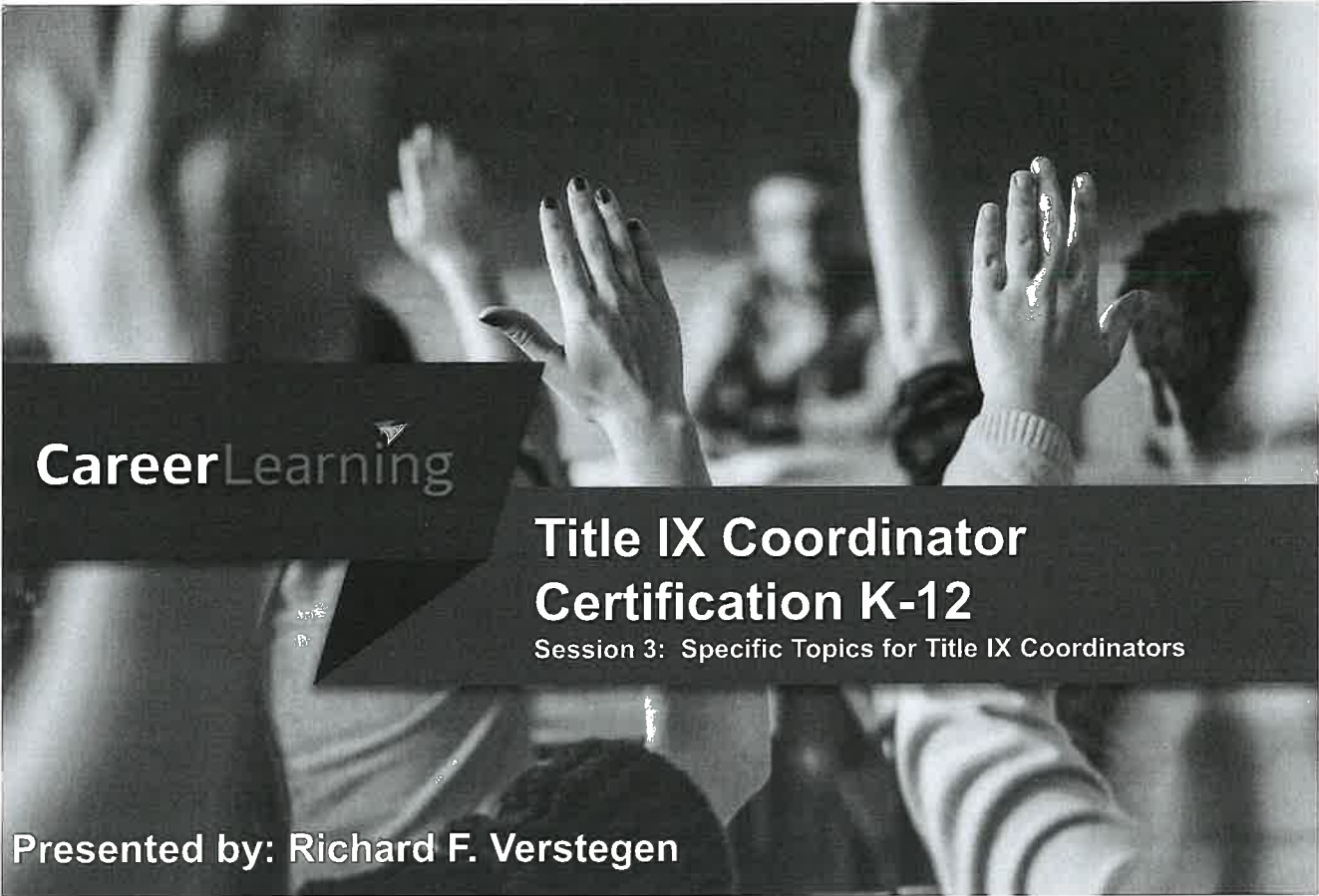


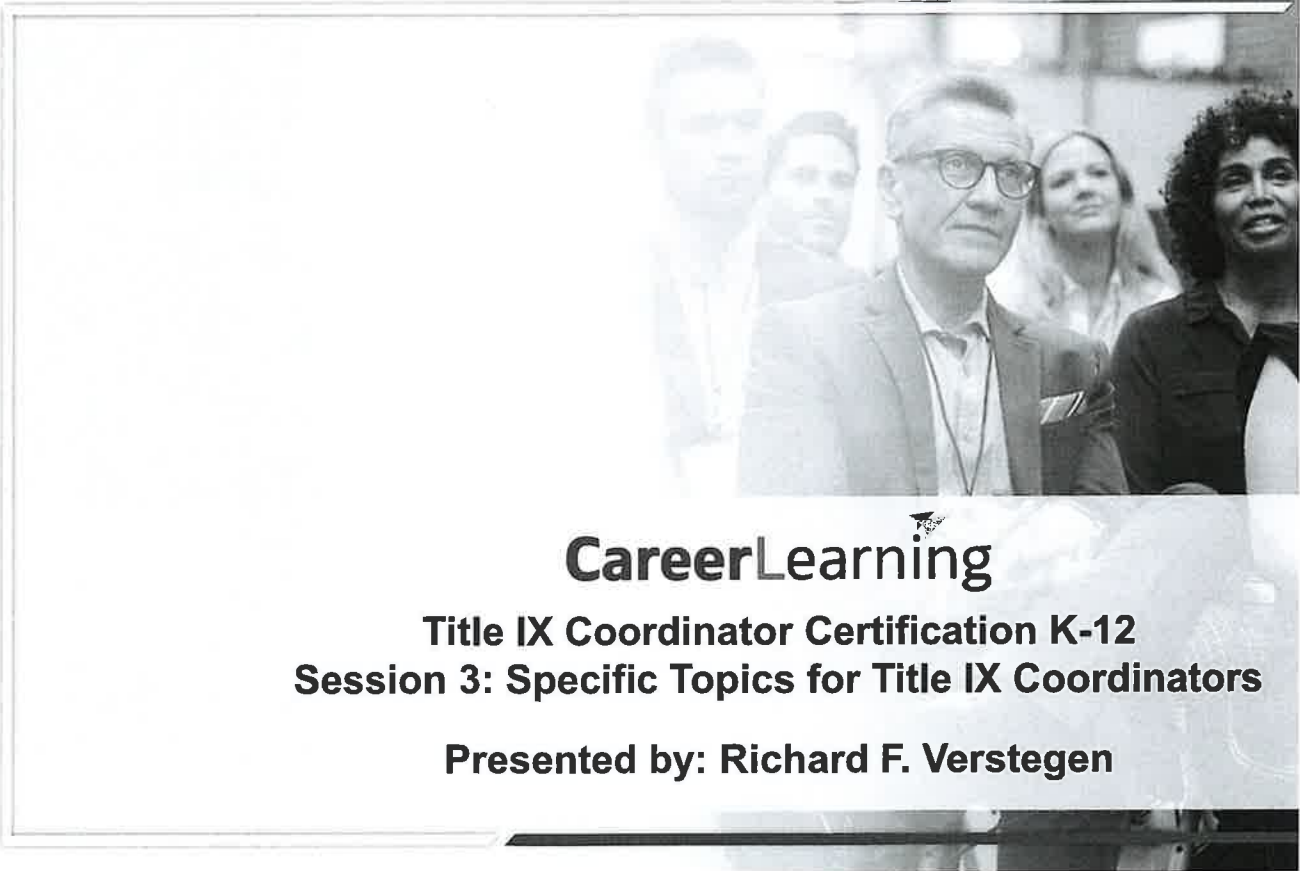


CareerLearning

Title IX Coordinator Certification K-12

Session 3: Specific Topics for Title IX Coordinators

Presented by: Richard F. Verstegen



CareerLearning

**Title IX Coordinator Certification K-12
Session 3: Specific Topics for Title IX Coordinators**

Presented by: Richard F. Verstegen

2/15/23
1:30 - 3:00

Overview

I

Specific Topics

- Athletics
- Pregnancy
- Employment
- LGBTQ

II

Policy Considerations

III

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.





Athletics

CareerLearning

www.careerlearning.com

Poll Question

- **Have you had to address any issues with discrimination in athletics within the last 5 years?**
 - Yes, dealing with lack of sports based on student interests
 - Yes, dealing with financial issues
 - Yes, dealing with other issues
 - No



CareerLearning

www.careerlearning.com



Title IX Athletics

- **Regulations**

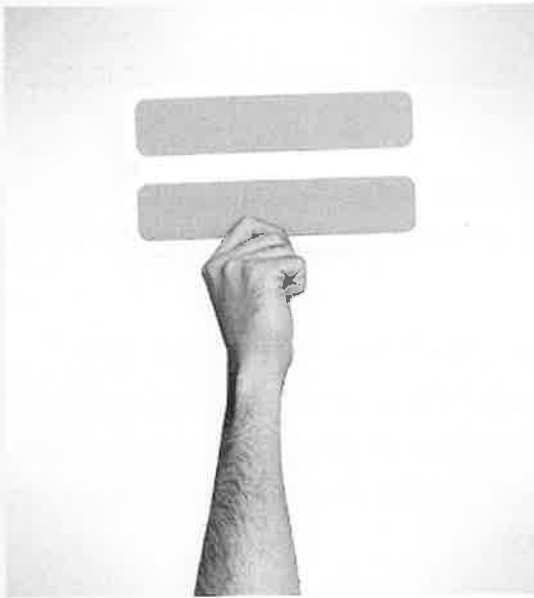
- The regulations implementing contain specific provisions relating to athletic opportunities.
- "No person shall, on the basis of sex, be excluded from participation in, the benefits of, be treated differently than another person or otherwise be discriminated against in any intercollegiate, club or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

Title IX Athletics

- **Regulations – equal opportunity**

- A recipient which operates or sponsors interscholastic, intercollegiate, or intramural athletics shall provide equal athletic opportunity for both sexes. 34 C.F.R. s. 106.41(c).
- In determining whether equal opportunities are available the Director shall 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 opportunity is available the Director will consider, among other factors:
 4. Travel and per diem allowance;
 5. Opportunity to receive coaching and 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 benchmark:
 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 has 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, whether 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 and female students in numbers substantially proportionate to 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 available 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 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 underrepresented gender and persists in this approach as intelligence 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 participation opportunities provided for the underrepresented sex.
- To meet the requirements, it is not necessary to show annual or constant 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 an underrepresented sex that should be accommodated.
- An institution can satisfy part three where there is evidence that the im 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 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 determine if 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;
 3. Travel and per diem allowances;
 4. Opportunity for coaching and academic support;
 5. Assignment and compensation of coaches and administrators;
 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

- **Nondiscriminatory justification:**
 - Sports that require more resources because of the nature of the game (i.e., football = \$\$\$\$)
 - Special circumstances, like a high demand
 - Special operational expenses for 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 evaluate whole and not by comparing the k girls' coaches in each sport.

Title IX Athletics

Locker rooms and facilities

- Compliance factors for locker room, practice, and competition facil
 - The quality and availability of the facilities provided for practice competitive events;
 - Exclusivity of use of facilities for practice and competitive even
 - 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 re Evansville-Vanderburgh School Corporation (Corporation).
 - The review examined whether the Corporation discriminated female students under Title IX by denying them an equal opportunity to participate in its high school interscholastic athletics program by not providing to 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 room practice, and competitive facilities at each high school by comparing male and female students, 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 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 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 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) at <http://www.ed.gov/ocr/docs/t9interp.html>.



Pregnancy

Poll Question

- Have you had to address any issues with discrimination in pregnancy within the last 5 years?
 - Yes, dealing with harassment
 - Yes, dealing with discrimination
 - Yes, dealing with both harassment and discrimination
 - No



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
 - Programs and services
 - Employment
- Title IX's focus has been on not reinforcing stereotypes of pregnant students 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



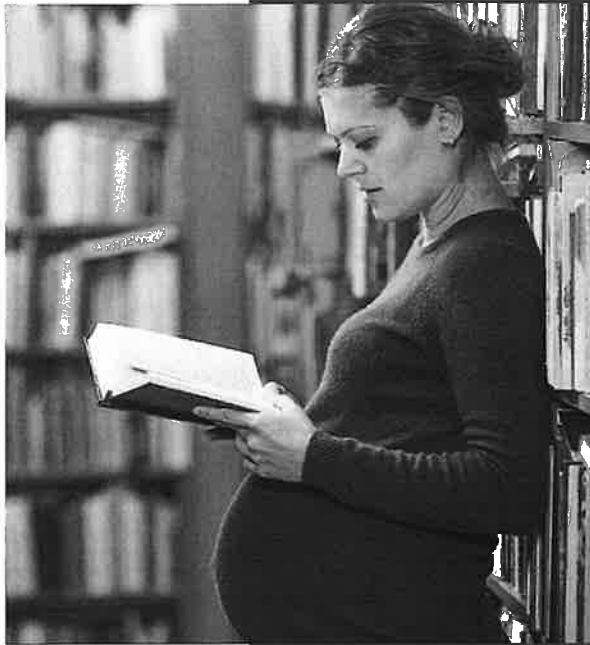
- **OCR guidance**

- On June 25, 2013, the Office for Civil Rights (OCR) issued a Dear Colleague Letter on pregnancy and parenthood 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 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—school- and family-related.
- Pregnancy is consistently the most common family-related reason by female students.



Title IX Pregnancy

OCR guidance

- Title IX guidance details how the law a range of specific educational activities policies that affect pregnant and parent 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. C.F.R. s. 106.40(b)(1)
- A recipient which operates a portion of its education program or activity separate from its regular education program 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. 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 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

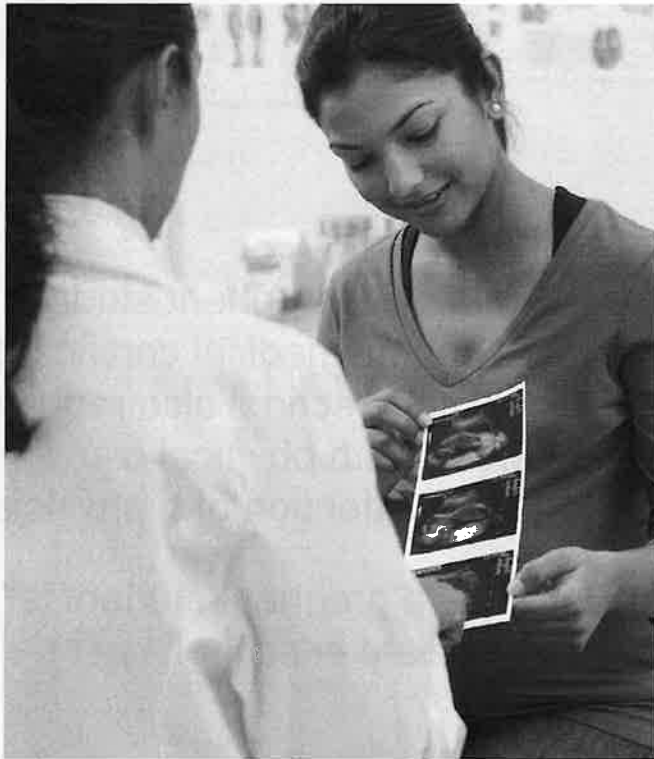
- **Regulations**
- A recipient may require such to obtain certification of a physician that the student is physically and emotionally able to continue participation, so long as such certification is required of all students for other physical or emotional conditions requiring the attention of a physician.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

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

- **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

- **Excused absences and medical leave**
 - Educational institutions must excuse absences due to pregnancy and childbirth as long as the doctor deems them medically necessary.
 - Educational institutions must allow a student to return to the same academic status as before the student's leave began, which should include giving the student 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

- **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 legitimate reasons to overcome any claim of discrimination).
- *Varlesi v. Wayne State University*, Case No. 14-1862 (affirming a jury award of \$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 that the university refused to allow her to make up work).

CareerLearning

www.careerlearning.com



Other Areas

CareerLearning

www.careerlearning.com

Poll Question

- **Have you had to address issues with discrimination within LGBTQ students within the last 5 years?**
 - Yes, dealing with harassment
 - Yes, dealing with discrimination
 - Yes, dealing with both harassment and discrimination
 - No



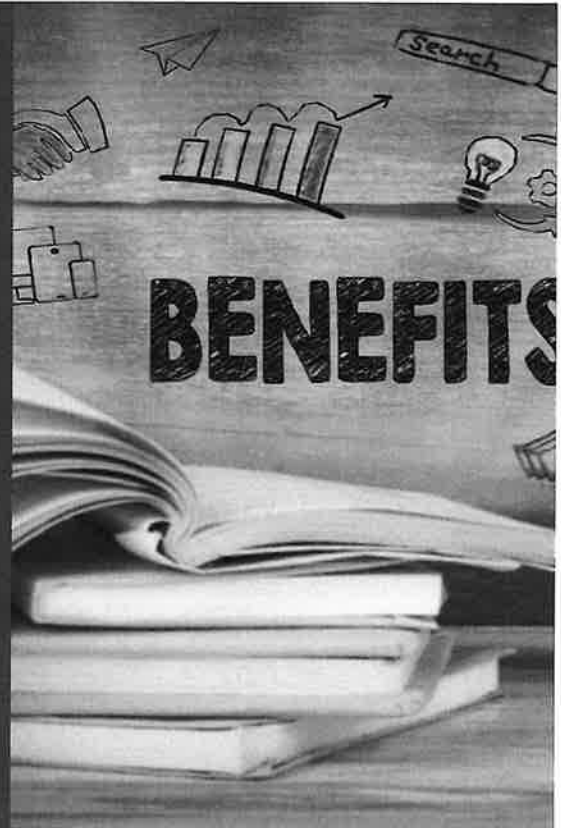
Title IX Employment

- **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 bona-fide 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 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 prior guidance on gender identity issues. The Department of Justice and the Department of Education issued the statements of policy and

- [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 excluding transgender students and denying transgender students accurate transcripts are unconstitutional and violate Title IX. *Grimm v. Gloucester County Public Schools*, 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 restroom have been discriminatory – the school board's notion of what "sex" 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. 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

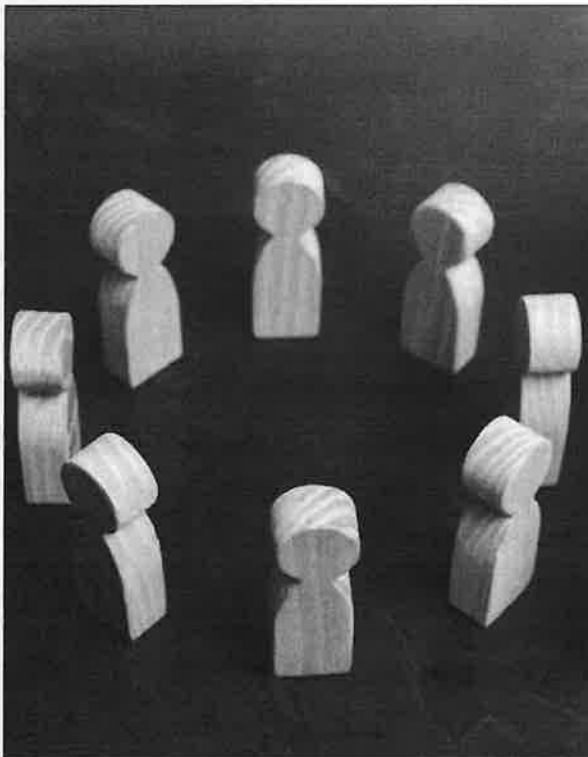


- **DOE Notice of Interpretation**
 - On June 16, 2021, the U.S. Department of Education (DOE) issued a Notice of Interpretation (Notice) explaining how to enforce Title IX's prohibition on discrimination on the basis of sex to include: (1) discrimination based on sexual orientation and (2) discrimination based on gender identity.
 - This Notice can be found at:
<https://www2.ed.gov/about/offices/list/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 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 access to, or subjected to sex stereotyping in academic or extracurricular opportunities and other education programs or activities, denied benefits 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: DOE: Title IX protects against discrimination based on sexual orientation and gender identity.



Title IX

- **Policy implications**

- School districts should take care to review DOE’s recent Notice and review their nondiscrimination policies and practices 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 sex orientation or gender identity as a “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 Title IX and to work with these students on an individual basis to accommodate 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, the 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;
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 student (Student), who attended Jacobsen Middle School
- The investigation found that the Student was targeted for harassment over years because of his nonconformity with gender stereotypes.
- The District signed a Resolution Agreement in which it agreed to take all necessary steps to ensure that all students enrolled in the District are not subject to sexual harassment, and to respond promptly and appropriately to all reports of harassment.



Conclusion

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 sex 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 relate 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



CareerLearning

www.careerlearning.com

COMING SOON

Join us!

I have upcoming webinars with CareerLearning



CareerLearning

www.careerlearning.com

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



CareerLearning

www.careerlearning.com



Richard Verstegen
Attorney

Questions?



Boardman & Clark, LLP



<https://www.boardmanclark.com>



(608) 286-7233



rverstegen@boardmanclark.com

CareerLearning

www.careerlearning.com

Disclaimer

Our webinars are designed to be accurate and authoritative, but we do not provide legal, accounting, medical or similar professional services. Client remains solely responsible for compliance with all applicable laws, regulations, accounting standards and official health guidance. If legal, accounting, medical or other expert advice is desired, Client should retain the services of an appropriate professional.

Photocopying, distributing or using these copyrighted materials electronically without the copyright owner's express written consent is strictly prohibited. Consent is granted for the use of purchase of webinars and then solely for the use of registered attendees of the webinars. No right or license is given to reproduce the materials in any form or format or to place the materials in any form on any website or blog or to otherwise republish it in any manner without the express written permission of the copyright holder.