

Title IX: Best Practices in Training and Compliance

In conjunction with



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Agenda

1. Title IX Headlines
2. Title IX Statute and Case Law
3. Title IX Regulations
4. Administrative Response and Investigations
5. OCR Enforcement
6. Transgender Student Developments

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Title IX Headlines

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"Secretary Devos Announces New Civil Rights Initiative to Combat Sexual Assault in K-12 Public Schools" – February 26, 2020

- Letter to Superintendents sharing that Secretary Devos directed OCR to examine the problem of sexual assault in public elementary and secondary schools
- OCR will focus on ensuring that school districts understand how to effectively respond under Title IX to complaints of sexual harassment and assault
- In 2019 – OCR's receipt of K-12 sexual harassment complaints was nearly 15 times greater than it was a decade ago in 2009
- Initiative Activities: compliance reviews, raising public awareness and support, data quality reviews, new CRDC questions

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Title IX Headlines

Virginia student sues school system, alleging mishandling of sexual assault report

Washington Post, May 29, 2018

A 17-year-old Fairfax County student and her parents sued the county school system, accusing officials of failing to properly investigate a sexual assault [by another student] that allegedly took place during a band trip

The allegations emerged four years after the Fairfax school system entered into an agreement with the U.S. Department of Education to improve the handling of sexual harassment cases. That pact was prompted by an alleged sexual harassment case involving students

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Title IX Headlines

"Jury Sides with Fairfax schools in case of alleged sexual assault on band trip"

Washington Post – August 9, 2019

- Jury found the School Board not responsible for sexual harassment that occurred on an Oakton High School band trip in 2017 because it did not have "actual knowledge" of sexual harassment
- Student's attorney said she wanted to shine a spotlight on the school division's mishandling of the response
 - school officials determined that a sexual assault did not occur and took no disciplinary action
 - offered the girl counseling and allowed her to retake some tests or take them at home

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Title IX Headlines

Two former Bruton High School students accuse coach of sexual harassment in civil lawsuit

Wavy10 News - January 23, 2020

- “Both girls claim that the teacher almost stalked them — showing up at their lunch hours and setting up private coaching sessions and meetings”
- The former students are suing for \$50,000 each for violation of their Equal Protection Rights under Title IX and for battery
- Update: the former students “*acknowledge that when the Bruton High School Principal became aware of the situation involving Harold Strickland, school and Division-level administration took swift, immediate, and appropriate action to investigate and correct the situation*” (July 3, 2020 – settlement reached)

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Title IX Headlines

“It’s Like the Wild West: Sexual Assault Victims Struggle in K-12 Schools”

New York Times – May 11, 2019

- Detailed then-proposed draft federal regulations
 - “schools would be expected to recognize complaints under Title IX only where harassment is ‘severe and pervasive,’ and could decline to investigate claims that happen off campus or outside the school’s programming”
- Referred to Winchester Public Schools case to highlight deficiencies of proposed regulations: WPS would not have been obligated to investigate student’s claims of off-campus conduct, even where accused had pled no contest to criminal sexual battery and abduction
- Those in favor of new regulations say “It’s not that we have to have full courtroom procedures, we need to have procedures in place that make it so that some sort of teenage vendetta doesn’t completely ruin the lives of an innocent student. And that’s what’s really lacking at all levels right now, especially the K-12 level”

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Title IX Headlines

Molested Student Awarded \$1 Million

March 12, 2000|Associated Press

WASHINGTON — A federal jury has ordered the Alexandria, Va., school board and a former elementary school principal to pay more than \$1 million to a former student who was molested by a teacher.

The school board was ordered to pay \$700,000 to Jackson Baynard, 20, who was abused by Craig Lawson starting in 1990 when he was a sixth-grader at Charles Barrett Elementary School. Catherine Malone, the Barrett principal at the time, was liable for \$350,000.

Postscript: Verdict against School Board was reversed on appeal on grounds that Board had no actual knowledge of the teacher’s actions. Verdict against the principal was not. *Baynard v. Malone*, 268 F.3d 228, 236 (4th Cir. 2001).

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Title IX Headlines

"Study: #MeToo Era Challenges Sex Discrimination Fight in Schools"

Public News Service – June 12, 2018

- Study from UC Boulder published in March 2018
- "Researchers found that key staff responsible for preventing and responding to harassment frequently didn't know it was their job"
- Concluded that: "school administrators had autonomy and discretion in interpreting and enacting their duties, however they lacked time, information, and other resources necessary to respond properly to the stated duties in their position"
- Spent little time on Title IX related duties, felt under-supported and under-prepared, lack of understanding of role/responsibilities

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Title IX Headlines

Education Department fines Michigan State and settles its 'Wake of Sex Abuse Scandal'

U.S. News and World Reports – September 2019

- Two federal investigations concluded that: "Michigan State failed to protect students from sexual abuse and in doing so violated several federal regulations"
- Largest fine ever levied, monitoring until 2024
- In addition to Clery Act violations, the investigations also found that the school lacked the administrative capabilities required by law to comply with Title IX regulations
- Specifically, the school failed to take measures to protect students while complaints were pending and failed to take prompt and effective steps to end harassment, eliminate a hostile environment and prevent any further harassment from recurring
- Michigan State agreed to pay the fine and the university's provost resigned
- *Update:* As of September 1, 2020, MSU has completed 33 tasks required by the Office for Civil Rights (according to Lansing State Journal)

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Title IX Headlines

"Fairfax student accused of sexual harassment loses gender discrimination lawsuit"

September 16, 2019

- Former student (graduated) accused FCPS of inadequately investigating accusations made against him by a female student that he slapped her buttocks
- Alleged males treated more harshly than females, due process rights violated
- Judge determined that student "was afforded the notice and opportunity to be heard"; did not present sufficient evidence otherwise
- Male student's attorney described FCPS' adjudication process as "kangaroo court" – no opportunity to cross-examine

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Title IX Headlines

"Virginia's transgender students win safeguards against harassment under new law"
Washington Post, March 5, 2020

- New legislation (new § 22.1-23.3) requires the Virginia Department of Education to develop and publish rules regulating the treatment of transgender students in elementary, middle and high schools
 - Rules will address bullying, dress codes, school record-keeping and the use of bathrooms
- Local school divisions must adopt policies in advance of 2021-2022 school year

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Goals for Today

- Recognize staff-student sexual harassment, including "grooming" behaviors that lead up to such misconduct
- Understand schools' Title IX responsibilities when it comes to student-student and adult-student sexual harassment
- Understand your obligations pursuant to new Title IX regulations
- Review applicable updated VSBA policy
- Understand legal liability for individual school administrators/teachers

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Title IX Statute and Case Law

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Title IX

- **Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq. (Title IX):**
 - "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"
 - School division may violate Title IX if it does not respond promptly to actual knowledge of sexual harassment in an education program or activity of the school division against a person in the United States in a manner that is not deliberately indifferent

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Title IX – Types of Harassment

Schools have responsibilities under Title IX both for alleged sexual harassment by staff, and by other students:

- **Staff-student harassment**
 - *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998) established that school district could be liable for sexual harassment of student by teacher where school official with authority to institute corrective measure had notice of, but was deliberately indifferent to, misconduct
- **Student-student harassment**
 - School divisions are not liable for one student harassing another but may be liable for failing to respond adequately. *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999)

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Title IX – Types of Harassment

Quid Pro Quo and Hostile Environment

QUID PRO QUO – employee conditions an educational benefit or decision on the student's submission to unwelcome sexual conduct; or

Conduct creates a "HOSTILE ENVIRONMENT"

- Degree to which the conduct affects students' education;
- Type, frequency and duration of the conduct;
- Identity and relationship between harasser(s) and victim(s);
- Number of individuals involved (group harassment);
- Age and sex of harasser and victim;
- Size of school, location of incidents, and context;
- Welcomeness (depends on age, relationship between offender and victim).

* In either case, conduct must deny or limit student's ability to participate in or benefit from educational programs or activities

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Title IX - Types of Harassment

“Sexual assault” as defined in 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)

- One incident of sexual assault can trigger Title IX responsibilities
- “We believe that sexual assault inherently creates the kind of serious, sex-based impediment to equal access to education that Title IX is designed to prohibit, and decline to require ‘denial of equal access’ as a separate element of sexual assault”

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Title IX – Types of Harassment

Covers Gender-Based Harassment

- U.S. Department of Education’s Office for Civil Rights (“OCR”) interprets this to include **gender-based harassment**
- Gender-based harassment includes verbal, non-verbal or physical aggression, intimidation, or hostility based on sex or sex stereotyping, including failing to conform to stereotypical notions of masculinity or femininity

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Title IX – Sexual Assault/Harassment

For purposes of reporting and investigating, when a school division knows of possible harassment, it must take immediate and appropriate steps to investigate or otherwise determine what occurred

If an investigation reveals that the harassment created a hostile environment, the school division must then take prompt and effective steps reasonably calculated to:

- End the harassment;
- Eliminate the hostile environment;
- Prevent its reoccurrence; and
- As appropriate, remedy its effect

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Staff-Student Sexual Harassment: Grooming Behaviors

- Often occur in context of providing additional assistance to students; i.e., music lessons, advice on a school project, tutoring, athletic assistance or training, outdoor activities
- Goal to establish an emotional connection in order to normalize sexual behavior
- What to look for:
 - Inappropriate and/or excessive communications such as through texting, "IM"ing, Facebook, Snapchat, and other social media
 - Overly involved in students' personal and social lives
 - Acting more like a friend than a teacher (being cool, talking about juvenile issues, dressing inappropriately, sharing music and videogames, etc.)
 - Visiting students at home with or without parent present.
 - Overly familiar and/or "touchy" with student
 - Attending social or athletic activities with students outside school-sponsored events
 - Favoritism or giving special privileges; gifts

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Grooming Offender Characteristics

- Teachers are the most likely offenders, followed by coaches, and persons whose jobs give them one-on-one access to students (music, band and drama teachers, bus drivers)
 - 2010 Government Accountability Office report found that 1 teacher offender can have as many as 73 victims and may be transferred to up to three different schools in a division
- Studies have shown that certain populations are specifically targeted:
 - Students with disabilities
 - Students from single-parent homes or undergoing other emotional or social stress rendering them vulnerable/need
- Offenders exercise control and secrecy over students by gradual grooming behaviors intended to test child's ability to maintain secrecy and compliance; use text or other electronic communications

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Doe v. Edgewood Indep. Sch. Dist., No. 19-50737 (5th Cir. Jul. 6, 2020)

- Employee-on-student harassment
- Affirmed that a school district is not liable under Title IX for teacher-on-student harassment unless the district, among other things, had "actual notice" of the misconduct and was "deliberately indifferent" to it
- Student victim failed to show that the school division had *actual knowledge*
 - As for actual notice, it is not enough the misconduct is reported to any employee. The reported-to employee must "at a minimum ha[ve] authority to institute corrective measures on the district's behalf" – here the school peace officer had no such authority
 - Student abused by two employees including a teacher and the school peace officer whose knowledge of teacher's conduct was used to coerce student to engage in similar acts with him
 - Doe alleged school division received several reports regarding both employees and did nothing
 - Court found that peace officer was not teacher's supervisor and his ability to arrest teacher was not the equivalent of instituting corrective measures

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Doe v. Denver Public Schools, No. 19-1293(10th Cir. August 17, 2020)

- Reversed District Court decision to dismiss student's Title IX suit for failure to state a claim
- Background:
 - a group of students began sexually harassing Ms. Doe after she was sexually assaulted by another student in March of her freshman year at East High School (EHS)
 - Ms. Doe alleges that despite her numerous reports of the harassment to school personnel, as well as reports from teachers and a counselor, the school administration never investigated her complaints and little if anything was done to prevent the harassment from continuing
 - Ms. Doe stopped attending regularly scheduled classes about 14 months after the assault, and transferred to a different school after completing her sophomore year

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Doe v. Denver Public Schools, No. 19-1293(10th Cir. August 17, 2020)

- Analysis:
 - retaliation for reporting sex discrimination comes within the meaning of the statutory language prohibiting discrimination "on the basis of sex"
 - Ms. Doe alleges that she was continuously harassed for a number of months describing more than half a dozen of the types of things said to her, which will suffice the severe and pervasive requirement for the motion to dismiss stage
 - Ms. Doe may have been denied educational benefit even though she held a 4.0; and school's provision of counseling was not enough to defeat claim of deliberate indifference
- Holding: Student "should get the opportunity to show that she has evidence supporting her allegations"

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John Doe 2 v. Fairfax County School Board

Student on Student Sexual Harassment – Case #1:18-cv-00846
(May 29, 2019)

Facts:

- 16-year old male student accused by three female classmates of inappropriately touching them and making sexually harassing comments
- During the school's investigation, the male student said he accidentally touched one of the young ladies, denied touching the other, and admitted to making some, but not all, of the comments – although he said they were meant as a joke and were directed to other students
- The school suspended the male student for ten days, which his parents appealed
- School hearing officers conducted an initial hearing during which the young man was represented by counsel, after which they determined the male student committed serious repeated offenses in violation of School Board policy, removed him from his home school, assigned him to an alternative learning center for the remainder of the 2017-18 school year and to a different Fairfax County high school for the 2018-19 school year

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John Doe 2 v. Fairfax County School Board

Facts:

- The student's family appealed the discipline decision to the School Board, which denied the appeal
- Plaintiffs petitioned the Circuit Court under Virginia law, which denied the Petition for Review holding that the plaintiffs failed to show that the School Board acted improperly
- While the Circuit Court petition was pending, the plaintiffs (student and his father) filed a five-count complaint in federal court against the School Board for allegedly violating Title IX, the First and Fourteenth Amendments of the U.S. Constitution, and various clauses of the Virginia Constitution
- The basis for plaintiffs' Title IX claim was, essentially, that the male student was treated more aggressively because he was a male student accused of sexual misconduct and that the School Board refused to believe him because of his gender

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John Doe 2 v. Fairfax County School Board

Rulings:

- The United States District Court for the Eastern District of Virginia initially held that the state Circuit Court's decision did not contemplate all of the issues raised in the federal litigation, and therefore did not have preclusive effect
- A dispute over a school disciplinary proceeding on the basis of gender bias will fall within one of two categories: (1) an "erroneous outcome" theory, under which a plaintiff claims that he is innocent and was wrongly found to have committed an offense, or (2) a "selective enforcement" theory, under which the plaintiff argues that regardless of his guilt or innocence, the severity of the penalty or the decision to initiate the proceeding was affected by the student's gender

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John Doe 2 v. Fairfax County School Board

- Regarding the first theory, the male student argued, among other issues, that the accusers were never interviewed beyond an initial meeting with the administration and the evidence revealed that one administrator acknowledged that she never interviewed two students; further, that the administration did not investigate possible exculpatory evidence, including that he was not in the school library at the time of one alleged infraction
- Plaintiffs also argued that a recently issued Dear Colleague Letter from OCR, and a previous scandal at the same Fairfax high school involving a girls' basketball coach created an inhospitable environment for males accused of sexual misconduct
- The Court determined that "plaintiffs have demonstrated numerous deficiencies with the investigatory process that were relied upon and compounded at each state of the disciplinary proceeding" but plaintiffs "have not produced sufficient evidence to establish a particularized causal connection between gender bias and the flawed investigation and outcome"
- The Court also held that plaintiffs failed to present evidence supporting an anti-male bias or pattern of decision-making that male students were disciplined more harshly than females

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John Doe 2 v. Fairfax County School Board

Ruling – Selective Enforcement

- Regarding selective enforcement, a male plaintiff must demonstrate that a female was in circumstances sufficiently similar to his own and was treated more favorably
 - The Court held that Plaintiffs here failed both to allege and present any evidence supporting a claim that a female student similarly situated to the male student was treated more favorably
- ### Ruling – First Amendment
- Plaintiffs argued that because the male student's comments were made in private conversation with a limited audience, they were not disruptive nor invasive of the rights of others
 - The Court held that the claim was contradicted by the fact that three female students complained about the comments, and that under the Supreme Court's *Fraser* decision, school boards may prohibit "vulgar and offensive terms" without having to determine whether they actually were disruptive
 - The Court held the School Board did so in a "*sufficiently clear and specific*" manner in its Student Rights and Responsibilities handbook, which prohibited "conduct of a sexual nature" that creates "an offensive environment"

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John Doe 2 v. Fairfax County School Board

Ruling – Due Process Claim

- The Court held that there was no dispute that the male student was provided oral notice of the allegations against him on the date of the infraction and was given an opportunity to tell his side of the story, which he did
- The Court also held that the male student was suspended for ten days only after his opportunity to respond to the allegations, and that he received all process to which he was due for this short-term suspension
- The Court held further that the appeal hearings satisfied all due process, recognizing that the student and his family were represented by counsel, knew the bases for the disciplinary recommendation, and participated in the hearing and accessed an appeal to the School Board
- The Court specifically recognized that the Fourth Circuit has NOT recognized the right to cross-examine witnesses in the academic context
- The Court also noted that undercutting any due process claim was the fact that the student was transferred to another educational setting, rather than being expelled

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Fairfax County School Board v. S.C., 180497 (2019)

- May 30, 2019 Supreme Court of Virginia decision
- Addressed judicial review of School Board actions pursuant to § 22.1-87
- § 22.1-87 provides: Any parent, custodian, or legal guardian of a pupil attending the public schools in a school division who is aggrieved by an action of the school board may, within thirty days after such action, petition the circuit court having jurisdiction in the school division to review the action of the school board
 - Review on the record any other evidence found relevant to the issues on appeal by the court
 - School Board's action must be sustained unless arbitrary or capricious

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Fairfax County School Board v. S.C., 180497 (2019)

- Facts
 - S.C. disciplined for nonconsensual, sexual touch of three students at school
 - Suspended for 10 days and referred to hearing officer
 - Hearing officers (2) found that student's actions were "willful, deliberate, and far outside the bounds of acceptable student conduct" and in violation of Student Code of Conduct
 - Unable to determine if sexual battery
 - Upheld discipline, student unsuccessfully appealed to school board.
 - S.C. appealed that decision to circuit court, and the discipline was dismissed with prejudice

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Fairfax County School Board v. S.C., 180497 (2019)

- Analysis
 - Circuit court reviewed the record, received briefs and arguments from counsel and entered a final order holding SB acted arbitrarily
 - In response to motion to reconsider, court amplified reasoning and again dismissed discipline with prejudice
 - The parties did not offer any evidence outside of the administrative record, thus review was limited to the record
 - Arbitrary and capricious actions – when they are willful and unreasonable and taken without consideration of or in disregard of facts or law

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Fairfax County School Board v. S.C., 180497 (2019)

- Analysis (continued)
 - Minimal due process required for 10 day suspension – notice and an opportunity to respond to the charge
 - Assumed (without deciding) that S.C. had some liberty interest implicated in her disciplinary transfer, she received all the process she was constitutionally due
 - SB did not act arbitrarily and/or capriciously in affirming decision

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Fairfax County School Board v. S.C., 180497 (2019)

- Notable quotes from the opinion:
 - "A school is an academic institution, not a courtroom or administrative hearing room"
 - "Maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures"
 - "Given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions."
 - "Applying the 'intensely practical' principles of due process applicable to school disciplinary proceedings, *Goss*, 419 U.S. at 578, we find nothing in this record suggesting that the School Board acted arbitrarily in violation of S.C.'s due process rights."

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Doe v. Katy Indep. Sch. Dist., 2019 U.S. Dist. LEXIS 214831(S.D. Tex., Dec. 13, 2019)

- Teacher-student relationship
- Student argued that District knew teacher had earlier incidents of a sexual nature with students such that it was deliberately indifferent to risk he posed to female students like Doe
- Relationship began in spring of Doe's senior year and continued through first year of college; when it ended Doe told Mom, who requested a meeting with Principal
- Teacher admitted to relationship with student and resigned, later charged with felony, pled guilty
- The parties agreed that the District had no knowledge about relationship with Doe until after Doe graduated
- "Vague allegations that do not include sexual harassment do not put a school district on notice of that risk"
- However, genuine factual disputes as to deliberate indifference –led court to DENY summary judgment to the School District

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Russell County School Division: A Cautionary Tale

Doe v. Russell County School Board, 2017 U.S. Dist. LEXIS 56479 (W.D.Va. April 13, 2017)
(motion to dismiss)
Employee-on-student sexual harassment

- Facts:
- Gobble employed as a janitor from 2006-2014, arrested February 12, 2014 – confessed to serial sexual abuse of four boys
 - Henley, principal of Lebanon Elementary School, allegedly knew that Gobble had Doe living with him and took him on weekend trips – failed to investigate and did not take any action
 - Hooker, principal of LES during Doe's 4th grade year, knew Gobble spent substantial sums of money on and time with Doe, during and outside school hours
 - Hooker sat in on DSS interviews of Gobble and Doe in which they denied that anything had happened between them
 - Hooker did not independently investigate the complaint and took no other action
 - Various teachers and other school board employees witnessed Gobble acting inappropriately toward Doe and other male students

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Doe v. Russell County School Board

- Plaintiff alleges that the School Defendants allowed Gobble to have unsupervised and unrestricted access to LES, including its most isolated areas, at all times of the day and year; allowed Gobble to have unrestricted access to LES students
- Opinion references USDOE, OCR and Virginia Board of Education and their repeated notifications to schools of the problems of sexual assault – recommended training, etc.
- Complaint alleges that the School Defendants failed to heed warnings and did not provide the required and recommended training for teachers, administrators, staff, students, or parents
- Defendants moved to dismiss because the allegations do not show that the School Board had actual knowledge that Gobble was abusing Doe, facts known by Gobble and Hooker did not create actual knowledge

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Doe v. Russell County School Board

Summary Judgement Decision – February 13, 2018

Summary judgement denied as to School Board

- Reasonable jurors could conclude that principal's response to the DSS investigation was clearly unreasonable in light of the known circumstances and that inaction allowed abuse to continue for months longer than it might otherwise have occurred
 - Through the DSS investigation, Principal learned that Doe, a particularly vulnerable elementary school student, was living in the same bedroom with a school employee to which he was unrelated
 - Principal also knew that Doe was regularly spending time with Gobble at school behind closed doors
- Court cited 2011 DCL, in deciding that reasonable jurors could conclude that School Board failed to take corrective action after Gobble's confession and arrest
 - Although Doe left for a time, he ultimately returned and is a student there now
 - Failed to offer counseling or other remedial measures
 - Failed to take action necessary to prevent future harassment, such as training or disciplining personnel, or revising applicable policies

Following denial, settlement reached for \$1.1 million

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34 C.F.R. PART 106

Title IX Regulations

Effective August 14, 2020

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DISCLAIMER

We are not your School Board lawyers

Please consult with your School Board lawyer prior to addressing a specific fact pattern or situation

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History of Sexual Harassment Enforcement

- 1975 - Department of Education promulgated rules to enact Title IX, sexual harassment not contemplated
- 1997 Guidance from DOE included sexual harassment under Title IX
- 1998 - SCOTUS rules an educational entity is liable for Title IX teacher-on-student harassment if it is "deliberately indifferent" to "actual notice" *Gebser v. Lago Vista*
- 1999 - SCOTUS rules peer-on-peer harassment is actionable under Title IX - *Davis v. Monroe County Board of Education*
- 2001 OCR revised 1997 guidance in light of *Gebser* and *Davis*, included "interim measures" to help victims
- 2011 and 2014 – sexual violence added to definition of sexual harassment, 2014 question and answer document based on multitude of questions regarding 2011 guidance
- 2017- OCR rescinded 2011 and 2014 guidance, provided 7pg. Q and A document

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Title IX Recent Developments

- November 16, 2018 Notice of Proposed Rulemaking <https://www2.ed.gov/about/offices/list/ocr/docs/proposed-title-ix-regulation-fact-sheet.pdf>
- 124,000 + comments received
- May 19, 2020 final rule published - USDOE guidance document is over 2000 pages; previous Title IX regulations did not refer to sexual harassment
- Seventeen states (including Virginia) filed suit challenging the final rule and requesting a stay of its effective date pending judicial review - stay DENIED on August 12, 2020
 - "Although Plaintiffs have raised serious arguments about certain aspects of the Rule, they have not established a likelihood of success on their claims, nor have they established that they are likely to suffer irreparable harm"

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Title IX Regulations – Training Requirements

- 34 CFR § 106.45(b)(1)
 - Training for Title IX Coordinator, investigator, decision-maker, or any person designated to facilitate an informal process on the following:
 - Definition of sexual harassment
 - Scope of the school division's education program or activity
 - How to conduct an investigation and grievance process - including hearings, appeals, and informal processes, as applicable
 - How to serve impartially (avoiding prejudgment of facts, conflicts of interest, and bias)
 - In addition:
 - Investigators must receive training on issues of relevance, investigative report that fairly summarizes relevant evidence
 - Decision-makers must receive training on any technology to be used at live hearing, relevance of questions and evidence

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Title IX Regulations

- Defining Sexual Harassment - 34 CFR § 106.30(a)
 - Quid pro quo harassment;
 - Unwelcome conduct on the basis of sex is so severe, pervasive and objectively offensive that it denies a person equal access; *or*,
 - Sexual assault (as defined in the Clery Act regulations)
- What Triggers School's Obligation to Respond
 - Actual knowledge
 - Reporting to a Title IX Coordinator will always give schools actual knowledge
 - In K-12, reporting student-on-student harassment to any employee at that school gives the school actual knowledge
 - Any individual may report, not just victim
 - Conduct within school division's own program or activity - includes any location, event, or circumstance over which the school division exhibits substantial control over both the alleged harasser and the context in which the harassment occurred
 - Perpetrated against a person "in the United States" (new provision)

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Title IX Regulations

- General Response
 - Regulations require school divisions to appoint a Title IX Coordinator - specifically named on website, contact information, annual training, records of that training
 - *authorized to coordinate school division's compliance efforts*
 - *doesn't have to be full-time only job, but individual needs to have sufficient authority and time to carry out role*
 - Liability when school knows of sexual harassment allegations and responds in a way that is "deliberately indifferent" – "clearly unreasonable in light of the known circumstances"
 - Must "respond meaningfully to every report" – but must activate grievance process only when a **formal complaint** is filed
 - If school follows grievance procedures – **safe harbor against finding of deliberate indifference**
 - Must investigate formal complaints

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Title IX Regulations – Receipt of Report

- How a School Must Respond
 - Reports trigger obligation to meet with and offer the complainant supportive measures (available to complainants and respondents)
 - **Definition: non-disciplinary, non-punitive, individualized services, offered as appropriate and without charge to a complainant or a respondent before or after the filing of a formal complaint, or where no complaint has been filed 34 CFR § 106.30 (a)**
 - counseling, course modifications, schedule changes, monitoring, supervision, extensions of deadlines, security
 - removing a respondent completely from an activity would likely be considered punitive
 - Explain formal complaint process
 - K-12 schools need to protect younger students and may require the Title IX Coordinator to file a formal complaint even when a young victim does not want to file
- Emergency removal/administrative leave of respondent permitted under certain circumstances
 - Must conduct an individualized safety and risk analysis and determine that emergency removal is necessary in order to protect a student or other individual from an immediate threat to physical health or safety
 - School division must provide respondent with notice and an opportunity to challenge the decision immediately after the removal
 - Example: Accusation of sexual harassment leads to respondent's threats of physical self-harm

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Title IX Regulations – Grievance Process *Formal Complaint*

- Basic Requirements 34 CFR § 106.45(b)(1)
 - Treat complainants and respondents equitably
 - Objective evaluation of all relevant evidence
 - Presumption of innocence for respondent
 - Burden of proof on the school, preponderance of evidence vs. clear and convincing
 - Reasonably prompt time frames
 - Description of possible disciplinary outcomes and remedies following a determination of responsibility
- Notice of allegations 34 CFR § 106.45(b)(2)
 - Written notice to all parties of grievance process and allegations at issue
 - STATEMENT that respondent is presumed "not responsible" until final decision
 - Notice of right to advisor (who may be an attorney) and to inspect and review evidence
 - Notice of any code of conduct provision regarding false statements

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Title IX – Grievance Process

- Dismissal 34 CFR § 106.45(b)(3)
 - Mandatory if investigation reveals alleged conduct did not occur in school division's program or activity OR against a person in U.S.
 - Permissive if complainant provides Title IX Coordinator in writing a request to withdraw complaint, if respondent is no longer employed by the recipient or enrolled in its education program; or if specific circumstances prevent the school division from gathering enough evidence to reach a decision
- Investigation 34 CFR § 106.45(b)(5)
 - Equal opportunity to present witnesses, evidence, **inspect and review evidence (10 day review period)**
 - *Cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a doctor, psychiatrist, psychologist, and made in connection with treatment to the party unless there is written consent from the parent to do so
 - No gag order
 - Advisors (can be a lawyer) permitted for complainant or respondent in any meeting, any restrictions imposed by school division as to advisors must be applied equally to both parties
 - Written notice of interviews

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Title IX – Grievance Process

- Investigative Report
 - *Must fairly summarize relevant evidence*
 - *At least 10 days before determination of responsibility - send it to each party and the party's advisor for their review and response*
- Hearings for K-12 - optional, but prior to determination, the parties must be allowed to submit written questions to challenge each other's credibility and decision-maker must allow for limited follow-up
 - Questions and evidence about the complainant's prior sexual behavior are not relevant, unless offered to prove that someone other than the respondent committed alleged conduct; or if it concerns specific incidents related to respondent to prove consent
 - Decision-Maker must explain to the party proposing the questions any decision to exclude a question as not relevant

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Title IX – Grievance Process

- Decision-maker's Written Determination 34 CFR § 106.45(b)(7)
 - Must be made by someone other than Title IX Coordinator or investigator and must:
 - *identify allegations;*
 - *describe all procedural steps taken;*
 - *include findings of facts and conclusions about the application of code of conduct to the facts;*
 - *include a statement of, and a rationale for, the decision reached on each allegation, any disciplinary sanctions imposed on the respondent; and*
 - *include procedures and permissible bases for appeals*
- Appeals - 34 CFR § 106.45(b)(8)
 - Available to both parties after determination or dismissal of formal complaint and based on the following
 - *procedural irregularity;*
 - *new evidence that could affect the outcome; or*
 - *conflict of interest or bias by Title IX Coordinator, investigator, decision-maker*

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Title IX Regulations

- Informal resolution 34 CFR § 106.45(b)(9)
 - Cannot be required
 - May facilitate mediation or other informal process
 - May not be offered in employee-student harassment context
- Documentation 34 CFR § 106.45(b)(10)
 - For 7 years schools must create and maintain records documenting every Title IX sexual harassment investigation and determination of responsibility including:
 - Disciplinary sanctions imposed, if any;
 - Any informal resolution or appeal;
 - All materials used to train their Title IX Coordinators, investigators and decision-makers, and any person who facilitates an informal resolution process (parties may request copies); and
 - Basis for conclusion that its response was not deliberately indifferent
 - School must keep records regarding response to every report – including documentation of supportive measures offered and implemented for complainant

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Title IX – Regulations

- Other miscellaneous requirements and clarifications
 - Notice of policy, grievance procedures, and Title IX Coordinator's name or title, email address, office address, and telephone number published on website and sent to:
 - applicants for admission and employment
 - students' parents or legal guardians
 - unions or professional organizations holding agreements with the school division (34 CFR § 106.8)
 - Must also publish notice of nondiscrimination policy and Title IX Coordinator's contact information in handbooks to students/employees
 - Timelines must be reasonably prompt (see VSBA model policy)
 - No damages assessed by DOE
 - Nothing requires restriction of 1st Amendment, Due Process rights
 - Severability provisions
 - Prohibition on retaliation (34 CFR § 106.71)

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Title IX Regulations – Office for Civil Rights Frequently Asked Questions – September 4, 2020

- Final Rule Effective: August 14, 2020, will not be enforced retroactively
- Districts have a duty under Title IX to address sexual harassment if the alleged victim shows "signs of enduring unequal educational access"
 - skipping a class
 - decline in GPA
 - difficulty concentrating
- An individual may file a formal Title IX complaint as long as she is participating or attempting to participate in the district's programs or activities (alumni groups included), specifically "a complainant who has left school because of sexual harassment, but expresses a desire to re-enroll if the recipient appropriately responds to the sexual harassment, is 'attempting to participate' in the recipient's education program or activity"
- The Title IX Rule does not adopt the Federal Rules of Evidence, uses "relevance" as the sole admissibility criterion
 - Not relevant: treatment records, information protected by legally recognized privilege, certain prior sexual behavior
 - Ordinary meaning of the word should be applied

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VSBA Model Policy - JFHA/GBA

- Compliance officer - receives all complaints of harassment *other than* Title IX sexual harassment (there can be more than one)
- Title IX Coordinator - designated and by School Board to coordinate efforts to comply with its responsibilities
- Any student/employee who believes he or she has been a victim of harassment should report it to the Title IX Coordinator
- Title IX Coordinator makes initial decision whether the allegations may be sexual harassment prohibited by Title IX - if it cannot be, then it is referred to the compliance officer who follows the "Compliance Officer Formal Procedure"

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VSBA Model Policy – JFHA/GBA

- Compliance Officer Formal Procedure
 - Set out parameters of investigation
 - May be conducted by Compliance Officer or third party
 - Completed not later than 14 school days after receipt
 - Written notice to reporting and receiving party
 - Interim measures
- In making determination, School Division shall consider at a minimum:
 - Surrounding circumstances
 - Nature of the behavior
 - Past incidents or past or continuing patterns of behavior
 - Relationship between the parties
 - How often conduct occurred
 - Identity of perpetrator
 - Location
 - Ages
 - Context

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VSBA Model Policy – JFHA/GBA

- Action by Superintendent within 5 days of Compliance Officer Report
- Appeal available to complainant if the superintendent determines that no prohibited harassment occurred
- Informal Procedure available with consent of both parties
- Sexual Harassment Prohibited by Title IX
 - Definitions
 - Title IX Grievance Process
 - Dismissal of Formal Complaints
 - Investigation of Formal Complaints
 - Determination regarding responsibility
 - decision-maker cannot be Title IX Coordinator or investigator
 - determination provided simultaneously

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VSBA Model Policy – JFHA/GBA

- Appeals
 - Gives both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome
 - Reviews the evidence gathered by the investigator, the investigator's report, and the decision-maker's written decision
 - Issues written decision and provides simultaneously to both parties
- Timelines (*tollled if informal process initiated, extended for good cause)
 - Investigative report within 35 days formal complaint filed
 - Determination within 10 working days from the date the investigative report is provided to decision-maker
 - Either party may appeal within 5 working days
 - Appeal resolved within 15 calendar days from the filing of the appeal

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VSBA Model Policy – JFHA/GBA

- Informal Resolution Process
 - Such as mediation
 - When one party requests, the other must respond within 3 days
 - Must be completed within 10 days
 - Facilitated by trained educational professional, consultant, or other individual
 - If resolved, facilitator documents the nature of complaint and resolution, both parties sign and receive a copy, forwarded to Title IX Coordinator
- Recordkeeping

Retaliation

Prevention and Notice of Policy

False Charges

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Administrative Response and Investigations

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Administrative Response to Sexual Harassment or Assault

- All employees must be able to recognize sexual violence and harassment of students by other students or school employees
- All employees must be able to recognize "grooming behaviors" by other employees or other third parties (volunteers, coaches, etc.)
- All employees must know to report suspected harassment or grooming behaviors to principal and Title IX Coordinator
- Failure to do so can contribute to liability of the Division under Title IX and individual liability of the employee under other laws

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General Response and Investigations

General response: Whether or not the student files a formal complaint or asks the school to take action, if the school knows or reasonably should know of an incident of sexual misconduct, school must respond appropriately (immediate effective action to eliminate the hostile environment)

Failure to timely or thoroughly investigate may amount to deliberate indifference

To assemble facts to describe:

- What happened
- Why it happened



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The Best Investigations Are:

- Prompt (meeting school division policy requirements)
- Thorough (and documented)
- Objective

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Step 1 - Intake

- Title IX Coordinator must meet promptly with the complainant and the parents and document the same
 - discuss availability of supportive measures with or without the filing of a formal complaint; explain process
 - If formal complaint is filed, consider whether informal resolution might be appropriate
- Determine the rules and law that apply; consult counsel if necessary
- Map out the investigation
 - Who will investigate?
 - What will be investigated?
 - Who will be interviewed and in what order?
 - Outline a calendar of events to begin without delay
- Give notice to respondent
- Consider whether and what supportive measures are required for the responding party during investigation

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Step 2 – Designate an Investigator(s)

- Free of actual or reasonably perceived conflicts of interest and biases for or against any party
- Maintains confidentiality
- Analyzes and documents available evidence to support reliable decisions
- Objectively evaluates
- Synthesizes available evidence



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Step 3 – Gather Information

Reporting Party

- Interview them like a journalist and LISTEN and DOCUMENT!
- Chronological order
- Obtain the names, addresses, contact info of anyone with knowledge
- Ask about any proposed resolution

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Step 3 – Gather Information

Supportive Measures

Different for each case –

- Placement of students in different classes
- Provide victim with escort or different transportation services
- Counseling
- Academic, emotional, and social support
- Written agreement with offender to avoid victim
- Extension of deadlines
- Safety plan
- Offending employee placed on administrative leave
- Emergency removal

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Step 3 – Gather Information

Respondent

- Give a detailed description of what has been alleged to allow full response
- Inform the responding party that no conclusions have been made and not to discuss this matter with others
- Inform the responding party that any attempt to influence or coerce or intimidate the reporting party will be grounds for immediate discipline
- Consider the need for a recorded or written statement

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Step 3 – Gather Information

Witnesses

- Interview third-party witnesses with open, not leading, questions
- Provide some background to give witnesses the opportunity to address the issues – but preserve confidentiality if possible
- Remind all witnesses of confidentiality and the prohibition of retaliation
- Compare all stories for consistency and inconsistency

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Step 4 – Record Your Findings – Investigative Report

- Leave out insignificant details
- Highlight misconduct with specific description of the events, not generalized conclusions
- Do not editorialize – but may make credibility determinations, which can't be based on party's status as complainant, respondent or witness
- Make use of evidentiary attachments, such as photos, e-mails, texts, screen shots, videos, handwritten documents, etc.
- Provide to parties and they have 10 days to provide a written response



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Step 5 – Report Results to Decision-Maker

Report should summarize both inculpatory and exculpatory evidence

Takes into account unique and complex circumstances

Decision maker must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness and explain to the party proposing a question any decision to exclude a question as not relevant

Limited follow-up questions



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Step 6 - Decision-Maker's Written Determination of Responsibility

- Makes decision regarding determination of responsibility, cannot be the investigator OR the Title IX Coordinator
 - Commentary addresses consideration of consistency, accuracy, memory, credibility, implausibility, inconsistency, unreliability, ulterior motives, lack of credibility
- Must include:
 - identification of allegations
 - description of procedural steps taken from the receipt of formal complaint through determination
 - findings of fact supporting the determination
 - conclusions regarding application of code of conduct to facts
 - statement of and rationale for the result as to each allegation, including disciplinary sanctions
 - details regarding appeal procedures
- Is it more likely than not that the respondent engaged in the alleged misconduct?
- Decision is final when provided to both parties simultaneously

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Step 7- Appeal Decision-Maker

- Not the same person as initial decision-maker, investigator, or the Title IX Coordinator
- Decides appeal on following bases:
 - procedural irregularity that affected outcome of matter;
 - new evidence not reasonably available at the time the determination regarding responsibility or dismissal was made; or
 - Title IX Coordinator, investigator, decision-maker bias
- Provides notification in writing to both parties:
 - when appeal filed; and
 - of decision, describing result and rationale for result

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Serving Impartially – Decision-makers

- Regulations' preamble states that being impartial = free from bias
 - Whether bias exists requires examination of facts and school divisions should apply an objective commonsense approach to evaluating whether a particular person is biased
- Consider perceived conflict of interest vs. actual conflict of interest toward complainants or respondents generally or an individual complainant or respondent
 - Past advocacy for victim or respondent's rights
 - Prior adjudication involving complainant or respondent
- Avoid:
 - Reliance on sex stereotypes (complainant always female, respondent always male)
 - Pre-judgement of facts

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Conduct Off-School Grounds

- Regulations do not impose a geographic test or draw a distinction between on-campus and off-campus misconduct
- Required to investigate if the sexual harassment occurred within the scope of an educational program or school-sponsored activity

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Remedies for Student-on-Student Harassment

- Disciplinary sanctions against student offender
- Strict behavioral and "no contact" contract
- Separate classes, schedules, transportation, or programs
- Administrative transfer of victim (voluntary) or offender (voluntary or involuntary) to another school
- Targeted training for students who are creating a hostile environment, i.e. an athletic team or band

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FERPA Considerations

- Can school divisions notify a complainant or alleged victim of the type of discipline imposed on another student?
- Depends on whether the discipline related directly to the harassed student.
 - The Family Policy Compliance Office – *Letter to Anonymous*; August 1, 2017
 - The following sanctions directly relate to the harassed student:
 - General letter stating a decision has been made regarding expulsion, whether the decision has been appealed, and if so, subsequently that the appeal was fully addressed
 - No contact order
 - Suspension, transfer to other classes

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OCR Enforcement

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OCR Authority

- U.S. Department of Education's Office for Civil Rights (OCR) enforces:
 - Title VI of the Civil Rights Act of 1964 – prohibits discrimination on the basis of race, color and national origin
 - Title IX of the Education Amendments of 1972 – prohibits discrimination on the basis of gender in educational programs receiving federal funds
 - Section 504 of the Rehabilitation Act of 1973 – prohibits discrimination and harassment based on disability in programs that receive federal financial assistance
 - Title II of the Americans with Disabilities Act of 1990 – prohibits discrimination and harassment based on disability in public entities

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OCR Complaints

- Complaints may be filed by anyone who believes that an educational institution that receives federal financial assistance has discriminated against someone on the basis of race, color, origin, sex, disability, or age – and need NOT be the victim

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Process for OCR Complaint and Investigation

- Once filed, OCR decides whether or not to investigate:
 - Is the complaint already being investigated by another agency or by the school's formal grievance procedure (or state)?
 - Was the complaint made within 180 days from the last date of the alleged discrimination?
- Rapid Resolution Process If appropriate for RRP, OCR will promptly attempt to resolve the complaint and obtain information necessary to make a compliance determination
 - OCR will contact the recipient to determine if the recipient is interested in immediately resolving or has taken action to resolve the complaint allegations

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OCR Investigation

- During investigation, OCR will review information submitted by both parties, may conduct interviews
- OCR will request data, the institution's narrative response, and any other available evidence:
 - Record of trainings
 - Policies
 - Correspondence/communication
- OCR's goal is to obtain independent written documentation that corroborates oral statements made by the complainant or witnesses

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OCR Investigation

- Facilitated Resolution Between the Parties - If determined appropriate by OCR and both parties consent, OCR will designate staff to facilitate an agreement
 - OCR does not sign, endorse, approve, monitor or enforce, but will inform parties of breach and complainant's right to file a new complaint within 60 days of breach (or 180 days of the date of original allegations of discrimination, whichever is later)
 - If unsuccessful, investigation proceeds
- Resolution during Investigation - allegations can be resolved at any time prior to a draft letter of findings; 30 days to reach final agreement after draft shared with school division; agreement is monitored

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OCR: Finding of Discrimination

- OCR's finding that a school division violated one of the various laws it enforces must be supported by a preponderance of the evidence; that is, evidence that shows it is more likely than not that the school division took/failed to take the action alleged
- When there is a significant conflict in the evidence (no corroborating witness statements), OCR generally must conclude that there is insufficient evidence to establish a violation of the law
- Appeal afforded to complainants - in order to change outcome there must be a clear error of fact or law

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Finding/Potential Finding of Discrimination – What Happens Next?

- Resolution Agreement:
 - OCR will closely monitor
 - Will not close the complaint until the terms of the resolution agreement are fulfilled and the school division is in compliance with the statute(s) and regulation(s) at issue
- If no agreement, OCR will issue a Letter of Findings setting forth factual and legal basis for violation/non-violation
- May initiate administrative enforcement proceedings to terminate or suspend federal financial assistance to the division or refer the case to the Department of Justice (DOJ)
- OCR may also move to defer any new or additional federal money to the school division (Notice of Opportunity for Hearing)

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Compliance Reviews

- Regulations require OCR to initiate “periodic compliance reviews” to assess the practices of recipients to determine whether they comply with the regulations promulgated pursuant to the laws OCR enforces
- Broad discretion afforded by regulations to determine issues for investigation and the number and frequency
- Many fewer compliance reviews vs. complaints received

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OCR Investigation

- 2020 Case Processing Manual (August 2020):
<https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>
- August 26, 2020 Revisions:
 - Requires OCR to issue a draft resolution letter to the recipient in addition to the proposed 302 resolution agreement, and to provide the recipient an opportunity to inform OCR of any factual errors contained within the draft resolution letter;
 - Requires OCR to issue a draft letter of findings to the recipient in addition to the proposed 303(b) resolution agreement, and to provide the recipient an opportunity to inform OCR of any factual errors contained within the draft letter or findings; and
 - Articulates, for the first time, the applicable standard of review for appeals of OCR determinations - clear error of fact or law
- Retains several provisions from 2018 Manual:
 - Section 109, which requires OCR to comport with the First Amendment when investigating and resolving complaints;
 - The requirement that OCR must automatically provide recipient institutions a copy of the complaint and/or appeal at the outset of an investigation or appeal process; and
 - Provisions reinstating a robust appeals process, which provides complainants the opportunity to submit a written appeal within 60 days of OCR's determination and provides recipient institutions with an opportunity to submit a written response

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Transgender Student Developments

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Recent Developments: Transgender Students and Title IX

- February 22, 2017: Withdrawal of statements of policy and guidance reflected in May 2016 DCL on OCR's enforcement of Title IX with respect to transgender students based on gender identity as well as related January 2015 letter
- March 6, 2017: U.S. Supreme Court vacated and remanded Gloucester County School Board v. G.G. case for further consideration;
- May 22, 2018: US DC for EDVA denied School Division motion to dismiss in G.G.
 - rejected argument that allowing a transgender student to use staff or other gender-neutral facilities is sufficient to comply with Title IX.
 - Basic rationale: denying student access to restroom based solely upon designation of sex at birth is a form of gender stereotyping.
 - At the same time, the argument that allowing transgender students to use facilities consistent with gender identity violates the privacy rights of other students in the restroom or locker room is not one that has gained traction, at least to date. If a student is uneasy about changing or using the toilet in the presence of a transgender student, that student – rather than the transgender student – should avail him or herself of options for greater privacy (and the school should provide such options)

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Recent Developments: Transgender Students and Title IX

- The parties filed cross-motions for summary judgment.
 - The plaintiff continued to allege sex-based discrimination, both regarding the bathroom issue and alleging the school has failed to change his school records despite a change in his birth certificate (following order from different judge)
 - The School Board has filed motions to exclude certain evidence (e.g., not supported by expert testimony)
 - The School Board also filed a motion to stay, pending the United States Supreme Court's review of a Title VII case in which the Court will entertain the question of whether "on the basis of sex" includes transgender in the employment context

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Grimm v. Gloucester County School Board, 2019 U.S. Dist. LEXIS 138246 (E.D. Va. August 9, 2019)

- Headline
 - Grimm's motion for summary judgment was GRANTED
 - School Board's motion for summary judgment was DENIED
- Title IX
 - Board disputed that he was excluded because of sex and that the improper discrimination caused him harm
 - No question that Board's policy discriminates against transgender students
 - "Biological gender" not a medically accepted term
 - Only student with a male birth certificate excluded from male restroom
 - Board refused to update records
 - He unquestionably suffered harm and continues to suffer harm

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Grimm v. Gloucester County School Board, 2019 U.S. Dist. LEXIS 138246 (E.D. Va. August 9, 2019)

- Equal Protection
 - All persons similarly situated should be treated alike
 - Intermediate scrutiny
 - Board bears burden that its proffered justification for its use of the classification is “exceedingly persuasive”
 - Privacy rights of students – unwarranted based on facts
 - No justification offered for refusal to change records

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Grimm v. Gloucester County School Board, 2019 U.S. Dist. LEXIS 138246 (E.D. Va. August 9, 2019)

- School Board’s Motion for Summary Judgment - denied
- Permanent Injunction – granted
 - Requiring Board to update Grimm’s official school records to conform to the male designation on his updated birth certificate

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Grimm v. Gloucester County School Board, 2019 U.S. Dist. LEXIS 138246 (E.D. Va. August 9, 2019)

- Court’s Conclusion
 - “solemn obligation to guard the well-being of the children in their charge
 - “history will judge us by the difference we make in the everyday lives of our children”
 - “there can be no doubt that all involved in this case have the best interests of the students at heart”
 - “however well-intentioned some external challenges may have been and however sincere worries were about possible unknown consequences arising from a new school restroom protocol, the perpetuation of harm to a child stemming from unconstitutional conduct cannot be allowed to stand”

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***Grimm v. Gloucester Cnty. Sch. Bd.*, No. 19-1952**
(4th Cir. Aug. 26, 2020)

- 4th Circuit panel held (2-1) that Gloucester School Board violated Grimm's rights under the Fourteenth Amendment Equal Protection Clause and Title IX because the Board adopted a policy barring the student who is a female-to-male transgender individual, from using the boys' restroom at school based on his gender identity
 - Dissenter (Niemeyer): While the law prohibits discrimination on the basis of sex in the provision of educational benefits, it allows schools to provide 'separate living facilities for the different sexes,' 20 U.S.C. § 1686, including 'toilet, locker room, and shower facilities,' 34 C.F.R. § 106.33.
- "that the Board's policy as applied to Grimm is not substantially related to the important objective of protecting student privacy, we affirm summary judgment to Grimm."
- Refusal to update records: "harmed Grimm because when he applies to four-year universities, he will be asked for a transcript with a sex marker that is incorrect and does not match his other documentation;" and (2) "this discrimination is unlawful because it treats him worse than other similarly situated students, whose records reflect their correct sex"

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***Grimm v. Gloucester Cnty. Sch. Bd.*, No. 19-1952**
(4th Cir. Aug. 26, 2020)

- Regarding GCSB's reliance on the bodily privacy interest to justify its restroom policy, the majority pointed out that GCSB "ignores the reality of how a transgender child uses the bathroom: 'by entering a stall and closing the door.'" It noted: "**Grimm used the boys' restrooms for seven weeks without incident.** When the community became aware that he was doing so, privacy in the boys' restrooms actually increased, because the Board installed privacy strips and screens between the urinals" (Privacy argument also rejected in 3rd and 9th Circuits)
- "We hold that the Board's application of its restroom policy against Grimm violated Title IX"

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***Vlaming v. West Point School Board, et al.*, filed in the Circuit Court for King William County on September 30, 2019**

- Background:
 - French teacher at West Point High School refused to refer to transgender student using masculine pronouns
 - Mr. Vlaming instead called student by name only, in violation of directives from school division administrators
 - Offered rescinded Dear Colleague as explanation
 - Mr. Vlaming was warned that he would face disciplinary action, and during one class in fall of 2018, he referred to student as "her"
 - Suspended for insubordination and eventually terminated
- Suit alleges violations of right to speak freely, exercise religion, referring to female as male is telling a lie
 - No policy specifically regarding pronouns
- Names superintendent, principal, assistant principal in addition to school board
- Update: Vlaming moved to remand case from federal court back to state court arguing case involves only state claims -- and the motion was granted on **August 19, 2020**
 - Rationale: School Board's general argument that the complaint raises Title IX issues, Vlaming does not raise claims under Title IX, but rather asserts that the Board policies do not comport with Virginia law
 - Vlaming does not ask the Court to decide whether the statute adequately aligns with Title IX

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Certiorari denied, *Doe v. Boyerton Area School District*

- May 28, 2019 – Supreme Court rejected a challenge to a 2016 Third Circuit ruling that allowed students to use private changing areas in accordance with self-identified gender
- Issues:
 - Whether a public school has a compelling interest in authorizing students who believe themselves to be members of the opposite sex to use locker rooms and restrooms reserved exclusively for the opposite sex, and whether such a policy is narrowly tailored
 - Whether the Boyertown policy constructively denies access to locker room and restroom facilities under Title IX “on the basis of sex”
- BASD attorneys had argued that its policy was consistent with guidance from Pennsylvania School Boards Assoc. and NSBA
- Ruling issued without any comments
- Cited in August 26, 2020 4th Circuit Grimm opinion

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Doe v. Boyerton Area School District, 17-3113(3rd 2018)

- Issue: whether the District Court correctly refused to enjoin the School Division from allowing transgender students to use bathrooms and locker rooms that are consistent with the students’ gender identities
- Plaintiffs, students who believe the policy violated their constitutional rights of bodily privacy, as well as Title IX, and Pennsylvania tort law
- Holding: The presence of transgender students in the locker and restrooms is no more offensive to privacy interest than the presence of other students who are not transgender. Nor does it infringe on the plaintiff’s rights under Title IX
 - Affirmed substantially for the reasons set forth in D.C.’s opinion

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Doe v. Boyerton Area School District, 17-3113(3rd 2018)

- Rationale:
 - Forcing transgender students to use bathrooms or locker rooms that do not match their gender identity causes “severe psychological distress often leading to attempted suicide”
 - Avoiding bathrooms altogether can lead to medical problems and decreases in academic learning
 - Although the court appreciated that the Plaintiffs also reduced water intake, fasted, etc. to reduce bathroom visits – “we do not view the level of stress that cisgender (gender assigned at birth) students experience as comparable to transgender students
 - Policy served a compelling interest – preventing discrimination against transgender students
 - School-district already provides single-user accommodations for all students – for those that are uncomfortable with the policy

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Doe v. Boyerton Area School District, 17-3113(3rd 2018)

- Rationale (continued)
 - Nothing in the record suggests that cisgender students voluntarily electing to use single-user facilities face the same extraordinary consequences
 - Requiring transgender students to use single user or birth-sex-aligned facilities is discrimination
 - Plaintiffs claiming a right of privacy in a space that is not all that private
 - Title IX claim unpersuasive because the policy treated all students equally and plaintiffs failed to meet the elements of a hostile environment harassment

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Soule v. Connecticut Association of Schools, Inc., filed in U.S. District Court for District of Conn., February 12, 2020

- Families of three female high school track athletes who had previously filed a Title IX OCR complaint (still pending), filed this suit to prevent transgender athletes from participating in girls' sports
- Would require athletes to compete based on their birth sex
- Motion to put athletic association rule on hold for the spring high school sports season
- Complaint argues three girls have been deprived of track titles, scholarship opportunities and positive public recognition
- Connecticut rule does not require hormone therapy, unlike USA Track and Field
- May 15, 2020 – USDOE Letter of Impending Enforcement Action

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Takeaways

- US DOE Resources: <https://sites.ed.gov/titleix/policy/>
 - Email T9questions@ed.gov
- Publicize identity of Title IX coordinator and contact information
 - Identify other individuals who will fill Title IX personnel roles
- Post policy, training materials
- Revise School Board Policy – Prohibition Against Harassment and Retaliation

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Other Questions:

- Training and training materials - does requirement to publish materials on website include recording of training or just written materials?
- Identification of individuals to fill various roles
 - Should school divisions have a full-time Title IX Coordinator?
 - there can be more than one, and it does not have to be full-time position, depending on school division

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Questions?

Thank You for your time!



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