

**New Title IX Regulations  
for K-12 Schools**



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BETHLEHEM, PENNSYLVANIA

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**Introductions**

- Kathleen Conn, Ph.D., J.D., LL.M., is Of Counsel with KingSpry, after a career as a teacher, Curriculum Supervisor and Principal in K-12 public education. She is an experienced investigator and gives training sessions in Lehigh Valley school districts. 
- Brian Taylor, J.D., is an attorney with KingSpry who is a litigator, a trained investigator, and works with K-12 school districts in the Valley. 

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**What We Shall Talk About Today**

- The New Title IX Regulations from DOE, effective August 14, 2020
- What is Title IX
- Reasons for Changes from Prior Guidance
- Overview of Most Important Changes for K-12 Schools
- Duties of Title IX Coordinator
- Supportive Measures
- Grievance Procedures
- Investigations
- Continuing Duties for Appeals and Final Resolutions

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### What is Title IX?

- Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in all federally-funded school districts, which is basically **all K-12 schools**
- Title IX states:
- *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.*

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### Discrimination on the Basis of Sex

- The Supreme Court interpreted discrimination on the basis of sex as “sexual harassment”
- Generally, sexual harassment is considered to be conduct of a sexual nature that a reasonable person would consider to be unwelcome
- It can be verbal, written, or physical
- Sexual harassment can be male-on-female, same sex, child-to-child, adult-to-child, or child-to-adult

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### Two Ways of Enforcing Title IX

#### Judicially – In Court

- By suing the school district
- Where the plaintiff must show that a school district official had actual knowledge and was deliberately indifferent to sexual harassment

#### Administratively

- By reporting to the Office for Civil Rights (OCR)
- Where OCR will attempt to force the school district to comply with Title IX




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### The Office for Civil Rights (OCR)

- OCR is a sub-agency of the United States Department of Education
- Agencies have the power to interpret a law by making Regulations, also called Rules, which then have the force of law
- However, the agency must go through a process in making those Rules, called “notice-and-comment” rulemaking




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### Why New Regulations?

- Under the Obama administration, schools received “significant guidance” which was communicated through “Dear Colleague Letters”
- However, these letters did not have the force of law, because they were not adopted by “notice-and-comment” rulemaking
- When Betsy DeVos took over the U.S. Department of Education, changes were made




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### New Regulations/New Rule

- On September 22, 2017, DeVos’s Acting Assistant Secretary of Education at OCR rescinded two Obama-era DCLs that said schools had to stop all sexual harassment that they “should know” was occurring, and that ALL students, including LGBTQ students, were protected under Title IX
- OCR promised to issue new regulations that had the force of law




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### Following the Process

- OCR published the proposed regulations in the Federal Register on November 29, 2018 and the 38-page document was open for email comments by the public for approximately 2 months
- OCR received 124,149 comments, and some of those were signed by groups of people
- In May 2020, OCR published its 2,033-page analysis and discussion of the public comments in the Federal Register and announced the changes to Title IX as the “Final Rule”

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### Significant Changes for K-12

- **A new Definition of Sexual Harassment**
  - (1) An employee of the school district conditioning the provision of an aid, benefit, or service of the school district on an individual's participation in unwelcome sexual conduct; also called *quid pro quo* harassment
  - (2) 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 district's **education program or activity**; or
  - (3) Sexual assault, dating violence, domestic violence, or stalking.

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### Important Words in the Definition

- The qualification of “**severe, pervasive, and objectively offensive**” applies only to “unwelcome conduct” and does not apply to incidents of *quid pro quo* sexual harassment, sexual assault, dating violence, domestic violence, or stalking.
- A single incident of these offenses is sufficient to constitute sexual harassment.




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### Important Words in the Definition

- In the past, it was confusing to figure out if the school district had a duty to respond when sexual harassment occurred outside the school
- The words “**effectively denies a person equal access to the school district's education program or activity**” mean that the school district has a duty to respond only if the harassment occurs as part of the school district's operations; in locations, events, or circumstances where the school has substantial control over the harasser and substantial control over the context in which the harassment occurs

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### Important Words in the Definition

- Therefore, the school district has no duty under Title IX to respond to off-campus sexual harassment that occurs, e.g., at an off-campus party in a private home
- The school can apply sanctions under the district code of conduct, but does not have to take action under Title IX
- Also, Title IX only applies to students who are physically in the United States.




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### Who Is Protected?

- **All District Employees**
- **All students**
- The Department declined to define sex, but said that since sexual harassment is conduct that can be directed toward any individual, **Title IX applies to all individuals**, regardless of sexual orientation or gender identity, that is, also to individuals who are LGBTQ or transgender, and “all are to be equally respected”



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### Reporting Sexual Harassment

- In the past , the school district’s actual knowledge of sexual harassment required that a school official with authority to take corrective action had been notified of the sexual harassment
- Under the new Rule, if a complaint of sexual harassment is made to the Title IX Coordinator or to **any person in the district**, the district has actual knowledge



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### Reporting Sexual Harassment

- A student, parent, caregiver, friend, or a witness of sexual harassment may report sexual harassment
- Report may be made anonymously
- This new provision is of special help to younger students who may tell a teacher or even a recess monitor
- Any person who receives a report of sexual harassment must promptly inform the Title IX Coordinator



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**The Title IX Coordinator**

- Each school district shall have a Title IX Coordinator who is trained in this policy and the Coordinator's contact information must be published widely – to everyone in the district, students and all staff, and in the community
- When the Title IX Coordinator receives a complaint of sexual harassment, he/she must give **supportive measures** to the complainant
- I recommend give to the respondent also

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**Supportive Measures**

- Supportive measures are non-disciplinary, non-punitive individualized services offered as appropriate and as reasonably available, without fee or charge, to both the complainant and the respondent
- Such supportive measures must be made available before or after the filing of a formal complaint or where no formal complaint has been filed, to both students and employees

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**Supportive Measures**

- Supportive measures shall be designed to protect the safety of all parties and the educational environment, or to deter sexual harassment
- Such measures may include:
  - Counseling,
  - Extensions of deadlines or other curriculum-related adjustments,
  - Modifications or changes of work or class schedules or locations,
  - Campus escort services,
  - Mutual restrictions on contact between the parties
  - Leaves of absence,
  - Increased security and monitoring of certain areas of the campus

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### Supportive Measures

- The Title IX Coordinator must respect the complainant's wishes when designing supportive measures, and the measures must be kept confidential
- This is where special education students' needs may be met
- Emergency removal may apply to the alleged perpetrator if he/she is a danger to health or safety
- Faculty alleged to be perpetrators may be placed on administrative leave

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### Title IX Coordinator Duties

- The Title IX Coordinator must receive training
- Because of the many duties of the Coordinator, the new regulations allow more than one Coordinator
- Duties
  - Notifications to complainant and respondent
  - Interviews with all parties who have information about the complaint
  - Conducting the investigation
  - Scheduling the live hearing, if one will be held
  - Writing the investigative report

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### Title IX Coordinator Duties, cont.

- Advise the complainant of the option of informal resolution of complaints, e.g., by mediation
- Conduct an investigation in a formal complaint
- Write the investigative report
- Dismiss complaints on written notice from the complainant or complaints that do not meet the definition of sexual harassment above
- Keep all records for **seven years**

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**Essentials of the Grievance Process**

- Equal treatment of complainants and respondents
- Supportive measures for both complainants and respondents
- Objective evaluation of all relevant evidence
- No credibility determinations based on status in the investigation
- Remedies for a complainant where respondent is determined to be responsible
- Title IX Coordinator (or designee) as investigator

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**Essentials of the Grievance Process**

- Formal Resolution Process
- Informal Resolution Process
- Optional Live Hearings
- **Informal Resolution is NOT available for employee-on-student harassment**
- Complainant must sign a formal complaint before the Grievance Process can begin

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**Essentials of the Grievance Process**

- Training for all employees involved
- Presumption of innocence of respondent
- Prompt time frames for resolution of the case
- Allowance for temporary delays for good cause, e.g., law enforcement involvement, rape kit analysis
- Written notices of all stages for both parties
- No misuse of legally recognized privilege, e.g., physician-patient confidentiality or rape shield laws
- All training materials available upon request by members of the public

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**Informal Resolution of Complaints**

- An informal resolution process may be initiated after filing of a formal complaint by both complainant and Title IX Coordinator, e.g. mediation
- Both parties must voluntarily agree in writing
- The parties may switch to an informal process even after a formal resolution has begun, and may end the informal process and return to the formal process at any time before agreeing to a resolution

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**Informal Resolution of Complaints**

- All who conduct informal resolutions must be trained
- The informal resolution process may NOT be used in cases of faculty-on-student sexual harassment or in cases of any adult employee-on-student sexual harassment




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**Formal Resolution of Complaints**

- After the Title IX Coordinator receives a formal complaint, the Coordinator must give certain written notices to all known parties:
  - Notice of the allegations
  - Notice about the grievance process, including any informal resolution process
  - Notice that the allegations of sexual harassment potentially constitute sexual harassment, and give parties sufficient time to prepare a response before any initial interview

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### Formal Resolution of Complaints

- A statement that the respondent is presumed not responsible for the alleged conduct
- Notice that the parties may have an advisor of their choice, who may be, but is not required to be, an attorney, with them, and that they may inspect and review evidence
- Notice that knowingly making false statements or knowingly submitting false information is prohibited

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### Formal Resolution of Complaints

- Prior to completion of the investigative report, the Title IX Coordinator must send to each party and the party's advisor the evidence subject to inspection and review
- The parties must have at least 10 days to submit a written response, which the investigator will consider
- The Title IX Coordinator shall create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a live hearing (if a hearing will be scheduled), send to each party and the party's advisor, if any, the investigative report for their review and written response

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### Dismissal of a Formal Complaint

- The Title IX Coordinator may dismiss a formal complaint if the conduct alleged in the formal complaint:
- Would not constitute sexual harassment even if proved,
  - Did not occur in the district's education program or activity
  - The complainant requests dismissal of the complaint in writing
  - If the conduct did not occur against a person physically in the United States
  - If the respondent is no longer enrolled or employed by the school district
  - Specific circumstances prevent the Title IX Coordinator from gathering sufficient evidence

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### Live Hearings

- K-12 school districts may decide if they will allow a live hearing, which would occur after the Title IX Coordinator has sent the investigative report to the parties
- If a live hearing is scheduled, either party to the formal complaint may request that the parties and their advisors be in separate rooms and communicate via technology and not in person
- Advisors to the parties, but not the actual parties, may question and cross-examine parties and witnesses on relevant issues and evidence, and credibility determinations

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### Live Hearings

- If a party does not have an advisor who can be present, the school district must provide an advisor of the district's choice without fee or charge to that party, who may be an attorney
- An audio or audiovisual recording or transcript of any live hearing must be created, and copies must be available to the parties for inspection and review
- Remember the live hearing is **optional** for K-12

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### The Investigation

- Must be conducted by a trained investigator who can be the Title IX Coordinator or contracted investigator from outside the district who is unbiased and free from conflict
- No timelines are specified in the new regulations, but the investigation must be prompt and unbiased
- Respondent must be considered not responsible until determined to be responsible

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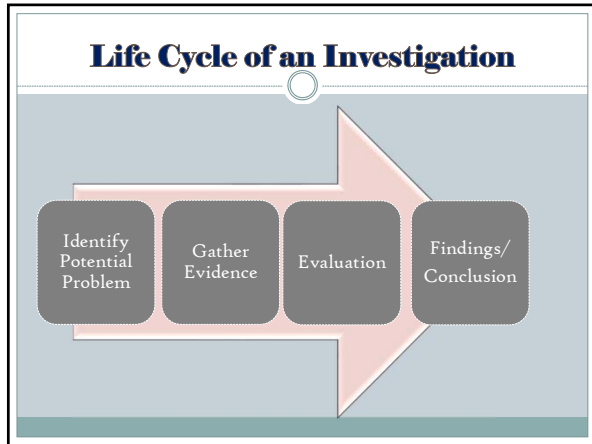
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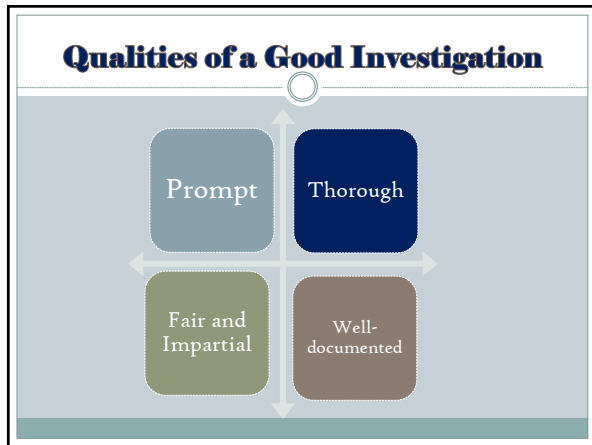
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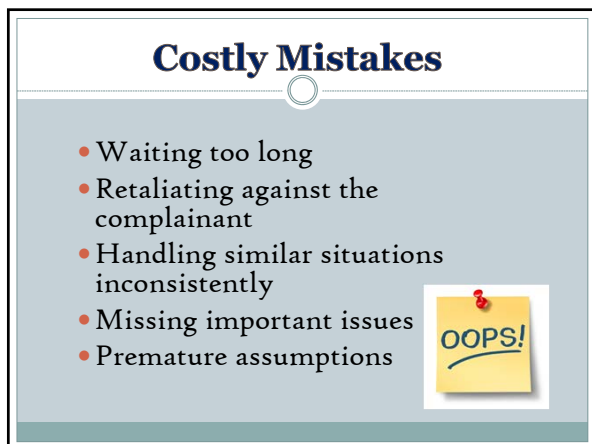
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**Questioning the Complainant**

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- A. Allow complainant to begin where comfortable**
- B. Gain complainant's trust**
- C. Keep questions simple**
  - 1. What happened?**
  - 2. Who was involved?**
  - 3. Where did the incident take place?**
  - 4. Any witnesses?**
  - 5. Review your understanding of what complainant said**

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**Questioning the Witness**

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- What did you observe?
- Who was present or may have observed?
- What did that person say or do?
- What did you say or do?
- Did you tell anyone?
- Do you know of any similar incidents?
- Do you know of any other leads, such as documents and witnesses?
- Is there anything you think I should know?




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**Questioning the Respondent**

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- Let the respondent get comfortable
- Let the respondent begin
- Ask Open-ended Questions
- Avoid Compound Questions
- Do Not Put Words into the Respondent's Mouth
- Save Unfriendly Or Embarrassing Questions Until The End Of The Interview
- Review Your Understanding Of What You Have Been Told
- Ask For Any Other Information Or Documentation




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### Investigation Report

- Date of the incident(s) that were investigated
- Date of complaint/event that triggered investigation
- Why was the investigation started and what was being investigated
- Who performed the investigation
- When did the investigation begin
- What documents were gathered
- Where were the evidence/documents found
- What policy/procedure applied
- Who were the witnesses
- Summary of factual evidence – drafted and/or reviewed by an attorney or investigator

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### What to Maintain on File

- **EVERYTHING!**
- **And for 7 years**




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### After the Investigation

- If a live hearing is not part of the district's grievance process, after the Title IX Coordinator has sent the final investigative report to the parties, the Title IX Coordinator must hand over the report to a person not previously involved in the case, an **independent decision-maker**
- The decision-maker must allow each party the opportunity to submit written relevant questions to any party or witness, receive answers, and allow for additional limited follow-up questions from each party

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### After the Investigation

- The independent decision-maker shall determine whether sexual harassment occurred, assign responsibility, and impose disciplinary sanctions as appropriate.
- The same standard of evidence must be used in adjudicating all formal complaints of harassment
- But the district can decide whether to use the preponderance of the evidence standard (that is, it is more likely than not the harassment occurred) or the clear and convincing evidence standard

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### After the Investigation

- Critically important note: It is essential that all determinations of responsibility under a Title IX complaint be made using the same standard of review, the preponderance of evidence **OR** the clear and convincing evidence standard
- It is also recommended that districts use the same standard of evidence in adjudicating ALL questions of determinations of responsibility, i.e., guilt or innocence of any kind of charges/allegations

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### The Decision-Maker

- The decision-maker must simultaneously send both parties a written determination explaining the reasons for the outcome of the investigation
- This two-person method of determining responsibility is a new requirement
- If there is an appeal, a third person who has not been part of the case before now, must take over the appeal




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### Final Decision

- The decision-maker who takes over after the investigative report is created and communicated to the parties must issue a written determination of the final decision
  - This must be a comprehensive report that includes:
    - The charges
    - The description of the process
    - The findings of fact supporting the outcome
    - The sanctions, if any, that will occur
    - Remedies, if any, for the complainant
    - The appeals process




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### The Appeal

- An appeal can be filed by either party in cases of a:
  - Procedural irregularity that may have affected the outcome
  - New evidence became available that may have affected the outcome
  - Provable bias or conflict of interest of the Title IX Coordinator
- A new third person must decide the appeal and make the determination known to both parties in writing simultaneously
- The Title IX Coordinator must enforce the outcome

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### Retaliation

- Retaliation against anyone who participates in the proceeding is prohibited
- However, First Amendment rights must be respected




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**Publications Required**

- This policy must be promulgated throughout the district and community
- The name and contact information for the Title IX Coordinator must be prominently displayed on the district website and in every district building, as well as a notice of nondiscrimination on the basis of sex
- The policy must be available for review and periodic updates

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**Immediate Action Required!**

- District policies on sexual harassment, definitions and procedures, must be made compliant with this new Rule by August 14, 2020
- Forms for reporting sexual harassment must be examined and, if necessary, be revised to comply with these new regulations
- All staff must be trained in the requirements of the new Rule, because ALL employees of the district are, under the new Rule, mandated reporters: from the cafeteria worker, to the bus driver, the custodian, to the classroom teacher, to the librarian, to the counselor

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**Immediate Action Required!**

- Reporting forms needed
- Trainings for administrators, faculty, staff, students, and parents and community members
- Notice on website added
- Notices printed for all buildings in the district
- Lots of work to be done in a short time period
- All this while planning what "school" will look like during the Covid-19 pandemic!

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**Please Call on Us!**

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- KingSpry attorneys have been anticipating a deluge of requests for policy reviews, staff trainings, and development of new forms for reporting, notifications, etc.
- We are prepared to break down and customize all training materials and reporting forms for administration, faculty, staff, students, and parents and community members

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**Questions?**

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- Thank you for your attention!
- We'll be happy to take questions and, if you think of something later, we can take questions by email
- For questions and comments about this presentation, contact Kathleen Conn and/or Brian Taylor, at [kconn@kingspry.com](mailto:kconn@kingspry.com) , or [btaylor@kingspry.com](mailto:btaylor@kingspry.com)

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**Moving On . . .**

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- This policy takes effect on August 14, 2020
- If you need help updating your district Title IX policy, contact the Head of the Education Group at KingSpry, John Freund  
at [jef@kingspry.com](mailto:jef@kingspry.com) or at 610-332-0390
- We also conduct training sessions for Title IX Coordinators, employees, students, as well as parent and community members

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