

# **New Title IX Regulations: What You Need to Know Now**



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# Purpose



- This presentation has been designed for the Staff Members of the Lehigh Career Institute of Technology (LCTI)
- This presentation has been delivered by Zoom on September 16, 2020, and a copy is available for public inspection upon request, at the law firm of King, Spry, Herman, Freund & Faul, LLC, Bethlehem, PA, as required by the 2020 Title IX Regulations

# Introductions



- Kathleen Conn, Ph.D., J.D., LL.M., is Of Counsel with KingSpry, after a career as a HS teacher, K-12 Curriculum Supervisor, and ES Principal in K-12 public schools. Before moving to Allentown, she was a Professor in the Graduate Education Department at Neumann University.
- She is an experienced investigator and gives presentations in Lehigh Valley school districts on sexual harassment.



# What We Shall Talk About Today



- Title IX and Why We're Here This Morning
- Reasons for Changes from Prior Guidance
- An Overview of the 2020 Title IX Regulations
- How the Title IX Changes Apply to YOU!
- Information about the Title IX Coordinator's Duties and What a "Designee" Means
- Supportive Measures
- Grievance Procedures
- Investigations
- Rights of Appeal and Final Resolutions

# What is Title IX?



- Title IX of the Education Amendments of 1972 is a **federal civil rights law** which prohibits discrimination on the basis of sex in all federally-funded educational institutions
- Title IX applies to basically **all K-12 schools and postsecondary educational institutions** which receive any kind of federal financial assistance

# What Is Title IX?



- Title IX states:
- *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 Federal financial assistance.*

# Who Is Protected Under Title IX?



- **All students** in United States educational institutions which receive Federal financial assistance
- **All employees** of those institutions
- The comments to the new Regulations explicitly state that all individuals, including LGBTQ individuals, are protected



# Discrimination on the Basis of Sex



- **The Supreme Court interpreted discrimination on the basis of sex as “sexual harassment”**
- **In the past**, sexual harassment was considered to be conduct of a sexual nature that a reasonable person would consider to be unwelcome
- ***But now sexual harassment has a more specific definition!***



# Two Ways of Enforcing Title IX

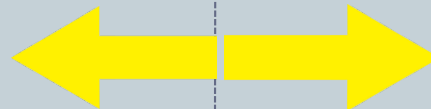


## Judicially – In Court

- By suing the educational institution
- Where the plaintiff must show that a school official had actual knowledge and was deliberately indifferent to sexual harassment
- **The goal: money damages**

## Administratively

- By reporting to the Office for Civil Rights (OCR)
- Where OCR/DOJ will work with the educational institution to see that it complies with Title IX
- **The goal: systemic change**



# The Office for Civil Rights (OCR)



- OCR is a sub-agency of the United States Department of Education
- Agencies have the power to interpret a law by making Regulations, also called Rules, which then have the force of law
- However, the agency must go through a process in making those Rules, called “notice-and-comment” rulemaking



# Why New Regulations?

- Under the Obama administration, schools received “significant guidance” which was communicated through “Dear Colleague Letters”
- However, these letters did not have the force of law, because they were not adopted by “notice-and-comment” rulemaking
- When Betsy DeVos took over the U.S. Department of Education, changes were made



# New Regulations/New Rule



- On September 22, 2017, DeVos's Acting Assistant Secretary of Education at OCR rescinded two Obama-era DCLs that said schools had to stop all sexual harassment that they knew or “should have known” was occurring, and that ALL students, including LGBTQ students, were protected under Title IX
- OCR promised to issue new regulations that had the force of law

# Following the Process



- OCR published the proposed regulations in the Federal Register on November 29, 2018 and the 38-page document was open for email comments by the public for approximately 2 months
- OCR received 124,149 comments, and some of those were signed by groups of people
- In May 2020, OCR published its 2,033-page analysis and discussion of the public comments, and about a week later, published the document as the “Final Rule” in the Federal Register

# Significant Changes in Definition



- **New Definition of Sexual Harassment**

- (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the school on an individual's participation in unwelcome sexual conduct; also called *quid pro quo* harassment
- (2) Unwelcome conduct determined by a reasonable person to be **so severe, pervasive, and objectively offensive** that it **effectively denies a person equal access to the school's education program or activity**; or
- (3) Sexual assault, dating violence, domestic violence, or stalking

# What Are Those Third Elements?



- **(3) Sexual assault, dating violence, domestic violence, or stalking**
- These elements of the definition are from the Clery Act, the law that requires postsecondary institutions to report crimes on campus and campus property
- They are also in the Violence Against Women Act, of which the Clery Act is a part
- DOE says that these elements are put in the definition to align K-12 and postsecondary requirements under Title IX, and to make schools aware of these as violations of Title IX

# Defining the Third Elements



- **Sexual Assault** – “any sexual act directed against another person, without consent of the victim, including instances where the victim is incapable of giving consent”
- **Dating Violence** - 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, and
  - iii. The frequency of interaction between the persons involved in the relationship.



# Defining the Third Elements, cont.



- **Domestic Violence** – “**felony or misdemeanor crimes of violence** committed by a
  - Current or former spouse or intimate partner of the victim,
  - Person with whom the victim shares a child in common,
  - Person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner,
  - Person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or
  - 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”

# Defining the Third Elements, cont.



- **Stalking** – “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”

# What Do These Four Offenses Mean?



- All four of these offenses can **possibly** trigger the responsibility of the school to respond
- **BUT**, certain limits apply
- *For example*, the authority of the school does not typically extend into a student's home
- The new definition of sexual harassment is designed to protect students and employees of any school that receives federal funding **only** under situations where the school has control!

# Significant Changes in Definition



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# Important Words in the Definition



- **The qualification of “severe, pervasive, and objectively offensive” applies only to “unwelcome conduct”**
- That qualification does not apply to incidents of *quid pro quo* sexual harassment, sexual assault, dating violence, domestic violence, or stalking.
- A single incident of these other offenses is sufficient to constitute sexual harassment.

# Important Words in the Definition



- In the past, it was confusing to figure out if an educational institution had a duty to respond when sexual harassment occurred outside the school
- The words “effectively denies a person equal access to the school’s education program or activity” mean that the school has a duty to respond only if the harassment occurs as part of the school’s operations; in locations, events, or circumstances where the school has substantial control over the harasser and substantial control over the context in which the harassment occurs

# Important Words in the Definition



The educational institution has a duty to respond **under Title IX** only if :

(1) The sexual harassment occurs as part of the school's operations – i.e., its education program or activities, and

(2) In locations, events, or circumstances where the school has substantial control over the harasser and substantial control over the context in which the harassment occurs

# What Did NOT Change



- Sexual harassment can be verbal, written, or physical
- Sexual harassment can be male-on-female, same sex, child-to-child, adult-to-child, or child-to-adult
- **But with the new definition of sexual harassment, everyone needs to know what the new definition means, AND how the school is legally responsible to respond!!!**



# Mandated Reporters



- Mandated Reporters under Pennsylvania law have specific responsibilities
- Action required under Title IX does not necessarily satisfy the Mandated Reporters' responsibilities



# So What Does This Mean?

- Responsibility for Title IX process depends on several important factors, but does not mean other resources are unavailable
  - School codes of conduct may apply
  - Mandated reporting still applies
  - Law enforcement may be an option for the complainant



# Reiterate Who Is A Respondent



- **Title IX applies:**
- **“In locations, events, or circumstances where the school has substantial control over the harasser and substantial control over the context in which the harassment occurs”**
- **If the respondent (employee or student) leaves school, graduates, or otherwise leaves, Title IX does not apply**

# And What About the Complainant?



- **An individual shall have status as a complainant only if the individual is participating in, or attempting to participate in, the school's education program or activity, at the time of the alleged sexual harassment**
- Remember: A Title IX lawsuit is a lawsuit alleging that the educational institution is liable

# Significant Details



- The school has no duty **under Title IX** to respond to off-campus sexual harassment that occurs, e.g., at an off-campus party in a private home
- The school can apply sanctions under the school's code of conduct, but is not always required to take action under Title IX
- Also, Title IX only applies to students who are physically in the United States.



# Reporting Sexual Harassment



- In the past , the school's actual knowledge of sexual harassment required that a school official with authority to take corrective action had been notified of the sexual harassment
- **Under the new Rule, if a complaint of sexual harassment is made to the Title IX Coordinator or to any person in the district, the district is considered to have actual knowledge**
- **And any individual can make the complaint, even anonymously**

# Reporting Sexual Harassment



- A student, parent, caregiver, friend, or a witness of sexual harassment **may report sexual harassment**
- This new provision is of special help to younger students who may tell a teacher or even a recess monitor
- **Any person who receives a report of sexual harassment must promptly inform the Title IX Coordinator**



# The Title IX Coordinator



- Each educational institution that receives federal funding must have a Title IX Coordinator who is trained in this policy and the Coordinator's contact information must be published widely – to everyone in the district, students and all staff, and in the community
- LCTI's two entities, K-12 and postsecondary, each have a Title IX Coordinator
- Do you know who is *your* Title IX Coordinator?



# What Happens After a Report?



- When the Title IX Coordinator receives a report of potential sexual harassment, the Title IX Coordinator must provide supportive measures to both parties, complainant and respondent, as appropriate and reasonable
- But must take into consideration the wishes of the complainant

# Supportive Measures



- Supportive measures are non-disciplinary, non-punitive individualized services offered as appropriate and as reasonably available, without fee or charge, to both the complainant and the respondent
- The complainant's wishes have to be considered
- Such supportive measures must be made available before or after the filing of a formal complaint or where no formal complaint has been filed, in the cases of both student and employee complainants
- ***And these may affect you . . .***

# Supportive Measures



- Supportive measures shall be designed to protect the safety of all parties and the educational environment, or to deter sexual harassment
- Such measures may include:
  - ✦ Counseling,
  - ✦ Extensions of deadlines or other curriculum-related adjustments,
  - ✦ Modifications or changes of work or class schedules or locations,
  - ✦ Campus escort services,
  - ✦ Mutual restrictions on contact between the parties
  - ✦ Leaves of absence,
  - ✦ Increased security and monitoring of certain areas of the campus

# Supportive Measures



- The Title IX Coordinator must respect the complainant's wishes, and the measures must be kept confidential
- This is where requirements under IDEA, Section 504, or ADA may be met, for students or for employees
- Emergency removal may apply to the alleged respondent if he/she is a danger to health or safety
- Faculty alleged to be respondents may be placed on administrative leave

# Title IX Coordinator Duties



- The Title IX Coordinator must receive training
- Because of the many duties of the Coordinator, the Coordinator may appoint designees
- All designees must receive training
- School administrators may be named designees to assist in handling complaints of sexual harassment
- **AND, even if there is a designee, the Title IX Coordinator MUST receive notice of the complaint PROMPTLY**

# What Happens to a Report?



- Once the Title IX Coordinator receives a report of sexual harassment and provides supportive measures, the Coordinator must advise both **complainant** and **respondent** of the processes involved in handling a Title IX complaint
- An investigation may follow
- **Determination of responsibility**
- Sanctions
- Appeals

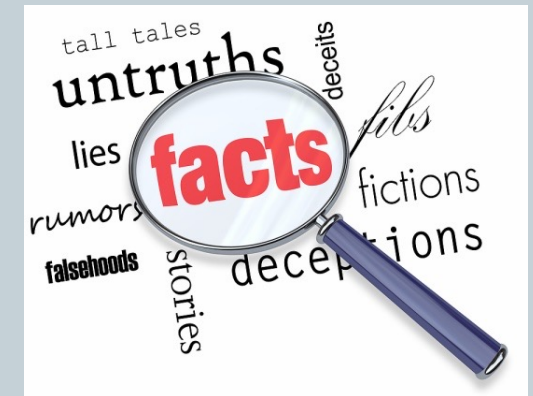
# Title IX Coordinator Duties



- The complainant must sign a formal complaint on the LCTI complaint form before any process can move forward
- A formal complaint is the go-ahead permission for an investigation
- There are three processes for resolution of the complaint, called **Grievance Processes**
  - **Formal Resolution**
  - **Informal Resolution**
  - **Live Hearings**

# Formal Resolution

- The Title IX Coordinator or designee conducts the investigation
- Interviews the parties, witnesses, anyone who may have relevant information
- Basically, the Title IX Coordinator or designee is the fact-finder





# Title IX Grievance Processes



- Formal Resolution Process
- Informal Resolution Process
- Live Hearings **MAY** be held in K-12, **MUST** be held in postsecondary resolution of complaints
- **Informal Resolution is NOT available for employee-on-student harassment**
- Complainant must sign a formal complaint before the Grievance Process can begin

# Title IX Coordinator Duties



- Explain the Grievance Processes to both parties
- Conduct the investigation, if Formal Resolution will take place
- Conduct the Informal Resolution
- Schedule the Live Hearing, if one will be held
- Write the investigative report
- Dismiss complaints on written notice from the complainant or if complaint(s) do not meet the new definition of sexual harassment
- Keep all records for **seven years**

# Essentials of the Grievance Process



- Training for all employees involved
- Presumption of innocence of respondent
- Prompt time frames for resolution of the case
- Allowance for temporary delays for good cause, e.g., law enforcement involvement, rape kit analysis
- Written notices at all stages of the process, for both parties and advisors
- No misuse of legally recognized privilege, e.g., physician-patient confidentiality or rape shield laws
- All training materials available upon request by members of the public

# Informal Resolution of Complaints



- An **informal resolution process** may be initiated after filing of a formal complaint by both complainant and Title IX Coordinator, e.g. mediation or restorative justice
- Both parties must voluntarily agree in writing
- The parties may switch to an informal process even after a formal resolution has begun, and may end the informal process and return to the formal process at any time before agreeing to a resolution

# Informal Resolution of Complaints



- All who conduct informal resolutions must be trained
- The informal resolution process may NOT be used in cases of faculty-on-student sexual harassment or in cases of any adult employee-on-student sexual harassment



# Formal Resolution of Complaints



- After the Title IX Coordinator receives a formal complaint, the Coordinator must give certain written notices to all known parties:
  - Notice of the allegations
  - Notice about the grievance process, including any informal resolution process
  - Notice that the allegations of sexual harassment potentially constitute sexual harassment, and give parties sufficient time to prepare a response before any initial interview

# The Investigation



- Must be conducted by a trained investigator who can be the Title IX Coordinator or designee, even a contracted investigator from outside the district who is unbiased and free from conflict
- No timelines are specified in the new regulations, but the investigation must be prompt and unbiased
- Respondent must be considered not responsible until determined to be responsible

# Formal Resolution of Complaints



- Needs a statement that the respondent is presumed not responsible for the alleged conduct
- Notice that the parties may have an advisor of their choice, who may be, but is not required to be, an attorney, with them, and that they and their advisors may inspect and review evidence
- Notice that knowingly making false statements or knowingly submitting false information is prohibited



# Formal Resolution of Complaints



- Prior to completion of the investigative report, the Title IX Coordinator must send to each party and the party's advisor the evidence subject to inspection and review
- The parties must have at least 10 days to submit a written response, which the investigator will consider
- **The Title IX Coordinator then creates an investigative report** and, at least 10 days prior to a live hearing (if a hearing will be scheduled), sends to each party and the party's advisor, if any, the investigative report for their review and written response

# Dismissal of a Formal Complaint



The Title IX Coordinator may dismiss a formal complaint if the conduct alleged in the formal complaint:

- Would not constitute sexual harassment even if proved
- Did not occur in the district's education program or activity
- The complainant requests dismissal of the complaint in writing
- If the conduct did not occur against a person physically in the United States
- If the respondent is no longer enrolled or employed by the recipient
- Specific circumstances prevent the Title IX Coordinator from gathering sufficient evidence

# Standard of Evidence



- The educational entity (LCTI) has the choice to use one of two evidentiary standards:
  - **Preponderance of the evidence** – i.e., more likely than not that the incident(s) occurred as alleged
  - **Clear and convincing evidence** – i.e., substantial evidence exists that the incident(s) occurred as alleged
- Whichever standard the entity chooses, that same standard must be used in every Title IX Grievance Process

# After the Investigative Report



- The Title IX Coordinator must schedule the live hearing if one will be held
- If not, the Title IX Coordinator must send the final **investigative report** to the parties and advisors
- Each party must have the opportunity for additional limited back and forth questions and responses from each party
- **BUT THEN . . . the Title IX Coordinator must hand over the report to a person not previously involved in the case, an independent decision-maker**

# Live Hearings



- The Live Hearing would occur after the Title IX Coordinator has sent the investigative report to the parties
- If a live hearing is scheduled, either party to the formal complaint may request that the parties and their advisors be in separate rooms and communicate via technology and not in person
- Advisors to the parties, but not the actual parties, may question and cross-examine parties and witnesses on relevant issues and evidence, and credibility determinations

# Live Hearings



- **Live hearings are mandatory for postsecondary institutions**
- **The new, independent decision-maker must take over and conduct the Live Hearing**
- **The independent decision-maker controls the relevance of the questioning and the progress of the live hearing**

# Live Hearings



- If a party does not have an advisor who can be present, the recipient must provide an advisor of the district's choice without fee or charge to that party, who may be an attorney
- An audio or audiovisual recording or transcript of any live hearing must be created, and copies must be available to the parties for inspection and review



# The Independent Decision-Maker



- **The trained independent decision-maker is the one who determines whether sexual harassment occurred, assigns responsibility, and imposes disciplinary sanctions as appropriate**
- The same standard of evidence must be used in adjudicating all formal complaints of harassment
- But remember, the educational entity can choose whether to use the **preponderance of the evidence standard** or the **clear and convincing evidence standard**



# Standards of Evidence Again



- **Preponderance of evidence**
  - More likely than not
- **Clear and convincing evidence**
  - Substantial evidence
- Whichever standard is applied, a live hearing may be what is needed to test credibility or clear up conflicting testimony



# Final Decision



- The independent decision-maker must issue a written determination of the final decision
- **This must be a comprehensive report that includes:**
  - The charges
  - The description of the process
  - Factual findings supporting the outcome
  - The sanctions, if any, that will occur
  - Remedies, if any, for the complainant
  - Information about the appeals process



# The Decision-Maker



- The decision-maker must simultaneously send both parties a written determination explaining the reasons for the outcome of the investigation
- This **two-person method of determining responsibility** is a new requirement



# The Appeal Step



- **If there is an appeal, a third person who has not been part of the case before now, must take over the appeal**



# Limited Reasons for Appeal



- An appeal can be filed by either party in cases of a:
  - **Procedural irregularity** that may have affected the outcome
  - **New evidence** became available that may have affected the outcome
  - **Provable bias or conflict of interest** of the Title IX Coordinator
- The new third person must decide the appeal and notify both parties in writing simultaneously
- The Title IX Coordinator must enforce the outcome

# What to Maintain on File



- **EVERYTHING!**
- **And for 7 years**



# Retaliation



- Retaliation against anyone who participates in the proceeding is prohibited
- However, First Amendment rights must be respected



# What Is Your Responsibility?



- Every educational institution that receives federal funding must have a Title IX Coordinator
- K-12 and postsecondary
- LCTA has TWO Title IX Coordinators
- One for the K-12 context, one for postsecondary
- **This is your first responsibility!!!**
- **Know who your Title IX Coordinator is**



# What Is Your Responsibility?



- **All reports of potential sexual harassment must reach the Title IX Coordinator immediately, if not sooner**
- If, for some reason, you cannot reach the Title IX Coordinator, report the allegation or your observation to your administrator!
- **BUT, you must follow up**, with that administrator and with the Title IX Coordinator
- **This is the law now!**

# **Not Every Report Is a Title IX Violation**



**But that is not your job to decide!**

**You are trained in this policy! You are not trained as a Title IX Coordinator, so do not decide what to report**

**Relay ALL allegations, all witnessed potential sexual harassments, all concerns**

# Another Example of Difference



- Postsecondary institutions may choose to designate certain individuals as “confidential advisors”
- If reports of sexual harassment are made to these confidential advisors, they may counsel the complainant
- They do not have to report the allegation immediately and may respect confidentiality
- **There is no such provision in K-12!**

# Why Different Treatment?



- Think about the differences in K-2, 3-5, MS, HS and beyond with respect to
  - Knowledge of sexual harassment
  - Vocabulary and terminology
  - Trust of administrators and staff
  - Concern for parental disapproval
  - Shame and embarrassment
  - Fear of being ostracized, ridiculed

# There's a Difference: K-12 or Older



- Reports of sexual harassment from students in lower grades are different:
- “That boy bothered me. . .” “Where?” “in the boys’ room . . .”
- “That girl tried to kiss me!”
- “We were playing doctor.”
- “I didn’t like how he (she) looked at me. . .”
- “Do you understand “good touch/bad touch”?”

# Why Different Treatment



- Reports of sexual harassment from students in middle or high school may not be forthcoming because of embarrassment or shame, fear of losing a teacher or friends, being a snitch
- This is where keeping your eyes open really matters
- A formerly alert and happy MS student may be quite reserved now, and even sad
- Same in high school

# Sexual Harassment Is a Big Deal



- Part of sexual harassment prevention is teaching students the value of “self”
- Teachers who de-value students do damage that may never be undone
- Never underestimate the power of adults’ grooming
- **“If you see something, say something”**

# Back to Requirements



- The new Title IX Regulations and LCTI's policy must be promulgated throughout the district and community
- The name and contact information for each Title IX Coordinator must be prominently displayed on the district website and in every district building, as well as a notice of nondiscrimination on the basis of sex
- The policy must be available for review and periodic updates



# Questions?



- Thank you for your attention!
- I'll be happy to take questions about the presentation and, if you think of something later, I can take questions by email
- Think of some scenarios you have dealt with . . .
- Were you responsible under Title IX? Would you be NOW?
- You can contact, me, Kathleen Conn, at [kconn@kingspry.com](mailto:kconn@kingspry.com)