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Title IX Employee Training Module

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What We Will Discuss Today . . .

- Basic Concepts of Title IX Regulations
- Prohibition Against Discrimination in Access
- Types of Prohibited Sexual Harassment
- Duties of **All Employees** Under Newly Amended Regulations
- Scenarios

Title IX
Basic Concepts

Title IX

Title IX was enacted in 1972 as part of amendments to the Higher Education Act of 1965.

Title IX prohibits discrimination in federally funded educational programs on the basis of sex.

Any school district receiving any Federal funds MUST comply with Title IX.

The US Department of Education's Office for Civil Rights (OCR) enforces Title IX.

Title IX prohibits sex discrimination in federally funded educational programs.

"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."

- **Types of discrimination prohibited include**:
  - Sex stereotypes
  - Sexual harassment
  - Failure to provide equal opportunity in athletics
  - Discrimination based on pregnancy or parental status
  - Sexual violence
  - Scheduling and other things such as equipment and access to facilities
  - Gender identity, transgender, sex role expectations
  - Discipline
  - Retaliation

What is Prohibited?

1. Students may not be **discriminated against** on the basis of sex.

2. Students may not be **retaliated against** for making complaints regarding sexual harassment or discrimination.

3. School Districts cannot be **deliberately indifferent** to complaints of sexual harassment by students.

   (Employees are protected under Title VII)

What is Required?

- Schools must provide **equal opportunities** to both sexes in the following:
  - Awarding of **scholarships** (applies primarily to intercollegiate programs)
  - **Participation opportunities**, dates and scheduling, including the number of opportunities available, selection of sports, and level of competition
- Treatment and benefits.
- Administrative remedies need not be exhausted before suit is filed.

What is Required?

Other Responsibilities of the School:

1. Designate at least one Title IX Coordinator for the District (and perhaps by building if large district)
2. Publish a policy that states that the District does not discriminate on the basis of sex in its education programs and activities
3. Establish a grievance complaint procedure
4. Implement the grievance complaint procedure

US DOE Changes Title IX Regs

- The U.S. Department of Education released revised Title IX regulations, which includes several new provisions.
- U.S. DOE Sec. Devos stated that the changes take "historic steps to strengthen Title IX protections for all students and to ensure all students can pursue an education free from sex discrimination."
- The regs take effect **August 14th, 2020.**
- Districts should check with your policy providers for updates this summer.

Discrimination in Access/Participation

Title IX and Students

- Girls must have equal access to sports.
- Scheduling and other things such as equipment and access to facilities also must be equal.
- *Communities of Equity v. Michigan High School Athletic Assn.*, 459 F3d 608 (6 Cir. 2002)
  - MHSAA violated equal protection by scheduling athletic seasons for girls' sports during nontraditional and less advantageous times of the academic year than boys'.
  - Facility availability did not require the seasons and scheduling was not substantially related to MHSAA objective of maximizing athletic participation with optimal use of facilities..
- Regulations state that girls should be allowed to play on boys' teams where there is no girls' team. 45 CFR 86.41(b).
  - Exception for contact sports. Id.

Transgender issues

- Ohio does not have laws that clearly prohibit discrimination against individuals based on transgender status.
  - ***Ohio Revised Code section 3313.666*** requires schools to have policies in place to prevent and punish bullying and harassment.
    - While not explicitly stating so, this would include behavior directed at a person's gender identity.
- Federal laws trump the lack of state protections.
  - The U.S. Department of Education has stated that transgender status is protected under Title IX. "on the basis of sex"
- If a student has a claim against a school district for discrimination, the Office for Civil Rights (OCR) would analyze:
  - Did the district discriminate against the student based on "sex?"
  - Did the district exclude or deny the student benefits of or subject the student to discrimination under any education program?

Transgender issues

- Title IX's sex discrimination prohibition extends to claims of discrimination based on **gender identity** or failure to conform to stereotypical notions of masculinity or femininity.
- The Office for Civil Rights accepts such complaints for investigation.
- Actual or perceived sexual orientation or gender identity of the parties does not change a school's obligations.
- LGBT youth report high rates of sexual harassment and sexual violence.
- School should **investigate and resolve allegations** of sexual harassment violence toward LGBT students using same procedures and standards it uses in all complaints involving sexual violence and harassment.
- Incidents of sexual violence that may be accompanied by anti-gay comments or be partly based on a student's actual or perceived sexual orientation does not relieve a school of its obligation under Title IX to investigate and remedy those instances of sexual violence.

Title IX and Fundraising

- School districts are responsible to ensure that
  - "…benefits, services, treatment and opportunities overall, regardless of funding sources, are equivalent for male and female athletes."
- This is true even if the funds are raised by the student-athletes themselves or by a booster club.
- Travel is listed as a specific factor to be considered in determining equality of opportunity for male and female athletes.

Title IX and Fundraising

- **Avoiding Title IX Fundraising Claims**
  - First, the school should determine if there is an imbalance between male and female athletic opportunities.
  - To successfully defend itself from Title IX claims, the district should keep accurate records of how both school and private dollars have benefited male and female athletics.
  - The only requirement of Title IX is that there generally be equal opportunity for male and female athletes. It does not have to be the same types of things, i.e.: all travel is equal, all uniforms are equal.

Title IX and Fundraising

- **Avoiding Title IX Fundraising Claims**
  - Districts may choose to adopt a policy by which all booster gifts and fundraising on behalf of an athletics team must go to the general athletics fund for equitable distribution.
  - Formation of one umbrella booster organization to handle fundraising and distribution, with the charge to ensure that funds are equitably distributed.
  - Ensure that where possible, one booster organization serves comparable sports (e.g. baseball and softball).

What if we don't have any complaints?

- A **proactive approach** is your best approach, especially when considering school district athletic programs and possible Title IX violations.
- Consider a committee to annually review your district's athletics including:
  - Money spent from the District on:
    - Facilities
    - Coaches
    - Uniforms
    - Equipment
    - Transportation
    - Trainers
  - **Donations** received from PTOs/boosters
  - **Schedule** of games and practices
  - Quality of **facilities**
  - Advertisement of games
  - Athletic code of conduct and enforcement
  - Participation numbers (male vs. female)
  - Pay-to-play fees
- Annually document your findings as a committee.

Sexual Harassment

Types of Title IX Sexual Harassment

- There are three categories of sexual harassment:

1. Any instance of *quid pro quo* harassment by a school's employee;

2. Any unwelcome conduct that a reasonable person would find so **severe, pervasive, and objectively offensive** that it denies a person equal educational access;

3. Any instance of sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VA WA).

Quid Pro Quo harassment defined

- Quid Pro Quo harassment occurs when participation in or the availability of access to the educational program is conditioned upon sexual conduct.
- Quid Pro Quo harassment is assumed by law to be sufficiently severe, pervasive and offensive that it denies the victim equal access to the educational program.

Types of Title IX Sexual Harassment

- **Student Sexual Harassment by Peers or Staff**
  - A student may have a harassment claim against school officials based upon conduct of another student *only if school officials* have
    - **Actual knowledge** of the harassment;
    - **Deliberately indifferent** to the plight of the victim; and
    - Harassment is **so severe, pervasive and objectively offensive** that the victim is being denied access to the education opportunities or benefits provided by the school.

Types of Title IX Sexual Harassment

- **Student-Student Sexual Abuse/ Peer Sexual Harassment, cont**.
  - These claims are not only against the other sex.
  - The recent Milford basketball case where players forced another player into sexual acts could be a sexual harassment claim.
  - Schools with recent problems with homophobia or anti-LGBTQ issues may also want to keep a close eye out and make sure they follow up on all claims.
  - Many times bullying also may be sexual harassment.

Types of Title IX Sexual Harassment

- **Teacher - Student Sexual Abuse**
  - Sexual abuse of a student by a teacher may constitute a violation of Title IX and entitle the student to monetary damages.
  - Money damages cannot be awarded against a school district under Title IX unless it is shown that a responsible school official had
    - **actual knowledge** of the abuse, *and*
    - **deliberately ignored** it.

School Employee and District Response

"Actual Knowledge" Defined

- Means a report may be made to ***any*** school employee
- Also means that when a report is made to **any school employee**, this **starts the clock** on responding to the complaint promptly.
- Title IX Compliance Officer must immediately contact complainant to explain how to file a formal complaint and offer supportive measures.
- Explain supportive measures may occur with or without a formal complaint.

What are these "supportive measures"?

- Defined as:
  - "Individualized services reasonably available that are nonpunitive, non-disciplinary, and not unreasonably burdensome to the other party while designed to ensure equal educational access, protect safety, or deter sexual harassment."
  - Examples: changing classes, stay away orders, different schedules, assigning buses, guidance counselor access, checking in regularly, etc., etc.

"Actual Knowledge" of what?

- **Err on the side of caution!** There are many examples in which notice of sexual harassment may be obtained other than by direct complaint:
- Examples:
  - Teacher hears a rumor about a sexual relationship between another teacher and a student;
  - A staff member watching a student speak in a sexually inappropriate way to another student;
  - The school receiving notice that that an off-campus sexual violence event is creating retaliation at school.
  - Incident on the bus where a student grabs another student.
- Although the law is still not quite settled on what constitutes notice, it is recommended these types of instances be reported to the district's Title IX coordinator for follow-up.

Must the Conduct Occur at School?

- School officials are responsible for acts occurring on school grounds or situations over which the school exercised "substantial control"
  - Athletic Events
  - Field Trips
  - Class Trips
  - Banquets, concerts, etc.
  - Keep an eye out for this if you are a chaperone or someone working or assisting during these events.

General Response to Sexual Harassment

- The amended regulations require that districts respond **promptly** and in a way that is not intentionally indifferent, when it has **actual knowledge** of sexual harassment.
- Districts must treat complainants and respondents equally in offering supportive measures to the complainant and by following a compliant grievance process **before** issuing disciplinary sanctions on the respondent.

When must a complaint be submitted?

- There are **no timelines** to initiate a complaint.
  - Statutes of limitations don't really confine board duty to investigate.
  - Policy may recommend that individuals make every effort to report within a certain number of days. However, from an investigation standpoint…the sooner the better.
- Policy may indicate that all members of the school community must report incidents of discrimination or retaliation that are reported to them to the CO within a certain number of business days.
  - Again, failure to adhere to this deadline **is not** sufficient reason to ignore investigation process.

When is an investigation warranted?

- When you discover a possible violation of policy and/or law
- When a complaint/concern is reported by a board member, staff, student, parent, community member.
- When a formal or informal complaint is made through your compliance officers for Title IX, homeless liaison, ADA coordinator, bullying/harassment/dating violence for students, or other discrimination based on a protected category.
- When you get notice of an EEOC/OCR/ODE complaint.
- When the reporter calls.

I have become aware of potential sexual harassment! What do I do!?

- **Promptly report** to the District's Title IX Coordinator for investigation.
  - If you don't know who the coordinator is, the name and contact information should be displayed on the District's website. You can also ask a principal or supervisor to whom reports should be directed.
- Maintain the confidentiality of the situation outside of discussing with the coordinator or investigator.
- Participate in interviews as requested.
- Review your district's Title IX policy.

District's Title IX Obligations with Respect to Sexual Misconduct

- Investigate
- End
- Prevent
- Remedy

When Do Districts "Drop the Ball"?

When they fail to:

- Take allegations seriously, and **conduct an investigation**
- **Discipline** as appropriate
- **Notify the affected parties** of the investigation results and follow up [remember your timelines]
- **Remedy the effects** of the harassment/bullying
- **Prevent retaliation**
- **Check in with the victim** after the investigation
- And … when they **do the same thing over and over again** that does not work!

Scenarios

Scenario

You overhear two male students talking about a text they received from a school district employee. In the text, the staff member allegedly states the students are “hot” and “it is too bad they don’t date older women.” What do you do?

Scenario

A high school experiences a lot of teen pregnancies in the school year. In response, it decides to isolate the students and place them in separate classes. The students receive the same curriculum. Is this a Title IX violation?

https://go.boarddocs.com/oh/pymatuning/Board.nsf/Public?open&id=policies#

Scenario

The cheerleading coach is concerned that it is not safe for the student to participate in cheerleading while she is pregnant. May she be prohibited from participating for medical reasons? May the district require her to submit a medical certification?

Scenario

The baseball booster club donates $25,000 to a school district to update the baseball field bleachers after the boy's baseball team wins the state championship. The money is raised by the boosters, and parent volunteers agree to install the bleachers. No updates are scheduled for the adjacent girls softball field, which is old and run down. Could this be a Title IX violation?

Scenario

A teacher overhears two students talking about another student who punched her boyfriend in the mouth at a party over the weekend, making him bleed. The boyfriend is also a student at the school.

Scenario

A student, known to be homosexual is overheard calling his friend, who is also known to be homosexual, various homophobic slurs.

Thank you!

The information in this handout and presentation was prepared by Ennis Britton Co., L.P.A. It is intended to be used for general information only and is not to be considered specific legal advice. If specific legal advice is sought, please consult an attorney.

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