



# Title IX – Then and Now

KENAI PENINSULA BOROUGH SCHOOL  
DISTRICT

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# Title IX (1970's)

- Title IX of the Education Amendments was first enacted in 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 subject to discrimination under any educational programs or activity receiving federal financial assistance.***
- The immediate effects of the 1972 passage was to open the doors for women to educational opportunities.
- Before Title IX, women were often excluded from or had only limited access to educational programs.
- Elite colleges and universities set quotas for the admission of women or prohibited them from attending. Those that accepted women often required higher test scores and grades for their admission.
- If admitted, women had less access to scholarships; were excluded from “male” programs such as law and medicine; and faced more restrictive rules such as early curfews.

# Title IX (1970's Continued)

- In May of 1974, an Amendment was passed directing the U.S. Department of Health, Education and Welfare (HEW) to issue “reasonable provisions considering the nature of particular sports.
- June 1974, HEW issued draft Title IX regulations (after receiving more than 10,000 comments – most on athletics)
- The final version was signed into law by President Ford in 1975.
- 1975 version of Title IX included provisions regarding discrimination in athletics. Gave elementary schools 1 year to comply. Gave secondary schools and colleges 3 years to comply.

# Title IX (1975)

- Generally, the 1975 amendments:
  - Required reasonable opportunities for both sexes to receive athletic scholarships;
  - Prohibited discrimination in any intercollegiate, club, or intramural athletics;
  - Allowed for separate teams when the teams were based on competitive skill **OR** if the students are in a **CONTACT SPORT**
  - What was controversial with the 1975 amendment was the provision that required that “if a team is provided for members of one sex and not for the other in a NON-contact sport and athletic opportunities for the sex for whom a team is not provided have previously been limited, members of that sex must be allowed to try out for the team offered.”

# 1975

- The 1975 regulations required schools to designate an employee to coordinate the school's efforts to comply with Title IX
- Required school's to adopt and publish grievance procedures providing for prompt and equitable resolution of complaints that the school was discriminating on the basis of sex.

# Title IX (1979)

- U.S. Supreme Court Opinion *Cannon v. University of Chicago*

Held that the objectives of Title IX are two-fold:

1. To avoid the use of federal resources to support discriminatory practices; and
2. To provide individual citizens effective protection against those practices.

# Title IX (80's)

- Relatively quiet
- Some attempts to make amendments but all failed.



# Title IX (The '90's)

- In 1992, the US Supreme Court held that Title IX Plaintiff's were entitled to monetary damages for intentional discrimination. *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992)
- In 1997, the Office of Civil Rights (OCR) issued "Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties."
  - ❖ Document came about as a result of years of enforcement.
  - ❖ Through its enforcement of Title IX, OCR learned that a significant number of students, both male and female, had experienced sexual harassment which interfered with and/or affected the student's academic performance and emotional and physical well-being.
  - ❖ OCR proclaimed the elimination of sexual harassment of students as its highest priority.

# Title IX (90's Continued)

- In 1998 the US Supreme Court ruled that students can sue for student-on-student sexual harassment under Title IX and schools are liable for money damages if:
  - (1) the harassment is so severe, pervasive, and offensive that it interferes with a victim's educational environment; and
  - (2) the school knows about the harassment and its response is clearly unreasonable under the circumstances.

*Davis v. Monroe County Board of Education, 526 U.S. 629 (1999)*

# Title IX (2000 – 2010)

- **2002** Department of Education Appointed a Title IX Commission
- **Senator Biden** introduced resolutions to reaffirm Title IX
- 2005 *Jackson v. Birmingham Board of Education* - U.S. Supreme Court holds individuals can sue for retaliation under Title IX

# Title IX (2011 – 2019)

- Department addressed issues through a series of guidance documents and Dear Colleague Letters.
- 2016 – OCR issued a Dear Colleague Letter on transgender rights, requiring schools to allocate access to sex-segregated facilities such as bathrooms, showers, and dorm rooms, on the basis of students' **gender identity** rather than their **biological sex**. These incentives were harshly criticized and later **revoked by the Trump administration**.
- None of the guidance letters were law, especially in Title IX however, because the courts deferred to them, the guidance letters cannot be entirely ignored. Secretary of Education, Betsy DeVos withdrew all of the Obama Administration's guidelines on sexual harassment and announced that the era of rule by letter and guidance is over. She promised to initiate a full rulemaking process. **SHE DID** –launch a full year's worth of public comments and meetings on the revision of Title IX.

# Title IX (May of 2020)

- In May of 2020 the U.S. Department of Education released its Final Rules under Title IX.
- The final rule became law on **August 24, 2020**
- This was the deadline for school's to come into compliance.
- Covid was already an issue yet no continuances or extensions were granted for compliance.

# Title IX (Then vs. Now)

**2020:** *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 educational programs or activity receiving federal financial assistance*

## COMPARE TO

**1975:** *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 educational programs or activity receiving federal financial assistance.*

# 2020 Version

What was new?

- Language that sexual harassment, including sexual assault, is unlawful discrimination.
- Clear definitions of sexual harassment;
- Mandates for K-12 schools to respond whenever any employee has notice of sexual harassment
- Imposes a requirement that each school have a Title IX Coordinator
- Expands a school's obligations to ensure its educational community knows how to report to the Title IX Coordinator

# 2020 Version

- Defines the roles and responsibilities of the Title IX Coordinator
- Requires schools to provide supportive measures to the person alleged to be the victim (called the “Complainant”)
- Mandates that schools investigate sexual harassment allegations in **any** formal complaint;
- Allows for the filing of formal complaints by the victim **or** the Title IX Coordinator
- Requires a grievance process before the imposition of any disciplinary sanctions or other actions against a respondent (person accused);

# 2020 Version

- Requires the school to respect a victim's wishes regarding whether or not to investigate **unless** the Title IX Coordinator determines that signing a formal complaint over the victim's wishes is not clearly unreasonable in light of the known circumstances;
- Mandates certain procedures for the handling of complaints, responses to complaints, investigations, and cross examination in place of hearings at the K-12 level
- Requires schools to publish the standard of evidence to be used in advance of a complaint being filed;
- Requires schools to have an appeal and an informal resolution process
- Prohibits retaliation.

# 2020 Version

Sexual harassment means **conduct on the basis of sex** that satisfies **one or more** of the following:

1. A school employee conditioning education benefits on participation in unwelcome sexual conduct (i.e. *quid pro quo*); or
2. Unwelcome conduct **that a reasonable person** would determine is so **severe, pervasive and objectively offensive** that it effectively denies a person equal access to the school's education program or activity; or
3. Sexual Assault (as defined in federal statute); dating violence; domestic violence; or stalking (as defined in the Violence against Women's Act [VAWA])

# 2020 Version

- The sexual harassment must occur in the school's education program or activity, and must occur in the UNITED STATES.

Defines Educational Program or activity to include locations, events, or circumstances over which the school exercises **substantial control** over both the respondent and the context in which the sexual harassment occurs.

# Title IX Coordinator

Under the May 2020 rule

- Each school must designate and authorize at least one employee to coordinate its efforts to comply with its Title IX responsibilities, which employee must be referred to as the Title IX Coordinator.
- The school must notify applicants for admission and employment, students, parents or legal guardians, employees and all unions of the: (1) name or title; (2) office address or email address; and (3) telephone number of the Title IX Coordinator.
- “Any person may report discrimination, including sexual harassment (whether or not the person is the victim), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person’s verbal or written report.”
- “Schools must prominently display on their websites the required contact information for the Title IX Coordinator.”
- Coordinator must be given **independent authority** to monitor and implement the school’s compliance with Title IX.
- Title IX Coordinator must treat complainant’s and respondent’s equitably by offering supportive measures to a complainant, and by following a grievance process required by Title IX BEFORE the imposition of any disciplinary sanctions or other actions that are not supportive measures, against a respondent.

# Supportive Measures

- Non-disciplinary, non-punitive, individualized services offered as appropriate, as reasonably available, and without fee or charge, to the complainant before or after the filing of a complaint. Such measures are designed to restore or preserve equal access to the school's educational programs and/or activities without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment.
- Supportive measures may include: Counseling, extensions of deadlines; modifications of class schedules; leaves of absence; mutual restrictions between the parties.

# Rights of Parents/Guardians

- Title IX expressly recognizes the legal rights of parents/guardians to act on behalf of a complainant or respondent on any Title IX matter.

# So what does it mean?

- It took 20 years for the initial vagueness of Title IX to sort itself out through the courts in regards to athletics.
- Today, the athletics portion is pretty well settled in the courts with women athletes appearing to have caught up to their male counterparts.
- Sexual harassment has been trickier to address under Title IX.
- It took nearly 25 years for OCS to issue guidance on sexual harassment, and another 20 years for enforcement to begin in earnest.

# Sexual Harassment under Title IX

- One reason why sexual harassment has been more difficult to address is its very nature: the central problem is not a policy or the allocation of resources which can be easily measured but is instead the behavior of employees and/or students, much of which takes place in private.
- Another reason for the difficulties: it is not always obvious why sexual harassment, even its ugliest form (sexual assault) constitutes sexual discrimination.
- At first the courts held that harassment, however objectionable, was not discrimination. However, the courts have done an about-face and now say that harassment does constitute discrimination

# March 2021

- President Biden issues Executive Order 14021 entitled 'Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity.'
- Order's the Department of Education (which includes OCR) to review all existing regulations, orders, guidance documents, policies, etc., that are or may be inconsistent with his policy statement and provide findings of their review.

# June 2021, US Supreme Court

- US Supreme Court issues a decision in *Bobstock v. Clayton County, GA*
- Holds that an employer violates Title VII which makes it unlawful to discriminate against an individual “because of” the individual’s sex, by firing an individual for being homosexual or being a transgender person.
- When an employer fires a person for traits or actions that the employer would not have questioned in members of a different sex, then sex plays a necessary and undisguisable role in the decision, which is exactly what Title VII forbids.

# June 2021

- In light of the *Bobstock* decision, US Department of Education published a Notice of Interpretation to “clarify the Department’s enforcement authority over discrimination based on sexual orientation and discrimination based on gender identity under Title IX of the Education Amendments of 1972.”
- Department issued notice to make clear that the Department interprets Title IX’s prohibition on sex discrimination to encompass discrimination based on sexual orientation and gender identity.
- OCR made clear it would fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in educational programs and activities that receive federal financial assistance from the Department.

# What's next under Title IX?

- It is very unclear.
- Title IX is the law and the School District must have policies
- With or without policies the issues will come and the issues are there
- Without policies, if a complaint is filed – the school is vulnerable to bigger money damage awards
- Policies will not create issues, will not answer all the questions, will not solve all the problems: they are just a tool and a requirement