Hogan Lovells

Title IX

Title IX/Equity Coordinators: Athletics and Beyond

Maree Sneed, Partner

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Agenda

1. What Is Title IX And Why Did Congress Enact It

2. What Is Sexual Harassment and How Should We Address It?

Agenda

3. What Topics Does Title IX Touch (beyond harassment)?
   - Athletics
   - Pregnancy/Parenting
   - Single Sex Education
   - Science, Technology, Engineering and Math (STEM) and Career Technical Education (CTE)
   - Discipline

4. What are the Responsibilities of Title IX/Equity Coordinators?

Learner Objectives

The learner will:

1) Review Title IX and its foundations.
2) Review key components of addressing sexual harassment.
3) Review the range of topics that Title IX might affect.
4) Review a Title IX Coordinator’s responsibilities.

POP
QUIZ!

True or False

Title IX only applies to the participation of women in athletics programs.

True or False

Title IX protects only women.

True or False

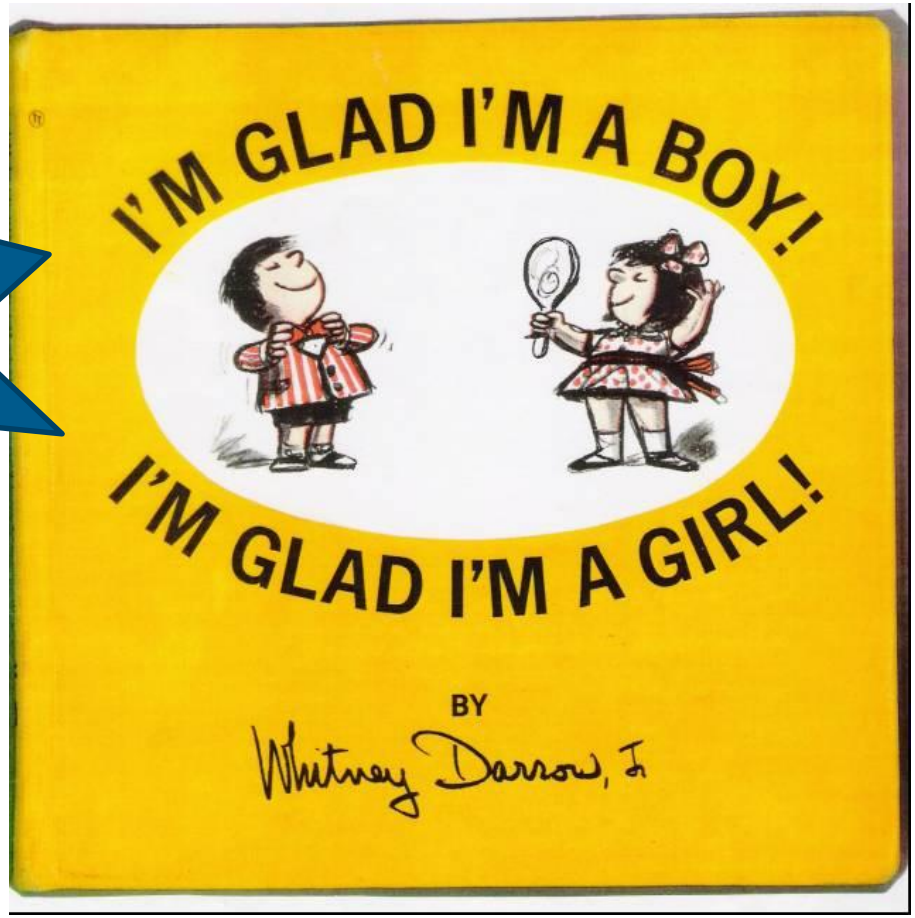
Title IX prohibits discrimination based on gender stereotypes.

Unit 1. 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)

Why were these laws enacted?

Excerpts from . . .



Boys invent things.

Girls use what boys invent.

Boys can eat.

Girls can cook.

Why were these laws enacted?

1971

Fewer than 295,000 girls participated in high school varsity athletics (about 7% of all varsity athletes)

2001

2.8 million girls participated in high school varsity athletics (about 41.5% of all varsity athletes)

-- Barbara Winslow, Brooklyn College – "The Impact of Title IX" (citing the National Coalition for Women and Girls in Education)

Title IX's Origins

"The 1960s feminist movement, the black freedom struggle, a more active and aware youth culture, and other sources of social unrest roiled the nation as a whole and the sports world in particular. Equal 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."

-- Barbara Winslow, Brooklyn College – "The Impact of Title IX"

Title IX

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."*

Other Relevant Federal Laws: Name that law!

1. Prohibits employment discrimination based on race, color, religion, sex, or national origin?
   - Title VII of the 1964 Civil Rights Act
2. Protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination.
   - Equal Pay Act of 1963
3. Prohibits discrimination on the basis of race, color, and national origin in federally funded programs and activities.
   - Title VI of the 1964 Civil Rights Act
4. Prohibits discrimination on the basis of disability in federally funded programs/activities.
   - Rehabilitation Act of 1973

U.S. Department of Education

Office for Civil Rights ("OCR") Issues Guidance Addressing Title IX

Guidance includes:

1. Guidance on Obligation of Schools to Designate a Title IX Coordinator (April 24, 2015)

2. Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities (December 1, 2014)

3. Questions and Answers about Title IX and Sexual Violence (April 29, 2014)

4. Guidance on Supporting the Academic Success of Pregnant and Parenting Students (June 25, 2014)

U.S. Department of Education

Office for Civil Rights ("OCR") Issues Guidance Addressing Title IX

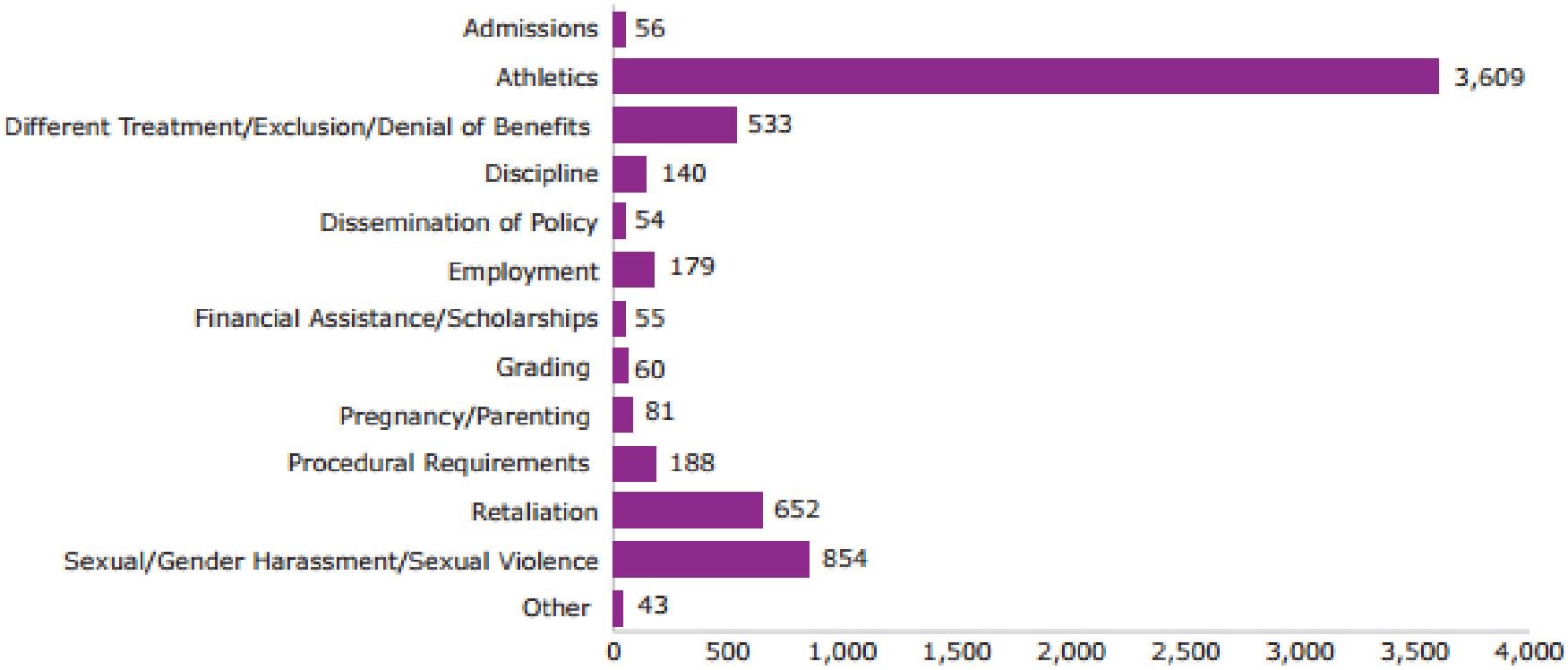
Recent guidance includes (continued):

5. Guidance on the prohibition against retaliation under Federal civil rights laws (April 24, 2013)
6. Guidance on Addressing Sexual Harassment/Sexual Violence (April 4, 2011)
7. Guidance 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)
8. Guidance on Accommodating Students' Athletic Interests and Abilities: Standards for Part Three of the "Three-Part Test" (April 20, 2010)

Statistics

Complaints Received by OCR

FIGURE 14: Number of Title IX Issues Raised in OCR Complaints, by Issue, FY 13–14



Total Number of Complaints Raising Title IX Issues, **FY 2013–14 = 5,845**

Note: A single complaint can raise multiple issues; therefore the total number of issues raised will exceed the number of complaints received.

--OCR, Report to the President and Secretary of Education, FY13-14

Connecticut Laws

Section 10-15c: *The public schools shall be open to all children five years of age and over . . . and each such child shall have, and shall be so advised by the appropriate school authorities, an equal opportunity to participate in the activities, programs and courses of study offered in such public schools . . . without discrimination on account of race, color, sex, gender identity or expression, religion, national origin, or sexual orientation.*

Rights of transgender students in Connecticut: Pub. Act No. 11-55

- Public Act No. 11-55 prohibits discrimination on the basis of gender identity or expression in all areas in which the laws already prohibit sex discrimination, including education

- "Gender identity or expression" = "a person's gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth, which gender-related identity can be shown by providing evidence including, but not limited to, medical history, care or treatment of the gender-related identity, consistent and uniform assertion of the gender-related identity or any other evidence that the gender-related identity is sincerely held, part of a person's core identity or not being asserted for an improper purpose"

Rights of transgender students in Connecticut

- For more information, see the Connecticut Commission on Human Rights and Opportunities publication entitled "Guidelines for Schools on Gender Identity and Expression," at http://www.ct.gov/chro/lib/chro/Guidelines_for_Schools_on_Gender_Identity_and_Expression_final_4-24-12.pdf

Who Is Protected by Title IX?

- Both men and women
- Both staff and students

What Institutions Are Covered by Title IX?

- Institutions receiving federal funding
- Covered institutions include local school districts, colleges and universities, charter and for-profit schools, athletic associations
- Educational programs offered by non-educational institutions that receive federal funds, such as libraries, prisons, and museums

What Educational Activities Are Covered By Title IX?

<u>Brainstorm</u>!

1.
2.
3.
4.
5.
6.
7.
8.
9.
10.

What Is Discrimination “On The Basis Of Sex”?

Think/Pair/Share

“A female high school student was spit on, slammed into lockers, mocked, and routinely called names because she did not conform to feminine stereotypes and because of her sexual orientation. The student had short hair, a deep voice, and wore male clothing. After the harassment started, she told some classmates she was a lesbian, and the harassment worsened. The school described the harassment as ‘sexual orientation harassment’ in its incident reports and did not take any action.”

--StopBullying.gov

Does this violate Title IX?

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.
- 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 considered 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 care classes.
4. A principal refuses to promote a woman to assistant principal because he believes it will be better for her after she haves a child.

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. An employer that is hiring construction laborers requires applicants to have a high school diploma, and boys tend to have somewhat higher dropout rates than girls.
3. 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.
4. 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.

Retaliation

- **<u>In sum</u>**: If an individual (student, parent, teacher, coach, etc.) complains formally or informally to a school about a potential civil rights violation (including a 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

The 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 affirmed.

Retaliation

Roderick Jackson v. Birmingham Board of Education (continued)

U.S. Supreme Court

The opinion by the Court stated: "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 an employee?

Adverse treatment, which can include***:***

- Demotion or termination
- Reduction in pay
- Material change in job duties
- Harassment on the job
- Refusal to give positive job references

Retaliation

What could be considered retaliation for an employee?

Adverse treatment, which can include***:***

- Suspension or expulsion
- Reduction in grades
- Denial of permission to participate on teams, or change in position on team, amount of playing time, etc.
- Harassment in class or on field

Retaliation

In FY 13–14, OCR received 652 complaints of retaliation under Title IX.

Example: 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 based on sex, race, and disability and that it disciplined her more harshly and ultimately withdrew her from enrollment in retaliation for bringing her concerns to the school's attention. Under the terms of the resolution agreement, the 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."

--OCR, Report to the President and Secretary of Education, FY13-14

Unit 2: What Is Sexual Harassment?

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What is 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 new 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 her harassers."

Is this harassment?

What is Sexual Harassment?

On October 26, 2010, the U.S. Department of Education's Office for Civil Rights (OCR) issued a Dear Colleague Letter addressing bullying and harassment in schools.

- The letter warns that school districts that fail to appropriately identify, thwart, and remedy bullying and harassment risk violating federal civil rights laws and losing federal funds.
- "[S]ome student misconduct that falls under a school's anti-bullying policy also may trigger responsibilities under one or more of the federal antidiscrimination laws enforced by [OCR]."

What is Sexual Harassment?

- The 2010 Dear Colleague Letter:
  - Clarified responsibilities of districts to prevent incidents of harassment and bullying, and
  - Provided examples (including the example above describing the experiences of a new high school student) of harassment and bullying for which OCR may find that a district violated federal civil rights laws.

What is Sexual Harassment?

- The 2010 letter warns that school districts that fail to appropriately identify, thwart, and remedy bullying and harassment risk violating federal civil rights laws and losing federal funds.

"[S]ome student misconduct that falls under a school's anti-bullying policy also may trigger responsibilities under one or more of the federal antidiscrimination laws enforced by [OCR]."

What is Sexual Harassment?

On April 4, 2011, OCR issued a Dear Colleague Letter addressing sexual violence in schools.

- The Dear Colleague Letter:
  - (1) Clarifies that Title IX, which prohibits discrimination on the basis of sex, covers sexual violence; and
  - (2) Provides detailed guidance on districts' obligations to take "immediate and effective steps" to address incidents of peer-on-peer sexual violence.
- Although targeted primarily at colleges and universities, OCR explicitly states that the obligations in the letter "apply equally to school districts."
- Like the OCR letter on bullying and harassment, the Dear Colleague Letter warns that districts that fail to take prompt and effective steps to address incidents of sexual violence risk losing federal funds or being referred to the U.S. Department of Justice ("DOJ") for litigation.

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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

What is Sexual Harassment?

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."

What is Sexual Harassment?

From the headlines . . .

“Bruce is a huge My Little Pony fan—who wouldn't be a fan of a toy that comes with the tagline "Friendship is magic?" When it came time to choose a new lunchbox for school, he picked a Rainbow Dash bag from the My Little Pony product line.

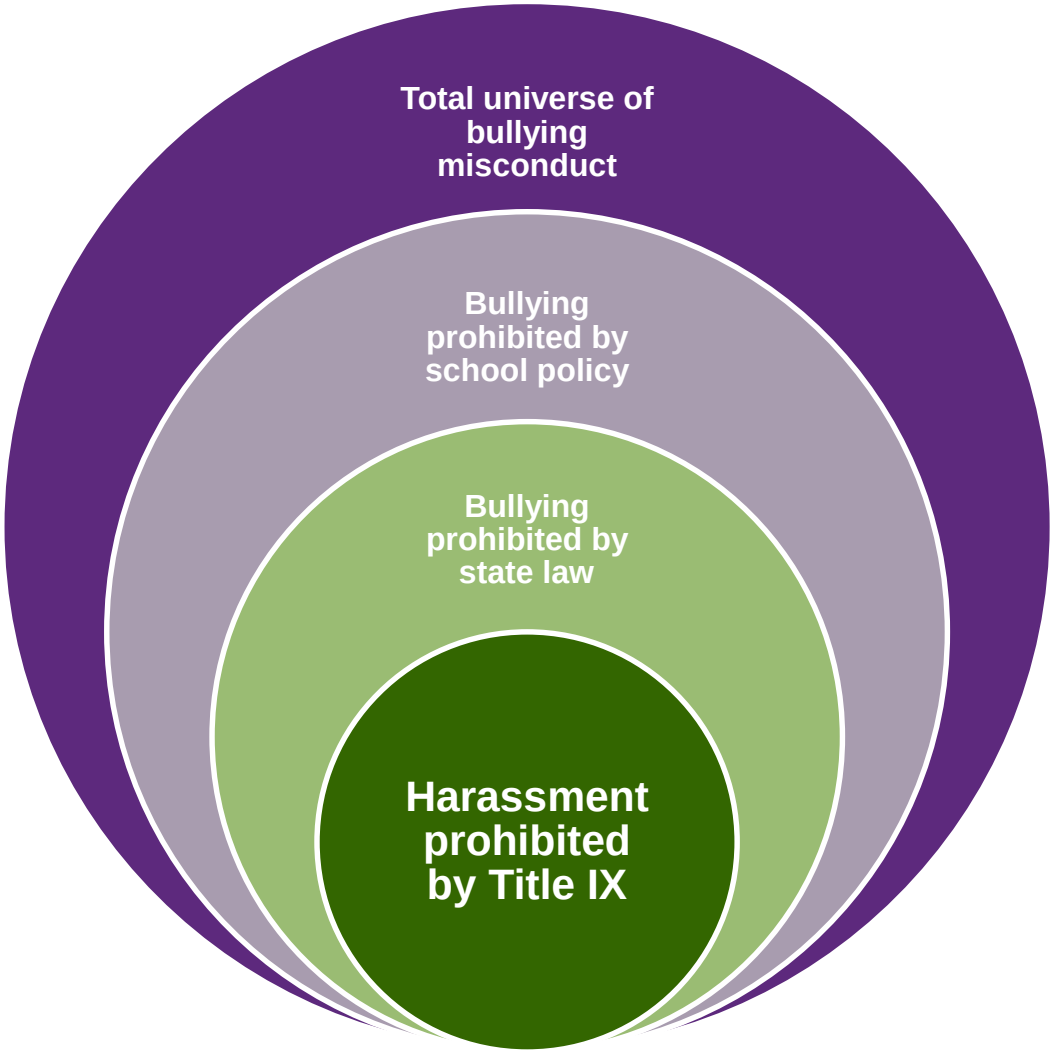
Some of Bruce's classmates thought his colorful lunchbox was only for girls, and they decided to let him know it in the worst possible way. Bruce told local ABC affiliate WLOS that when he showed up to school with his adorable bag his classmates began ‘punching me, pushing me down, calling me horrible names—stuff that really shouldn't happen.’

. . . [T]he school advised Bruce to leave the bag at home because it was a ‘trigger for bullying.’”

What is Sexual Harassment?

- Title IX prohibits harassment of students for exhibiting **stereotypical** characteristics for their sex or for failing to conform to such stereotypes

What is Sexual Harassment? What is Bullying?



What is Bullying?

- Connecticut Legislature took action in 2002 (Public Act 02-119) to address bullying public schools, and amended the law four times thereafter, including in 2011 (Public Act 11-232, “An Act Concerning the Strengthening of School Bullying Laws”).

What is 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.

What is 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

What is Sexual Harassment?

- Could be perpetrated by a teacher, student or third party
- People of the same gender could harass each other
- OCR opined in 2010 that “[h]arassment does not have to include intent to harm, be directed at a specific target, or involve repeated incidents.”

What is Sexual Harassment?

OCR opined in 2010 that:

"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."

What is Sexual Harassment?

It could happen on school grounds, but it could also happen . . .

- At sporting events
- At an off-campus program
- Off-campus (i.e., online)

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.

See 2010 Dear Colleague Letter

What are Some of the Risks of Violating Title IX?

- Private Litigation
  - Students (and parents on behalf of their children) have a private right of action under Title IX.
  - Therefore, students and their parents may sue school districts for money damages when those districts fail to adequately address harassment in violation of Title IX.
- OCR
  - A student, parent, or third party can submit a complaint to OCR, and OCR will investigate.
  - OCR may initiate its own investigations.
  - OCR may refer a case of non-compliance to the U.S. Department of Justice

Note: These actions could occur simultaneously.

An example of recent private litigation . . .

***Eilenfeldt v. United C.U.S.D. #304 Board of Education*, 84 F.Supp.3d 834 (C.D. Ill. 2015)**

A parent brought suit against a school district on behalf of her minor child ("J.M.") alleging a violation of Title IX. The case is ongoing; a recent court opinion resolving various motions recounted some of the key facts:

"The bullying began in January, 2011 when "T1.," "P.," and "D1." (presumably other students, . . .) repeatedly shoved J.M. in the hallways and inappropriately touched him in the locker room. [The parent] immediately reported this conduct to three of J.M.'s teachers . . . Despite the report, J.M.'s teachers did not investigate the incidents or punish the students who were involved. When responding to the complaints, [one teacher] said that J.M. 'brought some of this on himself.'. . . (continued)

An example of recent private litigation . . .

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

". . . Students verbally taunted J.M by calling him a rapist, pedophile, and child molester and suggesting that he was sexually attracted to young boys. In addition to the verbal bullying, students produced pictures, graffiti artwork, and videos depicting J.M. as a pedophile and child molester . . . "

Practically Speaking, What Does Title IX Require?

- Title IX requires schools to have a Title IX Coordinator
- Title IX requires every school 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.
- Schools have a legal obligation to take steps to prevent harassment and address harassment
- OCR advises: "Even if a student or his or her parent does not want to file a complaint or does not request that the school take any action on the student's behalf, if a school knows or reasonably should know about possible sexual harassment or sexual violence, it must promptly investigate to determine what occurred and then take appropriate steps to resolve the situation."

  -- OCR, "Know Your Rights: Title IX Prohibits Sexual Harassment and Sexual Violence Where You Go to School."

Sexual Harassment Grievance Process & Policy

Make the Policy User-Friendly.

- Gather input from the community, e.g. by distributing survey to students.
- Use plain language that will be accessible to students and employees.
- Provide notice to students and employees of the grievance procedures, including where complaints may be filed.

--National Women's Law Center

Sexual Harassment Grievance Process & Policy

Clearly Define Sexual Harassment.

- Clearly explain the types of behavior that constitute sexual harassment.
- Provide specific examples of prohibited behaviors.
- Make clear that *all* students and staff are protected from sexual harassment—regardless of who the harasser is.
- Spell out that harassment need not occur on campus to be prohibited.

--National Women's Law Center

Sexual Harassment Grievance Process & Policy

Clearly Explain the Grievance Process.

- Describe the steps of process.
- Identify staff responsible for each step of process.
- Provide reasonably prompt time frames for each step of process.
- Assure the parties they will be informed of the outcome.
- Lay out possible disciplinary actions for harassment.
- Explain how to file an appeal.

--National Women's Law Center

Sexual Harassment Grievance Process & Policy

Ensure Confidentiality and Prohibit Retaliation.

- Ensure that complaints will be handled with as much confidentiality as possible.
- Make clear that retaliation is prohibited.
- Confidentiality will help to prevent retaliation against students or witness's cooperating in an investigation, but you should explicitly forbid such conduct in your official policy and provide specific illustrations of retaliatory acts.

--National Women's Law Center

Sexual Harassment Grievance Process & Policy

Make Sure the Policy is Well-Publicized and Effectively Implemented.

- Every student and school employee should receive a copy of the policy and complaint procedures or a brochure or pamphlet summarizing it, as well as regular reminders about it.
- Posters about the policy and sexual harassment should be placed in locker rooms, classrooms, administrators' offices, student activity areas, or other public places.
- A description or summary of the policy, with names of persons to contact for more information, should be included online and in all major school publications such as handbooks, course catalogs, or orientation materials.

--National Women's Law Center

Sexual Harassment Grievance Process & Policy

Remember…

- Apply the correct standard – the **preponderance of the evidence** standard should be used under the federal civil rights laws.

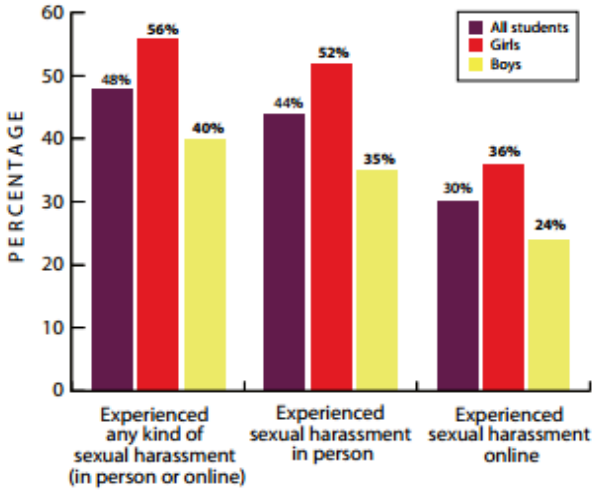
- The grievance procedures may include voluntary informal methods (e.g., mediation) for resolving some types of sexual harassment complaints.
  - **In cases involving allegations of sexual assault, mediation is never appropriate.**
  - The complainant must be notified of the right to end the informal process at any time and begin the formal stage of the complaint process.

– OCR, "Know Your Rights: Title IX Prohibits Sexual Harassment and Sexual Violence Where You Go to School.

Sexual Harassment Grievance Process & Policy

A 2011 American Association of University Women study on sexual harassment found that about half (48%) of the students in grades 7–12 experienced some form of sexual harassment at school during the 2010–2011 school year.

Figure 1. Students Who Experienced Sexual Harassment during the 2010–11 School Year, by Gender



Notes: Students were asked if they had experienced any of 10 types of sexual harassment since the beginning of the school year. **Bold** numbers indicate statistically significant gender differences at the 95 percent level. Base=survey respondents (n=1,965 students), 1,002 girls and 963 boys in grades 7–12.
Source: AAUW sexual harassment survey, May–June 2011.

You Receive an Allegation of Harassment: Now What?

- Is there a particular timeframe within which an investigation must be completed?
  - OCR has opined that schools have “a responsibility to respond promptly and effectively.”

- If a school doesn’t know about harassment, then does it have an obligation to end it?
  - “If a school **knows or reasonably should know** about sexual harassment or sexual violence that creates a hostile environment, the school must take immediate action to eliminate the sexual harassment or sexual violence, prevent its recurrence, and address its effects.

-- OCR, “Know Your Rights: Title IX Prohibits Sexual Harassment and Sexual Violence Where You Go to School.”

You Receive an Allegation of Harassment: Now What?

- The student and parent do not want to file a formal complaint. Is the school's responsibility over?
  - No. "If a school knows or reasonably should know about possible sexual harassment or sexual violence, it must promptly investigate to determine what occurred and then take appropriate steps to resolve the situation."

- The police have started investigating. Is the school's responsibility over?
  - No. "A criminal investigation into allegations of sexual harassment or sexual violence does not relieve the school of its duty under Title IX to resolve complaints promptly and equitably."

- 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.

-- OCR, "Know Your Rights: Title IX Prohibits Sexual Harassment and Sexual Violence Where You Go to School."

You Receive an Allegation of Harassment: Now What?

- Does the school need to protect the student's or complainant's confidentiality?
  - Protect confidentiality to the extent possible.

But What Does That Mean?

OCR opined in its April 2011 Dear Colleague Letter: "If the complainant requests confidentiality or asks that the complaint not be pursued, the school should take all reasonable steps to investigate and respond to the complaint consistent with the request for confidentiality or request not to pursue an investigation. If a complainant insists that his or her name or other identifiable information not be disclosed to the alleged perpetrator, the school should inform the complainant that its ability to respond may be limited. The school also should tell the complainant that Title IX prohibits retaliation, and that school officials will not only take steps to prevent retaliation but also take strong responsive action if it occurs."

You Receive an Allegation of Harassment: Now What?

OCR opined in its April 2011 Dear Colleague Letter (continued):

"As discussed in the 2001 Guidance, **if the complainant continues to ask that his or her name or other identifiable information not be revealed, the school should evaluate that request in the context of its responsibility to provide a safe and nondiscriminatory environment for all students**. Thus, the school may weigh the request for confidentiality against the following factors:

- the seriousness of the alleged harassment;
- the complainant's age;
- whether there have been other harassment complaints about the same individual; and
- the alleged harasser's rights to receive information about the allegations if the information is maintained by the school as an "education record" under the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; 34 C.F.R. Part 99."

You Receive an Allegation of Harassment: Now What?

Act Immediately to End Harassment

- Acting immediately sends a message that the harassment is not acceptable.
- When taking steps to separate the complainant and alleged perpetrator, minimize the burden on the complainant.
  - For example, a school district would not, as a matter of course, remove complainants from classes or housing while allowing alleged perpetrators to remain.
- 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.

You Receive an Allegation of Harassment: Now What?

Investigations are Important

- 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 to a complaining student or parent, OCR, and/or DOJ 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.

You Receive an Allegation of Harassment: Now What?

Investigate All Allegations of Harassment.

- The inquiry must be *prompt, thorough, and impartial*. (**ACES will offer a separate training session addressing investigations!**)
- At a minimum:
  - interview the complainant, alleged harasser, and anyone else who may have relevant information;
  - follow the same investigative processes for each harassment complaint
- Determine whether state/local law requires notifying law enforcement officers

You Receive an Allegation of Harassment: Now What?

When responding to a complaint, be careful about how you respond.

<u>What do you think about the following comments?</u>

- 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

You Receive an Allegation of Harassment: Now What?

"Dangerous Words," compiled by the National 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.

You Receive an Allegation of Harassment: Now What?

"Dangerous Words," compiled by the National Women's Law Center (continued)

- 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.
- Its just a prank that got out of hand.
- Oh well, boys will be boys.

You Receive an Allegation of Harassment: Now What?

Take Steps to Stop the Harassment from Happening Again.

- Prevent harassment from recurring.
- Look at policies and procedures again (Do they need to be revised?)
- Train staff and students
- Follow-up with complainant after completing your investigation to ensure the harassment ceased and there has not been retaliation.

-- National Women's Law Center

You Receive an Allegation of Harassment: Now What?

Protect and minimize burden on complainant, including taking interim steps before final outcome.

- Providing an escort between classes, counseling, medical services, and academic support (tutoring).
- 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.
- Providing damages to compensate for out of pocket costs and emotional distress.

-- National Women's Law Center

You Receive an Allegation of Harassment: Now What?

Strategies for Administrator

- Ensure all necessary anti-discrimination policies and procedures are in place.
- Develop sexual harassment training programs for administrators, employees, and students.
- Conduct self-evaluation of school to determine what kind of educational environment exists for female students.
- Make certain that orientation programs for students, employees, and administrators include materials about sexual harassment.
- Be sure that all school programs and activities, even those that occur off-school premises, are free from sexual harassment.

-- National Women's Law Center

You Receive an Allegation of Harassment: Now What?

Think/Pair/Share

1. A high school's basketball team is in the state finals. A student files a complaint alleging that a teammate sexually assaulted her on the bus on the way to the semi-finals game. The school informs 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 reports that several boys in her class have sent her nude photographs of themselves and others; they appear on her iPhone and then disappear. The school tells the complainant to turn her phone off during the school day.

Preventing & Addressing Sexual Harassment/Violence

Implement education and training programs

ALL STUDENTS AND STAFF:

* What constitutes sexual harassment and violence, warning signs, how to respond
* Policies, disciplinary procedures and consequences.

Inform students that primary concern is student safety so other rules violations will be addressed separately, *e.g.,* use of alcohol or drugs never makes victim at fault for sexual violence.

Make victim resources available

Develop specific sexual violence materials that include schools' policies, rules, and resources for students, faculties, coaches, and administrators.

-- National Women's Law Center

You Receive an Allegation of Harassment: Now What?

Role Play

A parent reports to you that his daughter showed him a so-called "senior list" on her iPhone. Someone has described what they believe to be her sexual habits. As he sits across from you in your office, he explains that his daughter does not want to come to school anymore.

ACTION!

- What questions should you ask the parent?
- What information should you give to the parent?

You Receive an Allegation of Harassment: Now What?

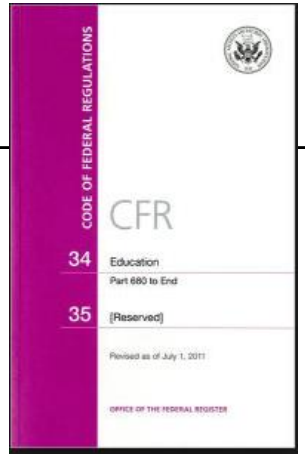
From the headlines . . .

OCR began an investigation in 2012 based on similar facts at Ladue Horton Watkins High School in Missouri. It does not appear that the matter has been resolved yet . . . (i.e., there is no resolution agreement on OCR's website).

Unit 3: What Topics Does Title IX Touch (beyond harassment)?

1. Athletics
2. Pregnancy and Parenting
3. Single sex education
4. STEM and CTE
5. Discipline

Title IX: 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).

Title IX: Athletics

Girls' Participation in Athletics Before and After Title IX

As Determined by a Survey Administered by

THE NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS

School Year	Boys	Girls
1971-1972	3,666,917	294,015
2014-2015	4,519,312	**3,287,735**

Title IX: Athletics

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. (Journal of the National Cancer Institute, 1994)
- 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.

-- Women's Sports Foundation, "Benefits – Why Sports Participation for Girls and Women" (undated)

Title IX: Athletics

The Three-part test: It's not just for postsecondary institutions.

In addition to the language from the Regulation, OCR also uses as a means of assessing compliance

- the Intercollegiate Athletics Policy Interpretation issued on December 11, 1979 in the Federal Register (Policy Interpretation);
- the Clarification of Intercollegiate Athletics Policy Guidance: The Three Part Test, issued on January 16, 1996; and
- the Intercollegiate Athletics Policy Clarification: The Three Part Test – Part Three, issued on April 20, 2010.

The provisions of these policy documents are generally applicable to interscholastic athletics programs.

Title IX: Athletics

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.

Title IX: Athletics – 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.
- OCR 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%.

Title IX: Athletics – Prong One (Proportionality)

Participation should be proportionate to enrollment.

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

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*

Title IX: Athletics – Prong One (Proportionality)

Participation should be proportionate to enrollment.

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

- OCR determine 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."

Title IX: Athletics – 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."

Title IX: Athletics – Prong One (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

Title IX: Athletics – Prong One (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. For example, OCR was informed that the District's athletics program history dates back to at least 1908, when boys' basketball began at Portland High. 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."

Title IX: Athletics – 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."

Title IX: Athletics – Prong Three (Full And Effective Accommodation)

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

April 2010 Dear Colleague Letter

- 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."

Title IX: Athletics – Prong Three (Full And Effective Accommodation)

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

"When a school cannot demonstrate compliance with either parts one or two, OCR next turns to part three of the Three Part Test to determine if the District is fully and effectively accommodating the athletic interests and abilities of the underrepresented sex. To make this determination, OCR considers the District's assessment of any unmet interest and ability in its athletics program. OCR also considers other indicators of possible interest and ability such as developing sports on a regional or national level, as well as local youth and feeder programs in the areas from which a district draws its students."

"**The District had not conducted an athletic interest survey at either Portland High or Deering High during the tenure of either of the relatively new Athletic Directors (both starting within the last 4 years) and it was unclear when, if ever, any survey was conducted or what other outreach efforts were undertaken to assess athletic interest of the girls in the District**. OCR learned during its interviews of athletes and coaches of potential interest in a volleyball team, the only MPA sanctioned sport not currently offered for girls."

Title IX: Athletics

Are These Adequate Defenses to Not Meeting Three-Part Test?

1. "Girls are less interested in sports than boys, and boys need them more to stay engaged in school."

2. "Giving girls additional opportunities to play would require cutting boys' teams."

3. "Boys' sports bring in more money than girls' sports."

False

-- National Women's Law Center

Title IX: Athletics

NWLC and PRRAC's Key Findings:

- "42% of our nation's public high schools are 90% or more white, or over 90% minority"
- "40% of heavily minority high schools have large female opportunity gaps compared to 16% of heavily white schools"

Title IX: Athletics

"Some educational institutions may not understand their obligations under Title IX and impose a greater burden on girls when cutting athletic opportunities or benefits.

For example:

"In an effort to save money, state high school athletic associations in Delaware, Florida, and Nevada implemented cuts in the number of games scheduled for most teams. But these associations specifically spared football from any cuts, thus imposing more of the burden of the economic crisis on girls. . . ."

NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

TITLE IX

FACT SHEET

Title IX Still Applies: Gender Equity in Athletics During Difficult Economic Times

August 2015

In difficult economic times, educational institutions at all levels face tight budgets. As a result, some schools may make grueling decisions to cut athletic opportunities or benefits, ranging from delaying the purchase of new uniforms to reducing the number of scheduled games to totally eliminating certain teams. When making these hard choices, it is important for schools to remember that if they cut any athletic opportunities or benefits, they must do so in a way that does not discriminate on the basis of sex in violation of Title IX of the Education Amendments of 1972—that is, any cuts must not exacerbate existing gender inequities or create new ones.

Title IX: 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

-- National Women's Law Center

Title IX: Athletics

Participation of Transgender Students: "The [**Connecticut Interscholastic Athletic Conference ("CIAC")**] has concluded that it would be fundamentally unjust and contrary to applicable state and federal law to preclude a student from participation on a gender specific sports team that is consistent with the public gender identity of that student for all other purposes. Therefore, for purposes of sports participation, the CIAC shall defer to the determination of the student and his or her local school regarding gender identification. In this regard, **the school district shall determine a student's eligibility to participate in a CIAC gender specific sports team based on the gender identification of that student in current school records and daily life activities** in the school and community at the time that sports eligibility is determined for a particular season."

-- CIAC Bylaws, Article IX (2015-2016)

Title IX: Pregnant and Parenting Students

Statistics

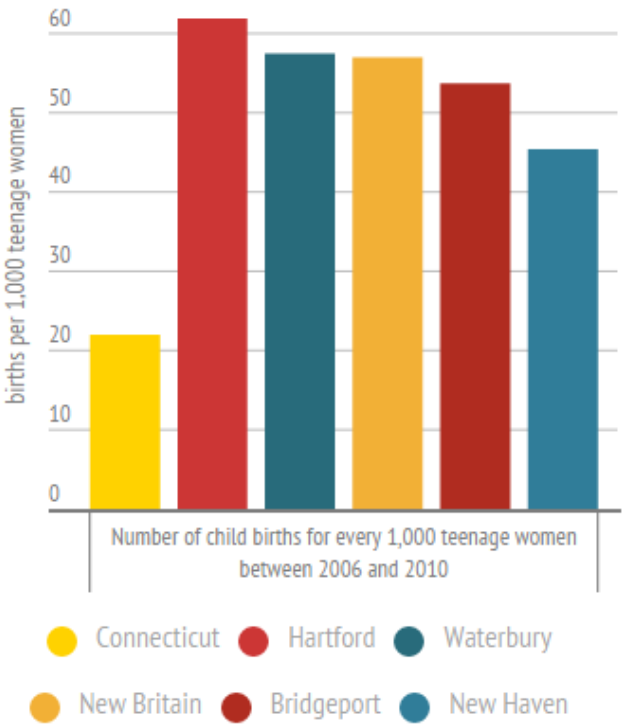
- 26% of young men and young women combined who had dropped out of public high schools — and 1/3rd of young women — said that becoming a parent was a major factor in their decision to leave school

- Only 51% of young women who had a child before age 20 earned their high school diploma by age 22

Title IX: Pregnant and Parenting Students

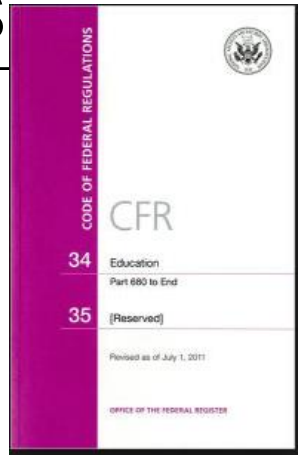
Statistics

-- Brian Charles, “Teen pregnancy in Connecticut: City birth rates twice state average” *New Haven Register* (March 22, 2014)



The average rate of births to teenage women across Connecticut and its largest cities between 2006 and 2010, according to data from the University of Connecticut Health Center and the Connecticut State Department of Education.

Title IX: 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).

Title IX: 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."

Title IX: Pregnant and Parenting Students

2013 OCR Dear Colleague Letter and Pamphlet: (continued)

- **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."

Title IX: Pregnant and Parenting Students

2013 OCR Dear Colleague Letter and Pamphlet: (continued)

- **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."

Title IX: Pregnant and Parenting Students

2013 OCR Dear Colleague Letter and Pamphlet: (continued)

- **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."

Title IX: Pregnant and Parenting Students

The ACLU has been active in this area.

Examples:

- A public charter school in Delhi, Louisiana, "eliminated a policy that required female students even suspected of being pregnant to submit to a pregnancy exam and forced them out of school if they refused or tested positive. The policy change was in response to a letter issued by the" ACLU.

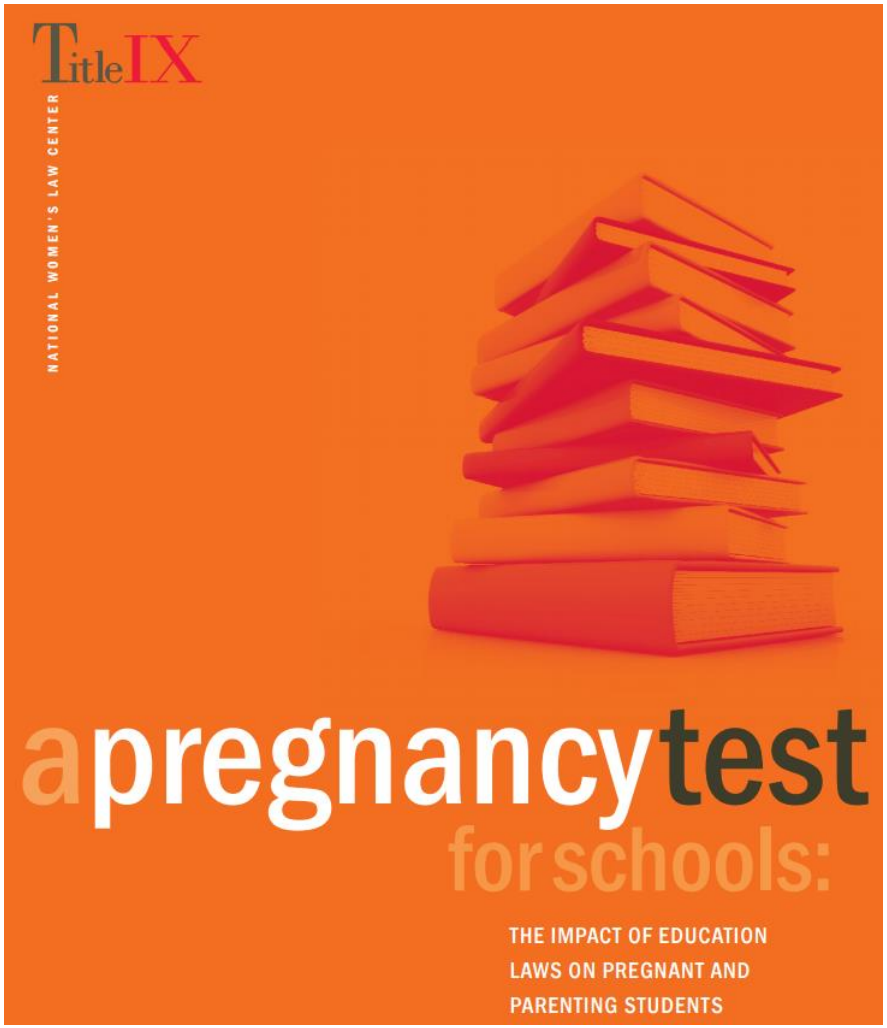
- ACLU brought a lawsuit on behalf of "Shantelle Hicks, 15, who was initially kicked out of middle school and then publicly humiliated at an assembly by the school director and another staff member because she was pregnant."

- The ACLU "filed and settled a lawsuit on behalf of pregnant and parenting teenagers who were funneled into sub-standard education programs rather than given the opportunity to continue their education at their local high schools."

Title IX: Pregnant and Parenting Students

NWLC reported:

"Young women often report that their teachers treat them as if they have no promise. They note that teachers and principals focus on negative statistics and stereotypes. Some say that they feel as though school officials have given up on them and talk about them in diminished terms. '**You should have seen the way he looked at me, with disgust, like I was nothing**.' '**[T]hey just didn't seem to care and some of the teachers treated me like she's just gonna drop out now so don't spend time on her. So I left**.' Pregnant and parenting students also report being subject to increased scrutiny.31 Counselors and teachers tell young mothers that they "can't make any mistakes" and **must be on their "best behavior" because some people still believe that pregnant students shouldn't be attending mainstream schools**. This kind of discrimination has a tremendous negative impact on pregnant and parenting students; such low expectations disincentivize attendance and push these students out of school."



Title IX: Pregnant and Parenting Students

Recent Pregnancy Discrimination Complaints

- This summer, NWLC filed an OCR Complaint against a school district in Georgia. A high school principal told a pregnant student that she would not receive credit for work completed while on bed rest, refused to excuse pregnancy-related absences, and denied student homebound instruction that the districted had offered to other eligible students who had medical conditions.

Title IX: Pregnant and Parenting Students

Think/Pair/Share

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.

What should a Title IX/Equity coordinator do?

Title IX: Pregnant and Parenting Students

- **Connecticut State Department of Education's Teen Parent Program**:
  - Shelby Pons, Director: shelby.pons@ct.gov or 860-807-2103; Susan Radway: susan.radway@ct.gov or 860-807-2070
- "The Support for Pregnant and Parenting Teens (SPPT) Grant is a school-based grant program available in five Connecticut school districts with the highest teen pregnancy and school dropout rates (Bridgeport, Hartford, New Britain, New Haven and Waterbury). The programs are located in comprehensive high schools serving students in grades 9-12, with a focus on improving the health, education and social outcomes for pregnant and parenting students and their children. The main goal is to increase school retention and graduation rates."
- The Centers for Disease Control and Prevention highlighted the program's success as a "Public Health Practice Story From the Field."

Title IX: 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

Title IX: Single-Sex Programs

Public school districts and schools that are currently offering or are interested in offering single-sex classes must comply with the Constitution of the United States and other applicable Federal laws, including Title IX and the Equal Educational Opportunities Act (EEOA), which prohibits some forms of student assignment to schools if the assignment results in sex segregation.

Title IX: Single-Sex Programs

When we talk about the U.S. Constitution, what do we mean?

Equal Protection Clause

The Equal Protection Clause of the 14th Amendment to the U.S. Constitution states: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title IX: Single-Sex Programs

When we talk about the U.S. Constitution, what do we mean? (continued)

Example: The Virginia Military Institute was male-only educational institution until, in 1996, the U.S. Supreme Court found its activities to violate the Equal Protection Clause.

VIRGINIA MILITARY INSTITUTE
NO ORDINARY COLLEGE. NO ORDINARY LIFE.

Under this case, single-sex programs can survive Constitutional scrutiny only if they:

- Are substantially related to
- An exceedingly persuasive justification;
- They provide equal opportunity to the excluded gender.

Title IX: Single-Sex Programs

When we talk about the U.S. Constitution, what do we mean? (continued)

An “exceedingly persuasive justification can be thought about more concretely by examining Justice Ginsburg’s opinion in the VMI case. She wrote:

> “The notion that admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school, is a judgment hardly proved, a prediction hardly different from other "self-fulfilling prophec[ies], . . . once routinely used to deny rights or opportunities. Women's successful entry into the federal military academies, and their participation in the Nation's military forces, indicate that Virginia's fears for VMI's future may not be solidly grounded. The Commonwealth's justification for excluding all women from ‘citizen-soldier’ training for which some are qualified, in any event, does not rank as ‘exceedingly persuasive.’ ”

Title IX and Single-Sex Schools

The Title IX statute permits certain entities to be single-sex. For example:

- non-vocational institutions (including nonvocational coeducational elementary or secondary schools)
- private undergraduate institutions
- certain institutions controlled by religious organizations
- public undergraduate institutions that traditionally and continually from their establishment have had a policy of admitting only students of one sex
- institutions whose primary purpose is the training of individuals for the military services or the merchant marine

Title IX and Single-Sex Schools

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]

Title IX and Single-Sex Schools

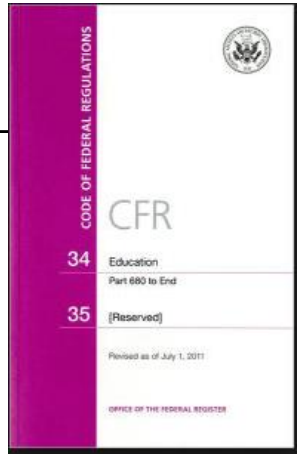
The Dear Colleague Letter notes, in relevant part:

"**Generally, a school district may offer a single-sex nonvocational elementary or secondary school under Title IX only if it offers a substantially equal single-sex or coeducational school to students of the excluded sex***.* However, single-sex nonvocational private schools are not governed by the Department's Title IX regulation requiring a substantially equal single-sex or coeducational school. By contrast, vocational schools that receive Federal financial assistance may never be limited to one sex."

Title IX: Single-Sex Programs

If offering single-sex programs, coeducational elementary and secondary schools and school districts that receive Federal financial assistance from the U.S. Department of Education must comply with the U.S. Department of Education's Title IX regulations in 34 C.F.R. § 106.34(b) on single-sex classes.

Title IX: Single-Sex Programs



Federal regulations 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..."

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

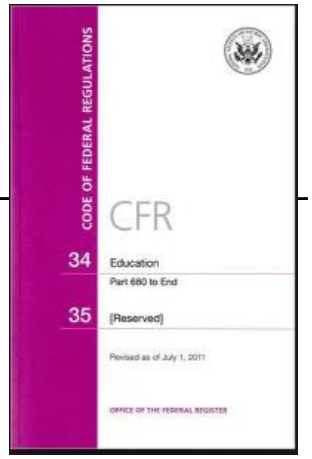
Title IX: Single-Sex Programs

Federal regulations permit grouping students on the basis of sex for the following:

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

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

Title IX: Single-Sex Programs



Federal regulations provide:

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

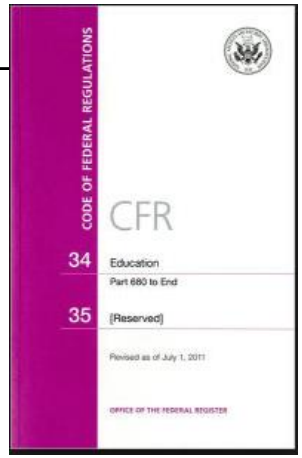
(i) Each single-sex class or extracurricular activity is based on the recipient's important objective—

(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; . . .."

-- 34 C.F.R. 106.34(b)(1).

Title IX: Single-Sex Programs



Federal regulations provide:

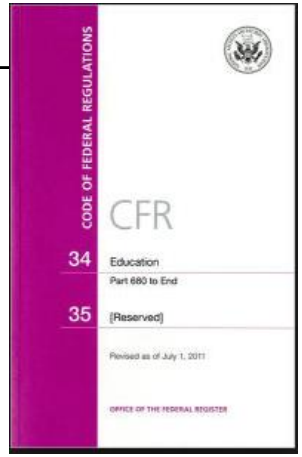
"(ii) The recipient implements its objective in an evenhanded manner;

(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."

-- 34 C.F.R. 106.34(b)(1).

Title IX: Single-Sex Programs



Federal regulations provide:

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.”

-- 34 C.F.R. 106.34(b)(2).

Title IX: Single-Sex Programs

“Equal opportunity” . . . What does that mean?

Let’s go back to the VMI case . . .

“A remedial decree must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in the position they would have occupied in the absence of discrimination. . . .The constitutional violation in this case is the categorical exclusion of women, in disregard of their individual merit, from an extraordinary educational opportunity afforded men. Virginia chose to leave untouched VMI's exclusionary policy, and **proposed for women only a separate program, different in kind from VMI and unequal in tangible and intangible facilities.** [Virginia Women's Institute for Leadership (“VWIL”)] affords women no opportunity to experience the rigorous military training for which VMI is famed. Kept away from the pressures, hazards, and psychological bonding characteristic of VMI's adversative training, VWIL students will not know the feeling of tremendous accomplishment commonly experienced by VMI's successful cadets. . . .”

Title IX: Single-Sex Programs

"Equal opportunity" . . . What does that mean?

Let's go back to the VMI case . . . (continued)

"Virginia maintains that methodological differences are justified by the important differences between men and women in learning and developmental needs, but generalizations about 'the way women are,' estimates of what is appropriate for most women, no longer justify denying opportunity to women whose talent and capacity place them outside the average description. In myriad respects other than military training, **VWIL does not qualify as VMI's equal. The VWIL program is a pale shadow of VMI in terms of the range of curricular choices and faculty stature, funding, prestige, alumni support and influence**."

Title IX: Single-Sex Programs

There are questions about whether the current Title IX regulations meet Constitutional standards.

Proceed with caution . . .

Title IX: Single-Sex Programs

Gender Stereotyping: We've talked about the Constitution guaranteeing Equal Protection under the law. There is also an international perspective.

The United Nations publishes a description of gender stereotyping on its website and talks about its dangers. It states, in part:

"A gender stereotype is a generalized view or preconception about attributes or characteristics that are or ought to be possessed by, or the roles that are or should be performed by women and men. A gender stereotype is harmful when it limits women's and men's capacity to develop their personal abilities, pursue their professional careers and make choices about their lives and life plans. . . ."

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Title IX: Single-Sex Programs

Gender Stereotyping (continued)

"Harmful stereotypes can be both hostile/negative (e.g., women are irrational) or seemingly benign (e.g., women are nurturing). It is for example based on the stereotype that women are more nurturing that child rearing responsibilities often fall exclusively on them. Gender stereotyping refers to the practice of ascribing to an individual woman or man specific attributes, characteristics, or roles by reason only of her or his membership in the social group of women or men."

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Title IX: Single-Sex Programs

In 2014, ACLU filed an administrative complaint against a Florida school district with OCR 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. . . . "

Title IX: Single-Sex Programs

The complaint stated, in relevant part: (continued)

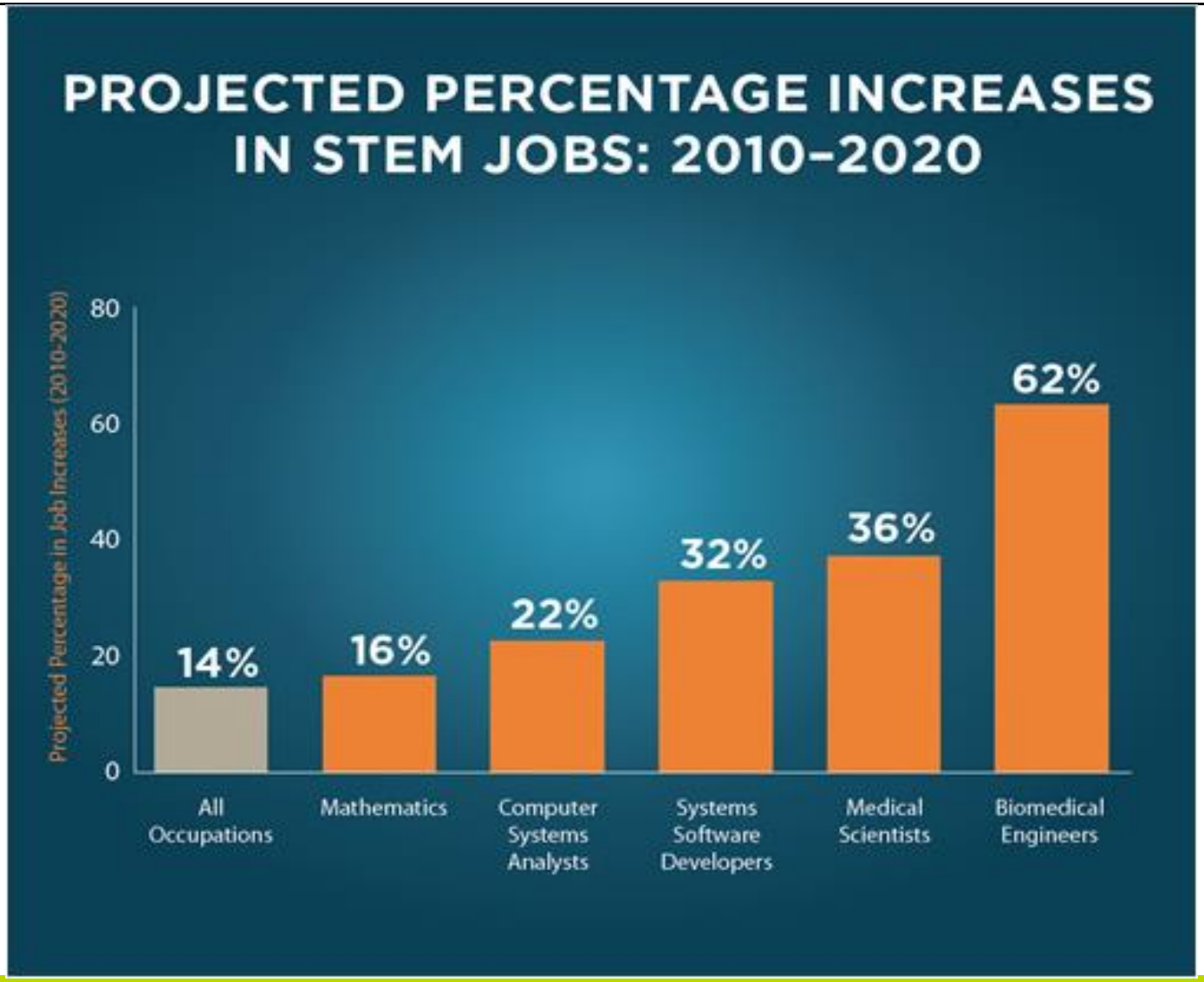
"Girls are taught mathematics in a way that makes it less abstract and consequently gives girls the message that they are not good at abstract mathematics. Boys are taught literature in a way that makes stories highly concrete and fact-based and does not encourage them to connect with characters' emotions. These sex stereotypes limit opportunities for boys and girls alike."

Title IX: Single-Sex Programs

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.

As the Title IX/Equity Coordinator, what will you do?

Title IX: STEM and CTE



-- U.S. Department of Education

Title IX: STEM and CTE

Straight from the headlines . . . "**Top Science Publisher Failing Minority Groups, Industry Leaders Say,**" The Huffington Post (July 27, 2015)

" . . . In an open letter sent last week to the prestigious American Association for the Advancement of Science -- which is best known for publishing the well-regarded magazine Science and running career-advice site Science Careers -- 600 scientists and supporters called on the group to 'work more diligently to ensure that Science's web and printed material does not reinforce harmful stereotypes that hinder the advancement of underrepresented groups in [science, technology, engineering and mathematics] fields.' . . ."

Title IX: STEM and CTE

Straight from the headlines . . .“**Children's Place Pulls 'Sexist' T-Shirt**,” Good Morning America (August 6, 2013)

Title IX: STEM and CTE

The White House Initiative on Girls and Women has numerous resources addressing STEM initiatives.

On March 20, the White House hosted an episode of “We the Geeks” featuring women role models in the sciences. See https://www.whitehouse.gov/blog/2014/03/18/we-geeks-women-role-models

Title IX: STEM & Educational Resources

Resources are critical: "[S]chools serving more students of color are less likely to offer advanced courses and gifted and talented programs than schools serving mostly white populations, and students of color are less likely than their white peers to be enrolled in those courses and programs within schools that have those offerings.

- "[A]lmost one in five black high school students attend a high school that does not offer Advanced Placement (AP) courses, a higher proportion than any other racial group."
- "[O]f the high schools serving the most black and Latino students in the 2011-12 school year, only 74 percent offered Algebra II and only 66 percent offered chemistry. Comparable high-level opportunities were provided much more often in schools serving the fewest black and Latino students, where 83 percent offered Algebra II courses and 78 percent offered chemistry."

-- OCR, Dear Colleague Letter (2014)

Title IX: Discipline

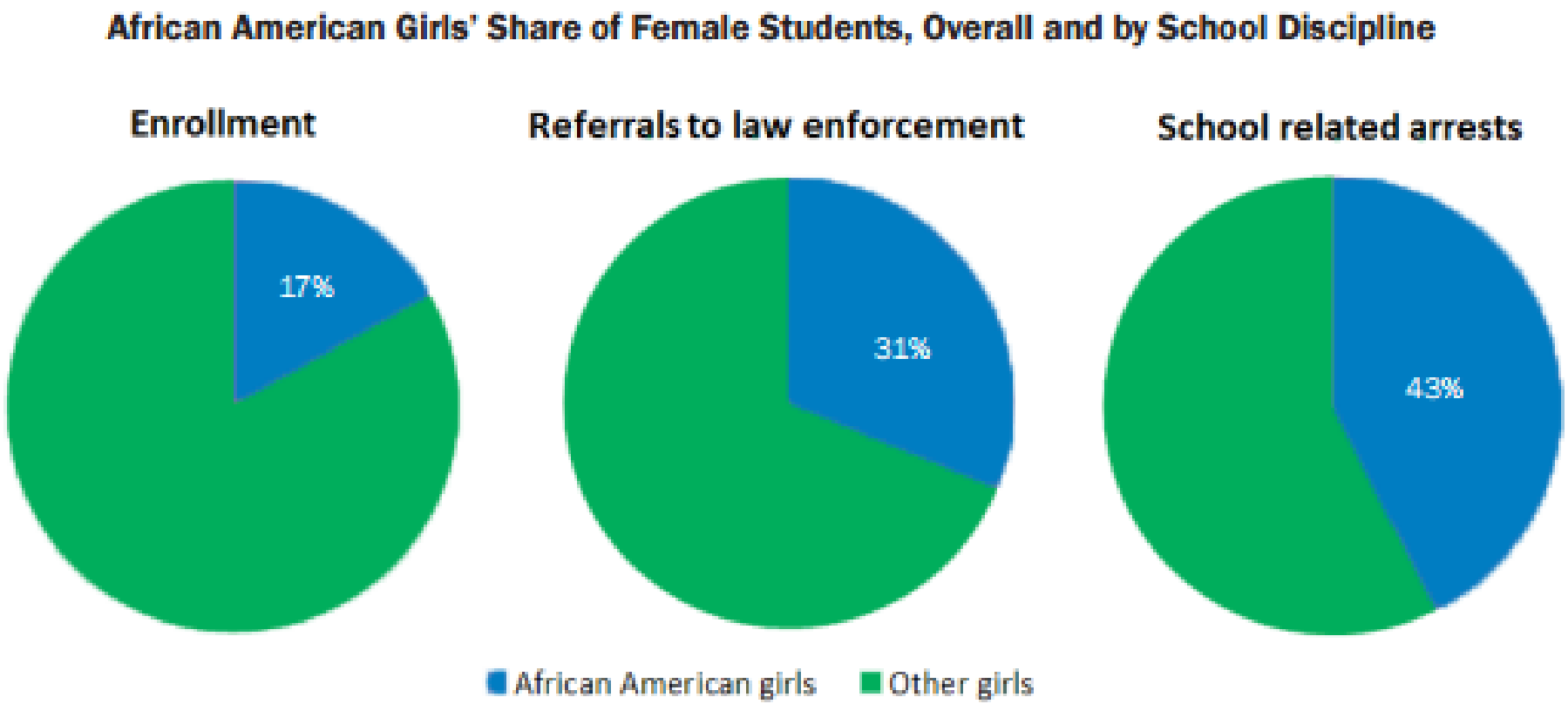
<u>Certain girls are disproportionately affected by discipline in schools</u>

- In 2014, the National Women's Law Center and NAACP Legal Defense Fund reported, and Smithsonian magazine published an article explaining, that during the 2011 to 2012 school year, 12% of African American girls, pre-K through 12th grade, were suspended—that rate is higher than the rate for any other group, and 6 times the rate for Caucasian girls.

Title IX: Discipline

- Many schools now have zero-tolerance policies: The NWLC/NAACP report states that "[w]hile African American males are the most likely to be disciplined in school, African American females are also disproportionately suspended and expelled. In fact, an analysis of 2006-07 data on the suspension of middle school students showed that **African American girls in urban middle schools had the fastest growing rates of suspension of any group of girls or boys**."

Title IX: Discipline



Source: U.S. Department of Education, Civil Rights Data Collection, 2009-10 National and State Estimations, National total, http://ocrdata.ed.gov/downloads/projections/2009-10/2009-10-Estimations-Nation.xls. Data are for students without disabilities.

-- NWLC and NAACP Legal Defense Fund Report, "Unlocking Opportunity"

Title IX: Discipline

The NWLC/NAACP report notes that “[s]tereotypes of African American girls and women date back to slavery — such as the view that African American women are ‘angry’ or ‘aggressive,’ and ‘promiscuous” or ‘hyper-sexualized.’ Such racial and gender stereotypes shape educators’ and administrators’ views of African American female students in critically harmful ways. This **implicit bias is rarely discussed or acknowledged**, and therefore it goes virtually undetected. But addressing it is essential, as it can lead to the setting of lower academic expectations for African American girls, significant discipline disparities and a higher rate of referrals to the juvenile justice system, all factors that push African American girls out of school.”

Title IX: Discipline

The U.S. Department of Education and the U.S. Department of Justice jointly issued a Dear Colleague Letter describing their concern about discipline in U.S. schools based on a review of the Civil Rights Data Collection.

- "[I]ntentional discrimination occurs when a school has a discipline policy that is neutral on its face (meaning the language of the policy does not explicitly differentiate between students based on their race), but the school administers the policy in a discriminatory manner or when a school permits the ad hoc and discriminatory discipline of students in areas that its policy does not fully address. . . . Intentional discrimination also occurs when a school adopts a facially neutral policy with the intent to target students of a particular race for invidious reasons."
- "Schools also violate Federal law when they evenhandedly implement facially neutral policies and practices that, although not adopted with the intent to discriminate, nonetheless have an unjustified effect of discriminating against students on the basis of race. The resulting discriminatory effect is commonly referred to as 'disparate impact.'"

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 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 proferred justification a pretext for discrimination?

Title IX: Discipline

Examples of recommendations from U.S. Department of Education and U.S. Department of Justice Dear Colleague Letter:

- 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
- Emphasizing positive interventions over student removal
- Data collection and responsive action

Title IX: Discipline

Resource: In 2014, the U.S. Department of Education and U.S. Department of Justice released a school discipline package.

http://www2.ed.gov/policy/gen/guid/school-discipline/fedefforts.html#guidance

What are the Responsibilities of Title IX/Equity Coordinators?

Be prepared to:

- Stay abreast of developments related to Title IX, its implementing regulations, and guidance from federal agencies
  - SHARE: What are some strategies people use to stay on top of developments?
- Investigate complaints
- Educate your colleagues, students, and your community about Title IX
  - SHARE: How do you approach training in your district?
- Revise your policies and procedures, as appropriate
- Resolve complaints promptly

What are the Responsibilities of Title IX/Equity Coordinators?

On April 25, 2015, OCR published a resource guide for Title IX coordinators.

They posted it on a dedicated Title IX Coordinators page: http://www2.ed.gov/policy/rights/guid/ocr/title-ix-coordinators.html.

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
- recommended best practices

What are the Responsibilities of Title IX/Equity Coordinators?

OCR's Dear Colleague Letter, which is part of the April 2015 resource guide, recommends that the Title IX/Equity Coordinator:

- Have independence (in order to avoid conflicts of interest)
- Be full-time (*Let's discuss this!*)

A large school district or a postsecondary institution may choose to designate multiple coordinators for buildings/schools/campuses, which may improve incident reporting.

- If there are multiple coordinators, there should be one lead Title IX coordinator who has ultimate oversight responsibility.

What are the Responsibilities of Title IX/Equity Coordinators?

The Basics

1. Designate at least one employee as the Title IX coordinator – the position cannot remain vacant.

"Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part." 34 C.F.R. § 106.8(a)

What are the Responsibilities of Title IX/Equity Coordinators?

2. Post a notice of nondiscrimination prominently

"Each recipient shall implement specific and continuing steps to notify applicants for admission and employment, students and parents of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, that it does not discriminate on the basis of sex in the educational program or activity which it operates, and that it is required by title IX and this part not to discriminate in such a manner. . . ."

34 C.F.R. § 106.9(a)

OCR, Notice of Nondiscrimination (August 2010), available at http://www.ed.gov/ocr/docs/nondisc.pdf.

What are the Responsibilities of Title IX/Equity Coordinators?

Annual publication:

- **In local newspaper prior to the beginning of the school year**
- **On school website (but there are caveats described in the 2015 Resource Guide (such as prominently displaying a link on the homepage), so plan carefully)**

Ongoing publication in:

- In all official publications

What are the Responsibilities of Title IX/Equity Coordinators?

3. A recipient must notify all students and employees of the name or title, office address, telephone number, and email address of the Title IX coordinator, including in its notice of nondiscrimination.

"The recipient shall notify all its students and employees of the name, office address and telephone number of the employee or employees appointed."

34 C.F.R. § 106.8(a)

What are the Responsibilities of Title IX/Equity Coordinators?

4. "[A]dopt and publish grievance procedures providing for the prompt and equitable resolution of student and employee complaints under Title IX. These procedures provide an institution with a mechanism for discovering incidents of discrimination or harassment as early as possible and for effectively correcting individual and systemic problems."

--OCR, Resource Guide (April 2015)

"A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part." 34 C.F.R. § 106.8(b)

What are the Responsibilities of Title IX/Equity Coordinators?

5. When the regulations went into effect, each recipient school system had to perform a one-time self-evaluation of its policies and procedures, and then modify policies and practices that did not comply with Title IX.

What are the Responsibilities of Title IX/Equity Coordinators?

6. School systems may take remedial and affirmative steps to increase the participation of students in programs or activities when there has been discrimination on the basis of sex in an education program or activity.

What are the Responsibilities of Title IX/Equity Coordinators?

- Has anyone used “meta tags” to help direct visitors to their website to information about Title IX and the Title IX/Equity Coordinator?
- How do you make information available to the school community (such as complaint forms)?
- Does anyone use a 1-800 or 1-866 hotline or a dedicated email address?

Resources

Resources

Boston Office Office for Civil Rights

US Department of Education, 8th Floor

5 Post Office Square

Boston, MA 02109-3921

Telephone: 617-289-0111

FAX: 617-289-0150; TDD: 877-521-2172

Email: OCR.Boston@ed.gov

OCR resource page on sex discrimination:
http://www2.ed.gov/policy/rights/guid/ocr/sex.html l

OCR policy guidance:
http://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/sex.html

Resources

The Commission on Human Rights and Opportunities (CHRO)

25 Sigourney St.,

Hartford, CT 06106

Tel: 860-541-3400 or 800-477-5737

Website: http://www.state.ct.us/chro/

Resources

State Department of Education Website

http://www.state.ct.us/sde/

Under Quick Links - click on

"Bullying and Harassment"

Resources

Adrian R. Wood, Ph.D.

Education Consultant, State Civil Rights Compliance Coordinator

Turnaround Office

Connecticut State Department of Education

Phone: (860) 713-6795 / Fax: (860) 713-7035

Adrian.wood@ct.gov

Resources

National Women's Law Center
11 Dupont Circle
Suite 800
Washington, DC 20036

Tel: (202) 588-5180
Email: info@nwlc.org
Websites: http://www.nwlc.org
and www.titleix.info

Resources

Maria Pacheco, Ed. D.
Director of Equity and Diversity Projects
New England Equity Assistance Center
The Education Alliance at Brown University
4 Richmond Square, 4th Floor
Providence, RI 02906
(401) 274-9548
fax 401.421.7650
http://neeac.alliance.brown.edu

Resources

National Center for Lesbian Rights
870 Market Street Suite 370
San Francisco CA 94102
tel 415.392.6257
info@nclrights.org
www.nclrights.org

- PDF of report on Equal Opportunity for Transgender Student Athletes: http://www.nclrights.org/site/DocServer/TransgenderStudentAthleteReport.pdf?docID=7901

Resources

- White House Task Force to Protect Students from Sexual Assault (established January 2014)
  - Recommends and provides toolkit for administering school climate surveys
  - Contains checklist for comprehensive sexual misconduct policy
  - Encourages schools to comprehensively train teachers and staff to appropriately investigate sexual assault claims
  - https://www.notalone.gov

Questions?

Maree Sneed
Partner
Hogan Lovells US LLP
555 Thirteenth Street NW
Washington, DC 20004
(202) 637-6416
maree.sneed@hoganlovells.com

www.hoganlovells.com

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