

2018 Title IX Training for Nebraska's School Leaders

TITLE IX

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Agenda

- Brief Introduction to Title IX
 - It's not just about athletics
 - Key terms
 - General Duties
- Big Title IX Issues in 2018
 - Transgender students
 - Creepy Teachers
 - Pregnant Students
 - Sports
- Investigations and Follow up

Introduction to Title IX

- A federal statute that prohibits discrimination:
 - On the basis of sex
 - In education programs or activities
 - Receiving federal financial assistance

20 U.S.C. § 1681 et seq.
34 C.F.R. § 106 et seq.

It's Not Just About Athletics...

- "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."
--United States Congress, June 23, 1972
- Purpose: To combat the "corrosive and unjustified discrimination against women in the American educational system."
--Senator Birch Bayh of Indiana

It's Not Just About Athletics...

- Title IX Addresses "Sexual Misconduct":
 - "Sufficiently serious" sexual harassment
 - Conduct that limits or interferes with a student's ability to participate in or benefit from school programs or activities
 - A form of sex discrimination
 - Examples of "sufficiently serious" sexual harassment include
 - sexual violence
 - physical acts against a person's will, including inability to consent (e.g. rape, sexual assault, battery, or coercion)
 - repeated unwanted acts. [2001 Guidance]

Introduction To Title IX: Key Terms

- Quid pro quo harassment
- A faculty or staff member conditions an educational decision or benefit on the student's submission to unwelcome sexual conduct
 - May also involve other individual with the power to make an educational decision or grant a benefit

Introduction To Title IX: Key Terms

- Hostile Environment Harassment
- Unwelcome Conduct
 - By an employee, student, third party
 - Of a sexual nature: Sexual advances, requests for sexual favors, nonverbal or physical conduct of a sexual nature; or
 - Nonsexual gender-based conduct: Aggression, intimidation, hostility based on sex/gender
- Severe, persistent, or pervasive
 - Affects a student's ability to participate in or benefit from an education program or activity, or
 - creates an intimidating, threatening or abusive educational environment

Introduction To Title IX: Key Terms

- Sexual violence:
 - Physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to age or use of drugs/alcohol or intellectual/other disability
 - Acts that fall into this category include – rape, sexual assault, sexual battery, sexual abuse, and sexual coercion
 - Is a form of sexual harassment
- 2014 Q&A § A-1

General Duties Under Title IX

- Upon notice of sexual harassment or sexual violence occurring within an educational program/activity:
 - Take prompt and effective action to:
 - End the misconduct
 - Prevent its recurrence
 - General expectation:
 - Conduct investigation and
 - Institute remedies as appropriate
 - Within 60 days
- 2001 Guidance
34 C.F.R. § 106.8(b)

Specific Legal Obligations

- Designation of Title IX Coordinator
 - Policies/Procedures
 - Nondiscrimination Policy
 - Grievance Procedures
 - Designation of Responsible Employees & Reporting of Possible Sexual Misconduct
 - Investigation
 - Interim measures
 - Effective Remedial Action
 - Training and Education
- 34 C.F.R. § 106 et seq.

Title IX Coordinator

"Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under [Title IX], including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part"

34 C.F.R. § 106.8(a)

Title IX Coordinator

- Must have at least one person actually serving at all times
 - Position cannot be vacant
 - Be independent to avoid potential conflict of interest
 - Report directly to senior leadership
 - Ensures senior officials stay informed
 - Provides the appropriate formal and informal authority to coordinate compliance
- 2015 Title IX Coordinator DCL

2015 Title IX Coordinator DCL

Title IX Coordinator

- Title IX Coordinator must have:
 - Qualifications
 - Training
 - Authority
 - Time
- OCR recommends Title IX Coordinator
 - Have knowledge of policies and procedures
 - Be involved in policy adoption/revision
 - Receive annual training

2015 Title IX Coordinator DCL

Title IX Coordinator

- Visibility:
 - District must notify students and employees of the name or title and contact information of the person designated to coordinate the recipient's compliance with Title IX

34 C.F.R. § 106.8(a)

Title IX Coordinator

- Job* responsibilities:
 - Coordinate compliance, including procedure for resolving Title IX complaints
 - Identify patterns or systemic problems revealed by Title IX reports

2015 Title IX Coordinator DCL

Policies and Procedures

- Nondiscrimination policy
- Designation of Title IX Coordinator
- Designation of responsible employees
- Reporting, receiving and investigating complaints
- Grievance Procedures
- Training for Staff and Students

34 C.F.R. § 106.8

Policies and Procedures

- Grievance Procedures
 - Easy to find and navigate
 - Notice of grievance procedures, including where complaints may be filed
 - providing for prompt and equitable resolution
 - student and employee complaints alleging any action "prohibited Title IX"
 - Statement of District's jurisdiction over Title IX complaints

34 C.F.R. § 106.8

Policies and Procedures

- Grievance Procedures (con't)
 - Definitions of sexual harassment, which includes sexual violence, and an explanation of when it creates a hostile environment
 - Designated and reasonably prompt time frames
 - Written notice of the outcome of the complaint
 - Assurance the District will take steps to prevent recurrence and remedy discriminatory effects

34 C.F.R. § 106.8

Policies and Procedures

- Grievance Procedures (con't)
 - Reporting policies and protocols, including provisions for confidential reporting
 - Who is responsible for evaluating requests for confidentiality
 - Prohibition of retaliation
 - Right to file a simultaneous criminal complaint
 - Available interim measures

2014 Q&A § C-5

Policies and Procedures

- Grievance Procedures (con't)
 - Evidentiary standard
 - Preponderance of the evidence
 - Clear and convincing*
 - Potential remedies for students
 - Sanctions against perpetrators
 - Sources of counseling, advocacy, and support

2014 Q&A § C-5

Revised Guidance on Sex Assault (September 2017)



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

September 2017

[Q&A on Campus Sexual Misconduct](#)

Under Title IX of the Education Amendments of 1972 and its implementing regulations, an institution that receives federal funds must ensure that no student suffers a deprivation of her or his access to educational opportunities on the basis of sex. The Department of Education intends to engage in rulemaking on the topic of schools' Title IX responsibilities concerning complaints of sexual misconduct, including peer-on-peer sexual harassment and sexual violence. The Department will solicit input from stakeholders and the public during that rulemaking process. In the interim, these questions and answers—along with the Revised Sexual Harassment Guidance previously issued by the Office for Civil Rights—provide information about how OCR will assess a school's compliance with Title IX.

- District now has to make two choices:
 - Clear and convincing vs. preponderance
 - Appeal procedures

[Link to Q&A](#)

Responsible Employees

- District designation should include:
 - Employees authorized to take action to redress sexual misconduct, duty to report misconduct,
- and
- Employees who a student reasonably believes has such authority

Responsible Employees

- Duties:
 - Must report any possible sexual misconduct to the Title IX coordinator or other appropriate school designee
 - Note: Mental health counselors, health center employees, professionals with license requiring confidentiality & volunteer counselors are RE's for training purposes, but not reporting purposes

[2014 Questions and Answers]

Training

- Required:
 - Title IX coordinators
 - Investigators
 - Responsible employees
 - Campus security authorities
 - Students

Training

- Recommended specialized training:
 - Student athletes and athletic departments
 - International students
 - Teachers in programs with nontraditional learning environments
 - Staff serving students with special needs

Training: Responsible Employees

- Training on reporting obligations:
 - What should be included in a report
 - Consequences for failing to report
 - Procedure for responding to request for confidentiality
 - Providing the contact information for the Title IX Coordinator
 - Information to provide students

2014 Q&A §J-1

Training: Students

- OCR recommends:
 - Training be age appropriate
 - Repeated regularly
 - Use of educational methods most likely to help the students retain the information

2014 Q&A § J-4

Training: Students

- OCR recommends:
- Training for
 - Student athletes
 - Members of student organizations
- Training at back-to-school nights

2014 Q&A § J-4

Big Title IX Issues in 2018

- Transgender Students
- Creepy Teachers (#MeToo)
- Pregnancy
- Sports

Transgender Students

OCR and DOJ

- 2015/2016 guidance: Transgender students are Title IX protected class
- 2017 Dear Colleague Letter
 - withdrew guidance to “further and more completely consider the issues involved”
 - Assured continued protection of all students, including LGBT students, from harassment and discrimination

OCR’s Internal Guidance (6/6/17*)

- OCR may open investigation for allegations of:
 - Complaints of sex discrimination against transgender students
 - Sex harassment against transgender students
 - Hostile environment based on sex or sex-stereotyping, “such as refusing to use a transgender student’s preferred name or pronouns when the school uses preferred names for gender-conforming students or when the refusal is motivated by animus toward people who do not conform to sex stereotypes”
 - Retaliation against a transgender student who complains
- Regional offices no longer have to check with DC before closing cases

OCR’s Internal Guidance (6/6/17*)

- What’s Missing?
 - Bathrooms, locker rooms, field trips, etc.
 - “It is permissible, for example, for one allegation in a complaint (such as harassment based on gender stereotypes) to go forward while another allegation (such as denial of access to restrooms based on gender identity) is dismissed.”
- According to news reports, OCR has dismissed 5 bathroom complains in the last year

OCR and DOJ

- OCR/DOJ also withdrew participation in related transgender litigation
- So where do we stand?
 - Some guidance documents remain in place
 - Change of approach on policy level
 - Internal OCR Memo indicates reduced DC oversight
 - No legal determination on whether transgender students are protected under Title IX

Transgender Cases

Whitaker v. Kensosha USD (7th Cir. 2017)

- Student identified as female at birth, transitioned to identifying as male in 8th grade
- Junior year: teacher reported student using boys' bathroom
- School directed student to use either its gender-neutral bathroom or girls' bathroom
- Student sued for injunction, claiming violation of Title IX and Equal Protection

Whitaker v. Kensosha USD (7th Cir. 2017)

- 7th Circuit:
 - Upheld District’s Court’s preliminary injunction allowing students’ use of boys’ bathroom during senior year
 - Policy that requires an individual to sue bathroom that does not confirm with his/her gender identity violates Title IX
 - Remanded
- School District: settled for \$800,000

Students and Parents for Privacy v. USDOE (N.D. Ill 2018)

- Bathroom access case with OCR; school entered resolution agreement
- Parent group sued school and USDOE alleging agreement violated Title IX rights of gender conforming girls

Students and Parents for Privacy v. USDOE (N.D. Ill 2018)

- District court:
 - Denied injunction
 - "federal protections against sex discrimination are substantially broader than based on only on genitalia and chromosomes."
 - Student will suffer no irreparable harm
 - "Any student who fears their privacy would be impaired by encountering a transgender student in the bathroom or locker room simply has to access existing and available single-user facilities."

Creepy Teachers

Title IX Liability

- Teacher-student sexual harassment
- The test:
 - (1) an official with the authority to institute corrective measures on the recipient's behalf;
 - (2) had actual knowledge of the harassment; and
 - (3) the recipient's response to such knowledge exhibited deliberate indifference.

Title IX Liability

- "it is not the harassment itself that constitutes the Title IX violation but, instead, the deliberate failure to curtail known harassment."

Cases

King v. Curtis, W.D. Mich (2016)

- Athletic trainer assaults multiple students
- Dispute over when district had "actual knowledge" assault had occurred
- Court finds not until police contacted school about allegations
 - Prior complaints and situations did not rise to the level of actual knowledge

King v. Curtis, W.D. Mich (2016)

- Once school definitely has knowledge, still need to demonstrate they were not "deliberately indifferent"
- Superintendent on investigation:
 - "there was no reason to investigate" because the allegations against Defendant Curtis were being investigated by the police"

**King v. Curtis,
W.D. Mich (2016)**

▪Court:

- These positions reflect a misunderstanding of the school district's obligations under Title IX.

As the United States Department of Education had previously informed educators, "the school's Title IX investigation is different from any law enforcement investigation, and a law enforcement investigation does not relieve the school of its independent Title IX obligation to investigate the conduct."

**King v. Curtis,
W.D. Mich (2016)**

▪Court:

- Failure to investigate exacerbated hostile environment for students, many in the community believed allegations were fabricated
- Investigation could have uncovered that Curtis admitted a sexual relationship with a student to a school board member

**King v. Curtis,
W.D. Mich (2016)**

- Court: failure to train staff resulted in violation of plaintiff's constitutional rights

•

**King v. Curtis,
W.D. Mich (2016)**

- Superintendent when asked about training:
 - Never attended any training concerning teacher-on-student sexual harassment
 - Never received any training to identify signs of sexual harassment or sexual abuse of children
 - No employee handbook or written materials provide guidance to staff regarding the warning signals that might appear that a child is being sexually abused
 - No staff received any practical training about how to identify and report sexual harassment
 - No students received training concerning sexual assault

**Doe v. Bradshaw,
Mass (2016)**

- Para is also a soccer coach
- Dating, sexting, and buying alcohol for students
- Finally caught, criminal investigation begins
- On actual knowledge:
 - Rumors aren't actual knowledge, BUT the investigation in this case could have been much better
- Title IX Claim fails but:
 - Due Process, Equal Protection, Negligence, Negligent Infliction of Emotional Distress

**Doe v. Bradshaw,
Mass (2016)**

- Plus: another special education issue
- After Teacher's arrest, Doe's grades drop, begins to have anger issues, suicide attempt, attacks a man in a convenience store for looking at her wrong.
- Services are not offered, and she is not verified or offered an evaluation for over a year after the assault is public.

Pregnancy

Title IX: Pregnancy

BASIC RULES

- Schools may not discriminate (in school or extracurricular activities) based on pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery from pregnancy.
- Schools must treat students affected by pregnancy and related medical conditions the same as students similarly affected by temporary disabilities.

True or False

1. Your school cannot exclude pregnant or parenting students from classes or school-sponsored activities.
2. Your school can make pregnant or parenting students attend special programs or schools that target their needs.
3. Your school must require pregnant or parenting student athletes to produce a doctor's note to continue participating in athletics.

Pregnancy and Dropping Out

- One-third of female dropouts say that becoming a parent was a major factor in their decision to leave school.
- Those who left school to care for a family member or child were “most likely to say they would have worked harder if their schools had demanded more of them and provided the necessary support.”

Source: Gates Foundation Dropouts Survey, September/October 2005

Girls and the Dropout Crisis

- Nationally, over 25% of girls do not graduate from high school on time with a standard diploma, if at all.
- Rates for girls of color even worse:
 - Latinas: 41%
 - Black: 43%
 - Native American/Alaskan Native: 49%

Can schools do this?

1. Require pregnant students to produce a doctor's note before they can participate in PE classes.
2. Offers special school with state-of-the-art childcare facilities and parenting classes, but no extracurricular activities.
3. Dismiss a pregnant student from the cheerleading squad for safety concerns.
4. Dismiss a pregnant student from National Honor Society for failing to meet the “good moral character” requirement

Cases

Workman v. Univ. of Akron, ND Ohio (2017)

- Master's student becomes pregnant during coursework
- Student is offered deferment and advised against trying to complete the program pregnant and post-partum
- Student presses on

Workman v. Univ. of Akron, ND Ohio (2017)

- Student fails to meet clinical hour requirements
- Student fails Counselor Preparation Comprehensive Exam, thrice
- Dismissed from program

**Workman v. Univ. of Akron,
ND Ohio (2017)**

- Court: student failed to perform the academic requirements at a sufficient to meet her educator's legitimate expectations
- Complaint of discrimination promptly investigated

**D.W. v. Blanche Kelso Bruce
Academy,
ED Mich (2013)**

- Detroit Public Schools has special school for pregnant and parenting teens: CFA
- CFA is drastically reduced in its offerings to the point that students are not meeting high school graduation requirements
- DPS argues pregnant students are not REQUIRED to attend CFA

**D.W. v. Blanche Kelso Bruce
Academy,
ED Mich (2013)**

- Court is not convinced:
 - "DPS provides no services for pregnant or parenting students. Many parenting students are forced to drop out of high school because they are unable to find affordable childcare or because they can no longer emotionally handle the stigmatization that comes with being a pregnant teen or young mom."

**D.W. v. Blanche Kelso Bruce Academy,
ED Mich (2013)**

- Court is not convinced:
 - "Plaintiffs' Complaint clearly establishes that the education being offered to the pregnant and parenting young women at CFA was, and continues to be, inferior to the education Plaintiffs male and non-pregnant female counterparts are receiving at DPS."

Pregnancy

- NEB. REV. STAT. 79-2,151
 - (1) Specifically identify procedures to anticipate and provide for student absences due to pregnancy and allow students to return to school and, if applicable, participate in extracurricular activities after pregnancy;
 - (2) Provide alternative methods to keep a pregnant or parenting student in school
 - (3) Identify alternatives for accommodating lactation by providing students with private, hygienic spaces to express breast milk during the school day; and
 - (4) Daycare or daycare assistance

Sports

Athletics: Three Basic Requirements

1. Schools must offer male and female students equal opportunities to participate.
2. Schools must allocate athletic scholarship dollars equitably.
3. Schools must provide male and female athletes with equal benefits/services.

Participation: The "Three-part Test"

Schools are providing equal participation opportunities to their male & female students if:

- Athletic participation opportunities for males and females are **substantially proportionate** to their respective enrollments; **OR**
- The school has a history and continuing practice of **expanding athletic participation** opportunities for the underrepresented sex; **OR**
- The school has **fully and effectively accommodated** the interests and abilities of the underrepresented sex.

Equal Benefits/Services

Boys' and girls' athletics programs must be equal overall,* including:

- Scheduling
- Travel
- Coaching
- Locker rooms/facilities
- Medical/training services
- Publicity
- Recruiting
- Tutoring
- Housing/dining

* No "booster club" exception

Cases

Ryburn v. Giddings, WD Tex. (2017)

- Ryburn asserts a Title IX claim, after her son is injured during wrestling drills.
- Alleges that the District, through subjecting male students to inherently dangerous exercises, deprived son of an educational opportunity on the basis of his sex.

Ryburn v. Giddings, WD Tex. (2017)

- Court dismisses
 - Wrestling and drills may be more dangerous than some of the girls sports, but equal opportunities need not be identical under Title IX.
 - Sufficient interest is a factor in determining if a school should create an athletic team. Lack of female wrestlers does not make wrestling drills discriminatory against male students.

**Arcene v. Assumption Parish
Sch Bd.
ED LA. (2017)**

- Cheerleader kicked off the squad for posting a picture of her behind on snapchat while in uniform, on the way back from a school event.
- Parents allege a higher bar for cheerleaders, and female students, than their male counterparts

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- Parents allege a higher bar for cheerleaders, and female students, than their male counterparts

**Arcene v. Assumption Parish
Sch Bd.
ED LA. (2017)**

- Arcene v. Assumption Parish Sch Bd.
 - Similar to Ryburn, no discrimination
 - Cheerleading permission form indicated "son/daughter" which shows team was open to all students. Male students had previously been on the squad.
- There is a discipline discrepancy, cheerleaders kicked off team after one violation, while all other sports are two violations, BUT: cheerleader team sent out special permission form that informed parents their students could be kicked off the team for "unacceptable behavior in uniform or at a school event" in addition to the standard sports policy

**Arcene v. Assumption Parish
Sch Bd.
ED LA. (2017)**

- There is a discipline discrepancy, cheerleaders kicked off team after one violation, while all other sports are two violations,
- BUT: cheerleader team sent out special permission form that informed parents their students could be kicked off the team for "unacceptable behavior in uniform or at a school event" in addition to the standard sports policy

**Portz v. St. Cloud State Univ.,
Minn (2016)**

- Female students granted injunction to stop St. Cloud from eliminating women's tennis team. School engaged in cost-cutting overhaul
- Included elimination of men's and women's programs,
- Roster cuts/increases to remaining programs to equalize gender participation.

**Portz v. St. Cloud State Univ.,
Minn (2016)**

- But: Plaintiffs show a lot of fuzzy math in how the administration built their plan
- Court decides there is sufficient evidence that tennis team could win on the merits, grants injunction
- "The Court finds that Plaintiffs' harm weighs more heavily, especially because it is at best unclear whether one more year of women's tennis will cost SCSU much of anything."

Investigations and Responses

Responding to Harassment Complaints

Step 1: Stop Any Ongoing Harassment Immediately.

- Moving quickly tells everyone that such behavior is not acceptable and that your school takes harassment seriously.
- You also must take steps necessary to ensure that the harassment does not recur.

Dangerous Words

When responding to a complaint, be careful that these words don't come out of your mouth:

- It's just teasing- no big deal.
- The people in our school would never do...
- I know he/she didn't mean anything like that.
- You need to learn to handle these things.
- If you won't file a written complaint our hands are tied
- When it is he said she said I can't do anything
- Boys will be boys or Kids will be kids

The Investigation

- Must be *prompt, thorough, and impartial*.
 - At a minimum should include interviews with the victim, the alleged harasser, and anyone else who can provide relevant information.
 - DOCUMENT, DOCUMENT, DOCUMENT
 - Limit the disclosure of information to people who really need to know

Create a Plan

- Written list of interviewees
- Written list of questions
- Written list of documents
- Review time line
 - Within 60 days
 - Check your policy!

2001 Guidance
34 C.F.R. § 106.8(b)

During Investigation: OCR Requires "Interim Measures"

- Provide complainant with periodic updates on status of the investigation
- Minimize burden on complainant
- Make sure parties understand the process.
- Keep parties informed of the status of the investigation.
- Remind parties and witnesses that they are protected from retaliation.

2014 Q&A § G

Interim Measures

- Factors to consider:
 - Specific need expressed by complainant
 - Age of students involved
 - Severity or pervasiveness of the allegations
 - Any continuing effects on the complainant
 - Whether complainant and respondent share the same classes, transportation
 - Whether other judicial measures [restraining order] have been taken to protect the complainant
 - Whether complainant or accused are students with special needs

2014 Q&A § G2

After Investigation: Corrective Action

- School-wide responses
 - Problem areas? (e.g. track team)
 - re-evaluate and re-distribute policies and procedures
 - training for staff, students and parents
- Follow up with the victim
 - Be sure it's stopped
 - Be sure no retaliation
 - Be sure you haven't made things worse
 - SAT for counseling if needed
- Follow up with aggressor
 - Social skills?
 - Monitoring

Remedial Measures

- Stop the conduct
- Prevent the conduct
- Protect against retaliation
- Duty can arise even where discipline not available
- Duty goes beyond discipline

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