



Hogan
Lovells

Title IX

Area Cooperative Educational Services

Maree Sneed

October 17 and 18, 2018

A decorative graphic on the right side of the slide, consisting of several overlapping, semi-transparent geometric shapes in shades of green and white, creating a modern, abstract design.

Agenda

- Title IX and its foundations
- Title IX issues
 - Bullying and sexual harassment
 - Sexual violence
 - Transgender students
 - Athletics
 - Pregnancy/parenting
 - Single-sex education
 - Career and Technical Education (CTE)
 - Discipline
- Title IX Coordinator's responsibilities



True or False

- Under Title IX, a district may be required to investigate off-campus peer-on-peer sexual violence even if a police report has been filed.



True or False

- Title IX protects the rights of transgender students.



True or False

- Under Title IX, it is legal for a school to have single-sex Algebra I classes, but not offer a coeducational Algebra I class.



True or False

- A school district would violate Title IX if the boys' baseball field had lights, but the girls' softball team did not have lights.



True or False

- Under Title IX, a school may exclude a pregnant student from being president of the student government.



Ripped from the Headlines

HEADLINE NEWS...

Two middle school students charged with sexual battery on school bus

Officials say two East Bay High School students arrested for sexual assault

North High School student facing criminal charges after alleged sexual assault on school bus

Mom claims daughter was inappropriately touched at school

Seven year old says other child touched her at school

A touch during recess, and reaction is swift

Student charged in 'pantsing' incidents

Texas School District Faces Two Lawsuits Over Sexual Assault

The La Vernia, Texas, Independent School District is facing two lawsuits from families who say their children were raped by high school athletes while adults knew of the assaults and failed to take action.

-February 11,
2018



Stories of alleged sexual harassment continue as Merced high school board addresses policies

Teachers, students and supporters hold up #MERcedTOO signs, a play off the national #MeToo movement, during a Merced Union High School District board meeting Wednesday, June, 13, 2018, at the administrative building in Atwater. Vikaas Shanker
vshanker@mercedsunstar.com

The national "#MeToo" discussion that has reinvigorated conversations on sexual assault and harassment came to Atwater on Wednesday, as teachers, students and supporters continued to come forward and claim the Merced Union High School District administration mishandled complaints.

- Merced Sun-Star (June 17, 2018)

Parents accuse Columbus Junction schools of mishandling report of sexual harassment

COLUMBUS JUNCTION — While they did not make the school board's agenda, two Columbus Junction Schools parents said at the Monday meeting they were holding the district responsible for harassment experienced by their student.

Before winter break, the student approached them saying that another student in their grade had pressured them and other students to sexually touch each other.

- Muscatine Journal (June 26, 2018)

#MeTooK12 hashtag combats sexual harassment in schools

In Oakland USD, girls who were chronically absent and suspended frequently told researchers in a 2015 study that sexual assault and harassment were among the biggest barriers for them at school.

Every Friday, for example, boys in fourth and fifth grade and in middle school would make a game of slapping girls' butts. But those students rarely faced repercussions, says Emma Mayerson, the executive director and founder of Alliance for Girls, a national nonprofit that conducted the research in partnership with the district.

- DistrictAdministration.com (March 2018)

Macomb School District sued for \$10 mil: Former students claim sexual harassment and assault ignored

A civil suit has been filed against Macomb School District 185, along with the district's school board, Macomb Senior High School Principal John Rumley and Assistant Principal Ed Fulkerson by two former students in the U.S. District Court for the Central District of Illinois on Friday, seeking a jury trial and compensation of \$10 million.

The student's attorney, Jeff Green, claims in the suit that a teen boy, identified as MP, who was a Macomb High School student from 2014 to 2017 sexually assaulted the teen girls. The girls are identified as Jane Doe, who was a minor at the time of the incident, and Jane Roe, who is still a minor. The minor girl's mother is also mentioned in the suit, noted as Julie Roe.

- Western Courier (February 23, 2018)

Education Department launches probe of Fairfax County school's handling of harassment allegations

By [Debbie Truong](#) December 22, 2017 [Email the author](#)

NEWS > CRIME & COURTS

Colorado public schools are paying millions to settle lawsuits when educators fail to report sex abuse of students

By **CHRISTOPHER N. OSHER** | cosher@denverpost.com | The Denver Post

PUBLISHED: June 15, 2018 at 7:00 am | UPDATED: June 26, 2018 at 4:51 pm

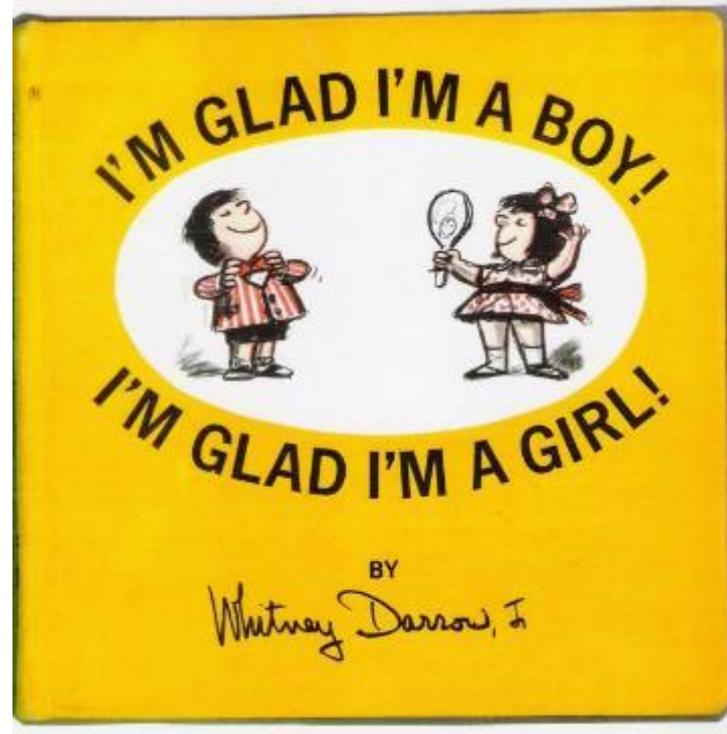
Title IX and its foundations

What is Title IX, and why did Congress enact it?



Western High School Girls' Basketball, Washington, DC, 1899. (Courtesy Library of Congress Prints and Photographs Division)

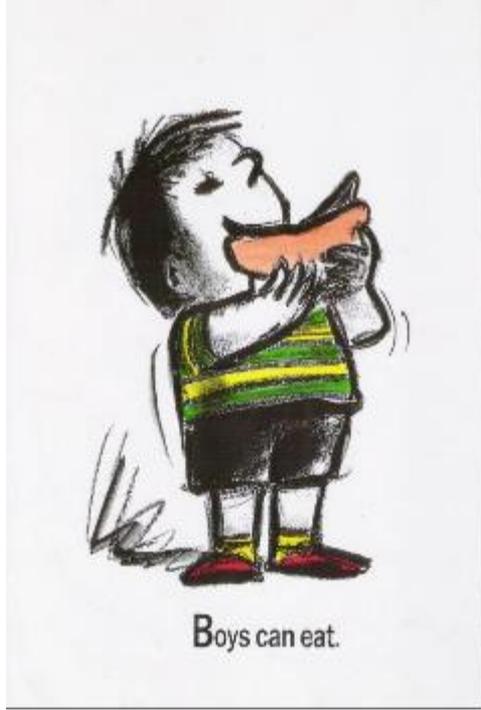
What is Title IX, and why did Congress enact it?



What is Title IX, and why did Congress enact it?



What is Title IX, and why did Congress enact it?

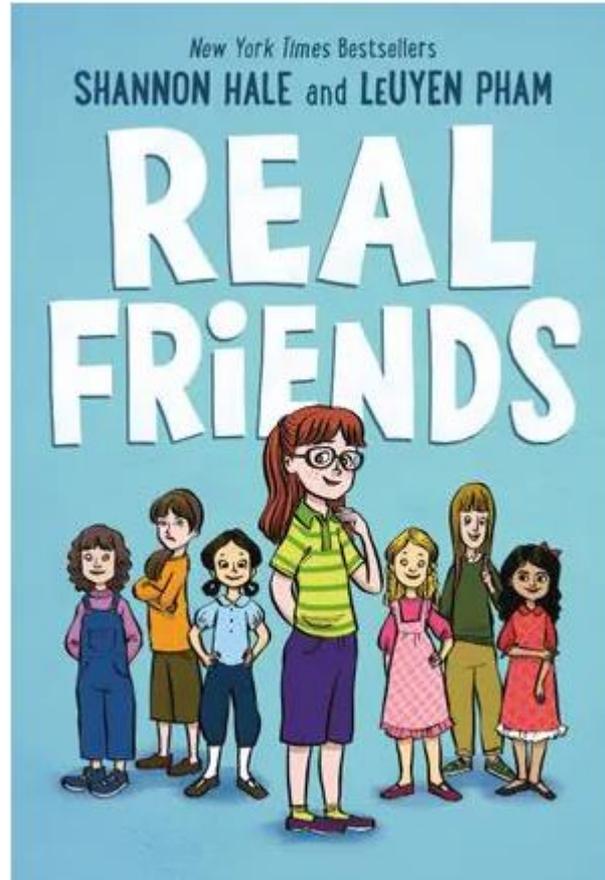


What are we teaching boys when we discourage them from reading books about girls?

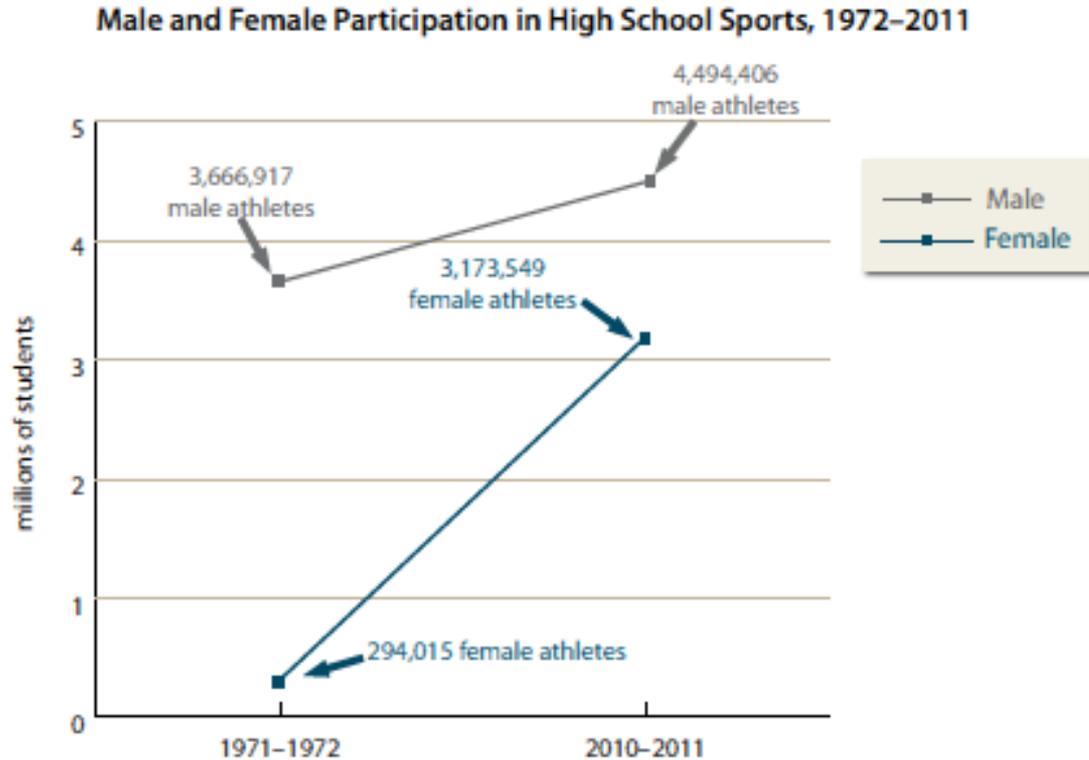
I'm on book tour for the latest installment in the chapter book series "The Princess in Black." A woman asks, "So when are you going to write a series like this for boys?" I say, "These books are for boys. And girls. For anyone who likes to read about a monster-battling hero." The woman looks skeptical. She is certain that no boy would be caught dead reading a book about a girl, let alone a princess.

- The Washington Post (October 10, 2018)

What are we teaching boys when we discourage them from reading books about girls?



What is Title IX, and why did Congress enact it?



Source: National Federation of State High School Associations (2011).

What is Title IX, and why did Congress enact it?

- “In the 1960s, “[e]qual rights, social justice, and equal opportunities in education and employment were dominant and popular themes. **Patsy Mink of Hawaii rose in this cultural climate. As the first woman of color to be elected to Congress, she was no stranger to race and sex discrimination.** Turned down by twenty medical schools, Mink pursued law. But no law firm would hire her. She entered politics in order to fight for gender and racial equality. **In 1972 Mink and Edith Green, a Democrat from Oregon who focused on women’s issues, education, and social reforms, introduced Title IX, and were responsible for its passage.** Fellow politician Daniel Patrick Moynihan would later state that Title IX was one of the most important pieces of education legislation in the history of the Republic.”



Source: Barbara Winslow, “The Impact of Title IX.”

Title IX: The law

- Title IX of the Education Amendments of 1972 (20 U.S.C. §§ 1681 et seq.) prohibits *sex discrimination in education and in employment*.
- "No person in the United States shall, *on the basis of sex*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

What institutions are covered by Title IX?

- Institutions receiving federal funding
- School districts, colleges/universities, charter and for-profit schools and athletic associations
 - Organizations receiving “significant assistance” from these
- Educational programs offered by non-educational institutions that receive federal funds, such as libraries, prisons, and museums



Who is protected by Title IX?

- Elementary through professional school
- Both staff and students
- Both men/boys and women/girls
- Heterosexual, gay, lesbian, bisexual, and transgender persons
- People with and without disabilities
- People of different races and national origin
- U.S. citizens and non-citizens (including undocumented persons)



What is discrimination “on the basis of sex”?

- Title IX does not prohibit discrimination on the basis of sexual orientation.
- But Title IX does protect all students – regardless of actual or perceived sexual orientation – from sex-based discrimination and harassment.
 - Title IX prohibits harassment of students for exhibiting stereotypical characteristic for their sex or for failing to conform to such stereotypes.
 - Title IX prohibits sexual harassment regardless of whether the harasser and the victim share the same gender.

EXAMPLE?

- Title IX protects pregnant students and those with related medical conditions.

What is discrimination “on the basis of sex”?

Intentional Discrimination

- Intent to harm is not required – being treated differently based on sex is enough
- Usually proved by “circumstantial,” not “smoking gun” evidence

Disparate Impact Discrimination

- Practices that do not explicitly target one gender but that nonetheless harm one group
- Put the policy in context: Are more members of one group affected by the policy?

What is discrimination “on the basis of sex”?

Could any of these scenarios be discrimination in violation of Title IX?

1. Guidance counselors consistently tell male students about opportunities to take coding classes, but fail to mention those opportunities to female students.
2. Teachers consistently call on boys more than girls.
3. Recruitment materials feature only girls in child development classes.
4. Teachers require boys and girls to line up separately.

What is discrimination “on the basis of sex”?

Could any of these scenarios be considered discrimination in violation of Title IX?

1. A school requires students to pass a weight lifting test before allowing them to enroll in an computer course, and more girls than boys fail the test.
2. A school refers students for internships based on psychological tests that measure “ambition” and “drive,” and girls have lower scores than boys on these criteria.
3. African-American girls who are referred to the principal’s office by their teachers are more likely to receive suspensions than their peers for similar behavior.

Examples of discrimination “on basis of sex?”

Retaliation

- If an individual (student, parent, teacher, coach, etc.) complains formally or informally to a school about a potential violation of Title IX, the school must not retaliate (including intimidating, threatening, coercing, or in any way discriminating against the individual) because of his or her complaint.



Retaliation

- U.S. Supreme Court addressed this issue in 2005: *Roderick Jackson v. Birmingham Board of Education*.
- Facts: Roderick Jackson, a teacher in the Birmingham, Alabama, public schools, brought suit against the Birmingham Board of Education (Board) alleging that the Board retaliated against him because he had complained about sex discrimination in the high school's athletic program.
- Lower federal courts: The District Court dismissed Jackson's complaint because it thought that Title IX did not prohibit retaliation, and the Court of Appeals for the Eleventh Circuit agreed.
- U.S. Supreme Court: "We consider here whether the private right of action implied by Title IX encompasses claims of retaliation. We hold that it does where the funding recipient retaliates against an individual because he has complained about sex discrimination."

Retaliation

- What could be considered retaliation for a student?
- Adverse treatment, which can include:
 - Suspension or expulsion;
 - Reduction in grades;
 - Denial of permission to participate on teams, or change in position on team, or amount of playing time; or
 - Harassment in class or on field.



Office for Civil Rights

Assistant Secretary for Civil Rights

- On June 7, 2018, Kenneth Marcus was narrowly confirmed as Assistant Secretary for Civil Rights
- Controversy and public opposition surrounded hearing:

Officers

Chair
Judith L. Lichtman
National Partnership for
Women & Families
Vice Chairs
Jacqueline Pata
National Congress of American Indians
Thomas A. Soenz
Mexican American Legal
Defense and Educational Fund
Hillary Shelton
NAACP
Secretary
Jo Ann Jenkins
ARP
Treasurer
Lee A. Saunders
American Federation of State,
County & Municipal Employees

Board of Directors

Helena Berger
American Association of
People with Disabilities
Kimberly Churches
AAUW
Kristin Clarke
Lawyers' Committee for
Civil Rights Under Law
Ihr Fokston Garcia

January 11, 2018



OPPOSE CONFIRMATION OF KENNETH MARCUS FOR ASSISTANT SECRETARY FOR CIVIL RIGHTS

Dear Senator,

On behalf of The Leadership Conference on Civil and Human Rights, a coalition of more than 200 national organizations committed to promoting and protecting the civil and human rights of all persons in the United States, and the 31 undersigned organizations, we are writing to urge opposition to the confirmation of Kenneth Marcus to serve as Assistant Secretary for Civil Rights at the U.S. Department of Education. **Mr. Marcus has not demonstrated a willingness and ability to enforce civil rights law and protect all students in our country from discrimination and he is therefore unsuited to lead the Department of Education's Office for Civil Rights.**

Critics Criticism of Assistant Secretary Marcus

- Critics claim that Assistant Secretary Marcus:
 - seeks to limit the use of disparate impact allegations and that his confirmation hearing revealed his lack of support for immigrant children in school
 - developed single-sex education programs based on sex stereotypes when he was Assistant Secretary of Education for OCR in 2003-2004
 - has not supported LGBT students
 - has not supported students with disabilities

What is OCR? What does it do?

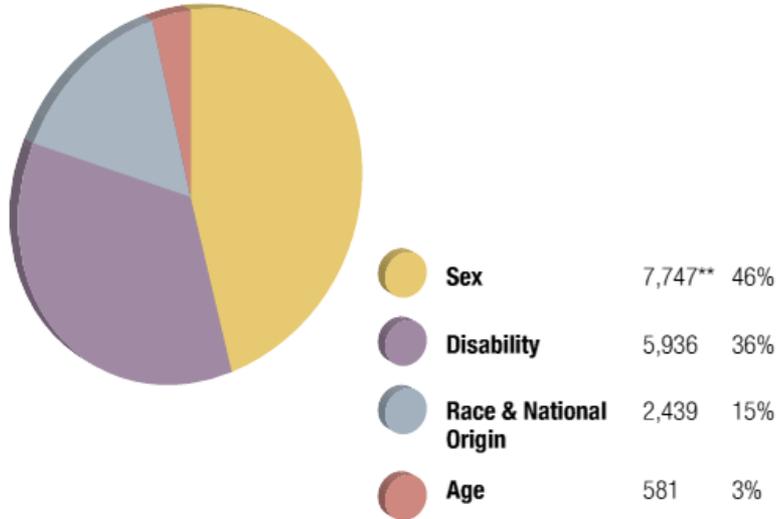
- The U.S. Department of Education's Office for Civil Rights
- What OCR does:
 - Policy guidance
 - Technical assistance
 - Civil Rights Data Collection (CRDC)
 - Enforcement
 - Complaint process
 - Compliance reviews



“The mission of the Office for Civil Rights is to ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights.”

What is OCR? What does it do?

Figure 3: Percentage of Complaints Received by Type of Alleged Discrimination* (FY 2016)



* The numbers above do not reflect the total number of complaints received in FY 2016 because some complaints cover more than one statute and because a small percentage of complaints received in FY 2016 have not yet been categorized by statute.

** 6,157 of these are multiple complaints from an individual.

- Complaints and compliance reviews (FY 2016) by the numbers:
 - 16,720 complaints received
 - 13 compliance reviews (proactive investigations)
 - 8,625 cases resolved
 - “Resolved”: dismissal, administrative closure, finding of no violation, early complaint resolution, or resolution agreement
 - Includes cases received prior to FY2016
 - 1,116 resolutions

Office for Civil Rights investigation backlog

- During month of September of 2018 (approaching end of federal fiscal year), Office for Civil Rights approved overtime for 471 of its employees.
- Caseload has doubled in the last decade
- In fiscal year 2018, Congress gave ED an additional \$8.5 million in appropriations – instruction was to hire more staff; but hiring isn't complete, so OCR is paying overtime to current attorneys and investigators.
- “Clearing the case backlog is priority one. Justice delayed must not become justice denied.”



What is OCR? What does it do?

- In FY2016, OCR received 346 complaints of retaliation under Title IX.
- Example (from FY2014): Cartwright Elementary School District (AZ) – “In November 2013, OCR resolved a complaint that a school did not respond in a timely and appropriate way to a student’s concerns about harassment by peers . . . and that it disciplined her more harshly and ultimately withdrew her from enrollment in retaliation for bringing her concerns to the school’s attention. [T]he district agreed to submit to OCR for review its policies and procedures relating to handling complaints of harassment and related penalties, addressing non-discrimination, and tackling retaliation; to train district staff on related issues, including prohibition against retaliation; and to reassess the student’s needs and reinstate her with proper educational and behavioral supports.”

Some Definitions

- Law
- Regulations
- Dear Colleague Letters
- Questions & Answers

Selected OCR Title IX Policy Guidance

- Dear Colleague Letter (“DCL”) on Title IX, and Q&A on Campus Sexual Misconduct (Sept. 22, 2017)
- DCL on Title IX and Transgender Students (May 13, 2016) (*withdrawn and rescinded, Feb. 22, 2017*)
- DCL on Obligation of Schools to Designate a Title IX Coordinator (April 24, 2015)
- Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities (December 1, 2014)
- DCL on Supporting the Academic Success of Pregnant and Parenting Students (June 25, 2014)
- Questions and Answers about Title IX and Sexual Violence (April 29, 2014) (*withdrawn, Sept. 22, 2017*)

Selected OCR Title IX Policy Guidance, continued...

- DCL on the prohibition against retaliation under Federal civil rights laws (April 24, 2013)
- DCL on Addressing Sexual Harassment/Sexual Violence (April 4, 2011) (*withdrawn, Sept. 22, 2017*)
- DCL on Schools' Obligations to Protect Students from Student-on-Student Harassment on the Basis of Sex; Race, Color and National Origin; and Disability (October 26, 2010)
- DCL on Accommodating Students' Athletic Interests and Abilities: Standards for Part Three of the "Three-Part Test" (April 20, 2010)
- DCL on Sexual Harassment (Jan. 25, 2006)
- Revised Sexual Harassment Guidance (Jan. 19, 2001)

A quick caveat regarding ED regulations and guidance

- President Trump's Regulatory Reform Executive Orders: Series of EOs issued in January and February of 2017 requiring agencies to review all existing regulations focusing on whether the regulations: eliminate jobs, are outdated, or where costs exceed benefits.
- ED appointed a Regulatory Reform Task Force at the end of April 2017 that was responsible for :
 - Canvassing ED's regulations and policy-oriented guidance, including Dear Colleague Letters;
 - Seeking input from the public on existing regulations and guidance documents; and
 - Making recommendations about which should be repealed, replaced, or modified.
- Examples of changes: transgender guidance and sexual violence guidance withdrawn; OCR investigation scope limited

A quick caveat regarding ED regulations and guidance

- In September 2017, OCR withdrew the statements of policy and guidance reflected in:
 - 2011 Dear Colleague Letter on Addressing Sexual Harassment/Sexual Violence (April 4, 2011) and
 - Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities (December 1, 2014).
- ED announced that it intends to engage in a rulemaking process to develop new regulations related to Title IX. ED has drafted new regulations regarding Title IX, but the draft regulations have not been published.
- In the interim, ED issued a new Q&A on Campus Sexual Misconduct (Sept. 22, 2017) and said that it would continue to rely on previous guidance (2006 DCL, 2001 Revised Sexual Harassment Guidance).

OCR Case Processing Manual

OCR Case Processing Manual

- ❑ On March 5, 2018, OCR issued a revised Case Processing Manual, including OCR’s procedures for conducting civil rights investigations, monitoring enforcement actions, and initiating compliance reviews.
- ❑ The new Manual limits what qualifies as an OCR complaint. “Not all information that OCR receives is sufficient to constitute a complaint subject to further processing.”
 - ❑ The following are not subject to further processing:
 - ❑ Anonymous correspondence;
 - ❑ Courtesy copies of correspondence or documentation filed with or otherwise submitted to another person or entity;
 - ❑ Inquiries that seek advice or information from OCR;
 - ❑ Allegations that are communicated to OCR orally; and
 - ❑ Written information that relies exclusively on statistical data, media reports, journals/studies, and/or other published articles as the basis for the alleged discrimination. (But, at OCR’s discretion, this may be sufficient to justify the provision of technical assistance or the opening of a compliance review or directed investigation.)

OCR Case Processing Manual

- ❑ The new Manual expands the grounds for dismissing complaints. OCR can now dismiss complaints for the following new or revised reasons:
 - ❑ **Initial Determination:** OCR is unable to conclude, based on a review of the documents and/or information received from the complaint, that the complaint establishes a violation of one of the laws OCR enforces;
 - ❑ **Burden on OCR Resources:** A complaint filed against multiple recipients will be dismissed when “viewed as a whole, [it] places an unreasonable burden on OCR’s resources.” This will allow OCR to decide not to investigate multiple complaints filed by a single “frequent flyer” complainant (for example, in the areas such as web accessibility and Title IX athletics);
 - ❑ **Same or Similar Cases:** Complaints will be dismissed when they contain the same or “similar allegations based on the same operative facts” as cases in other forums, such as in federal or state court litigation, a recipient’s internal grievance procedures, or OCR’s complaint process. Previously, only cases with the exact same allegations could be closed; and
 - ❑ **Complainant Information:** The complainant fails to provide information requested by OCR within 14 calendar days (shortened from 20 days).

OCR Case Processing Manual

- ❑ The new Manual provides more information to and more flexibility for school districts and institutions alleged to have violated civil rights law.
- ❑ A copy of the complaint will be provided to recipients upon request.
- ❑ The timeframe for responding to OCR's data requests will be established at OCR's discretion, depending on the nature and extent of data requested and/or other special circumstances, "including factors affecting feasibility of the timeframe brought to OCR's attention by the recipient." The previously suggested 15 calendar day response time has been dropped.
- ❑ The new procedures add: "OCR will make efforts to work with recipients to conduct interviews in a manner that minimizes disruptions to the recipient's educational environment."

OCR Case Processing Manual

- ❑ The new Manual provides expanded opportunities to resolve complaints earlier and more easily.
 - ❑ “RRP”: The **Rapid Resolution Process**, an expedited case processing for resolving cases early in the process, can now be used for all cases (not just disability cases).
 - ❑ “FCR”: The option for the parties to mediate an agreement with OCR is still available, but is now called **“Facilitated Complaint Resolution”** (previously, it was called “Early Complaint Resolution (or “ECR”)”).
 - ❑ “RA”: The new Manual provides the regional offices and recipients with more time to negotiate **Resolution Agreements**. For cases subject to the 30-day negotiations timeframe (resolutions entered prior to any compliance findings), negotiations may continue after the 30th day while the investigation is ongoing. For cases subject to the 90-day timeframe (cases with violation findings), negotiations may be extended for another 30 days when negotiations are “on-going.”

OCR Case Processing Manual

- ❑ The new Manual no longer requires that, prior to the closure of monitoring, OCR also make a determination that the recipient is in compliance with the statute(s) and regulation(s) that were at issue. This language also no longer needs to be included in agreements.
- ❑ The new Manual does away with the agency's former appeals process altogether. Although not required by statute or regulation, OCR previously offered complainants (but not recipients) the opportunity to appeal the agency's substantive compliance determinations. Under the new Manual, neither party can appeal OCR's determinations.
- ❑ Regional OCR offices are now required to focus on the investigation and resolution of "allegations" instead of "allegations and issues" or "issues of systemic discrimination."

Aftermath of Updated OCR Case Manual

DeVos goes deep with anti-regulatory mission at Education Department

California is the latest state to lob legal challenges at the Education Secretary's controversial policies.

by Heidi Przybyla / Jul.03.2018 / 4:41 AM ET / Updated 7:36 AM ET

Civil rights groups sue Betsy DeVos over changes in handling complaints

The NAACP, National Federation of the Blind, and Council of Parent Attorneys and Advocates sued the department.

CASEY QUINLAN  JUN 1, 2018, 10:40 AM

The New York Times

DeVos Education Dept. Begins Dismissing Civil Rights Cases in Name of Efficiency

By Erica L. Green

April 20, 2018

Civil Rights Investigations Today

Mother Jones

POLITICS ENVIRONMENT FOOD MEDIA CRIME & JUSTICE PHOTOS

Betsy DeVos Has Scrapped More Than 1,200 Civil Rights Probes Started By the Obama Administration

“They aren’t doing their full job, which means they can move quickly.”

Annie Waldman Jun. 21, 2018 6:59 PM

- Changes under DeVos
 - Beforehand, 51% of cases that took more than 3 months resulted in finding a civil rights violation
 - Under DeVos, 35% of cases that take over 3 months find civil rights violations
 - OCR can now dismiss “serial” complaints: repeated complaints by one person or a group about the same situation
 - OCR can now dismiss cases that are an “unreasonable burden”
 - Obama had 13 compliance reviews under his last 15 months in office while Trump had 2 in his first 15 months

Bullying and Sexual Harassment

Federal Law: Title IX -- Harassment

- Title IX of the Education Amendments of 1972 (20 U.S.C. §§ 1681 et seq.) prohibits *sex discrimination in education and in employment*.
- "No person in the United States shall, *on the basis of sex*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

Practically speaking, what does Title IX require?

- Title IX requires each school district to have at least one Title IX Coordinator.
- Title IX requires each school district to have an anti-discrimination policy and grievance process to address sex discrimination, including sexual harassment.
- The policy must be widely distributed and available on an on-going basis.
- School districts have a legal obligation to take steps to prevent harassment and address harassment.
 - OCR advises that steps may “include conducting sexual harassment training for the school site or academic department where the problem occurred, taking a student survey concerning any problems with harassment, or implementing other systemic measures at the site or department where the alleged harassment has occurred.”

Connecticut Law: Bullying

- How does Connecticut law define **bullying**?
 - The repeated use by one or more students of a written, oral, or electronic communication, such as cyberbullying, directed at or referring to another student attending school in the same school district; **OR**
 - A physical act or gesture by one or more students repeatedly directed at another student attending school in the same school district, that:
 - Causes physical or emotional harm or damage to the student's property;
 - Places the student in reasonable fear of harm to himself or herself, or of damage to his or her property;
 - Creates a hostile environment at school for the student;
 - Infringes on the rights of such student at school; or
 - Substantially disrupts the education process or the orderly operation of a school.

Connecticut Law: Bullying

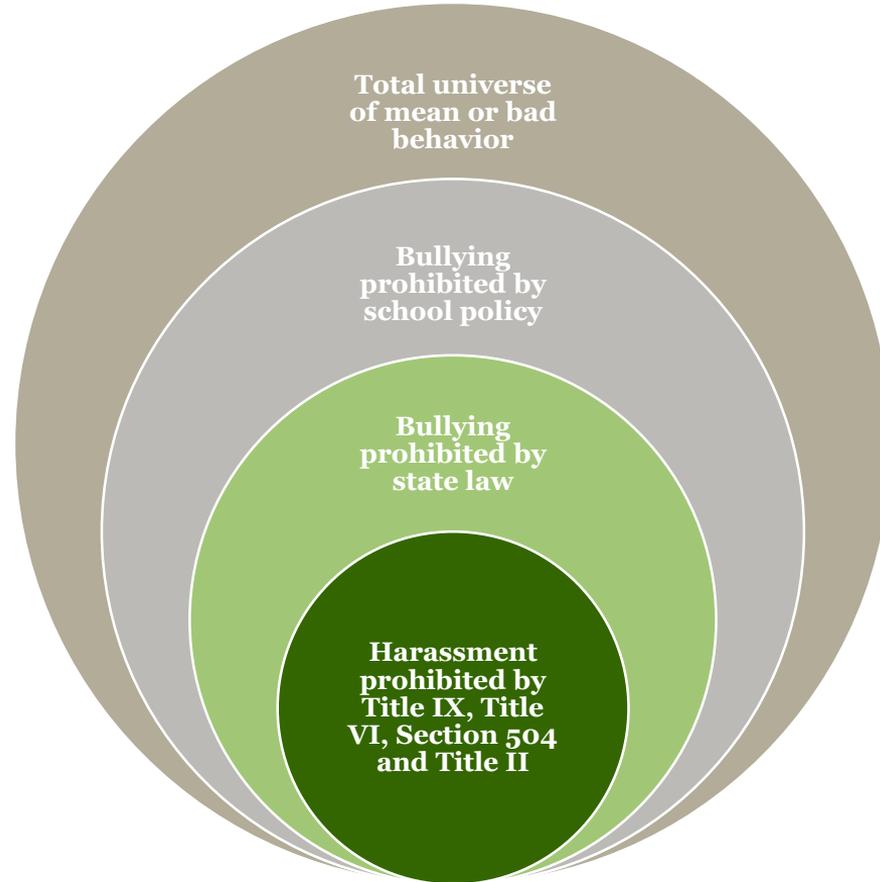
- “Bullying’ shall include, but not be limited to, a written, oral or electronic communication or physical act or gesture based on any actual or perceived differentiating characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity or expression, socioeconomic status, academic status, physical appearance, or mental, physical, developmental or sensory disability, or by association with an individual or group who has or is perceived to have one or more of such characteristics”

-- Conn. Gen. Stat. § § 10-222d

Connecticut Law: Bullying

- How does Connecticut law define **cyberbullying**?
 - “[A]ny act of bullying through the use of the Internet, interactive and digital technologies, cellular mobile telephone or other mobile electronic devices or any electronic communications.”
 - “**Mobile electronic device**” means any hand-held or other portable electronic equipment capable of providing data communication between two or more individuals, including, but not limited to, a text messaging device, a paging device, a personal digital assistant, a laptop computer, equipment that is capable of playing a video game or a digital video disk, or equipment on which digital images are taken or transmitted.
 - “**Electronic communication**” means any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photo-optical system.
- Is one action enough to qualify as bullying or cyberbullying?
 - **NO** – under Connecticut law, bullying requires “*repeated*” written, oral or electronic communication.

The Universe of Bullying & Harassment



Cyberbullying

Background

- The growth of the Internet has provided and will continue to provide many educational benefits for students.
- However, the Internet, smartphones, and social media have also provided students with new, harder-to-monitor ways to bully and harass each other.



Cyberbullying

- Cyberbullying is defined by Stopbullying.gov as “bullying that takes place using electronic technology. Examples of cyberbullying include mean text messages or emails, rumors sent by email or posted on social networking sites, and embarrassing pictures, videos, websites, or fake profiles.”
- Many instances of cyberbullying occur through social networking sites, such as Facebook, Twitter, YikYak, Snapchat, Instagram, and YouTube.
- Cyberbullying can occur 24 hours a day, 7 days a week. No matter where or when it occurs, its effects can impact a child’s educational experience.



Sexting and Cyberbullying

- “Sexting” is the sending or receiving of text messages with sexual content, such as pictures or videos that contain nudity.
- Teens in several states – some as young as 14 – have been charged with the creation and distribution of child pornography and sexual exploitation of a minor.
- When there is a harassing aspect to sexting, and that harassment is “sufficiently serious that it creates a hostile environment,” a school district’s failure to adequately address that harassment could violate Title IX.



Sexting and Cyberbullying in the News

“Police accuse two students, age 12, of cyberbullying in suicide”

- *CNN* (January 24, 2018)

“Colorado University Researchers Launch ‘cyberbullying detector’ program for social media”

- *The Denver Post* (June 22, 2018)

“2 Wilson Middle School Students Face Charges in Sexting Incident”

- *The Enquirer* (Cincinnati, February 7, 2018)

“Cyberbullying Is a Bigger Problem Than Screen Time Addiction”

- *The New York Times* (August 24, 2016)

Sexting and Cyberbullying in the News

“Snapchat bullying triggers suicide.”

- *WLIX* (Lansing, Michigan) (June 9, 2016)

“Snapchat murder, rape threat spurs 100 to attend anti-bullying rally; student charged”

- *PennLive.com* (February 22, 2017)

“Sexting Case Rocks Colorado Town”

- *Wall Street Journal* (November 8, 2015)

“Cyberbullying Is a Bigger Problem Than Screen Time Addiction”

- *The New York Times* (July 16, 2015)

Sexting and Cyberbullying



*“Queens girl, 12, hangs herself
after being cyberbullied”*

NY Post (May 23, 2013)

*“Jumping off the
gw bridge sorry”*

Facebook Post by Tyler Clementi
(September 22, 2010)



Emerging Issues in Cyberbullying

- Some victims of cyberbullying and their families have sued students and school districts for libel, defamation and other similar torts.
- Some schools have attempted to charge students with cyberbullying when they comments online that are disparaging to school staff.



Why are bullying and harassment such “hot” topics?

Headlines and public campaigns

- “Obituary of 15-year-old who killed self cites school bullies” -- *The Washington Post* (June 23, 2017)
- “Muslim Schoolchildren Bullied By Fellow Students And Teachers” -- *NPR* (March 29, 2017)
- “After years of alleged bullying, an Ohio teen killed herself. Is her school district responsible?” -- *The Washington Post* (May 23, 2016)



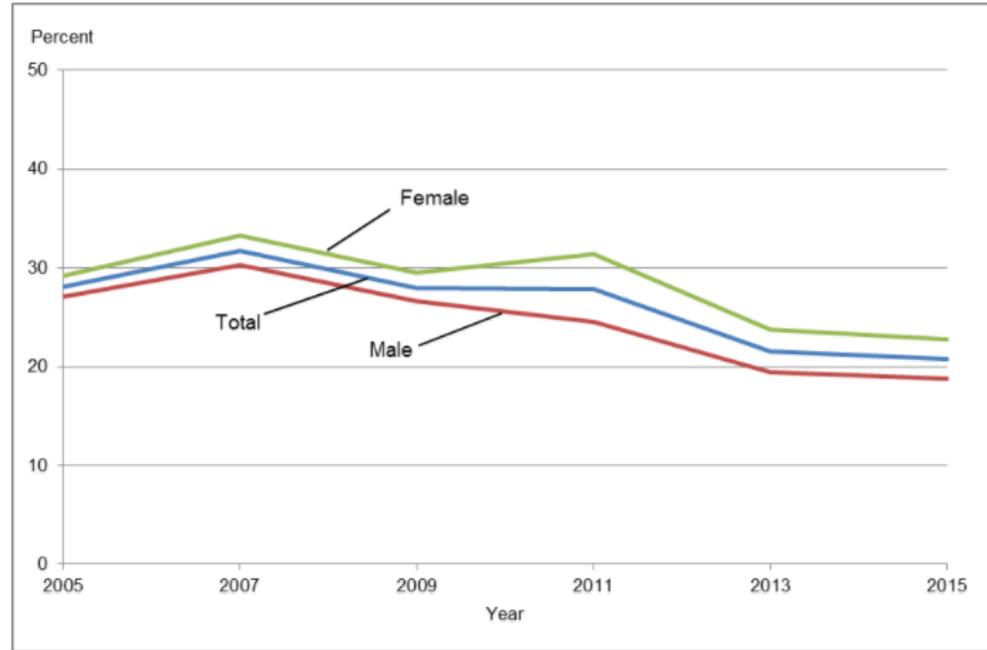
“[We must] dispel the myth that bullying is just a harmless rite of passage or an inevitable part of growing up. It’s not.”

President Obama (March 10, 2011)

Why are bullying and harassment such “hot” topics?

- According to the National Center for Education Statistics, student-reported bullying has slightly decreased since 10 years ago but plateaued since 2013. About 1 in 5 students report being bullied at school.

Percentage of students, ages 12–18, who reported being bullied at school during the school year: Selected years, 2005 through 2015

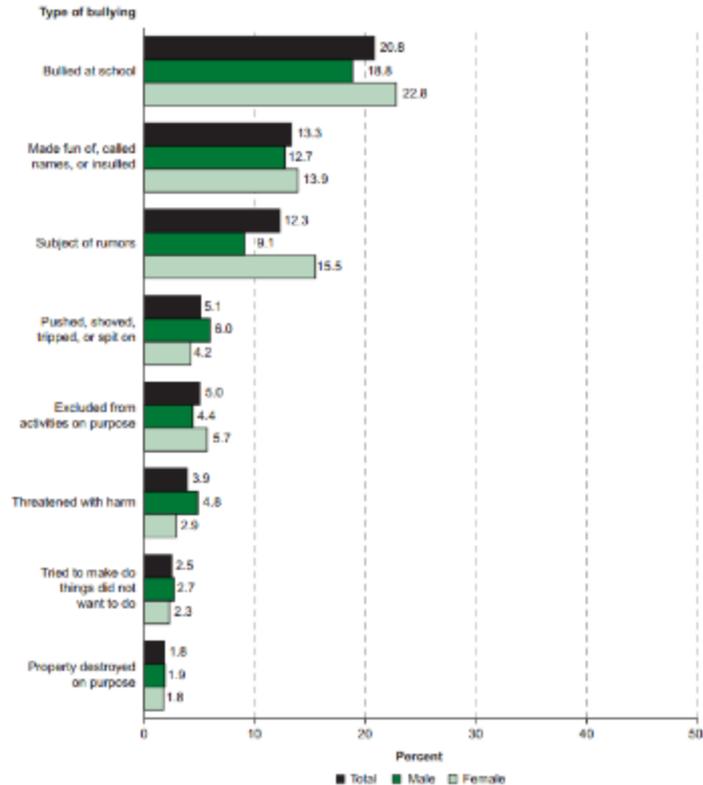


SOURCE: U.S. Department of Justice, Bureau of Justice Statistics, School Crime Supplement (SCS) to the National Crime Victimization Survey, 2005 through 2015. See *Digest of Education Statistics 2016*, table 230.40.

Why are bullying and harassment such “hot” topics?

- Percentage of students who reported being bullied at school in 2015, by type:
 - Bullied (total) – 20.8%
 - Made fun of, called names, or insulted – 13.3%
 - Subject of rumors – 12.3%
 - Pushed, shoved, tripped, or spat on – 5.1%
 - Excluded on purpose – 5.0%
 - Threatened with harm – 3.9%
 - Attempted coercion to do something they did not want to do – 2.5%
 - Property destroyed – 1.8%

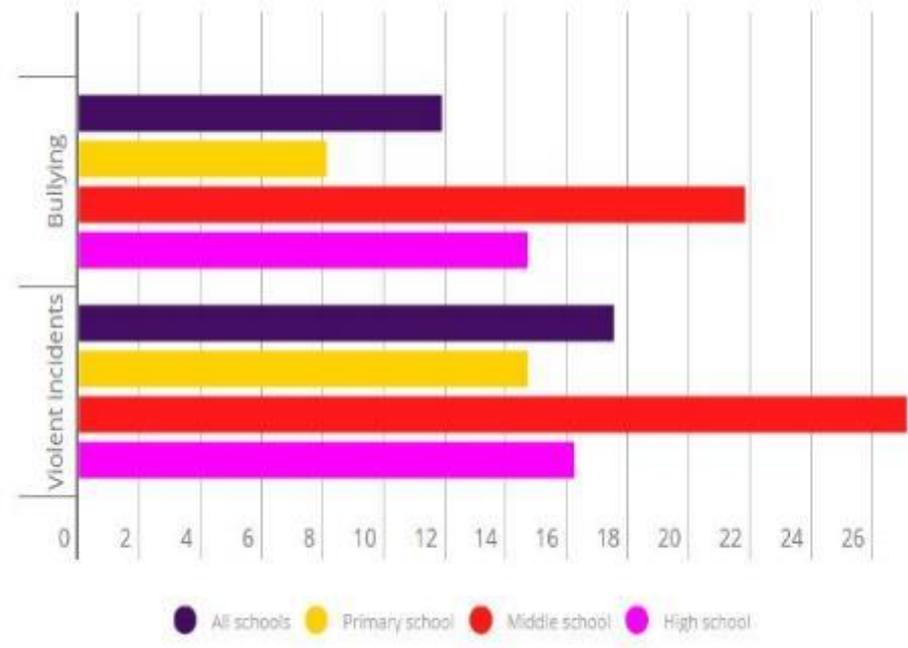
Figure 11.1. Percentage of students ages 12–18 who reported being bullied at school during the school year, by type of bullying and sex: 2015



NOTE: "At school" includes in the school building, on school property, on a school bus, and going to and from school. Students who reported experiencing more than one type of bullying at school were counted only once in the total for students bullied at school.
SOURCE: U.S. Department of Justice, Bureau of Justice Statistics, School Crime Supplement (SCS) to the National Crime Victimization Survey, 2015.

Why are bullying and harassment such “hot” topics?

- Female students are more likely than male students to report being bullied at school (23% vs.19%)
- Middle schoolers report the highest rates of bullying (21.8%)
- Reports of being bullied by grade level:
 - Grade 6 – 31%
 - Grade 8 – 22%
 - Grade 12 – 15%



Percent of schools reporting bullying incidents daily or at least once a week.

A recent study

A third of students say they were bullied last school year, according to a report released today by non-profit group [YouthTruth](#).

That's an increase from two years ago, when just over one in four students had been.

- USA Today (September 24, 2018)

Recent Study: Key Findings

- **Middle school students were more likely to be bullied than high school students.** Nearly 40 percent of middle-schoolers said they'd been bullied; 27 percent of high-schoolers said the same.
- **Most bullying happens in person**, with the majority of students saying they'd been verbally harassed.
- **Most students who were bullied said it was because of how they looked.** Sexual orientation and race were the next highest reasons.
- **Higher rates of bullying were reported at majority white schools.** Students of color in these schools experienced a steeper increase in bullying over last year.

Why are bullying and harassment such “hot” topics?

Impact of bullying and harassment

- Victims of bullying are at increased risk of . . .
 - Psychological and emotional problems:
 - Low self-esteem, high anxiety, depression
 - Suicide ideation and attempts
 - Physical health problems
 - Headache, backache, sleeping problems, bedwetting
- Perpetrators of bullying are at increased risk of . . .
 - Substance use, academic problems, and violence later in adolescence and adulthood

What is harassment?

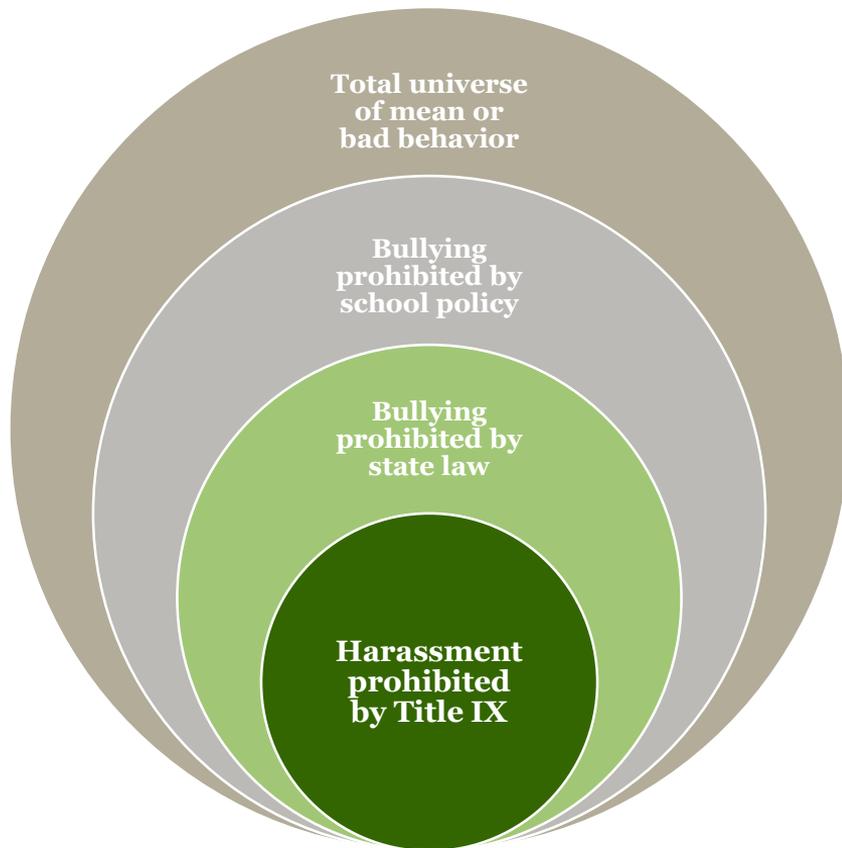
- Harassment may be verbal, written, or other conduct that is threatening or harmful.
 - It does not have to include intent to harm, be directed at a specific target, or involve repeated incidents.
 - It is only a small part of the larger universe of bullying or cyberbullying activity.



What is sexual harassment?

- OCR has defined sexual harassment as “unwelcome conduct of a sexual nature.”
- What could that mean?
 - unwelcome sexual advances
 - requests for sexual favors
 - verbal, nonverbal, or physical conduct of a sexual nature
 - name-calling
 - graphic and written statements, which may include use of cell phones or the Internet
 - conduct that may be physically threatening, harmful, or humiliating

When is bullying considered harassment under Title IX?



What is sexual harassment?

- OCR has said that “[h]arassment does not have to include intent to harm, be directed at a specific target, or involve repeated incidents.”
- Sexual harassment can be perpetrated by a teacher, student or third party.
- People of the same sex can harass one another other.
- Harassment can happen on school grounds, but it can also happen at sporting events, at an off-campus program, or off campus (i.e., social media).

What must schools do?

- A school must address harassment incidents “about which it knows or reasonably should have known.”
 - A school has such notice where a “responsible employee knew, or in the exercise of reasonable care should have known about the harassment.”
- A school must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring.
 - A school must take “immediate and appropriate action” to investigate.

What is sexual harassment?

- What constitutes “harassment” for which schools are legally responsible under Title IX? The misconduct must:
 1. Have a nexus to school;
 2. Be based on a protected category (i.e., sex);
 3. Be sufficiently severe or pervasive to create a hostile environment; and
 - “Harassment creates a hostile environment when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student’s ability to participate in or benefit from the services, activities, or opportunities offered by a school.”
 4. Be known or reasonably should be known to school administrators

Response checklist

- Incident specific response:
 - Victim(s) and parents
 - Perpetrator(s) and parents
 - Staff who knew or should have known
- School-wide response:
 - Students
 - Staff
 - Parents



The nature of these steps will depend on the ages of the victim(s)/harasser(s), and the nature/pervasiveness of the harassment.

Is this sexual harassment?

- When OCR initiated its investigation, the Student last attended Central Valley High School. At the time of the Student's interview with OCR, he had decided not to complete his education with the District.
- The Student informed OCR that he was bullied and harassed by other students based on his sexual orientation and failure to meet the gender norms of his peers. He was called derogatory names based on his appearance and sexual orientation, and was subjected to verbal taunts of a sexual nature. The Student was getting into physical fights with other students who were harassing him, which led to his being disciplined and, eventually, expelled.
- The Student felt that teachers had heard some of the verbal harassment, but did nothing to stop it. He told school staff about the harassment. The Student also provided notice of the harassment to District officials at his expulsion hearing, where he told the expulsion panel that he experienced harassment at the school based on how he dresses, acts, and speaks.

Analysis

- Is this harassment?
- Why?
- Was the school deliberately indifferent?
- What, if anything, should the school have done differently?

Is this sexual harassment?

A high school student sends topless photos of herself to her boyfriend via Snapchat throughout their 3-month relationship, expecting the photos will automatically delete after 10 seconds. The boyfriend takes a screenshot of one of the photos. Following their break-up some weeks later, he texts the screenshot to some teammates, who in turn post suggestive comments on the girl's social media pages. When she consults her guidance counselor, the counselor hesitates to act because the photos were taken voluntarily outside of school, have not been shown on campus, and the bullying has not explicitly mentioned the photos.

Analysis

- Is this harassment?
- Why?
- Was the school deliberately indifferent?
- What, if anything, should the school have done differently?

Is this sexual harassment?

- Shortly after enrolling at a new high school, a female Student had a brief romance with another student.
- After the couple broke up, other male and female students began routinely calling the new Student sexually charged names, spreading rumors about her sexual behavior, and sending her threatening text messages and emails.
- One of the Student's teachers and an athletic coach witnessed the name calling and heard the rumors, but identified it as 'hazing' that new students often experience. They also noticed the Student's anxiety and declining class participation.
- The school attempted to resolve the situation by requiring the Student to work the problem out directly with the other students.

Analysis

- Is this harassment?
- Why?
- Was the school deliberately indifferent?
- What, if anything, should the school have done differently?

Sexual Orientation

- Title IX does not *explicitly* prohibit discrimination on the basis of sexual orientation.
- But Title IX does protect all students – regardless of actual or perceived sexual orientation – from sex-based discrimination and harassment.
 - Title IX prohibits harassment of students for exhibiting **stereotypical characteristic** for their sex or for failing to conform to such stereotypes.

Examples?

- Title IX prohibits sexual harassment regardless of whether the harasser and the victim share the same gender.

Is this sexual harassment?

A female high school student on the lacrosse team comes out as gay during her junior year. Soon after, she is ridiculed for dressing in a way that is perceived as more masculine than feminine, is purposely isolated from social and academic groups, and is called “dyke” by her teammates. When the student reports this behavior to her coach, the coach responded “You should just make things easier on yourself and act like a girl. Put some make up on.” The team’s behavior intensified when they pranked the student by leaving anonymous and false notes in her locker claiming that another gay female student had feelings for her. When the student realized what was going on, she again complained to the coach who said that she “was asking for it.” The student quit the lacrosse team.

Analysis

- Is this harassment?
- Why?
- Was the school deliberately indifferent?
- What should the school have done differently?

Is this sexual harassment?

A male high school student on the track team was verbally mocked by teammates with “homo,” “fag,” and terms based on female genitalia. One day, his teammates ambushed him in the locker room and dragged him to the showers, where they penetrated him with a broom. His shouts could be heard by a coach nearby, but when the student confronted the coach afterward, the coach said that “this is a part of growing up” and it will help him “become a man.” After word of the incident got out, students ridiculed him on social media. When his parents complained to the coach and the school, no action was taken and there was no follow-up with the parents. The student’s academic performance suffered, and he was forced to repeat classes and eventually transfer schools where he repeated sophomore year.

Analysis

- Is this harassment?
- Why?
- Was the school deliberately indifferent?
- What should the school have done differently?

Responses to Allegations of Sexual Harassment

You receive an allegation of harassment: Now what?

Be careful about the language you use

- What do you think about the following comments?
 - A teacher said that a student “gives back about as much as he gets” and that he just “needs to stay away from certain kids” and “learn how to make life easier for himself.”
 - A teacher said that a student “brought some of this on himself.”

(Eilenfeldt v. United C.U.S.D. #304 Board of Education)

“Dangerous Words,” compiled by Nat’l Women’s Law Center

- Just ignore it.
- He puts his arms around everyone.
- Why can’t you learn to accept a compliment?
- You must have wanted it - otherwise you would have told him no.
- That’s how they do things where he comes from.
- It’s a joke. Lighten up.
- No one’s filed a charge so our hands are tied.
- We’ve never had a complaint, so we don’t have a problem.
- This kind of behavior is all a part of growing up.
- It’s a matter of hormones, we can’t control that.
- If we had to discipline every student who used bad language we’d never get anything else done.
- It’s just a prank that got out of hand.
- Oh well, boys will be boys.

What are some of the risks of violating Title IX?

- Private litigation
 - Students (and parents on behalf of their children) may sue districts alleging sexual harassment under Title IX. These lawsuits may seek money damages when districts fail to adequately address harassment in violation of Title IX.
 - With increasing frequency, parents are pursuing lawsuits when – in the parents’ opinion – districts fails to respond appropriately to bullying or harassment.
- OCR complaint/investigation
 - A student, parent, or third party may submit a complaint to OCR, and OCR may investigate.
 - OCR may initiate its own investigations.
 - OCR may refer a case to the U.S. Department of Justice.
- DOJ complaint/investigation

OCR complaints/investigations of sexual harassment

- In FY2016, OCR:
 - Received 673 complaints involving sexual/gender harassment
- In FY 2015, OCR:
 - Received 536 complaints and resolved 375 complaints involving bullying and sexual harassment and
 - Initiated and resolved 2 compliance reviews related to bullying and sexual harassment.

OCR complaints/investigations of sexual harassment

Lifecycle of a bullying/harassment claim: monitoring

1. OCR monitors school districts' responses to bullying and harassment.

Monitoring tool: Civil Rights Data Collection (“CRDC”)

- Mandatory survey through which OCR collects data directly from school districts.
 - All districts now participate in the CRDC.
 - Data is collected for one school year at a time.
- School districts must collect and report new data bullying and harassment allegations, policies, and disciplinary measures.
- CRDC tracks harassment and bullying on the basis of disability, race, color, national origin, sex, sexual orientation, and religion.

OCR complaints/investigations of sexual harassment

Lifecycle of a bullying/harassment claim: investigation

2. OCR will investigate a district's response to bullying and harassment.
 - Investigations can be initiated through complaints or compliance reviews.
 - Complaint process
 - OCR evaluates thousands of complaints received to determine whether it has the authority to investigate.
 - Compliance reviews
 - OCR has authority to proactively initiate compliance reviews.
 - During an investigation, OCR acts as a “neutral” fact finder.
 - At the close of an investigation, OCR determines whether a district has complied with its obligations under federal civil rights laws.

OCR complaints/investigations of sexual harassment

Lifecycle of a bullying/harassment claim: Outcomes of findings

3. School districts that fail to respond appropriately to bullying and harassment may face:
 - OCR enforcement;
 - lawsuits by DOJ; and/or
 - private litigation.
- OCR will enforce compliance through one of the following mechanisms:
 - Seeking early complaint resolution;
 - Entering into a voluntary resolution agreement;
 - referring to the DOJ for investigation for possible enforcement via litigation; or
 - Seeking to terminate federal funds.

Before a complaint is made, a school district should:

1. Regularly train all school personnel to identify harassment that they observe or that is reported to them;
2. Regularly train all school personnel on district anti-harassment policies, procedures, and complaint processes;
3. Identify one school-level and one district-level staff member to whom reports of harassment may be made;
4. Identify staff members to serve as investigators when complaints of harassment are received;
5. Ensure that all staff who investigate are trained and know the district's anti-harassment policies and procedures and civil rights laws enforced by OCR; and
6. Regularly train students on the district's anti-harassment policies and procedures, including how to identify and report harassment.

Withholding federal funds for Title IX violations

- In September 2018, Chicago Tribune reported that ED is withholding \$4 in federal Magnet Schools Assistance Program funds from Chicago Public Schools (“CPS” CPS) because of CPS’s alleged failure to protect students from sexual violence
 - Total grant was \$14.9 million over 5 years; this year’s \$4 million installment is being withheld
 - CPS will be permitted to receive money next year if it comes into compliance with Title IX
- OCR said it has “identified serious and pervasive violations under Title IX” and a slow response by CPS to two OCR investigations
 - Finding was not specific to the three citywide magnet schools that were part of the grant; decision was based on district-wide compliance issues
 - CPS attributes decision to partisan politics and plans to appeal

Standards of liability

Private litigation (standard established by *Davis v. Monroe County Board of Education*)

Standard: School district was deliberately indifferent

Requires: Actual knowledge by a school official, conscious disregard of risk

OCR Complaint / Investigation

Standard: School district knew or reasonably should have known (Negligence)

Requires: A reasonable person would have known about harassment/civil rights violations

Deliberate Indifference

- What is deliberate indifference?
- Why does it matter?

How should you respond to sexual harassment?

- Stop any ongoing harassment immediately.
- Take care not to penalize the student who was harassed.
- Submit any bullying or harassment form to administrator.

You receive an allegation of harassment: Now what?

Once a complaint is made, school administrators will:



Note: The steps described on the following slides should be adjusted according to the particular facts of the alleged harassment, including the age, disabilities, etc. of the alleged victim, the alleged harasser, and the witnesses.

You receive an allegation of harassment: Now what?

Once a complaint is made:

1. Immediately take steps to ensure that the alleged victim and the alleged harasser are kept separate during the investigation and
2. Investigate the alleged harassment fully and promptly.

Note: Please keep in mind that the steps taken in an investigation should be adjusted according to the particular facts of the alleged harassment, including the age, disabilities, or other sensitivities of the alleged victim, the alleged harasser, and the witnesses.

You receive an allegation of harassment: Now what?

Act immediately to end harassment

- Acting immediately sends a message that the harassment is not acceptable.
- It may be appropriate to provide “interim measures,” individualized services offered as appropriate to either or both the reporting and responding parties involved in an alleged incident of sexual misconduct, prior to an investigation or while an investigation is pending.
 - For example: Counseling, extensions of time, modifications of class schedules, restrictions on contact, etc.
- Inform complainants about their Title IX rights, any available resources (such as counseling, health, and mental health services), and their right to file a complaint with local law enforcement.

FAQ #1

Is there a particular timeframe to complete an investigation?

- OCR: Schools have “a responsibility to respond promptly and effectively.”
 - In your district, follow the timeframe required by district policy, regulation or procedures.

FAQ #2

The police have started investigating. Is the school's responsibility over?

- **No.**
- “Because legal standards for criminal investigations are different, police investigations or reports may not be determinative of whether harassment occurred under Title IX and do not relieve the school of its duty to respond promptly and effectively.”
- During the police investigation, schools must take action to ensure student safety.
- Once police confirm the evidence gathering portion of their investigation is complete, school should promptly finalize its investigation.

FAQ #3

The student and parent do not want to file a formal complaint. Is the school's responsibility over?

- OCR: “Regardless of whether the student who was harassed, or his or her parent, decides to file a formal complaint or otherwise request action on the student’s behalf . . . , the school must promptly investigate . . . and then take appropriate steps to resolve the situation.”

FAQ #4

Does the student victim have a right to confidentiality?

- OCR: “The school should inform the student that a confidentiality request may limit the school’s ability to respond. If the student continues to ask that his or her name not be revealed, the school should take all reasonable steps to investigate and respond to the complaint consistent with the student’s request as long as doing so does not prevent the school from responding effectively to the harassment and preventing harassment of other students.”
- Factors to consider: Seriousness of the harassment, age of students, prior reports of harassment, and the rights of the accused.

FAQ #4 continued

“OCR enforces Title IX consistent with the federally protected due process rights of public school students and employees. Thus, for example, if a student, who was the only student harassed, insists that his or her name not be revealed, and the alleged harasser could not respond to the charges of sexual harassment without that information, in evaluating the school's response, OCR would not expect disciplinary action against an alleged harasser.

At the same time, a school should evaluate the confidentiality request in the context of its responsibility to provide a safe and nondiscriminatory environment for all students. The factors that a school may consider in this regard include the seriousness of the alleged harassment, the age of the student harassed, whether there have been other complaints or reports of harassment against the alleged harasser, and the rights of the accused individual to receive information about the accuser and the allegations if a formal proceeding with sanctions may result.”

FAQ #4 continued

- “In all cases, a school should discuss confidentiality standards and concerns with the complainant initially. The school should inform the student that a confidentiality request may limit the school's ability to respond. The school also should tell the student that Title IX prohibits retaliation and that, if he or she is afraid of reprisals from the alleged harasser, the school will take steps to prevent retaliation and will take strong responsive actions if retaliation occurs. If the student continues to ask that his or her name not be revealed, the school should take all reasonable steps to investigate and respond to the complaint consistent with the student's request as long as doing so does not prevent the school from responding effectively to the harassment and preventing harassment of other students.” (2001 Guidance)

FAQ #5

Should the alleged victim and offender be separated while an investigation is pending?

- Yes, it may be necessary to take “interim measures” such as:
 - Rearranging schedules or placing restrictions on contact;
 - Providing individual counseling, medical services, and/or tutoring; and/or
 - Removing negative grades or evaluations that resulted from the harassment from the student’s record, or allowing a student to retake a test or class.

Notes on interim measures from OCR’s 2017 guidance:

- “[A] school may not rely on fixed rules or operating assumptions that favor one party over another, nor may a school make such measures available only to one party.”
- Interim measures should be individualized based on the circumstances, and schools should make every effort to avoid depriving any student of education.
- Interim measures may change over time based on students’ evolving needs.

FAQ #6

- If a school doesn't know about harassment, then does it have an obligation to end it?
 - “[I]f the school knows or reasonably should know about the harassment, the school is responsible for taking immediate effective action to eliminate the hostile environment and prevent its recurrence.”

FAQ # 7

- After the school resolves the complaint, it has no further obligations, right?
 - No. It must ensure there is no retaliation and that the harassment is not recurring.

Investigation Guidelines

Investigations are required for all allegations of harassment

- It is the right thing to do!
 - Investigations are necessary to ensure equal access to education.
- Legal reasons:
 - A school district must be able to demonstrate that it has appropriately investigated and responded to all allegations of harassment.
 - If a school district knows about harassment but does not do anything, its failure to act may create liability under the **deliberate indifference** standard.
- Investigations must be prompt, thorough, and impartial.
- Before starting, make an investigation plan including what questions to ask, who to interview, and logistics.

Investigation step #1

Review applicable statutes, regulations, and school district policies and procedures. Follow all applicable policies and procedures throughout the investigation.

- As investigator, your first step is to review your district's sexual harassment policies and procedures. Follow those procedures throughout your investigation!



Investigation step #2

Ask the complaining student or staff member for a full narrative of the facts to supplement the information provided on MCPS Form 230-35, *Bullying, Harassment, or Intimidation Reporting Form*.

- The investigator should double-check to ensure that the complainant has provided all relevant information, including:
 - Who, what, when, where;
 - Race, ethnicity, and gender of victim;
 - Students, teachers, and other staff involved;
 - Witnesses to the incident; and
 - The specific nature of the alleged harassment.
- Review the complainant’s responses carefully before conducting any further interviews.



Investigation step #3

Review student/staff files of individuals allegedly involved in the incident.

- Reviewing the files will provide the investigator with key background facts that can inform his or her questioning of the victim, the alleged harasser, and witnesses.



Investigation step #4

Interview all alleged victims (which may or may not include the complainant).

In addition to the standard factual information listed in #2 above, the investigator should consider asking the victim(s) the following questions:

- How did you react to the harassment?
- How has the alleged harassment affected you and your experience at school?
- Are there any other students, teachers, or staff that might have relevant information?
- Do you have any notes, emails, text messages, documentation, or other physical evidence related to the incident?
- How would you like to see this situation resolved?



Note: Hold separate interviews with each alleged victim.

Provide interviewees – whether they are the victim, a witness, or the alleged harasser – with appropriate translation services if the interviewee is an English Language Learner.

Investigation step #5

Interview other witnesses individually.

- A full investigation includes interviews with all potential witnesses, even if the first few witnesses interviewed have provided identical information.
- The investigator should explain briefly the reasons for the interview and ask whether the witness has any relevant information about the alleged incident.
- The investigator should consider asking the following questions:
 - Describe the alleged harasser's general behavior toward the victim.
 - What, if anything, did the victim tell you about the incident?
 - Do you know of anyone else who might have relevant information?
 - Are you aware whether the alleged harasser has ever engaged in similar conduct in the past?
- Be sure that you have captured all potential witnesses by encouraging your interviewees to list any other students or school personnel who could possibly have information about the incident.



Investigation step #6

Interview the alleged harasser(s).

- The investigator should inform the alleged harasser of the allegations against him or her.
- The investigator should ask the alleged harasser about the basic facts surrounding the incident and give the alleged harasser an opportunity to explain the reasons for his or her actions.

Note: Hold separate interviews with each alleged harasser.



Investigation step #7

Review the notes from the interviews.

- Follow up on any factual inconsistencies. Re-interview witnesses as necessary.
- If the alleged harasser says something that directly contradicts what the complainant reported to you, circle back with the complainant to clarify her version of the events.



Investigation step #7

Review the notes from the interviews.

- Follow up on any factual inconsistencies. Re-interview witnesses as necessary.
- If the alleged harasser says something that directly contradicts what the complainant reported to you, circle back with the complainant to clarify her version of the events.



During the investigation . . .

It may be appropriate for a school to take interim measures during the investigation of a complaint. Examples:

- Rearrange schedules;
 - Provide counseling, medical services, and academic support (tutoring); and
 - Remove negative grades or evaluations that resulted from the harassment from the student's record, or allow a student to retake a test or class.
- Note: In 2017, ED said that “[i]n fairly assessing the need for a party to receive interim measures, a school may not rely on fixed rules or operating assumptions that favor one party over another, nor may a school make such measures available only to one party. Interim measures should be individualized and appropriate based on the information gathered by the Title IX Coordinator, making every effort to avoid depriving any student of her or his education. The measures needed by each student may change over time, and the Title IX Coordinator should communicate with each student throughout the investigation to ensure that any interim measures are necessary and effective based on the students’ evolving needs.”

After you have concluded your investigation and determined that harassment occurred, now what?

Response checklist

- Incident specific response:
 - Victim(s) and parents
 - Perpetrator(s) and parents
 - Staff who knew or should have known
- School-wide response:
 - Students
 - Staff
 - Parents



The nature of these steps will depend on the ages of the victim(s)/harasser(s), and the nature/pervasiveness of the harassment.

Preventing harassment from reoccurring

Incident-specific examples:

Taking appropriate disciplinary action per your school district policy:

- Providing, if necessary, services (community resources) to the victim to address the effects of the harassment;
- Preventing retaliation;
- Considering whether students should be separated;
- Ensuring that victims and their families know how to report subsequent problems with harassment; and
- Conducting follow-up inquiries to confirm that there have not been any new instances of harassment or retaliation.

School-wide examples:

- Providing training or other interventions for the larger school community
- Distributing anti-harassment materials to students and parents

Notice to victims and perpetrators

Must provide written notice of the outcome of disciplinary proceedings to both parties, and inform them of their Title IX rights and any available resources (such as counseling, health, and mental health services).

- The content of the notice may vary depending on the underlying allegations and the age of the students.
- Inform the reporting party's parents (or the student if 18 or older):
 - Whether the school found that the alleged conduct occurred;
 - Any individual remedies offered to the reporting party or any sanctions imposed on the responding party that directly relate to the reporting party; and
 - Other steps the school has taken to eliminate the hostile environment, if applicable.

After the investigation . . .

Take steps to stop the harassment from happening again.

- Once a district has determined that harassment has occurred, the district must take appropriate steps to end harassment.
- The nature of those steps will depend on a number of factors, including the ages of the victim(s) and the harasser(s), the nature of harassment, and the pervasiveness of harassment.
- Generally, school districts take some or all of the following steps:
 1. Discipline the harasser(s) appropriately.
 2. If appropriate, engage in conflict resolution procedures involving the harasser and his or her victim.
 3. If necessary, provide services to the victim to address the effects of the harassment.
 4. Prevent retaliation.

After the investigation . . .

Take steps to stop the harassment from happening again (cont.)

- Provide training or other interventions for harassers and/or the larger school community.
- Inform parents and students about the harassment incident and the school district's response.
- Distribute anti-harassment materials to students and parents.
- Ensure that the victim and his or her family know how to report subsequent problems with harassment.
- Conduct follow-up inquiries to confirm that there have not been any new instances of harassment or instances of retaliation.

Examples of Private Litigation

Examples of private litigation

- *Doe v. Board of Education of Community High School District 218* (June 19, 2017)
- Minor child, Jane Doe, through her parents, brought suit against the school district, Board of Education, superintendent, principal, assistant principals, and physical education teacher, alleging that physical education teacher videotaped Jane Doe as she disrobed in a locker room
- The complaint alleged that the school district previously had received reports that the teacher had engaged in inappropriate sexual conduct, and that the teacher had been warned to stay away from other students
- The U.S. District Court for the Northern District of Illinois found that the school district was not deliberately indifferent

Examples of private litigation

- *Fenner v. Freeburg Comm. High School District (S.D. Ill. 2016)*
- Katrina Fenner, on behalf of her son, filed suit against Freeburg Community High School District 77
- Fenner alleged that her son was hazed by senior members of the men's soccer team, and was harassed over social media continuously.
 - Civil Rights: Claimed that this was harassment on the basis of sex because the girl's soccer team did not have similar hazing rituals. Furthermore, she alleged that the administration knew about the hazing rituals but did nothing to prevent them.
- These claims survived a motion to dismiss in federal court.

Examples of OCR Investigations

OCR/DOJ enforcement: Anoka-Hennepin

- Complaint submitted to DOJ that a female student was being “harassed by peers” for being “too manly.” Other female students reported similar teasing. Some male students were being called “gay boys” and “girly.”
- DOJ opened an investigation (Nov. 2010), and OCR joined investigation (Jan. 2011).
 - Used authority under Title IX, Title IV, and ED regulations which prohibit discrimination on the basis of sex (Remember: OCR will consider harassment based on not conforming to gender stereotypes as harassment on the basis of sex)
- DOJ and OCR visited the district multiple times.
 - Conducted interviews with students, parents, teachers, staff, and administrators
 - Reviewed more than 7,000 pages of documents
- In July 2011, six students filed federal lawsuits against the school district, school board, and several school administrators.
- In August 2011, OCR and DOJ joined settlement discussions with the District, SPLC, and NCLR.

OCR/DOJ enforcement: Anoka-Hennepin

- All parties entered into Consent Decree, filed in U.S. District Court for the District of Minnesota
 - When fully implemented, Consent Decree will resolve complaint.
 - District agreed to:
 - Review and improve its policies and procedures concerning sex-based harassment by working with an Equity Consultant;
 - Hire or appoint a Title IX and Equity Coordinator;
 - Conduct training for all faculty, staff, and students; clarify policies for reporting and responding to harassment;
 - Hire a Mental Health Consultant to assist students subject to harassment;
 - Create an Anti-bullying/ Anti-harassment Task Force;

OCR/DOJ enforcement: Anoka-Hennepin

- Consent Decree (cont'd)
 - Administer an anti-bullying survey each year;
 - Identify harassment “hot spots” and monitor these trouble areas;
 - Ensure that all middle and high schools have a peer leadership program addressing harassment;
 - Hold annual meetings between superintendent and students at each middle and high school; and
 - Provide compliance reports to DOJ and OCR each trimester.
- Consent Decree in effect for five years, in which DOJ and OCR to monitor and to provide technical assistance as needed.
 - This could include additional visits, interviews, reports, or training.

OCR enforcement via Resolution Agreement: Pasadena USD

- Complaint filed with OCR by parent
 - Daughter has autism and receives 1:1 special education assistance.
 - Complaint cited multiple instances of verbal and physical harassment based on sex, race, and disability
- Subjects of OCR Investigation:
 - District policies prohibiting discrimination
 - District investigation procedures
- Findings:
 - District’s investigation was prompt and thorough (interviewed witnesses, students, complainant), but notification of parties, recordkeeping, and responsiveness to multiple instances of harassment were insufficient.



OCR Enforcement: Pasadena

- Pasadena and OCR entered into a Resolution Agreement.
 - Within 5 months of the agreement, Pasadena to:
 - Provide all district educators and students with education on preventing bullying and harassment;
 - Provide OCR with an overview of its bullying/harassment plan; and
 - Provide OCR with a copy of most recent annual climate survey results.
 - Within 30 days of the agreement,
 - School district to disseminate guidance to administrators on reporting findings to complainants any time it conducts an internal harassment investigation.



OCR Complaint No. 04-18-1576 Notification

Dear Ms. Broyles:

On June 1, 2018, the Office for Civil Rights (OCR) of the U.S. Department of Education (Department) received your complaint against the Decatur City School District (District). You filed the complaint on behalf of [](Student), a student in the District.

Specifically, you made the following allegations:

1. The District subjected the Student to discrimination on the basis of sex when it failed to provide a prompt and equitable response to the Parent's report that the Student had been sexually assaulted in the girls' restroom by a male student who identified as gender fluid and who was permitted access to the girls' restroom pursuant to the District policy (Policy) that permits students access to facilities, including restrooms, that correspond to their gender identity.
2. Several aspects of the Policy, including permitting students access to facilities, including restrooms, that correspond to their gender identity, create a hostile environment for girls.
3. The District retaliated against the Student's Parent, for reporting the sexual harassment incident, by identifying the Parent as the "responsible party" in the District's referral of the sexual harassment incident to the Georgia Division of Family and Children Services (DFCS).

OCR Complaint No. 04-18-1576 Notification (cont'd)

Accordingly, OCR will investigate the following legal issues:

- Whether the District failed to provide a prompt and equitable response to a report that the Student was subjected to sexual assault, and, as a result, was subjected to a sexually hostile environment, including whether the District implementation of the Policy contributed to creation of a hostile environment for the Student and other girls, in noncompliance with Title IX and its implementing regulations at 34 C.F.R. §§ 106.8, 106.31.
- Whether the District retaliated against the Student's Parent for reporting the sexual harassment incident, in noncompliance with Title IX and its implementing regulation at 34 C.F.R. § 106.71.

What do you do?

What do you do?

- A high school student, Sam, discovered that someone from school made a Facebook page called “Everyone Hates Sam.” The Facebook page had insults and rumors about Sam, as well as discussion of a school-wide game to see who could get Sam to complain to a teacher or principal first. When Sam’s parents eventually told the school, they said they couldn’t do anything about the Facebook page because it was a Free Speech issue. Meanwhile, Sam increasingly missed class and his grades declined.

What do you do?

- Is this harassment?
- Why?
- Was the school deliberately indifferent?
- What should the school have done differently?

What would you do?

1. A high school's basketball team was in the state finals. A student filed a complaint alleging that a teammate sexually assaulted her on the bus on the way to the semi-finals game. The school informed the complainant that she must provide her own transportation to the state finals, and should not ride the team's designated bus.
2. A middle school student reported that several boys in her class had sent her nude photographs of themselves and others; they appeared on her iPhone and then disappeared. The school told the complainant to turn her phone off during the school day.

What do you do?

1. A parent/guardian called the school to report that a grade 3 male student was displaying inappropriate behavior over the course of the past two weeks to a grade 3 female student.
2. The parent/guardian of a grade 5 male student (A) told the administrator that a grade 5 male student (B) touched student A inappropriately on multiple occasions in the classroom and at recess.

Sexual violence

What is sexual violence?

- Sexual violence is a form of sexual harassment prohibited by Title IX.
- “Sexual violence” is defined by OCR as “physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent (e.g., due to the student’s age or use of drugs or alcohol, or because an intellectual or other disability prevents the student from having the capacity to give consent).”
- A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, sexual abuse, and sexual coercion.
- Sexual violence can be carried out by school employees, other students, or third parties.

OCR sexual violence enforcement

- In FY 2016, OCR:
 - Received 260 complaints related to sexual violence, including 83 against K-12 schools.
- In FY 2015, OCR:
 - Received 229 complaints related to sexual violence, including 65 against K-12 schools;
 - Resolved 83 complaints related to sexual violence; and
 - Began 2 compliance reviews and resolved 1 investigation related to sexual violence.

Why is sexual violence a focus under Title IX?

- According to an AP Investigation released in May 2017:
 - 17,000 reports of K-12 student-on-student sexual violence were filed between 2011 and 2015
 - Such attacks are “greatly under-reported”
 - For every adult-on-student incident that was reported, seven student-on-student assaults were reported
 - Schools are the second-most common place for children to be assaulted

Sexual Assault by Fellow Students: 17,000 Reports in 4 Years, AP Investigation Finds

by THE ASSOCIATED PRESS

July 7, 2017

EDUCATION WEEK

Welcome, Site Licensee
Full Premium Access!

AP Investigation Reveals Hidden Horror of Sex Assaults by K-12 Students

Sexual violence as sexual harassment

- On April 4, 2011, OCR issued a Dear Colleague Letter addressing sexual violence in schools.
- The Dear Colleague Letter:
 - Clarified that Title IX, which prohibits discrimination on the basis of sex, covers sexual violence; and
 - Provided detailed guidance on districts' obligations to take “immediate and effective steps” to address incidents of peer-on-peer sexual violence.
- Like the OCR letter on bullying and harassment, the Dear Colleague Letter warned that districts that fail to take prompt and effective steps to address incidents of sexual violence risk losing federal funds or being referred to DOJ for litigation.
- *The 2011 DCL was withdrawn on September 22, 2017.* OCR said it will continue to rely on its 2001 Revised Sexual Harassment Guidance and 2006 DCL on Sexual Harassment.

Sexual violence as sexual harassment

- On April 29, 2014, OCR issued additional guidance in a Q&A letter concerning obligations to address sexual violence as a form of sexual harassment under Title IX.
- The Q&A letter:
 - Further clarified the legal requirements and guidance in the 2011 DCL;
 - Provided examples of proactive efforts schools can take to prevent sexual violence; and
 - Provided remedies schools may use to end sexual violence, prevent its recurrence, and address its effects
- *The 2014 Q&A was withdrawn on September 22, 2017.* OCR said it will continue to rely on its 2001 Revised Sexual Harassment Guidance and 2006 DCL on Sexual Harassment.

Sexual violence as sexual harassment

Parties of the same sex

- Title IX prohibits sexual harassment regardless of the sex of the harasser, i.e., even if the harasser and the person being harassed are members of the same sex. (2001 Guidance)
 - A school should include examples of same-sex sexual violence in any explanation about the particular type of conduct that could violate the school's prohibition on sexual violence.
 - School staff should receive appropriate training about working with LGBT students and same-sex sexual violence.

Sexual violence as sexual harassment

Parties with disabilities

- When students with disabilities experience sexual violence, Title IX and federal civil rights laws may be relevant to a school's obligation to investigate and remedy such incidents.
- Students with disabilities may need:
 - help learning about sexual violence, or
 - services as a result of sexual violence.
- A student may develop the need for special education after experiencing sexual violence.

District obligations concerning sexual violence

Case study: Palo Alto USD

- Palo Alto Unified School District was determined to be noncompliant with Title IX
 - Multiple instances of sexual harassment and sexual assault of students, both in and out of school
- Resolution Agreement signed March 2017
- The following examples are excerpted complaints from the Palo Alto investigation and the District's response to each. Consider what the district did well and what it should have done differently.

District obligations concerning sexual violence

Case study: Palo Alto USD

Reported Conduct

- Off-campus sexual assault of female student by a male student
- Female student's parent gave Palo Alto High School oral notice of the assault
- After assault was reported, female student harassed at school and on social media by classmates

District Response

- Referred student to on-campus and off-campus counseling
- Assisted student in filing police report
- Gave student an exam waiver so she would not have to return to campus
- Interviewed alleged perpetrator, other witnesses
- Attempted to find source of retaliatory harassment
- Did not provide outcome of either investigation to complainant

District obligations concerning sexual violence

Case study: Palo Alto USD

- What did Palo Alto do right in this instance?
- What should Palo Alto have done differently?

District obligations concerning sexual violence

Case study: Palo Alto USD

Reported Conduct

- Male student allegedly locked a female student in a bathroom at an off-campus party and told her he would not let her out unless she performed sex acts on him
- 2 students reported the incident to an Assistant Principal

District Response

- Assistant Principal relayed report to Title IX coordinator
- Female student's counselor met with her
 - Informed of counseling resources
 - Informed of right to file UCP complaint or police report
 - Encouraged her to report any subsequent harassment
- Met with accused student
 - Warned not to harass other student
 - Notified his parent of the allegation, made parent aware of counseling resources
- Followed up with female student's parent, who notified school of police report filing
- School monitored parties but did not provide notice of an outcome to either party

District obligations concerning sexual violence

Case study: Palo Alto USD

- What did Palo Alto do right in this instance?
- What should Palo Alto have done differently?

District obligations concerning sexual violence

Case study: Palo Alto USD

Reported Conduct

- Student A reported being stalked by Student B
- Student A had recently broken up with B because of B's possessive tendencies
- Student B knew A's class schedule and routes home, allegedly harassed A both on- and off-campus
- Student A alleged B's conduct caused A to be tardy and could not focus on school work when B was visible outside A's classroom
- Student B once followed A as A walked home and physically assaulted A, resulting in B's arrest
 - School was notified
- Student A received an Emergency Protective Order requiring B to stay 300 yards away
 - School was notified

District Response

- Assistant Principal offered counseling for Student A
- Administrators suggested having a campus security supervisor monitor Student A between classes to ensure Student B did not approach
- School eventually suspended Student B in order to comply with the Protective Order
- Student A's parents say they were not provided information on sexual harassment complaint procedures

District obligations concerning sexual violence

Case study: Palo Alto USD

- What did Palo Alto do right in this instance?
- What should Palo Alto have done differently?

Another case study

Middle school football team forfeits season after racially insensitive video

The football team at Short Pump Middle School in Henrico County, Va., forfeited their season after a few players posted a racially insensitive video to Snapchat.

- Time, October 23, 2017

What do you do?

- Is this harassment?
- Why?
- Was the school deliberately indifferent?
- What should the school have done differently?

Another case study continued

Middle school football team forfeits season after racially insensitive video

Police in Short Pump, Virginia are investigating a Snapchat video showing local white middle school football players faking sexual assault on African American students.

- Washington Post, October 22, 2017

What do you do?

- Is this harassment?
- Why?
- Was the school deliberately indifferent?
- What should the school have done differently?

Transgender Students

Bullying and harassment based on sex

Transgender students

- The legal obligations of schools for accommodating and protecting transgender students is in flux
- Timeline of federal transgender policy developments since January 2015:

January 2015
OCR Public Letter to Private Citizen
Instructed school to follow students' gender identity, not sex assigned at birth



May 2016
OCR DCL
Detailed obligations rooted in deference to gender identity (accommodations, no requirement of medical diagnosis, how to address discrimination)



February 2017
OCR DCL
Previous OCR Letter and OCR DCL
repealed



June 2017
OCR Internal Memo
OCR issues internal memo explaining that discrimination, bullying, and harassment of transgender students are still covered by Title IX

OCR internal memo on transgender students

OCR Instructions to the Field re Complaints Involving Transgender Students

- Issued June 6, 2017
- Summary:
 - OCR should rely on Title IX and its implementing regulations in evaluating complaints of sex discrimination
 - Specified that OCR may assert subject matter jurisdiction over:
 - Failure to promptly and equitably resolve a complaint of sex discrimination
 - Failure to assess whether sexual or gender-based harassment (including not using preferred pronouns)
 - Retaliation against a transgender student after discrimination concerns raised
 - Different treatment based on sex stereotyping
- Also provided script for dismissing claims from transgender students

Example of OCR Action Following OCR Revoking Guidance

- June 2017: OCR's Sparta, Ohio OCR investigation closed
 - Elementary school case involving transgender student's access to the bathroom of their gender identity
 - Case closed because the student settled with the school district
 - Earlier OCR findings that a student had suffered discrimination at school withdrawn, citing revocation of the 2016 DCL
 - Unusual to withdraw a federal investigator's legal conclusion

Connecticut State Department of Education Guidance Following OCR Revoking Transgender Guidance

- On June of 2017, Connecticut State Department of Education issued guidance on civil rights protections for transgender students.
- Guidance addresses a range of topics and states that “issues that arise often must be resolved in context of local communities, and school district leaders should consult their legal counsel regarding how the applicable laws and regulations may affect the policy decisions they are making for their schools.”

Connecticut State Department of Education Guidance Following OCR Revoking Transgender Guidance

- Connecticut Guidance states that “students and parents/guardians have the right to enforce Title IX directly by filing a lawsuit in court and/or seeking enforcement by appropriate state authorities. . . [s]tudents and parents/guardians also have the right to enforce protections against gender identity discrimination established by Connecticut law.”

Connecticut State Department of Education Guidance Following OCR Revoking Transgender Guidance

- Connecticut Guidance states that “[b]ecause of uncertainty concerning how OCR will handle complaints of gender identity discrimination during the Trump administration, CSDE recommends that students, parents and guardians, file complaints with OCR and CHRO if they are unable to resolve issues directly with the school district.”

Connecticut State Department of Education Guidance Following OCR Revoking Transgender Guidance

- An Example of Topic in Connecticut Guidance
 - “Students are not required to produce documents that reflect gender identity in order to have the right to be treated consistent with their gender identity . . . schools are expected to treat students consistent with the student’s state gender identity even if the education records or identification documents indicate a different sex. Similarly the school’s obligation to treat a student consistent with the student’s gender identity or expression does not require notice from parent or guardian.”

Connecticut State Department of Education Guidance Following OCR Revoking Transgender Guidance

- Another Example in Connecticut Guidance
 - “Under federal and state laws, CSDE policies and procedures and Executive Order No. 56, schools are required to provide access to the restroom that corresponds to a student’s gender identity at school, even when this differs from their sex assigned at birth. . . In communicating with students, families and staff about this requirement, schools may find it helpful to note that a private restroom option will be made available to any student.”

Va. transgender student separated from other youths in safety drill, mom says

The superintendent of a Virginia school system has requested a review of safety procedures amid allegations a transgender student was forbidden from entering a locker room during a middle-school safety drill.

Students in the 14-year-old girl's physical education class in the Stafford County Public Schools were shepherded into the girls or boys locker room during the Sept. 28 drill. But the student was prevented from sheltering in either, according to the girl's mother and Equality Stafford, a group that advocates for LGBTQ rights in the county's schools. The drill was designed to simulate a lockdown that might happen if the school were threatened.

- The Washington Post (October 9, 2018)

What do you do?

- Is this harassment?
- Why?
- Was the school deliberately indifferent?
- What should the school have done differently?

Hypothetical

You are a principal of a school. You have a transgender student who wants to use the restroom that matches the gender with which they identify. The student says you are required by federal law to permit her to use the restroom she wants. Are you?

Ripped from the headlines

Transgender teen gets ‘permanent’ access to boys’ locker room in legal settlement

News

3rd Circ. Upholds Boyertown School District's Transgender Bathroom Policy

In a highly anticipated decision following a May hearing, the U.S. Court of Appeals for the Third Circuit said in its opinion released Tuesday that transgender students in a Montgomery County school district may continue using bathrooms and locker rooms that match their gender identities.

By P.J. D'Annunzio | June 19, 2018 at 07:31 PM

Gloucester County School Board v. G.G.

- ❑ The District enacted a policy that requires students to use restroom and locker rooms that match their sex assigned at birth.
- ❑ In June 2016, G.G. sued the District arguing that the policy violated his rights under the U.S. Constitution and Title IX.
- ❑ District court initially rejected G.G.’s Title IX claim, finding it was barred by ED’s Title IX regulations that allow schools to provide “separate toilet, locker room, and shower facilities on the basis of sex”.
- ❑ A divided panel of U.S. Court of Appeals for the 4th Circuit reversed district court’s decision.
- ❑ The 4th Circuit relied on a January 2015 Dear Colleague Letter (DCL) from Department of Education’s Office for Civil Rights (OCR) (the letter was issued after the district court’s decision).



Gloucester County School Board v. G.G.

- ❑ School board appealed, asking the Supreme Court to hear the case; oral argument initially scheduled for March 28, 2017.
- ❑ On February 22, 2017 Trump Administration (ED and DOJ) issued a new DCL to “withdraw and rescind” the March 2016 DCL in which the Obama Administration set forth its interpretation of Title IX.
- ❑ On March 6, 2017 Supreme Court vacated and remanded case to the 4th Circuit for further consideration in light of ED and DOJ’s Feb. 22 guidance.
- ❑ In August 2017, G.G. filed an Amended Complaint.
- ❑ In May 2018, the district court denied the District’s motion to dismiss the Amended Complaint.
- ❑ In June 2018, the district court granted the District’s interlocutory appeal which asks the 4th Circuit to resolve whether the ban is discriminatory.



Gloucester County School Board v. G.G.

- ❑ Despite the rescission of the Obama-era guidance on Title XI, the district court denied the motion to dismiss and held that G.G. “may bring a Title IX claim based on his transgender status” and “has sufficiently pled a Title IX claim of sex discrimination under a gender stereotyping theory.”
- ❑ The court also declined to dismiss G.G.’s Equal Protection Claim because G.G. “sufficiently pled that the Policy was not substantially related to protecting other students’ privacy rights...” and the District’s argument that the policy did not discriminate against any one class of students was “resoundingly unpersuasive.”

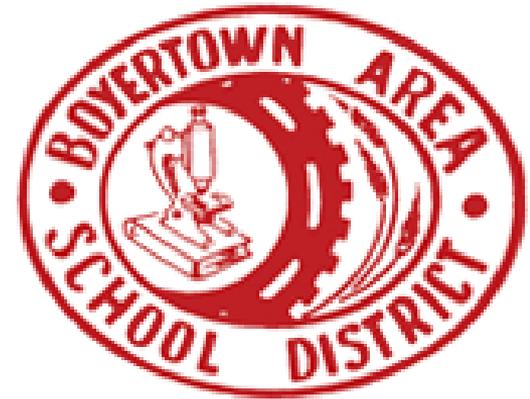


What does *Gloucester* mean for schools?

- ❑ The Supreme Court has yet to rule on the specific issue: whether prohibiting students from using the bathroom of their gender identity is a violation of Title IX and the Equal Protection Clause of the 14th Amendment.
- ❑ This is an area of significant lower court litigation. For example

Doe v. Boyertown

- ❑ The Boyertown Area School District implemented a policy that permitted students to use the gender-segregated bathrooms and locker rooms of their choice.
- ❑ In May 2018, the 3rd Circuit issued a bench decision affirming the district court's denial of Plaintiff's request for a preliminary injunction, rejecting their argument that allowing transgender students to use the same facilities as cisgender students violates cisgender students' right to privacy or otherwise causes them harm.
- ❑ The suit marks the first time a suit filed by non-transgender plaintiffs challenging an existing transgender-inclusive school policy has reached a federal appeals court.



After alleged sexual assault, officials open investigation of transgender bathroom policy

Alliance Defending Freedom, a conservative legal group, filed a civil rights complaint in June with the Education Department against City Schools of Decatur, and last month, the department wrote to say it was opening an investigation. The complaint outlines the girl's allegations that she was sexually assaulted in a girl's bathroom by a "gender fluid" classmate who was born male. The girl's attorneys have accused school officials of creating "a hostile and discriminatory learning environment for girls" in violation of Title IX, which bars sex discrimination in public schools that receive federal funding.

City Schools of Decatur officials have contested the version of events laid out in the complaint, asking whether the assault reported by the girl did happen and contradicting claims that the classmate the girl identified is "gender fluid." A social service agency investigation determined the girl's allegations were "unfounded."

- The Washington Post (October 9, 2018)

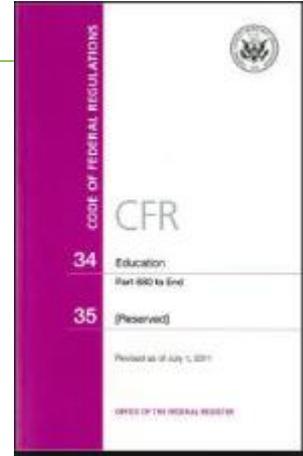
Athletics

Athletics

- Federal regulations provide:

“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. 106.41(a).



Athletics

Participation in Athletics Before and After Title IX

School Year	Boys	Girls
1971-1972	3,666,917	294,015
2016-2017	4,563,238	3,400,297

OCR enforcement of equal access to athletic opportunities

- In FY 2016, OCR:
 - Received 6,251 complaints related to equal access to athletic opportunities and benefits. (*note: More than 6,000 of the complaints were filed by a single complainant.*)
- In FY 2015, OCR:
 - Received 1,771 complaints and resolved 1658 complaints related to equal access to athletic opportunities and benefits, and
 - Started 5 compliance reviews involving equal access to athletic opportunities and benefits and resolved 1 review.

OCR enforcement of equal access to athletic opportunities

- The Women's Sports Foundation, founded by Billy Jean King, notes the following benefits of sports:
 - High school girls who play sports are less likely to be involved in an unintended pregnancy; more likely to get better grades in school and more likely to graduate than girls who do not play sports.
 - As little as four hours of exercise a week may reduce a teenage girl's risk of breast cancer by up to 60%; breast cancer is a disease that afflicts one out of every eight American women.
 - Girls and women who play sports have higher levels of confidence and self-esteem and lower levels of depression.
 - Girls and women who play sports have a more positive body image and experience higher states of psychological well-being than girls and women who do not play sports.

(Source: Women's Sports Foundation, "Benefits – Why Sports Participation for Girls and Women".)

ED's Three-Part Test

- Schools are providing equal participation opportunities to their male & female students if:
- Prong 1: Athletic participation opportunities for males and females are *substantially proportionate* to their respective enrollments; **OR**
- Prong 2: The school has a *history and continuing practice* of expanding athletic participation opportunities for the underrepresented sex (which is demonstrably responsive to the developing interests and abilities of the members of that sex); **OR**
- Prong 3: The school has *fully and effectively accommodated* the interests and abilities of the underrepresented sex with its present program.

ED's Three-Part Test: Prong One (proportionality)

- **Participation should be proportionate to enrollment.**
- Example: OCR Resolution Agreement with Portland Public Schools (Maine) (September 2013)
 - OCR conducted a compliance review, and determined that in 2010-11, girls were underrepresented in the District's athletics program, with a disparity of 3.64%. In 2011-12, that disparity remained and even grew slightly to 3.74%.

PORTLAND SCHOOL DISTRICT STUDENT POPULATION*

	2010-11		2011-12	
Males	1,195	51.33%	1,110	49.91%
Females	1,133	48.67%	1,114	50.09%
Total	2,328		2,224	

**Data provided by the District and the Maine Dept. of Education*

PORTLAND SCHOOL DISTRICT ATHLETIC PARTICIPATION*

	2010-11		2011-12	
Male Athl.	830	54.97%	793	53.65%
Female Athl.	680	45.03%	685	46.35%
Total	1,510		1,478	

**Data compiled from team rosters and coach interviews*

ED's Three-Part Test: Prong One (proportionality)

- Example (continued): OCR Resolution Agreement with Portland Public Schools (Maine) (September 2013)
 - OCR determined how many athletic participation opportunities the school district would need to create at each of its schools in order to be in compliance with Title IX.
 - OCR noted that “[i]t is also possible that the two high schools could collaborate – as they currently do with girls’ hockey – if there is an insufficient number of students to create a team at either school but there would be a sufficient number to create a combined team.”

ED's Three-Part Test: Prong One (proportionality)

- Cheerleading is not a “sport” for purposes of complying with Title IX.
- *Biediger v. Quinnipiac University*, 691 F.3d 85 (2nd Cir. 2012)
 - The court held that competitive cheerleading did not count for purposes of complying with Title IX.
 - The court held: “For purposes of determining the number of genuine varsity athletic participation opportunities that Quinnipiac afforded women students, the district court correctly declined to count: . . . any of the 30 roster positions for women's competitive cheerleading because that activity was not yet sufficiently organized or its rules sufficiently defined to afford women genuine participation opportunities in a varsity sport.”
 - The court cited the district court’s observation “that competitive cheerleading is not yet recognized as a ‘sport,’ or even an ‘emerging sport,’ by the NCAA.”

ED's Three-Part Test: Prong Two (Program Expansion)

- **The school has a history and continuing practice of expanding athletic participation opportunities for the underrepresented sex.**
 - Look at the historical record for the school district
 - Examine whether the school district's plan is demonstrably responsive to the developing interests and abilities of the members of the underrepresented sex

ED's Three-Part Test: Prong Two (Program Expansion)

- **Example: OCR Resolution Agreement with Portland School District (Maine)**

“In analyzing this part of the Three Part Test, OCR reviewed the start date (or best estimate) for every sport offered by the District that had a recorded history. The District informed OCR that the start dates of many additional sports were unknown or could not be defined with any accuracy because they were started long ago. . . .OCR reviewed team pictures from the early 1900s that indicated that boys’ football and baseball started at approximately the same time. . . . The District has canceled or combined sports teams for the underrepresented sex in the past few years, . . .

“Based on this information, OCR concluded that the District could not demonstrate both a ‘history’ and ‘continuing practice’ of program expansion for its underrepresented sex. While there were periods of time in the District’s history when it increased participation opportunities for girls, there were significant periods of time when little or no expansion occurred and other, more recent periods of time when the District shrunk its program offering for girls. Accordingly, OCR determined that the District did not meet part two of the Three Part Test.”

ED's Three-Part Test: Prong Three (Full and Effective Accommodation)

The school has fully and effectively accommodated the interests and abilities of the underrepresented sex.

- OCR will consider the following:
 - Is there unmet interest in a particular sport?
 - Does the institution use nondiscriminatory methods of assessment when determining athletic interests and abilities of students?
 - Was a viable team eliminated?
 - Were there multiple indicators of interest?
 - Were there multiple indicators of ability?
 - How often are assessments conducted?
 - Is there sufficient ability to sustain a team in the sport?
 - Is there a reasonable expectation of competition for the team?
- OCR advised in its 2010 Dear Colleague Letter that “[i]f the answer to all three questions is ‘Yes,’ OCR will find that an institution is not fully and effectively accommodating the interests and abilities of the underrepresented sex and therefore is not in compliance with” the third prong.”

ED's Three-Part Test: Prong Three (Full and Effective Accommodation)

The school has fully and effectively accommodated the interests and abilities of the underrepresented sex.

- Surveys alone are not sufficient to determine compliance, regardless of the response rate.
- Non-responses to surveys are not definitive evidence that there is a lack of interest or ability in athletics.
- An institution is not required to administer a survey to be in compliance with this prong, and OCR advised that it does not evaluate just surveys when determining compliance. OCR stated in the 2010 Questions and Answers: “A survey is only one indicator that may be used as part of an overall assessment of interests and abilities of the underrepresented sex.”

Athletics

- Boys' and girls' athletics programs must be equal overall,* including:
 - Scheduling
 - Travel
 - Coaching
 - Locker rooms/facilities
 - Medical/training services
 - Publicity
 - Recruiting
 - Tutoring
 - Housing/dining

- * No “booster club” exception

Hypothetical

- Parents of girls on the softball team complain to you that your school does not provide the same facilities and opportunities that are provided for boys' athletic teams. The parents say that the school is discriminating against female athletes in the following areas: funding; equipment; game and practice times; travel; coaching opportunities; locker rooms and publicity.
- Parents claim that the baseball team has 7 coaches and the softball team has one coach. In addition, they say that the baseball team has a brick locker room with central heat/air, restroom facilities and coaches' office and the softball team locker room is a trailer with no heat or air and no offices.
- What do you do?

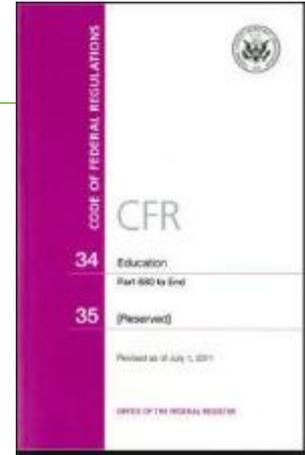
Pregnant and parenting students

Pregnant and parenting students

Federal regulations provide:

“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. 106.40(a).



Pregnant and parenting students: 2013 OCR Dear Colleague Letter and Pamphlet

- No exclusion: Schools may not exclude a pregnant student from participating in any part of an educational program, such as advanced placement or honors classes, extracurricular programs, interscholastic sports, honor societies, and opportunities for student leadership.
- Special services: “If a school provides special services, such as homebound instruction or tutoring, for students who miss school because they have a temporary medical condition, it must do the same for a student who misses school because of pregnancy or childbirth.”

Pregnant and parenting students: 2013 OCR Dear Colleague Letter and Pamphlet

- Assistance: “To ensure a pregnant student’s access to its educational program, when necessary, a school must make adjustments to the regular program that are reasonable and responsive to the student’s temporary pregnancy status. For example, a school might be required to provide a larger desk, allow frequent trips to the bathroom, or permit temporary access to elevators.”
- Absences: “A school must excuse a student’s absences because of pregnancy or childbirth for as long as the student’s doctor deems the absences medically necessary. When a student returns to school, she must be allowed to return to the same academic and extracurricular status as before her medical leave began,” including the ability to make up work.
 - “A school may offer the student alternatives to making up missed work, such as retaking a semester, taking part in an online course credit recovery program, or allowing the student additional time in a program to continue at the same pace and finish at a later date, especially after longer periods of leave. The student should be allowed to choose how to make up the work.”

Pregnant and parenting students: 2013 OCR Dear Colleague Letter and Pamphlet

- Medical certification: “A school may require a pregnant student or student who has given birth to submit medical certification for school participation only if the school also requires such certification from all students with physical or emotional conditions requiring the attention of a physician.”
- Alternative programs: “A school may provide information to its students about the availability of an alternative program, but it may not pressure a pregnant student to attend that program. A pregnant student must be allowed to remain in her regular classes and school if she so chooses.”
- Teacher policies: “Schools must ensure that the policies and practices of individual teachers do not discriminate against pregnant students.”
 - “[I]f a teacher’s grading is based in part on class attendance or participation, the student should be allowed to earn the credits she missed so that she can be reinstated to the status she had before the leave.”

Pregnant and parenting students: 2013 OCR Dear Colleague Letter and Pamphlet

- Harassment: “Title IX prohibits harassment of students based on sex, including harassment because of pregnancy or related conditions.”
 - “Harassing conduct can take many forms, including
 - verbal acts and name-calling,
 - graphic and written statements, and
 - other conduct that may be humiliating or physically threatening or harmful.
 - Particular actions that could constitute prohibited harassment include making sexual comments or jokes about a student’s pregnancy, calling a pregnant student sexually charged names, spreading rumors about her sexual activity, and making sexual propositions or gestures.”

Pregnant and parenting students: Hypothetical

- Linda Locker is four months pregnant. She continues to attend mainstream instruction, and participate in the honor society. She wants to participate in physical education class. She no longer fits her gym clothes, but brought a pair of plain gray sweatpants and a plain gray sweatshirt from home. The teacher told her to sit quietly in the bleachers because it was better for her, and that she could only receive credit when dressed in the school-approved gym uniform. Linda expressed interest in participating in Model United Nations and competing to be on a float in the spring fling parade; the assistant principal eliminated her name from consideration for both activities. One of Linda's teachers approaches you, and explains the information above.

Pregnant and parenting students:

National Women's Law Center Recommendations

- Ensure compliance with Title IX and a welcoming school climate
- Excuse absences for illness or medical appointment of student's child
- Flexibility in scheduling
- Goal-setting and guidance, encouragement
- Individualized graduation plans
- Home instruction during maternity leave
- Child care, transportation assistance
- Secondary pregnancy prevention
- Access to social services and health care
- "Parenting" classes teaching range of life skills
- Outreach to dropouts

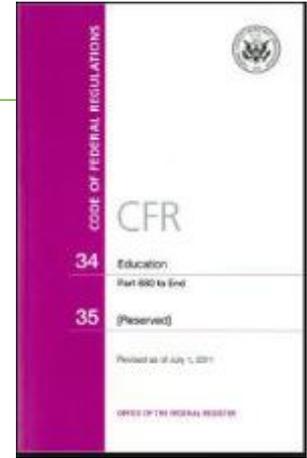
Single-sex classes and programs

Single-sex programs

Federal regulations provide the following general standard:

“Except as provided for in this section or otherwise in this part, a recipient shall not provide or otherwise carry out any of its education programs or activities separately on the basis of sex, or require or refuse participation therein by any of its students on the basis of sex...”

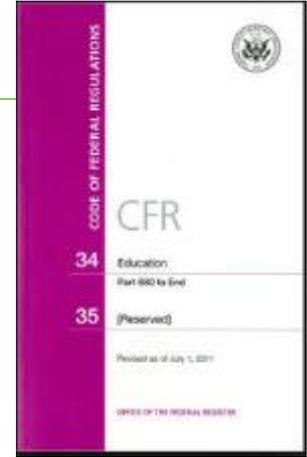
34 C.F.R. 106.34(a).



Single-sex programs

Federal regulations (34 C.F.R. 106.34(a)) provide:

“Except as provided for in this section or otherwise in this part, a recipient shall not provide or otherwise carry out any of its education programs or activities separately on the basis of sex, or require or refuse participation therein by any of its students on the basis of sex...”



Grouping students on the basis of sex is permitted for:

- Contact sports in gym class
- Ability grouping in gym class
- Human sexuality class
- Chorus (based on vocal range or quality)

Single-sex classes and extra-curricular activities: How to do it

Federal regulations (34 C.F.R. 106.34(b)) provide:

“[A] recipient that operates a nonvocational coeducational elementary or secondary school may provide nonvocational **single-sex classes or extracurricular activities**, if—

(i) Each single-sex class or extracurricular activity is based on the recipient's important objective—

(A) To improve educational achievement of its students, through a recipient's overall established policy to provide diverse educational opportunities, provided that the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective; or

(B) To meet the particular, identified educational needs of its students, provided that the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective;

(ii) The recipient implements its objective in an evenhanded manner;

(iii) Student enrollment in a single-sex class or extracurricular activity is completely voluntary; and

(iv) The recipient provides to all other students, including students of the excluded sex, a substantially equal coeducational class or extracurricular activity in the same subject or activity.”

In order to implement its objective in an evenhanded manner, “[a] recipient that provides a single-sex class or extracurricular activity . . . may be required to provide a **substantially equal single-sex class or extracurricular activity** for students of the excluded sex.”

Title IX and single-sex education

In 2014, OCR published a Dear Colleague Letter addressing single-sex elementary and secondary classes.



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

**Questions and Answers on Title IX and Single-Sex Elementary and Secondary
Classes and Extracurricular Activities***

The Office for Civil Rights (OCR) of the U.S. Department of Education (Department) has received a number of questions about the legality, under the Department's regulations implementing Title IX of the Education Amendments of 1972 (Title IX), of single-sex elementary and secondary classes and extracurricular activities offered by recipients of funding from the Department.¹

Single-sex classes and extra-curricular activities: Hypothetical

- At the faculty meeting, the principal announces that the school will begin offering Calculus as a single-sex class at the beginning of the next school year. The statement is made without any explanation, or details about the roll out of the initiative.
- How should the Title IX Coordinator respond?

Single-sex classes and extra-curricular activities

- In 2014, ACLU filed an OCR complaint against a Florida school district alleging that it had a single-sex classroom approach that violates Title IX.
- The complaint stated, in relevant part:

“By training teachers that boys and girls learn differently, and teaching girls and boys differently based on expectations about the talents, capacities and preferences of each sex, the District has created a hidden curriculum that is harmful to all students. Girls are encouraged to work quietly and discuss their feelings and personal problems. They’re expected to be cooperative and noncompetitive. Boys are encouraged to move around, compete and are not encouraged to discuss their feelings. . . . Girls are taught mathematics in a way that makes it less abstract and consequently gives girls the message that they are not good at abstract mathematics. Boys are taught literature in a way that makes stories highly concrete and fact-based and does not encourage them to connect with characters’ emotions. These sex stereotypes limit opportunities for boys and girls alike. ”

Has the school violated Title IX? Why or why not?

Gender equity in career and technical education

OCR Guidance on gender equity in CTE



UNITED STATES DEPARTMENT OF EDUCATION
Office for Civil Rights
Office of Career, Technical, and Adult Education

June 15, 2016

Dear Colleague:

Career and Technical Education (CTE) programs are critical to strengthening our economy and securing a brighter future for our nation. Ensuring that all students have access to high-quality secondary and postsecondary CTE programs is central to achieving the equity that our nation's civil rights laws require.

The Department's Office of Career, Technical, and Adult Education (OCTAE) and Office for Civil Rights (OCR) join together in this letter to make clear to recipients¹ that all students, regardless of their sex or gender,² must have equal access to the full range of CTE programs offered.³

OCR guidance on gender equity in CTE

- Purpose

- Regardless of sex or gender, students should have equal access to the full range of available Career and Technical Education courses.

- Goals

- Eliminate discriminatory practices.
- Take proactive steps to expand participation of students in fields where one sex is traditionally underrepresented.

- Desired Results

- Increase overall participation and success in high-growth fields, for both men and women.

OCR guidance on gender equity in CTE

- The DCL gives several examples of best practices to promote gender equity:
- Conduct counseling, recruitment, and admission practices in a nondiscriminatory manner.
 - Give the same types of information and materials to all students.
- Portray a broad range of occupational opportunities to all students.
 - Do not filter your information to students based on stereotypical assumptions about their interests and abilities.
- Include persons of different sexes at recruitment and information fairs.
 - Also, ensure that promotional materials depict persons of different sexes.
- Routinely assess your school's progress toward gender equity.
 - Gather data on gender enrollment by class; have students complete surveys; and follow up with counselors, teachers, and other staff.

Gender equity in CTE: Hypothetical

- A high school is planning to sponsor a career day for all students to promote its information technology program. This is the only promotional effort that the high school will undertake for its information technology program. All of the current students and recent graduates of the program who will be invited to speak at the career day are male, even though some female students are currently enrolled in and have recently graduated from the program. The high school has not revised its promotional materials in a number of years, and all of the materials distributed at the career day depict males and use male pronouns to refer to students in the program. The high school only distributed these promotional materials at the career day and did not distribute them to members of the student community who did not attend the career day.
- Did the school violate Title IX? Why or why not?

Discipline

Title IX: Discipline

- Civil Rights Data Collection (“CRDC”)
- Mandatory survey through which OCR collects civil rights data directly from school districts via a web-based collection tool.
 - OCR relatively recently implemented certain changes to its data collection.
 - All districts participate in the CRDC (instead of only a representative sample).
 - Data is being collected only for one school year (not for two years, as in the past).
- School districts must collect and report new data on allegations of bullying and harassment, bullying and harassment policies, and students disciplined for bullying and harassment.
- The CRDC materials describe harassment or bullying on the basis of (i) disability, (ii) race, color, national origin, and (iii) sex.

Title IX: Discipline

- The CRDC website allows the public to view data for specific schools and districts, and compare data across multiple schools or districts.



Title IX: Discipline

- Disparate treatment – Questions to consider:
 - Did the school limit or deny educational services, benefits, or opportunities to a student or group of students of a particular race by treating them differently from a similarly situated student or group of students of another race in the disciplinary process?
 - Can the school articulate a legitimate, nondiscriminatory reason for the different treatment?
 - Is the reason articulated a pretext for discrimination?

Title IX: Discipline

- Disparate Impact – Questions to consider:
 - Has the discipline policy resulted in an adverse impact on students of a particular race as compared with students of other races?
 - Is the discipline policy necessary to meet an important educational goal?
 - Are there comparably effective alternative policies or practices that would meet the school's stated educational goal with less of a burden or adverse impact on the disproportionately affected racial group, or is the school's proffered justification a pretext for discrimination?

Title IX: Discipline

- Examples of recommendations from DCL:
 - Safe, inclusive, and positive school climates that provide students with supports such as evidence-based tiered supports and social and emotional learning
 - Training and professional development for all school personnel
 - Appropriate use of law enforcement
 - Positive interventions rather than student removal
 - Data collection and responsive action

Title IX Coordinators

What are the responsibilities of Title IX Coordinators?

- A Title IX coordinator's responsibilities include:
 - Overseeing a school's response to Title IX reports and complaints.
 - Identifying and addressing any patterns or systemic problems revealed by the reports or complaints.
 - Staying informed of all complaints raising Title IX issues.
 - Having no other responsibilities that may pose a conflict with Title IX responsibilities.
- Title IX gives coordinators broad protection from retaliation
 - Investigations cannot be impeded
 - Adverse actions cannot be taken because of investigation

What are the responsibilities of Title IX Coordinators?

- Be prepared to:
 - Stay abreast of developments related to Title IX, its implementing regulations, and guidance from federal agencies
 - Investigate complaints
 - Educate your colleagues, students, and your community about Title IX
 - Revise your policies and procedures, as appropriate
 - Resolve complaints promptly

What are the responsibilities of Title IX Coordinators?

- On April 25, 2015, OCR published a resource guide for Title IX coordinators.
- The resource guide includes:
 - an overview of the scope of Title IX;
 - a discussion about Title IX’s administrative requirements;
 - a discussion of key Title IX issues (such as athletics and discipline);
 - references to federal resources; and
 - recommended best practices.



True or False

- Under Title IX, a district may be required to investigate off-campus peer-on-peer sexual violence even if a police report has been filed.



True or False

- Title IX protects the rights of transgender students.



True or False

- Under Title IX, it is legal for a school to have single-sex Algebra I classes, but not to offer coeducational Algebra I class.



True or False

- A school district would violate Title IX if the boys' baseball field had lights, but the girls' softball team did not have lights.



True or False

- Under Title IX, a school may exclude a pregnant student from being president of the student government.



Questions?

Contact Us

Maree Sneed

Maree Sneed is recognized in the education industry as a lawyer who helps school districts, independent schools, educational institutions, and educational companies solve their most complex problems. For three decades, clients have sought Maree's advice as a result of her experience working in the education system, her legal acumen, her public policy work, and her ability to make connections between the education and legal arenas.

Maree has advised clients in the education sector on a broad range of issues, including social media, bullying and cyberbullying, harassment, sex and race discrimination, English language learners, and magnet schools. She also advises on privacy, including the Family Educational Rights and Privacy Act; special education/IDEA; equitable access and opportunities; integration and desegregation; school facilities; contracts; Title IX, Title VI, and 504 compliance; and charter schools.



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Education
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