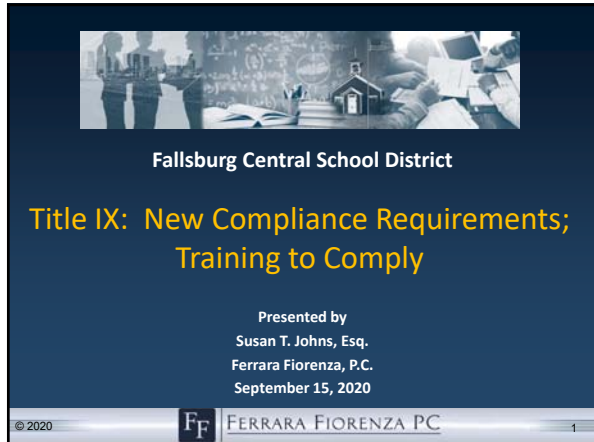


# Title IX


## Notes

A presentation slide with a dark blue background. At the top is a horizontal image showing silhouettes of people in a classroom setting. Below the image, the text 'Fallsburg Central School District' is centered. The main title 'Title IX: New Compliance Requirements; Training to Comply' is in large, bold, yellow font. Below the title, it says 'Presented by Susan T. Johns, Esq. Ferrara Fiorenza, P.C. September 15, 2020'. At the bottom left is '© 2020' and at the bottom right is the Ferrara Fiorenza PC logo and name.

Fallsburg Central School District

**Title IX: New Compliance Requirements;  
Training to Comply**

Presented by  
Susan T. Johns, Esq.  
Ferrara Fiorenza, P.C.  
September 15, 2020

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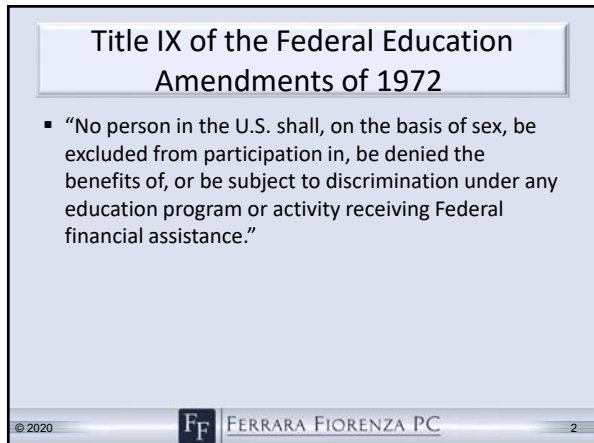
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A presentation slide with a light blue background. The title 'Title IX of the Federal Education Amendments of 1972' is in a white box at the top. Below the title is a bulleted quote: 'No person in the U.S. shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal financial assistance.' At the bottom left is '© 2020' and at the bottom right is the Ferrara Fiorenza PC logo and name.

**Title IX of the Federal Education  
Amendments of 1972**

- “No person in the U.S. shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal financial assistance.”

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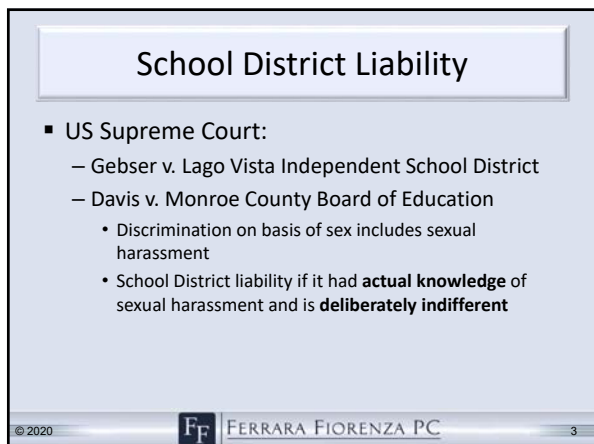
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A presentation slide with a light blue background. The title 'School District Liability' is in a white box at the top. Below the title is a bulleted list: 'US Supreme Court: Gebser v. Lago Vista Independent School District, Davis v. Monroe County Board of Education'. Under Davis v. Monroe, there are two sub-bullets: 'Discrimination on basis of sex includes sexual harassment' and 'School District liability if it had actual knowledge of sexual harassment and is deliberately indifferent'. At the bottom left is '© 2020' and at the bottom right is the Ferrara Fiorenza PC logo and name.

**School District Liability**

- US Supreme Court:
  - Gebser v. Lago Vista Independent School District
  - Davis v. Monroe County Board of Education
    - Discrimination on basis of sex includes sexual harassment
    - School District liability if it had **actual knowledge** of sexual harassment and is **deliberately indifferent**

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# Title IX

## Notes

### Title IX Regulations

- New Regulations effective August 14, 2020
  - Define sexual harassment more narrowly than prior OCR guidance
  - Require adoption and publishing of grievance procedures
  - Modify the due process afforded to students
  - Modify protections for accused and alleged victim
  - Specify training requirements
  - 7-year record keeping requirement
  - Title IX Coordinator role is enhanced

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### Title IX Regulations: Discrimination

- Prohibited discrimination:
  - School employee conditions an aid, benefit, or service of the school on an individual's participation in unwelcome sexual conduct;
  - Unwelcome conduct determined by a **reasonable person** to be **so severe, pervasive, and objectionably offensive** that it effectively denies equal access to the school's education program or activity; and/or
  - Sexual assault, dating violence, domestic violence, stalking

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### Title IX Regulations: Discrimination

- "Treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX." (34 CFR 106.45(a))
  - No retaliation
  - But, knowingly making a materially false statement in bad faith may be subject to discipline

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# Title IX

## Notes

### Title IX Regulations: Coordinator

- District must designate the Title IX Coordinator
  - Notice to be given of Coordinator's name or title, email address, office address and telephone number
  - Authorized to coordinate all compliance efforts
    - Responsible for effective implementation of remedies.
    - Responsible for coordinating effective supportive measures

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### Title IX Regulations: Training

- How to conduct an investigation and grievance process including:
  - Hearings
  - Appeals
  - Informal resolution processes
- How to serve impartially including
  - Avoiding prejudgment of facts/issues
  - Conflicts of interest
  - Bias

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### Title IX Regulations: Training

- How to use technology in a live hearing and how to record a live hearing
- How to determine issues of relevance, including when questions and/or evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant
  - Relevant ONLY when evidence/questions are offered to prove that someone other than respondent committed the offense alleged; or
  - Are offered to prove complainant's consent

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# Title IX

## Notes

### Title IX Regulations: Training

- Title IX Coordinators, investigators, decision makers and any person who facilitates an informal resolution process must receive training on:
  - Definition of sexual harassment
  - Scope of the district's education program or activity
  - Equitable treatment of Complainant and Respondent
  - Objective evaluations of all relevant evidence, inculpatory and exculpatory

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### Title IX Regulations: Grievance Process

- Applies to all formal complaints
- Applies prior to any disciplinary sanction
- Requires:
  - Equitable treatment of Complainant and Respondent;
  - Objective evaluation of all relevant evidence, inculpatory and exculpatory
- Prohibits:
  - Credibility determination on basis of status
  - Conflict of interest or bias by investigator/decision-maker/ or informal resolution facilitator

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### Title IX Regulations: Grievance Process

- Requires, con't.
  - Presumption of "not responsible": determination of responsibility made at conclusion
  - Prompt time frames for conclusion, including time for appeals and informal resolution
  - Description of possible disciplinary sanctions and remedies
  - Standard of evidence to be used
  - Grounds for appeal
  - Range of available supportive measures
  - Prohibits use of legally recognized privileged information

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# Title IX

## Notes

### Title IX Regulations

- Response to allegations of sexual harassment
  - General response
    - When actual knowledge
    - Investigate
    - Avoid deliberate indifference
  - Response to formal complaint
    - All of above
    - Comply with grievance process

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### Obligation to Respond

- “Actual knowledge” triggers duty to investigate/respond.
  - When Title IX Coordinator or **any school employee** has notice of sexual harassment or alleged sexual harassment.
  - Notice can be by formal complaint.
  - Notice can be by any source, by any person.
  - However, imputing knowledge based solely on vicarious liability or constructive notice is not actual knowledge.

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### Obligation to Respond

- If “actual knowledge” of sexual harassment, response must be
  - PROMPT
  - NOT DELIBERATELY INDIFFERENT
    - Not clearly unreasonable in light of known circumstances
  - EQUITABLE
    - Treat complainant/respondent equitably
    - Offer supportive measures to both
    - No discipline unless formal grievance process is followed.

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# Title IX

## Notes

### Obligation to Offer Supportive Measures

- Includes individualized non-disciplinary, non-punitive individualized services as appropriate, as reasonably available, and without fee or charge.
- Designed to restore / preserve equal access to the education program or activity without unreasonably burdening the other party.
- Includes measures designed to protect the safety of all parties or the educational environment, or deter sexual harassment

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### Supportive Measures

- Supportive measures may include, but are not limited to:
  - Counseling
  - Course-related adjustments to deadlines
  - Modification of work or class schedules
  - Mutual restrictions on contact between the parties
  - Leaves of absence

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### Supportive Measures

- Supportive measures must be kept confidential to the extent doing so does not impair the ability to provide the supportive measures.
- Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

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# Title IX

## Notes

### Obligation to Respond, con't.

- Title IX coordinator must (with or without a formal complaint):
  - Promptly contact complainant and offer supportive measures
  - Consider complainant's wishes as to type of supportive measures
  - Explain to complainant process to file formal complaint

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### Obligation to Respond, con't.

- Must treat Complainant and Respondent equitably:
  - Offer supportive measures to Respondent.
  - Follow grievance procedure before imposing any disciplinary sanction or other action against respondent that is not a supportive measure.

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### Obligation to Respond, con't.

- Emergency removal of respondent is permitted only after:
  - Individualized safety and risk analysis;
  - Determination that **an immediate threat to physical health/safety** of student or other arising from allegations of sexual harassment justifies removal; and
  - Respondent is given notice and opportunity to challenge decision immediately following removal.
    - NY Education Law regarding student discipline applies.

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# Title IX

## Notes

### Obligation to Respond, con't.

- Administrative leave
  - May place non-student employee respondent on administrative leave during pendency of a grievance process
    - Collective bargaining agreement?
    - Statutory employment rights?

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### Grievance Process

- Formal Grievance Process is required
  - Upon receipt of a written complaint
  - Prior to discipline

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### Formal Complaint

- A written document filed by a complainant OR signed by the Title IX Coordinator alleging sexual harassment and requesting investigation
  - Complainant must be participating in or seeking to participate in education program/activity of District
  - May be filed in person, by mail, e-mail, form on website, etc.

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## Formal Compliant

- Triggers written notice to ALL known parties
  - Of grievance process, including informal resolution process
  - Of allegations, including sufficient details (names, date, location if known) and allowing sufficient time to respond prior to interview
  - That respondent is presumed not responsible; determination made at conclusion
  - Of right to advisor of choice, who may be an attorney
  - Of right to inspect and review evidence
  - That false statements or information may violate code of conduct

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## Implementing the Grievance Process

- Treat Complainant and Respondent equitably.
- Follow the grievance procedure before the imposition of **any** disciplinary sanction or other action that is not a supportive measure
- Provide remedies designed to preserve/restore equal access to program/activity, may include supportive measures
- Require objective evaluation of ALL relevant evidence
  - Inculpatory and exculpatory

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## Implementing the Grievance Process

- Do not make credibility determinations based on person's status, whether complainant, respondent or witness
- Facilitate an informal resolution process
- Be without bias or conflict of interest
- Presume that respondent is not responsible for the alleged conduct until a determination is made at conclusion of grievance process

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### Investigating the Complaint

- Burden of gathering information sufficient to make a determination is on the District, not the parties
- Provide both parties an equal opportunity to present witnesses and evidence
- Do not restrict either party's ability to discuss allegations or gather and present evidence
- Provide same opportunity to have others present during proceedings

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### Investigating the Complaint

- Provide to a party who is expected to attend, written notice of date, time, participants, purpose and location
- Allow sufficient notice to allow party to prepare
- Provide both parties equal opportunity to review all evidence directly related to the allegations, including evidence on which the investigator will not rely, and any exculpatory or inculpatory evidence
- Provide both parties at least 10 days prior to completion of investigation report to respond to evidence
- Allow both parties to respond in writing to evidence

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### Tips for an Effective Investigation

- Conduct Interviews as close in time to allegations as possible, while memory is fresh, and evidence is available.
- Plan the interviews carefully, listing and prioritizing those with knowledge or potential knowledge.
- Prepare a detailed list of questions designed to learn the facts about the allegations.

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## Notes

### Investigating the Complaint

- Tips for an Effective Investigation
  - Interview Complainant first
  - Interview corroborating witnesses
  - Interview Respondent
  - Be sure to interview witnesses with possible exculpatory information
  - Interview witnesses suggested by parties equally
  - Comply with notice requirements

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### Investigating the Complaint

- Tips for an Effective Investigation...
  - Interview witnesses separately
  - Investigate corroborating and exculpatory information
  - Keep interview notes / recording
  - Determine credibility
  - Prepare a timeline / chronology
    - Better analyze testimony
    - Further refine questions
    - Resolve inconsistencies in statements; error or lie

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### Investigating the Complaint

- Tips for an Effective Investigation
  - Gather documents and physical evidence (video, text message screen shots, etc.)
  - Visit the site if relevant
- REMEMBER all evidence is subject to both parties' review; opportunity to use at any hearing

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# Title IX

## Notes

### Investigating the Complaint

- A written investigation report that fairly summarizes the relevant evidence is required.
- Prior to finalizing the report...
  - Provide it to parties / advisors for review and written response
  - Parties / advisors must have at least 10 days before a hearing or determination of responsibility to respond
  - Investigator must consider written response

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### Hearing Requirement

- A live hearing is not required for grades K-12
  - District may allow a hearing for HS students and not others
  - District may allow Title IX Coordinator to determine whether a live hearing is necessary as long as grievance process indicates equitable circumstances justifying a hearing

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### Determining Responsibility

- Decision maker may not be the Title IX Coordinator or the investigator.
- Decision maker must apply specified standard of evidence to relevant facts:
  - Preponderance of the evidence
  - Clear and convincing evidence

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## Notes

### Determining Responsibility

- Decision maker must, **prior to determination**
  - Afford each party the opportunity to submit written relevant questions to be asked of any party or witness;
  - Provide each party with the answers;
  - Allow for limited follow-up questions from each party.

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### Determining Responsibility

- Written Determination is Required
  - Give to both parties simultaneously
  - Identify allegations
  - Describe process followed – interviews, site visits, etc.
  - Make findings of fact supporting disposition
  - State result and rationale, including determination of responsibility

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### Determining Responsibility

- Written notice to both parties...
  - Determine disciplinary sanction
  - Determine remedies to restore equal access
  - Describe appeal process, available to either party
    - Procedural irregularity that affected outcome
    - New evidence not reasonably available before that affects outcome
    - Title IX Coordinator, investigator or decision maker had a conflict of interest or bias for or against any party that affected outcome
    - Other bases determined by District; offered equally

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### Dismissal of Formal Complaint

- **Must** be dismissed for failure to state a claim:
  - If the allegations, even if true, do not constitute sexual harassment;
  - If the allegations, even if true, did not occur in school or at a school related activity or event
- Dismissal does NOT preclude action under another provision of the Code of Conduct

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### Dismissal of Formal Complaint

- **May** be dismissed if, prior to determination,
  - Complainant notifies the Title IX Coordinator in writing that s/he would like to withdraw the Complaint or any of its allegations;
  - Respondent is no longer enrolled or employed by District; or
  - Prevented from obtaining evidence to reach a determination.

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### Dismissal of Formal Complaint

- Written notice of the dismissal and reason(s) must be given to all parties:
  - promptly
  - simultaneously

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### Consolidation of Formal Complaints

- Permitted where the allegations of sexual harassment arise out of the same facts and circumstances
  - Formal complaints against more than one respondent
  - More than one formal complaint against one or more respondents
  - One complainant against one respondent

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### Appeals

- All parties must be provided with an equal opportunity to appeal from:
  - Written determination of responsibility
  - Written decision to dismiss formal complaint, or any allegations contained in formal complaint
- District must set time frames for bringing an appeal and decision on appeal

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### Appeals

- An appeal may be brought on the following grounds:
  - Procedural irregularity that affected the outcome
  - New evidence that was not reasonably available at the time determination was made AND that could affect the outcome
  - Conflict of interest or bias for or against a party that affected the outcome
  - Grounds determined by the District - equally

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# Title IX

## Notes

### Appeals

- District must notify the other party in writing when an appeal is filed
- Implement the appeals process equally
- Decision maker for appeal may not be decision maker in underlying determination, Title IX coordinator or anyone who conducted the investigation

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### Appeals

- Both parties must be afforded a reasonable, equal opportunity to submit written statement in support of or against the appeal
- Decision maker for appeal must issue a written decision describing result and rationale
- Written decision must be provided to parties simultaneously

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### Informal Resolution

- District cannot require parties to participate in informal resolution process
- District may not offer informal resolution process unless a formal complaint is filed
- Parties may participate in informal resolution process at any time prior to a determination of responsibility

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## Informal Resolution

- May be undertaken when the District provides the parties written notice of:
  - The allegations
  - The requirements of informal resolution process
    - Statement of when information resolution process precludes parties from resuming formal complaint arising from the same allegations if all parties agree to a resolution

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## Informal Resolution

- District written notice (con't)
  - That any party has right to withdraw from informal resolution process prior to agreeing to a resolution and may resume grievance process re: formal complaint
  - Inform parties of any consequences resulting from participating in information resolution process including records that will be maintained or could be shared

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## Informal Resolution

- District must obtain voluntary, written consent of each party to participate in informal resolution process
- District may NOT offer or facilitate informal resolution process to resolve allegations that an employee sexually harassed a student

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# Title IX

## Notes

### Record Keeping Required

- Records related to complaints of sexual harassment to be kept for 7 years, including
  - Complaint
  - Decision
  - Audio or visual recording or transcripts
  - Disciplinary sanctions imposed on respondent
  - Remedies provided to complainant to restore or preserve equal access to education or activity

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### Record Keeping Required

- District must keep for 7 years (con't)
  - Any appeal and result of appeal
  - Informal resolution and result thereof
  - All materials used to train Title IX coordinator, investigators, decision makers, and any person who facilitates an informal resolution
    - Training to promote impartial investigations and determinations.
    - Training materials must be on website or if no website available upon request

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### Record Keeping Required

- Must keep records for 7 years of each response to sexual harassment including:
  - Any supportive measures taken
  - Basis for conclusion that response was not deliberately indifferent
  - Documents re: measures taken designed to restore or preserve equal access to education or activity
  - Reasons why supportive measures not provided

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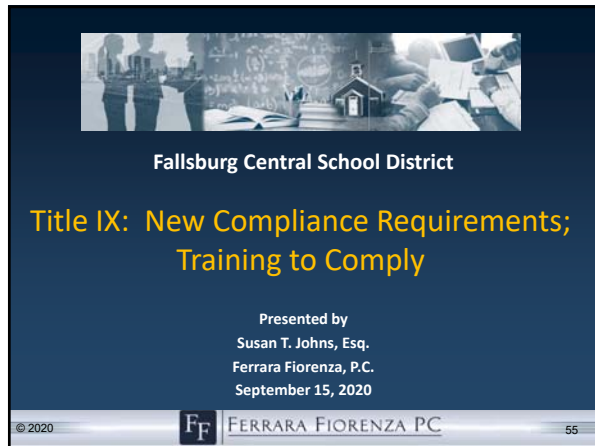
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# Title IX


*Notes*



Fallsburg Central School District

**Title IX: New Compliance Requirements;  
Training to Comply**

Presented by  
Susan T. Johns, Esq.  
Ferrara Fiorenza, P.C.  
September 15, 2020

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This is a presentation slide for Fallsburg Central School District. It features a header image showing people in a classroom setting. The main title is 'Title IX: New Compliance Requirements; Training to Comply'. Below the title, it states 'Presented by Susan T. Johns, Esq., Ferrara Fiorenza, P.C., September 15, 2020'. At the bottom, there is a footer with '© 2020', a logo for Ferrara Fiorenza PC, and the number '55'.

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