



DANNIS WOLIVER KELLEY

Attorneys at Law

# **Title IX Overhaul: Keeping up With the Federal Regulatory Changes**

August 11, 2020

Jennifer Choi and Chelsea Tibbs

This training is provided for educational, compliance and loss-prevention purposes only, and absent the express prior agreement of DWK, does not create or establish an attorney-client relationship.  
The training is not itself intended to convey or constitute legal advice for particular issues or circumstances. Contact a DWK attorney for answers to specific questions.

# Housekeeping

---

- Attendees will receive all materials including the recording and PowerPoint via email after this presentation.
- On your dropdown menu, there is a Chat box. Feel free to ask questions there or email [emcpeters@dwkesq.com](mailto:emcpeters@dwkesq.com).
- We will be monitoring the questions as they come in and may answer some questions during the webinar. We will also save time at the end of the webinar to continue to answer questions.

# Title IX

---

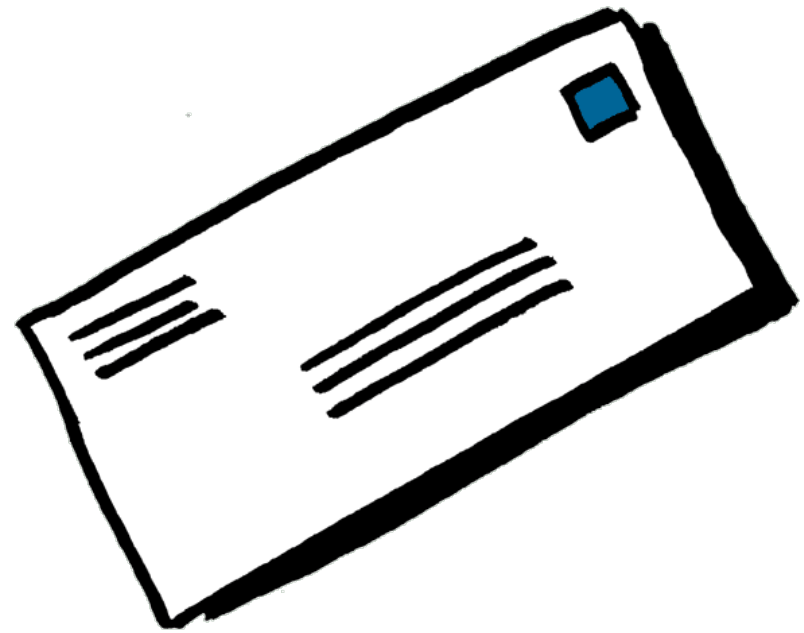
- Title IX of Education Amendments of 1972
  - Compact
  - 37 words
- Equality in access to education without regard to sex and gender



# Regulations and Case Law

---

- Regulations and Case Law
  - Binding Law
- “Dear Colleague” Letters
  - Subregulatory guidance
  - No force of law, but it feels like it



# New Regulations: The “Final Rule”

---

- DOE provided Proposed Regs November 29, 2018
- Closed Public Comments February 29, 2019
- Issued May 6 2020
- 34 CFR Part 106
- The Good News:
  - Much of the new regulations are consistent with what we have been doing before.

# New Regulations: The “Final Rule”

---

## The “Not-so-good” News:

- Length
  - Preamble, the “why,” is 2k pages
- Implementation
  - Timing, August 14, 2020
- Legal challenges
  - Litigation, injunction of implementation



# Required Response to Sexual Harassment, Generally

---

- “A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.”
  - Section 106.44 of the 2020 Final Rule (emphasis added)

# NEW: Actual Knowledge

---

- Who is responsible for being aware of reports of sexual harassment?:
  - Title IX Coordinator
  - “any official of the recipient who has the authority to institute corrective measures”; OR
  - any Employee of an elementary and secondary school
- In short: everyone!
- Actual knowledge triggers further action in the form of supportive measures and information re. Formal Complaints



# NEW: Formal Complaint

---

## Elements of a Formal Complaint:

- A document filed by a complainant (or their parent or legal guardian) alleging sexual harassment against a respondent and requesting that the school investigate the allegations
- Who can file a complaint?
- Signature Requirement for Complainant
- Complaints Signed by Title IX Coordinator

**STOP AND ASSESS.**

# NEW: Definition of Sexual Harassment

---

- Significantly narrowed definition
- Sexual harassment is defined as
  - (1) any quid pro quo harassment by a school's employee;
  - (2) “any unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive” that it “denies” a person equal educational access;
  - (3) sexual assault;
  - (4) dating violence;
  - (5) domestic violence; or
  - (6) stalking. (34 C.F.R. § 106.30)

# NEW: Mandatory Dismissals

---

- LEAs must dismiss a formal complaint of sexual harassment when the alleged conduct:
  1. would not constitute sexual harassment under the new definition
  2. did not occur in the LEA's education program or activity
  3. the alleged conduct did not occur against a person in the United States.
- Discretionary Dismissals
- Written Notice Required for all dismissals.
  - Appeal rights attach to dismissals.

# Investigation Time!

---

- Actual Knowledge + Formal Complaint + Sexual Harassment + Educational Program or Activity + in United States = INVESTIGATION and/or informal resolution



# NEW: Investigation and Remediation

---

- Now With More Due Process Than Ever!
  - Notice
  - Two-Step Evidence Inspection Process:
    - Step 1: Inspection and Review of Evidence before investigation report finalized
    - Step 2: Obligation to give parties the opportunity to submit questions after report is finalized but before a determination of responsibility is made
  - Live hearing option
  - Written determination

# Notice

---

- Title IX Coordinator must send written notice of the allegations to both parties upon receiving a formal complaint.
- What must be in the written notice?
  - grievance process
  - sufficient details of the allegation(s)
  - advisor
  - false statement or false information



# Step 1: Initial Inspection and Review of Evidence

---

- Before the completion of the investigation report the recipient must send both parties all evidence related to the allegations raised in a formal complaint.
- 10 days for written response from parties that investigator must consider.
- Then investigation report can be finalized.

# Step 2: Opportunity to submit questions

---

- “after the school has sent the investigative report to the parties and before reaching a determination regarding responsibility, the 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”



# NEW: Live Hearing Option

---

- For recipients that are elementary and secondary schools, and other recipients that are not postsecondary institutions, the recipient's grievance process *may* but need not, provide for a hearing



# Written Determination

---

- The Final Rule requires that LEAs issue a written determination regarding responsibility.
- Determination must be made using pre-selected evidentiary standard.
- We will address report writing in our subsequent training.

# NEW: Options for Evidentiary Standard

---

- Preponderance of the Evidence
  - More likely than not true. Feather test.
- Clear and Convincing
  - Highly probable that it is true.



# NEW: Appeal Requirement

---

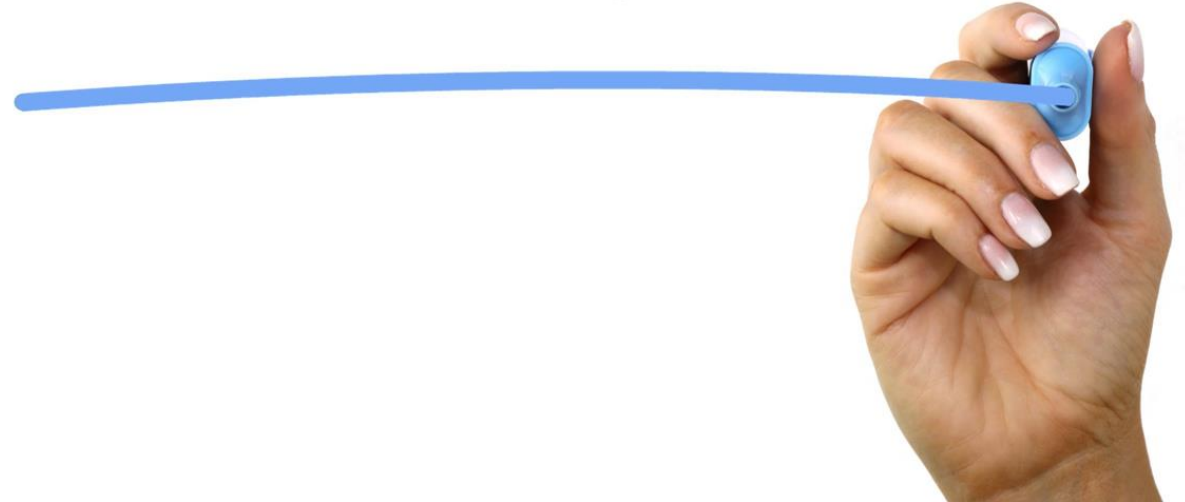
- Two stages where appeals rights kick in:
  1. determinations of responsibility
  2. dismissals of formal complaints.
- Three (3) basis for appeal
- Internal procedural requirements for appeal implementation

# Next Steps for Implementation: Prioritize

---

1. Identify Title IX Coordinator
2. Update your policies
3. Training

PRIORITIZE



# Priority 1: Title IX Coordinator and other Roles

---

- Title IX Coordinator
  - Not a new requirement, but a new emphasis on visibility
  - Cannot be decision maker or decision maker on appeal
- What about other roles that I keep hearing about?
  - Investigator
  - Decision-maker
  - Decision-maker on Appeal

# Priority 2: Update Your Policies

---

- “One size fits all” is not the best approach
- Optimize your current policies

One size  
does **NOT**  
fit all



# Priority 3: Training

---

- Two levels of training:
  - Title IX Compliance Team
  - Identifying Sexual Harassment for all District Employees
- Training materials must be made public



# Questions

---



# Upcoming Title IX Compliance Training

---

- What?
  - An in-depth compliance training to make sure your district is meeting all of the requirements.
- When?
  - August 25<sup>th</sup> or September 2<sup>nd</sup>
  - Time TBD
- How?
  - A link to register for one of these training opportunities will be sent to you along with the materials from today's webinar.



DANNIS WOLIVER KELLEY

Attorneys at Law

SAN FRANCISCO

LONG BEACH

SAN DIEGO

SAN RAFAEL

CHICO

SACRAMENTO

SAN LUIS OBISPO

[www.DWKesq.com](http://www.DWKesq.com)



Jennifer Choi  
Attorney  
San Francisco  
(415) 247-5654  
[jchoi@dwkesq.com](mailto:jchoi@dwkesq.com)



Chelsea Tibbs  
Attorney  
Sacramento  
(916) 970-2016  
[ctibbs@dwkesq.com](mailto:ctibbs@dwkesq.com)

*Thank you*