

Title IX: The New Regulations

(AND WHAT YOU MUST KNOW)

Mark J. Sommaruga, Esq.

October 7, 2020

- “Federal law 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 of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.* [“Title IX”].**

- Although Title IX refers to “no person,” with rare exceptions, it **applies only to** those who are employed at or enrolled in or applying to a school, college, or university that receives federal funds.
- Underscoring the fact that federal funding is a necessary precondition to Title IX coverage, Title IX’s regulations use the word “Recipient” to refer to such educational entities.

- Initially, Title IX was applied almost exclusively in the context of athletics, specifically in terms of ensuring that students of the “underrepresented gender” (i.e. female) were afforded equitable athletic opportunities and equitable athletic benefits.
- The primary focus of Title IX, however, eventually shifted to sexual harassment and sexual assaults.

- Protects **both** male and female students;
- Prohibits sexually harassing conduct towards members of the same sex as well as members of the opposite sex;
- Applies to sexual harassment **between students**, which is also known as “peer sexual harassment”.
- Ongoing issues regarding sexual orientation and transgendered protections.

TITLE IX

- Applies to sexual harassment directed **toward students** by school employees or by third parties;
- Can apply to incidents only involving employees, as Title IX also protects *employees* of educational institutions, programs, and activities against sex discrimination and harassment

Two U.S. Supreme Court cases established the requisite elements of liability for sexual harassment under Title IX.

- **Gebser v. Lago Vista Independent School District**, 524 U.S. 274 (1998), established the standard for holding schools liable when a school employee sexually harasses a student.
- **Davis v. Monroe County Board of Education**, 526 U.S. 629 (1999), established the standard for school liability when a student is sexually harassed by another student.

In Gebser, the Supreme Court held that a school will **not** be civilly liable in a lawsuit for sexual harassment of a student by a school employee unless:

- An school official with **authority to take corrective action** had **actual knowledge** of discrimination, but failed to adequately respond; and
- The **inadequate response** must amount to **deliberate indifference** to discrimination.

Similarly, in Davis, the Court held that liability is imputed to the school **only** where:

- The school has been “deliberately indifferent to sexual harassment, of which the [district had] actual knowledge”;
- The harassment is so “severe, pervasive and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit”; and
- The school responded in a way that was clearly unreasonable under the circumstances.

- As the United States Department of Education [“DOE”] advises: “The Davis standard ensures that all students, employees, and recipients understand that unwelcome conduct on the basis of sex is actionable under Title IX **when a reasonable person in the complainant’s position would find the conduct severe, pervasive, and objectively offensive such that it effectively denies equal access to the recipient’s education program or activity.**”

- The DOE's Office for Civil Rights ["OCR"] has jurisdiction over alleged violations of Title IX.
- On April 4, 2011, OCR issued a "**Dear Colleague Letter**," or "**DCL**" – which is the means by which OCR typically issues guidance that educational entities are expected to follow -- in response to what OCR perceived as schools' generally dismal handling of student-on-student sexual harassment claims, particularly those that involved sexual assaults (and in the colleges). It has proven to be one of the most controversial DCLs that OCR has ever issued.

- OCR's April 4, 2011 DCL required schools to adopt a **“preponderance of the evidence”** standard when determining whether a student sexually harassed a peer. This is the law's lowest evidentiary threshold, below the **“clear and convincing”** standard most schools had been using. The “preponderance” standard requires only a showing that it is more likely than not that the accused individual engaged in the relevant conduct.
- The DCL also allowed schools to limit the accused student's right to confront his or her accuser.

- In conjunction with the DCL, OCR disseminated a list of colleges and universities that were being investigated for their alleged failure to address and remediate sexual assault claims.
- Needless to say, this resulted in terrible publicity for the named institutions.

- Obviously, trying to compel a more robust response to allegations of sexual assault was an extremely positive goal, and OCR's more exacting mandates were lauded by many.
- Others, however -- despite agreeing with OCR's intent -- disagreed with its methods. One federal appellate judge issued a scathing assessment of the April 4, 2011 DCL, writing that "its extremely broad definition of 'sexual harassment' has no counterpart in federal civil rights case law; and the procedures prescribed for adjudication of sexual misconduct are heavily weighted in favor of finding guilt."
- Plummer v. University of Houston, 860 F.3d 767 (5th Cir. 2017)(dissent)

- OCR's April 4, 2011 DCL, the desire not to be included on OCR's list of schools under investigation, and the consequent threat that OCR would withdraw federal funds, created substantial pressure on schools to improve their response to sexual assault claims.

- Many schools (mostly colleges) were ill-equipped to investigate such serious claims.
- Disciplinary panels consisting of academics or even other students, and whose traditional duties had been limited to deciding claims of academic dishonesty, were suddenly required to adjudicate the equivalent of serious felonies in the college world (i.e., kicking students out of school).

- This resulted in a number of procedural debacles which, in turn, triggered a torrent of lawsuits, filed primarily by male college students who claimed they were unjustly disciplined in adjudicatory processes that were prosecuted ineptly, selectively, or in bad faith.
- It was recently estimated that **over 500 such lawsuits** have been filed across the United States.

- Ironically, the overwhelming majority of these legal actions claimed that in seeking to comply with Title IX, schools (again, mostly colleges) have, in fact, violated Title IX either by: 1) selectively enforcing it against male students while not pursuing claims against female students, or 2) reaching an erroneous outcome as a result of an unfair or biased disciplinary process.
- The majority of the lawsuits were initially dismissed, but they have increasingly gained traction, with courts more open to recognizing these Title IX causes of action as well as contract, negligence, and – in the case of public universities -- constitutional claims.

- It is this sequence of events that has given rise to the new Title IX regulations which OCR has promulgated and which are now in effect.
- Trying to address a purported problem in the colleges (apparently, people being thrown out of college without due process), but also subjects K-12 schools to a new/convoluted procedural scheme.
- Was this a solution in search of a problem in the K-12 schools? (Hint-my answer is “**yes**”).

What Is Sexual Harassment?

- In part, the new Title IX regulations expand upon the Supreme Court's original formulation in Davis of what constituted unlawful sexual harassment. Specifically, the regulations define sexual harassment as including:
 - An employee of the district conditioning the provision of an aid, benefit, or service on the individual's participation in unwelcome sexual conduct;
 - 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 district's education program or activity; or
 - Sexual assault, dating violence or stalking.

- Where submission to, or rejection of, the conduct by the individual is used as the basis of academic/employment decisions affecting the individual.
- Where submission to, or rejection of, the conduct by the individual is used as the basis for any decision affecting the individual regarding services, honors, programs, or activities available at or through the district.
- Where a person is subjected to unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to a district education program or activity. (“Hostile Environment”).

1. Nonverbal sexual harassment
2. Verbal sexual harassment
3. Physical sexual harassment
4. Graphic sexual harassment
5. Third party sexual harassment (bystander harassment)

- Suggestive/unwelcome or obscene letters, notes, sexualized stories, invitations, slurs, jokes, epithets, or gestures, derogatory comments/name calling, assault, touching, impeding or blocking movement, leering /undue attention, display of sexually suggestive objects, pictures or cartoons.
- Unwelcome sexual advances; requests for sexual favors; pressure for dates; **continuing to** express sexual interest after being informed that the interest is unwelcome.
- Coercive sexual behavior used to control, influence, or affect the educational opportunities, grades, and/or learning environment of students, including promises or threats regarding grades, course admission, performance evaluations, or recommendations; enhancement or limitation of student benefits or services (e.g. scholarships, financial aid, work study job).
- Inappropriate attention of a sexual nature from peer(s), i.e. student to student, employee to employee.
- Sexual assault, dating violence, domestic violence or stalking.

Some Specific Scenarios

-Michele is a high school English teacher. Carol and Matt are math teachers in the same school. Once, while Michele was in the ladies room, Carol mentioned to her that Matt made her feel somewhat uncomfortable. It seemed to Carol that whenever she was physically near Matt he brushed up against her. In addition, Carol mentioned that she understood from Sharon, also a math teacher, that Matt sometimes puts his arm around Sharon and stares at her legs.

-One day while Michele was working on a curriculum project with her department head, Ralph, she brought up her discussion with Carol. Ralph didn't think much of it. When Michele urged him to do something about the situation he refused. He told Michele that he has no interest in meddling in the affairs of the Math Department, and the situation was for the Math Department head to handle

-What would you have done if you were Ralph?

A fifth-grade boy taunted and touched a girl at his school over a five-month period. The girl's mother filed a sexual harassment claim against the School System on her daughter's behalf. Can the School System be found liable in light of these facts: *(YES/NO)*

- The girl had complained to a teacher and the principal and they did not assist her?
- The girl had complained to the principal and the principal gave the boy a detention (the mother wanted the boy expelled)?
- The only person in the school aware of the situation was one of the girl's school- mates?

- A drama teacher made sexual advances towards one of her students. The student voluntarily transferred out of the class and filed a claim of sexual harassment.
- The head of the drama department had observed the teacher's actions twice and each time casually suggested to the teacher that her conduct toward the student might make the student feel uncomfortable (and did nothing more).
- **Could the School District be found liable in light of these facts?**

- Jane is a custodian and single mother. Charlie supervises Jane and the other custodians. Charlie thinks Jane is lonely and feels she would be happier if she socialized more. He suggested to Jane that they go to a local fair together on Saturday afternoon. This is not the first time he has invited Jane to socialize with him. Jane refused (again), to which Charlie replied: “Jane, you need to loosen up. How can I recommend you for that cafeteria job you want if you insist on remaining in your shell?”
- Jane filed a sexual harassment claim against Charlie and the District. Can the District be found liable for Charlie’s conduct in light of these facts: (yes/no)
 - Charlie did not recommend Jane for the job?
 - Charlie recommended Jane for the job?
 - The Administration was aware of Charlie’s actions?
 - The Administration knew nothing about Charlie’s actions?

True or False: Sexual Harassment

- To be considered sexual harassment, an incident must be between a supervisor and one of his or her subordinates or between a staff member and a student.
- The only type of harassment which can lead to damages occurs when an employee is fired, demoted, or suffers a tangible economic loss for rejecting sexual advances.
- In a harassment case, a person can refuse to testify about whether he/she had an intimate relationship with the person alleging the claim, as it is not relevant to the case.
- Sexual jokes and banter are often a natural part of the workplace culture and would not be considered sexual harassment.

Quiz: Copyright by Learning Dynamics, Inc., 1062 Barnes Road, Wallingford, CT 06492 1-800-3SKILLS. All Rights Reserved.

True or False: Sexual Harassment

- As a supervisor, if you hear a rumor that one of your employees is being sexually harassed by another employee in your department, your first step is to speak with the alleged harasser to get his or her side of the story.
- As a staff member, if you hear a rumor that a student is being sexually harassed by a staff member, your first step is to speak with the alleged harasser to get his or her side of the story.
- You should try to dissuade employees from complaining about sexual harassment.
- Sexual advances that are "welcome" at first and later become "unwelcome" would not be considered sexual harassment.

Quiz: Copyright by Learning Dynamics, Inc., 1062 Barnes Road, Wallingford, CT 06492
1-800-3SKILLS. All Rights Reserved.

- Under the new regulations, Title IX only applies to conduct that occurs in a program or activity over which the district exerts substantial control over both the respondent and the context or in any building owned or controlled by an **officially** recognized student organization.
- Title IX does **not** apply, however, if the conduct occurred against a person outside the United States.
- **PLEASE REMEMBER: The fact that OCR does not recognize a particular action as constituting a Title IX violation does not mean the conduct does not violate some other section of the district's disciplinary policies. (Examples: bullying; harassment that is still covered by state law or Title VII, just "bad" acts.)**

- School districts are required to establish certain positions who are charged with responsibility for different aspects of the district's Title IX obligations. These positions include:
- **Title IX Coordinator**
 - Employee who will coordinate the district's efforts to comply with its responsibilities under Title IX.
- **Investigator**
 - If possible, should not be the Title IX Coordinator
- **Decision-Maker**
 - Must not be the Title IX Coordinator or the Investigator
- **Appeal Decision-Maker**
 - Must not be the Title IX Coordinator, Investigator or Decision-Maker

- **THINK ABOUT THEM!!**
- Is this all practical?
- Especially for small school districts?

Initial Obligations – Title IX Coordinator

- School districts must inform students, parents or legal guardians, employees, and all unions which have a collective bargaining agreement with the district of the name, title, office address, e-mail address, and telephone number of the Title IX Coordinator.
- Furthermore, it must advise them that “**any person**,” not just the alleged victim, can report sexual harassment to the Title IX Coordinator in person, by mail, e-mail, telephone, or any other means that ensures the Coordinator will receive this report.
- This contact and related information must be posted on the district’s **website** and in Student-Parent Handbooks.

Initial Obligations – Grievance Procedure

- A school district must adopt and publish grievance procedures that provide for “the prompt and equitable resolution of student and employee complaints alleging” a violation of Title IX.
- The same individuals and entities to whom the district must provide the Title IX Coordinator contact information must also be provided with a copy of the grievance procedures, including but not limited to instructions on how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the district will respond.

Actual Knowledge

- A district with **actual knowledge** of sexual harassment must take steps to address it (to avoid liability).
- In elementary and secondary schools “actual knowledge” means that **any** employee of an elementary or secondary school had knowledge, including administrators, teachers, custodians, secretaries, food service workers, and paraprofessionals.
- **This knowledge can be based upon personal observation or upon reports.**

- The knowledge of one employee will be imputed to the entire district.
- Thus, it is incumbent upon every employee to **promptly notify the Title IX Coordinator** upon learning of possible sex discrimination or sexual harassment.
- In cases in which an employee is the one accused of sexual harassment, his or her obvious knowledge of the harassment will **not** be imputed to the district.
- Once the district has knowledge, **it must act in a way that is not “deliberately indifferent”** to the alleged harassment.

- The “victim”
- The Title IX coordinator
- A bystander?

■ WHAT IS A FORMAL COMPLAINT?

An allegation of sexual harassment that is:

1. Signed by a complainant **or** by the Title IX Coordinator (an electronic signature will suffice); and
2. Requests an investigation.

The complainant must either “be participating in or attempting to participate in the education program or activity” of the district.

The Grievance Process: The Investigation

- Some underlying principles for sexual harassment investigations
 - Thorough
 - Prompt
 - Impartial
 - Equitable
- New Terminology to Learn
 - Complainant
 - Respondent
 - Responsible Party
 - Supportive measures
- Standard of evidence to be used should be pre-defined in policy and consistent for investigations into staff and students
 - District chooses: “**preponderance of the evidence**” or “**clear and convincing evidence**”

- Upon obtaining actual knowledge of sexual harassment, the district “must respond promptly in a manner that is not deliberately indifferent.”
- A district or school is “**deliberately indifferent only if its response to sexual harassment is *clearly unreasonable* in light of the known circumstances.**”

- Courts have typically applied an “ends justify the means” approach to determining whether or not an educational entity has acted in a manner that was “clearly unreasonable.”
- In other words, if the response stopped the conduct at issue, courts will generally find that the educational entity acted appropriately and thus did not violate Title IX.

Upon receiving a report of sexual harassment, the Title IX Coordinator must also:

- 1. Promptly contact the complainant and discuss the availability of “**supportive measures**,” including informing the complainant that such measures are available whether or not he or she chooses to file a formal complaint;
- 2. Consider the complainant’s wishes with respect to supportive measures; and
- 3. Explain the process for filing a formal complaint.

- “**Supportive Measures**” are individualized services offered as appropriate and without fee or charge before or after the filing of a formal complaint **or even where no formal complaint has been filed.**
- They are designed to restore or preserve equal access to the district’s education program or activities, including measures designed to protect the safety of all parties and deter further sexual harassment.

“**Supportive Measures**” include, but are not limited to:

- Counseling
- Extensions of academic deadlines
- Modifications of course work or class schedules
- **School-based escort services**
- **No-contact directives**
- Leaves of absences

Response To Complaint -- The Grievance Process

In addition to discussing Supportive Measures and explaining how to file a formal complaint, the district must follow its grievance process, which the Title IX regulations mandate includes the following elements:

- 1. Both the complainant and the respondent must be treated equitably – in other words, each must be afforded the **same** rights and responsibilities.
- 2. There must be an express presumption that the respondent (the individual who is claimed to have engaged in the sexual harassment) is not responsible for the alleged conduct until and unless the investigation determines otherwise. (Sounds a lot like “innocent until proven guilty”.)

Response To Complaint -- The Grievance Process

- 3. Require that neither the Title IX Coordinator, the Investigator, the Decision-Maker, the Appeals Decision-Maker, nor any individual designated to facilitate an informal resolution process – such as a mediation – has a conflict of interest or a bias for or against either the specific individuals involved or for or against complainants or respondents in general.
- 4. Ensure appropriate **training** of the Title IX Coordinator, the Investigator, the Decision-Maker, the Appeals Decision-Maker, nor any individual designated to facilitate an informal resolution process on how to perform their respective duties without prejudgment, and further train the Decision-Maker and Appeals Decision-Maker on how to determine the relevancy of questions and evidence (without favoritism).

Response To Complaint -- The Grievance Process

- 5. Include reasonably prompt timeframes, with allowances for temporary extensions for good cause, including the provision of written notice to the parties of the length of the extension and the reason for it. (Think of what might constitute “good” cause.)
- 6. Describe the potential disciplinary consequences that the district could impose should there be a finding of responsibility for sexual harassment, with the understanding that remedies must be designed to restore or preserve equal access to the district’s education program and activities.
- 7. Set forth the evidentiary standard that the district will use – preponderance of the evidence or clear and convincing, with the understanding that the same standard **must** be used in both employee-student and student-student cases.

- 8. Set forth the range of Supportive Measures that are available to the complainant and to the respondent.
- 9. Not require, allow, rely upon, or otherwise use questions or evidence that constitutes or seeks disclosure of information protected under legally recognized privileges, such as priest-penitent, doctor-patient, or social worker-student.

- Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant ***unless*** offered to prove that someone other than the respondent committed the conduct alleged by the complainant, *or* if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.
- The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question or evidence as not relevant.

Once A Formal Complaint Is Filed: The First Steps

If the complainant files a formal complaint, the district must take these steps

1. Provide the parties with notice of the allegations, including:
 - The identity of the complainant and the respondent
 - Conduct alleged to constitute the sexual harassment
 - The date and location of incident
2. Provide:
 - Notice of the grievance process, including any informal resolution processes available;
 - A statement that the determination of responsibility will not be made until the end of the process;
 - Notice of the right to have advisor (including an attorney) at all stages; and
 - A citation to the section of the district's disciplinary code that prohibits providing false statements and information during the grievance process.
3. Determine if the conduct, as alleged, would violate Title IX

Once A Formal Complaint Is Filed (“Due Process”)

- During the investigation, the district:
 - Must provide each party with an equal opportunity to present witnesses, including fact and expert witnesses, and other evidence;
 - Cannot restrict the ability of either party to discuss the allegation or gather/present relevant evidence,
 - Must allow each party to have an advisor of their choosing at each step;
 - Must provide each party the opportunity to inspect and review all evidence; and
 - Prior to the completion of the formal investigation report, must provide each party and the party’s advisor with a copy of the evidence for the purpose of reviewing it.
 - Must provide each party with up to ten days to provide written responses to the evidence.

- Are all of these procedures consistent with a school district's typical student suspension and (even) expulsion procedures?
- May decouple a charge of Title IX based sexual harassment from the charges in a student discipline procedure (and proceed on another basis).

- Order of witnesses is important.
- Usually, start with complainant and save the accused for last.
- Why? To funnel the investigation; to be able to confront the accused appropriately.

- Selecting an appropriate interviewer for an investigation (or for a particular student).
- Consider age of witnesses (including complainant and the accused), the nature of the allegations, and advantages of someone who can establish rapport.
- Training and qualifications (for example, Title IX trained persons for investigation), including prior experience.
- Who/how many should be present during interview? (School personnel and outsiders/agencies; parents?)

- Note taking: what you must do to keep away via FERPA and FOIA?
- Other forms of keeping a “record” (i.e., tape recording)?
- **Pro:** it creates a record.
- **Con:** it creates a record (even if not FOIA-able or FERPA-able, it may be subpoena-able).

- Review relevant records; show them to witnesses as appropriate. Examples: complaints, policies, incident reports, evidence.
- Be prepared!!
- Explain to witness purpose of interview.
- Explain obligation to cooperate (you may draw adverse inference when accused refuses to answer relevant questions).
- Explain protections against retaliation.

The Interview: How To Ask Questions

- Ask at first open ended questions, and then move to more narrow and focused questions.
- But do not ask compound questions; ask one question at a time.
- Usually ask questions which force witness to relay events chronologically to ensure complete coverage of the events (and so that you can compare differing versions of events by different witnesses).
- Try to save unfriendly or embarrassing questions until end of interview. But don't avoid the tough questions.

- You must aim for a combination of support, sympathy, and neutrality.
- May seem contradictory but you want witnesses to feel comfortable (without giving the impression that you believe or disbelieve them).
- Don't aim for *Perry Mason/Law and Order* moments.
- In other words: honey, vinegar and flies. You go figure it out.
- Also, a good “poker face” does not hurt when damaging information is conveyed.

- Finally, make sure that witness has provided all relevant facts and evidence and has identified other persons with potential information/corroboation.
- When finished, thank the witness for raising concerns or for his/her cooperation, reaffirm the district policies against non-retaliation.
- Confidentiality: guarantees and limits.
- Written statements from witnesses if necessary.

- Need for assistance from administration (or legal counsel)*?

***NOT INTENDED AS A PLUG FOR BUSINESS**

- Re-interview if necessary. Especially when discovering new information.
- After all, there is no limit on number of interviews (but there may be deadlines in your policies).

- Know your role in the process. (Maybe important to know before you get started).
- Involvement of other administrators?
- Report requirement: a recommendation v. final report?
- Remember timelines and policy requirements

The Investigation Report

- At the conclusion of the investigation, the Investigator must prepare a formal written report that objectively summarizes the relevant evidence.
- The report must be provided to both the complainant and the respondent, as well as their respective advisors, at least 10 days prior to the ultimate determination of responsibility, during which time the parties are entitled to review the report and submit written responses to it, including commentary on the credibility and weight of the evidence.

So What Is In The “Report”?

- Ensure that it adequately states the allegations and issues raised.
- List witnesses and evidence reviewed, and steps taken during investigation.
- Summarize witness “testimony” and evidence, including any conflicting information, and any corroborating evidence.
- Findings: at some point, one has to make a judgment/credibility call. (Easier said than done.) This is why the burden of proof might matter.
- Recommendations (as to parties and the school itself).

The Determination: The Decision-Making Process

At the post-secondary level, parties are entitled to a hearing. At the K-12 level, however, **a hearing is not required** prior to the Decision-Maker determining whether or not the respondent engaged in sexual harassment.

Nonetheless, the Decision-Maker must:

1. Allow each party to submit relevant questions that the party wishes the Decision-Maker to ask the other party or any witness.
2. Provide each party with the answers to those questions.
3. Allow each party to ask follow-up questions.

NOTE: The ultimate burden of proof, as well as responsibility for gathering evidence that is sufficient to permit a determination to be made, rests on the district, not on either the complainant or on the respondent.

The Grievance Process: The Decision On Responsibility

- This is a formal written decision that must at a minimum:
 - Identify the allegations,
 - Describe the procedural steps taken to investigate,
 - Make findings of fact,
 - Make conclusions regarding the application of rules to the facts,
 - Contain a statement of rationale for the result as to each allegation,
 - Identify any disciplinary sanctions to be imposed,
 - Identify whether remedies will be provided to the complainant, and
 - Inform the parties of the appeal procedures.

The decision must be provided to both parties simultaneously.

Appeals From The Decision

- Following the Decision-Maker's determination, either party can appeal.
- The Appeals Decision-Maker must be a different individual from the Title IX Coordinator, the Investigator, or the original Decision-Maker.
- Typically, the appeal is limited to the following circumstances:
 - Discovery of new evidence that is material and relevant to the determination.
 - Bias or a conflict of interest on the part of the Decision-Maker.
 - Procedural errors in the original determination process.
- Both the complainant and the respondent must be provided with an equal opportunity to submit a written statement to the Appeals Decision-Maker.
- The Appeals Decision-Maker must issue a written decision setting forth his or her determination and the basis for such finding.
- The decision must be provided to each party simultaneously.

The district is required to keep each investigation file for at least seven years, including any disciplinary sanctions as well as any remedies and/or supportive measures that were provided.

- The district **may** dismiss a formal complaint or any allegations therein, if at any time during the investigation:
 - The complainant notifies the Title IX Coordinator in writing that he or she would like to withdraw the formal complaint or the allegations therein,
 - The respondent is no longer enrolled in or employed by the district, and/or
 - Specific circumstances prevent the district from gathering evidence sufficient to make a determination.
- Such dismissal does **not** preclude initiating discipline under another section of the district's policies/rules/code of conduct.

- Whether or not a formal complaint is filed, the district can always offer an informal resolution process.
 - Before doing so, district must provide parties with written notice disclosing:
 - The allegations,
 - The requirements of the informal process including circumstances under which it would preclude a party from resuming the formal complaint process from the same allegations,
 - The fact that any party has the right to withdraw from the informal resolution at any time, and
 - Any consequences from engaging in the informal resolution process including whether records from it will be maintained and/or shared in the formal complaint process.
- The informal resolution process **cannot** be used when the claim of sexual harassment involves an employee.

More on FOIA and FERPA

Concerns: Statements and Reports

- FOIA and FERPA (right to access v. obligation to withhold).
- <http://schoollaw.pullcomblog.com/archives/school-districts-refusal-to-release-bullying-investigation-report-upheld/>
- But difference between new Title IX and bullying.
- *Understanding Connecticut's Freedom of Information Act*, by Mark J. Sommaruga (5th Edition, 2018), pp. 60-64.
- Videos? Same considerations.

More On What Can We Share And What We Must Write

- Review your policies.
- Sharing of disciplinary consequences? (As opposed to sharing the fact that there has been a response or discipline).

- **Update:** District Title IX policies/procedures; stand alone policy for Title IX (as misconduct no longer covered under Title IX may violate other civil rights laws or school policies).
- **Identify:** Title IX Coordinator, Investigator, Decision-Makers and anyone designated by the district to facilitate an informal resolution process
- **Train** them in:
 - Definition of sexual harassment under Title IX
 - Scope of the district's education program or activity
 - How to conduct an investigation and/or grievance process
 - How to serve impartially, including avoiding prejudice, conflicts of interest and bias
- **Post:** contact information of the Title IX Coordinator on the website and in the school's handbook
- **Post:** training materials on the district's website

- The ACLU with various other organizations have already filed the first legal challenge against the Regulations
- Just because conduct does not violate Title IX as set forth in these new regulations does not mean it does not violate the district's other policies
- Beware of state laws that provide additional protections
- Employment based sexual harassment-even without a complainant
- Do not forget about bullying/school climate responsibilities
- Do not forget district employees' obligations as mandatory reporters if alleged conduct could be considered abuse or neglect

QUESTIONS?



Mark Sommaruga, Esq.

Tel: 860.424.4388

Email: msommaruga@pullcom.com

Website: <https://www.pullcom.com>

Blog: <https://schoollaw.pullcomblog.com>

(A/K/A “Education Law Notes”)



These slides are intended for educational and informational purposes only. Readers are advised to seek appropriate professional consultation before acting on any matters in this update. These slides may be considered attorney advertising. Prior results do not guarantee a similar outcome.

BRIDGEPORT | HARTFORD | SPRINGFIELD | STAMFORD | WATERBURY | WESTPORT | WHITE PLAINS