Title IX In "Jeopardy": Title IX Basics in Uncertain Times

OSPA Summer Conference
July 28, 2024

Presented By

Jackie Gharapour Wernz
Title IX Consultant

ECR SOLUTIONS
education civil rights

1

Reminders!

- This is a training on Federal Law
- This is not legal advice
- To post or not to post?
- Keep it hypothetical
- Ask questions
- Have fun!

2

Scope of Title IX

3

© July 2024 ECR Solutions LLC. All rights reserved.

Title IX Applicability

- Title IX applies to federally funded schools
- Applies to all parts of a school district that receives such funds
- Protects students, employees, applicants for employment, and others participating in or attempting to participate in the education program or activity
- Protects against all forms of sex discrimination, defined specifically to include sexual orientation and gender identity under the 2024 Title IX Rule
- Essence is that an institution may not exclude, segregate, deny benefits to, or otherwise treat differently based on sex unless expressly authorized by a Title IX exception

4

2020 Rule: The Basics

- Proposed November 16, 2018
- Final Rule Issued May 6, 2020
- Effective Date of August 14, 2020
- Applicable to incidents occurring after the effective date
- Over 2000 pages of preamble and rule

5

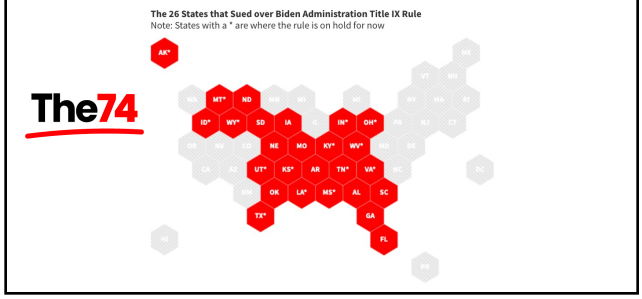
2024 Rule: The Basics

- Proposed June 23, 2022
- Final Rule Issues April 19, 2024
- Stated effective date of August 1, 2024
- Enjoined in 21 states (not including Oregon) and 1000+ individual schools, colleges, and universities, even in states without an injunction
- Applicable to incidents occurring after the effective date
- Over 1500 pages of rule (57) and preamble (1504)

6

© July 2024 ECR Solutions LLC. All rights reserved.

Injunctions in the States



7

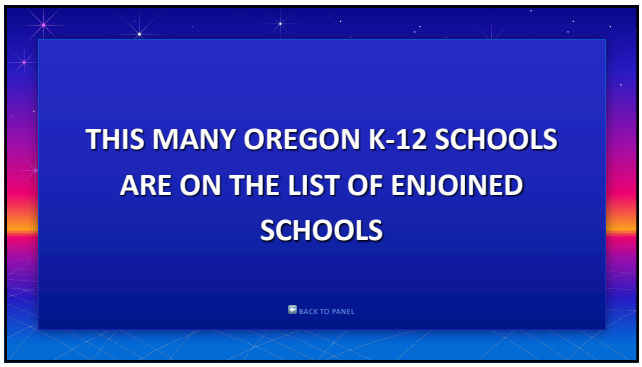
Join the Vevox session

Go to **vevox.app**

Enter the session ID: **169-120-111**

Or scan the QR code

8



9

© July 2024 ECR Solutions LLC. All rights reserved.

INJUNCTIONS OF THE 2024 RULE HAVE FOCUSED ON THE DEFINITION OF THIS KEY TERM IN TITLE IX

BACK TO PANEL

13

LGBTQI+ Status (2024 Rule)

"Discrimination on the basis of sex includes discrimination on the basis of sex stereotypies, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity" – 34 C.F.R. § 106.10 (2024 Version).

"Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex" except for in athletics or housing in higher education – 34 C.F.R. § 106.31 (2024 Version).

These provisions are the focus of state lawsuits against the rule; changes seem likely but this will be the law in Oregon as of August 1 unless there is a nationwide injunction or stay

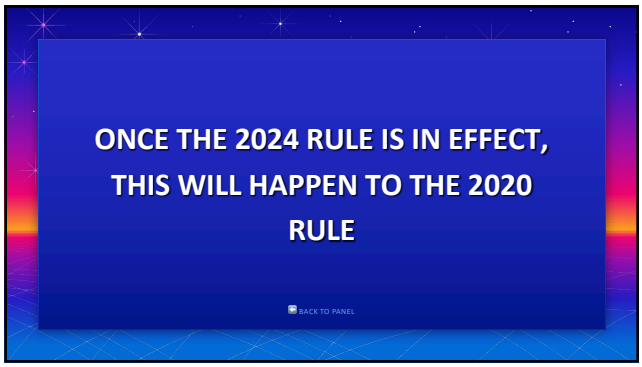
16

THIS IS HOW LONG SCHOOLS IN OREGON WOULD HAVE TO SWITCH RULES IF A NATIONAL INJUNCTION IS IMPLEMENTED

BACK TO PANEL

17

© July 2024 ECR Solutions LLC. All rights reserved.



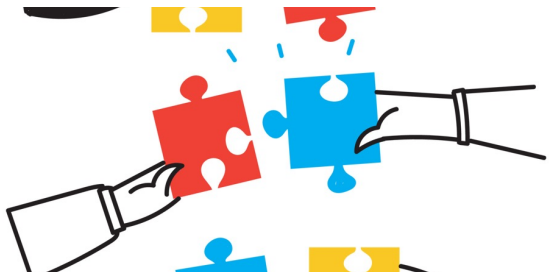
20

Agenda

- The Title IX Coordinator
- "Classic" Title IX Administrative Requirements
- "Classic" Title IX Substantive Areas
- Proactive Title IX Responsibilities
- Reactive Title IX Responsibilities

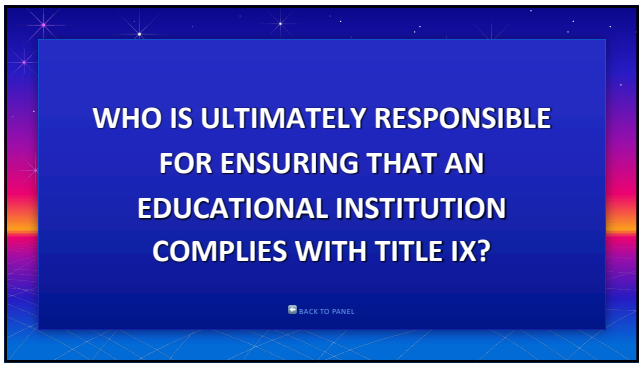
23

The Title IX Coordinator



24

© July 2024 ECR Solutions LLC. All rights reserved.

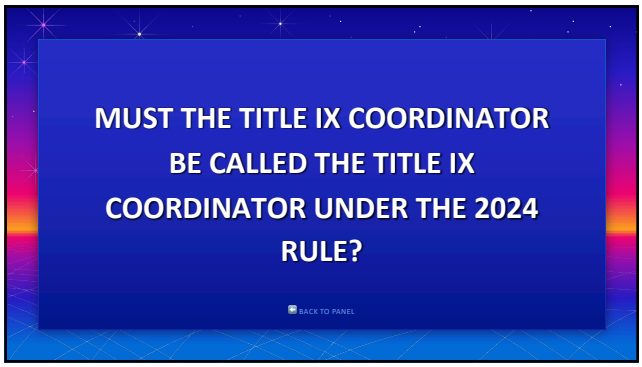


25

Title IX Coordinator

- Each educational institution subject to Title IX must designate at least one employee to coordinate its efforts to comply with its responsibilities under Title IX regarding sex discrimination
- Must provide notice to the community of contact information for the Title IX Coordinator, including on the educational institution's website

28



29

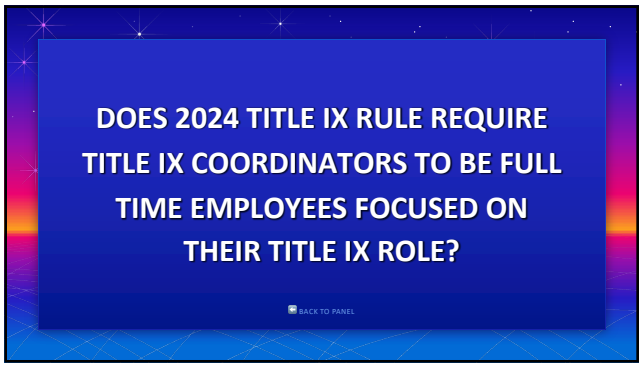
© July 2024 ECR Solutions LLC. All rights reserved.

Title IX Coordinator

Examples of Title IX Coordinator responsibilities:

- Compliance with administrative requirements
- Knowledge of institutional policies and procedures
- Participate in drafting and revision of policies and procedures
- Coordinate policies and procedures
- Educating the school community on how to make complaints
- Coordinating responses to complaints, including investigations Working with law enforcement when necessary
- Ensuring that complaints are resolved promptly and appropriately
- Monitoring outcomes, identifying patterns, and assessing the effects of sex discrimination on the campus climate
- Being available to meet with the school community to discuss Title IX issues

32



33

Title IX Coordinator: Full-Time

- Schools must make the role of the Title IX Coordinator visible in the school community and ensure that the Title IX Coordinator is sufficiently knowledgeable about Title IX and the recipient's policies and procedures
- Designating a full-time Title IX coordinator will minimize the risk of a conflict of interest and in many cases ensure sufficient time is available to perform all the role's responsibilities
- If a recipient designates one employee to coordinate the recipient's compliance with Title IX and other related laws, it is critical that the employee has the qualifications, training, authority, and time to address all complaints throughout the institution, including those raising Title IX issues

36

© July 2024 ECR Solutions LLC. All rights reserved.

Deputy Title IX Coordinators

- The Title IX coordinator should work closely with many different members of the school community whose responsibilities implicate Title IX
- Examples: administrators, counselors, athletic directors, non-professional counselors or advocates, and legal counsel
- Can designate these or others as Title IX coordinators or deputy Title IX Coordinators, including over specific areas (e.g., gender equity in academic programs or athletics, harassment, complaints from employees)
- If an educational institution has multiple Title IX coordinators or deputies, it must designate **one lead Title IX coordinator who has ultimate oversight responsibility**
- Even if such employees are not formally designated as coordinators or deputy coordinators, should work closely with the Title IX Coordinator

37

"Classic" Title IX Administrative Requirements

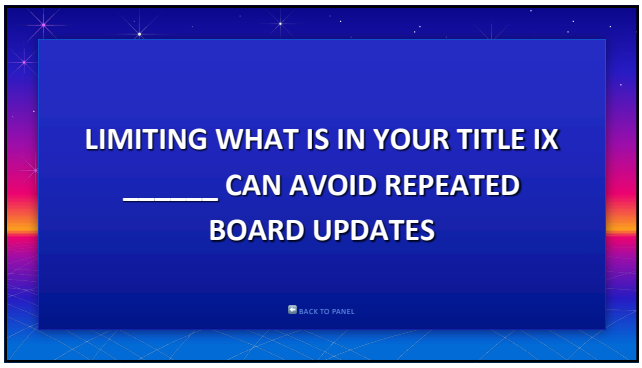
38

"Classic" Title IX Administrative Requirements

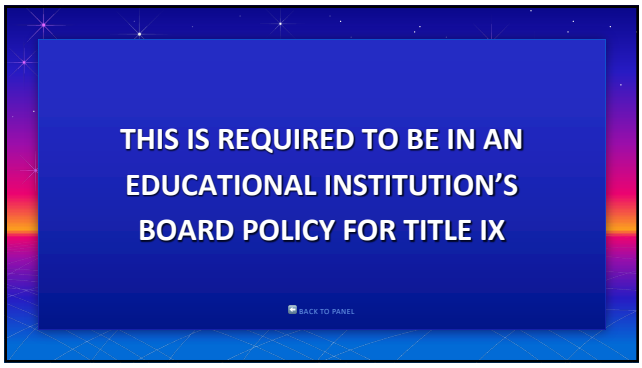
- The requirements of the Title IX regulations have long been the underpinning of both the Title IX coordinator's job and an educational institution's compliance with Title IX
- Classic requirements including policies, procedures, and notices help an educational institution maintain an environment for students and employees that is free from unlawful sex discrimination in all aspects of the educational experience, including academics, extracurricular activities, and athletics
- Allow an institution to resolve complaints of discrimination without the need for involvement by outside entities like the Federal government
- Ensure that members of the school community are aware of their rights under Title IX, have the contact information for the Title IX Coordinator, and know how to file a complaint alleging a violation of Title IX

39

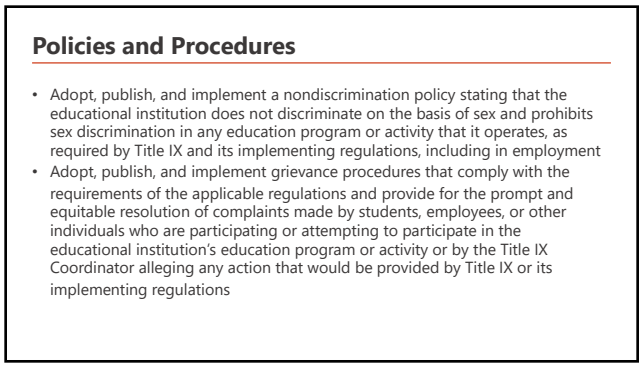
© July 2024 ECR Solutions LLC. All rights reserved.



40



43



46

© July 2024 ECR Solutions LLC. All rights reserved.

Notice of Nondiscrimination

- Provide a notice of nondiscrimination to students, parents, guardians, and other authorized legal representatives of students, employees, applicants for employment, and all unions and professional organizations holding collective bargaining or professional agreements
- Publish the notice of nondiscrimination on its website and in each handbook, catalog, announcement, bulletin, and application form that it makes available to persons entitled to notice that it makes available to students, parents, guardians, and other authorized legal representatives of students, employees, applicants for employment, and all unions and professional organizations holding collective bargaining or professional agreements or which are otherwise used in connection with the recruitment of students or employees
  - The 2024 Title IX rule allows a short notice with a link to the full notice on the school district's website

47

Notice of Nondiscrimination Requirements

- Statement that the educational institution does not discriminate on the basis of sex and prohibits sex discrimination in any education program or activity that it operates, as required by Title IX and its implementing regulations, including in employment
- Statement that inquiries about the application of Title IX and this part to the educational institution may be referred to the Title IX Coordinator or OCR
- The name or title, office address, email address, and telephone number of the Title IX Coordinator
- How to locate the educational institution's nondiscrimination policy and grievance procedures
- How to report information about conduct that may constitute sex discrimination
- How to make a complaint of sex discrimination under Title IX

48

"Classic" Title IX Substantive Areas

49

© July 2024 ECR Solutions LLC. All rights reserved.

Title IX Applies To:

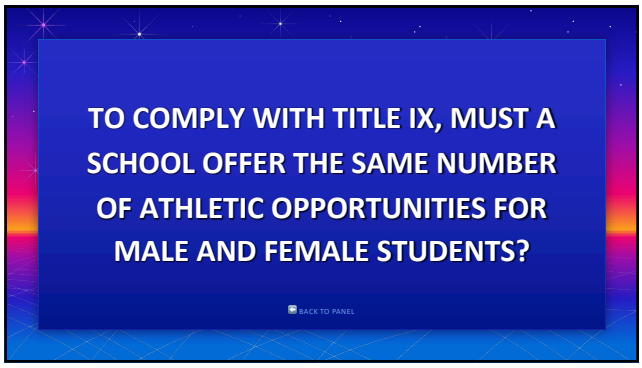
- Recruitment, Admissions, Counseling (Higher Ed Only)
- Financial Assistance (Higher Ed Only)
- Athletics
- Sex-Based Harassment
- Pregnant & Parenting Students
- Different Treatment (Where No Exception)
- Single Sex-Education
- Employment
- Retaliation

50

Application of Title IX to Athletics

- The Department's Title IX regulations prohibit sex discrimination in interscholastic, intercollegiate, club, or intramural athletics offered by an educational institution
- Sex discrimination must be avoided with respect to
  - Student Interests and Abilities: An institution must provide equal athletic opportunities for members of both sexes and effectively accommodate students' athletic interests and abilities
  - Athletic Benefits and Opportunities

51



52

© July 2024 ECR Solutions LLC. All rights reserved.

Student Interests and Abilities: The 3 Part Test

Part 1: Whether participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments

Part 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

Part 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

55

Student Interests and Abilities: Coordination

Title IX Coordinator Checklist:

1. Compare enrollment data to the number of athletic participation opportunities offered to check for substantial proportionality
2. If there is not substantial proportionality, review the institution's history of expanding participation opportunities for students of the underrepresented sex
3. If there is not a history of expanding participation, evaluate whether there is unmet interest in a particular sport, whether there is sufficient ability to sustain a team in the sport, and whether there is a reasonable expectation of competition for the team

56

Test Three: Coordination

Unmet Interest?
- Surveys and Interest Forms
- Focus Groups and Meetings
- Participation Trends

Ability to Sustain a Team?
- Tryout Data
- Existing Competitions
- Skill Development Programs

Expectation of Competition?
- Regional Competition Analysis
- League and Conference Availability
- Scheduling and Travel Feasibility

57

© July 2024 ECR Solutions LLC. All rights reserved.

Equal Athletic Benefits (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
7. Provision of medical and training facilities and services
8. Housing and dining services (higher ed only)
9. Publicity
10. Recruitment
11. Support services

58

The Laundry List: Coordination

- Periodically review and compare the distribution of athletic benefits and opportunities by sex in each of these areas, including financial expenditures on male and female athletic teams
- If a booster club donates to a team or a team raises significant funds for itself, the school is responsible for ensuring that disparities in funding do not result in unequal treatment or opportunities for male and female athletes
- The Oregon School Activities Association (OSAA) has approved rules allowing high school athletes to benefit from NIL deals, which OCR has said will also be subject to Title IX rules

59

DOES THE 2024 TITLE IX RULE FOR THE FIRST TIME REQUIRE SCHOOLS TO PROTECT STUDENTS FROM DISCRIMINATION BASED ON PREGNANCY OR PARENTING STATUS?

BACK TO PANEL

60

© July 2024 ECR Solutions LLC. All rights reserved.

Pregnant & Parenting Students

- The 2024 Title IX Rule codifies many longstanding protections for pregnant and parenting students and employees and adds others, including the general rule **prohibiting different treatment** based on parental, family, or marital status
- For employees, it requires providing **reasonable break time** for lactation
- For students and employees, it requires **lactation spaces** that are not a bathroom and are clean, shielded from view, and free from intrusion by others
- For students, it requires **all employees** to provide information about the Title IX Coordinator to any student or their parent/guardian who reports the student's pregnancy or related condition to any employee
- The rule also requires that the Title IX Coordinator take specific actions to **promptly and effectively prevent sex discrimination and ensure equal access** to its education program or activity upon learning of a student's pregnancy or related conditions

63

Pregnancy & Parenting: Coordination

- Coordinate the recipient's response to complaints of discrimination against pregnant and parenting students
- Consider providing training and educational resources to students and employees so they know that Title IX prohibits discrimination against pregnant and parenting students and what supports may be available
- Consider providing workshops to administrators, teachers, and other staff on requirements related to pregnant and parenting students

64

Student P&RC: Coordination

If a student or their parent/legal guardian notifies the Title IX Coordinator of the student's pregnancy or related condition (P&RC), the Title IX Coordinator must:

- Provide notice of obligations under Title IX and copy of non-discrimination notice
- Offer voluntary access to separate and comparable educational programs and activities (cannot require)
- Offer voluntary leave of absence for at least as long as their licensed healthcare provider says is necessary (cannot require; must offer longer leave if available)
- Reinstate to academic and, as practicable, extracurricular status upon return from leave
- Offer reasonable modifications of policies, practices, or procedures based on the student's individual needs and in consultation with the student (fundamental alteration not required)
- Implement modifications offered and accepted by the student (student can decline)
- Not require documentation from students unless necessary and reasonable

65

© July 2024 ECR Solutions LLC. All rights reserved.

Student P&RC: Reasonable Modifications

Examples of reasonable modifications as long as they do not fundamentally alter the education program or activity:

- Breaks during class to express breast milk, breastfeed, or attend to health needs such as eating, drinking, or using the restroom
- Intermittent absences for medical appointments
- Access to online or homebound education
- Changes in schedule or course sequence
- Extensions of time for coursework and rescheduling of tests and examinations
- Allowing a student to sit or stand or carry or keep water nearby
- Counseling
- Changes in physical space or supplies (e.g., access to a larger desk or footrest)
- Elevator access
- Other changes to policies, practices, or procedures

66

Student P&RC: Documentation

- May not require supporting documentation unless necessary and reasonable for the educational institution to determine reasonable modifications to make or whether to take additional specific actions required by Title IX
- Examples when it is not necessary and reasonable:
  - When the need for a specific action is obvious, such as when a student who is pregnant needs a bigger uniform
  - When the student has previously provided sufficient supporting documentation
  - When the reasonable modification because of pregnancy or related conditions at issue is allowing a student to carry or keep water nearby and drink, use a bigger desk, sit or stand, or take breaks to eat, drink, or use the restroom
  - When the student has lactation needs, or
  - When the specific action is available to students for reasons other than pregnancy or related conditions without submitting supporting documentation.
- May not require a certification of physical ability or health unless a certified level of physical ability or health is necessary to participate in a class, program, or activity and the information is not used to discriminate

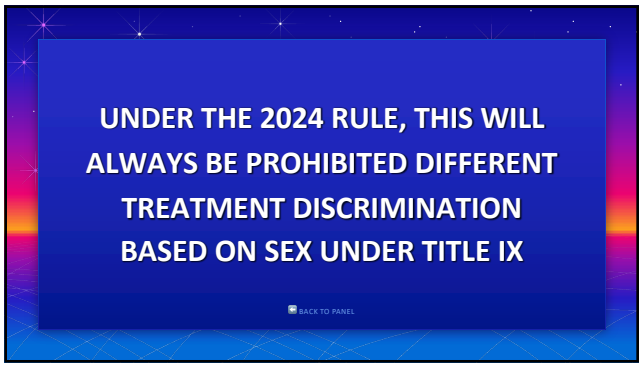
67

Different Treatment or Impact (Where No Exception)

- Unless there is an exception in the Title IX regulations, schools are generally prohibited from engaging in different treatment or disparate impact discrimination based on sex
- These complaints are relatively common, so we will discuss the elements more in depth in our later sessions

68

© July 2024 ECR Solutions LLC. All rights reserved.



69

Different Treatment & Impact: Discipline

- Different treatment issues often arise with respect to discipline, so Title IX Coordinators should pay special attention to that issue:
  - Regularly review policies, procedures, and practices to help make sure they do not treat similarly situated students differently based on sex for similar conduct and do not have an unlawful disparate impact on students based on sex
  - Regularly review and analyze disciplinary records regarding disciplinary incidents to monitor the administration of discipline policies to ensure that they are not administered in a discriminatory manner (may need to take steps to ensure disciplinary recordkeeping is accurate and complete)
  - Ensure that students are not disciplined based on their gender identity or for failing to conform to stereotypical notions of masculinity or femininity in their behavior or appearance

73

Single Sex Education

- Schools generally may not provide education programs or activities separately on the basis of sex or refuse to allow students to participate in programs or activities based on sex
- Some limited exceptions apply with respect to:
  - Single-sex nonvocational elementary or secondary schools where a substantially equal school (single sex or coed) is offered to students of the other sex
  - Single-sex classes and extracurricular activities (contact sports in PE, human sexuality classes, and others if certain criteria are met); classes must be reassessed at least every two years

The Title IX Coordinator should be involved in assessing compliance with Title IX by conducting periodic assessments, keeping track of complaints, confirming participating in single-sex activities is voluntary, and helping ensure that substantially equal alternatives are offered

74

© July 2024 ECR Solutions LLC. All rights reserved.

Single Sex Education

- Schools generally may not provide education programs or activities separately on the basis of sex or refuse to allow students to participate in programs or activities based on sex
- Some limited exceptions apply with respect to:
  - Single-sex nonvocational elementary or secondary schools where a substantially equal school (single sex or coed) is offered to students of the other sex
  - Single-sex classes and extracurricular activities (contact sports in PE, human sexuality classes, and others if certain criteria are met); classes must be reassessed at least every two years

The Title IX Coordinator should be involved in assessing compliance with Title IX by conducting periodic assessments, keeping track of complaints, confirming participating in single-sex activities is voluntary, and helping ensure that substantially equal alternatives are offered

75

Employment Under Title IX

- Title IX prohibits discrimination on the basis of sex in any employment or recruitment, consideration, or selection for employment, whether full-time or part-time
- This includes employment actions such as recruitment, hiring, promotion, compensation, grants of leave, and benefits
- An educational institution must make employment decisions in a nondiscriminatory manner and may not enter into contracts, including those with employment agencies or unions that have the direct or indirect effect of subjecting employees or students to discrimination based on sex
- Title IX's employment provisions protect against discrimination based on an applicant's or employee's pregnancy or marital or parental status

76

Employment: Coordination

- Although employment matters are often handled through human resources rather than Title IX, the Title IX Coordinator should none the less ensure school employees are aware that the Title IX Coordinator is available to help employes as well as students
- The Title IX Coordinator should be familiar with the school district's employment policies and procedures
- The Title IX Coordinator should train appropriate human resources employees regarding the school district' s obligations under Title IX

77

© July 2024 ECR Solutions LLC. All rights reserved.

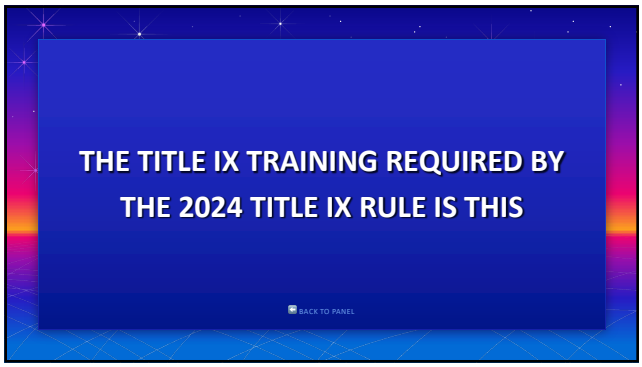
Retaliation Under Title IX

- An educational institution cannot retaliate against an individual, including a Title IX Coordinator, for the purpose of interfering with any right or privilege secured by Title IX
- Retaliation against an individual because the individual filed a complaint alleging a violation of Title IX; participated in a Title IX investigation, hearing, or proceeding; or advocated for others' Title IX rights is also prohibited
- Educational institutions should ensure that individuals are not intimidated, threatened, coerced, or discriminated against for engaging in such activity

78

Proactive Title IX Responsibilities

79



80

© July 2024 ECR Solutions LLC. All rights reserved.

2020 Rule – Required Training

Coordinators, investigators, Decision-makers (initial and appellate), and Informal Resolution Facilitators:

- The definition of sexual harassment
- The scope of the education program or activity
- How to conduct an investigation and grievance process, including hearings (for higher ed), appeals, and informal resolution processes
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias

83

2020 Rule – Required Training

Investigators:

- Issues of relevance to create an investigative report that fairly summarizes relevant evidence

84

2020 Rule – Required Training

Initial Decision-makers:

- Any technology used at live hearings (for higher ed)
- Issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant

85

© July 2024 ECR Solutions LLC. All rights reserved.

What About Training on the Rest of Title IX?

- Before 2020, **neither the Title IX statute nor the Title IX rule required specific training for Title IX sex discrimination other than "sexual harassment"**
- Some training has gone above and beyond (like those OSPA has offered you in the past) to cover other types of discrimination under Title IX (e.g., different treatment, disparate impact, retaliation)
- These topics will now be **required** to be covered more clearly under the 2024 rule
- OCR has made clear that the training requirements **are not retroactive** and so **no training on the 2024 rule was required before August 1, 2024**

86

2024 Rule – Required Training

All Employee Training

- The school's obligation to address sex discrimination in its education program or activity
- The scope of conduct that constitutes sex discrimination under Title IX and its regulations, including the definition of sex-based harassment, and
- Responsibilities of non-confidential and confidential employees to report information about conduct that reasonably may be sex discrimination to the Title IX Coordinator or provide certain information to the reporting party if not required to report
- Responsibilities of all employees to provide certain information to a student or a person with a legal right to act on behalf of the student informs the employee of the student's pregnancy or related condition

88

2024 Rule – Required Training

Informal Resolution Facilitators

- All "all employee" training topics
- The rules and practices associated with the school's informal resolution process
- How to serve impartially, including by avoiding conflicts of interest and bias

89

© July 2024 ECR Solutions LLC. All rights reserved.

2024 Rule – Required Training

Investigators, Decisionmakers, and Individuals With Authority to Modify or Terminate Supportive Measures

- All "all employee" training topics
- The school's required response to sex discrimination (§ 106.44)
- The school's grievance procedures for sex discrimination complaints (§ 106.45 and, for higher ed, § 106.46)
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- The meaning and application of the term "relevant" in relation to questions and evidence and the types of evidence that are impermissible regardless of relevance under the school's Title IX grievance procedures

90

2024 Rule – Required Training

Coordinators and Designees

- *All training topics stated so far*
- Their specific responsibilities related to:
  - Their role as Title IX Coordinator or designee
  - The right of the Coordinator to delegate to designees
  - Specific actions the school must take to prevent discrimination and ensure equal access for pregnancy and related conditions, if relevant to the person's role
  - The school's required response to sex discrimination (§ 106.44), including supportive measures, if relevant to the person's role
  - The school's recordkeeping requirements
- Any other training necessary to coordinate the school's compliance with Title IX

91

Remember!

- This OSPA training continues to be focused on **FEDERAL LAW**
- You should continue to work with OSPA, OSBA, ODE, and your local counsel to ensure that any training requirements under state law are met

92

© July 2024 ECR Solutions LLC. All rights reserved.

UNDER THE 2024 TITLE IX RULES, SCHOOLS MUST DO THE FOLLOWING THING(S) THAT THEY WERE NOT DOING BEFORE

BACK TO PANEL

93

Proactive Monitoring

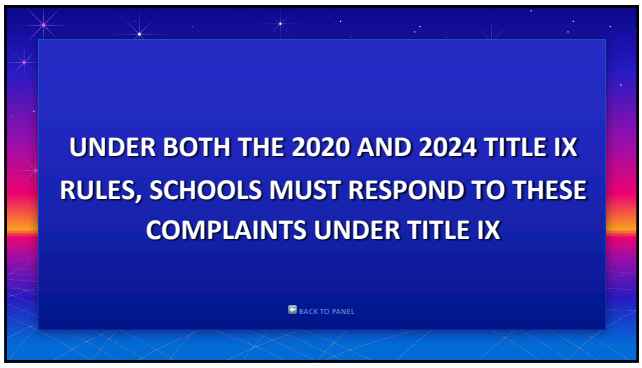
- An educational institution must require its Title IX Coordinator to monitor the education program or activity for barriers to reporting information about conduct that reasonably may constitute sex discrimination under Title IX or its implementing regulations and take steps reasonably calculated to address such barriers
- The Title IX coordinator should also assist the institution in developing a method to survey the school climate and coordinate the collection and analysis of information from that survey
- The coordinator should monitor students' participation in athletics and across academic fields to identify programs with disproportionate enrollment based on sex and ensure that sex discrimination is not causing any disproportionality or otherwise negatively affecting a student's access to equal educational opportunities
- Regularly assess the adequacy of current training opportunities and programs

96

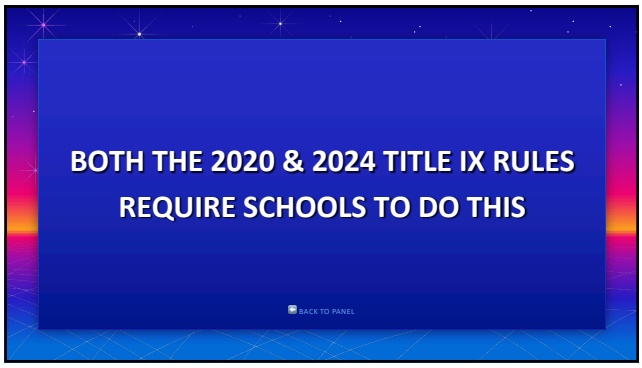
Reactive Title IX Responses

97

© July 2024 ECR Solutions LLC. All rights reserved.



98



101

Keeping Up With the Changes

- Educational institutions must ensure that Title IX Coordinators remain trained despite changes in the law
- The best way to ensure Title IX coordinators have the most current knowledge of Federal and State laws, regulations, and policies relating to Title IX and gender equity is for a recipient to provide regular training to the Title IX Coordinator, as well as to all employees whose responsibilities may relate to the recipient's obligations under Title IX
- OCR's regional offices can provide technical assistance, and opportunities for training may be available through Equity Assistance Centers, State educational agencies, private organizations, advocacy groups, and community colleges
- A Title IX coordinator may also find it helpful to seek mentorship from a more experienced Title IX coordinator and to collaborate with other Title IX coordinators in the region (or who serve similar institutions) to share information, knowledge, and expertise

104

© July 2024 ECR Solutions LLC. All rights reserved.

105

© July 2024 ECR Solutions LLC. All rights reserved.