



Back to School Legal Workshop Title IX 2021: What's New?

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Title IX Law



A federal statute that prohibits discrimination:

- ✓ On the basis of sex
- ✓ In education programs and activities
- ✓ Receiving 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."

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Recent Title IX History: "On the basis of Sex"



- On Feb. 22, 2017, the U.S. Department of Justice (DOJ) and U.S. Department of Education Office of Civil Rights (OCR) issued a joint "Dear Colleague Letter" **rescinding** the Obama administration's joint guidance, which said that school districts should allow transgender students to use sex-segregated restrooms and locker rooms based on gender identity.
- The Letter reiterated that Title IX protects LGBTQI+ students from bullying and harassment. "[T]his withdrawal of these guidance documents does not leave students without protections from discrimination, bullying, or harassment," it asserted.

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Title IX 2021: "On the basis of Sex"



Federal Executive Order on Preventing and Combating Discrimination based on Gender Identity or Sexual Orientation (January 20, 2021)

- Makes the policy statement that all persons should receive equal treatment under the law without regard to their gender identity or sexual orientation.
- "Children should be able to learn without worrying about whether they will be denied access to the restroom, locker room or school sports."
- Laws that prohibit discrimination based on sex, e.g., Title IX, along with their implementing regulations, cover discrimination based on gender identity and sexual orientation.

Title IX 2021 : OCR Interpretation (June 22)



- Clarifies OCR's enforcement authority over discrimination based on sexual orientation and discrimination based on gender identity under Title IX.
- Interpretation will guide OCR in processing complaints and conducting investigations.
- OCR will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities that receive federal financial assistance

Title IX: OCR Interpretation (Cont.)



OCR will investigate

"allegations of individuals being harassed, disciplined in a discriminatory manner, excluded from, denied equal access to, or subjected to sex stereotyping in academic or extracurricular opportunities and other education programs or activities, denied the benefits of such programs or activities, or otherwise treated differently because of their sexual orientation or gender identity."

Title IX 2021: Resource for LGBTQI+ Students



Examples of the kinds of incidents...OCR can investigate:

- "A lesbian high school student wants to bring her girlfriend to a school social event where students can bring a date. Teachers refuse to sell her tickets, telling the student that bringing a girl as a date is 'not appropriate for school.' Teachers suggest that the student attend alone or bring a boy."
- "On her way to the girls' restroom, a transgender high school girl is stopped by the principal who bars her entry. The principal tells the student to use the boys' restroom or nurse's office because her school records identify her as 'male.' Later, the student joins her friends to try out for the girls' cheerleading team and the coach turns her away from tryouts solely because she is transgender."

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Title IX Cases: "On the basis of Sex"



Two recent cases have tested the application of Title IX to the participation of transgender student-athletes in competitive athletics:

- In *Soule v. Connecticut Association of Schools, Inc.*, three female high school track and field athletes sued the CIAC and several of its participating school districts seeking to reverse the CIAC rule allowing athletes to compete in sports corresponding with their gender identity.
- In June 2020, OCR concluded its investigation and issued a letter of findings - it determined that CIAC and the named school districts violated Title IX because their actions caused female student-athletes' athletic opportunities to be provided to "male" student-athletes.
- Recently dismissed as moot.

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Title IX Cases: "On the basis of Sex" (Cont.)



- In *Hecox v. Little*, transgender college athletes filed a federal lawsuit challenging a new Idaho law that banned transgender women from competing in women's/girls' sports.
- The District Court granted a motion for a preliminary injunction prohibiting the State of Idaho from enforcing the law.
- "The State has not identified a legitimate interest served by the Act that the preexisting rules in Idaho did not already address, other than an invalid interest of excluding transgender women and girls from women's sports entirely, regardless of their physiological characteristics."

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Title VII: "Because of Sex"



- In the case *Bostock v. Clayton County, Georgia*, the U.S. Supreme Court decided that Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination "because of...sex," forbids an employer from firing an employee because that person is gay or transgender.
- While *Bostock* arose in the Title VII (employment) context, federal courts frequently use Title VII case law to interpret Title IX.
- The District Court in the *Hecox* case referred to *Bostock* in reaching its decision.

Title IX Cases: "On the basis of Sex"



- Four U.S. Courts of Appeals have issued rulings that Title IX's anti-discrimination provisions apply to transgender students, including the U.S. Court of Appeals for the Sixth Circuit.
- The 11th Circuit specifically applied *Bostock* to the student context, ruling that a school district's bathroom policy that did not permit a transgender student to use the bathroom of his gender identity violated Title IX.
- A few courts have found that students have a valid claim alleging that a school failed to protect them from harassment and harm by other students due to their sexual orientation, but those decisions were based on the 14th Amendment's Equal Protection or Due Process clauses.

Title IX Regulations: Sexual Harassment



Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021)

- Describes OCR's interpretation of schools' responsibilities under Title IX, and the Department's current implementing related to sexual harassment, as enforced by OCR.
- The focus is on questions related to the most recent amendments to the regulations in 2020.
- The 2020 amendments primarily set out the minimum steps that a school must take in response to the notice of alleged sexual harassment.

Sexual Harassment: Off-Campus Conduct



- Does the school district have substantial control over the respondent and context in an off-campus setting?
- Schools must make a fact-specific determination.
- No single factor is determinative.
- Did the school fund, promote, or sponsor the event or circumstance where the alleged harassment occurred?
- If an incident of sexual harassment between two students in a private hotel room occurs in a context related to a school-sponsored activity, such as a school field trip, the school would need to consider whether it exercised substantial control over the context in which the sexual harassment occurred.

Sexual Harassment: E-Communications



- The 2020 amendments did not create a distinction between sexual harassment occurring in person versus online.
- A student using a personal device to perpetrate online sexual harassment during class time may constitute a circumstance over which the school exercises substantial control.
- As with in-person harassment, the factual circumstances of online harassment must be analyzed to determine if it occurred in circumstances over which a school exercised substantial control over the respondent and the context.

Sexual Harassment v. Sex Discrimination



- The 2020 amendments explain that the grievance **process** required for formal sexual harassment complaints does not apply to complaints alleging discrimination based on different treatment based on sex or other forms of sex discrimination.
- Schools must respond to these complaints using the prompt and equitable grievance **procedure** that schools have been required to adopt and publish since 1975, when the original regulations were issued.
- Schools are required to have a Title IX Coordinator to receive complaints of sex discrimination and respond promptly and equitably to such complaints.

Appeals



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:

- Procedural irregularity that affected the outcome of the matter
- Newly discovered evidence that could affect the outcome of the matter
- Title IX personnel had a conflict of interest or bias, that affected the outcome of the matter.

Decision-Maker for Appeals



- Authorized to respond to appeals from a determination of responsibility or from a dismissal of a formal complaint of sexual harassment.
- Cannot be the Title IX Coordinator, the investigator, or the decision-maker in the specific case.
- May be outsourced to a properly trained individual.
- May school boards serve as a decision-maker for appeals?
Yes, but comprehensive training would be required.

Title IX training Requirements



- Training is required for "Title IX Coordinators, Investigators, **Decision-makers**, and anyone who facilitates an informal resolution process." ("Title IX personnel")
- **All involved in the grievance process** must be specifically trained.
- School districts need to ensure that **ALL** employees are trained on Title IX, how to recognize potential concerns, and how to report it internally to the Title IX Coordinator.

Title IX Training Requirements



- Training of Title IX personnel must include training on the definition of sexual harassment, the scope of the school'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.
- A school must ensure that decision-makers receive training on any technology to be used at a live hearing.
- Decision-makers and investigators must receive training on issues of relevance, including how to apply the rape shield protections provided only for complainants.

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THANK YOU!

Questions?

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