

Title IX Compliance: Guidance On New Regulations, Roles and Responsibilities.

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Presentation Objectives

1. Have an understanding of the federal and state regulations and their innerworkings, district policies, district and private liability and legal consequences for non-compliance.
2. Understand the definitions of sexual harassment, misconduct, discrimination and bullying, thus providing the next steps and the level of investigation to be done.
3. Understand the roles and responsibilities of each Title IX compliance position.
4. Have an understanding and tools to conduct a consistent and thorough investigation, including documentation, safeguards and reducing liability for the district.

The Law

- Sexual harassment and hostile environment laws stem from anti-discrimination laws. Anti-discrimination laws come from the three levels of law: Federal, State and Local.

Federal

- Equal Education Opportunities Act of 1974 (EEOA)
- Title VII of the Civil Rights Act of 1964
- Title IX of the Education Amendments of 1972
- Americans with Disabilities Act (ADA)
- Individuals with Disability Education Act (IDEA)

State

- New York State Human Rights Law
- Dignity for all Students Act (DASA)
- If allegations in a formal complaint do not meet the definition of sexual harassment, or did not occur in the school's educational; program or activity, the school must dismiss such allegation for Title IX purposes, but may still address the allegations in any manner the school deems appropriate.

Local

- New York City Human Rights Law
*only applicable in NYC

Title IX – Education Amendments of 1972



Title IX is a federal law prohibiting discrimination on the basis of sex in all education programs and activities operated by recipients of federal funds.

20 U.S.C.A §1681(a):

“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 educational program or activity receiving federal financial assistance...”

Statement of Non-Discrimination

- “Each recipient shall implement specific and continuing steps **to notify** ... students and parents ... **that it does not discriminate on the basis of sex** in the educational program or activity which it operates, and that it is required by Title IX and this part not to discriminate in such a manner.”

34 C.F.R. § 106.9

Title IX Protection Extends To:



- **Elementary Schools**
- **Secondary Schools**
- Colleges & Universities– public or private
- Certain other educational programs & activities

The protection extends to all aspects of these institutions' educational programs and activities.

Title IX prohibits all forms of sex discrimination, including gender based harassment, sexual harassment and sexual violence.

Title IX Requirements

- **May not** exclude from participation in, be denied benefits of, or be subjected to discrimination in academic, extracurricular, research, occupational training, or other educational program or activity on basis of sex
- **May** provide separate toilet, locker room, shower facilities as long as comparable
- **May not** provide programs separately, except:
 - Contact sports
 - Ability grouping in PE classes
 - Human sexuality classes
 - Choruses
- **May** provide single-sex classes or extra-curricular activities under certain conditions

Title IX Requirements

- **May not** discriminate on the basis of sex in counseling or guidance of students
- **May not** exclude students on basis of pregnancy, childbirth, etc. unless student voluntarily participates in separate program
- **May not** exclude students from athletics or provide athletics separately on basis of sex (except where selection based on competitive skill, or, activity is a contact sport)
- **Must** provide “equal athletic opportunity” for members of both sexes

Equal Access to Athletics

- Title IX ensures that female students receive equal opportunity to participate in athletic programs and equal resources such as facilities, coaching and equipment.

Scope of Title IX

Within your District, Title IX covers:

- Recruitment
- Admissions
- Access to Courses or Programs
 - Includes Physical Education
- Counseling
- Student Rules and Policies

Scope, cont.

- Financial Assistance
- Athletics
- Extra-Curricular Activities
- Employment Practices
- Sexual Harassment of Students and Employees
- Treatment of Pregnant and Parenting Students

Title IX Cont.

- Title IX of the Education Amendments of 1972 – says nothing about sexual harassment.
- In the 1980s, federal courts held that sexual harassment constitutes a form of sex discrimination under Title VII of the Civil Rights Act, and they began to establish liability rules for employers.

Title IX Cont.

- In the 1990s, the Supreme Court applied similar rules to schools under Title IX in two key Title IX decisions: *Gebster v. Lago Vista Independent School District and Davis v. Monroe County Board of Education*.
- The justices held that any school receiving federal money can be held liable for sexual harassment of students by their teachers or peers only if it (1) had “actual knowledge” of the misconduct and (2) responded with “deliberate indifference.” Moreover, the misconduct in question must be, “so severe, persistent **and** objectively offensive that it effectively bars the victim’s access to educational opportunity.”
- NOTE: the Supreme Court’s interpretation of Title IX was a **narrower** judicial interpretation of Title VII of the Civil Rights Act and previous administrative interpretations of Title IX.

- The Department of Education's Office for Civil Rights (OCR) enforces, among other statutes, Title IX of the Education Amendments of 1972 and issued guidance documents post *Gebster* and *Davis*.
- In January 2001, OCR rejected the SC framework and instituted more demanding requirements on educational institutions. In 2011, OCR issued a lengthy, "dear colleague letter" (DCL) spelling out many measures schools must institute to "end any harassment, eliminate a hostile environment if it has been created, and prevent harassment from occurring again."

OCR Cont.

- In 2014, OCR followed up with a more detailed guidance to combat sexual harassment on campuses, including elementary and secondary institutions. OCR's new policy required schools to use the lenient "preponderance of the evidence" standard (50% plus a feather) in disciplinary hearings and discouraged live hearings and cross-examinations. OCR encouraged schools to employ a "single investigator" model, giving one person appointed by the school's Title IX coordinator authority to investigate alleged misconduct as well as to determine guilt and innocence.
- OCR expected schools to "encourage students to report sexual harassment early, before such conduct becomes severe **OR** pervasive..."

2020 Amendments to Title IX

- The new approach to Title IX by the Trump administration was to return to the original framework established by the Supreme Court in 1998 and 1999, with the focus on schools' responsibility to address particular cases of serious sexual misconduct.
- Unlike previous OCR guidelines included in ambiguous and mixed legally binding requirements and “best practices” suggestions, the new rules are unambiguously legally binding – they establish what educational institutions **must** do and **cannot** do – not what might be a good idea.

Implementing Established Guidelines

- Schools have a duty to provide a safe learning environment. To do this, Title IX outlines that they must:
- **Prevent and train:** Schools must provide appropriate training and instruction to all school employees and students with respect to issues that surround illegal harassment and bullying, including creating and dissemination of an understandable policy to all.
- **Investigate:** Establish and implement appropriate complaint and investigation procedures for employees and students to ensure that complaints receive an immediate, appropriate, adequate, and comprehensive response.
- **Remedy:** Provide appropriate and adequate remedial measures and follow-through to prevent continued inappropriate behaviors, prevent retaliation, and to address supportive measures.
- **Monitor:** Promote a bullying and harassment-free school environment through continued monitoring and appropriate corrective measures of inappropriate behaviors.

Title IX Team

- The 2020 Amended Title IX Regulations state that a Title IX Coordinator shall be supported by their team including–
 - Investigators;
 - Decision makers;
 - Appeal officers;
 - Informal resolution process facilitators;
- who are impartial, unbiased, and free from conflicts.

Role of the Complaint Manager

- The complaint manager is simply the person at the school site designated and publicized as the person to receive harassment and bullying complaints.
- Generally the school principal in K-12 settings.
- The complaint manager may receive concerns and/or complaints directly from students or may receive reports from teachers, counselors, parents and other third parties to whom the student has complained or who have personally observed the conduct.
- Many problems arise at the complaint level due to lack of training, failure to investigate properly, use of standard staff or student discipline and lack of communication and/or record keeping.

Title IX Coordinator's Responsibilities



The Title IX Coordinator, is an administrator with wide ranging responsibilities that include:

- Provide district wide oversight and assurance of compliance;
- Prevent and remediate all sex/gender-based discrimination and harassment;
- Conduct school visits to review policies, publications, grievance procedure and hiring process for compliance with Title IX and the harassment and anti-bullying policy;
- Be accessible to students, educators, staff, and community members to answer questions about harassment and bullying and file a complaint;
- Coordinate to provide for Title IX and anti-harassment and bullying training for students, staff, educators and board members;
- Coordinate training for investigators, decision-makers, appeals decision makers, and informal resolution facilitators;
- Be the primary contact for government inquiries;
- Stay current on the latest developments, laws, and regulation.
- Districts should designate 2 Title IX Coordinators, as to prevent a potential appeal issue of bias or conflict of interest.

Responsibilities Con't.



- Conduct intake meeting with complainant;
- Offer supportive measures to complainant and respondent;
- Explain the grievance process, accept formal complaints, and determine mandatory dismissal;
- Evaluate for emergency removal (based on threat of physical health or safety concerns), provide notice, and opportunity for respondent to challenge decision;
- Assign unbiased investigator;
- Send notices of allegations;
- Review investigative reports, written decision, and appeal decision (not determining guilt/innocence);
- Draft outcome letter after decision is issued;
- Ensure remedies, sanctions and overall corrective plan;
- Ensure proper record keeping (all records retained for at least 7 years)

Grievance Procedure

Official adoption and publication of procedures providing prompt and equitable resolution of student and employee complaints related to Title IX is required.

The Grievance Procedure should be published in the same locations as the Statement of Non-discrimination.

Title IX Coordinator Investigates

- Title IX Coordinator may investigate when needed or act as a facilitator of an informal resolution process but may NOT make decisions about responsibility, determine sanctions or rule on appeal.

Investigator

- The role of an investigator is to conduct a fair and impartial investigation of an alleged misconduct.
- The investigator may work with the Title IX Coordinator to develop a strategy for the investigation.
- The investigator does NOT decide the guilt or innocence of the respondent.

Investigator Responsibilities

- Meet with Title IX Coordinator regarding intake information of complaint;
- Gathers, reviews and weighs evidence;
- Meet and interview complainant, respondent and identify any witnesses;
- Assess relevant information and credibility of parties;
- Maintain accurate and thorough investigation records and notes;
- Creates and investigative report summarizing evidence.

Investigation

- Who?
- What?
- Where?
- When?
- Why?
- How?
- Impact?
- Next Steps – Supportive Measures?

Decision Maker

- Role is to determine whether district policy has been violated based on the **standard of evidence**.
- Makes determination based on the investigation report and may hold an optional hearing with cross-examination.
- Create a written determination with findings of fact, conclusions and rationale for the results to each allegation in the complaint.
- If appropriate, recommend disciplinary action and remedies if policy violation found.

Prohibited Cross-Examination



- The amended Title IX provides rape shield protections for complainants (as to all recipients whether postsecondary institutions, K-12 schools, or others), deeming irrelevant questions and evidence about a complainant's prior sexual behavior unless offered to prove that someone other than the respondent committed the alleged misconduct or offered to prove consent.

Appeal Officer

- Makes a determination on a party's request for an appeal.
- Provides written notice of right to appeal to both parties based on three grounds for appeal;
- a school must offer both parties an appeal from a determination regarding responsibility, and from a school's dismissal of a formal complaint or any allegations therein, on the following bases:
 - 1) procedural irregularity that affected the outcome of the matter, 2) newly discovered evidence that could affect the outcome of the matter, 3) and/or Title IX personnel had a conflict of interest or bias, that affected the outcome of the matter.
- – A school may offer an appeal equally to both parties on additional bases.

Retaliation

- Amended Title IX expressly prohibits retaliation.
- Charging an individual with code of conduct violations that do not involve sexual harassment but arise out of the same facts or circumstances as a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX constitutes retaliation.
- The school must keep confidential the identity of complainants, respondents, and witnesses, except as may be permitted by FERPA, as required by law, or as necessary to carry out a Title IX proceeding.
- Complaints alleging retaliation may be filed according to a school's prompt and equitable grievance procedures.
- The exercise of rights protected under the First Amendment does not constitute retaliation.
- Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a Title IX grievance proceeding does not constitute retaliation; however, a determination regarding responsibility, alone, is not sufficient to conclude that any party made a bad faith materially false statement.

KF and AF v. Monroe Woodbury Central School District, 13-516-cv (2d Cir. 2013)

Student must prove that the District was:

- 1) Deliberately indifferent
- 2) To sexual harassment
- 3) Of which it had actual knowledge
- 4) That was so severe, pervasive, and objectively unreasonable that it deprived the victim of access to school benefits.

Recent Cases – cont.

Lawrence (NY) Union Free School District, 02-09-1203
(OCR, 2012)

Districts must ensure that they provide equal opportunities for male and female student-athletes where facilities, coaching, access to competitive events, and other factors are concerned.

Cases: Sexual Harassment



- *Doe v. Georgetown County Sch. Distr.* (D.S.C. 2015)
 - Cheerleading coach teasing re: player's "saggy boobs" inappropriate but not Title IX violation
 - No deliberate indifference b/c district investigated, reprimanded coach, and suspended her for two weeks
- *Hankey v. Town of Concord-Carlisle* (D. Mass. 2015)
 - Pervasive bullying that included keying a word referencing her genitalia on her car was not harassment "because of sex" under Title IX
 - Over a year of "gender-neutral bullying and threats"
 - Didn't reach indifference part of the standard

Cases: Sexual Harassment



- *Jenkins v. University of Minnesota* (D. Minn. 2015)
 - University was not deliberately indifferent to allegations of sexual harassment by scientist collaborating with school
 - Investigated, changed student's work assignment, altered office location, and attended meetings between them
 - Title VII (hostile work environment) claim continued
 - Burden on school to prove it exercised reasonable care to prevent/address the harassment and that (her resignation within a week of filing complaint) the plaintiff unreasonably failed to take advantage of preventive/corrective measures adopted by school

Cases: Sexual Harassment



- *Doe v. Springfield-Clark Career Tech. Ctr.*
(S.D. Ohio 2015)
 - Potential Title IX claim by plaintiff alleging seduction by culinary arts professor
 - Claimed prior notice of inappropriate touching and comments
 - College investigated; responded with some monitoring, but did not remove him or limit contact with students
 - Trial needed to determine how much college knew beforehand and whether acts were indifferent

Cases: Sexual Assault

- *Butters v. James Madison Univ.* (W.D. Va. 2015)
 - Spring break sexual assault captured, in part, on cell video that was later shared led court to agree that university was deliberately indifferent to request to redress
- *Takla v. Regents of the Univ. of CA* (C.D. Ca 2015)
 - Claims of sexual harassment by history professor survived motion to dismiss; overly emphasizing whether further harassment occurred to measure UCLA's responsiveness penalizes the victim taking steps to avoid the environment/harasser.

Retaliation

- *Meyer v. University of Iowa* (Polk County, 2015)
 - Former Sr. Assoc. AD sued b/c of alleged retaliatory demotion after she challenged coach's (her partner) termination
 - Day after submitting complaint about discrimination against female coaches and other women in the athletics dep't, she was reassigned a job in facilities
 - Alleged conflict if coach sued Dep't
 - Claims include sex discrimination (passed over for promotion), unequal pay (vs males), etc.
 - OCR investigating whether coach's termination violates Title IX

Transgender

- *Township High School Distr. 211* (Illinois, 2015)
 - Transgender girl supported at school: records identify her as female; staff/students use her preferred name and female pronoun; access to girls' restrooms and plays on girls' athletic teams
 - **Issue:** prohibited from using girls' locker rooms to change even though student will use restroom stall (private space)
 - School offered separate changing area adjacent to girls' locker room
 - OCR: excluding student from girls' locker room impairs her educational opportunities on the basis of sex in violation of Title IX
 - 30 days to agree (early December) or formal enforcement action

Transgender

- OCR has other resolution agreements with schools
 - Transgender students should be treated consistent with their gender identity, including bathrooms and locker rooms
- Illinois case unique: narrow issue related to locker rooms

Cases: Special Education



- *Preston v. Hilton Cent. Sch. Distr.* (W.D.N.Y. 2012).
 - Male high school student with Asperger Syndrome harassed and bullied by peers
 - No harassment on the basis of his gender; no indication that the perpetrators exhibited an anti-male bias
 - No overt sexually harassing conduct
 - Together, no harassment because of his male gender
 - ADA and Section 504 claims sufficient; allegations that the district failed to investigate harassment by peers, because of his disability, may qualify as “deliberate indifference”
 - Even if the district’s failure to do so was not motivated by discriminatory animus

Cases: Special Education

- *Swanger v. Warrior Run Sch. Distr.* (M.D. Pa. 2015)
 - No liability for sexual assault by male SPED student despite prior incident
 - Prior: male student asked female classmate if he could touch her. No touching occurred.
 - District put student through enhanced supervision and separated him from the female student he had propositioned
 - Not deliberately indifferent

- St. Joe's University (May 2015)
 - University suspended softball team with three games left in the season as a result of hazing reports
 - Lawsuit followed: victim of sexual harassment (as part of hazing) that school knew about and failed to properly respond
 - Prior hazing could be notice
 - Can't rely on alcohol pressure and non-sexual nicknames no matter how inappropriate
 - Will have to show more was required, beyond ending season
 - This and another lawsuit were settled (by September 2015)

Social Media

- OCR to investigate University of Mary Washington (VA) based on accusations that the school allowed a sexually hostile environment to occur by failing to confront online harassment; also alleged retaliation against students for complaining.
- Identify and discipline perpetrators; create technological barriers to their use

Questions