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Title IX Regulations: Biden Administration Update

2021 MASA Spring Conference

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DIFFERENT
BY DESIGN

Title IX

Title IX of the Education Amendments of 1972 (Title IX) provides that:

“[n]o 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. . . .”

Title IX

1972

- Passage of Title IX

Title IX

1979

- *Cannon v. Univ. of Chicago* (May 14, 1979)

Cannon v. Univ. of Chicago

- Plaintiff claimed she was denied admission to medical school because she was a woman.
- U.S. Court of Appeals for the Seventh Circuit held that plaintiff had “no right of action against respondents that may be asserted in federal court.”
- U.S. S. Ct.: “Petitioner may maintain her lawsuit, despite the absence of any express authorization for it in the statute.”

Title IX

1979

- Carter signs the “Department of Education Organization Act” (October 17, 1979)

1980

- ED established (May 4, 1980)
- OCR given oversight responsibilities

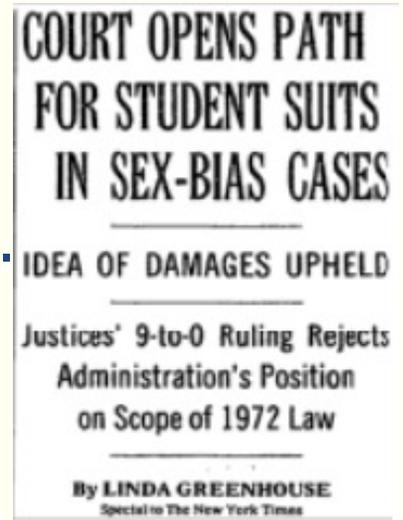
Title IX

1992

- *Franklin v. Gwinnett County Public Schools*

Franklin v. Gwinnett County Public Schools

- Student sued, **alleging she had been subjected to continual sexual harassment by teacher.**
- Student sought **money damages** against the school district.
- District court, and Court of Appeals dismissed the case, holding that Title IX did not provide an action for money damages.
- In 9-0 decision, U.S. Supreme Court reversed, ruling that Gwinnett could seek money damages.



Title IX

1998

- *Gebser v. Lago Vista Independent School District*

1999

- *Davis v. Monroe County Board of Education*

Gebser v. Lago Vista Independent School District (1998)

- Teacher engaged in a secret sexual relationship with a student. The District had no policy in place for investigating sexual harassment complaints. When the relationship was uncovered, the teacher was fired and arrested. The student and her family brought a claim against the District alleging sexual harassment.
- Supreme Ct. ruled that educational institutions may be liable for money damages where employees harass students if school officials had **actual knowledge of harassment**, and are **deliberately indifferent** to the harassment

Davis v. Monroe Cnty. Bd. of Education (1999)

- Mother of student sued the Board of Education, claiming the District failed to prevent another student from harassing her daughter.
- Question before the Supreme Court: Can a school be held liable for student on student harassment?
- Yes! Supreme Ct. holds that educational institutions may be liable for ***student-on-student*** harassment if the conditions in *Gebser* are met.
 - deliberate indifference to harassment that is severe enough to prevent victims from enjoying educational opportunities.

Title IX

2001

- OCR replaces 1997 guidance regarding sexual harassment of students by other students, employees, or third parties

2005

- *Jackson v. Birmingham Bd. Of Educ.* S.Ct. rules that employee (coach) who complained of sex discrimination on behalf of his team could assert a claim for retaliation under Title IX.

Jackson v. Birmingham Bd. Of Educ. (2005)

- The district court had granted the school district's motion to dismiss; the Eleventh Circuit affirmed.
- In 5-4 decision, U.S. Supreme Court reversed.
- *NB*: “[T]he Board should have been put on notice that it could be held liable for retaliation by the fact that this Court's cases since *Cannon* have consistently interpreted Title IX's private cause of action broadly to encompass diverse forms of intentional sex discrimination; by Title IX itself, which expressly prohibits intentional conduct that violates clear statutory terms....; **by the regulations implementing Title IX, which clearly prohibit retaliation and have been on the books for nearly 30 years**; and by the holdings of all of the Courts of Appeals that had considered the question at the time of the conduct at issue that Title IX covers retaliation.”



Title IX

2011

- OCR issues the April 4, 2011 DCL

2013

- VAWA Reauthorization signed into law – codifying portions of the 2011 DCL

Title IX

2014

- Creation of “White House Task Force to Protect Students from Sexual Assault.”
- VAWA regulations
- DOE issues 46-page FAQ related to how institutions should address sexual violence.

2015

- OCR issues guidance regarding obligations to designate a Title IX Coordinator

2017

- OCR withdraws April 4, 2011 DCL and April 29, 2014 Q & A
- OCR issues new Q & A on Campus Sexual Misconduct

Title IX

2018

- November 2018: OCR issues draft Title IX regulations regarding sexual harassment and assault.

2019

- Notice and Comment (originally scheduled to end January 28, 2019) draws over 110,000 comments; comment period extended slightly due to technical difficulties.

Title IX

2020

- March 13, 2020: President declares national emergency concerning novel coronavirus disease (COVID-19).

2020

- May 6, 2020: Department of ED issues final regulations regarding Title IX; regulations are published in the Federal Register on May 19, 2020.

2020

- August 14, 2020: Implementation date of new Title IX regulations.

Immediate Challenge to 2020 Regulations

- Several sets of litigation filed in the D.C. Circuit seeking to enjoin the regulations from taking effect on 8/14/20 – *TRO denied*.
- NSBA filed a Letter for Clarification with the DOE asking for the Dept. to provide clarity of several issues:
 - Effective date – is it possible to adopt new policies and provide training in three months, during global pandemic?
 - Complaint evaluation standard – how should a coordinator know whether they need to sign a formal complaint if the alleged victim is unwilling?
 - Clarify when confidential information should be released.

New Title IX Regulations

Major changes to Title IX regulations:

- Changes the definition of what misconduct constitutes unlawful sexual harassment under Title IX
- Excludes coverage for harassment that is off school grounds or not part of a school program
- Changes when a school is obligated to investigate and redress sexual harassment under Title IX

New Title IX Regulations

Major changes to Title IX regulations:

- Changes investigation process; adds due process procedures
- Changes how the DOE assesses whether a school complied with the obligation to investigate and redress harassment under Title IX
- Includes employee / employee harassment?

New Title IX Regulations

- Requirement to specifically designate employee called “Title IX Coordinator”.
- Must notify applicants for admission and employment, students, employees, and all unions or professional organizations holding collective bargaining agreements or other contracts of Title IX Coordinator’s contact information.
- Any person may report sex discrimination (including sexual harassment) to the Title IX Coordinator.
- Dissemination requirements (including certain information that must be maintained on institutional website).
- Requirement to adopt a grievance procedure with specific provisions for addressing “sexual harassment,” as that term is defined in the Title IX regulations.



When must a school respond to sexual harassment under Title IX?

A recipient with **actual knowledge** of **sexual harassment** in an education program or activity against a person in the United States must **respond promptly** and in a manner that is **not deliberately indifferent**.

Definition – “Sexual Harassment”

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (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 recipient's education program or activity; or
- (3) “Sexual assault” as defined in Violence Against Women Act (VAWA) 20 U.S.C. 1092(f)(6)(A)(v), “dating violence” as defined in 34 U.S.C. 12291(a)(10), “domestic violence” as defined in 34 U.S.C. 12291(a)(8), or “stalking” as defined in 34 U.S.C. 12291(a)(30).



Definition – “Sexual Harassment”

“In a Program or Activity”

- Davis: Any location, events, or circumstance over which the recipient exhibits substantial control over both the alleged harasser and the “context” in which the harassment occurred.
- Regulations now specify “in the United States.”

Actual Knowledge

- Final Rule adopts standard from Supreme Court case law.
 - Means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school.
 - Constructive notice is not sufficient.
 - BUT note – any employee!

Deliberate Indifference

- Old OCR Guidance – The school must take immediate action to eliminate the sexual harassment or sexual violence, prevent its reoccurrence, and address its effects.
- Final Rule – Failure to respond reasonably in light of known circumstances.

Problems with Regulations

- Victim advocates argue:
 - Hardship on student victims and thus, discourages reporting
 - Difficult system to navigate for victims
 - Victims facing defamation lawsuits from accused
- Respondent advocates argue:
 - Creates a fair due process proceeding for the accused
- Schools argue:
 - Don't have the resources to sit in judicial capacity
 - Difficult system to navigate

Biden Campaign Promises

- **Expand prevention and services to public K-12 schools. Sexual assault, harassment, and dating violence don't only affect college students.** Biden will push for legislation, regulatory action, and appropriations so that K-12 public schools provide annual, age-appropriate education on healthy relationships and affirmative consent beginning in elementary school through graduation, and create funding opportunities for after-school programs and youth-serving groups to implement prevention education programs. Biden will also work to create new funding for public K-12 schools to implement Title IX trainings for administrators and staff. And, Biden will make it easier for teens experiencing dating violence and sexual assault to access accommodations, services, and protective measures.



Title IX – Biden Administration

2021

- January 20, 2021: President signed Executive Order, “Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation”. Extends holding of *Bostock v. Clayton County, Georgia* to Title IX.

2021

- March 8, 2021: President signed Executive Order, “Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity”. Orders Secretary Cardona to review Title IX regulations issued by Secretary DeVos.

January 2021 Executive Order

BRIEFING ROOM

Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation

JANUARY 20, 2021 • PRESIDENTIAL ACTIONS

January 2021 Executive Order

Policy: All persons should receive equal treatment under the law, no matter their gender identity or sexual orientation.

Bostock v. Clayton County:

- * is applicable to Title IX (and other federal laws)
- * prohibits discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary

Administration will *fully enforce* Title VII and other laws that prohibit discrimination on the basis of gender identity or sexual orientation.

January 2021 Executive Order

Orders:

- Agencies to review regulations and consider whether to revise, suspend, or rescind agency actions or promulgate new agency actions
- Agencies must create plan within 100 days
- Expect announcement on April 30, 2021

March 2021 Executive Order

BRIEFING ROOM

Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity

MARCH 08, 2021 • PRESIDENTIAL ACTIONS

March 2021 Executive Order

Policy: All students should be guaranteed an educational environment free from discrimination on the basis of sex, sexual orientation or gender identity.

March 2021 Executive Order

Orders agencies to:

- Review all existing regulations, orders, guidance documents, policies and other agency actions that are or may be inconsistent with the policy and to provide findings
- Specifically orders a review of the 2020 regulations
- Issue new guidance on the 2020 regulations
- Consider suspending, revising or rescinding, or publishing new proposed rules
- Consider additional enforcement actions
- Agencies must create plan within 100 days
- Expect announcement on June 16, 2021

Current litigation

The Women's Student Union v. U.S. Department of Education, Case No. 3:21-cv-01626, United States District Court, ND of CA

- Filed March 8, 2021
- Seeks injunctive relief and declaratory relief
- Seeks to set aside the 2020 Regulations
- Argues new regulations reduce federal protections for students in public schools

What to do in the meantime?

Until there is further guidance from the courts, the administration, and/or new regulations:

- Continue to assume the 2020 regulations are in effect
- Ensure you have adopted your new policy / regulation and posted it on your website
- Ensure identification of Title IX Coordinator, Investigator, Decision Maker, Appeals Officer
- Ensure training of all those involved in the process

Questions?