



CareerLearning

Title IX Investigator Certification (K-12): Advanced Training

Session 2

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Title IX Investigations Related to Sexual Discrimination

Agenda

I

Athletics

II

Pregnancy

III

Other Areas

IV

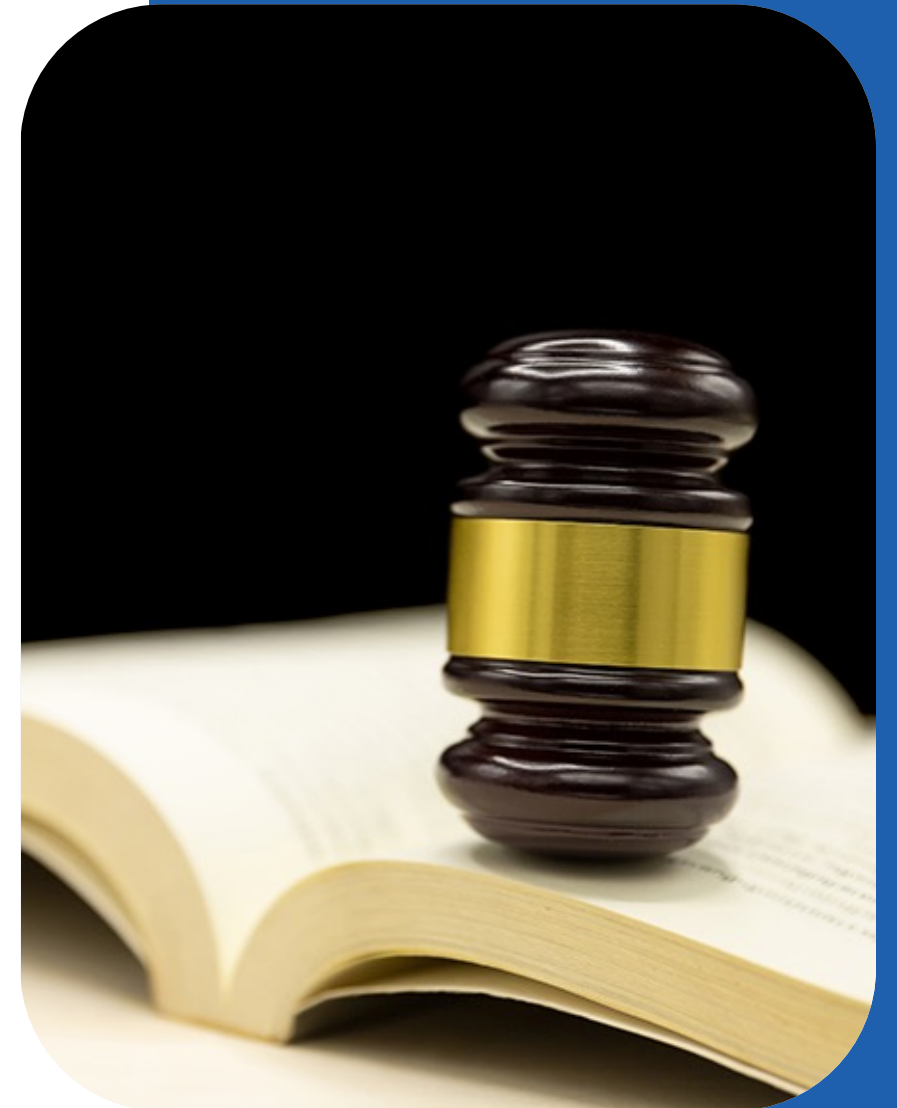
Conclusion



Title IX

Title IX regulations

- “The purpose of this part is to effectuate title IX of the Education Amendments of 1972... which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance...” 34 C.F.R. s. 106.1.
- Other regulations found under 34 C.F.R. part 106.



Grievance Procedure

Important elements

- Notice to students and employees of the grievance procedures, including where complaints may be filed
- Application of the grievance procedure to complaints filed by students or on their behalf alleging sexual discrimination carried out by employees, other students, or third parties
- Provisions for adequate, reliable, and impartial investigations of complaints
- Written notice to the complainant of the outcome of the complaint
- Assurance that the institution will take steps to prevent the recurrence of any sexual discrimination and remedy discriminatory effects on the complainant and others, if appropriate
- Designated and reasonably prompt time frames for the major stages of the complaint process

Grievance Procedure

April 2014 Guidance (rescinded)

- The April 2014 Guidance (now rescinded) included additional suggestions for grievance procedures.
- No longer suggested but may be included:
 1. A statement of the school's jurisdiction over Title IX complaints;
 2. Adequate definitions of sexual discrimination;
 3. Reporting policies and protocols, including provisions for confidential reporting

Grievance Procedure

April 2014 Guidance (rescinded)

4. Identification of the employee or employees responsible for evaluating requests for confidentiality;
5. Notice that Title IX prohibits retaliation;
6. Notice of available interim measures that may be taken to protect the student in the educational setting;
7. The evidentiary standard that must be used in resolving a complaint;
8. Notice of potential remedies; **and**
9. Notice of potential sanctions.



Athletics



Title IX Athletics

Regulations

- The regulations implementing Title IX contain specific provisions relating to athletic opportunities.
- “No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.” 34 C.F.R. s. 106.41(a)

Title IX Athletics

Regulations– Equal opportunity

- A recipient which operates or sponsors interscholastic, intercollegiate, club, or intramural athletics shall provide equal athletic opportunity for members of both sexes. 34 C.F.R. s. 106.41(c).
- In determining whether equal opportunities are available the Director will consider, among other 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;

Title IX Athletics

Regulations– Equal opportunity

- *Equal opportunity*
- In determining whether equal opportunities are available the Director will consider, among other factors:
 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;
 10. Publicity.

Title IX Athletics

- The Department's Title IX regulations prohibit sex discrimination in interscholastic, intercollegiate, club, or intramural athletics offered by a recipient institution, including with respect to:
 - A. Student interests and abilities;
 - B. Athletic benefits and opportunities; **and**
 - C. Athletic financial assistance.



Title IX Athletics

Three-part test

- Under the three-part test, an institution must meet at least one of three benchmarks:
 1. Whether participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; **or**
 2. Where the members of one sex have been and are underrepresented among athletes, whether the institution can show a history and continuing practice of program expansion that is demonstrably responsive to the developing interests and abilities of the members of that sex; **or**



Title IX Athletics

Three-part test

3. Where the members of one sex are underrepresented among athletes, and the institution cannot show a history and continuing practice of program expansion, as described above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program

Title IX Athletics

Part one— substantial proportionality

- Where an institution provides athletic participation opportunities for male and female students in numbers substantially proportionate to their respective full-time student enrollments, OCR will find that the institution is providing nondiscriminatory participation opportunities for individuals of both sexes.
- This part of the test establishes a safe harbor for institutions that have distributed athletic opportunities in numbers substantially proportionate to the gender composition of their student bodies.

Title IX Athletics

Part one– substantial proportionality

- Analysis:
 - First, determine the number of participation opportunities afforded to male and female athletes in the school's athletic program.
 - Second, determine whether athletic opportunities are substantially proportionate.
 - OCR recognizes that exact proportionality is not required in order to satisfy this test. Disparities are acceptable where they result from modest fluctuations in enrollment patterns.

Title IX Athletics

Part two— history of program expansion

- OCR finds compliance where an institution can show a history and continuing practice of program expansion that is demonstrably responsive to the developing interests and abilities of the members of that sex.
- This test is satisfied where an institution is continually expanding athletic opportunities in an ongoing effort to meet the needs of the underrepresented gender and persists in this approach as interest and ability levels in its student body rise.





Title IX Athletics

Part two– history of program expansion

- OCR will review the entire history of the athletic program, focusing on the participation opportunities provided for the underrepresented sex.
- To meet the requirements, it is not necessary to show annual or constant efforts, but only continuing efforts of program expansion.

Title IX Athletics

Part three– accommodating interests/abilities

- This part considers whether there are concrete and viable interests among the underrepresented sex that should be accommodated.
- An institution can satisfy part three where there is evidence that the imbalance does not reflect discrimination.



Title IX Athletics

Part three– accommodating interests/abilities

- To ascertain whether the interests of students are being fully and effectively accommodated, OCR will consider whether there is:
 1. Is there an unmet interest in a particular sport?
 2. Is there sufficient ability to sustain a team in the sport?
 3. Is there a reasonable expectation of competition for the team?
- If all of these conditions are met, the Department of Education will find that an institution has not fully and effectively accommodated the interests and abilities of the underrepresented sex.

Title IX Athletics

Benefits and opportunities

- In determining whether an institution is providing equal opportunity in athletics, the regulations require the Department to consider, among others, the following factors (a.k.a. the “laundry list”):
 1. The provision of equipment and supplies;
 2. Scheduling of games and practice time;
 3. Travel and per diem allowances;
 4. Opportunity for coaching and academic tutoring;
 5. Assignment and compensation of coaches and tutors;
 6. Provision of locker rooms, and practice and competitive facilities;

Title IX Athletics

Benefits and opportunities

- In determining whether an institution is providing equal opportunity in athletics, the regulations require the Department to consider, among others, the following factors (a.k.a. the “laundry list”):
 7. Provision of medical and training facilities and services;
 8. Housing and dining services;
 9. Publicity;
 10. Recruitment; **and**
 11. Support services.



Title IX Athletics

Non-discriminatory justifications

- Sports that require more resources because of the nature of the game (i.e., football = \$\$\$\$)
- Special circumstances, like a surge in demand
- Special operational expenses, such as tournaments



Title IX Athletics

Scheduling

- OCR will evaluate the scheduling of the athletic program as a whole.
- Five factors for consideration:
 1. The number of competitive events offered per sport
 2. The number and length of practices
 3. Time of day competitive events are scheduled
 4. Time of day practices are scheduled
 5. Number of pre-season and post-season competitive opportunities

Title IX Athletics

Coaching

- Three factors to compare:
 - Availability of coaches and volunteer assistants
 - Assignment of coaches
 - Compensation
- Coaching equivalency is evaluated as a whole and not by comparing the boys' and girls' coaches in each sport.



Title IX Athletics

Locker rooms and facilities

- Compliance factors for the locker room, practice, and competition facilities:
- The quality and availability of the facilities provided for practice and competitive events;
- Exclusivity of use of facilities for practice and competitive events;
- Availability of locker rooms;
- Quality of locker rooms;
- Maintenance of practice and competitive facilities; **and**
- Preparation of facilities for practice and competitive events.



Title IX Athletics

Fundraisers and donations

- Once a school accepts a donation, the money becomes public money that is subject to Title IX.
- Schools are not obligated to accept donations, but by accepting the donation, the school must ensure that it remains in compliance with Title IX.

Title IX Athletics

Evansville-Vanderburgh Schools (IN)

- On February 4, 2013, OCR resolved a Title IX compliance review of Evansville-Vanderburgh School Corporation (Corporation).
- The review examined whether the Corporation discriminated against female students under Title IX by denying them an equal opportunity to participate in its high school interscholastic athletics program and by not providing female athletes locker rooms, practice, and competitive facilities that are equivalent to those provided to male athletes.

Title IX Athletics

Evansville-Vanderburgh Schools (IN)

- Under the terms of the agreement, the Corporation will assess whether there are unmet athletics interests and abilities among female students and, if so, it will take steps by 2013-14 to increase opportunities for females, including new sports teams for girls.
- The agreement also requires the Corporation to assess the locker rooms, practice, and competitive facilities at each high school by comparing, for males and females, the quality, availability, exclusivity, maintenance and preparation of practice and competitive facilities, and the availability and quality of locker rooms.

Title IX Athletics

Additional resources

- For more information about the obligation to provide equal athletic opportunities and to effectively accommodate students' athletic interests and abilities, please review:
 - Dear Colleague Letter: Part Three of the Three-Part Test (April 20, 2010), *available at* <http://www.ed.gov/ocr/letters/colleague-20100420.html>;
 - Dear Colleague Letter: Athletic Activities Counted for Title IX Purposes (September 17, 2008), *available at* <http://www.ed.gov/ocr/letters/colleague-20080917.pdf>

Title IX Athletics

Additional resources

- For more information about the obligation to provide equal athletic opportunities and to effectively accommodate students' athletic interests and abilities, please review:
 - Dear Colleague Letter: Further Clarification of Intercollegiate Athletics Policy Guidance (July 11, 2003), available at <http://www.ed.gov/ocr/title9guidanceFinal.html>;
 - Dear Colleague Letter: Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (January 16, 1996), available at <http://www.ed.gov/ocr/docs/clarific.html>; and
 - Title IX Policy Interpretation: Intercollegiate Athletics (December 11, 1979), available at <http://www.ed.gov/ocr/docs/t9interp.html>.



Pregnancy



Title IX– Pregnancy

General requirements

- Title IX prohibits generally discrimination on the basis of sex in education programs and activities.
- Title IX regulations specifically prohibit discrimination against any student based on pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery from any of these conditions.
- Title IX regulations also prohibit a school from applying any rule related to a student's parental, family, or marital status that treats students differently based on their sex.



Title IX– Pregnancy

General requirements

- Title IX prohibits discrimination on the basis of sex in many aspects within education.
- Programs and services
- Employment
- Title IX's focus has been on not making certain stereotypes of pregnant students or employees within education.

Title IX– Pregnancy

General requirements

- Title IX regulations also emphasize the need to treat certain pregnant students similar to students with temporary disabilities.
- In this respect, certain accommodations may need to be provided to students who are pregnant.





Title IX– Pregnancy

OCR guidance

- On June 25, 2013, the Office for Civil Rights (OCR) issued a Dear Colleague Letter on pregnancy and parenting discrimination.
- The Department of Education also issued *Supporting the Academic Success of Pregnant and Parenting Students* in June 2013.

Title IX Pregnancy

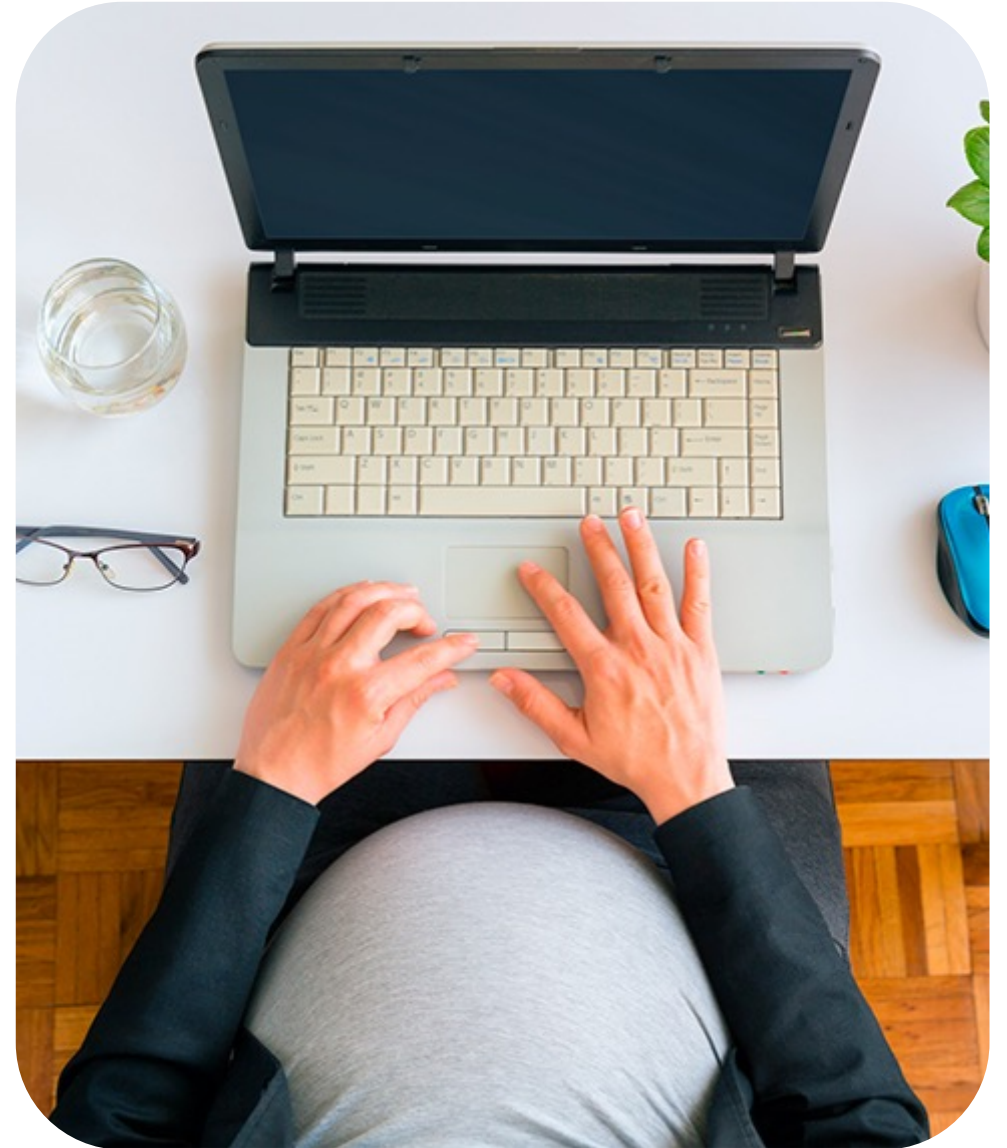
OCR guidance

- Focus on concerns with 16 through 24-year-olds who were not enrolled in high school and had not earned a high school diploma or alternative credential
- Students give a range of reasons for dropping out of high school, both school-and family-related.
- Pregnancy is consistently the most common family-related reason given by female students.

Title IX Pregnancy

OCR guidance

- Title IX guidance details how the law applies to a range of specific educational activities and policies that affect pregnant and parenting students, including:
 - Class and school activities;
 - Excused absences and medical leave;
 - Accommodations;
 - Harassment; **and**
 - Policies and procedures.



Title IX Pregnancy

Regulations

- A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient. 34 C.F.R. s. 106.40(b)(1)
- A recipient which operates a portion of its education program or activity separately for pregnant students, admittance to which is completely voluntary on the part of the student as provided in paragraph (b)(1) of this section shall ensure that the separate portion is comparable to that offered to non-pregnant students. 34 C.F.R. s. 106.40(b)(3).

Title IX Pregnancy

OCR guidance

- Under Title IX, it is illegal for schools to exclude a pregnant student from participating in any part of an educational program or activity.
- This applies to specific classes, extracurricular activities, honor societies, and other activities.
- Educational institutions must allow students to continue to participate in classes even though they are pregnant.

Title IX Pregnancy

OCR guidance

- Educational institutions can allow students to choose whether to participate in special instructional programs or classes for pregnant students. Students can participate if they want to, but schools cannot pressure them to do so.
- Any alternative program must provide the same types of academic opportunities as the institution's regular program.
- Educational institutions must allow students to participate even though they are pregnant and not require them to submit a doctor's note.



Title IX Pregnancy

OCR guidance

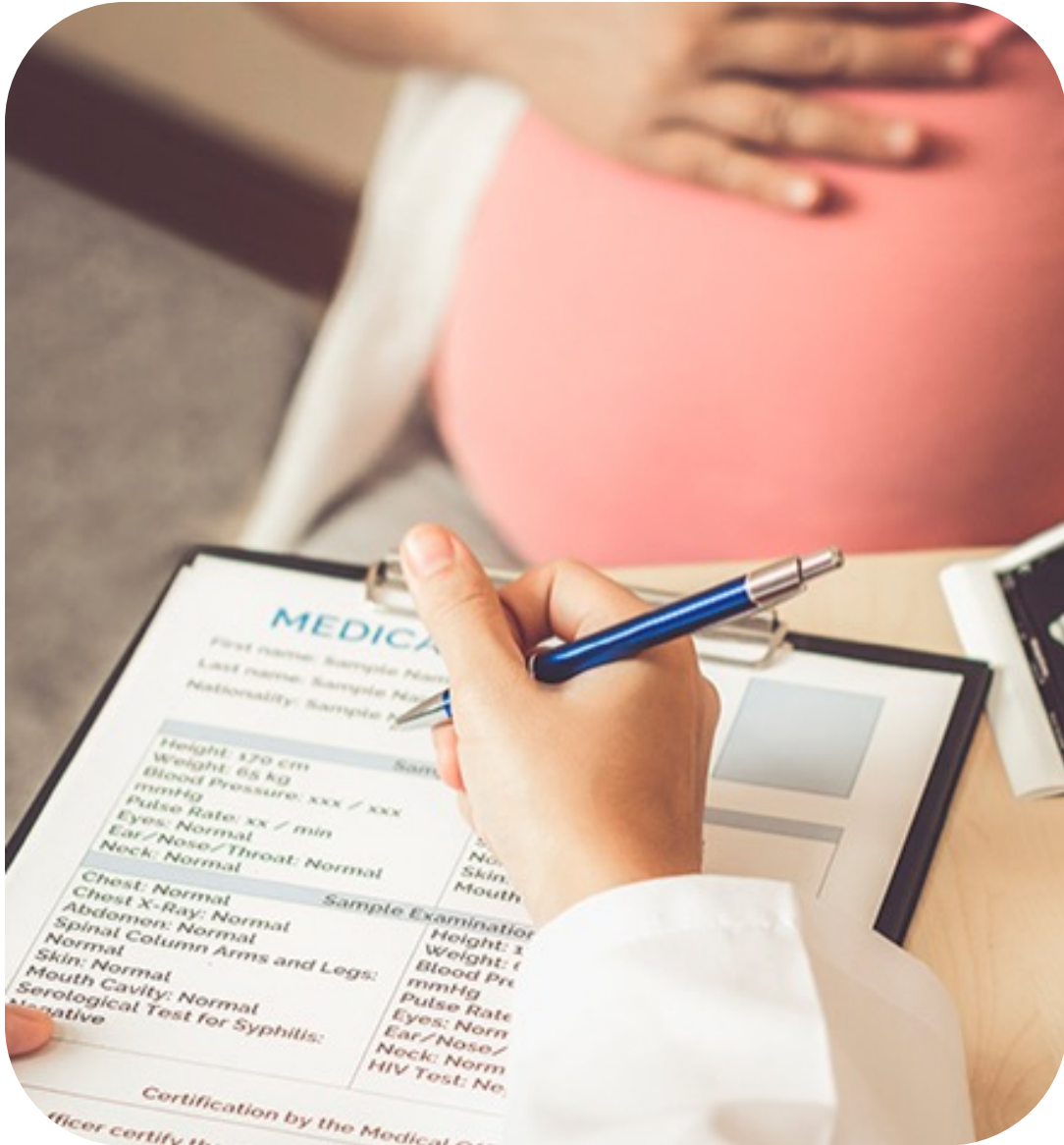
- Educational institutions may require a pregnant student or student who has given birth to submit medical certification for school participation but only if the school also requires such certification from all students with physical or emotional conditions requiring the attention of a physician.
- Schools should not presume that a pregnant student is unable to attend school or participate in school.

Title IX Pregnancy

Regulations

- A recipient may require such a student to obtain certification of a physician that the student is physically and emotionally able to continue participation, so long as such certification is required of all students for other physical or emotional conditions requiring the attention of the physician. 34 C.F.R. s. 106.40(b)(2).





Title IX Pregnancy

Excused absences and medical leave

- Educational institutions must excuse absences due to pregnancy and childbirth for as long as the doctor deems the absences medically necessary.
- Educational institutions must allow the student to return to the same academic status as before the student's medical leave began, which should include giving students the opportunity to make up any work missed while the student was out.
- Other options may also be offered, such as retaking a semester.

Title IX Pregnancy

Excused absences and medical leave

- In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began. 34 C.F.R. 106.40(b)(5).



Title IX Pregnancy

OCR guidance

- To ensure a pregnant student's access to its educational program, when necessary, an educational institution must make adjustments to the regular program that are reasonable and responsive to the student's temporary pregnancy status.
- Educational institutions must provide pregnant students with the same special services it provides to students with temporary medical conditions.
- This includes at-home tutoring or independent study.



Title IX Pregnancy

Pregnancy and athletics

- NCAA has provided significant guidance on this issue.
- See NCAA Pregnant and Parenting Student-Athletes, Resources, and Model Policies. <http://www.ncaa.org/about/resources/inclusion/pregnant-parenting-student-athletes>

Title IX Pregnancy

Relevant cases

- *Ivan v. Kent State University*, 863 F.Supp. 581 (concluding that the university articulated legitimate reasons to overcome any claim of discrimination).
- *Varlesi v. Wayne State University*, Case No. 14-1862 (affirming a jury award of nearly \$850,000 after finding discrimination against a pregnant student).
- *Stewart v. City University of New York* (2013) (settlement after an administrative complaint after allegations that the university refused to allow her to make up assignments).
- *Kostal v. Logan University* (2013) (settlement after an administrative complaint allegations that the university refused to allow her to make up work).



Other Areas





Title IX Employment

Employment

- In recruitment, hiring, rates of pay, job assignments, benefits, and other terms or conditions of employment, an educational institution may not discriminate against persons on the basis of sex. 34 C.F.R. s. 106.51.
- Recruitment. 34 C.F.R. s. 106.53.
- Compensation. 34 C.F.R. s. 106.54.
- Job classification and structure. 34 C.F.R. s. 106.55.

Title IX Employment

Employment

- Fringe Benefits. 34 C.F.R. s. 106.56.
- Advertising. 34 C.F.R. s. 106.59.
- Pre-employment Inquiries. 34 C.F.R. s. 106.60.
- Sex as bonafide occupational qualification. 34 C.F.R. s. 106.61.



Title IX Employment

Employment and status

- Under 34 C.F.R. s. 106.57, an educational institution shall not apply any policy or take any employment action:
 - Concerning the potential marital, parental, or family status of an employee or applicant for employment that treats persons differently on the basis of sex; **or**
 - Which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.



Title IX LGBTQ

Students and LGBTQ

- On February 22, 2017, the Department of Justice and the Department of Education rescinded their respective prior guidance on gender identity issues. The Department of Justice and the Department of Education withdrew the statements of policy and guidance.
- [DOJ Dear Colleague Letter February 22, 2017](#)

Title IX LGBTQ

Students and LGBTQ

- In 2017, the Seventh Circuit decided an appeal from the U.S. District Court for the Eastern District of Wisconsin. *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, [858 F.D.A. 1034](#), 1039-42 (7th Cir. 2017).
- The *Whitaker* case involved the following topics:
 - Restroom use,
 - Title IX, **and**
 - The Equal Protection Clause.



Title IX LGBTQ

Students and LGBTQ

- Fourth Circuit Court of Appeals decided that restroom policies segregating transgender students and denying transgender students accurate transcripts are unconstitutional and violate Title IX. *Grimm v. Gloucester*, 972 F.3d 586 (4th Cir. 2020).
- The District argued that it had the ability to create sex-segregated restrooms and that the act in and of itself isn't discriminatory. The court stated that while the act of creating the sex-segregated restrooms may not have been discriminatory – the school board's notion of what "sex" means was discriminatory.

Title IX LGBTQ

Students and LGBTQ

- On June 15, 2020, the U.S. Supreme Court held that discrimination on the basis of an individual's status as homosexual or transgender constitutes sex discrimination within the meaning of Title VII of the Civil Rights Act of 1964. See [*Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1741 \(2020\)](#).
- The Supreme Court held: “[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”



Title IX LGBTQ

Students and LGBTQ

- Biden Executive Order
 - The Executive Order makes the policy statement that all persons should receive equal treatment under the law without regard to their gender identity or sexual orientation.
 - The Order bases these policy statements on Title VII of the Civil Rights Act of 1964 and the Supreme Court's recent ruling on that law, *Bostock v. Clayton County*.

Title IX

DOE Notice of Interpretation

- On June 16, 2021, the U.S. Department of Education (DOE) issued a Notice of Interpretation (Notice) explaining that it will enforce Title IX's prohibition on discrimination on the basis of sex to include:
 1. Discrimination based on sexual orientation; **and**
 2. Discrimination based on gender identity.
- This Notice can be found at:
<https://www2.ed.gov/about/offices/list/ocr/docs/202106-titleix-noi.pdf>



Title IX

DOE Notice of Interpretation

- This Notice also informs schools that the Office for Civil Rights (OCR) will investigate complaints of discrimination based on sexual orientation and gender identity and will address compliance concerns or violations when necessary.
- In fact, OCR has stated that it 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 benefits of such programs or activities or otherwise treated differently because of their sexual orientation or gender identity.”
- Earlier this year, the U.S. Department of Justice came to the same conclusion as DOE: Title IX protects against discrimination based on sexual orientation and gender identity.



Title IX

Policy implications

- School districts should take careful note of DOE's recent Notice and review nondiscrimination policies and procedures with respect to sexual orientation and gender identity.
- If a district's nondiscrimination policy prohibits discrimination on the basis of sex, there is no need to include sexual orientation or gender identity as a subset of "sex" to avoid OCR scrutiny, provided the district interprets "sex" to include sexual orientation and gender identity and its practices reflect such interpretation.

Title IX LGBTQ

Students and LGBTQ

- Safest route is to assume that students who are transgender are protected under Title IX and to work with these students on an individual basis to accommodate them with respect to the use of restrooms and locker rooms, preferred names, and pronouns, school-sponsored activities, and athletics.
- In responding to requests from students who are transitioning or transgender, a district should consider:
 1. District policies and procedures;
 2. The age of the student;
 3. The parents' involvement and support;
 4. How to maintain student confidentiality;
 5. How to make the district's facilities accessible for the student; **and**
 6. Possible harassment/retaliation.

Title IX LGBTQ

Tehachapi USD (CA)

- Tehachapi Unified School District (District) agreed to resolve a Title IX complaint alleging sexual and gender-based harassment of a gender non-conforming male student (Student), who attended Jacobsen Middle School.
- The investigation found that the Student was targeted for harassment over two school years because of his nonconformity with gender stereotypes.
- The District signed a Resolution Agreement in which it agreed to take all reasonable steps to ensure that all students enrolled in the District are not subject to sex-based harassment, and to respond promptly and appropriately to all reports of harassment.

Conclusion

IV

Title IX Proposed Regulations

June 23, 2022, Proposed Regulations

- Sex discrimination applies to sexual orientation, gender identity, and sex characteristics.
- New definition of sex-based harassment, including hostile environment that looks at “sufficiently severe or pervasive” conduct
- New definition of confidential employees
- New response requirements, including eliminating the definition of actual knowledge and deliberately indifferent

Title IX Proposed Regulations

June 23, 2022, Proposed Regulations

- Requires institutions to address off-campus conduct
- Expands the definition of complainant
- Requires institutions to provide supportive measures to students and employees in instances involving any sex discrimination
- Sets forth additional training requirements
- Combining grievance procedures for sex discrimination and sexual harassment complaints in certain instances

Title IX Proposed Regulations

June 23, 2022, Proposed Regulations

- Sets forth additional requirements for sex-based harassment complaints involving a post-secondary student
- Revised informal resolution procedures
- New regulations related to protecting students from discrimination based on pregnancy, including providing reasonable modifications for students, reasonable break time for employees for lactation, and lactation space for students and employees
- Revised retaliation provisions



Conclusion

- Need to consider various areas
- Need to identify policies
- Need to ensure staff is trained in various areas

COMING SOON

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I have upcoming webinars with CareerLearning.



What was your key takeaway?

Please let us know in the Q&A.

We will use your response with your first name and last initial on our website so others can benefit!





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Questions?



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