understand their rights and responsibilities.

# Obama-Era OCR: (Over?) Zealous Enforcement and Equity Imbalance

- Primary focus was higher ed; little, if any, mention was made of K-12
- Dramatically ramped up enforcement; became feared
- Provided extensive sub-regulatory guidance
- Made investigations and outcomes public
- Had a pro-reporting party imbalance to their approach
- Field shifted from an imbalance toward the responding party to an imbalance toward the reporting party
- Resulted in widespread abrogation of due process rights for responding parties

# Increased Focus on Due Process

- The pro-complainant imbalance prompted hundreds of lawsuits by respondents
  - Wave of John Doe cases with unfavorable findings toward schools
  - Rise in lawsuits alleging selective enforcement, negligence, deliberate indifference, etc.
- Courts began requiring heightened levels of due process
  - Sixth Circuit leads this revolt
- Trump-era OCR shifting imbalance back toward respondents, using courts and due process as their rationale
  - Impetus for new regulations
- Again, all primarily focused on higher ed, but creating conditions that have resulted in slew of new regulations impacting K-12



# Lessons Learned From Higher Ed

- You are not exempt from the zealous enforcement of OCR
  - February 2020: OCR initiative to combat sexual assault in K-12 public schools
    - Compliance reviews; public awareness and support; data collection and reviews
- Respondents have rights, too
  - You will need to sufficiently balance the rights of all parties in the process
- Not enough to just have policies and procedures; but you must follow them
- Don't wait to implement the changes that are industry standards and those that have become established best practices
- Compliance can be costly, but not as costly as litigation

# Overview of 2020 Regulatory Changes

- Overview of Regulatory Process
- Key Regulatory Changes
- OCR Enforcement
- Changes for K-12 Moving Forward

# Overview of Regulatory Process

- November 29, 2018: OCR published proposed amendments to Title IX regulations:
  - Received over 124,000 comments; mostly opposed to changes
  - OCR reviewed the comments
  - OCR had to respond materially to the comments
- May 6, 2020: Released final regulations
  - Official version will be printed in the Federal Register



# Overview of Regulatory Process

- Impose new requirements on K-12 schools that were previously only required for higher ed
- Amendments are significant, legalistic and very due-process heavy
- Amendments to Title IX regulations become effective August 14, 2020
  - Amend the Code of Federal Regs.
  - Have the force of law
  - Enforceable by OCR and the courts (although not bound to do so)
  - Some provisions already mandated by courts in some jurisdictions
  - Intervening variables
    - Impending lawsuits and injunctions
    - Election year
    - Conflicts with State law

# Key Regulatory Changes

- Grievance Procedures
- Jurisdiction
- Notice to Institution / Notice to Parties
- Definition of Sexual Harassment
- Supportive Measures
- Informal Resolution
- Formal Investigation and Hearings
- Due Process Elements
- Substantial Documentation Requirements
- Significant Training Requirements

# Changes For K-12 Moving Forward

- You are now in the “hot seat”
- More formal organizational structure
  - Title IX Coordinator, investigator, decision-maker(s)
- Greater investment – financial, personnel, time
- Recognize difference between what is required to be covered under Title IX versus what is discretionary/what is covered under your school policy
  - i.e. off-campus conduct; signed complaint; definition of sexual harassment, etc.
- Incorporating a “hearing” with cross examination into each formal resolution
- Advisors of choice for parties



# Changes For K-12 Moving Forward

- FERPA “shift” in terms of information shared with parties
- Substantially increased level of documentation and record-keeping
- Awareness and mitigation of any bias and conflicts-of-interests
- Expanded policies and procedures
- Increased training
  - Title IX Coordinator
  - Investigator
  - Decision-maker
  - Anyone who facilitates an informal resolution process
- Implications for employees

# Additional Resources

- A Deeper Dive: Regulations Overview Webinar for K-12 Schools and Districts, Friday, May 22, 2020 at 11 am ET
- ATIXA's 2020 Regs Rapid Response (R<sup>3</sup>) Resource Center – <https://atixa.org/r3/>
- Joining ATIXA is your BEST option to access R<sup>3</sup> content. For more information about ATIXA membership, please visit <https://atixa.org/r3-membership/>

# Need More Information?

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