

# New Title IX Regulations:

## What Every K-12 School Should Know

May 22, 2020  
Thompson & Horton LLP Title IX Summer Seminars



**Christopher B. Gilbert**  
Thompson & Horton LLP  
3200 Southwest Freeway  
Suite 2000  
Houston, Texas 77027



**Jessica Witte**  
Thompson & Horton LLP  
8300 N. MoPac Expressway  
Suite 220  
Austin, Texas 78759



1

# 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 subject to discrimination under any education program or activity receiving federal financial assistance.”





2



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

Cherry Creek School District blasted for underreporting sex assaults

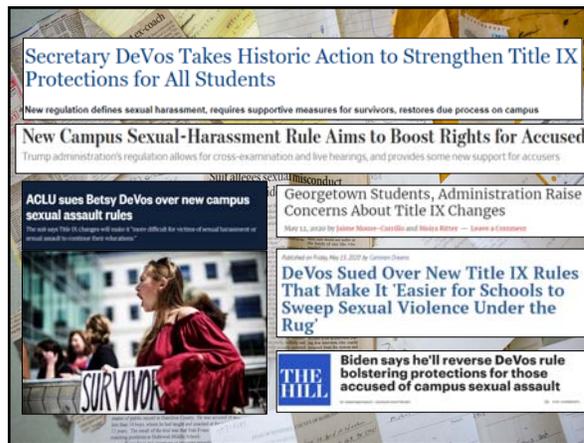
Kindergartners sexually abused classmate, took photos on school iPads, lawsuit says

**NIGHTMARE**  
**Middle-School Principal Gave Students 'Free Pass' to Rape Classmate, Lawsuit Claims**  
The now 18-year-old boy and his parents claim that Washington Public School officials treated multiple sexual assaults as "harmless" or "accidental touchings."

Tennessee high school coach indicted for failing to report abuse in player rape case

AP uncovers 17,000 reports of sexual assaults at schools across US

3



Secretary DeVos Takes Historic Action to Strengthen Title IX Protections for All Students

New regulation defines sexual harassment, requires supportive measures for survivors, restores due process on campus

New Campus Sexual-Harassment Rule Aims to Boost Rights for Accused

Trump administration's regulation allows for cross-examination and live hearings, and provides some new support for accusers

ACLU sues Betsy DeVos over new campus sexual assault rules

The suit says Title IX changes will make it "easier for victims of sexual harassment or assault to seek redress."

Georgetown Students, Administration Raise Concerns About Title IX Changes

May 12, 2020 by Jasper Moore-Claiborne and Blake Risher — Leave a comment

DeVos Sued Over New Title IX Rules That Make It 'Easier for Schools to Sweep Sexual Violence Under the Rug'

Biden says he'll reverse DeVos rule bolstering protections for those accused of campus sexual assault

4

## Path to Final Regulations

- September 22, 2017  
OCR issues Dear Colleague Letter withdrawing Obama-era Title IX guidance
- November 16, 2018  
USDOE releases its proposed regulations outlining schools' obligations to prevent, address, and investigate sexual harassment
- January 28, 2019  
Proposed regulations are open for comment until this date
- March 27, 2020  
Paycheck Protection Program ("PPP") loans introduced as part of the CARES Act
- May 6, 2020  
Final regulations are issued
- August 14, 2020  
Final regulations become effective



5

## Private Schools and Title IX

- Accepting PPP loans makes the school a **recipient of federal financial assistance** for the duration of the loan
- Private schools that accept such loans are required to comply with federal civil rights laws, including Title IX
- Private schools will only be held to these legal obligations **until the loan is paid or forgiven**, but there may be some longer-lasting effects




6

## Overview of New Regulations

- Effective August 14, 2020
- Defines sexual harassment and scope of Title IX protections
- Adopts deliberate indifference to actual knowledge of sexual harassment standard
- Adds that knowledge of any school district employee can trigger a duty to respond
- Discusses formal/informal complaints

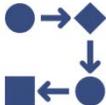


7

7

## Overview of New Regulations

- Discusses the procedures schools must have to respond to reports
  - ❖ Supportive measures
  - ❖ Process for emergency removal, if applicable
- Discusses procedures schools must have for due process
  - ❖ Investigation
  - ❖ Grievance process
  - ❖ Appeals process



8

8

## Overview of New Regulations

- Further defines role of Title IX Coordinator
- Provides role for investigator, decisionmaker, facilitator, and person reviewing any appeal
- Identifies policies school districts must implement
- Discusses written notices schools must provide
- Provides training schools must provide to personnel involved in the Title IX complaint process
- Includes specific anti-retaliation provisions with a complaint process for any retaliation

9

9

## Sexual Harassment Defined

- 1) **Quid Pro Quo**
  - ❖ A **school employee** conditioning an educational benefit or service on an individual's participation in unwelcome sexual conduct
- 2) **Hostile environment**
  - ❖ Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school's educational program or activity
- 3) Sexual assault, dating violence, domestic violence, or stalking as defined under the Clery Act and the Violence Against Women Act

10

10

## What Triggers A Need to Respond?

A school must respond when it has:

- ✓ actual knowledge
- ✓ of sexual harassment
- ✓ that occurred within the school's educational program or activity
- ✓ against a person in the United States



11

11

## Actual Knowledge

Actual knowledge means notice of *sexual harassment* or *allegations of sexual harassment* by **any employee** of an elementary and secondary school



"In elementary and secondary schools telling **any** school employee always puts the school on notice."

- OCR Webinar on New Title IX Regulations (emphasis in original)

12

12

## Substantial Control

- The sexual harassment must occur **within the school's program or activity** (on or off campus)
  - ❖ This "includes locations, events, or circumstances over which the recipient exercised **substantial control over both the respondent and the context** in which the sexual harassment occurs."
- The harassment must have been perpetrated against a person **in the United States**



13

## School District's Response



- Must respond in a manner that is **not "deliberately indifferent"**
  - ❖ The school cannot act in a manner that is clearly unreasonable in light of the known circumstances
  - ❖ The response must be prompt



14

## School District's Response

- Once the school knows about the sexual harassment, the Title IX Coordinator must contact the complainant (victim) to provide information regarding:
  - ❖ Supportive measures
  - ❖ Right to file a complaint
  - ❖ How to file a formal complaint
- A Title IX Coordinator must engage in such outreach even if no formal complaint has been filed by anyone



15

## Supportive Measures

- Free, individualized services designed to restore or preserve an individual's equal access to education, to protect the individual's safety, or deter further sexual harassment
- Required even without a formal complaint
- Should be available to the complainant **and** the respondent
- Cannot be punitive or disciplinary
- Consider the complainant's wishes regarding supportive measures
- The measures should not unreasonably burden another person
- The measures should be kept confidential
- Title IX Coordinator is responsible for implementing the supportive measures



16

## Supportive Measures

- Examples:
  - ❖ counseling,
  - ❖ extensions of deadlines or other course-related adjustments,
  - ❖ modifications of work or class schedules,
  - ❖ campus escort services,
  - ❖ mutual restrictions on contact between the parties,
  - ❖ leaves of absence, and
  - ❖ increased security and monitoring of certain areas of the campus.




17

## Emergency Removal / Administrative Leave

- Emergency removal of student
  - ❖ Must conduct an individualized safety and risk assessment
  - ❖ Student is an imminent threat to the physical health or safety of another student or individual arising from the allegations of sexual harassment
  - ❖ Provide notice and immediate opportunity to challenge the decision
- Administrative leave for employees during investigation is permitted
  - ❖ Follow state law, Board policy, and normal district procedures



18

### IDEA & Section 504 Implications

- Removal of a student would be a change of placement
- MDR requirements and procedural safeguards will be triggered
- Some supportive measures, such as provision of counseling or changes to class schedules, will also implicate placements and services under IDEA and Section 504
- **Bottom line:** ARD/Section 504 Committees will need to be involved from the beginning and the Title IX staff will need to be trained on identifying and address SPED/504 implications

19



19

### Formal Complaints

- May be made by a complainant (or parent, or legal guardian) or signed by the Title IX Coordinator
  - ❖ Complainant's wishes as to whether to file a formal complaint should be respected unless the Title IX Coordinator determines that initiating an investigation against the complainant's wishes is not clearly unreasonable
- Complainant must be participating in or attempting to participate in the school's education program or activity
- School must have policy regarding how to file a formal complaint and must publish how to file the formal complaint on the district's website

20



20

### Response to Formal Complaints

- Upon receipt of a formal complaint and prior to any interviews, school must provide the parties written notice of:
  - ❖ The school's grievance process;
  - ❖ The allegations of sexual harassment;
  - ❖ The presumption of innocence;
  - ❖ The right to inspect and review evidence;
  - ❖ The right to have an advisor during the process; and
  - ❖ Any provision in the school's code of conduct that prohibits knowingly making false statements or submitting false information during the grievance process.

21




21

### Formal Complaints: Dismissal

- **Mandatory Dismissal**
  - ❖ Complaint does not describe conduct that would constitute sexual harassment, as defined, even if proven
  - ❖ The sexual harassment did not occur in the school's education program or activity
  - ❖ The sexual harassment did not occur against a person in the United States

22



22

### Formal Complaints: Dismissal

- **Permissive/Discretionary Dismissal**
  - ❖ Complainant notifies Title IX Coordinator in writing that he/she wishes to withdraw the formal complaint or some allegations in the complaint
  - ❖ The respondent is no longer enrolled or employed
  - ❖ Circumstances exist that prevent the school from gathering sufficient evidence to reach a determination about the allegations

23



23

### Formal Complaints: Dismissal

- If the school dismisses the complaint or allegations in the complaint, it must promptly send written notice of the dismissal **and** the reason for the dismissal to all parties
- Any party can appeal the dismissal decision

24



24

## Investigation and Grievance Process

- Treat parties equitably
- Objective evaluation of evidence
- Ensure all individuals involved are properly trained with no conflicts of interest
- Presumption of innocence
- Reasonably prompt timeframes with delays only for good cause
- Description of range of outcomes
- Standard of evidence
- Right to appeal
- Description of range of supportive measures
- Privileges: no information protected by privilege unless person holding privilege has waived it

25

## Investigation

- Title IX Coordinator can be investigator, but decision maker cannot be investigator. Decision maker role is separate from Title IX Coordinator and investigator roles.
- School must provide parties **written notice** of the date, time, location, participants, and purpose of all hearings (if applicable), investigative interviews, or other meetings with sufficient time to prepare
- Burden of gathering evidence rests with the school and not on the parties
- Cannot restrict either party's ability to discuss the allegations or to gather and present evidence

26

## Investigation

- Two opportunities to respond:
  - ❖ Both parties must be given the opportunity to review all evidence prior to the conclusion of the investigation and be given at least 10 days to submit a written response
  - ❖ Prior to reaching a final determination, school must send to each party the investigative report for review and written response

27

## Investigation

- Specific requirements for gathering evidence
- Contents of investigative report



28

## Grievance Process

- Must "adopt and publish grievance procedures that provide for the prompt and equitable resolution of **student and employee** complaints" alleging any action prohibited by Title IX
- No live hearing requirement at K-12 level
- But, must afford each party the opportunity to submit written questions that the party wants asked of the other party or any witness
  - ❖ Questions must be relevant
  - ❖ Must allow for follow-up questions

29

## Grievance Process

- Decisionmaker may not be Title IX Coordinator or investigator
- Decisionmaker must issue a written determination including:
  - ❖ Identification of the allegations;
  - ❖ Description of procedural steps taken;
  - ❖ Findings of fact;
  - ❖ Conclusion regarding application of code of conduct to fact;
  - ❖ Statement of/rationale for the result of each allegation; and
  - ❖ Procedure for appeal.
- Remedies must be designed to restore or preserve equal access to the school's educational program or activity
- Need not be non-disciplinary or non-punitive and need not avoid burdening the Respondent.

30

### Grievance Process

- Decision must be objective and unbiased
- Objective evaluation of relevant evidence and conclusion about whether the respondent is responsible for alleged sexual harassment
- Must exercise independent judgment
- Must be free of conflict of interest or bias for or against the complainant or respondent
- Needs special training



31



31

### Informal Resolution

- Availability
  - ❖ May not be a condition of enrollment or employment or enjoyment of any other right
  - ❖ Only for formal complaints
  - ❖ Not available for allegations involving allegations that an employee sexually harassed a student

32



32

### Informal Resolution

- Requirements
  - ❖ Written notice including
    - Allegations;
    - Circumstances under which the parties would be precluded from resuming a formal complaint;
    - Right to withdraw; and
    - Consequences of the process.
  - ❖ Written consent

33



33

### Grievance Process: Appeals

- Each party must be provided the opportunity to appeal (1) a determination regarding responsibility and/or (2) the school's dismissal of a formal complaint
- Bases for appeal:
  - ❖ Mandatory
    - Procedural irregularities that affected the outcome
    - New evidence
    - Conflict of interest
  - ❖ School may choose to offer appeals on additional bases

34



34

### Grievance Process: Appeals

- Decision-maker on appeal cannot be the same decision-maker from the initial determination, the investigator, or the Title IX Coordinator
- Process:
  - ❖ Both parties provided notice of the appeal and given opportunity to submit written statements
  - ❖ Decision-maker issues a written decision including the result and rationale

35



35

### Timeline of Investigation and Determination

	Monday	Tuesday	Wednesday	Thursday	Friday
Formal Complaint Filed	1	2	3	4	5
District provides notice of the allegations of sexual harassment with sufficient time to prepare a response before any initial interview.					
Interviews					
Interviews					
Provide evidence subject to inspection and REVIEW - give parties have at least 10 days to submit a written response.	10	11	12	13	14

Legend:  
Green days are statutory mandatory days  
Yellow days are "permissive" days, and might be reduced (but not likely)

36



36

### Timeline of Investigation and Determination

March 22	23	24	25	26
27	28	29	April 1	2
3	4	5	6	7
8	9	10	11	12
13	14	15	16	17

Receive and consider written comments from parties as to evidence (March 27-29)

Issue Investigative Report to both parties – give 10 days for their review and written response (March 30-April 1)

Receive and consider written response from parties as to investigation report (April 13-15)

Issue Determination (April 16-17)

Legend: Green days are statutory mandatory days. Yellow days are "permissive" days, and might be reduced (but not likely).

decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party

Thompson & Horton LLP

37

### What did this investigation presume?

- TIXC could analyze complaint, assemble team, and issue initial notice of interview in two (2) days
- Parties are given five (5) days to find an advisor (attorney?) and prepare for interviews
- Investigator is able to conduct interviews over two (2) days, synthesize information and evidence, and provide parties access to evidence in 1-2 days
- Investigator is able to receive comments about evidence, synthesize them into report, and issue investigation report in two (2) days
- Right of parties to submit written, relevant questions that a party wants decisionmaker to ask any other party or witness, review answers, and ask additional, limited follow-up questions does not extend the mandatory 10-day period between investigation report and determination (hint: it probably will)
- Decisionmaker is able receive comments about investigation report, as well as first and (limited) second round of written cross examination answers, synthesize that information, and issue written determination report in two (2) days

Thompson & Horton LLP

38

### Many District Staff Members Will Be Involved

Title IX Coordinator, Investigator, Decision-maker, Appeal Officer, Informal Resolution Facilitator, Hearing Advisors (if live hearings are utilized)

Thompson & Horton LLP

39

### Training

- Title IX Coordinator, Investigator, Decision-makers must receive training on:
  - ❖ Definition of sexual harassment;
  - ❖ Scope of school's education program or activity;
  - ❖ How to conduct an investigation and grievance process – hearings, appeals, informal resolution processes; and
  - ❖ Serving impartially, avoiding prejudgment of facts, conflicts of interest, and bias.
- Decision-makers and investigators must receive training on issues of relevance of questions and evidence
- Schools must ensure that all training materials are accessible on their websites

Thompson & Horton LLP

40

### Required Notices

- Must provide (1) notice of the school's policy of non-discrimination, (2) information regarding the school's grievance procedure, and (3) the name or title, office address, e-mail address, and telephone number of their Title IX Coordinator(s) to:
  - ❖ Applicants for admission and employment;
  - ❖ Students;
  - ❖ Parents or legal guardians;
  - ❖ Employees;
  - ❖ All unions or professional organizations holding collective bargaining or professional agreements with the school.
- Title IX Coordinator's contact information and notice of the school's policy of non-discrimination must be on the school's website and in each handbook

Thompson & Horton LLP

41

### Retaliation

- New regulations contain an anti-retaliation provision
- Charges of code of conduct violations that arise out of the same facts or circumstances as a report of sex discrimination or sexual harassment for the purpose of interfering with any right under Title IX constitutes retaliation
- Charges for making a materially false statement is not retaliation if charge is not based solely on outcome of the grievance process
- Complaint process for retaliation

Thompson & Horton LLP

42

## Recordkeeping



Must retain records for **seven** years. Records must include:

- ❖ Final determination;
- ❖ Any audio/visual records or transcripts;
- ❖ Supportive measures taken or reason for no supportive measures;
- ❖ Sanctions imposed;
- ❖ Remedies provided;
- ❖ Appeal and result;
- ❖ Informal resolution and result;
- ❖ All training materials; and
- ❖ The basis for the school's conclusion that any response to an allegation of sexual assault was not deliberately indifferent and that it took measures to restore/preserve equal access.

**Thompson & Horton LLP**  
ATTORNEYS AT LAW

43

## Homework

- ☑ Develop a plan to implement the new regulations
- ☑ Identify Title IX team: Coordinator, investigator(s), decision-maker(s), and facilitators
- ☑ Title IX Coordinator:
  - Must have the title "Title IX Coordinator"
  - Prepare documentation and processes to provide the Title IX Coordinator's name or title, office address, email address, and telephone number to:
    - ☐ Applicants for admission and employment
    - ☐ Students, parents or legal guardians
    - ☐ Employees
    - ☐ All professional organizations holding professional agreements with the district
  - Prominently display the contact information for the Title IX Coordinator on the district's website



**Thompson & Horton LLP**  
ATTORNEYS AT LAW

44

## Homework

- ☑ Title IX Coordinator will:
  - ☐ Receive reports
  - ☐ Advise complainant of availability of supportive measures
  - ☐ Explain to the complainant the process for filing a formal complaint
  - ☐ Potentially sign the formal complaint
  - ☐ Implement supportive measures
- ☑ Determine whether Title IX Coordinator will also be an investigator or if the school will keep the roles separate



**Thompson & Horton LLP**  
ATTORNEYS AT LAW

45

## Homework

- ☑ Training
  - ☐ Title IX Coordinator, investigator(s), decision-maker(s), decision-maker(s) for appeals, facilitators
  - ☐ Training for all other employees regarding need to report sexual harassment
  - ☐ Must post all training materials on website
  - ☐ Ensure training meets all requirements of the new regulations and does not engage in sex stereotyping



**Thompson & Horton LLP**  
ATTORNEYS AT LAW

46

## Homework

- ☑ Policy Development
  - ☐ TASB is developing model policies
  - ☐ Develop timelines for your investigation/grievance process and appeals
  - ☐ Determine whether the school will opt to adopt the hearing process
  - ☐ Determine the standard of proof the school will use for all complaints of sexual harassment (clear and convincing evidence vs. preponderance of the evidence)
  - ☐ Determine if school will provide additional bases for appeal of decision regarding responsibility
  - ☐ Determine if the school will have a more expansive definition of sexual harassment
  - ☐ Determine what process (if any) will be used by the school to address harassment that does not fall within the definition of sexual harassment in the Title IX regulations
  - ☐ Determine process for complaints of retaliation



**Thompson & Horton LLP**  
ATTORNEYS AT LAW

47

## Homework

- ☑ Forms and Documentation
  - ☐ Documentation to show initial response to report of sexual harassment
  - ☐ Formal complaint form
  - ☐ Notice to complainant and respondent regarding mandatory or permissive dismissal of formal complaint (before grievance process) and right to appeal dismissal
  - ☐ Form to opt in or out of informal resolution process
  - ☐ Notice to complainant and respondent at initiation of grievance process
  - ☐ Notice forms regarding interviews/meetings during grievance process
  - ☐ Potential checklist for investigator and decisionmaker to ensure the investigative report and decision contain all information required by the new regulations
  - ☐ Appeal forms
  - ☐ Checklist for recordkeeping

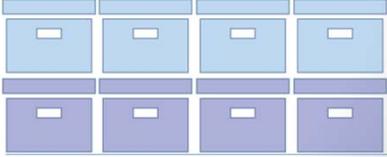


**Thompson & Horton LLP**  
ATTORNEYS AT LAW

48

## Homework

- Recordkeeping
  - Update document retention schedule
  - Make sure all relevant personnel know of new recordkeeping procedures (Title IX Coordinator, investigator(s), decisionmaker(s), etc.)



49



49

## Future T&H Title IX Summer Seminars

*(coming soon to a computer screen near you...)*

- Title IX Overview - Where We Were and Where We Are Going (*Title IX for Beginners*)
- Investigations
- What to Do When the Police Come Knocking? (*Title IX and the Intersection with Law Enforcement and Other Third Parties*)
- Grievance Process or Hearings and Determinations
- Title IX Litigation Trends
- The Interaction between Title IX and the IDEA

50



50

## Questions? Comments?



Christopher B. Gilbert  
[cgilbert@thompsonhorton.com](mailto:cgilbert@thompsonhorton.com)  
(713) 554-6744

Jessica Witte  
[jwitte@thompsonhorton.com](mailto:jwitte@thompsonhorton.com)  
(512) 615-2352

51



51