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Title IX & LGBTQ Students

Understanding the Latest Developments and Legal Requirements

Redford Union School District
Wednesday, October 13, 2021

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1

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Roadmap

- What is Title IX?
- “New” Title IX Regulations
- The Latest on LGBTQ Students
- Anticipated Developments
- Best Practices
- Scenarios
- Questions/Discussion



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What is Title IX?

“No person . . . 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.”

-20 U.S.C. § 1681 (a)

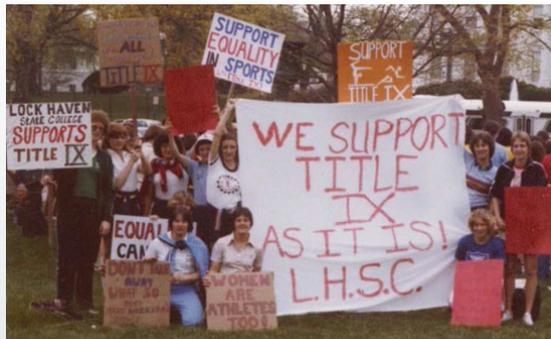
Translation:

We want an educational environment free from sex-based harassment



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←
Then



Now
→



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Title IX Scope

- Historical Context = **Sports**
- Modern Context = **LGBTQ Students, Sexual Violence/Assault**
 - Sex discrimination includes sexual violence and gender-based harassment
 - **The protections of Title IX extend to all academic, educational, extracurricular, athletic, and other programs of a school**, whether those programs take place on campus, in a school facility, at an off-campus class, seminar, or event that the school sponsors, or elsewhere
 - **Title IX protects both male and female students** and faculty and staff from sexual harassment by any school employees, non-employee third parties, and other students
- Today's Focus = **Sports and LGBTQ Students in Sports**



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Title IX Enforcement

- Process/Responsibility
 - U.S. Department of Education, Office of Civil Rights (OCR)
- OCR Investigations
 - Investigates Complaints
 - Document Collection and Review
 - Interviews Staff
 - Details, details, details
 - Time-Intensive
- Lawsuits (Private Right of Action)
 - Present Trend ... as you might imagine



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School District Must ...

- Take Immediate Action to End **Sex-Based Harassment** and Prevent its Occurrence
- Appoint a Title IX Coordinator
- Develop and Publish District-Wide Policies and Procedures
- Train Employees and Students
- Create a Climate that Encourages Reporting
- Investigate Claims



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Gebser v. Lago Vista Ind Sch Dist

524 U.S. 274 (1998)

- *Facts* - Teacher initiated sexual contact with the student. Teacher had sexual intercourse with student off-campus during class time. Student did not report the relationship to school officials; the pair were discovered by a police officer and the teacher was arrested and terminated by the school district. Relationship covered Spring 1991-January 1993.
- *Key Holdings* - A school board can be liable for money damages under Title IX for employee-on-student harassment IF:
 - An official of the school who has the **authority to institute corrective measures** on the school district's behalf ...
 - Has **actual notice** of the employee's misconduct ...
 - Is **deliberately indifferent** to the employee's misconduct (e.g. "an official decision by the [district] not to remedy the violation")



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Davis v. Monroe Cty Board of Ed

526 U.S. 629 (1999)

- *Facts* - 5th grade student was alleged victim of prolonged pattern of sexual advances by her 5th grade classmate; male student attempted to touch her breasts and genital area and made statements such as "I want to get in bed with you" and "I want to feel your boobs"
- *Key Holdings* – A school board can be liable for money damages under Title IX for student-on-student sexual harassment IF:
 - The *Gebser* standards of **notice** and **deliberate indifference** are met ...
 - The school has **substantial control** over the "context" in which the harassment occurred and over the harasser ...
 - The conduct is "sexual harassment" which is conduct "**so severe, pervasive, and objectively offensive**" that it **"effectively denies equal access to an institution's resources or opportunities."**



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"Two Roads Diverged ..."



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Evolution of New Title IX Regulations

- Issued by the Department of Education in November 2018
 - First overhaul since 1997
 - Impacts how schools will handle allegations of sexual harassment/assault
 - College-focused ... with an attempt to apply to K-12
- Final Title IX rule submitted for approval in November 2019
- Final rule announced on May 6, 2020
- New rules took effect on **August 14, 2020**

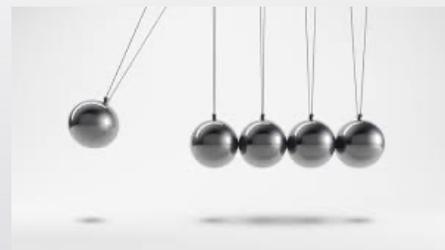


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Evolution of New Title IX Regulations

- **WHY?**
 - Politics?
 - #MeToo?
 - Glaring instances of non-compliance?
 - Scales tipped too far in favor of victims?
- The Debate
- The Swinging Pendulum



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New Vocabulary

Complainant = an individual who is alleged to be the victim of conduct that could constitute sexual harassment

Respondent = an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment



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(Re)Defining Sexual Harassment

- **Headline:** *“For the First Time, Title IX Regulations Define Sexual Harassment”*
- Sexual harassment means one of the following types of behaviors:
 - Conditioning aid, benefits, or services on an individual's participation in unwelcome sexual conduct (i.e., **quid pro quo harassment**)
 - Unwelcome conduct determined by a reasonable person to be **so severe, pervasive, and objectively offensive** that it **effectively denies** a person equal access to an education program or activity
 - Sexual assault, dating violence, domestic violence, or stalking [as defined by Clery Act and the Violence Against Women Act (VAWA)]
 - Mostly postsecondary, but need to familiarize with these definitions



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When Do We Have to Respond?

A recipient with **actual knowledge** of sexual harassment **in an education program or activity** against a person **in the United States** must respond promptly and in a manner that is **not deliberately indifferent**.

- Any person may report sexual harassment/sex discrimination, regardless of whether the person is the alleged victim of the reported conduct
- Reports can be made by mail, telephone, in-person, or by email, using the contact information for the Title IX Coordinator
- Reports can be made at any time, including non-business hours



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What Does That Mean?

- **“Actual knowledge”** of sexual harassment ...
 - Report to a Title IX Coordinator
 - Report to an official who has the authority to institute corrective measures on behalf of the school district
 - **Report to any employee of an elementary or secondary school**
 - “arguably broadens ... an elementary or secondary school’s obligation to respond to Title IX sexual harassment”
 - “unreasonable to expect young children to seek out specific employees for the purpose of disclosing Title IX sexual harassment”
- **“In a Program or Activity”** ...
 - Any location, event, or circumstance over which the recipient exhibits substantial control over the alleged harasser and the “context” in which the harassment occurred
 - Only have to address issues occurring against a person in the United States



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What Does That Mean?

- **“Not Deliberately Indifferent” ...**
 - “The response must amount to deliberate indifference to discrimination. The administrative enforcement scheme presupposes that an official who is advised of a Title IX violation refuses to take action to bring the [district] into compliance. The premise, in other words, is an official decision by the [district] not to remedy the violation.”
 - **“Clearly unreasonable in light of known circumstances ...”**
 - Good news, right?



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Title IX Coordinator – Under New Regs

- Still required to have one or more persons identified
- Must have someone with the title “**Title IX Coordinator**” – officially and publicly
- Must be designated and “**authorized**” to coordinate district's compliance efforts
 - Check job description; inclusive, authorized?
- Name and contact information, including email, must be posted/provided ...
 - On district website
 - Send information to students, parents or legal guardians, unions or professional organizations holding agreements with the district
 - Listed in all handbooks



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Title IX Coordinator

- Most Important Question to Know the Answer to ...

Who is the District's Title IX Coordinator?

- Important Questions to Ask ...

***Do We Have a Title IX Policy
(prohibiting discrimination on the basis of sex)?***

Do We Have a Procedure for Title IX Reporting/Investigating?



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Formal Complaint Response

- Must investigate **every** formal complaint – can be filed by a complainant OR signed by the Title IX Coordinator (does not render impartial)
- Specific steps for investigating, dismissing, and determining responsibility in formal complaint
- **Required elements for grievance procedures:**
 - Treat parties equitably
 - Objective evaluation of all evidence
 - No conflict of interest for investigator or decision-makers
 - Presumption respondent is not responsible
 - Reasonably prompt timeframes
 - Description or list of possible discipline/other remedies
 - Statement of standard used (preponderance v. clear and convincing)
 - Appeals procedures and bases
 - Range of supportive measures available
 - No breach of privilege without waiver



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Odds & Ends from New Regs

- Decision-maker cannot be the investigator or the Title IX Coordinator
- Informal resolution is PROHIBITED, except in limited circumstances
- Appeals permitted – with different decision-maker
- Training required; materials to be posted online
- Must maintain records for 7 years



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Essential – Staff Support

- Administrators must understand importance of role in supporting Title IX compliance
- Awareness of policy
- Awareness of procedures
- Model behavior
- Foster a culture of accountability
- Create a culture of reporting
- Be the “eyes and ears” for Title IX Coordinator/District
- May need to serve as investigator, decision-maker, or appellate officer



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IX Things to Remember

New
Vocabulary:
Complainant /
Respondent

Title IX
Coordinator –
Make it Official

Posting of Info
on Website /
Distribution to
Community

**Development of
Grievance
Process**

Single
Investigator
Model No
Longer Works

Training ... for
Everyone

Report to Any
Employee is
Actual
Knowledge

Appeals
Available

Maintain
Records for 7
Years



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Scenario #1

Kendra and Samantha are 9th graders who snuck into a party held by Chris, a 12th grader, on a Saturday night. After the party, Kendra tells Samantha she was cornered by Chris and that he touched her in a way that made her uncomfortable. Samantha becomes worried about Kendra and, on Monday, tells one of her teachers about the incident.

Is the teacher required to do anything?



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Scenario #1 - Options

1. **No**; the issue happened outside of school / off-campus and was not reported by the potential victim
2. **Maybe**; the teacher could talk to the student about her feelings and see if she wants to file a formal complaint
3. **Yes**; the teacher should report the concern to administration so an investigation can be completed



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Scenario #2

A middle school student is accused by a fellow student of sexual harassment. The accuser is a student with a long discipline record, multiple in- and out-of-school suspensions, and has, on at least on one occasion, falsely accused another student of theft. In short, none of the school's staff is willing to accept the accusation as true.

In light of the student's checkered past, should the school consider these allegations seriously?



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Scenario #2 – Options

1. **No**; given the student's track record for lying, there is no reason to trust that what she is claiming now is truthful
2. **Yes**; the reputation of the complaining party makes no difference and the district must be responsive to the complaint



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Scenario #3

Jordan, a 10th grader, tells a teacher at his school that he was sexually assaulted by a fellow student. The teacher informs Jordan the offense is a crime, so it must be reported to police.

What else, if anything, does the teacher need to do?



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Scenario #3 - Options

1. **Nothing**; she told Jordan to contact the police, so she has met her obligation under the law.
2. **Contact the police herself** and then let the police investigate
3. **Advise** building administration so a school investigation can be done



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Scenario #4

A middle school principal overhears teachers discussing an incident where a student inappropriately touched another student while on a school bus. The principal interviews the students. Both students seem dismissive of the incident and deny that they are bothered or hurt by what occurred.

Because the students deny they were negatively affected by the incident, is the principal required to report the incident to the students' parents or investigate?



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Scenario #4 - Options

1. The principal is required to report to the parents and investigate
2. The principal should tell the parents, but no investigation is needed
3. The principal should see if either of the parents want to file a formal complaint and investigate if they do
4. The principal doesn't need to do anything because the students said there is no issue



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LGBTQ Students & Staff

Applying Title IX and Avoiding Legal
Landmines



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Challenges

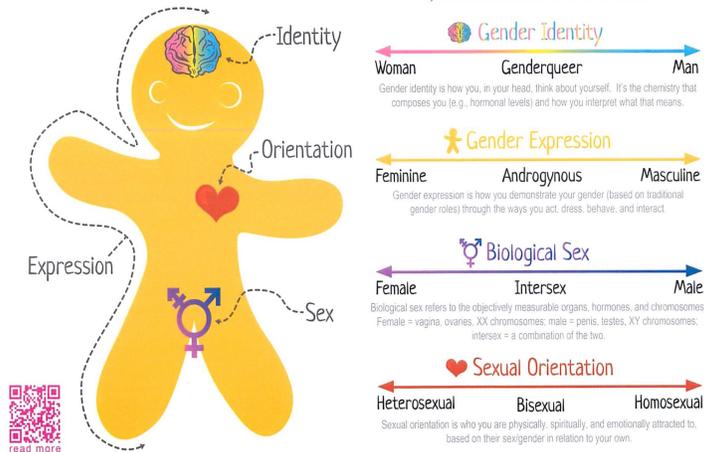
- Historical Concepts of Man/Woman
- Religious Beliefs
- Politics
- Societal Dynamics/Structure
- Social Acceptability
- Reactive, Not Proactive Laws
- Fear



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The Genderbread Person

by www.ItsPronouncedMetrosexual.com



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Common Themes

- Topics:
 - Pronoun/name usage
 - Bathroom usage
 - Sports teams/participation
 - Student records
 - Overnight stays
- Outcomes (Cases/Guidance):
 - Focused on individual rights
 - Individual > Group
 - Law reacts slowly
 - OCR legislating ... kinda
 - Court guidance finally arrives



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Input From OCR

- May 13, 2016 DCL (Obama-Era)
 - Definitive, Unequivocal Statement
 - Names, Pronouns, Restrooms, Locker Rooms, Overnight Stays, Athletics, Amendment of Student Records
 - "Consistent with their Gender Identity ..."
- Implications
 - Applies to all Recipients of Federal Funds



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Trump-Era Changes

- DCL Litigation
 - Reverse Field
- February 22, 2017 Guidance
 - Roll-Back May 2016 DCL
 - Closing on a Positive Note
- Less Active OCR Enforcement
 - Doesn't tell the whole story



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State BOE Statement & Guidance

on Safe and Supportive Learning Environments for LGBTQ Students

- | | |
|--|--|
| <ul style="list-style-type: none"> • Initial Draft Released Feb 2016 • Public Comment <ul style="list-style-type: none"> • Extended due to Volume • 13,000+ Comments Received • Vote Pushed to September • Revised Guidance <ul style="list-style-type: none"> • Adopted September 2016 • Implication ... <ul style="list-style-type: none"> • Not a legal mandate • Just guidance, suggestions | <p>Topics Covered:</p> <ul style="list-style-type: none"> ➤ Names/pronouns ➤ Student records ➤ Restrooms ➤ Locker rooms ➤ PE classes ➤ Dress Code ➤ Athletics |
|--|--|



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State BOE Policy Statement

“[A] school’s Title IX obligation to ensure nondiscrimination on the basis of sex requires schools to provide transgender students equal access to educational programs and activities even in circumstances in which other students, parents, or community members raise objections or concerns. As is consistently recognized in civil rights cases, the desire to accommodate others’ discomfort cannot justify a policy that singles out and disadvantages a particular class of students.”



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Time Line of Notable Events

- June 2020 – *Bostock v. Clayton County* [SCOTUS]
- August 2020 – USDE Interpretation on Title IX
- November 2020 – Election
- January 2021 – Executive Order
- February 2021 – T-Female Sports Equity Focus/Legislation
- March 2021 – Executive Order
- June 2021 – USDE Statements/Press Releases
- June 2021 – SCOTUS cert denial [*Grimm*]



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Legal Legal Developments

- ***Bostock v. Clayton County, GA*** [140 S. Ct. 1731 (2020)]
 - Relates to Title VII and workplace discrimination
 - Court held that discrimination on the basis of sexual orientation and gender identity is discrimination on the basis of sex
- **OCR Letter of Notification** [08.31.20] / re: Title IX applicability of *Bostock*
 - In *Bostock* itself, the Court firmly rejected the idea that its holding would sweep across all statutory or regulatory provisions that prohibit sex discrimination. *Bostock*, 140 S. Ct. at 1753 (“[N]one of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today.”). Thus, *Bostock* does not control the Department’s interpretation of Title IX. **However, with respect to complaints that a school’s action or policy excludes a person from participation in, denies a person the benefits of, or subjects a person to discrimination under an education program or activity, on the basis of sex, the *Bostock* opinion guides OCR’s understanding that discriminating against a person based on their homosexuality or identification as transgender generally involves discrimination on the basis of their biological sex.**



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Executive Orders from Biden Administration

- ***Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity and Sexual Orientation*** [01.20.21]
 - “Children should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or school sports.”
- ***Executive Order Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*** [03.08.21]
 - “Within 100 days of the date of this order, the Secretary of Education, in consultation with the Attorney General, shall review all existing regulations, orders, guidance documents, policies, and other similar agency actions that are or may be inconsistent with [administration policy].”
- “Administration Policy”
 - VERY clear
 - Early Predictions



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The Battle for Headlines

- **New Michigan bill: Divide high school teams based on biological sex**
 - Detroit News, 03.10.21
- **U.S. Department of Education confirms Title IX protects students from discrimination based on sexual orientation and gender identity**
 - USDE Press Release, 06.16.21 / Notice of Interpretation
- **Proposed Title IX Rule Changes Expected May 2022**
 - Inside Higher Ed, 06.24.21 / "consistent with the priorities of the Biden-Harris Administration"
- **Ohio Gov. Mike DeWine: Transgender athlete issue shouldn't be resolved by government**
 - Cincinnati Enquirer, 06.25.21
- **Supreme Court will not hear transgender bathroom rights dispute, a win for Va. Student who sued his school for discrimination**
 - Washington Post, 06.28.21



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Practical Considerations**

- **** = Some Legal Uncertainty; Best Practices based on Info Available**
- Term "transgender" is an adjective; using term as verb ("transgendered") or noun ("transgenders") can be offensive
- Use student's preferred name and pronouns; instruct other staff members to do the same
- Make dress-code guidelines gender neutral; transgender students can dress according to their gender identity as long as it complies with the dress code
- Don't put any requirements on accepting a student's own gender identity; their word is enough
- Allow transgender students to use the restroom (and locker rooms) of the gender of which they identify



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Practical Considerations**

- Allow transgender students to enroll in the PE class of the gender of which they identify
- On overnight field trips, allow transgender students to room with other students of the gender of which they identify
- Play on sports teams of their preferred gender
- Allow students to run for homecoming or prom court of the gender of which they identify
- Student may be eligible for a 504 Plan due to the anxiety, depression or psychological distress; 504 Plan can include student's preferred name and pronoun and appropriate restroom use
- Provide resources to families; gender support plan

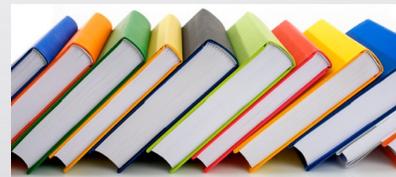


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Resources ...

- [OCR: Resources for LGBTQ Students](#)
- [GLSEN: Educator Resources](#)
- [State BOE Statement and Guidance on Safe and Supportive Learning Environments for LGBTQ Students \(2016\)](#)
- [NSBA Transgender Students in Schools \(2017\)](#)
- [The Trevor Project](#)
- [GLAAD: Transgender Resources](#)



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Questions / Discussion



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47



Thank You!

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48