



# **TITLE IX: PITFALLS & PRACTICES**

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 **CENTRAL BUCKS SCHOOL DISTRICT**

**SWEET | STEVENS | KATZ | WILLIAMS**

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# CAVEAT

This presentation does not address student rights or the responsibility of school employees and LEAs under Pennsylvania's Child Protective Services Law. The responsibility of school employees and/or schools are very different under this law which mandates reporting whenever a school employee has a reasonable suspicion that a child is/has been subject to abuse.

Please contact us if you need additional information about the Child Protective Services Law.





# AGENDA

01. Introduction

02. Sex-Based Harassment

03. Grievance Procedures

04. Culture, Bias, Sex-Stereotypes

05. Athletics



# INTRODUCTION

# WHAT IS TITLE IX?

Title IX of the Education Amendments of 1972 is a federal statute that prohibits discrimination on the basis of sex in education programs or activities of recipients of federal assistance, including schools entities and tech schools.

The statute says:

**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.**

20 U.S.C. § 1681



# AREAS OF IMPACT

- HARASSMENT AND ASSAULT ON THE BASIS OF SEX
- PREGNANT AND PARENTING STUDENTS
- TRANSGENDER ACCESS
- STUDENTS WITH DISABILITIES
- ATHLETICS
- STEM EDUCATION
- CAREER AND TECHNICAL EDUCATION
- DRESS CODES
- OFF-CAMPUS CONDUCT THAT HAS AN ON-CAMPUS EFFECT
- ACCESS TO RESOURCES, PROGRAMS, OR ACTIVITIES
- STAFF ON STUDENT SEXUAL INCIDENTS (E.G., STATUTORY RAPE AND CORRUPTION OF A MINOR)
- EMPLOYEE SEXUAL RELATIONSHIPS, CONSENSUAL AND NONCONSENSUAL
- BULLYING ON THE BASIS OF SEX
- RETALIATION AGAINST AN INDIVIDUAL WHO HAS ASSERTED TITLE IX RIGHTS OR PARTICIPATED IN A TITLE IX PROCESS

### College Students

- 1972 → 57% male and 43% female
- 2022 → 58% female and 42% male

### College Faculty

- 1970 → less than 1 in 5 faculty were women
- 2022 → 49.8% of faculty were women

But only 22% of leadership positions in top research universities go to women...

### STEM Careers

- 1970 → 8% of jobs held by women
- 2021 → 35% of jobs held by women

### Law School

- 1972 → 7% of degrees earned by females
- 2023 → 55.8% of entering class is female

### Medical School

- 1972 → 9% of degrees earned by females
- 2023 → 54.6% of total enrollment is female

### Athletics

- 1972 → 300,000 women and girls played high school and college sports
- 2022 → 3,238,180 girls in high school and 229,060 NCAA women

## TITLE IX'S IMPACT BY THE NUMBERS



# KEY TERMS

## DISCRIMINATION ON THE BASIS OF SEX

- Umbrella term
- “**Sex**” definition includes transgender/gender-identity, parenting, and pregnant students
- For limited occasions of separation or different treatment on the basis of sex, must ensure no more than *de minimis* harm to the person impacted

## SEX-BASED HARASSMENT

- Previously called “sexual harassment”
- Distinguishes between “sexual harassment” which must be of a sexual nature and other conduct that may or may not be sexual but **is based on sex**
- Includes three defined categories of conduct

## UNFAIR TREATMENT ON THE BASIS OF SEX

- **Disparate treatment** – intentional discrimination in which people in a protected class are treated differently
- **Disparate impact** – unintentional discrimination in which people in a protected class are negatively affected by a policy, practice, or rule that seems neutral

## RETALIATION

- Engaging or participating in the Title IX Process is a **protected activity**
- Use caution when disciplining someone who is involved in a Title IX process – must be able to prove that discipline was applied fairly and consistently; not because of involvement





# **SEX-BASED HARASSMENT**

# THE HARD TRUTH

IN ANY GIVEN SCHOOL YEAR,

**56% OF GIRLS**

**&**

**40% OF BOYS**

**IN GRADES 7-12 ARE SEXUALLY HARASSED**

- Only 2% of girls ages 14-18 report sexual harassment
- More than 1 in 5 girls ages 14-18 are kissed or touched without their consent

- Students of color, undocumented students, LGBTQ students, and disabled students are less likely than peers to report sexual assault

# THE HARD TRUTH

**FALSE ACCUSATIONS ARE RARE, BUT VICTIMIZATION IS NOT.**

Men and boys are more likely to be victims of sexual assault than to be falsely accused of it

False Accusation: alleges facts they know to be untrue

Mistaken Accusation: alleges facts that turn out to be untrue (misidentification, mis-recollection)



# THE HARD TRUTH

STUDENTS WITH DISABILITIES ARE **2.9 TIMES** MORE LIKELY TO BE SEXUALLY ASSAULTED THAN NON-DISABLED PEERS.

PEOPLE WHO ARE INTELLECTUALLY DISABLED ARE **7 TIMES** MORE LIKELY TO BE SEXUALLY ASSAULTED IN THEIR LIFETIME THAN PEOPLE WITH AVERAGE OR HIGH COGNITIVE AND ADAPTIVE CAPABILITIES.

Do staff who work with intellectually disabled students know about the prevalence of victimization?

Are they vigilant about students with disabilities?

How will you ensure that this knowledge is disseminated to 1:1s, aides, and teachers?

# THE HARD TRUTH

## 47% OF TRANSGENDER PEOPLE ARE SEXUALLY ASSAULTED AT SOME POINT DURING THEIR LIFETIME

Gay, Lesbian & Straight Education Network (GLSEN) surveyed about 8,000 LGBTQI+ students about their experience over 2021-2022 SY and found....

- 57.3% of LGBTQI+ students were sexually harassed at school during the past year
- 74.1% called names or threatened because of their gender expression
- 36.2% were pushed or shoved because of their sexual orientation
- 22.7% were pushed or shoved because of their gender expression
- 16.5% were punched, kicked, or injured with a weapon because of their sexual orientation
- 11.4% were punched, kicked, or injured with a weapon because of their gender expression
- 61.6% of students who reported an incident said school staff did nothing



# WHAT IS “SEX-BASED HARASSMENT”?

“Sex-based harassment” is a form of sex discrimination and means sexual harassment and other harassment on the basis of sex that falls into one of the following categories:

- Quid Pro Quo
- Hostile Environment Harassment
- Specific Offenses

## SOME SEXUALIZED CONDUCT IS DEVELOPMENTALLY APPROPRIATE

exploring physical and verbal boundaries, reflecting on aspects of their identity like their own sexuality and gender identity, experimenting with sexual conduct, asking questions



# QUID PRO QUO

- Latin for “this for that”

“An employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient’s education program or activity explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person’s participation in unwelcome sexual conduct”

# HOSTILE ENVIRONMENT HARASSMENT

Unwelcome sex-based conduct that

based on the totality of the circumstances,

is subjectively and objectively offensive and  
is so severe OR pervasive

that it limits or denies a person's ability to participate in  
or benefit from the recipient's education program or  
activity (i.e., creates a hostile environment).



# BREAK IT DOWN...

- (1) Was it unwelcome from the complainant's perspective?
- (2) Is it sex-based conduct?
- (3) Have you considered the totality of the circumstances?
- (4) Is it subjectively offensive to the complainant?
- (5) Is it objectively offensive to a reasonable person?
- (6) Is it so (a) severe, or (b) pervasive?
- (7) Has the severity and pervasiveness resulted in a limitation or denial of participation rights?



## **FACT SPECIFIC INQUIRY, CONSIDERING:**

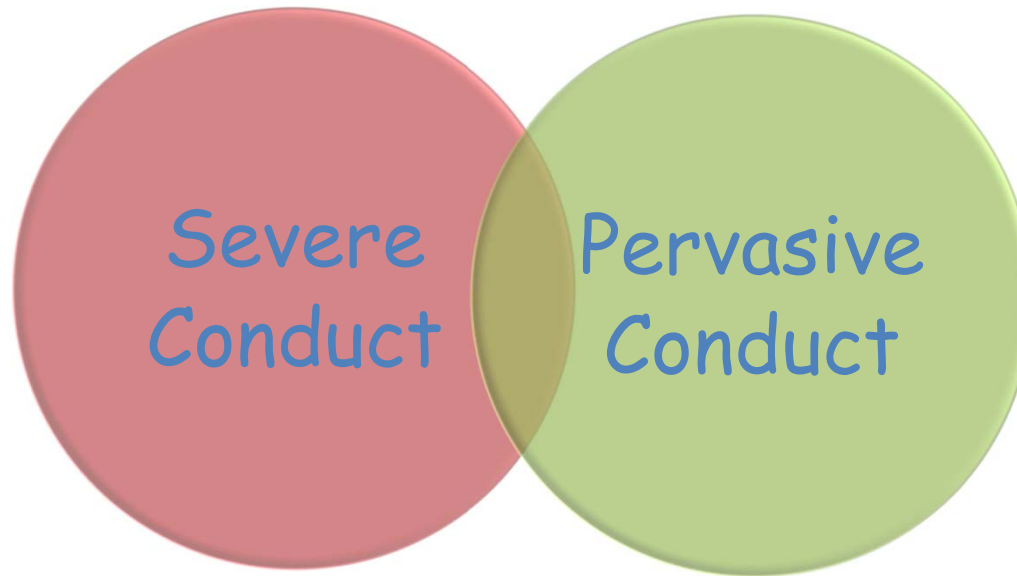
- The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;
- The type, frequency, and duration of the conduct;
- The parties' ages, roles within the recipient's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct;
- The location of the conduct and the context in which the conduct occurred;
- Other sex-based harassment in the recipient's education program or activity.

# SEVERITY AND Pervasiveness

- Greater than being bothersome or merely offensive
  - Tied to the “limits or denies” portion of the definition
- If significantly severe, may be so severe as to create a hostile environment
  - Isolated comments generally don’t meet the definition
  - Think physical harassment, slurs, intent to humiliate, and triggering words
- If no single instance is severe, may be so pervasive within the context that it occurs that it creates a hostile environment
  - Occurs on multiple occasions, permeates the educational environment, persistent, wide-spread, openly practiced, well-known to students and staff, pattern or practice, sustained and nontrivial

### “Or”

- More conduct covered
- Either one or the other will satisfy requirement
- Cannot recover money damages in court
- Under 2024 regulations, district must internally respond to “or” conduct with Title IX process
- OCR will look for response to all of this conduct



### “And”

- Restricted to only conduct in the middle of the Venn Diagram
- Basis for recovery of money damages in court
- Under both 2024 and 2020 regulations, District must internally respond to “and” conduct with Title IX process



# FROM THE PREAMBLE TO THE 2024 REGS

- “one stray remark does not satisfy the level of pervasiveness to which the regulations refer”
- “a statement of one’s point of view on an issue of debate and with which another person disagrees, even strongly so, is not the kind or degree of conduct that implicates the regulations”
- “sex-based conduct that occurs on multiple occasions and is so persistent that, for example, it limits another student’s ability to complete assigned coursework at the student’s typical level of performance would potentially constitute the type of pervasive sex-based conduct the final regulations are intended to reach.”
- “the legal standard is not whether or not conduct is subjectively ‘annoying’ or ‘immature.’”

# FROM THE PREAMBLE TO THE 2024 REGS

- Sending flowers once might be sex-based and subjectively offensive, but would not be pervasive or severe and would likely not be objectively offensive
- “... a student who reports that his peers repeatedly denigrated him as ‘girly’ over a period of weeks... In this example, if one peer made a one-off remark calling the student ‘girly,’ that alone may not be severe or pervasive enough to create a hostile environment, but if multiple peers repeatedly call the student “girly,” then that same treatment may create a hostile environment for that student.”



# SUBJECTIVE AND OBJECTIVE OFFENSIVENESS

- Subjectively judged from the perspective of the Complainant.
  - Evidence to support subjectiveness includes but is not limited to “the complainant’s own statements about the alleged conduct or other sources that could establish the complainant’s experience of the alleged conduct.”
  - “Subjective offensiveness must be supported by evidence, and subjective offensiveness alone would not support a finding or discipline”
  - “Whether the complainant subjectively found the conduct offensive or abusive is commonly understood as an important element of hostile environment harassment”
- “the objective standard is assessed from the perspective of a reasonable person in the complainant’s position.”
  - Takes into account age, knowledge, and experience of a person in that position
  - From an impartial standpoint
  - Would a reasonable person experience harm?



# HOSTILITY, GENERALLY

- “when the elements of sex-based hostile environment are satisfied for an affected student, a recipient has an obligation to address that hostile environment, even if a particular respondent’s conduct does not justify discipline.”
  - For example, in response to a hostile environment created by a series of incidents by different respondents, a recipient may offer supportive measures to the affected student or provide training for the broader school community.”
- Remember: upon actual knowledge, must respond promptly and effectively to end the discrimination and must also act to prevent its recurrence and remedy its effects.
  - A duty is owed to the complainant.

# OFF CAMPUS CONDUCT?

- Covers “acts of verbal, nonverbal, or physical aggression, intimidation, or hostility” and “could occur online or in person”
  - Key example: online stalking
- “ Online harassment can include, but is not limited to, unwelcome conduct on social media platforms such as sex- based derogatory name-calling, the nonconsensual distribution of intimate images (including authentic images and images that have been altered or generated by artificial intelligence (AI) technologies), cyberstalking, sending sex-based pictures or cartoons, and other sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and so severe or pervasive that it limits or denies a person’s ability to participate in or benefit from the recipient’s education program or activity”



# SPECIFIC OFFENSES

- Sexual assault meaning an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation;
  - Rape (penetration to vagina or anus no matter how slight), attempted rape, sexual battery, fondling, indecent assault, voyeurism, exposure to exhibitionism, exposure to pornography, public display of sensitive images that were taken in a private context when the victim was unaware
- Dating violence meaning violence committed by a person
  - Who is or has been in a social relationship of a romantic or intimate nature with the victim; and
  - Where the existence of such a relationship shall be determined based on a consideration of the following factors:
    - The length of the relationship;
    - The type of relationship; and
    - The frequency of interaction between the persons involved in the relationship.



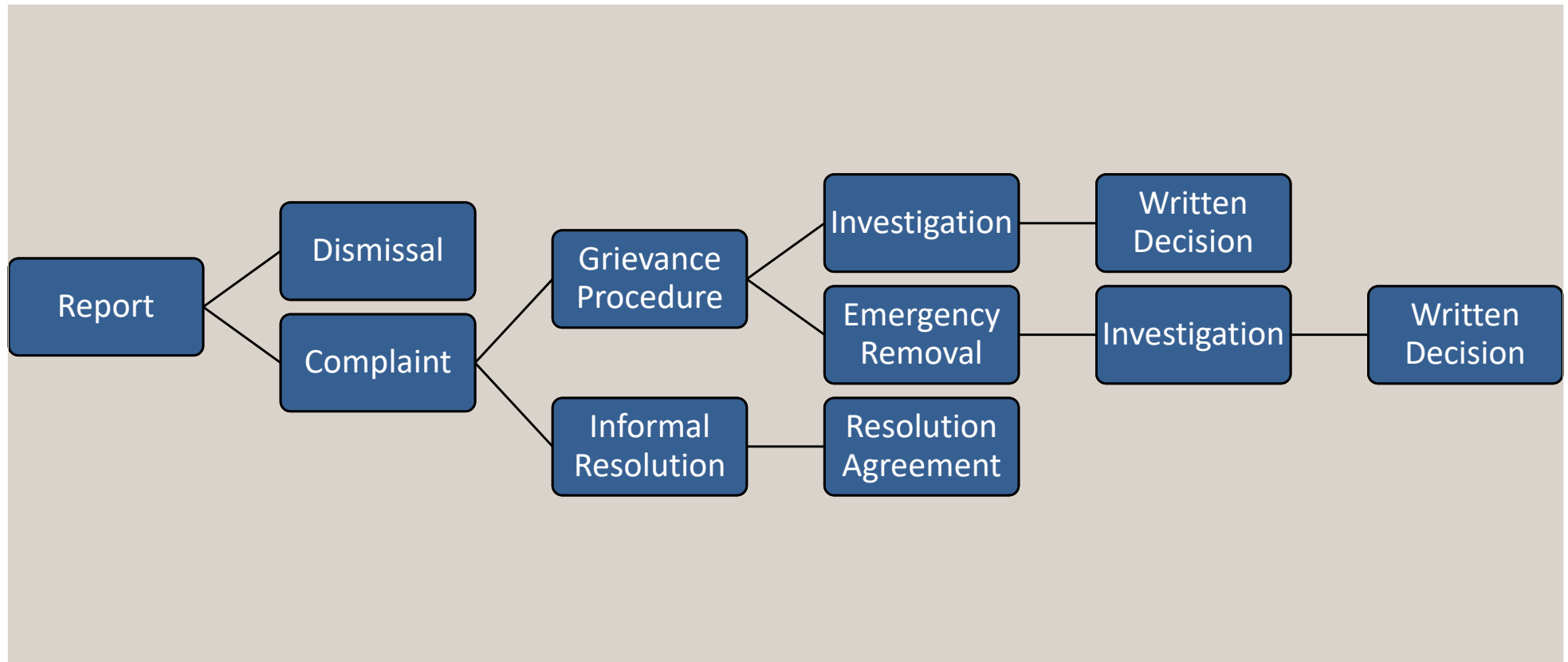
# SPECIFIC OFFENSES

- Domestic Violence meaning felony or misdemeanor crimes committed by a person who:
  - Is a current or former spouse or intimate partner of the victim under the family or domestic violence laws of the jurisdiction of the recipient, or a person similarly situated to a spouse of the victim;
  - Is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner;
  - Shares a child in common with the victim; or
  - Commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction.
- Stalking meaning engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
  - Fear for the person's safety or the safety of others; or
  - Suffer substantial emotional distress



# **GRIEVANCE PROCEDURES**

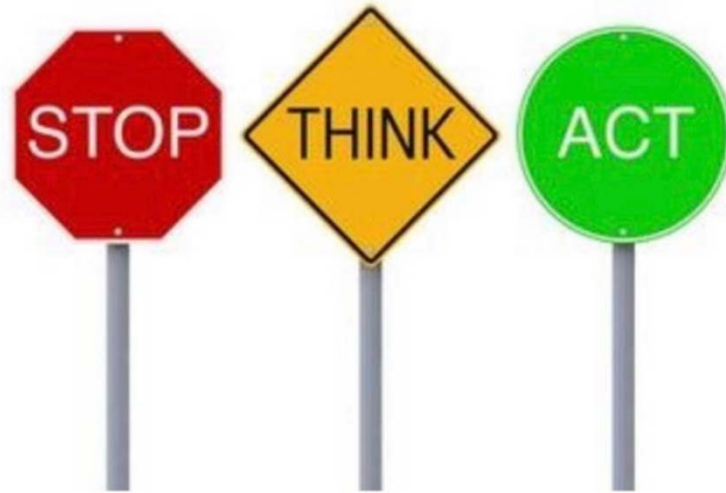
## Processing Reports from a Bird's Eye View





# DISCIPLINE PROHIBITED

unless and until the grievance procedure is complete and there's a finding of responsibility for violating the policy.



\*Two exceptions to be able to discipline or remove prior to conclusion of grievance procedure:

(1) informal resolution; (2) emergency removal

# **CONDUCT THAT FLOWS THROUGH THE GRIEVANCE PROCEDURES**

- Sex-based harassment
- General discrimination on the basis of sex
- Pregnancy and parenting discrimination
- Retaliation

**COMPARE WITH THE 2020 REGULATIONS, WHICH ONLY REQUIRED SEXUAL HARASSMENT TO FLOW THROUGH THE GRIEVANCE PROCEDURES.**

# PREGNANCY PROTECTIONS

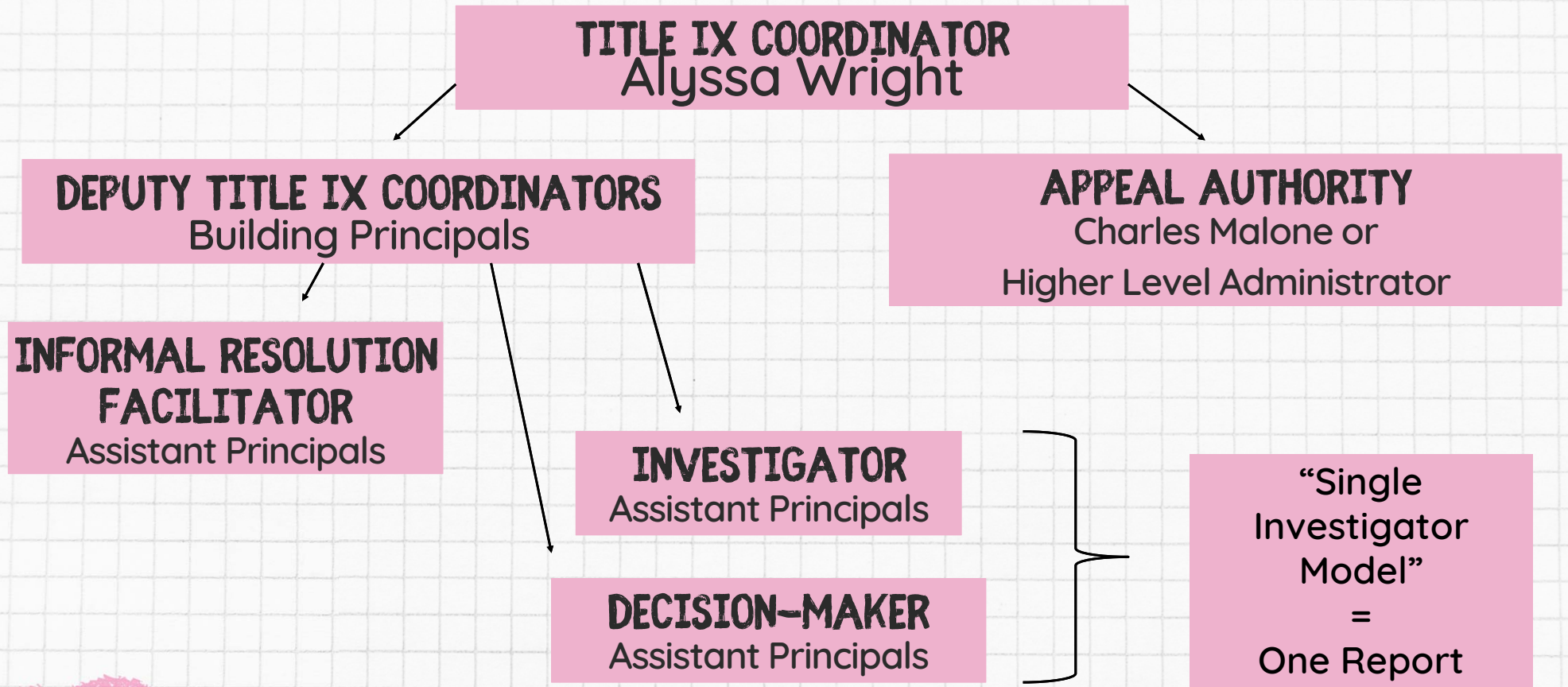
- Anti-discrimination mandate
- Reasonable accommodation mandate
  - Lactation space
  - Leave of absence
  - Cannot create a burden that doesn't apply to all other students
- Review Policy!

## Reporting Requirement

- All employees must report a pregnancy to the Title IX Coordinator, who will offer accommodations
- If the employee reasonably believes the T9C already knows, no requirement



# PERSONNEL CHART



# RESPONSIBILITIES OF ALL K-12 EMPLOYEES

Must notify the Title IX Coordinator or Deputy Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination.

Do your employees – café workers, security guards, paras, teachers, other admin – know about this responsibility?

Suggestion: teach them what to look for and how to report in 15 minutes or less and follow-up with an email.

Suggestion: require them to read the report form and policy

One person  
retains  
ultimate  
oversight

Makes the initial decision  
whether the alleged  
conduct even COULD  
constitute sex  
discrimination. If not, may  
dismiss complaint

Treats the  
complainant  
and  
respondent  
equitably

## TITLE IX COORDINATOR

Offers and  
coordinates  
supportive  
measures for  
the complainant

Inform complainant of  
grievance procedures  
and informal resolution  
process. If only a  
reporter, notify that  
person.

Notifies respondent of grievance  
procedures after complaint  
made. Offers respondent  
supportive measures if grievance  
procedures initiated or informal  
resolution has been offered to  
respondent.



# EQUITABLE TREATMENT OF PARTIES

## Complainant

- Offering supportive measures at the time of a report and providing remedies where a determination of responsibility for a policy violation has been made

## Respondent

- Following a compliant grievance process before imposing disciplinary sanctions or other actions that are not supportive measures against a respondent

# **TITLE IX COORDINATOR**

**MUST KEEP, FOR 7 YEARS,  
RECORDS DOCUMENTING:**

**01.**

The grievance procedures or informal resolution process for each complaint of sex discrimination

**02.**

The actions the school took in response to each notification the Title IX Coordinator receives about conduct that reasonably may constitute sex discrimination

**03.**

All materials used to provide training, which must be made available for inspection to any member of the public upon request

## **SUPPORTIVE MEASURES (THEY SURE SOUND LIKE ACCOMMODATIONS)**

1. Individualized services that are appropriate, reasonably available, and provided without fee or charge
2. Designed to restore or preserve equal access to the school's education program or activity for one party
3. Does not unreasonably burden the other party
4. Non-punitive; non-disciplinary
5. Designed to provide support during grievance procedures or informal resolution process, but may continue after conclusion of process



## **SUPPORTIVE MEASURES – PROCESS**

- Offer to complainant at the outset
- Offer to respondent after initiating complaint or informal resolution procedures, if appropriate
- Deputy T9C in charge of implementing at building level
- Must provide access to an impartial employee to review decisions to provide, deny, modify, or terminate supportive measures, & notify parties of the right to access this person
  - Staffing: this will likely be a different assistant principal as appointed by Deputy T9C or T9C

## **SUPPORTIVE MEASURES – SUBSTANCE**

Examples from regulations: counseling, extensions of deadlines or other course related adjustments, modifications of work or class schedules, campus escort services, restriction on contact applied to one or more parties, increase security and monitoring of certain areas of campus; changes in class, work, housing, or extracurricular or other activity



# STUDENTS WITH DISABILITIES

**MUST INVOLVE A MEMBER OF THE IEP TEAM  
(LIKELY THE SUPERVISOR OF SPEC ED)  
AT EVERY MAJOR STEP OF THE PROCEDURE**

- Supportive measures must allow a student to access FAPE
- Standard for supportive measures is that they are “designed” to restore or preserve access rather than supportive measures that “do” accomplish that goal.
  - A supportive measure provided to a student with disabilities that is designed to provide equal educational access but that fails to actually provide that access may expose the Local Educational Agency to liability under the IDEA even if the Department believes that the same situation would not result in liability exposure under Title IX
- May preclude or require tailoring of otherwise appropriate supportive measures or emergency removals, or, for students found responsible for sex-based harassment, disciplinary sanctions



# UNILATERALLY INITIATING GRIEVANCE PROCEDURES

## STEP ONE, T9C OR DEPUTY CONSIDERS THE FOLLOWING FACTORS:

- The complainant's request not to proceed with initiation of a complaint;
- The complainant's reasonable safety concerns regarding initiation of a complaint;
- The risk that additional acts of sex discrimination would occur if a complaint is not initiated;
- The severity of the alleged sex discrimination, including whether the discrimination, if established, would require the removal of a respondent from campus or imposition of another disciplinary sanction to end the discrimination and prevent its recurrence;
- The age and relationship of the parties, including whether the respondent is an employee of the recipient;
- The scope of the alleged sex discrimination, including information suggesting a pattern, ongoing sex discrimination, or sex discrimination alleged to have impacted multiple individuals;
- The availability of evidence to assist a decisionmaker in determining whether sex discrimination occurred; or
- Whether the school could end the alleged sex discrimination and prevent its recurrence without initiating the grievance procedures

# UNILATERALLY INITIATING GRIEVANCE PROCEDURES

**STEP TWO, AFTER APPLYING FACTORS AND CONSIDERING OTHER RELEVANT INFO:**

If “the conduct as alleged presents an imminent and serious threat to the health or safety of the complainant or other person, or that the conduct as alleged prevents the school from ensuring equal access on the basis of sex to its education program or activity” then Title IX Coordinator or Deputy Title IX Coordinator may initiate the grievance procedure over the complainant’s objection.



# UNILATERALLY INITIATING GRIEVANCE PROCEDURES

## STEP THREE, WHEN INITIATING THE COMPLAINT:

Notify the complainant prior to doing so and appropriately address reasonable concerns about the complainant's safety or the safety of others, including by providing supportive measures

## STEP FOUR, REGARDLESS OF WHETHER T9C INITIATES COMPLAINT:

Take other appropriate prompt and effective steps, in addition to steps necessary to effectuate the remedies provided to an individual complainant, if any, to ensure that sex discrimination does not continue or recur within the recipient's education program or activity



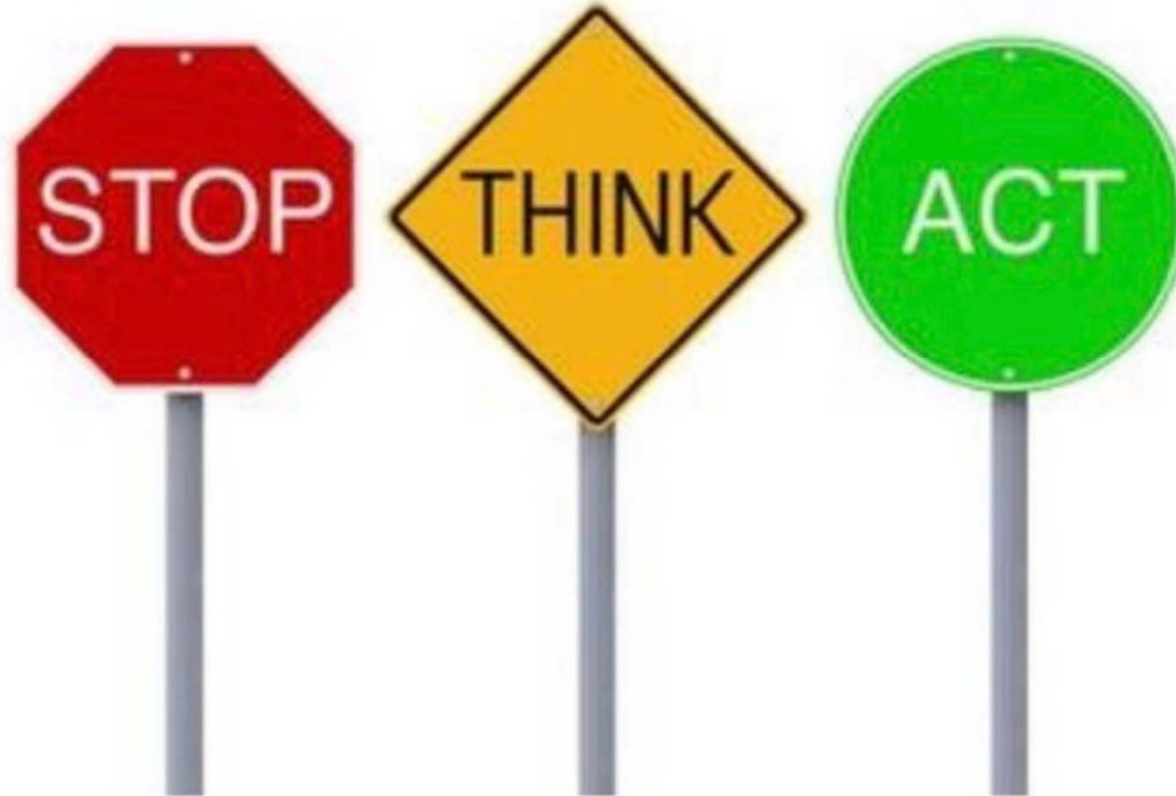
# UNILATERALLY DISMISSING THE COMPLAINT MAY DISMISS THE COMPLAINT, ACCORDING TO POLICY.

## Permissible Reasons for Dismissal

1. The allegations, even if proven, would not constitute sex discrimination;  
CAUTION!
2. The respondent is unidentified (after taking reasonable steps);
3. The complainant voluntarily withdraws the some or all allegations and the Title IX Coordinator determines that, without the complainant's withdrawn allegations, even if true, would not constitute sex discrimination; or
4. The respondent is not participating in the LEA's education program or activity and is not employed by the LEA.  
CAUTION!

# DISCIPLINE PROHIBITED

unless and until the grievance procedure is complete and there's a finding of responsibility for violating the policy.



# THE GRIEVANCE PROCEDURE

## First step: Read the Board Policy!

Policy will establish timelines for all major parts of the procedure:

1. Evaluation – decision by the T9C whether to dismiss or investigate
2. Investigation  
→ Be sure to include timeframe for review of evidence/evidence list
3. Determination
4. Appeal

For sex-based harassment situations, the policy must:

- Describe the range of supportive measures available to the parties
- List, or describe the range of, possible disciplinary sanctions that may be imposed and the remedies that the school may provide



# THE GRIEVANCE PROCEDURE

- Procedures include a presumption that the respondent is not responsible for the alleged sex discrimination until a determination is made at the conclusion of the grievance procedures
- Credibility determinations must not be based on a person's status as complainant, respondent, or witness
- May protect the privacy of parties and witnesses, but must not restrict the ability of the parties to:
  - Obtain and present evidence;
  - Consult with their family members, confidential resources, or advisors;  
or
  - Otherwise prepare for or participate in the grievance procedure

## **DISCIPLINE OR REMEDIES:**

- Must be designed to restore or preserve complainant's equal access to the education program or activity
- Can be disciplinary or punitive
  - Does not require exclusion for every incident
- May include the same services as provided when offering supportive measures

## SIDE BAR...

Although conduct may not satisfy the definition of “sex-based harassment” under Title IX, that does not mean that the conduct is immune from discipline.

School Districts have other Board policies or codes of conduct that may govern the behavior at issue, and under which corrective action may be taken.

However, if the conduct stems from the same incident, it should flow through the Title IX process first.



# INVESTIGATION

- The policy must provide for “adequate, reliable, and impartial investigation.”
- School – through the investigator – has the burden to gather sufficient evidence to determine whether sex discrimination occurred
- The investigator must review evidence and make relevance and impermissibility determinations

# INVESTIGATIVE GOALS

- Fair, reliable conclusion, which is part of a larger reasonable response requirement.
- Educate students how to better understand how their decisions can affect themselves and their community (reflection, additional follow-up, and accountability).
- Consistent process (fairness).
- Provide opportunities to learn, reflect, and grow.
- Make space for students, staff, and members of the school community to ask questions, address allegations of misconduct, and voice concerns.

# CREDIBILITY

- Where credibility is at issue and relevant, the investigator must make credibility determinations.
- Brief explanations about credibility of witnesses will resolve conflicting versions of events
- Make observations about credibility, but try to present information as objectively as possible



# DETERMINATIONS

- Policy must announce the standard of proof
  - Likely “preponderance of the evidence” meaning that a fact in dispute is more likely than not to be true
- Decisionmaker must evaluate relevant and not otherwise impermissible evidence for its persuasiveness
  - “if the decisionmaker is not persuaded under the applicable standard by the evidence that sex discrimination occurred, whatever the quantity of the evidence is, the decisionmaker must not determine that sex discrimination occurred”
- Notify parties in writing of the outcome, including rationale for the determination
- Notify parties in writing of the procedures and permissible basis for appeal

# AFTER A DETERMINATION OF RESPONSIBILITY FOR VIOLATING THE POLICY

- Title IX Coordinator coordinates:
  - the provision and implementation of remedies to a complainant or others identified as having equal access to the school's programs or activities limited or denied by sex discrimination;
  - Imposition of any disciplinary sanctions on a respondent, including notification to the complainant of any disciplinary sanctions
    - Exception to FERPA
  - Appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the school's activity or program
- "Not discipline a party, witness, or others participating in a recipient's grievance procedures for making a false statement or for engaging in consensual sexual conduct based solely on the recipient's determination whether sex discrimination occurred."



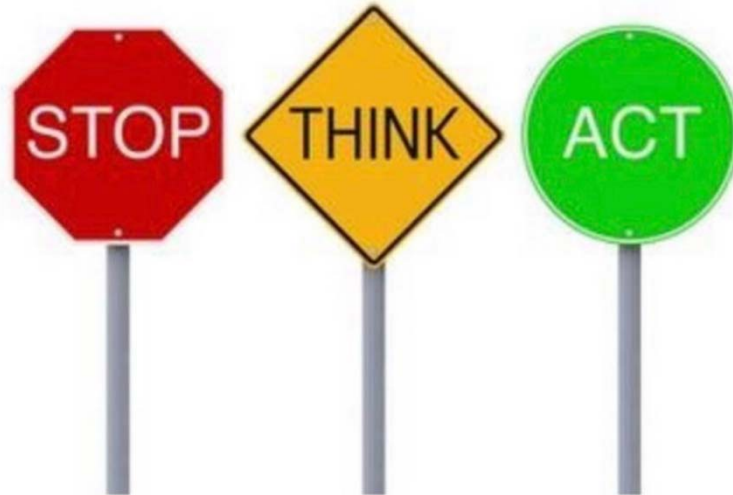
# APPEALS

- Parties must be able to appeal an initial decision by T9C to dismiss complaint as not alleging conduct that would constitute sex discrimination under Title IX
- After the conclusion of the grievance procedure, must offer an appeal process that is the same as offered in all other comparable proceedings, including proceedings related to other discrimination complaints



# EXCEPTIONS TO PROHIBITION ON DISCIPLINE

- Informal Resolution
- Emergency Removal



# INFORMAL RESOLUTION

- Optional to offer this pathway and must be supported by rules
  - If initiated, T9C still has the responsibility to take prompt and effective steps to ensure that sex discrimination does not continue or recur
- Person facilitating informal resolution must be different than investigator or decisionmaker or T9C
- There may be circumstances where informal resolution is inappropriate, and the school retains discretion to decline to offer informal resolution despite one or both parties' request
- School must not pressure or require the parties to engage in informal resolution, including by conditioning waiver of the right to an investigation and determination as a condition of enrollment or exercise of any right
  - Must obtain parties' voluntary consent

# INFORMAL RESOLUTION, CONT.

- Prior to informal resolution, must provide parties notice – best practice is written– that explains:
  - The allegations;
  - The requirements of the informal resolution process;
  - That, prior to agreeing to a resolution, either party has the right to withdraw and to initiate or resume the grievance procedures;
  - That the parties' agreement to a resolution at the conclusion of the informal resolution process would preclude the parties from initiating or resuming grievance procedures arising from the same allegations;
  - What terms could be included;
  - How or whether the school could disclose information from the informal resolution process during the grievance procedures, if initiated.



# INFORMAL RESOLUTION, CONT.

- Terms that can be included in an informal resolution agreement include but are not limited to:
  - Restrictions on contact; and
  - Restrictions on the respondent's participation in one or more of the school's programs or activities or attendance at specific events including restrictions the school could have imposed as remedies or disciplinary sanctions

# EMERGENCY REMOVAL

- Exception to the general rule that discipline cannot be instituted prior to full process
  - Only applicable:
    - Emergency situations, and
    - Where there is a serious and imminent threat to health or safety of the Complainant or any other person
      - This differs from the 2020 regulations in that the 2020 regulations required a threat to physical health or safety
  - Only instituted after an individualized safety and risk analysis
  - Must provide the respondent with notice and an opportunity to challenge the removal decision immediately following the removal
- Note that Pennsylvania school exclusion rules and IDEA discipline rules regarding change of placement still apply!

# FERPA

- If there is a direct conflict between FERPA and Title IX, “such that enforcing FERPA would interfere with Title IX’s primary purpose to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions.”
  - “a recipient must not use FERPA as a shield from compliance with Title IX”
- “a recipient must not redact information or evidence that is relevant to the allegations of sex discrimination and not otherwise impermissible because such redaction would infringe on the right of the parties to receive access to the relevant and not otherwise impermissible evidence, as well as on the parties’ due process rights”





# **CULTURE, BIAS, & SEX STEREOTYPES**

# BIAS AND IMPARTIALITY

- Bias is a pre-disposition toward an outcome
  - Bias can be specific to an individual, or a broad group
- All Title IX officers are expected to be impartial, both regarding general issues and specific individuals
  - Impartiality does not mean that Title IX officers may not make credibility determinations – they should do so, but based on factors such as the presence or absence of corroboration, the internal inconsistencies of evidence or even such elements as the demeanor of the witness, Complainant or Respondent
  - Those credibility determinations should be made after the evidence has been collected

# ENSURING EQUITY

- Increase
  - Trust in the institution
  - Social cohesion
  - Equal opportunities for success in school and in life
- Decrease
  - Negative social experiences (bullying, loneliness)
  - Discrimination
- Equity initiatives promote a fair and just school environment
  - Children begin to understand fairness between ages 4-6



# CULTURAL CONSIDERATIONS

- Culture: the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, that encompasses, not only art and literature but lifestyles, ways of living together, value systems, traditions and beliefs
- Intersectionality
  - Race, gender, socioeconomic class exist simultaneously as part of a person's identity
  - Discrimination is often based on more than one identity at a time
- Sexual proclivities vary based on individual preference, social acceptance, and cultural norms
- Power dynamics influence vulnerability and response to sexual harassment

# CONSENT

- Agreement between those with capacity to engage in sexual conduct
  - Common themes: lack of wantedness, use of threats, incapacitation, use of force, developmental age/ability to comprehend wantedness
- Ethical sexual conduct requires consideration of ability to leave a situation, coercion, trust, safety, broader social support, standing in the community
- Verbal, explicit, affirmative consent is the gold standard but is unrealistic
- Gray areas and miscommunication are abundant and expected
  - Non-verbal and indirect communication is typical
  - Problems with consent communication result in unintended sexual harm
  - Following sexual scripts, which are shaped by gender norms and expectations
  - Age and exposure play a factor



# DOES SEX = GENDER?

- New regulations explicitly cover gender discrimination, but this is not new
  - Pennsylvania has covered gender identity since 2003 via the PHRA
- “Because of sex” covers discrimination on the basis of gender identity and sexual orientation because sex is a but-for cause of these types of discrimination
  - Letter from Pamela S. Karlan, Principal Deputy Assistant Attorney General for the Civil Rights Division, to Federal Civil Rights Directors and General Counsels (Mar. 26, 2021)
- The reasoning from *Bostock* applies to Title IX specifically
  - Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32637 (June 22, 2021)



# SOME DEFINITIONS

- Sex means the assignment and designation of male, female, or intersex on a person's birth certificate. "Sex" is sometimes referred to as "biological sex."
- Gender identity is a person's deeply held sense or psychological knowledge of their own gender, regardless of the gender they were assigned at birth. One's gender identity can be the same or different than the gender assigned at birth.
- Transgender describes people whose gender identity is different from that traditionally associated with an assigned sex at birth.
- Gender expression refers to the manner a person represents or expresses gender to others, often through behavior, clothing, hairstyles, activities, or mannerisms.
- Gender expansive is a term that conveys a wider, more flexible range of gender identity and/or expression than typically associated with the binary gender system. Gender expansive is not synonymous with transgender; not all gender expansive individuals identify as transgender.
- Transition is the process in which a person changes their gender expression to better reflect their gender identity. In order to feel comfortable and to express their gender identity to other people, transgender people may take a variety of steps such as using a nickname or legally changing their name; choosing clothes and hairstyles to reflect their gender identity; and generally living and presenting themselves to others, consistently with their gender identity. Some, but not all, transgender people take hormones or undergo surgical procedures to change their bodies to better reflect their gender identity. Medical intervention is not required for a transition to occur.

## SEX STEREOTYPES & GENDER IDENTITY

- “...conduct directed at a student’s nonconformity with stereotypical notions of how boys or girls are expected to act and appear or that seeks to restrict students from participating in activities that are not stereotypically associated with the students’ sex could constitute sex-based harassment that creates a hostile environment.”
- “ Courts have also recognized that policies that prevent transgender students from participating in school consistent with their gender identity can harm those students. *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 523 (3d Cir. 2018) (detailing the harms exclusionary school policies have on transgender students)”
- Regarding misgendering, “a stray remark, such as a misuse of language, would not constitute harassment under this standard.”



# TRANSGENDER STUDENTS – STEREOTYPICAL MYTHS

Myth: being transgender is a mental illness.

- Transgender means an authentic difference between a person's gender identity (according to social norms) and the sex they were assigned at birth
- When that difference causes extreme pain, discomfort, or distress because of discrimination, stigma, and disapproval, then mental illness may arise
- Mental illnesses that arise are not caused by and do not cause transgender identity
- However, Gender Dysphoria may be a disabling condition under Section 504 and the ADA. Williams v. Kincaid, No. 21-2030 (4th Cir. Aug. 16, 2022)



# TRANSGENDER STUDENTS – STEREOTYPICAL MYTHS

Myth: permitting transgender students to use the bathroom/locker room consistent with their gender identity puts non-transgender students at risk of assault.

- Transgender students are more likely to be targeted regardless of the bathroom they use.
- Districts that have transgender-inclusive policies have not seen a rise in sexual assault or violent crimes (example – Los Angeles Unified School District)

# TRANSGENDER STUDENTS – STEREOTYPICAL MYTHS

- Myth: permitting transgender students to use the bathroom/locker room consistent with their gender identity violates the privacy rights of non-transgender students.
- Transgender students are NOT using bathrooms or locker rooms for sexual gratification purposes
  - They are also not transitioning to purposely effectuate a competitive advantage in sport
  - Seeing anatomical features that differ from one's own is not a privacy violation and the confusion or questions it causes are normal ones that children will be faced with at some point in their lives



# **ATHLETICS**



# REGULATORY HISTORY

- In 1975, schools and colleges given three years to comply with the mandate that discrimination between sexes in sports is a Title IX violation
- In 1979, a Policy Interpretation was issued and a subsequent clarification of that guidance was published in 1996.
- Compliance standards
  - Athletic scholarships “should be available on a substantially proportional basis to the number of male and female participants in the institution’s athletic program.”
  - Male and female athletes should receive “equivalent treatment, benefits, and opportunities” in the following areas: equipment and supplies, games and practice times, travel and per diem, coaching and academic tutoring, assignment and compensation of coaches and tutors, locker rooms and practice and competitive facilities, medical and training facilities, housing and dining facilities, publicity, recruitment, and support services.
  - Must address the interests of male and female students alike, and such interests must be equally and effectively accommodated.

# PROPOSED REGULATIONS

Not part of the regulations to be implemented in August 2024

- Prohibits “blanket” exclusion policies
- Promotes an individualized approach to determine whether it’s permissible to limit or deny a student’s eligibility to participate on a team consistent with gender identity
- Policy should set forth criteria
  - Consider the sport, level of competition, and grade or education level
  - Criteria must be substantially related to the achievement of an important educational objective AND minimize harm to students whose opportunity to participate on a team consistent with their gender identity would be limited or denied

Case to watch: *Soule v. Connecticut Association of Schools*, No. 21-1365-cv, in which cis-gender girls are alleging that permitting transgender girls on the same team violates Title IX.



## **TYPES OF LEGAL CLAIMS: ATHLETICS**

1. Equal participation opportunities
2. Equitable athletic treatment and benefits
3. Retaliation



# EQUAL PARTICIPATION OPPORTUNITIES

If challenged, District proves compliance using one of the following three tests:

## 1. Substantial proportionality

- Whether the percentage of participants by gender is the same or about the same as the enrollment percentage
- Is the raw number in the participation gap large enough to sustain a viable team?

## 2. History and continuing practice

- Whether the underrepresented group's interests and abilities are being met through the past *and current* practice of expanding participation opportunities
- Likely not enough to point at past expansion

## 3. Interests and abilities of students

- Despite disproportionality, whether underrepresented group's interests and abilities are being met.
- Unmet need, enough talent and skill to maintain a team, practices in the region

# EQUITABLE TREATMENT IN ATHLETICS

Yes, you've offered the teams. But are the benefits associated with the teams greater or less than those offered to sports for the other group?

- Overall comparison of male and female athletic programs
- Considers: recruitment benefits, provision of equipment and supplies, scheduling of games and practices, availability of training facilities, opportunity to receive coaching, quality of coaching, provision of locker rooms and other facilities and services, and publicity



# RETALIATION

Anyone in the school community who raises concerns about gender inequity in athletics is protected from retaliation!

Ask: Would a reasonable person be dissuaded from exercising their rights to avoid the adverse decision?  
Would it chill reporting?

- Case example
  - Parent complained about deficiencies in girl's softball program and compared it to the boy's baseball provisions
  - Coach of 7 years in the meeting and vouched that parent wasn't exaggerating
    - At the meeting, admin "reminded" coach that he was an at-will employee
  - A few weeks later, District fired softball coach for a few minor blunders over the course of several years
    - Reasons were all found to be pretextual
    - Not only was the coach retaliated against, but the parent/family who raised the concerns were also victims of retaliation.



# CONCLUSION

01. Introduction

02. Sex-Based Harassment

03. Grievance Procedures

04. Culture, Bias, Sex-Stereotypes

05. Athletics



# THANK YOU VERY MUCH

Please forward questions to Alyssa Wright.

SWEET | STEVENS | KATZ | WILLIAMS