
Title IX: New Regulations for 2020

Sexual Harassment At School

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Education

Baylor University, 1994
University of Florida College of Law, 1997

Admissions

Florida Bar: 1997
U.S. District Court Northern District: 1999
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U.S. Court of Appeals, Eleventh Circuit: 2001

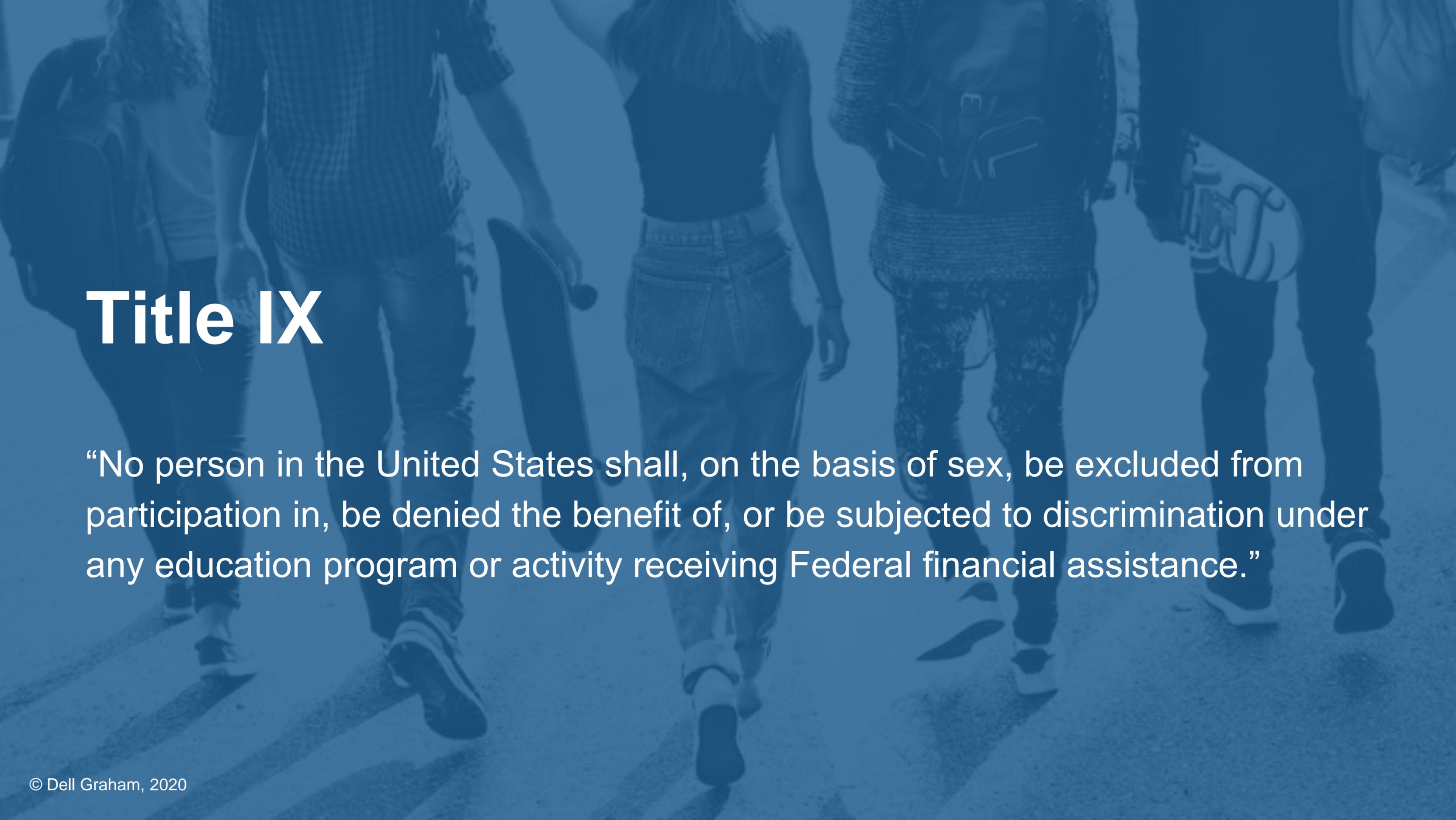
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Learning Objectives

- “Why are we here?”
- Recognize Title IX as a sexual harassment issue
 - Media refers to Title IX regarding sports and colleges, but it equally applies to K-12 campuses
- Understand new Title IX regulations that took effect August 14, 2020
- Note: Title IX regulations are 100 pages long with 1,900+ pages of discussion and supporting documentation





Title IX

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

“Why are we here?”

Agency Guidance

“Dear Colleague” letters, informal guidance

Not a basis for enforcement action

Formal Rulemaking

Proposed Regulations adopted through formal rulemaking process including public comment/scrutiny

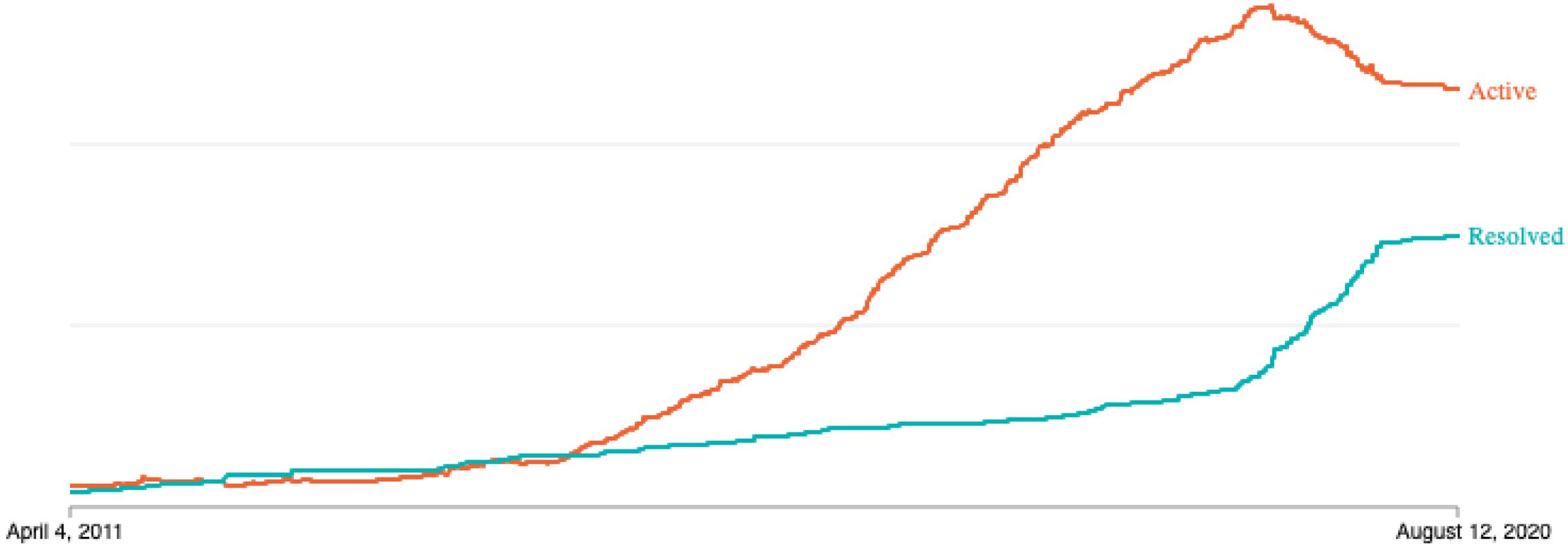
Has the force and effect of law

Title IX on K-12 Campuses

- Nearly 50% of grade 7-12 students reported experiencing sexual harassment in 2010-2011
- 2013-14 OCR: “67% of school districts had zero allegations of sexual harassment”
 - Incomplete data specific to ESE students. However, we know cognitive and physical disabilities increase vulnerability.
- 92% of ESE teachers have reported observing peer to peer harassment (2004 survey)



Increase in DOE Open Title IX investigations from 2011 to 2020



<https://projects.chronicle.com/titleix/#overview>

What is in the new regulations?

Big ideas:

1. Standardized definition of harassment
2. Increased emphasis on due process
3. New procedural requirements for investigations

Clearing up the Definitions of Sexual Harassment

Under the regulations, the following conduct on the basis of sex constitutes **sexual harassment**:

- Sexual conduct by a school employee towards a student, or
- Unwelcome conduct determined by a reasonable person to be so *severe, pervasive, and objectively offensive* that it effectively denies a person equal access to the school's education program or activity

Definitions from new regulations

- **Complainant:** an individual who is alleged to be the victim of conduct that could constitute sexual harassment

Parents and guardians who have a legal right to act on behalf of parties may do so, including by filing formal complaints

- **Respondent:** an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment

When must a school respond?

A school must respond when:

1. the school has ***actual knowledge*** of sexual harassment;
2. which occurred within the school's education program or activity (situations over which the school exercised substantial control); and
3. against a person in the United States.

The Final Rule **expands** “actual knowledge” to include notice to any elementary or secondary school employee.

New Investigative Requirements

- Both parties must now receive **written notice** of the allegations with sufficient detail for a respondent to respond (i.e. who, when, where, etc.)
- The parties may select an **advisor** of their choice to be present at all stages of the investigative process
 - May be an attorney and can be in addition to their parent, in the case of a student respondent, and in addition to a union representative in the case of an employee respondent
- The parties may submit and review evidence throughout the investigation
- **There is a presumption of innocence during the process**
- The standard of proof must be stated. Usually “**preponderance of evidence**” which simply means “more likely than not”.

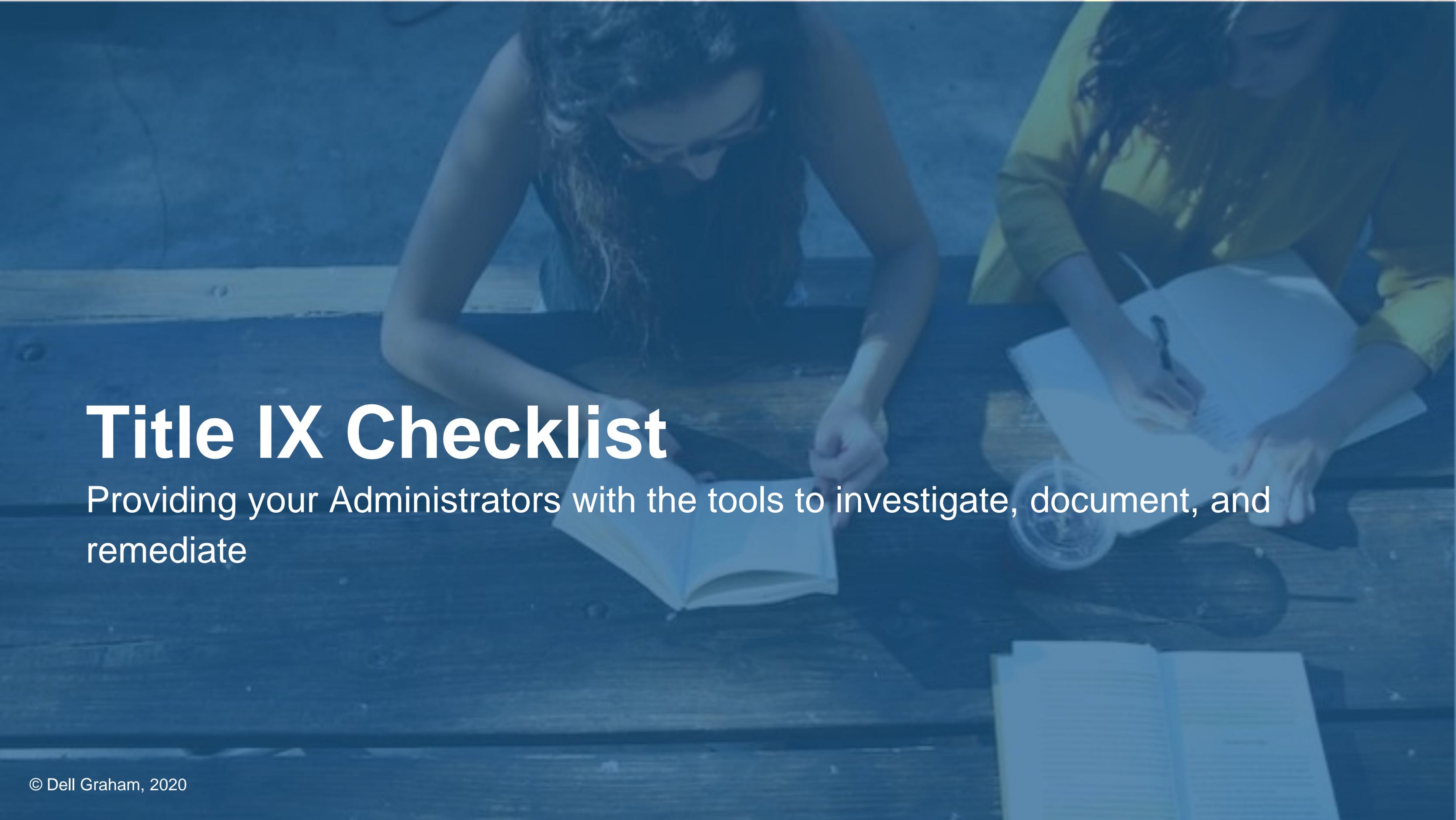
Title IX Basic Compliance

How many of you know who your Title IX Coordinator is for your district?
For your school?

Does your Title IX Coordinator directly report to Superintendent?

Other requirements under Title IX:

- Annual reporting
- Visibility on website for Office of Title IX Coordinator
- Visibility on school website for school level Title IX Coordinator
- “Regular training” provided to Title IX Coordinator

A photograph of two women sitting at a wooden table, looking at documents. The woman on the left is wearing a dark top and glasses, and the woman on the right is wearing a yellow top. They are both focused on the papers in front of them. The image has a blue tint.

Title IX Checklist

Providing your Administrators with the tools to investigate, document, and remediate

Investigation Process Overview

- Contact the District's Title IX Coordinator.
- Investigate regardless of whether law enforcement is investigating.
- Evaluate the relative age and ESE status of students involved.
- Respond to the incident based on a “preponderance of the evidence” standard.
- Note: a response is required whether or not the victim files a complaint.
- Provide the complainant notice, identifying Title IX Coordinator, how to contact Title IX Coordinator, and procedures for making a complaint.
- **Limit harm**: Address the immediate individualized needs of the complainant.
- E.g. class schedule, transportation, lunch, class transition
- Convene IEP?

The Title IX Investigation Process

1. All staff are mandatory reporters. They should report to school based Title IX Coordinator.
2. Title IX coordinator determines if the conduct is within school's jurisdiction and if it rises to the level of Title IX (severe, pervasive, objectively offensive)
 - If not, document offer of supportive measures
3. If a potential Title IX violation, then meet with Complainant and guardian.
4. Explain offer of supportive/safety measures to ensure Complainant feels comfortable to learn and focus on school.
5. Explain right to file a formal complaint which will trigger a formal investigation and that all information learned will be shared with both parties.

(continued)

The Title IX Investigation Process

If Complainant **does not** wish to file a formal complaint:

- Proceed with supportive measures and document outcome.
- Respondent cannot be disciplined for sexual harassment or misconduct. Non Title IX misconduct still exists. Follow usual procedures in the Code of Conduct.
- Title IX Coordinator can proceed with a formal complaint if there is a risk of safety to this or other students. Follow threat assessment procedures.

(continued)

The Title IX Investigation Process

If Complainant **does** wish to file a formal complaint, complete Formal Complaint Form.

- Both parties given the Notice of Investigation before beginning interviews.
- Both parties have a right to an advisor. School can limit advisor's role.
- Both parties have a right to submit witness names, interview questions and other evidence.
No gag orders during process.
- Both parties have a right to review all evidence at the conclusion of the investigation.
Provide a copy of the **Draft** Report of Student on Student Sexual Misconduct. Both parties have up to 10 days to review and provide a response
- Upon receiving response or on the 10th day, the report can be finalized. Final Report given to both parties who have another 10 days to review
- On 10th day, Final Report is sent to a district decision maker (not the Title IX Coordinator) who will determine if the Respondent is responsible and disciplinary action.
- Both parties have a right to appeal to a different district official.

Investigation guiding principles

- Evaluate the severity or pervasiveness of the alleged misconduct.
 - E.g., prior discipline history
- **Limit harm**: Initially evaluate the immediate effect on the student.
 - E.g., schedule, transportation, contact outside of class, lunch schedule, after school activities, offer counseling.
- **Remediate harm**: Evaluate whether an ongoing adjustment needs to be made to the immediate supportive measures, follow up with guidance to check on grades and enrollment status.

Dear Colleague Letter, 111 LRP 23852 (OCR 4/4/11);

Questions and Answers on Title IX and Sexual Violence, 8 GASLD 40 (OCR 2014)

Expectations for School Districts

- Title IX does not require school districts to be perfect or to prevent every incident of sexual harassment.
- But, schools must show that they respond and thoroughly investigate incidents. Take action where warranted, with the overall goal of preventing a pervasive atmosphere of harassment.
- Districts must also have in place a properly trained Title IX Coordinator who is visible and accessible to students. Updated policies and ongoing training of campus level administrators also now required.

What does Due Process look like?

Tips for Conducting Investigations

- It is critical that you listen, are present, avoid judgment, and do not blame the Complainant for what happened
- Avoid statements that indicate that you do not believe the person you are interviewing during the investigation
- Scrub “victim”, “accused”, “perpetrator” and similar language from reports
- Avoid statements and comments about possible outcomes.
Discipline is not the job of the investigator.

Important Provisions for Investigations

- No “single investigator” models. Decision-maker **can not** be investigator or the Title IX Coordinator
- It is very important to note that no disciplinary action can be taken against a respondent in a Title IX sexual harassment case before this entire process (through appeal) is completed
- Respondents entitled to **reasonable** notice before interview (to assure presence of parent, advisor/attorney)
- The parties are given the opportunity to submit written questions for the other parties and witnesses to answer with limited follow up questions.
- The decision-maker(s) must explain to the party proposing the questions any decision to exclude questions as not relevant.
- Both parties entitled to review all evidence
- Both parties receive a written determination re: outcome explaining **how** and **why** decision-maker reached conclusions
- Both parties have an equal opportunity to appeal
- Records of all sexual harassment reports and investigations be maintained for 7 years
- Protect all participants including witnesses from **retaliation**
- There is no time limit or statute of limitations on a complainant’s decision to file a formal complaint.

Recommended action for school based administrators

- Principals will need to designate a Title IX coordinator at their school (AP recommended) responsible for the facilitation of information to and from district level administrator conducting investigation
- All principals, APs, and Title IX coordinators will need to undergo Title IX training on how to properly handle these case
- Principals need to understand they will still be responsible for other types of student on student investigations pursuant to School Board policy
- Again, it is very important to note that **no disciplinary for sexual misconduct** can be taken against a respondent before this process is completed!
- **However, student code of conduct still applies to “disruption”, “unsafe conduct”, skipping class, etc.**

Expanded Requirements to Publicize Title IX Coordinator

The School must notify **students**, parents or legal guardians of elementary and secondary school students, **applicants** for employment, **employees**, and all **unions**, of the **Title IX**

Coordinator's:

- name or title
- office address
- e-mail address
- telephone number

Special Considerations

- Title IX does not eliminate rights under Section 504 or IDEA
- Supportive measures for Complainant cannot be punitive or disciplinary to Respondent, BUT they can place a burden on the Respondent so long as the burden is “not unreasonable.”
- OK: changing a class schedule
Not OK: removal from club or team or extracurricular activity
- Hypothetical: What to do about a marching band situation?



What Does a Title IX Lawsuit Look Like?

5 Elements of a Title IX Lawsuit

1. School Board is a funding recipient
2. The “appropriate person” has actual knowledge of the alleged harassment
3. The alleged harassment must be “severe, pervasive, and objectively offensive”
4. Plaintiff must show that the School Board acted with “deliberate indifference” to known acts of harassment
5. Plaintiff must demonstrate that the harassment effectively barred the student’s access to an educational opportunity or benefit



Clarifying the Definition of Harassment

The harassment is “severe, pervasive, and objectively offensive” to a reasonable person

- The behavior must be serious enough to have a **systemic effect of denying equal access to an education**
- Generally, a single instance of inappropriate touching would not be found to be severe or pervasive. *Hill v. Cundiff*, 797 F.3d 948 (11th Cir. 2015)

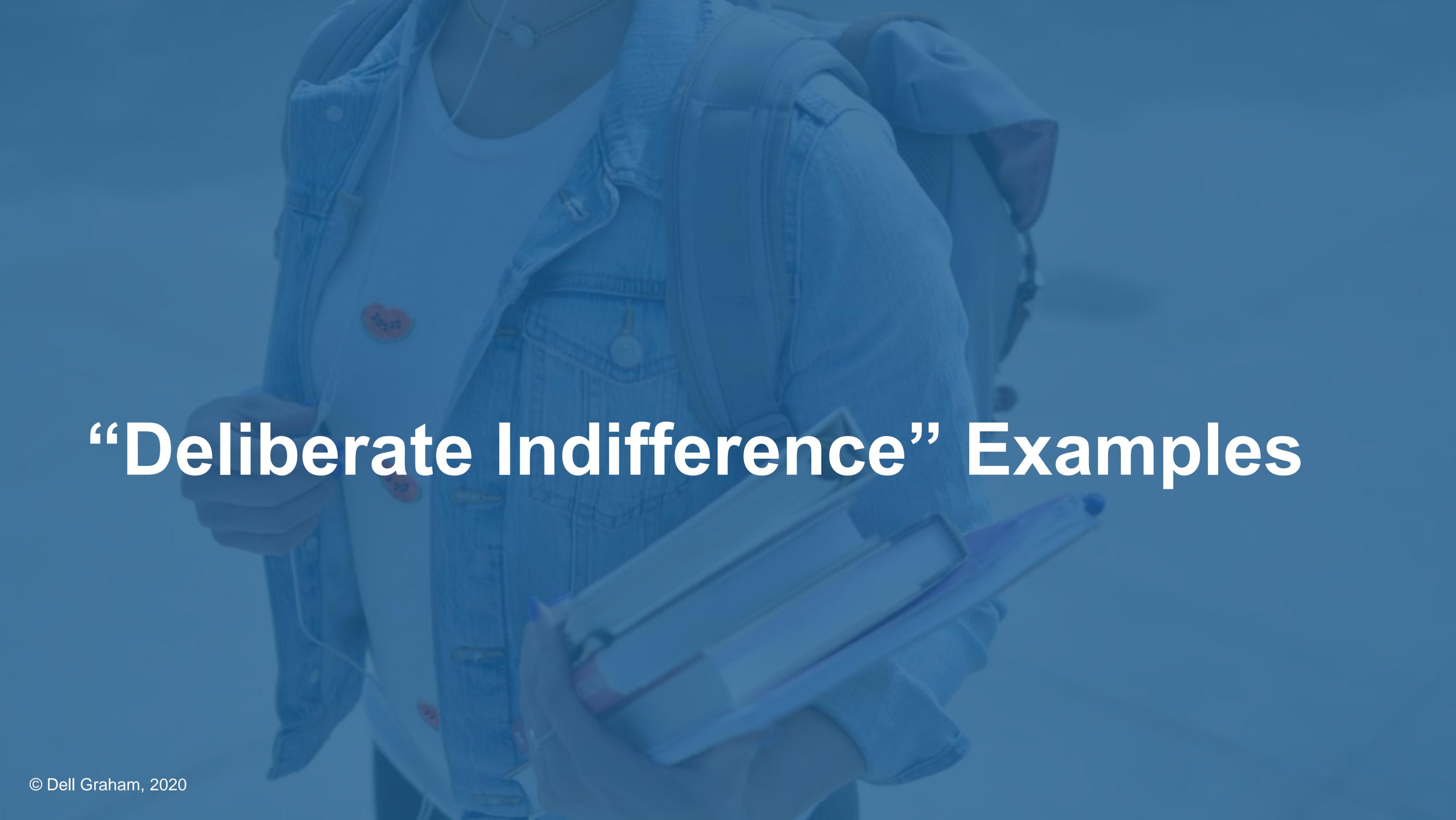
The harassment is “severe, pervasive, and objectively offensive”

Facts:

- Three 2nd grade students alleged that they were sexually harassed by another second grade student over several months.
- The students found it unwelcomed and intimidating and faked being sick several times and stayed home from school.

Held: Not severe enough to have a systemic effect.

Hawkins v. Sarasota Cnty. Sch. Bd., 322 F.3d 1279 (11th Cir. 2003).

A person wearing a denim jacket and a white t-shirt is holding a stack of books. The image is overlaid with a blue filter. The text "Deliberate Indifference" Examples is written in white across the center of the image.

“Deliberate Indifference” Examples

The School Board acted with “deliberate indifference” to known acts of harassment

- “Clearly unreasonable in light of known circumstances.”
- “Clearly unreasonable” means that the school’s response causes the student to undergo harassment or makes the student more vulnerable to it. Hill v. Cundiff, 797 F.3d 948 (11th Cir. 2015).
- “[N]o effort whatsoever either to investigate or to put an end to the harassment; fail[ure] to respond; **a lack of instruction to school personnel on how to respond to peer sexual harassment and a lack of a policy on the issue.**”

Rodriguez v. Alpha Inst. of S. Florida, Inc., No. 10-80714-CIV, 2011 WL 5103950, at *6 (S.D. Fla. Oct. 27, 2011).

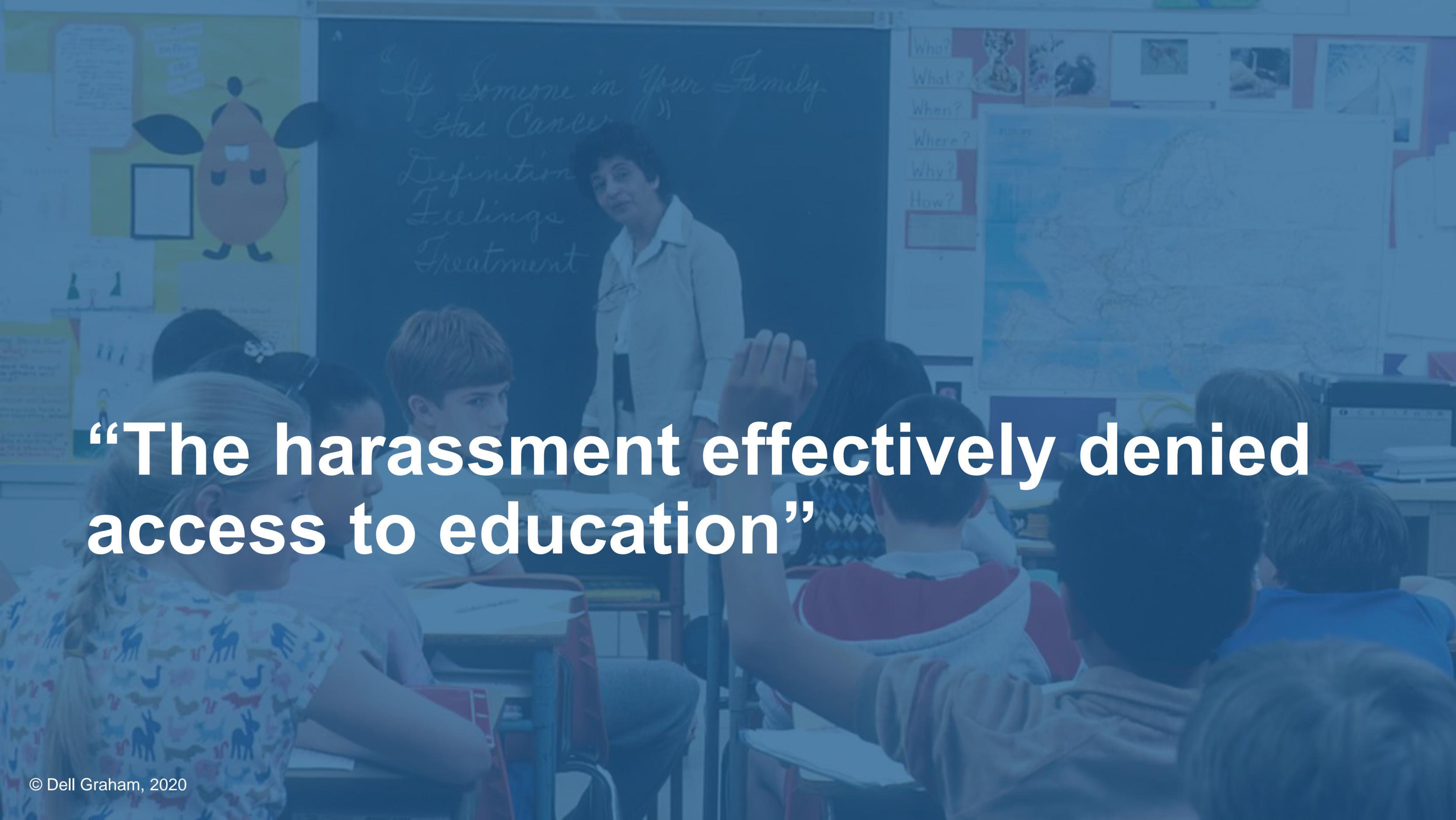
Question: Did the School Board act with “deliberate indifference” to known acts of harassment

Facts:

- There were two prior unrelated sex incidents, then sexual assault occurred on campus.
- Law enforcement conducted the investigation.
- Policies changed (for the better) after.

Held: The deliberate indifference was not met.

Doe v. Bibb Cnty., 688 Fed Appdx. 791, 11th Cir. (Ga.) 2017.

A photograph of a classroom scene, overlaid with a semi-transparent blue filter. A female teacher stands at the front of the room, facing a group of students seated at desks. On the blackboard behind her, the text "If Someone in Your Family Has Cancer" is written in cursive, with "Definition", "Feelings", and "Treatment" listed below it. To the right of the blackboard, a poster lists the questions "Who?", "What?", "When?", "Where?", "Why?", and "How?". A map of the United States is visible on the wall to the right. The students are mostly seen from the back, with one student in the foreground raising their hand. The overall atmosphere is educational and focused.

“The harassment effectively denied access to education”

Plaintiff must demonstrate that the harassment effectively barred the students access to an educational opportunity or benefit

“Hav[ing] a concrete, negative effect on the victim's education or access to school-related resources, which could include **dropping grades, being diagnosed with behavioral or anxiety disorders, becoming homebound/hospitalized** due to harassment, physical violence, or sexual assault.”

Roe ex rel. Callahan v. Gustine Unified School Dist., 678 F.Supp.2d 1008 (E.D.Cal.2009).

Seeing any of these outcomes should be red flags. Remediation/student supports are needed.

Plaintiff must demonstrate that the harassment effectively barred the students access to an educational opportunity or benefit

Facts:

- A male student made sexually explicit and vulgar remarks to 3 second grade students.
- He also offensively touched the girls.
- The girls faked being sick several times but suffered no decline in grades, teachers observed no behavior changes, and the girls didn't tell their parents for months.

Hawkins v. Sarasota Cnty Sch. Bd., 11th Cir. 2003.

Held: Access to education not denied.

Title IX Takeaways

- New regulations are here. Our understanding is evolving.
- Title IX training materials must be published on website
- Process must avoid conflicts of interest or bias
- Emphasis on due process for respondents
- Supportive measures (individualized help to preserve access to education) must be offered to every alleged complainant even if they do not wish to initiate or participate in the formal complaint process
- Help your administrators and staff recognize Title IX issues
- Need to implement proper procedures and training

Questions?

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