



# Putting Title IX into Play

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# Objectives of Training

**Statistics/Update on  
Cases involving Title IX**

**Standard for Legal  
Liability under Title IX**

**The Process**

**Recognizing Red Flags**

# Statistics and Outcomes

# Peer-on-Peer Harassment: 1996 - 2019

- ▶ 48% of 7-12<sup>th</sup> grade students report experiencing sexual harassment
  - ▶ LGBTQ: 86% verbal harassment, 40% physical
- ▶ Survey of 100 cases (peer-on-peer)
  - ▶ Physical Assaults: 38
  - ▶ Sexual Assaults: 23
  - ▶ Forced Sodomy: 15
  - ▶ Rape: 9
  - ▶ Reported severe emotional distress: 12
  - ▶ Suicide: 5
    - ▶ Attempted: 12
  - ▶ Victim changed school setting: 21
  - ▶ *Staff participated: 11*

# Outcomes: 1996 – April 2019

- ▶ Settlements
  - ▶ Range
    - ▶ \$4,000
    - ▶ \$5.75 million
  - ▶ Median: \$160,000
  - ▶ Average: \$563,924
- ▶ Verdicts
  - ▶ Range
    - ▶ \$27,000
    - ▶ \$28 million
  - ▶ Median: \$275,000
  - ▶ Average: \$2,286,500

# Employee-on-Student Harassment: 2015

- ▶ Arrests: 500
  - ▶ >50% placed on admin leave or resigned immediately following arrest
- ▶ 7% of students in 8<sup>th</sup> – 11<sup>th</sup> grade report physical sexual contact with school employee
  - ▶ 3.5 million
- ▶ Total is 10% when less-than-physical contact is factored in
  - ▶ 4.5 million
- ▶ Average ages
  - ▶ Perpetrator: 36; Victim: 15
- ▶ Washington Post (2015): 35% of accused/convicted used social media to access victim
  - ▶ Technology played an important role in 3 out of 4 cases
- ▶ Colleagues often *thought* there might be “something going on”
  - ▶ Fear of reporting in case suspicions are wrong
  - ▶ Awareness report could “ruin a person’s life”

# Standards of Liability

# Title IX: The Law

- ▶ No person in the United States
- ▶ On the basis of sex
- ▶ Shall 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



# Judicial Standard of Liability: Peer-on-Peer Harassment

- ▶ School Board liability for damages under Title IX for **student-on-student sexual harassment** if:
  1. The *Gebser* standards of notice and deliberate indifference are satisfied
  2. The school has substantial control over (a) the context in which the harassment occurred and (b) the harasser; and
  3. The conduct is “**sexual harassment**,” which is conduct (a) “so severe, pervasive, and objectively offensive” (b) that it “effectively denies equal access to an institution’s resources or opportunities.” [Hostile Educational Environment standard]

# U.S. Department of Education Title IX Regulations

- ▶ Adopted May 6, 2020
- ▶ Explicit recognition for the first time in *regulations* that sexual harassment, including sexual assault, is sex discrimination
  - ▶ Case law has long recognized this interpretation, and enforced Title IX accordingly
    - ▶ *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999)  
peer-on-peer
    - ▶ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998)  
employee-on-student

# New Regulations: Definition of Sexual Harassment

- ▶ Unwelcome conduct
- ▶ Determined by a reasonable person (objective standard)
- ▶ To be so severe, pervasive, and objectively offensive that it effectively denies a person's equal access to the recipient's education program or activity
  - ▶ This definition of sexual harassment tracks the *Davis* case and its definition of sexual harassment

# New Regulations

## Forms of Sexual Harassment

- ▶ *quid pro quo* (typically would be employee-on-student; not always)
- ▶ Hostile educational environment (new definition)
- ▶ Violence Against Women's Act - four categories:
  - ▶ Sexual Assault - 20 U.S.C. 1092(f)(6)(A)(v)
  - ▶ Domestic Violence - 34 U.S.C. 12291(a)(8)
  - ▶ Dating Violence – 34 U.S.C. 12291 (a)(10)
  - ▶ Stalking – 34 U.S.C. 12291(a)(30)

# Factors Affecting Sexual Harassment Definition

- ▶ “Severe, pervasive, and objectively offensive” misconduct is harder to establish the younger the children involved. *Gabrielle v. Park Forest-Chicago Heights, Illinois Sch. Dist.*, 163 F.3d 817 (7<sup>th</sup> Cir. 2003)
- ▶ In determining if a victim has been denied access to an educational opportunity or benefit, the ability of the student to receive an education, as reflected in the student’s grades, is a factor. *Hawkins v. Sarasota County Sch. Bd.*, 322 F.3d 1279 (11<sup>th</sup> Cir. 2003)

# Deliberate Indifference: Difficult to Prove

- ▶ Davis standard: A recipient is deliberately indifferent only “where its response to the harassment or lack thereof is **clearly unreasonable in light of the known circumstances**”
- ▶ Courts will focus on issues: (1) Did the school investigate properly? (2) If so, did the school implement measures to remediate the harassment? (3) If so, was the remediation effective?
- ▶ It is not necessary to conduct flawless investigations or perfect solutions. *Fitzgerald v. Barnstable Sch. Committee*, 504 F.3d 165 (1<sup>st</sup> Cir. 2007).

# Deliberate Indifference: Failure to Follow Policies, Regulations

- ▶ The failure to follow DOE regulations does not typically establish deliberate indifference. See *Gebser*.
- ▶ The failure to follow Division policies does not, in itself, establish deliberate indifference. See *Sanchez v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156 (5<sup>th</sup> Cir. 2011)
- ▶ The failure to follow OCR “Dear Colleague Letters” or other OCR guidance documents does not, standing alone, constitute deliberate indifference.

# Overall Concepts

- ▶ Every employee has an obligation to report suspected sexual misconduct/harassment
- ▶ Division has an obligation to respond in a way that is
  - ▶ Not deliberately indifferent
  - ▶ Is reasonable under the circumstances
- ▶ Student has private right of action for failure to respond appropriately
  - ▶ Can recover monetary damages if the harassment/misconduct was so severe, pervasive, and objectively offensive that it effectively denies a person's equal access to the recipient's education program or activity



# Case Law Scenario

# *Rasnick v. Dickenson County Sch. Bd.* (allegations: 2003)

- ▶ Elementary (computer lab) T
  - ▶ Played with student's hair
  - ▶ sent sexually explicit emails
- ▶ *Prior complaints about the teacher*
  - ▶ 1998-99: parent of 7<sup>th</sup> grade student
    - ▶ Put hand on back/shoulder
    - ▶ Touched hair
    - ▶ Told student "how pretty she was," she "ought to be a model"
    - ▶ "put his privates in her hand" (when in third grade)

## *Rasnick v. Dickenson County Sch. Bd.* (allegations: 2003) Continued.

- ▶ 1999-2000: parent of another student
  - ▶ Patted student on behind
  - ▶ Leaned over student at computer; looked down shirt; “nice breasts”
- ▶ Prior P:
  - ▶ Talked with another T about allegations: she did not believe true
  - ▶ Talked with Supt: “Stay away from that; if it needs handling, I will handle; could be explosive”

# *Rasnick v. Dickenson County Sch. Bd.* (Lesson)

- ▶ Failure to investigate prior complaints, even by different admin, concerning to the judge
  - ▶ Even after change of leadership, liability can arise from overall facts and circumstances
- ▶ Superintendent's "forbidding" admins from taking action *extremely concerning*
- ▶ Suit was dismissed ... But judge was expressly chagrined about having to dismiss it (would be different outcome today)

# Title IX Process

# TIXC Intake STEPS

34 C.F.R. 106.44

1. Division receives report
2. Would these facts violate Title IX?  
Yes? Title IX process  
No? Other process
3. Meet with complainant
  - supportive measures
  - formal process
4. Respondent: supportive measures
5. Emergency removal?
6. Formal Process iff
  - Complainant files
  - TIXC believes would violate TIX
7. Informal Resolution vs. Investigate Complaint
  - If investigating, detailed written notice to parties
  - if investigating, discipline for the sexual misconduct must wait until TIX process completed
8. Is external reporting mandated?

# Complaint

## Must Retain

- **Harassment**
  - unwelcome
  - Severe
  - Pervasive (AND)
  - Objectively offensive
  - Effective **denial** of access
- **Quid pro quo**
- **Sexual assault, dating violence, domestic violence, stalking**



regulatory definition of sexual harassment

34 C.F.R. 106.30(a)

## Must Dismiss\*

- Not sexual harassment even if true
- Did not occur in school program or activity
- Did not occur in US

\* Send written notice to all parties of dismissal and reasons; can address conduct under other policies

34 C.F.R. 106.45(b)(3)

## May Dismiss\*

- Complainant requests withdrawal\*\*
- Respondent's employment or enrollment ends \*\*
- Circumstances prevent gathering sufficient evidence to reach determination (passage of time, lack of cooperation of complainant, etc.)

\*\* don't be too quick to dismiss for these circumstances

34 C.F.R. 106.45(b)(3)

## Scope of Division's Educational Program or Activity

34 C.F.R. 106.44(a)

Any location, event, circumstance over which division exhibits substantial control over both alleged harasser(s) and context in which harassment occurred

- *Can include off-campus, "non-school" conduct* ◦



# Who Does What?

Title IX  
Coordinator

Investigator

Informal  
Resolution  
Processor

Decision Maker

Appeal Decision  
Maker

# Notice of Complaint

34 C.F.R. 106.45(b)(2)

1. Notice of grievance process (and any available informal resolution process)
2. Provide sufficient detail of allegations to allow respondent(s) to prepare response
  - names of known parties
  - conduct alleged
  - date/location
3. State respondent presumed “not responsible” and determination is at end
4. Notice of right to advisor
5. Notice of right to inspect and review evidence
6. Notice of any code of conduct regarding false statements
7. Explain (or refer to policies for) range of possible discipline/remedies; preponderance standard; process for appeal; and available supportive measures
  - supplement if “open” case as to new allegations

# Investigation

# Steps

34 C.F.R. 106.45(b)(5)

1. Written notice to parties before interviews
  - Sufficient notice/time to prepare
2. Equal access to parties to present evidence
3. Allow advisors to parties at all meetings
  - Cannot prevent discussion outside of process
4. Do not use health record evidence without consent
5. Make all evidence available upon request during process
  - redact names?
6. *Send evidence* to all parties at least 10 days before finishing report
  - Including evidence not being relied upon
7. Factor comments submitted by parties into report
8. Written report, sent to all parties at least 10 days before sending to decision maker
  - within 35 days after complaint filed (VSBA)
9. “reasonably prompt”
10. Maintain confidentiality

# Investigation Best Practices

1. Read policies, etc (*this slide show!*) before you start each time, and PLAN (timeline!)
2. Explain why you are interviewing the individual in general terms
  - maintain confidentiality if possible
  - inform *respondent* presumed not responsible, no decision has been made
3. Question all with open-ended, who, what, when, where, how Qs
  - (1) Complainant(s); (2) witnesses; (3) respondent(s)
4. Inquire along a timeline, in chronological order
5. Ask “single issue,” nonleading questions (and “anything else you’d like to add?”)
6. Obtain other witness contacts and any documentary evidence available from each
  - written or recorded statements?
7. Explain retaliation prohibition
  - can no longer requires *parties* to “keep confidential,” but can ask Ws to
8. Compare all statements and evidence
9. Gather and include evidence that weighs on: consistency, accuracy, memory, credibility (or lack thereof), implausibility, inconsistency, unreliability, ulterior motive, lack of cooperation

# Written Report

- ▶ “Summarize” relevant evidence – **please be specific**
  - ▶ Omit truly insignificant, irrelevant\* details
  - ▶ Include both inculpatory and exculpatory evidence
  - ▶ Provide enough factual information (if available) to allow decision maker to consider: consistency, accuracy, memory, credibility (or lack thereof), implausibility, inconsistency, unreliability, ulterior motive
- ▶ Note credibility evidence
  - ▶ Cannot base credibility determination on the speaker’s status (C, W, R)
- ▶ Append and refer to documentary evidence
- ▶ Indicate consideration of comments submitted by parties in response to evidence
- ▶ Do not make findings of responsibility, just recite evidence/facts

# “Rules of Evidence”

# Presumption

Throughout process, respondent(s) must be presumed  
“not responsible”

- do not pre-judge any fact or question ◦
- collect and review all evidence before decision ◦





# Relevance

## YES

- ▶ “Tends to prove or disprove a fact”
- ▶ Does this make the existence of any fact of consequence more or less likely to be true?
- ▶ Can be either inculpatory or exculpatory

## NO

- ▶ Questions about complainant's prior sexual conduct, unless offered to prove (1) someone other than respondent committed alleged conduct or (2) specific incidents involving respondent, to prove consent
- ▶ Health care/treatment records
- ▶ Protected by privilege (e.g., 5<sup>th</sup> A, attorney-client)

# Weighing Relevant Evidence

## CREDIBILITY

**reliability of the evidence or  
source:**

*Is there bias, motive, lack of  
consistency?*

## PERSUASIVENESS

**believability,  
relative strength**

*Is this evidence believable,  
plausible?*

- To be done *only after all evidence is gathered and reviewed*
- Consider only relevant evidence in totality
- Assign weight to relevant evidence based on believability, credibility
- Direct evidence is preferred to circumstantial
- Draw *necessary/objectively reasonable* inferences

# Burden of Proof (and Gathering Evidence)

34 C.F.R. 106.45(b)(5)(i)

At all times:  
division's

# Case Law Scenario

# Doe v. Russell County Sch. Bd. (allegations: 2016)

- ▶ Elementary custodian
  - ▶ Student was 9 (3d grade) when moved to the school and abuse began
  - ▶ *Convinced student's guardian to let student live with him for a year – slept in same bed/abused nightly*
- ▶ P(1) knew student lived with custodian, went on trips together
  - ▶ Did not investigate the relationship/take any action
  - ▶ Assumed the student and custodian were related
  - ▶ Required custodian to keep office door closed at all times
  - ▶ Knew custodian had other boys help gather trash
- ▶ P(2) knew custodian spent lots of time and money on student, at school and away from school
  - ▶ Knew CPS complaint was filed during student's 4<sup>th</sup> grade year
  - ▶ Participated in CPS interviews; custodian and student denied all
  - ▶ Told custodian if student was at school after instructional hours, should be supervised in after-school program
  - ▶ *Took no separate/independent action*

# Doe v. Russell County Sch. Bd. (Allegations: 2016)

- ▶ Ts knew *but did not report*
  - ▶ Custodian's wife jealous of student; divorcing custodian; reported to CPS
  - ▶ Custodian always had hands on student
  - ▶ Custodian "obsessive, overly friendly" with student
  - ▶ Custodian touched, gave money to other male student
  - ▶ Custodian and student slept together; went on trips; rode to/from school together; spent time alone together on school property
  - ▶ Custodian and student were caught alone together (but hidden, in the dark) in a T's classroom one summer
  - ▶ Custodian was also "courting" student's younger brother
  - ▶ Custodian passed notes to student after mother regained custody and put a stop to sleepovers
  - ▶ Custodian was allowed to remove students from classes

# Doe v. Russell County Sch. Bd. (Lesson)

- ▶ Even reliance on DSS' findings may not fulfill Title IX obligation
- ▶ Independent investigation *highly recommended* (alongside DSS, LE)
- ▶ Ongoing supportive measures/efforts within educational environment advisable even after complainant/respondent no longer on premises
  - ▶ Discipline for respondents *and* those with knowledge who failed to report
  - ▶ Supportive measures for complainants

# Decision



# Steps

34 C.F.R. 106.45(b)(6),  
(b)(7)

- ▶ Review report, evidence
- ▶ Review parties' responses to report
- ▶ Provide notice that parties can submit relevant questions (and reasonable followup questions) parties want asked of any party or witness
- ▶ Oversee Q&A process
  - explain any Q excluded as irrelevant
- ▶ Written decision: determine responsibility
  - within 10 work days of report (VSBA)
- ▶ Notice of right to appeal

# How to Decide

- ▶ Objective and unbiased
- ▶ Objective evaluation of evidence
- ▶ Conclusion about whether respondent is responsible for harassment prohibited by Title IX
- ▶ Exercise independent judgment
- ▶ No conflict of interest or bias
- ▶ Ultimate Question (for each allegation): is it more likely than not that the respondent engaged in (or is responsible for) the alleged conduct?

# Standard: Preponderance

“more likely than not”

- Remember to begin with the presumption *not responsible*; the evidence must establish respondent “more likely than not” **is** responsible ◦

# Written Determination:

- ▶ Identify allegations
- ▶ Describe procedural steps taken
- ▶ Find facts – for each fact, weigh evidence and determine whether it happened or not
  - ▶ *Consider: consistency/corroboration, accuracy, memory, credibility (or lack thereof), implausibility, inconsistency, unreliability, ulterior motive*
- ▶ Apply code of conduct to facts
- ▶ State result of each allegation and rationale
- ▶ Recommend discipline, remedies
  - ▶ Remedies designed to restore or preserve equal access to school's educational program or activity
- ▶ Notify about appeal procedure
- ▶ Provide to parties
  - ▶ Final if no appeal filed within 5 work days (VSBA policy)

# Case Law Scenario

# *Doe v. Putney* (Allegations: 2015)

- ▶ Student received texts from boy inviting her to skip class
  - Student declined but walked with him “to class”
  - SRO observed the two walking toward parking area, asked “where going”
  - Male student grabbed female and pulled into woods adjacent to school
  - Female student texted friends for help; friends reported “abduction” to SRO
  - SRO openly doubted veracity, advised admin of report
  - Neither SRO nor admin responded
  - In response to female’s parents calls of concerns, SRO stated “skipping school”

# Doe v. Putney (Allegations: 2015) Continued

- ▶ Male student sexually assaulted female as these events were unfolding
  - In response to further concerns from parents, SRO and admin found students in woods
  - SRO attempted to put both in back of squad car; ultimately let female sit in front when she objected
  - Admin separated the students
    - Female reported assault to SRO; male claimed “consensual”
    - No further investigation – accepted male student at his word
    - Report affirmatively misrepresented female’s appearance as clean, not disheveled
- ▶ Woods by school was known to SRO and admins as a location students engaged in sexual misconduct
  - So many, admin had held an assembly admonishing students

## *Doe v. Putney* (Lesson)

- ▶ SRO as agent of SB and admin had 3 reports of abduction, multiple messages/direct statements of assault
- ▶ Observed visible evidence of sexual assault
- ▶ Sufficient knowledge to invoke Title IX obligations of school division
  - Likely, deliberate indifference





# Appeal

# Steps

34 C.F.R. 106.45(b)(8)

1. Review timeliness of filing
  - within 5 work days of written decision (dismissal or determination) (VSBA)
2. Confirm bases for appeal are appropriate
  - procedural irregularity
  - new evidence not reasonably available during investigation
  - TIXC, investigator, decision maker bias, conflict of interest
3. Notice of appeal to both parties
4. Receive written statement(s) from parties (VSBA)
5. Review evidence, investigator report, written decision (VSBA)
6. Decision on appeal, in writing, describing result and rationale
  - within 15 calendar days of filing of appeal

# Informal Resolution

# Steps

34 C.F.R. 106.45(b)(9)

1. For student-on-student cases *only*
2. If one requests, other(s) must respond (yes/no) within 3 days (VSBA)
3. Obtain voluntary, written consent
4. Provide notice of allegations, informal process “rules,” and ability to resume formal process
5. Complete with in 10 days (VSBA)
6. If resolved, document complaint and resolution, parties sign, retain copies

# Record Retention

# Rules

34 C.F.R. 106.45(b)(10)

1. Documents relating to every complaint
  - investigation
  - determination
  - discipline imposed
  - informal resolution
  - appeal
2. Training materials \*
3. Documents relating to every report (whether or not becomes complaint)
  - supportive measures (or why not)
  - basis for conclusion response was not deliberately indifferent

# Questions?

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# Update on New Proposed Title IX Regulations

## Virginia DCJS

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# Jeffrey J. Nolan



- Curriculum developer and faculty member of Virginia DCJS-funded program on fair, trauma-informed investigations
- Curriculum development team and faculty member of U.S. DOJ trauma-informed investigation program
- Author and co-author of nationally-distributed book chapters, papers and articles on Title IX/Clery Act, fair, trauma-informed investigations and/or campus threat assessment
- Member of American Council on Education 2019 and 2022 Title IX Working Groups
- Certified FETI® Practitioner (CFP-B)
- Admitted to practice in MA, NY, TX, VT and VA

# Notice of Proposed Rulemaking Process

- Department review of May 2020 Title IX regulations began in March 2021, as directed by an executive order
- Department sought public input from stakeholders and convened a nationwide virtual public hearing in June 2021
- NPRM was published officially in the Federal Register on July 12<sup>th</sup>, and public will have until Monday, September 12<sup>th</sup> to submit comments to the Department
- Department will then have to summarize and respond to comments received and issue the resulting final regulations, which will include an effective date
- Department took 15 months to respond to approximately 125,000 comments to May 2020 regulations
- It will likely be many months before proposed regs become effective
- Until they are, May 2020 regulations remain in effect

# Scope and Definition Changes

- May 2020 regulations:
  - narrowed definition of "hostile environment sexual harassment" and
  - required schools to focus their Title IX procedures on on-campus or program-related conduct that fit within that definition
- Proposed regulations in NPRM roll back that narrowing and essentially restore the definition to that used during the Obama Administration, which is more likely to require investigations of a broader category of unwelcome conduct of a sexual nature

# Scope and Definition Changes

- Consistent with June 2021 Notice of Interpretation, proposed regulations make clear that sex-based discrimination covered by Title IX includes discrimination on the basis of:
  - sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation and gender identity
  - For the most part, these protections are already provided in essence by a combination of case law and other statutes

# Scope and Definition Changes

- Proposed regulations explicitly define discrimination on the basis of gender identity as including:
  - "different treatment or separation on the basis of sex in a way that would cause more than de minimis harm, including by adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with their gender identity"

# Scope and Definition Changes

- Although there is no definition of “de minimis harm,” Preamble (at p. 41536) cites several court decisions which appear to suggest that the Department would view the refusal of an institution to allow students to use:
  - restrooms
  - locker rooms or
  - shower facilities
- consistent with their gender identity to constitute more than de minimis harm, and therefore, be prohibited by Title IX
- Guidance on housing issues is less clear

# Scope and Definition Changes

- Proposed regulations emphasize, in contrast to on-campus/program-related focus of the May 2020 regulations, that Title IX obligates a school "to respond to sex discrimination within the [school's] education program or activity in the United States, even if it occurs off-campus," and
- to "respond to a hostile environment based on sex within its education program or activity in the United States, even if sex-based conduct contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States."
- This "schools must address the on-campus effects of off-campus harassment" concept is similar to guidance included in the 2011 Dear Colleague Letter.

# Scope and Definition Changes

- NPRM provides that the “conduct that occurs under a recipient’s education program or activity includes but is not limited to:
  - conduct that occurs in a building owned or controlled by a student organization that is officially recognized by a postsecondary institution
    - (similar to current regulations) and
- conduct that is subject to the school’s disciplinary authority
  - (this is a new and significant change)



# K-12 Students with Disabilities

- If a complainant or respondent is a K-12 student with a disability, the Title IX Coordinator must consult with:
  - the student's Individualized Education Program (IEP) team, if any, or
  - the group of persons responsible for the student's placement decision under 34 CFR 104.35(c) (Section 504 team), if any
  - to help ensure that the school complies with the IDEA and Section 504 throughout the school's implementation of grievance procedures

## K-12 Employee Notification Requirements

- K-12 schools must require all of their employees who are not confidential employees to notify the Title IX Coordinator when the employee has information about conduct that may constitute sex discrimination under Title IX
- Similar in application to May 2020 regulations' rule that K-12 schools are deemed to have "actual knowledge" of sexual harassment once any employee learns of it

# “Confidential Employees”

- “Confidential employee” means:
  - An employee of a school whose communications are privileged under Federal or State law associated with their role or duties for the institution;
  - An employee of a school whom the recipient has designated as a confidential resource for the purpose of providing services to persons in connection with sex discrimination—
    - but if the employee also has a role or duty not associated with providing these services, the employee’s status as confidential is limited to information received about sex discrimination in connection with providing these services; or
  - An employee of a postsecondary institution who is conducting an Institutional Review Board-approved human-subjects research study designed to gather information about sex discrimination—but the employee’s confidential status is limited to information received while conducting the study.

# Confidential Employee Requirements

- Confidential employee requirements:
  - Schools must notify all participants in their education program or activity of the identity of any confidential employee
  - Schools:
    - Must require a confidential employee to explain their confidential status to any person who informs the confidential employee of conduct that may constitute sex discrimination under Title IX and
    - Must provide that person with contact information for the recipient's Title IX Coordinator and explain how to report information about conduct that may constitute sex discrimination under Title IX

# Employee Notification Requirements - Postsecondary

- For postsecondary institutions, May 2020 regulations scrapped the "responsible employees must report sexual harassment" standard that Department had used for many years
- Replaced it with easier-to-administer approach that only requires colleges to initiate an investigation based on a signed, formal written complaint provided to a narrow group of college officials

# Postsecondary Employee Notification Requirements

- Proposed regulations would impose a more precise but ultimately broader version of the previous standard, in that they would mandate policies that require any employee who is not a confidential employee:
  - And who has authority to institute corrective measures on behalf of the school to notify the Title IX Coordinator when the employee has information about conduct that may constitute sex discrimination
  - And who has responsibility for administrative leadership, teaching, or advising in the school's education program or activity to notify the Title IX Coordinator when the employee has information about a student being subjected to conduct that may constitute sex discrimination

# Postsecondary Employee Notification Requirements

- Proposed regulations would impose a more precise but ultimately broader version of the previous standard, in that they would require policies that require any employee who is not a confidential employee:
  - And who has responsibility for administrative leadership, teaching, or advising in the recipient's education program or activity and has information about an employee being subjected to conduct that may constitute sex discrimination under Title IX to either:
    - (A) notify the Title IX Coordinator when the employee has information about conduct that may constitute sex discrimination against employees under Title IX; or
    - (B) provide the contact information of the Title IX Coordinator and information about how to report sex discrimination to any person who provides the information

# Public Awareness Events

- When a postsecondary institution's Title IX Coordinator is notified of information about conduct that may constitute sex-based harassment under Title IX that was provided by a person during a public event held on the postsecondary institution's campus or through an online platform sponsored by a postsecondary institution to raise awareness about sex-based harassment associated with a postsecondary institution's education program or activity, the postsecondary institution is not obligated to act in response to this information
  - unless the information reveals an immediate and serious threat to the health or safety of students or other persons in the postsecondary institution's community
- Institution must however use this information to inform its efforts to prevent sex-based harassment
  - including by providing tailored training to address alleged sex-based harassment in a particular part of its education program or activity or at a specific location when information indicates there may be multiple incidents of sex-based harassment



# Training Requirements

- Proposed regulations would require schools to do some training for all employees so that they understand their notification obligations
- More specific training would be required for Title IX Coordinators, investigators, and others involved in formal or informal resolution proceedings
- Proposed regulations would require retention and posting of training materials

# Procedural Changes

- Proposed regulations:
  - all complaints of sex-based discrimination at all schools would be addressed through procedures that include certain elements (see proposed section 106.45)
    - historically and currently, general sex-based discrimination procedures that do not involve sexual harassment are only required to be "prompt and equitable"
  - sex-based harassment cases at postsecondary institutions that involve a student complainant or student respondent would include certain additional elements (see proposed section 106.46)

# Procedural Changes

- In contrast to May 2020 regulations, the proposed regulations would, for example:
  - Allow complaints to be based on both oral and written complaints
  - Allow schools to temporarily separate respondents from the institution to the extent necessary to "protect the safety of the complainant or the [school's] environment"
    - This is in addition to current “emergency removal” or “administrative leave” separation rules, which would be retained

# Procedural Changes

- In contrast to May 2020 regulations, the proposed regulations would, for example:
  - Not require complaints to be "dismissed for Title IX purposes"
    - This would eliminate provision of May 2020 regulations that caused many schools to adopt relatively cumbersome dual-track procedures to address forms of sexual misconduct both within and outside the narrow definition of sexual harassment stated in the current regulations
    - See "Here's How Title IX Could Change Under Biden's Proposed Rule," Chronicle of Higher Education (June 23, 2020)

# Procedural Changes - Postsecondary

- In contrast to May 2020 regulations, the proposed college student complainant/respondent sex-based harassment regulations would, for example:
  - Allow schools to provide the parties with either access to evidence gathered in investigation or a written investigation report (with evidence provided upon request)
    - but they do not have to provide both
  - Allow, but not require, live hearings
    - Current “live hearing” procedures could be replaced by a process that involves live questioning of parties and witnesses at individual meetings with an investigator or investigators

# Procedural Changes - Postsecondary

- In contrast to May 2020 regulations, the proposed sex-based harassment regulations for college student complainant/respondents would, for example:
  - Allow investigators to make decisions regarding responsibility
    - that is, a "single investigator" model would again be permitted
  - Previously invalidated exclusionary rule would be replaced by a rule providing that:
    - if a party does not respond to questions related to their credibility, the decision-maker must not rely on any statement of that party that supports that party's position
      - but could rely upon statements, such as inculpatory or exculpatory text messages, that do not support that party's position

# Procedural Changes

- These changes will, of course, require an overhaul of policies rewritten in 2020 to comply with the current regulations
- While the notice and comment period is running its course, schools should
  - reflect on their experiences under the current regulations and
  - start to think through how they would like to change their policies within the more flexible parameters that would be established by the proposed regulations

# Informal Resolution

- In 1997, 2001 and 2011 guidance, Department stated:
  - "in cases involving allegations of sexual assault, mediation is not appropriate even on a voluntary basis."
- While some schools used non-mediation informal resolution processes notwithstanding this guidance, many schools read this language broadly and did not use any form of informal resolution practices in sexual assault cases
- Trump Administration's Department rescinded this guidance in 2017 and declared that informal resolution could be used in sexual assault cases if certain safeguards were implemented, and incorporated that position into the May 2020 regulations



# Informal Resolution

- Fortunately, proposed regulations do not revert to a pre-Trump Administration position on this point
  - proposed regulations would permit the use of informal resolution processes in sexual assault and other sex-based discrimination cases
- As with the current regulations, certain safeguards must be followed
- Helpfully, the proposed regulations explicitly state a safety-related caveat that was implied in the current regulations, specifically:
  - "[c]ircumstances when a recipient may decline to allow informal resolution include but are not limited to when the recipient determines that the alleged conduct would present a future risk of harm to others."

# Employee-Related Issues

- Proposed regulations back away from substantial incursion on the school-employee relationship that was made by the May 2020 regulations
- For example:
  - The most detailed procedural requirements that apply in college student complainant/respondent sex-based harassment cases discussed previously would not apply in employee-employee sex-based discrimination or harassment cases
    - Again, though, the NPRM standard would require the most detailed procedures in student complainant/employee respondent cases
  - Schools can provide a different standard of proof in employee-employee cases than they do in student cases

# Questions?



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