

Title IX and K-12

Where Are We & Where Are We Going?

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Title IX

Title IX of the Education Amendments of 1972 prohibits discrimination based on sex in education programs and activities that receive federal financial assistance.

- ***“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.”***
 - “ Person” = students, faculty, and staff;
 - Applies when (1) excluded from participation in, (2) denied the benefits of, or (3) subjected to discrimination.

Examples: sexual harassment, the failure to provide equal opportunity in athletics, enrollment, and discrimination based on pregnancy.

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Title IX and Athletics

As it concerns athletics specifically, Title IX requires:

- Equal athletic financial aid, 34 CFR § 106.37(c);
- Equal opportunity and benefits, 34 CFR § 106.41(c);
- Equal participation opportunities, 34 CFR § 106.41(a) and (c)(1).

Financial Aid

- Universities must provide reasonable opportunities for athletic scholarships or grants-in-aid for members of each sex “in proportion to the number of students of each sex participating in interscholastic or in collegiate athletics.”
- Proportion relates to athletes only.
- Not particularly at issue for K-12 publics.

Opportunities & Benefits

Equal opportunity and benefits, 34 CFR § 106.41(c): Equal athletic opportunity must be provided to each gender, which shall consider the following factors:

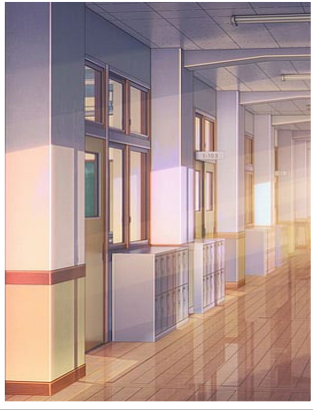
- (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- (2) The provision of equipment and supplies;
- (3) Scheduling of games and practice time;
- (4) Travel and per diem allowance;
- (5) Opportunity to receive coaching and academic tutoring;
- (6) Assignment and compensation of coaches and tutors;
- (7) Provision of locker rooms, practice and competitive facilities;
- (8) Provision of medical and training facilities and services;
- (9) Provision of housing and dining facilities and services; and
- (10) Publicity.

Participation Opportunities

Equal participation opportunities, 34 CFR § 106.41(a) and (c)(1): The Department of Education's Office for Civil Rights has created a three-prong test for assessing equity in athletic opportunity. If the school can satisfy any of the three prongs, there is typically no Title IX violation. These 3 prongs include:

- Prong 1 – Proportionality. This prong of the test looks to see if the school's athletics programs have a number of male and female student-athletes that is proportional to their overall representation in the full-time undergraduate student body. Although none of the Title IX sources of law establish a strict statistical test for how close is close enough, the OCR and courts have accepted a difference of less than five percent as being potentially within the “safe harbor” of proportionality, but typically it is closer to the 1-3% range.

Participation Opportunities



Institution A is a university with a total of 600 athletes. While women make up 52 percent of the university's enrollment, they only represent 47 percent of its athletes. If the university provided women with 52 percent of athletic opportunities, approximately 62 additional women would be able to participate. Because this is a significant number of unaccommodated women, it is likely that a viable sport could be added. If so, Institution A has not met part one.



Institution B women also make up 52 percent of the university's enrollment and represent 47 percent of Institution B's athletes. Institution B's athletic program consists of only 60 participants. If the University provided women with 52 percent of athletic opportunities, approximately 6 additional women would be able to participate. Since 6 participants are unlikely to support a viable team, Institution B would meet part one.

Participation Opportunities

- In 2022, the Sixth Circuit held that proportionality requires a review of the “*number* of participation opportunities, not the gap as a percentage of the athletic program.” *Balow v. Michigan State University*, No. 21-1183, CA 6 (February 1, 2022).
 - In *Balow*, the Sixth Circuit stated it did not understand the 1996 Clarification to provide any kind of “safe harbor” at 2% or any other percentage.
 - Instead, the Court considered the gap in the context of the size of a viable team. That is, if a gap is larger than the size of the “smallest viable team” that could be created – a school cannot show substantial proportionality.

Participation Opportunities

- Prong 2 - If a school can show that it is working to expand female athletics programs, it can be seen as complying with Title IX. As long as the expansion is in line with the interest female students have shown in joining athletics programs, the school can meet Title IX's requirements even if it does not have substantial proportionality.
- A history of expansion typically looks back about three to five years (though it can be longer). However, if the school is considering the elimination of a sport for women, it cannot rely upon Prong 2.

Participation Opportunities

- Prong 3 - Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, Prong 3 requires the institution to demonstrate that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.
- School must do its part to seek input so it can show there is not enough interest to add more teams or balance athletics opportunities. This interest may consider the current student body, as well as the regional area, high school participation in athletics, and available competition and interest at other institutions in the area (i.e., other institutions which sponsor a specific sport). A consultant would be required in assessing athletics programming under Prong 3
- As set forth in a 1979 Policy Interpretation issued by the Department of Education's Office of Civil Rights, Compliance with this requirement will also be assessed by examining the following two factors:
 - (1) Whether the competitive schedules for men's and women's teams, on a program-wide basis, afford proportionally similar numbers of male and female athletes equivalently advanced competitive opportunities; or
 - (2) Whether the institution can demonstrate a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged

Communities for Equity v. MHSAA

- In this sex discrimination case, high school girls in Michigan filed a complaint alleging that the Michigan High School Athletic Association (MHSAA) violated Title IX and the Equal Protection Clause of the Fourteenth Amendment.
- MHSAA allegedly refused to sanction additional sports for high school girls, provided inferior practice and playing facilities for post-season tournaments held in certain girls' sports, and required girls to play certain sports in disadvantageous seasons.
- This last contention allegedly reduced participation opportunities for high school girls.
- Parties participated in mediation which resulted in a settlement of all claims except for the issue of playing seasons.

Communities for Equity v. MHSAA

- The court conducted a bench trial in September 2001 concerning whether MHSAA's scheduling of only girls' sports in disadvantageous seasons violated Title IX and the Equal Protection Clause.
- Ruling in favor of Plaintiffs.
- Sixth Circuit affirmed.
- The court ordered MHSAA to submit a compliance plan to remedy the discriminatory scheduling of girls' sports.
 - Court issued a ruling requiring MHSAA to switch girls' basketball and volleyball to their traditional, advantageous seasons of the winter and fall respectively.
 - The Court ultimately approved the rest of MHSAA's remedial plan, finding that the switching of the remaining sports at issue (soccer, golf, tennis, swimming, and diving) balanced the inequity of nontraditional playing seasons amongst high school boys and girls in Michigan.

Where is Title IX Going in Athletics?

- April 6, 2023, the Department of Education Office for Civil Rights (“OCR”) issued a Notice of Proposed Rulemaking relating to Title IX.
- The proposal would amend the Title IX athletics regulation, 34 CFR § 106.41, and prohibit schools from categorically banning transgender students from sports teams that correspond to their respective gender identity, as opposed to their assigned birth sex (subject to certain exceptions).

Where is Title IX Going in Athletics?

- For **elementary school students**, students should be able to join sports teams consistent with their gender identity, explaining that it would be difficult for a school to justify excluding students consistent with their gender identity.
- For **high school and college students**, sex-related criteria limiting transgender students from participating on teams consistent with their gender identity can be permissible, but only when the school can show the purpose of the limitation is “substantially related” to an “important educational objective” (such as fairness in athletic competition) and that it is designed to “minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.”
- According to OCR, sex-related criteria would unlawfully “deny” students’ eligibility to participate consistent with gender identity if they flatly bar students’ opportunity to participate on male or female teams consistent with their gender identity.
- A one-size-fits-all approach relies on inappropriate generalizations that do not account for the nature of particular sports, the level of competition at issue, and the grade or education level of students to which they apply.

Where is Title IX Going in Athletics?

- **Example**: a policy that excludes transgender women and girls from women's sports entirely, without a valid interest, would be deemed improper.
- A policy based on fairness in competition would constitute an important educational objective justifying sex-related criteria—such as a policy excluding boys from girls' high school volleyball teams to preserve participation opportunities for girls.

Title IX & Sexual Harassment

In 2020, OCR released a final rule implementing a process for Title IX investigations within schools.

The Definition of “Sexual Harassment”

The final rule clarifies that sexual harassment shall include (i) any incident of sexual assault, dating violence, domestic violence, and stalking as defined under federal law, including the Clery Act and the Violence Against Women Act; (ii) quid pro quo harassment perpetrated by an educational institution’s employee; and (iii) all other forms of sexual harassment, where the conduct is “so severe, pervasive, and objectively offensive” that it denies the victim equal access to education, as set forth by the Supreme Court in *Davis v. Monroe County Board of Education*.

Important Definitions

Title IX Sexual Harassment means conduct **on the basis** of sex that satisfies one or more of the following:

1. An employee of the school conditioning a provision of aid, benefit, or service of the school on an individual's participation in unwelcome sexual conduct.
2. Unwelcome conduct that is so severe, pervasive, **and** objectively offensive that it effectively denies a person equal access to the school's education, program, or activity as determined by a reasonable person standard.
3. Other "sexual offenses" defined by statute.

Retaliation: intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX or 34 C.F.R. Part 106 constitutes **retaliation**.

Important Definitions

- Title IX, **fondling** means the touching of the private body parts of another person for the purpose of sexual gratification without consent.
- **Non-consensual sexual penetration** means non-consensual penetration or attempted penetration of a genital, anal, or oral opening of another person by use of an object, instrument, digit, or other body part. An “object” or “instrument” means anything other than a respondent’s genitalia or other body part. This includes forcing an individual to use an object, instrument, or digit to penetrate another individual as well as oral penetration by a sex organ of another person.
- **Incest** means sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by state law.
- **Statutory rape** means sexual intercourse, where there is no force or coercion, with a person who is under the statutory age of consent under state law.

Important Definitions

- **Dating violence** means assault or assault and battery committed by a person: (1) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (2) where the existence of such a relationship shall be determined based on a consideration of the following factors: (i) The length of the relationship. (ii) The type of relationship. (iii) The frequency of interaction between the persons involved in the relationship.
- **Stalking** means engaging in a course of conduct directed at a specific person that would cause a reasonable person to: (1) fear for their safety or the safety of others; or (2) suffer substantial emotional distress.

Program or Activity

- Title IX contains broad definitions of an educational institution’s “program or activity.”
- The final rule states that an education program or activity includes locations, events, or circumstances over which the institution exercises substantial control over the parties and the context in which the sexual harassment occurred.
- This includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution (such as a fraternity or sorority house).
- Notably, Title IX only provides protection against sexual harassment that occurs in the United States. A covered entity may also address sexual harassment affecting its students or employees that falls outside Title IX’s reach in any manner the entity chooses, including providing supportive measures or pursuing discipline.

Actual Notice

- Educational institutions must respond promptly upon receiving actual notice of sexual harassment or an allegation of sexual harassment.
- Notice can be provided by **any** individual.
- A K-12 institution shall be deemed to have actual notice once any employee has notice.
- Upon receiving notice of an allegation of sexual harassment, educational institutions must respond promptly and in a manner that is not “deliberately indifferent,” i.e. in a manner that is not clearly unreasonable in light of the known circumstances. At a minimum, the Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures, with or without filing a formal complaint, and to explain the process for filing a formal complaint. A formal complaint is defined as a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the institution investigate the allegations.
- Where allegations do not meet the definition of Title IX sexual harassment or when an incident did not occur within the institution’s program or activity, the institution is required to dismiss the allegations for Title IX purposes; but it may still address allegations in any manner the institution deems appropriate under its code of conduct or policies.

Investigation Process

- Institutions must designate a Title IX Coordinator, post a non-discrimination policy and reporting procedures on its website, and post the Title IX Coordinator's contact information prominently on its website to ensure accessible channels for reporting sex discrimination (including sexual harassment) at any time.
- Individuals involved with process: Coordinator; Investigator; Decision Maker. You need **THREE** people.

Supportive Measures?

Educational institutions must offer free supportive measures for any complainant or respondent, even where the complainant does not wish to initiate or participate in a formal grievance process.

- These services must be non-punitive, non-disciplinary, and not unreasonably burdensome to the other party, but are designed to ensure equal educational access, protect safety, or deter sexual harassment.
- Some examples include counseling, extensions of course-related deadlines, modification to work or class schedules, campus escort services, restrictions on contact between the parties, and other similar measures.

Grievance Process

- Complaint is needed – Claimant or Title IX Coordinator
- All parties get written notice of the allegations, an opportunity to select an advisor, and an opportunity to submit and review evidence throughout the investigation.
- Provide parties at least 10 days to inspect, review, and respond to all evidence directly related to report.
- Utilize trained Title IX personnel.
- Create an investigative report that summarizes the relevant evidence.
- Provide parties at least 10 days to review and provide a written response to the investigative report.
- Apply a presumption of innocence on the respondent during the grievance process and utilize either a preponderance of the evidence or a clear and convincing evidence standard in making findings. The institution must use the same standard for all formal complaints of sexual harassment.

Grievance Process

- Keep the burden of proof and the burden of gathering evidence on the institution, not the parties.
- Ensure the investigator is a different person than the final decision maker in a formal complaint.
- Prohibit any inappropriate questioning about prior sexual history and protect the privacy of a party's medical, psychological, or similar treatment records.
- Provide a written determination with an analysis as to how the conclusion was reached.
- Offer an opportunity to appeal a final determination. An appeal can be filed on the following bases: procedural irregularity, newly discovered evidence, and/or bias of the Title IX personnel that affected or could affect the outcome of the matter. A covered entity may also add other rights to appeal, so long as the other bases are available to all parties.
- Provide protection from retaliation for any individual that participates in a Title IX grievance process.

Dismissal

- Covered entities **may**, in their discretion, dismiss a formal complaint or allegations therein if:
 - The complainant informs the Title IX Coordinator in writing that the complainant desires to withdraw the formal complaint or allegations therein
 - The respondent is no longer enrolled or employed by the institution, or if specific circumstances prevent the institution from gathering evidence sufficient to reach a determination as to the formal complaint.
- Covered entities **must** dismiss is:
 - Conduct alleged would not constitute sexual harassment under Title IX if proved
 - Did not occur as part of an education program or activity
 - Did not occur in the United States
 - Dismissal does not preclude the institution from taking action under its code of conduct or policies.

Dismissal

- Informal Measures may be used to resolve complaints as follows:
 - Parties' voluntary, informed, written consent.
 - Waiver of the right to a formal investigation or adjudication of a formal complaint of sexual harassment as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, is prohibited.
 - **Informal resolution is not available to resolve allegations where an employee sexually harassed a student.**

Training and Posting

- All personnel involved in investigations must be trained.
- We recommend providing training to all staff.
- Training must include:
 - Definition of sexual harassment;
 - Scope of the institution's education program or activity;
 - How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable; and
 - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

Training and Posting

- Both decision-makers and investigators must be trained on issues of relevance, including how to apply the “rape shield” protections provided to complainants.
- Additionally, decision-makers must receive training on any technology that will be used at a live hearing.
- 2020 regulations make clear that any materials used to train Title IX personnel cannot rely on sex stereotypes and must promote impartial investigations.
- Posting:
 - Title IX Coordinator and Contact Information;
 - Type and form of Training used; and
 - Title IX Policy.

What's Next? Unknown - But Soon!

- The Biden Administration Issued a New Proposed Rule; Receiving over 200,000 comments, in June of 2022.
- Rule reportedly to be issued in May 2023 and will require adjustment to policy surrounding this area!

What's Next? Unknown - But Soon!

Intent behind the rule (without going into detail) included the following objectives

- Clearly protect students and employees from all forms of sex discrimination The Department's proposed regulations clarify that Title IX's prohibition of discrimination based on sex includes protections against discrimination based on sex stereotypes and pregnancy. The Department is also clarifying that Title IX's protections against discrimination based on sex apply to sexual orientation and gender identity.
- Protect the right of parents and guardians to support their elementary and secondary school children.
- Protect students and employees who are pregnant or have pregnancy-related conditions.
- The current regulations' requirements cover only formal complaints of sexual harassment. The proposed regulations would keep as much of the current regulations as possible to ensure consistency for schools and would update procedures to fill gaps and work more effectively in protecting against sex discrimination in the nation's K-12 schools and postsecondary institutions.
- Protect LGBTQI+ students from discrimination based on sexual orientation, gender identity, and sex characteristics. The proposed regulations would clarify that Title IX's prohibition on discrimination based on sex applies to discrimination based on sexual orientation and gender identity.

What's Next? Unknown - But Soon!

- Require schools to provide supportive measures to students and employees affected by conduct that may constitute sex discrimination, including students who have brought complaints or been accused of sex-based harassment. The current regulations require this support only when sexual harassment, rather than any form of sex discrimination, might have occurred.
- Clarify and confirm protection from retaliation for students, employees, and others who exercise their Title IX rights.
- To be effective in implementing Title IX, a school's grievance procedures for sex discrimination complaints must adapt to the age, maturity, needs, and level of independence of students in various educational settings, and the particular contexts of employees and third parties. Based on this reality, the Department's proposed regulations would include a framework that accounts for these differences, including requirements that apply in all settings and specialized requirements that are tailored to the unique situation of sex-based harassment complaints involving postsecondary students.

Exposure



Governmental Exposure

- Loss of Federal Funding
- Investigation and Review by Governmental Entity
- Unknown Publicity Damage

Litigation Exposure

- Individual Action
- Class Action
- Deliberate Indifference, Retaliation, and Heightened Risk Claims
- Athletic Claims
- Damages (sometimes), attorneys' fees

Emerging Caselaw

Cummings v. Premier Rehab Keller, P.L.L.C.

- Certain antidiscrimination statutes enacted under the Spending Clause are silent as to available remedies and therefore, a federal funding recipient is only on notice of potential penalties for a violation of statute if: (1) the statute explicitly includes the remedies available for a violation or (2) the remedy requested is generally available in a breach of contract lawsuit.
- Emotional distress damages are not generally available when applying general principles of contract law, thus recipients of federal funds are not on “clear notice” regarding such potential liability.
- Unless the statute at issue specifically provides for emotional distress damages, a plaintiff is foreclosed from seeking such relief from a recipient of federal funds concerning any statute enacted under the Spending Clause, including the Rehabilitation Act, the ACA, Title VI, and Title IX.

Emerging Caselaw

Wamer v. Univ. of Toledo

- The standard for liability in Title IX cases remains “actual knowledge” by the institution to alleged harassment of which it had actual notice.
- In cases involving student-on-student harassment, proof of deliberate indifference continues to require a showing that after the plaintiff’s complaint, the institution’s failure to respond proximately caused or allowed additional acts of harassment to occur.
- Now, when the alleged harasser is faculty or an administrator, the institution may be found to have acted with deliberate indifference even where no additional harassment occurred if “an objectively reasonable fear of further harassment caused the [student] to take specific reasonable actions to avoid harassment, which deprived the [student] of the educational opportunities available to other students.”

Emerging Caselaw

Snyder Hill et al. v. Ohio State University

The Sixth Circuit Court of Appeals reversed the dismissal of a Title IX action initiated by several individuals who claimed they were abused by a physician at the Ohio State University between 1978 and 1998. Although the University claimed that the claims fell well beyond the statute of limitations (which in Ohio was two years and which in Michigan is three years), the Plaintiffs countered that they could not have known the University injured them until 2018, when knowledge of the abuse became public.

First, there was no dispute that the alleged physical abuse of young men by the University doctor occurred between 1978 and 1998. Nevertheless, the court reasoned that Title IX pertains to an institution, not merely an individual, causing injury. Because Ohio State allegedly actively concealed the physician's abuse, and knowledge of the University's alleged actions did not become known until 2018, the court determined that the two-year window to file suit did not begin until 2018. As a result, public educational institutions that have allegedly suppressed Title IX violations may find themselves open to exposure, even if the alleged violations occurred decades ago.

Emerging Caselaw

Snyder Hill et al. v. Ohio State University

Second, some of the Plaintiffs were neither students nor employees. Still, the court allowed their claims to proceed. According to the court, a non-student, non-employee may bring a Title IX claim if they were discriminated against while participating, or at least attempting to participate, in the education program or activity. Such individuals may, for example, be accessing school libraries, computer labs, and vocational resources, or attending campus tours, public lectures, sporting events, and other activities at educational institutions.

This decision significantly expands potential exposure for Michigan's public educational entities, but it is pending appeal.



Questions?



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