



# HOT BUTTON LEGAL ISSUES FOR ASSISTANT ADMINS

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# AGENDA—HOT BUTTON ISSUES IN 2022

1. TRANSGENDER STUDENT UPDATES
2. RACIAL EPITHETS, THE N-WORD PASS AND DISPROPORTIONATE DISCIPLINE
3. TITLE IX REVIEW
4. QUICK TIPS FOR STUDENT INVESTIGATIONS

# WHAT IS THE STATE OF THE LAW REGARDING TRANSGENDER STUDENTS?

- There is no law in Utah regarding transgender students' use of facilities and/or pronouns.
- In March, 2022, the Utah Legislature passed a bill—H.B. 11—that banned transgender female students from participating on female athletic teams.
- The bill initially began as a compromise between those who wanted an outright ban and those who wanted wholesale participation, but the bill that ended up passing was an outright ban bill, but maintaining a fallback to the original bill if the bill was found invalid by a court.
- Governor Cox vetoed the bill.
- The Legislature overrode the veto.
- ACLU filed a lawsuit immediately after the bill became effective.
- A federal district court judge ruled (on a preliminary injunction) in favor of the transfemale athletes in August.

## H.B. 11, CONT.

- ❖ SO...Now, transgender female students wishing to participate on female athletic teams must get approval from the School Activity Eligibility Commission, made up of:
  - ❖ A mental health professional (appointed by the Senate)
  - ❖ A statistician with expertise in analysis of medical data (appointed by the Senate)
  - ❖ A board certified physician with expertise in gender identity healthcare (appointed by House of Rep.)
  - ❖ A sports physiologist (appointed by House of Rep.)
  - ❖ A rep from UHSAA (appointed by governor)
  - ❖ An athletic trainer who serves student athletes on the collegiate level (appointed by governor)
  - ❖ An ad hoc member appointed by UHSAA
  - ❖ A high school coach

# FEDERAL GUIDANCE

- March 8, 2021: Executive Order 14021 “Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity”
  - It is the policy of my Administration that all students should be guaranteed an educational environment free from discrimination on the basis of sex, including discrimination in the form of sexual harassment, which encompasses sexual violence, and including discrimination on the basis of sexual orientation or gender identity.
  - Directs the Secretary of Education to review Title IX regs
- June 22, 2021: OCR publishes a Notice of Interpretation that clarifies Title IX prohibits discrimination based on sexual orientation and gender identity
- June 23, 2021: Dear Educator Letter from OCR, celebration the 49<sup>th</sup> Anniversary of Title IX and reiterating that Title IX protects against sex discrimination on the basis of sexual orientation and gender identity and putting schools on notice that OCR will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity.
- June, 2021: DOJ/OCR issue “Resource for Students and Families” with examples of the kinds of incidents the DOJ or OCR can investigate

# FROM DOJ AND OCR RESOURCE DOCUMENT FOR STUDENTS AND FAMILIES

## EXAMPLES OF WHAT THE DOJ AND/OR OCR MAY INVESTIGATE:

- A lesbian high school student wants to bring her girlfriend to a school social event where students can bring a date. Teachers refuse to sell her tickets, telling the student that bringing a girl as a date is “not appropriate for school.” Teachers suggest that the student attend alone or bring a boy as a date.
- When he starts middle school, a transgender boy introduces himself as Brayden and tells his classmates he uses he/him pronouns. Some of his former elementary school classmates “out” him to others, and every day during physical education class call him transphobic slurs, push him, and call him by his former name. When he reports it to the school’s administrators, they dismiss it, saying: “you can’t expect everyone to agree with your choices.”
- A community college student discloses he’s gay during a seminar discussion. Leaving class, a group of students calls him a homophobic slur, and one bumps him into the wall. A professor witnesses this, but does nothing. Over the next month, the harassment worsens. The student goes to his dean after missing several lectures out of fear. The college interviews one, but not all, of the harassers, does nothing more, and never follows up with the student.
- An elementary school student with intersex traits dresses in a gender neutral way, identifies as nonbinary, and uses they/them pronouns. The student’s teacher laughs when other students ask if they are “a boy or a girl” and comments that there is “only one way to find out.” The teacher tells the class that there are only boys and girls and anyone who thinks otherwise has something wrong with them. The student tells an administrator, who remarks “you have to be able to laugh at yourself sometimes.”
- On her way to the girls’ restroom, a transgender high school girl is stopped by the principal who bars her entry. The principal tells the student to use the boys’ restroom or nurse’s office because her school records identify her as “male.” Later, the student joins her friends to try out for the girls’ cheerleading team and the coach turns her away from tryouts solely because she is transgender. When the student complains, the principal tells her “those are the district’s policies.”
- (From personal experience): An administrator tells a teacher to remove all displays of the Pride flag on teacher’s desk, car, lapel, water bottle, briefcase/backpack, etc. Other teachers are allowed to display NRA, Pro-Life, or Make America Great Again emblems. **NOTE: MAKE SURE YOU KNOW YOUR DISTRICT’S POLICY ON DISPLAY OF PRIDE FLAGS IN YOUR SCHOOL AND FOLLOW IT!** (but don’t be afraid to ask questions if the policy is no pride flags because DOJ won’t be...)

# WHAT ARE THE COURTS SAYING ABOUT RESTROOMS AND NAMES?

- Cases involving rights of transgender students in schools have been heard by the 3rd, 4th, 6th, 7th, 9th, and 11th, circuits (across 12 regional circuits).
- All have ruled in favor of the transgender student.

# LOCKER ROOMS/BATHROOMS/OVERNIGHT TRIPS

- Q: If a student wants to use the facilities consistent with the student's gender identity and/or sleep in rooms with other students consistent with the student's gender identity, what do I do?
- A: **Pause, get as much information as you can about the student and the situation**, the privacy of the facilities, whether the student has friends that will be going on the overnight trip, and tell the parent/student you will get back to them. **CALL District.**



# DO NOT SAY “NO, NEVER!” OR “YES, ALWAYS!”

- These are sensitive and highly fact-specific situations and it is best when districts handle these requests on a case-by-case basis, taking in consideration all the facts and circumstances.
- NOTE that courts are leaning heavily in favor of allowing restroom use.
- ALSO, if a student has been using the restroom associated with their gender and no one has complained, let it be!

# WHAT TO DO...

- A student discloses they are transgender and have a preferred pronoun they would like to use. Or a student discloses they are non-binary\* and prefer to use the pronoun “they”.
- The GOAL should always be to support the student and family (parents).
- Do you *have* to disclose this to parents?
- **Absent a district policy**, the law does not require you to disclose. NO.
- UNLESS you can articulate that the student is in danger (ie, suicidal/self-harm/ bullied ON THE BASIS OF GENDER IDENTITY).
- A student disclosure of a preferred pronoun alone is not likely dangerous.
- BUT remember the goal.


\*Non-Binary: a term people use to describe genders that don't fall into the binary (male or female gender roles)

## PREFERRED NAME AND PRONOUN IN SIS

- **Q:** If a student requests that the student's preferred name and identified gender be changed in the SIS, do I need parental consent?
- **A:** Yes. But please help students understand the reason: A change in a district's SIS will likely be accessible to parents through a parent portal and could "out" a student. Also, consider what class rolls will show. If the preferred name, not the legal name, is what shows up, a teacher or a substitute--unaware of the student's legal name—may communicate with parents using the student's preferred name, and inadvertently "out" the student. If a student is not prepared to disclose to parents his/her/their gender identity, it may not be wise to change the name in the SIS

# PARENTS' DIRECTIVES V. STUDENT'S DIRECTIVES

- **Q:** If a student asks to be called by a preferred name and pronoun, but the parent contacts me and directs me NOT to use any name other than the student's legal name and legal pronoun, what do I do?
- **A:** Unless the student is 18, comply with the parent's wishes. But please explain (gently) to the student that because the student is a minor, the school has to comply with the explicitly stated wishes of the parents.

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- **Q:** What if one parent is supportive of the student's preferred name and the other parent is not, and telling me to use only the legal name?
  - **A:** If parents are still together, let the parents know that in the best interest of the student, you will default to the wishes of the parent who supports the student's gender identity and that this is a family matter that needs to be worked out between them. If parents are divorced, refer to court documents first to determine which parent, if any, has educational decision-making authority. If not specified, do the same as you would with married parents.

## IF PARENTS ASK...

- **Q:** If a parent asks directly if the parent's student has said anything about his/her/their gender identity, and I know the student does not want parents to know yet, what do I say?
- **A:** You do not lie. Suggested responses could include: You know, you should really talk to your student about all this. These are complicated issues for kids.

# SUPPORTIVE PARENTS

- **Q:** What do I say when a parent is the one to tell me the student is transgender and would like to be called by a preferred name/pronoun?
- **A:** Invite the parent to come in and sit down to go over a host of issues that will likely come up for the student.
  - Begin with an explanation of the preferred name field in the SIS (if there is one), and how that preferred name will appear on class roles, but the legal name will still be visible to all staff who have access to the demographics page in the system.
  - Explain who those staff are.
  - Explain what documents will maintain the student's legal name, including state tests.
  - Discuss a plan for state testing.
  - Explain that you will have to manually change all non-legal documents, such as yearbook, honor roll, student ID to reflect the preferred name and then be sure to do that.

# HOT BUTTON TOPIC #2: LET'S TALK ABOUT RACE!

## Federal Laws That Protect Historically Marginalized Members of Society

**Sex/Gender**



Title IX of the  
Education  
Amendments  
Act of 1972

**Race/Color/  
National Origin**



Titles IV and  
VI of the  
Civil Rights  
Act of 1964

**Disability**



Section 504 of the  
Rehabilitation of 1973

Americans with  
Disabilities Act (ADA)

Individual with  
Disabilities Education  
Act (IDEA)



# VIOLATIONS OF FEDERAL LAW

- When a student or parent believes an entity has engaged in a violation of federal law, the person may:
  - File a lawsuit in federal court
  - File a complaint with the Office for Civil Rights, within the Department of Education
  - File a complaint with the Department of Justice

## LAWSUITS

- Parent files lawsuit in federal court: Jane Doe v. Weber School District, Superintendent Gina Butters, and Legal Counsel Heidi Alder
- Before a federal court judge
- Procedures include lengthy discovery, which includes the taking of depositions and production of documents, motions, and possibly a jury trial and could end in a settlement agreement between plaintiff and defendant
- Absent a Settlement Agreement, the case results in a judgment
- Defendants may be on the hook for monetary damages

## OCR INVESTIGATIONS

- Parent files complaint with OCR: Case # issued and OCR investigator assigned
- Before an OCR Investigator
- Procedures include investigation, including request for documents and possibly on-site investigations, attempt at mediation or Early Complaint Resolution, and often end in a Voluntary Resolution Agreement between OCR and the District
- Absent an Resolution Agreement, the case results in findings
- School District may lose federal funds

# AND THEN THERE'S THE DOJ

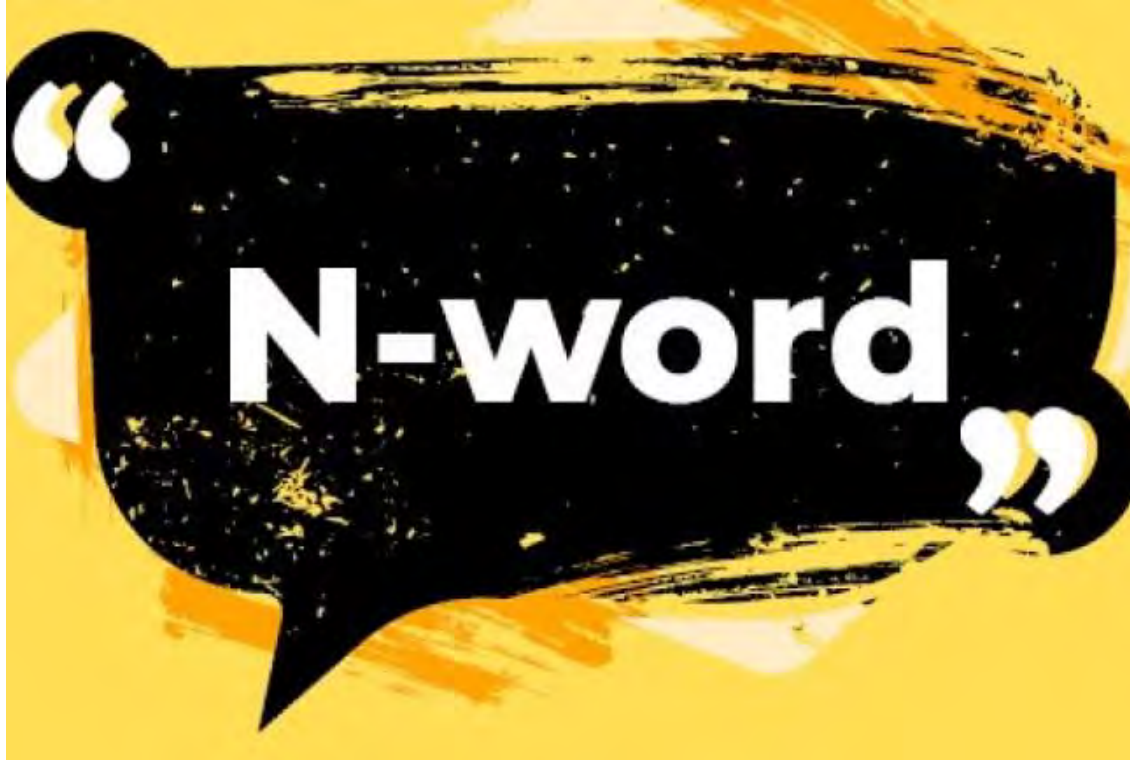
- Parent files a complaint with the DOJ
- Before the Civil Rights Division with the DOJ, made up of a staff of trial attorneys
- Procedures include investigation, including request for documents and on-site visits, which, if the complaints are found to have merit, could result in a lawsuit filed by the DOJ against the district
- The DOJ is required to offer a Settlement Agreement prior to filing suit.
- If the district chooses not to enter into a Settlement Agreement, the DOJ files a lawsuit against the district, which may result in monetary damages.

# TAKE-AWAYS FROM DAVIS DOJ INVESTIGATION

- Addressing student-on-student harassment on the basis of race is a requirement under federal law.
- “Deliberate indifference” doesn’t always mean walking away and doing nothing; it also means not doing enough or failing to prevent the harassment from continuing.
- If the adults do nothing, students stop reporting. And the harassment continues.
- Bullying is different than harassment! (More on this later...)
- Students cannot “acquiesce” to harassment—an “N-word pass” is not an excuse to ignore a student’s use of the “N-word.”
- The “N-word is NOT okay in schools. Ever. By anyone. For any reason.

# COURT OPINIONS ON THE USE OF THE “N-WORD” AS APPLIED TO HARASSMENT CASES

- “It does not take an educational psychologist to conclude that being referred to by one’s peers by the most noxious racial epithet in the contemporary American lexicon, being shamed and humiliated on the basis of one’s race and having the school authorities ignore or reject one’s complaints would adversely affect a Black child’s ability to obtain the same benefit from schooling as her white counterparts.” *Montiero v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1034 (9<sup>th</sup> Cir. 1998).
- “[The] use of the reviled epithet ‘n\*\*\*\*\*,’ raises a question of severe harassment going beyond simple teasing and name-calling.” *DiStiso v. Cook*, 691 F.3d 226, 242-43 (2d Cir. 2012).



## It's Time to Completely Ban the N-Word in Schools

Tyrone C. Howard

Howard is a professor of education at the University of California, Los Angeles, Graduate School of Education and Information Studies and the director of the university's Black Male Institute. He is also the director of the UCLA Pritzker Center for Strengthening Children and Families.

## Speaking about the use of the N-word by SOC

"Their peers defended the term as a term of endearment when concluded with an "a" and not "er." Others talked about how freely rap lyrics use the word, so they are just reciting music. Moreover, non-Black students shared with me how their Black classmates use it all the time and had given them "the OK" to use the word, too.

**"Let's be clear, the n-word** is one of the most hateful, inhumane, racist, and useless words in the English vocabulary. Its history is rooted in degradation, enslavement, dehumanization, hate, anti-Black racism, and a belief in the inferiority of Blacks and African-Americans. No student should use the n-word at school *ever*.

"Even when it comes to textbooks and literature that contain the n-word, school personnel need to preemptively inform students that the **word should be read out loud as "n word."**

"I also totally reject the contention that African-American students **have a "pass" on the use of the word because they have reclaimed and** renamed the word. It is time for school personnel to increase their racial literacy and be much more active in eliminating the **n-word.**"

# CONSEQUENTING FOR THE N-WORD

- The N-word is not appropriate for school, ever – ALWAYS address it.
- When considering appropriate consequences, think about the following:
  - The context in which it was said—was it targeted at someone in a derisive or angry manner? Or was it used as a greeting between two African-American students?
  - Was the word used with an “-a” or an “-er” at the end? (The “er” tends to be more often used to insult an African American)
  - Was the word used as a precursor to a fight? Was it used to goad someone into a fight?
  - Was there other profanity associated with the word? (I.e., “You f’in n-word”)
  - Was the word accompanied by an assault?
  - Were others within earshot who were offended or uncomfortable?
- Don’t be UHSAA (no offense...)

# ***SOME THOUGHTS ON DISCRIMINATORY LANGUAGE BY JAMIE ELLIS, DIRECTOR OF EQUITY AT WSD***

## **How language can create unsafe spaces in our schools and classrooms**

- If a word has a history of violence or has been used in a way that has contributed to violations of the rights of a protected class, that word is discriminatory and is not allowed at school.
- Protected classes: race, color, religion, sex (including sexual orientation or gender identity), disability, national origin, age.
- Discriminatory language is not the same as profanity or vulgar language. Even though vulgar language is offensive (just like discriminatory language), vulgar words/phrases like the “F” word” do not have a history of violence nor has its use specifically been used to deprive a particular group of their civil rights. Therefore, the “F” word is not discriminatory. It is, however, still inappropriate for school, but does not rise to the level of a civil rights violation.
- Discriminatory language is not merely offensive to the receiver; it is also harmful because it perpetuates that culture’s difficult past in our country. It produces anxiety and trauma and hinders that person’s/culture’s ability to move forward and feel safe in a situation or in a community.



# BULLYING V. HARASSMENT

- Bullying is defined in the law to mean:  
*When a school employee or student intentionally commits a written, verbal, or physical action against an employee/student that has the effect of:*
  - Causing harm to the person
  - Causing damage too that person's property
  - Placing the person in fear of harm to themselves or their property
  - Creating a hostile, threatening, humiliating environment because of the pervasiveness, persistence, or severity of the actions or because of the power differential between the bully and the target
  - Interfering with a student having a safe school environment

# HARASSMENT DEFINED

- Harassment means: *Unwanted conduct on the basis of a protected class.*
  - If it is “bullying” targeted at someone **on the basis of** that person's race, color, national origin, sex, disability, religion, then it IS harassment.
  - Harassment is also use of pejorative slurs or epithets, graffiti, jokes, the display of graphic material, etc. **when based on race, color, national origin, sex, disability, religion**, even when NOT directed at a specific person.
  - Harassment could include microaggressions—a comment or action that is subtle, and sometime unintentionally, hostile or demeaning to a member of a protected class.

# EXAMPLES OF HARASSMENT

- Threatening or intimidating conduct directed at a student on the basis of the student's protected class.
- Use of discriminatory language, when targeted at a student or group of students, including epithets, slurs, negative stereotypes, name calling, verbal abuse, derogatory comments, degrading descriptions, and hostile acts which are on the basis of a student's protected class.
- Verbal, written, or graphic material containing comments or stereotypes aimed at degrading students on the basis of a protected classes.
- Graffiti containing offensive or derogatory language, symbols, or pictures in the context any protected class
- Jokes, notes, stories, drawings or pictures, gestures, or the display or distribution of offensive or degrading material based upon any protected class.
- Displaying words, pictures, or symbols on clothing that are offensive or degrading based upon any of the legally protected classifications.
- Mocking someone's speech, clothes, hairstyle, customs on the basis of a protected class.

# DIFFERENCE IN RESPONSE

- Federal law prohibits discrimination based on race, color, national origin, sex, disability, and religion.
- Discrimination includes harassment that prevents students from equally accessing educational opportunities.
- While bullying is prohibited by state law, kids being mean to each other is different than allowing the perpetuation of discrimination in your schools.
- School districts are charged with eliminating discrimination and harassment in schools.
- ***A school's response to harassment must attempt to eliminate the harassment and make whole the person subject to harassment, and not just punish the harasser.***

# HOW TO ADDRESS HARASSMENT

When a student reports harassment on the basis of race, etc., the employee receiving the report should:

- #1: Take steps to stop the behavior
- #2: Ensure that the student who experienced the harassment is ok and offer supportive measures to help the student feel safe being in school. (Counseling, no contact-orders, change in class/seating assignment/schools if desired, etc.)
- #3: Promptly investigate the incident.
- #4: Follow-up with student/complainant to ensure harassment ceases.

## DO NOT SAY:

- Don't you think you are being over sensitive?
- I know how you feel. I've been through something similar.
- I can't talk to you right now. I'm busy.
- It's not that big of a deal. They didn't really mean it.
- Not everything people say or do is racist.
- I know that student; he's not racist.

## NOTE!

- Being a racist is not the same as engaging in harassment or discrimination in violation of federal law. It is possible to violate federal law and not be a racist. It is also possible to be racist and NOT violate federal law.
- If we can't consider the possibility that we may have biases that propel us to act in a way that implicates a student's civil rights-- because we aren't racist--we will never fully protect students of color in our schools.

# AVOIDING DISCRIMINATORY PRACTICES

- Be ever watchful of yourself to avoid dismissing a situation that needs attention and to avoid engaging in discrimination yourself.
- Make sure you are treating all students equitably—that you are not (even inadvertently) referring more students of color than white students to law enforcement, sending more students of color than white students home for suspensions, calling out more students of color than white students to meet with admin about x, y, or z.
- Be sure you know your district's Student Code of Conduct and you're following it, even-handedly.
- But it is also okay to acknowledge that a Black student whose grandparents may have been beaten by cops, being searched by an SRO may have a different feeling or experience than a white student whose grandparents grew up on the Andy Griffith's show. Being “color blind” in these situations will not help.
- This doesn't mean you never refer, search, suspend, or otherwise discipline students of color. But awareness and sensitivity can go a long way to de-escalate a potentially volatile situation.
- If your district doesn't have training or resources, consider addressing your own biases through some cultural or racial sensitivity training. (In all your spare time, I know!!)



# HOT BUTTON TOPIC #3: SEXUAL MISCONDUCT V. SEXUAL HARASSMENT

## TITLE IX STATES:

- “No person in the United States on the basis of sex shall 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.”

# LEGAL HISTORY AND BACKGROUND ON TITLE IX AS IT RELATES TO SEXUAL HARASSMENT



# CANNON V. UNIVERSITY OF CHICAGO

## 441 U.S. 677 (1979)



Supreme court says title IX includes an implied right of action, meaning people can sue under it.

# FRANKLIN V. GWINNETT COUNTY PUBLIC SCHOOLS 503 U.S. 60 (1992)



- Sexual harassment constitutes sex discrimination under title IX
- Title IX not only provides equitable remedies to require fair treatment, it also provides for damages awards (i.e., District can be sued for money)

# GEBSER V. LAGO VISTA INDEPENDENT SCHOOL DIST. 524 U.S. 274 (1998)

A school is not liable for monetary damages for teacher-student sexual harassment unless a school district official who “at a minimum has authority to institute corrective measures on the district’s behalf” has **actual notice** of, and is **deliberately indifferent** to, the teacher’s misconduct.



# DAVIS V. MONROE COUNTY BOARD OF EDUCATION 536 U.S. 629 (1999)

A school board may be held liable in cases of **student-on-student harassment**, but only where the district is **deliberately indifferent to sexual harassment**, of which the district has **actual knowledge**, and that harassment is so **severe, pervasive, and objectively offensive** that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.



# DEPARTMENT OF EDUCATION THE OFFICE FOR CIVIL RIGHTS



# OCR GUIDANCE

- From 2001-2017, OCR issued several guidance documents regarding sexual harassment and Title IX, heavily focused on the rights of the victim and the obligation of schools to take prompt and effective steps reasonably calculated to end any harassment and prevent harassment from occurring again.
- Schools were required to engage in prompt, thorough, and impartial investigation while providing interim supportive measure to the victim, informing the victim of the progress of the investigation, and informing the victim of the outcome of the investigation.
- Victim was the focus.



# CHANGES TO THE REGULATIONS

- Responding to complaints that the Department of Education's guidance did not adequately protect the rights of those accused of sexual harassment or sexual violence, in 2017, the U.S. Department of Education Secretary Betsy DeVos rescinded the Obama-era guidelines which encouraged colleges and universities to more aggressively investigate campus sexual assaults.
- In October, 2018, DOE proposed new regulations for the first time since 1997.
- The regulations were open to public comment, and the DOE received over 124,000 responses.
- The regulations were published May 6, 2020, and made effective August 14, 2020.

# OVERVIEW OF THE NEW REGULATIONS

- Definition of sexual harassment has changed—it is reserved for only very serious sexual conduct
- Respondents will get written notice before first investigative interview
- Parties will be able to have a parent and/or attorney at interview (an “advisor”)
- Gag orders prohibited
- The person who investigates the allegation and the person who makes the final decision must be different people
- Both parties have extensive opportunity to respond to evidence presented against them
- Appeal must be offered

# NEW(ISH) DEFINITION OF SEXUAL HARASSMENT

## Quid Pro Quo

- When an employee conditions some benefit in exchange for unwelcome sexual conduct

## Hostile Environment

- Conduct that is so **severe, pervasive, AND objectively offensive** that
- It denies equal access to educational program

## Violence Against Woman Act Big 4

- Sexual assault
- Dating violence
- Domestic violence
- Stalking

**STOP EVERYTHING!**

Before proceeding with an investigation of any allegation of a sexual misconduct or a suspension, **STOP**, and **CONTACT YOUR TITLE IX COORDINATOR**.



# QUID PRO QUO

- Principal promises bad evaluation if teacher doesn't give him massage
- Teacher offers student higher grade if student kisses her
- Coach implies athlete will start if she lets him sit close and rub her legs
- \*MUST BE BY AN EMPLOYEE\*



# SEVERE, PERVASIVE, AND OBJECTIVELY OFFENSIVE

## MUST MEET ALL FOUR ELEMENTS

- Severe = reasonable person considers it severe
  - Most physical contact will be considered severe
  - Non-physical contact associated by threats of violence
- Pervasive = pattern or widespread dissemination
- Objectively Offensive = reasonable person is offended
  - “I know it when I see it”
- Denies Access = undermines or detracts from educational experience
  - Could include dropping out of activities, grades dropping, skipping certain classes (or all classes), staying in for lunch, opting for online school

## FIGURING OUT “SPOO”—WHAT CONSTITUTES SEVERE, PERVASIVE, AND OBJECTIVELY OFFENSIVE?

- This conduct is NOT conduct that would otherwise meet the definition of sexual assault. If the conduct meets the definition of sexual assault, no need to go through this analysis.
- **Severe:** Consider the age, the impact on the Complainant, and the school community at large
- **Pervasive:** Could mean it happened multiple times, could mean something was disseminated to multiple people, or it could mean the impact was widespread
- **Objectively Offensive:** If 9 out of 10 people in a room find it offensive, it probably is.
- SPOO + deprives the Complainant equal access to educational opportunities. = Title IX route.
- **NOTE:** This is typically behavior that is *really* bad (“shocks the conscience”) and would generally result in long-term removal from school.

## LET'S WALK THROUGH A FEW

- Student exposes himself in front of a teacher and begins to masturbate. At school.
- 9<sup>th</sup> grade boy and 10<sup>th</sup> grade girl have consensual sex off campus. Boy films he and girl having sex, with girl's knowledge and reluctant consent. Boy promises to erase video, but instead takes it to school and shows 5-7 kids at lunch and 2 others in math class. Girl goes to different school but decides that she can't go to school in person anymore and opts for online.
- 8<sup>th</sup> grade girl reports that 8<sup>th</sup> grade boy has touched her private parts in art class several times over the course of one week. She reports that he reaches under the table and puts his hand on her thigh, moving it up until he is touching her crotch area, and that he has reached around her shoulders and put his hand down her shirt and grabbed her breast.

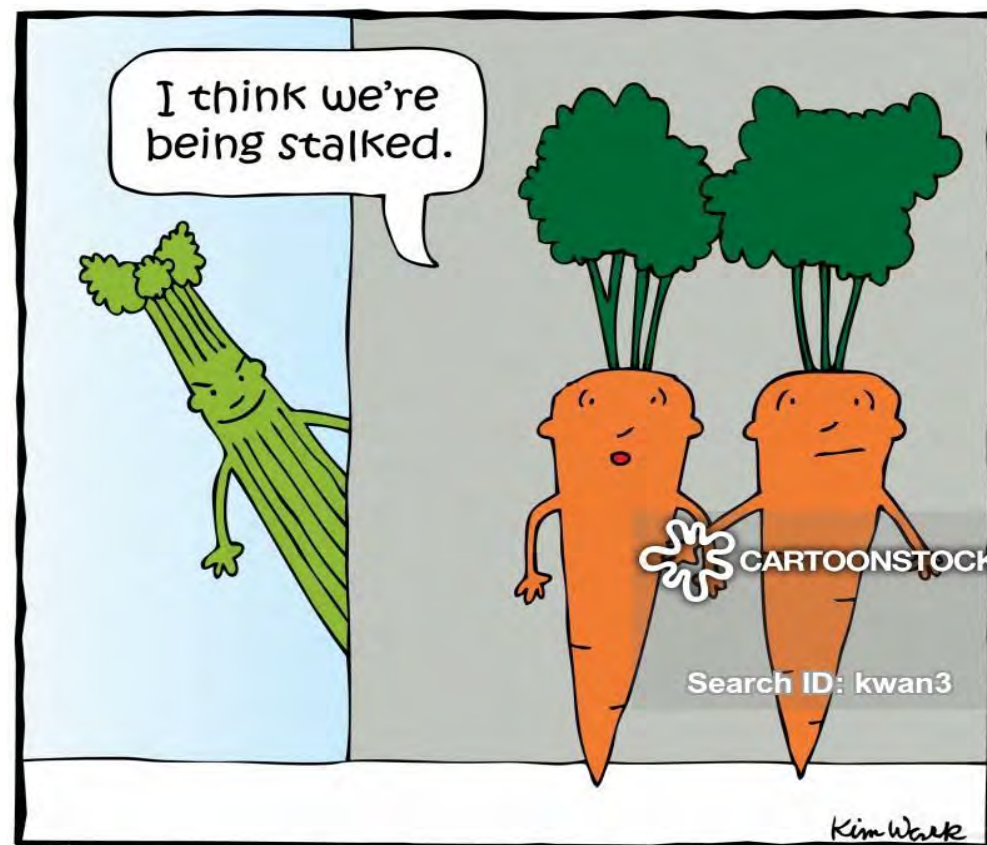


- Three different girls report that boy harassed them by engaging in the following conduct:
  - Girl 1 reported boy messaged her, called her names, used swear words, stated he was watching her, sometimes repeating messages within a short time or blaming girl for boy's depression and suicidal thoughts.
  - Girl 2 reported boy sent ongoing direct messages, emails and texts to her and classmates at times containing inappropriate comments such as "nice ass", and telling girl she looked pretty when she was home and not in the vicinity of the boy, and reporting to classmates that he'd had sex with the girl
  - Girl 3 reported that boy sent a message to a peer stating that they had slept together. When girl emailed boy and asked him to stop, he said he wouldn't and was going to commit suicide. Girl also said boy is telling peers that she and another girl (Girl 2) got him suspended.
- 4<sup>th</sup> grade boys playing "squirrel tap" repeatedly at recess.

- Girl #1 showed friends at school pictures of the breasts of Girl #2 taken during a sleepover. Both girls are in high school.
- Boy #1 grabbed and twisted the penis of Boy #2. Both boys are in elementary school.
- Boy #1 peeked over the bathroom stall and watched Boy #2 urinating. Boy #1 then commented on the size of Boy #1's penis to the class. Both boys are in elementary school.
- High school boy cornered high school girl in the band practice room, asked to see her breasts, she refused and he groped her.
- Girl send inappropriate sexual messages through text to boy. Boy opened and reviewed the messages at school.
- Notification by police that they are investigating possible rape by boy at the high school against girl at the high school. No indication the rape took place at school or at a school-related activity.

# VIOLENCE AGAINST WOMEN ACT BIG 4

- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking



# SEXUAL ASSAULT DEFINED

“any sexual act directed against another person, without the consent of the that person including instances where the person is incapable of giving consent, such as forcible rape, forcible sodomy, sexual assault with an object, forcible fondling\*.”

\*NOTE: Fondling requires that the touching be *for the purposes of sexual gratification*.

# SEXUAL ASSAULT IN SCHOOLS

- Butt slaps (“Ass Grab Game”)?
- Playing doctor?
- Crowded hallway?
- Squirrel tapping (grabbing or touching male genitalia over the pants in a joking manner)?



# SEXUAL INTENT?

## Factors In Determining Intent:

- Age and maturity of students?
- Disability?
- Experience or understanding?
- Control or coercion?
- Attitude of both students?
- Concealment?
- Where did it happen?
- How long did it last?

## DATING VIOLENCE

“violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the Complainant. The existence of such a relationship shall be determined based on the Complainant’s statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship”

**\*For the purposes of this definition dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse. Importantly, sexual harassment under the dating violence prong does not have to be sexual in nature.**

# STALKING

“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”

- **Must be two or more acts (on district property or during school sponsored activities), including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person’s property.**



# SEXUAL HARASSMENT V. SEXUAL MISCONDUCT

- Allegations of conduct that meets the definition of sexual harassment **MUST** be handled by the Title IX Coordinator **BEFORE** you engage in any investigative work.
- Allegations of sexual misconduct can be handled at the school level, just like you handle every other situation.

BUT REMEMBER!!!



- Call your District Title IX Coordinator just to make sure!

# TRAIN YOUR STAFF TO REPORT

- Previously, a school was not deemed to have “actual knowledge” of sexual harassment unless someone with authority knew.
- Now, the new regulations impute actual knowledge to an LEA when **ANY EMPLOYEE** knows.
- Make sure your employees know:
  - What to report
  - When to report it (immediately!)
  - And to whom they report
- You may train your staff on the new definition of sexual harassment, OR you may just tell your staff if you know of or even suspect any conduct that is sexual in nature occurring at our schools, report it!

# HOT BUTTON ISSUE# 4: QUICK TIPS FOR STUDENT INVESTIGATIONS

## ■ General Information

- It is a basic principle that students may be detained and questioned by school officials on matters of school discipline
- Schools have the authority to stop minor students to ask questions or conduct an investigation ***even in the absence of reasonable suspicion***, so long as such authority is not exercised in an arbitrary, capricious, or harassing manner.
- *Miranda* warnings do not apply in school settings
- *Miranda* **does** apply to police custodial interrogations although they happen to occur on school grounds or in the presence of and even with the involvement of school authorities.

## GENERAL INFORMATION RE: STUDENT INVESTIGATIONS, CONT.

- Parent notification: School officials have no obligation to contact parents before detaining and questioning students. In a 4<sup>th</sup> Circuit case, *Wofford v. Evans*, “the Constitution does not impose a duty of parental notification before the pupil’s disciplinary detainment while . . . school guardianship persists.” The court goes on to say that even if parent notification is convenient (w/cell phones, etc.), the ease misses the point. To REQUIRE parent notification adds another investigatory step, when school officials may be faced with imminent danger to students.
- HOWEVER, follow your district policies on this point!

## STUDENT INVESTIGATION TIPS (CONT.)

1. Interview students independently.
2. Avoid leading questions.
  - Don't ask: "Did Joe beat up Jake?" (to a witness) OR "Joe, you beat up Jake, didn't you?"
  - Instead: "Were you in the hallway after school? Did you see the fight that took place? Can you tell me what happened?" OR "Jake, I understand you were in fight with Jake. Can you tell me what happened?"
3. Ask follow up questions. e.g, "Who else was there?" "Were you present for the entire fight?" "Did you see anything throughout the day that might have caused the fight?" "Do you know why Joe and Jake were fighting?" "Did you hear anyone say anything?" "Did anyone record the fight?"
4. Have students write statements, in addition to verbally interviewing them.
  - Following a written statement, review the statement to ensure that everything the student told you is in the statement.
  - If students are too young to write statements, you may write the statement for the student or record the interview.

## STUDENT INVESTIGATIONS, CONT.

5. Ask interviewees for objective information--what they **observed, heard**, instead of what they thought, felt, etc.
6. If you are interviewing students about a bullying situation or a sexual harassment, do not interview the victim and perpetrator together in an effort to have them hug and make up.
7. If law enforcement is involved, police will want to do the interviews first so as not to taint the interview and muddy the waters for the prosecution, if the matter goes to trial. Let them, and then work with law enforcement to get the information you need to carry out your administrative responsibilities.
8. **Document**, document, document!
9. **Report** to proper authorities.



*That's all Folks!*

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