

Record Keeping

- A school district must maintain for a period of 7 years records of:
 - (A) Each sexual harassment investigation including
 - any determination regarding responsibility
 - any audio or audiovisual recording or transcript
 - any disciplinary sanctions imposed on the respondent, and
 - any remedies provided to the complainant designed to restore or preserve equal access to the school district's education program or activity.
 - (B) Any appeal and the result therefrom;
 - (C) Any informal resolution and the result therefrom; and
 - (D) All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process.
 - A school district must make these training materials publicly available on its website, or if the school district does not maintain a website, the school district must make these materials available upon request for inspection by members of the public.

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Record Keeping

- For each response required under § 106.44, a school district must create, and maintain for a period of 7 years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment.
- In each instance, the school district must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the school district's education program or activity.
- If a school district does not provide a complainant with supportive measures, then the school district must document the reasons why such a response was not clearly unreasonable in light of the known circumstances.
- The documentation of certain bases or measures does not limit the school district in the future from providing additional explanations or detailing additional measures taken.

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Title IX is ~~still~~ Under Construction

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Work Order #2:

Expand Title IX to add that discrimination on the basis of sex includes: (1) discrimination based on sexual orientation; and (2) discrimination based on gender identity

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Bostock v. Clayton County, 140 S. Ct. 1731, 590 U.S. (2020)

In June of 2020, The Supreme Court in Bostock held that sex discrimination, as prohibited by Title VII, encompasses discrimination based on sexual orientation and gender identity. The Court explained that to discriminate on the basis of sexual orientation or gender identity “requires an employer to intentionally treat individual employees differently because of their sex.” (Tab 5)

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2021 Notice of Interpretation

- On June 16, 2021 the U.S. Department of Education’s Office for Civil Rights issued a Notice of Interpretation (Tab 9).
- The Notice of Interpretation provides that OCR will enforce Title IX’s prohibition on discrimination on the basis of sex to include: (1) discrimination based on sexual orientation; and (2) discrimination based on gender identity. Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in any education program or activity offered by a recipient of federal financial assistance.
- Stems from the landmark U.S. Supreme Court decision in *Bostock v. Clayton County*, in which the Supreme Court recognized that it is impossible to discriminate against a person based on their sexual orientation or gender identity without discriminating against that person based on sex.

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Bostock’s Application to Title IX

◦ As explained in the Notice of Interpretation:
◦ “For the reasons set out below, the Department has determined that the interpretation of sex discrimination set out by the Supreme Court in Bostock—that discrimination “because of . . . sex” encompasses discrimination based on sexual orientation and gender identity—properly guides the Department’s interpretation of discrimination “on the basis of sex” under Title IX and leads to the conclusion that Title IX prohibits discrimination based on sexual orientation and gender identity.”

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**Work Order #3:
Rewrite 2020 Regulations**

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Demolition is Underway

- In March of 2021, President Biden signed an executive order directing Education Secretary, Miguel Cardona to suspend, revise, or rescind the 2020 Title IX regulations, OR being the process of collecting comments to draft new regulations.
- New regulations are expected to be announced in **April of 2022**

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Demolition is Underway

- Also in March of 2021, the Justice Department's Civil Rights Division issued an interpretation of the Supreme Court's 2020 ruling in *Bostock v. Clayton County, Georgia*, which held that an employer cannot fire an employee for being gay or transgender. The interpretation extended the rule to schools.
- "After considering the text of Title IX, Supreme Court case law, and the developing jurisprudence in this area, the [Civil Rights] Division has determined that the best reading of Title IX's prohibition on discrimination 'on the basis of sex' is that it includes discrimination on the basis of gender identity and sexual orientation."

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Creating a Positive School Culture and Climate

- Make clear to staff and students that discrimination of any kind, including sexual harassment, will not be tolerated
- Inform students on the types of behavior that constitute sexual harassment and how to report

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Monitor Culture and Climate

- This includes the culture and climate of schools and other school activities (e.g., athletics, clubs, etc.)
- Off-campus activities that come on to the school campus (cyberbullying)
- If sexual harassment is reported, monitor for potential retaliation against the complainant or witnesses

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Hammering it Home!

**Have we answered all of your questions?
Attorneys can move into breakout rooms
to answer any one-on-one questions.**

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