

TITLE IX OVERVIEW

Scottsboro City Board of Education

Taylor P. Brooks

tpb@lanierford.com

Lanier Ford Shaver & Payne, P.C.

July 19, 2022



What is Title IX?

- Title IX of the Education Amendments Act of 1972 provides that “[n]o 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.”

NOTE: Athletics is not a topic explicitly covered by the text of Title IX’s implementing statute. It is found in the regulations.

What is Title IX?

- In short, Title IX prohibits sex-based discrimination in a school's **educational program or activity** against any person in the United States.
 - Includes any location/events/circumstance where the school had **substantial control** over the context & the alleged perpetrator
- It is equally applicable to STUDENTS and EMPLOYEES.
- Failure to meet Title IX requirements can cause civil liability and loss of federal funding.

Enforcement and Liability

■ **Lawsuits**

- Referral of the violation to the Department of Justice for judicial action
- Private cause of action
- No administrative remedy requirement
- No cap on award

■ **OCR complaint**

- Investigations
- Voluntary compliance-resolution agreements
- Loss of federal funding

What is Sex-Based Discrimination?



What is Sex-Based Discrimination?

- “Sex-based discrimination” includes any harassment or other discrimination based, in any way, on a person’s sex/gender.
- This includes discrimination based on a person’s pregnancy/parenting status. It will likely mean gender identity and sexual orientation – if it does not already.

What is “Sexual Harassment”?

- Includes 3 types of misconduct on the basis of sex:
 1. Any instance of *quid pro quo* harassment by a school employee;
 2. Any unwelcome conduct that a reasonable person would find severe, pervasive **and** objectively offensive such that it effectively denies equal educational access;
 3. Any instance of sexual assault, dating violence, domestic violence, or stalking.

Proposed Changes

- Expands the scope and definition of sex-based harassment.
 - Now, definition includes harassment based on:
 - Sex characteristics;
 - Pregnancy or related conditions;
 - Sexual orientation; and
 - Gender identity.
 - Amends definition of hostile environment.
 - New definition – “sufficiently severe or pervasive that, based on the *totality of the circumstances* and evaluated *subjectively and objectively*, denies or limits a person’s ability to participate in or benefit from the recipient’s education program or activity.”

Overview: Definition of “Sexual Harassment”

- Certain conduct is defined by the **Violence Against Women Act** (34 U.S.C. § 12291(a)) and/or the **Clery Act** (20 U.S.C. § 1092(f)).
 1. **Sexual Assault**: Any sexual act directed against another person, forcibly and/or against that person’s will; or not forcibly or against the person’s will where the victim is incapable of giving consent because of his/her temporary or permanent mental or physical incapacity (or because of his/her youth). This offense includes the forcible rape of both males and females. Sexual assault may include, but is not limited to rape, fondling, incest, and statutory rape.

Overview: Definition of “Sexual Harassment”

- 2. Dating Violence:** Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.

- 3. Domestic Violence:** Violence committed by a current/former spouse of the victim; person with whom the victim share a child in common; person who is cohabitating with or has cohabitated with the victim as spouse; or person similarly situated to a spouse of the victim.

Overview: Definition of “Sexual Harassment”

4. **Stalking**: Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his/her safety or the safety of others; or suffer substantial emotional distress. Stalking may be conducted directly or indirectly and may include, but is not limited to, behaviors such as making unwanted calls or following someone.
5. **Other Sex-Based Discrimination**: Any conduct based on a person’s sex, pregnancy, gender identity, or gender expression that adversely affects a term or condition of that person’s employment, education, or participation in an educational program/activity.

The Grievance Procedure Summarized



Proposed Changes – Big Takeaways

- Amends description of how a school must respond to sex discrimination.
 - Current – requires response when school district has “actual knowledge” of harassment and must respond only in a manner that is “not deliberately indifferent.”
 - How to do this? Follow the grievance procedure
 - New – school district must “take prompt and effective action to end any prohibited sex discrimination that has occurred in its education program or activity, prevent its recurrence, and remedy its effects.”
 - How to do this? We will have to wait and see.

Summary of Grievance Procedure

■ Step 1: Initial Report

- Any person can report an incident that may be sexual harassment or discrimination to you as an employee.
- This “informal reporting” can be in any format.
- You MUST report to Title IX Coordinator.

■ Step 2: Initial Contact with Complainant by Title IX Coordinator

■ Step 3: Formal Complaint submitted to Title IX Coordinator

Proposed Changes – Big Takeaways

- Allows for both written and oral complaints
 - No longer requirement that a formal complaint be filed with signature of complainant.
- Adds new definition for “disciplinary sanctions” that makes clear consequences may only follow a finding that respondent violated the prohibition on sex discrimination/harassment.
- Adds express discretion for larger schools to create both a district-wide Title IX Coordinator and school-level Title IX Coordinators.

Summary of Grievance Procedure

- **Step 4:** Initial Assessment by Title IX Coordinator
- **Step 5:** Written Contact to Parties by Title IX Coordinator
- **Step 6:** Investigator Conducts Investigation

Summary of Grievance Procedure

- **Step 7:** Preliminary Investigative Report by Investigator – This is basically a chance for “cross examination” by the parties.
- **Step 8:** Final Investigative Report by Investigator
- **Step 9:** Final Decision by Title IX Council (aka, decision-makers)

Summary of Grievance Procedure

- **Step 10:** Appeals to Superintendent
- **Step 11:** Imposition of Discipline

Proposed Changes – Big Takeaways

- Adds new section regarding students with disabilities that addresses students with IEPs and 504 Plans.
 - Title IX Coordinator must “consult” with the IEP/504 Team about the student if a complaint is filed.
 - “Consult” is throughout the implementation of the grievance procedure.
 - “Consult” seems most relevant to ensuring any supportive measures are individualized and that there is no conflict between IEP and Title IX outcome.

General Duties Under Title IX



Avoiding Bias

- Implicit vs. Explicit Bias
 - Implicit biases are unconscious biases such as learned stereotypes
 - Cannot be biased against any party generally or specifically
 - Must remain impartial
- Beware of “leanings” toward a particular party at the outset
 - Job is not to advocate for or against any party
 - Title IX requires avoiding snap decisions before an investigation has been conducted
 - If unable to reserve judgment until the end, need to be removed from investigation/decision-making process

Conflicts of Interest

- Notify the Title IX Coordinator of any conflicts – actual or perceived
 - Removal only required for actual conflicts, but advisable for perceived conflicts as well
 - Conflicts can be in favor of or opposed to any party
- *Conflicts are especially likely in complaints involving employees*
 - If necessary, can use outside persons to investigate these types of complaints

Standard of Review

- Preponderance of the Evidence
 - Same standard for students and employees
 - Just “more likely than not” that alleged conduct occurred

- The Investigator bears the burden of proof
 - Complainants and respondents are not required to prove or disprove anything
 - Think of it as a truth-finding exercise

Role of Investigators



Running Investigations (Step 6)

■ Managing Confidentiality

- Parties are permitted to have advisors present during Title IX proceedings
 - Advisors may be friends, family, attorneys, or other trusted individuals
 - These persons MUST be permitted to participate, and thus will potentially see sensitive or otherwise confidential information
- Title IX is to be interpreted to be consistent with FERPA
 - Generally, investigative information MUST be shared with the parties, but they are not permitted to use that information outside the grievance procedure
 - A nondisclosure agreement can be used to ensure confidentiality

Running Investigations (Step 6)

■ Potential Witnesses

- Cannot be forced to provide evidence
- Title IX does not include the right to depose parties or witnesses, nor compel such participation
- Cannot penalize students or employees for their participation or lack thereof

■ Questions from Parties

- Ensure the questions are not unnecessarily adversarial – avoid retraumatizing parties
- Check for relevance to issue at hand and appropriateness
- May need to reword questions before sending to other party

Preliminary Investigative Report (Step 7)

■ Provide all information to both parties

- Parties must be permitted to review and respond to the evidence
- Preliminary report need ONLY outline the allegations & evidence – **include and documents/videos/etc. that you received during the process**
- May be simplest to send and receive information through the Title IX Coordinator

■ Follow up questions

- Once parties have had a chance to review the preliminary report outlining all evidence, the parties may submit written questions or further statements/evidence
- The investigator should submit these questions to the other party – but review them for relevance first
 - Consider rape-shield
 - Need be relevant to complaint
 - Can be reworded so long as gist of question remains intact

Final Investigative Report (Step 8)

■ Draft after reviewing all evidence

- Relevant information and facts
 - Direct observations and reasonable inferences drawn
 - Note consistencies or inconsistencies between sources
 - Credibility assessments of witnesses and evidence
 - May exclude general opinions regarding reputation of parties
 - Include any hard evidence (documents, videos, etc.)
- Provide to Title IX Coordinator for dissemination to parties and decisionmaker
- ***MUST NOT MAKE A RECOMMENDED DECISION***

Role of Decision-Makers



Decision-making (Step 9)

■ Review the Investigator's Final Report

- Follow up with any questions
- Consider the credibility and weight determinations made
- Determine whether the accused student should be found “responsible” based on the totality of the evidence presented in the report

Decision-making (Step 9)

■ Draft a Written “Opinion” for the Parties

- Must include:
 - Findings of fact;
 - Conclusions about whether the alleged conduct occurred;
 - Rationale for the result as to each allegation;
 - The disciplinary sanction, if any, to be imposed on the respondent;
 - Whether additional supportive services will be made available; and
 - Information about filing an appeal.

- Further questions about the process should go through Title IX Coordinator



Role of All Employees



Your Duty Under Title IX

- All K-12 employees are ***MANDATORY*** reporters of any potential incident of sex-based discrimination/harassment under Title IX.
- Your duty is to listen and ***REPORT*** – any time you hear about conduct that potentially violates Title IX you should report it to the Title IX Coordinator.

Regulatory and Administrative Considerations for Athletics



Applicable Regulations

- Title IX is a statute.
- When the government wants to provide clarification or extra details about a statute, it implements regulations.
- Regulations must supplement and not exceed the statute.
- The applicable regulation is:
 - 34 Code of Federal Regulations (C.F.R.) § 106.41

Athletics

“Title IX is implemented with respect to athletic activities by 34 C.F.R. § 106.41. Section 106.41(a) generally provides:

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.”

From Landow v. Sch. Bd. of Brevard Cty., 132 F. Supp. 2d 958, 961 (M.D. Fla. 2000).

Applicable Regulations

In determining whether equal opportunities are available [we] consider, among other factors:

- (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- (2) The provision of equipment and supplies;
- (3) Scheduling of games and practice time;
- (4) Travel and per diem allowance;
- (5) Opportunity to receive coaching and academic tutoring;
- (6) Assignment and compensation of coaches and tutors;
- (7) Provision of locker rooms, practice and competitive facilities;
- (8) Provision of medical and training facilities and services;
- (9) Provision of housing and dining facilities and services;
- (10) Publicity.

Applicable Regulations

- Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section,
- BUT, the government **may consider** the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

Applicable Regulations

- What does that last part mean?
 - Schools don't have to spend the same amount of money on different sports, and there may be times where that makes sense (Volleyball v. Football)
 - **But**, when a claim is made, the enforcement agencies **may consider** the amount of money spent as a potential factor.

Athletics

Unintuitive Aspects

- It makes ZERO DIFFERENCE with respect to Title IX whether the equipment/means/facilities were funded by the school system or some other group.
- The Board cannot justify any disparity by explaining that “the booster club paid for that, not the school.”
- It is irrelevant that the sport of one gender is more popular or generates more revenue.
- It is irrelevant the parents of a certain gender work harder to maintain their facilities.

TITLE IX OVERVIEW

Scottsboro City Board of Education

Taylor P. Brooks

tpb@lanierford.com

Lanier Ford Shaver & Payne, P.C.

July 19, 2022

