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2020 SCSBA VIRTUAL SCHOOL LAW CONFERENCE

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# The New Title IX Regulations

presented by:

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## Agenda

- Title IX – What is it, and how did we get here?
- The New Regs – What are Districts required to do?
- What's next?
- Questions?

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4 | **Title IX of the Education Amendments of 1972**

*• 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 . . .*

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5 | **Title IX of the Education Amendments of 1972**

- No person in the United States
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- Receiving Federal financial assistance

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6 | **Sexual Harassment in School**

- 51% of high school girls and 26% of high school boys experienced adolescent peer-on-peer sexual assault victimization.
- 1 in 4 young women experiences sexual assault before the age of 18.
- 10% of children were targets of educator sexual misconduct by the time they graduated high school.
- 79% of schools with students in grades 7-12 disclosed zero reported allegations of harassment or bullying on the basis of sex.

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7 | **What Do the New Regs Require?**

- A school or district must respond “promptly” when it has “actual knowledge” of “sexual harassment” in its “education program or activity” against a person in the United States.
- A school or district must not be “deliberately indifferent” in responding (i.e., the response must not be “clearly unreasonable in light of the known circumstances”).

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8 | **What Do the New Regs require?**

- Resolve allegations of sexual harassment promptly and accurately.
- Use a predictable, fair grievance process that provides due process protections to alleged victims and alleged perpetrators of sexual harassment.
- Effectively implement remedies for victims.

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9 | **What's New**

- New Definitions
- New complaint, investigation, and grievance procedures
- Title IX teams
- Training
- Recordkeeping

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10 | **Definitions**

- “Complainant” and “Respondent”
- “Actual knowledge”
- “Sexual Harassment”
- “Education program or activity”
- “Supportive measures”

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11 | **“Complainant” and “Respondent”**

- **Complainant** – the person who is the alleged victim of the sexual harassment.
- **Respondent** – the person who has been accused.
  - During an investigation and the grievance process, parties should NOT be referred to as perpetrators, victims, etc. because all respondents are presumed innocent until the decisionmaker makes a decision regarding responsibility.

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12 | **“Actual knowledge”**

A school or district has **actual knowledge** when notice or allegations of sexual harassment are reported to any school employee or when any employee personally observes such behavior.

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13 | **"Sexual Harrasment" – Three Types**

**Type 1 - Quid pro quo**

An employee of the recipient conditioning an aid, service, or benefit of the recipient on an individual's participation in unwelcome sexual conduct

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14 | **"Sexual Harassment" – Three Types**

**Type 2 – Hostile Environment**

- unwelcome conduct
- determined by a reasonable person
- to be so severe, pervasive, and objectively offensive
- that it effectively denies a person's equal access to the recipient's education program or activity

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15 | **"Sexual Harassment" – Three Types**

**Type 3 - Other conduct defined by federal law**

- Sexual Assault (20 U.S.C. 1092(f)(6)(A)(v))
- Domestic Violence (34 U.S.C. 12291(a)(8))
- Dating Violence (34 U.S.C. 12291(a)(10))
- Stalking (34 U.S.C. 12291(a)(30))

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16 | **“Education program or activity”**

- “Education program or activity” includes locations, events, or circumstances over which a school district exercised substantial control over the alleged perpetrator and the context in which the sexual harassment occurred.
- Depending on the circumstances, may cover incidents that occur off school district property or online (e.g., field trip, school district digital platform).

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The New Procedures for Title IX Sexual Harassment Cases

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18 | **Responding to a Formal Complaint:  
The New Grievance Procedures**

- Treat Complainants and Respondents equitably.
- Objectively evaluate the evidence and credibility of witnesses.
- Ensure that members of the Title IX Team have no conflicts of interest or bias toward the Complainant or Respondent.
- Start with a “presumption of non-responsibility” until a determination is made at the conclusion of the grievance process.

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19 | **Responding to a Formal Complaint:  
The New Grievance Procedures**

1. Initial Response/Supportive Measures offered
2. Determine whether there will be a formal complaint
3. Investigation
4. Investigative report
5. Decision as to responsibility and sanctions
6. Appeal
7. Decision on appeal

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20 | **Title IX Teams**

- Title IX Coordinator
- Investigator
- Informal Resolution Facilitator
- Decision-maker
- Decision-maker on appeal

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21 | **Initial Response**

- What are a school's first steps when allegations are reported?
- Who can make a complaint?
- When can a formal complaint be dismissed?

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22 | **“Supportive Measures”**

- 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
- designed to restore or preserve equal access to the education program or activity without “unreasonably” burdening the other party
- Examples – counselling, schedule changes, increased supervision (probably not complete removal unless there is an emergency)
- Title IX Coordinator is responsible for the effective implementation

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23 | **Written Notice to Parties**

- After a formal complaint has been made, the school must provide the following written notice to the known parties:
  - The grievance procedure, including an informal resolution process if the school chooses to offer one.
  - Sufficient details of the allegations of sexual harassment.
  - Additional allegations, if the school learns of any during the investigation process.

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24 | **Emergency Removal and Administrative Leave**

- Generally, a school may not sanction an alleged perpetrator until after the grievance process is carried out.
- However, the regulations provide exceptions for emergency removal and administrative leave under certain circumstances and in compliance with disability laws.

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25 | **Investigation**

- The burden of gathering evidence sufficient to reach a determination falls on the school, not the parties involved.
- Ensure Due Process for both parties during an investigation.
- Team must be trained, unbiased, no conflict of interest, no prejudgment.
- Write up investigation report.

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26 | **Informal Resolution Option**

- Not required for schools to offer, but the regulations allow for the option.
- Must be voluntary by both parties.
- Must provide the opportunity a party to withdraw and resume formal grievance process at any point before a decision is made.

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27 | **Decision Making**

- Decision-maker must issue a written determination regarding the decision of responsibility and any disciplinary sanctions.
- Effective implementation of any remedies.

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28 | **Appeals**

- Both parties must be notified of their right to appeal a decision.
- Parties can appeal a decision regarding responsibility or the dismissal of a formal complaint.

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29 | **Training**

- All staff should be trained on how to identify and report sexual harassment.
- Title IX team must be trained on the grievance process and their roles.
- Training materials must be maintained for 7 years and posted on the District's website.

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30 | **Record Keeping**

Must keep the following records for a minimum of 7 years:

- Investigation records
- Disciplinary sanctions
- Remedies
- Any informal resolutions and the result therefrom
- Supportive measures
- Training materials

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31 | **General Principles**

- “Prompt and equitable” resolution of student complaints.
- Treat complainants and respondents equitably.
- Objective evaluation of all relevant evidence.
- Have a well-trained Title IX team.
- Avoid conflicts of interest or bias.

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32 | **What's Next?**

- Get policies passed.
- Get Title IX team trained.
- Lawsuits?
- Will the regs survive a change in administration?

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**QUESTIONS?**

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