Title IX Coordinator and Policymaker Training

Mt. Carmel School District
DATE: 8/15/2024
Presented by: Sharon Montanye/Kalani Linnell

SWEET | STEVENS | KATZ | WILLIAMS

Agenda

- Introduction to Title IX
- Background and Foundational Concepts
- Athletics
- New Regulations
- Tips & Takeaways
- Case Studies

Introduction to Title IX

The Statute

Title IX of the Education Amendments of 1972 is a federal statute that prohibits discrimination on the basis of sex in education programs or activities of recipients of federal assistance including schools entities and tech schools.

The statute says:

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

20 U.S.C. § 1681

The Basics

•Applies to recipients of federal funding for educational programs or activities

- Includes schools, colleges, libraries
- Exempts: sororities, fraternities, Boy Scouts, Girl Scouts
- Has privacy exceptions for separate restrooms, locker rooms, and sleeping quarters so long as facilities are comparable

•Compare with other civil rights laws from that era

- The Equal Pay Act of 1963
- Title VII of the Civil Rights Act of 1964
- Title VI of the Civil Rights Act of 1964

Overarching Concepts to Consider

- Awareness
  - LEAs understanding their obligations
  - Communication to school community about their rights
  - Communication to school community about expectations
- Information
  - Accurate data collection (prevalence of sexual harassment, school climate, engagement rates)
    - Consider an audit by a neutral third party
- Oversight and Enforcement
  - Responding to internal grievance complaints
  - Responding to OCR complaints
  - Responding to litigation
- Enhancement
  - Funneling funding and resources to gender equity initiatives

Impacts

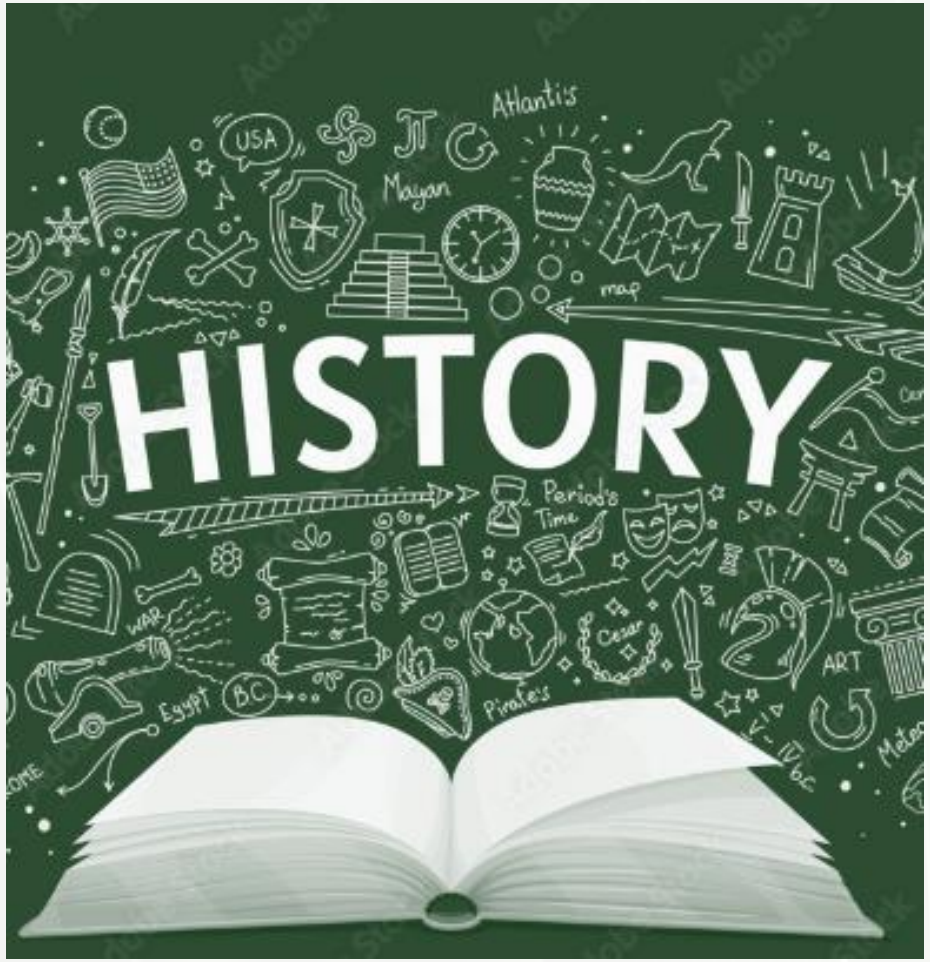
- College Students
  - 1972 → 57% male and 43% female
  - 2021 → 58% female and 42% male
- College Faculty
  - 1970 → less than 1 in 5 faculty were women
  - 2020 → 50.7% of faculty were women
    - But only 22% of leadership positions in top research universities go to women…
- Law school
  - 1972 → 7% of degrees earned by females
  - 2023 → 55.8% of entering class is female
- Medical school
  - 1972 → 9% of degrees earned by females
  - 2023 → 54.6% of total enrollment is female
- Athletics
  - 1972 → 300,000 women and girls played high school and college sports
  - 2022 → 3,238,180 girls in high school and 229,060 NCAA women

What's At Stake?

- **Does v. Pittston Area School District (2023)**
  - Settlement: $6 million
- **Doe v. North Penn School District, Case No. 2:20-cv-05142 (E.D. Pa. 2020)**
  - Settlement: $750,000.00
  - Injunctive relief: district-wide training (including training on student-on-student sexual harassment) to all administrators and employees; providing additional specialized training to Title IX Coordinator; providing age-appropriate, in-school instruction on identifying and reporting sexual harassment; implementing recurring, district-wide climate surveys addressing sexual harassment; and utilizing compliant procedures for reporting, investigating, and tracking sexual harassment.
- **MacLean v. Borough of Hellertown, No. 5:17-cv-02085-LKC (E.D. Pa. 2018)**
  - Settlement: $96,500.00 plus $15,000.00 in tuition for private or parochial school per year for three years
  - Injunctive relief: District must continue anti-bullying program; provide anti-bias training for the next three years; post the Safe Schools report on its website for three years

What's At Stake?

- **Wible v. School District of Philadelphia, No. 15-043169 (Phila. Cty. Ct. of Comm. Pls. 2018)**
  - Settlement: $850,000.00 (reached after receiving $500,000.00 verdict)
- **Hay v. Somerset Area School District, 2017 WL 2829700 (W.D. Pa. 2017)**
  - Settlement: $5 million
- **Evancho, et. al v. Pine-Richland School District, No. 2:16-cv-01537 (W.D. Pa. 2016)**
  - Settlement: $60,000.00 ($20,000.00 to each student)
  - Attorneys fees: $75,000.00
  - Injunctive relief: District must rescind its exclusionary bathroom policy and update its non-discrimination policy to include gender identity
- **Bittenbender v. Bangor Area School District, No. 5:15-cv-06465 (E.D. Pa. 2015)**
  - Settlement: $45,000.00
- **D.S.B. v. Pittsburgh Public Schools, No. 13-CV-1129-JFC (W.D. Pa. 2014)**
  - Settlement: $40,000 in education funds (two plaintiffs)
  - Attorneys fees: $25,000.00



Background & Foundational Concepts

Areas of Impact

- Harassment and assault on the basis of sex
- Pregnant and parenting students
- Transgender access
- Students with disabilities
- Athletics
- STEM Education
- Career and Technical Education
- Dress codes
- Access to resources, programs, or activities
- Staff on student sexual incidents (e.g., statutory rape and corruption of a minor)
- Employee sexual relationships, consensual and nonconsensual
- Bullying on the basis of sex
- Retaliation against an individual who has asserted Title IX rights or participated in a Title IX process
- Off-campus conduct that has an on-campus effect

Purpose

- To provide equal opportunities to female students and professors in the face of exclusionary practices and policies by targeting explicit discrimination
  - Examples: (1) earlier curfews on college campuses for women; (2) only allowing boys to be crossing guards in K-12 schools; (3) not permitting women in medical school (or filling a very low quota)
- The first regulations prohibited discrimination in admissions, recruitment, scholarship awards and tuition assistance, housing, access to courses and other academic offerings, counseling, financial assistance, employment assistance to students, health insurance benefits and services, athletics, and all aspects of education-related employment

Sports

•In 1975, schools and colleges given three years to comply with the mandate that discrimination between sexes in sports is a Title IX violation

•In 1979, a Policy Interpretation was issued and a subsequent clarification of that guidance was published in 1996.

•Compliance standards

- Athletic scholarships “should be available on a substantially proportional basis to the number of male and female participants in the institution's athletic program.”
- Male and female athletes should receive “equivalent treatment, benefits, and opportunities” in the following areas: equipment and supplies, games and practice times, travel and per diem, coaching and academic tutoring, assignment and compensation of coaches and tutors, locker rooms and practice and competitive facilities, medical and training facilities, housing and dining facilities, publicity, recruitment, and support services.
- Must address the interests of male and female students alike, and such interests must be equally and effectively accommodated.

Sports, cont.

•The last compliance standard: Must address the interests of male and female students alike, and such interests must be equally and effectively accommodated.

•Factors to consider:

- The determination of athletic interests and abilities of students
- The selection of sports offered
- The levels of competition available, including the opportunity for team competition

•Three part test

- Whether intercollegiate level participation opportunities for male and female students are provided in number substantially proportionate to their respective enrollments;
- Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion, which is demonstrably responsive to the developing interest and abilities of the members of that sex;
- Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program

Cannon v. University of Chicago, 441 U.S. 677 (1979)

- First case to establish that an implied right of action exists under Title IX such that an individual may bring a court case of intentional discriminatory violations

Grove City v. Bell, 455 U.S. 555 (1984)

- Even if a college rejects federal funding, the fact that its students receive funding through Department of Education programs binds them to Title IX obligations as indirect recipients of federal funding; however, the decision only applied to financial aid and admissions offices and did not apply to the entire institution.
- The Civil Rights Restoration Act of 1988 clarified that the entire institution is covered when any part of it receives federal financial assistance

Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992)

- Teacher resignation conditioned on dropping all charges and closing investigation against him.

- Held that money damages are available under Title IX for intentional discrimination.
    - Knowledge and this type of action – refusing to respond on the complainant's rights – constitutes intentional discrimination

- But see Cummings v. Premier Rehab Keller, --- S. Ct. --- (April 28, 2022) in which SCOTUS held that emotional distress damages are not available under Section 504, a different spending clause law

Meritor Savings Bank v. Vinson, 477 U.S. 57 (1984)

- Supreme Court recognition of the term “sexual harassment,” which was likely coined in 1975
  - “The gravamen of any sexual harassment claim is that the alleged sexual advances were ‘unwelcome’” and to be actionable, it must be “severe or pervasive”
  - Case was decided under Title VII of the Civil Rights Act of 1964 for creating a hostile or abusive work environment

Gebser v. Lago Vista Independent Sch. Dist., 524 U.S. 274 (1998)

- "The issue in this case, however, is whether the independent misconduct of a teacher is attributable to the school district that employs him under a specific federal statute designed primarily to prevent recipients of federal financial assistance from using the funds in a discriminatory manner."

- Where only the offender knows, actual knowledge not imputed onto the school district.

- Held: Damages may be recovered by a student for sexual harassment where an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct.

Davis v. Monroe County Bd. of Ed., 526 U.S. 629 (1999)

- Held: Damages may be recovered by a student for peer-on-peer sexual harassment where the district had actual knowledge of the peer-on-peer sexual harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity to benefit, and the district was deliberately indifferent in its response to that knowledge.
    - "simple acts of teasing and name-calling among school children" would not be judicially actionable under this standard
- Conduct at issue: sexually suggestive comments; physically rubbing his body against hers in the hallway; acting in a sexually suggestive manner during gym class.
- The conduct was reported to teachers by student and parent. It took three months to change seats in class to be separated from each other.
- The harassment stopped when the peer was eventually arrested for sexual battery of the student.

Administrative Enforcement

•1980: Department of Education established and Office for Civil Rights given oversight of Title IX enforcement

•OCR enforces statutes by investigating complaints, conducting compliance reviews, and publishing technical assistance

- An institution found to violate Title IX must be given an opportunity to voluntarily remedy the violation by taking corrective action
- OCR must seek this voluntary resolution. If an institution fails to voluntarily comply, OCR may:
  - Initiate administrative procedures to terminate federal funding; or
  - Refer the case to the department of Justice to pursue in Court

Judicial Enforcement

An implied private right of action exists under Title IX such that an individual may bring a court case for intentional discriminatory violations

- "Intentional" requires "actual knowledge" of the discriminatory conduct
- Must be severe, and pervasive, and objectively offensive, which is a higher bar than what falls under administrative enforcement and LEA response requirements

Athletics

"Jason, I'd like to let you play, but soccer is a girls' game."

Athletics (Original Regulations)

Program requirements:

- Provide equal opportunities for female and male students to be athletes
    - Three-pronged test
- Provide equitable treatment of participants in the overall girls' program as compared to the overall boys' program

Factors considered by OCR in reviewing Title IX issues in athletics include equal access to:

- Equipment and supplies;
- Medical services and training facilities;
- Locker rooms, practice and competitive facilities;
- Assignment and compensation of coaches; and
- Game and practice times.

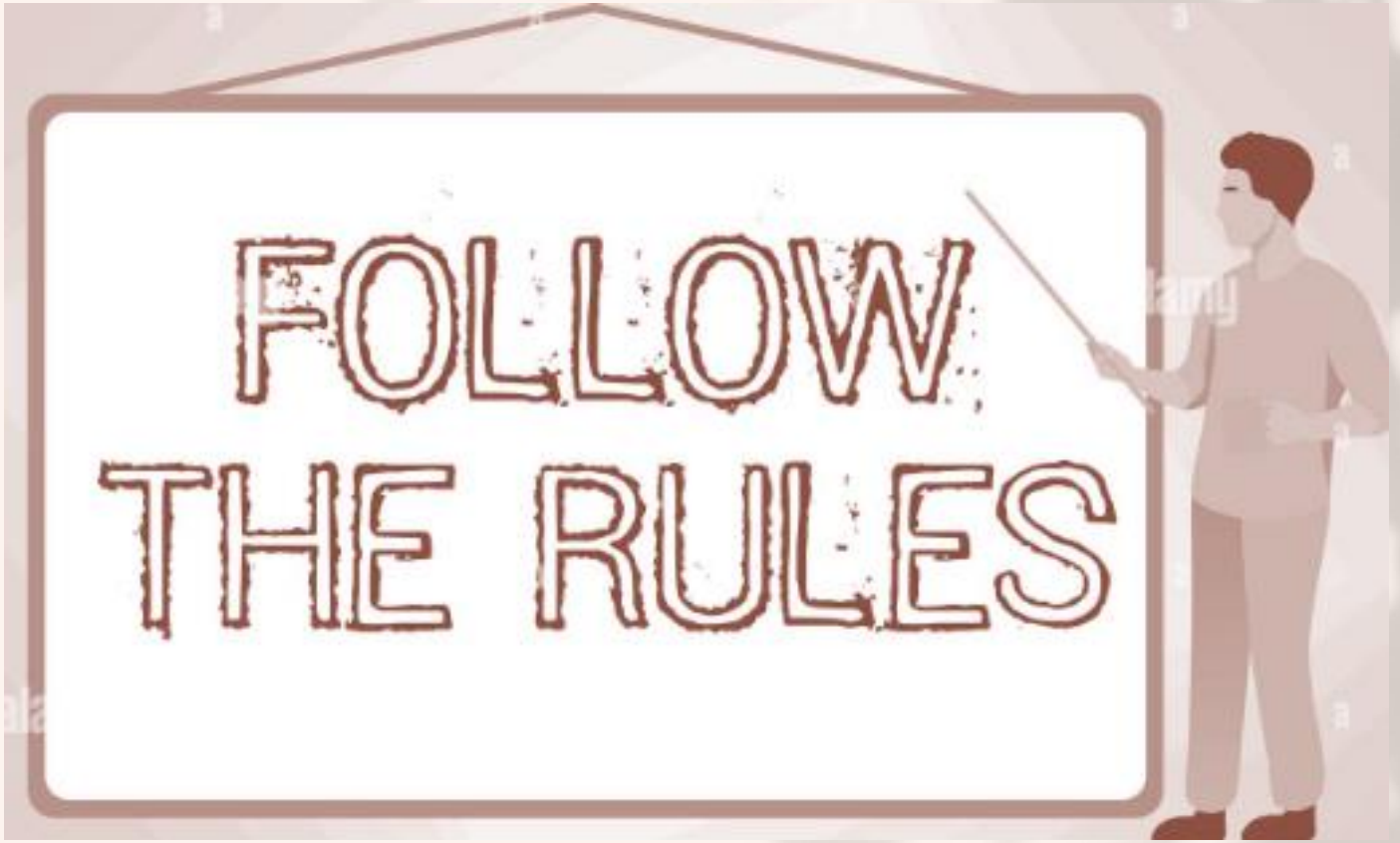
Athletics, Cont.

Proposed Athletics Regulations (not part of the regulations to be implemented in August 2024)

- Prohibits "blanket" exclusion policies
- Promotes an individualized approach to determine whether it's permissible to limit or deny a student's eligibility to participate on a team consistent with gender identity
- Policy should set forth criteria
  - Consider the sport, level of competition, and grade or education level
  - Criteria must be substantially related to the achievement of an important educational objective AND minimize harm to students whose opportunity to participate on a team consistent with their gender identity would be limited or denied

Case to watch: *Soule v. Connecticut Association of Schools*, No. 21-1365-cv, in which cis-gender girls are alleging that permitting transgender girls on the same team violates Title IX.

New Regulations



Key Concepts

Discrimination on the basis of sex

- Umbrella term
- **"Sex"** definition includes transgender/gender-identity, parenting, and pregnant students

For limited occasions of separation or different treatment on the basis of sex, must ensure no more than de minimis harm to the person impacted

Sex-based Harassment

- Previously called "sexual harassment"
- Distinguishes between "sexual harassment" which must be of a sexual nature and other conduct that may or may not be sexual but is based on sex

Includes three defined categories of conduct

Unfair treatment on the basis of sex

- Disparate treatment
- Disparate impact

Retaliation for engaging in activity protected by Title IX

- Example: participating in the Title IX grievance process

Under Title IX…

- Discipline is prohibited unless the **full process** has been followed and a finding has been made that the respondent is responsible for violating the policy prohibiting discrimination on the basis of sex (finding occurs at the conclusion of the process)
- Remedies
  - Must be designed to restore or preserve complainant's equal access to the education program or activity
  - Need not be non-disciplinary or non-punitive, need not avoid burdening respondent
  - May include the same services as provided when offering supportive measures

Sex-Based Harassment

- **"Sex-based harassment"** is a form of sex discrimination and means sexual harassment and other harassment on the basis of sex that falls into one of the following categories:
  - Quid Pro Quo
  - Hostile Environment Harassment
  - Specific Offenses

- **Some sexualized conduct is developmentally appropriate from children**
  - Examples: exploring physical and verbal boundaries, exploring aspects of their identity like their own sexuality and gender identity, experimenting with sexual conduct, asking questions

Quid Pro Quo

- Latin for “this for that”
- “An employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient’s education program or activity explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person’s participation in unwelcome sexual conduct”

Hostile Environment Harassment

- "**Unwelcome** sex-based conduct that, based on the totality of the circumstances, is **subjectively** and **objectively offensive** and is **so severe or pervasive** that it **limits or denies** a person's ability to participate in or benefit from the recipient's education program or activity (i.e., creates a hostile environment).
- Whether a hostile environment has been created is a fact- specific inquiry that includes consideration of the following:
  - The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;
  - The type, frequency, and duration of the conduct;
  - The parties' ages, roles within the recipient's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct;
  - The location of the conduct and the context in which the conduct occurred;
  - Other sex-based harassment in the recipient's education program or activity."

Hostile Environment Harassment

- Conduct that is unwelcome as well as sex-based, and that has an impact far greater than being bothersome or merely offensive.
- Covers “acts of verbal, nonverbal, or physical aggression, intimidation, or hostility” and “could occur online or in person”

Hostile Environment Harassment

- "isolated comments would generally not meet the definition of hostile environment sex-based harassment."
  - "one stray remark does not satisfy the level of pervasiveness to which the regulations refer"
  - "a statement of one's point of view on an issue of debate and with which another person disagrees, even strongly so, is not the kind or degree of conduct that implicates the regulations"
- Severity OR Pervasiveness
  - One instance can be so severe that it rises to the level of sex-based harassment without pervasiveness
  - Where minor conduct is so pervasive as to limit or deny participation, conduct does not have to be severe
  - "pervasiveness can also be found if there is a pattern or practice of harassment, as well as if the harassment is sustained and nontrivial

Hostile Environment Harassment

- Subjective judged from the perspective of the Complainant.
  - Evidence to support subjectiveness includes but is not limited to "the complainant's own statements about the alleged conduct or other sources that could establish the complainant's experience of the alleged conduct."
  - "Subjective offensiveness must be supported by evidence, and subjective offensiveness alone would not support a finding or discipline"
  - "Whether the complainant subjectively found the conduct offensive or abusive is commonly understood as an important element of hostile environment harassment"
- " the objective standard is assessed from the perspective of a reasonable person in the complainant's position."
- "the legal standard is not whether or not conduct is subjectively "annoying" or "immature.""

Hostile Environment Harassment

- Sending flowers once might be sex-based but would not be pervasive
- "… a student who reports that his peers repeatedly denigrated him as "girly" over a period of weeks… In this example, if one peer made a one-off remark calling the student "girly," that alone may not be severe or pervasive enough to create a hostile environment, but if multiple peers repeatedly call the student "girly," then that same treatment may create a hostile environment for that student."

Hostile Environment Harassment

- " Online harassment can include, but is not limited to, unwelcome conduct on social media platforms such as sex- based derogatory name-calling, the nonconsensual distribution of intimate images (including authentic images and images that have been altered or generated by artificial intelligence (AI) technologies), cyberstalking, sending sex-based pictures or cartoons, and other sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity"

“Unwelcomeness” and Consent

- Will you include a definition of “consent” in your policy?

- Means: an agreement between individuals with capacity to engage in sexual conduct which is affirmative, conscious, voluntary, and revocable.
  - Nuances should be clearly explained in definition
- Agreement between those with capacity to engage in sexual conduct
  - Ethical sexual conduct requires consideration of ability to leave a situation, coercion, trust, safety, broader social support, standing in the community
- Factors to consider
  - Lack of wantedness;
  - Use of threats or coercion;
  - Incapacitation;
  - Use of force;
  - Developmental age/ability to comprehend wantedness.

“Unwelcomeness” and Consent

- Verbal, explicit, affirmative consent is the gold standard but is unrealistic
  - Gray areas and miscommunication are abundant and expected
    - Non-verbal and indirect communication is typical
    - Problems with consent communication result in unintended sexual harm
    - Following sexual scripts, which are shaped by gender norms and expectations
    - Age and exposure play a factor
  - Lack of protest, lack of resistance, or silence do not, alone, constitute consent
- Affirmative consent must be ongoing for every sexual act and can be revoked at any time during sexual activity.
  - Consent should be requested and given several times by multiple parties during a sexual encounter involving multiple acts.
- Past relationships or sexual history do not indicate ongoing consent, nor should subsequent sexual relations or a dating relationship alone suffice to prove consent for past conduct

“Unwelcomeness” and Consent

- Mistaken belief
  - From the standpoint of a reasonable person, would consent be inferred?
  - From the standpoint of the respondent, was the belief of consent a sincerely held belief?
- Incapacity: an incapacitated person cannot provide consent
  - Age or disability can result incapacity to consent.
  - An incapacitated individual is someone who cannot make rational, reasonable decisions because they lack the capacity to understand the “who, what, when, where, why, or how” of a sexual interaction.
  - This includes a person whose incapacity results from disability, sleep, involuntary physical restraint, unconsciousness, use of alcohol or other drugs.

Specific Offenses

- **Sexual assault** meaning an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation;
- **Dating violence** meaning violence committed by a person
  - Who is or has been in a social relationship of a romantic or intimate nature with the victim; and
  - Where the existence of such a relationship shall be determined based on a consideration of the following factors:
    - The length of the relationship;
    - The type of relationship; and
    - The frequency of interaction between the persons involved in the relationship.

Specific Offenses

- **Domestic Violence** meaning felony or misdemeanor crimes committed by a person who:
  - Is a current or former spouse or intimate partner of the victim under the family or domestic violence laws of the jurisdiction of the recipient, or a person similarly situated to a spouse of the victim;
  - Is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner;
  - Shares a child in common with the victim; or
  - Commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction.
- **Stalking** meaning engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
  - Fear for the person's safety or the safety of others; or
  - Suffer substantial emotional distress

Title IX Coordinator

- One person must be designated as the ultimate coordinator of all things Title IX
  - Can have building level coordinators as well, but must designate just one person to "retain ultimate oversight"
  - Makes the first decision about whether the alleged conduct even **could** constitute sex discrimination under Title IX. If not, can dismiss the complaint.
- Must monitor barriers to reporting of sex discrimination and address those barriers
- Has record-keeping responsibilities
  - Must keep, for 7 years, records documenting:
    - The grievance procedures or informal resolution process for each complaint of sex discrimination
    - The actions the school took in response to each notification the Title IX Coordinator receives about conduct that reasonably may constitute sex discrimination
    - All materials used to provide training, which must be made available for inspection to any member of the public upon request

Title IX Coordinator, Cont.

- Must treat the complainant and respondent equitably;
- Must offer and coordinate supportive measures for the complainant;
- If grievance procedures have been initiated or an informal resolution process has been offered to a respondent, then must offer and coordinate supportive measures for the respondent;
- Notify complainant, or if complainant is unknown then the person who reported the conduct, of the grievance procedures and the informal resolution process;
- If complaint is made, notify respondent of grievance procedures and the informal resolution process if available and appropriate (if complainant has rejected the idea, then no longer required to make that available to respondent).

Title IX Coordinator, Cont.

Title IX coordinator may unilaterally initiate the grievance procedures after considering the following factors:

- The complainant's request not to proceed with initiation of a complaint;
- The complainant's reasonable safety concerns regarding initiation of a complaint;
- The risk that additional acts of sex discrimination would occur if a complaint is not initiated;
- The severity of the alleged sex discrimination, including whether the discrimination, if established, would require the removal of a respondent from campus or imposition of another disciplinary sanction to end the discrimination and prevent its recurrence;
- The age and relationship of the parties, including whether the respondent is an employee of the recipient;
- The scope of the alleged sex discrimination, including information suggesting a pattern, ongoing sex discrimination, or sex discrimination alleged to have impacted multiple individuals;
- The availability of evidence to assist a decisionmaker in determining whether sex discrimination occurred
- Whether the school could end the alleged sex discrimination and prevent its recurrence without initiating the grievance procedures

Title IX Coordinator, Cont.

- After considering those factors and any other relevant information, the Title IX Coordinator may unilaterally initiate a complaint where:
    - the conduct as alleged presents an imminent and serious threat to the health or safety of the complainant or other person, or that the conduct as alleged prevents the school from ensuring equal access on the basis of sex to its education program or activity
- If unilaterally initiating the complaint, notify the complainant prior to doing so and appropriately address reasonable concerns about the complainant's safety or the safety of others, including by providing supportive measures
- Regardless of whether a complaint is initiated, take other appropriate prompt and effective steps, in addition to steps necessary to effectuate the remedies provided to an individual complainant, if any, to ensure that sex discrimination does not continue or recur within the recipient's education program or activity

Title IX Coordinator, Cont.

- Title IX Coordinator may dismiss the complaint, according to the policy.

- Permissible reasons for dismissal:
  - The allegations, even if proven, would not constitute sex discrimination;
    - CAUTION!
  - The respondent is unidentified (after taking reasonable steps);
  - The complainant voluntarily withdraws the some or all allegations and the Title IX Coordinator determines that, without the complainant's withdrawn allegations, even if true, would not constitute sex discrimination; or
  - The respondent is not participating in the LEA's education program or activity and is not employed by the LEA.
    - CAUTION!

Responsibilities of All k-12 Employees

Must notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination

- Should tell Title IX Coordinator, who would then tell principal as part of initial report processing
- If in policy, can tell principal, who would then tell Title IX Coordinator
  - Principal should keep reporting employee copied on emails as the Title IX Coordinator will need to access the reporter
- Do not have to tell principal if principal is respondent
  - Go right to Title IX Coordinator
- Do not have to tell Title IX Coordinator if T9C is respondent
  - Go right to District leadership/cabinet

How will you ensure that all employees know to report?

Investigations

Policy must provide for “adequate, reliable, and impartial investigation”

The school has the burden to gather sufficient evidence to determine whether sex discrimination occurred

Review evidence and make relevance and impermissibility determinations

Investigative Goals

Fair, reliable conclusion, which is part of a larger reasonable response requirement.

Educate students how to better understand how their decisions can affect themselves and their community (reflection, additional follow-up, and accountability).

Consistent process.

Provide opportunities to learn, reflect, and grow.

Make space for students, staff, and members of the school community to ask questions, address allegations of misconduct, and voice concerns.

Permissible and Relevant Evidence

- Requirement of objectivity for evaluation of all relevant evidence, including both inculpatory and exculpatory evidence
- Impermissible evidence: evidence that must not be accessed or considered except by the school to determine if an exception applies, must not be disclosed, must not otherwise be used
- Must exclude the following types of evidence and questions seeking that evidence, whether or not it is relevant:
  - Privileged evidence (defined by Federal or state law)
  - Party's or witness's records that are made or maintained by a physician, psychologist, or other recognized professional in connection with the provision of treatment to the party or witness, unless consent is given;
  - Evidence relating to complainant's sexual interests or prior sexual conduct
    - Except if offered to prove e that someone other than the respondent committed the alleged conduct or is evidence about specific incidents of the complainant's prior sexual conduct with the respondent that is offered to prove consent to the alleged sex-based harassment
- Note that prior consensual sexual conduct between the complainant and respondent does not by itself demonstrate or imply the complainant's consent to the alleged sex-based harassment or preclude determination that sex-based harassment occurred

Access to Evidence

Each party has an equal opportunity to access all relevant and not otherwise impermissible evidence:

- Can be a description of the evidence, but if only a description must further provide the parties with an equal opportunity to access it upon request

Each party is given a reasonable opportunity to respond to the evidence or description of evidence

School must take reasonable steps to prevent and address the parties' unauthorized disclosure of information and evidence (if obtained solely through the grievance procedures)

Credibility of Parties and Witnesses

- Policy must have a process allowing the decisionmaker to question parties and witnesses to adequately assess that person's credibility
  - only to the extent that credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination
- Brief explanations about credibility of witnesses will resolve conflicting versions of events
- Make observations about credibility, but try to present information as objectively as possible

Elements of Credibility and Reliability

- Whether witness has an interest in the outcome of the case
- Whether testimony is based on personal experience/knowledge (as opposed to rumor, hearsay, or innuendo)
- Whether the information is conclusory or supported by extraneous facts
- Whether the witness's version of events is plausible
- Whether the witness's demeanor is confident or withdrawn
- Whether there is corroboration with documents or other witnesses
- Whether there is a past record of wrongdoing, lying, or inappropriate behavior (caution!)

Determinations/Decisions

- Policy must announce the standard of proof
  - Likely "preponderance of the evidence" meaning that a fact in dispute is more likely than not to be true
- Decisionmaker must evaluate relevant and not otherwise impermissible evidence for its persuasiveness
  - "if the decisionmaker is not persuaded under the applicable standard by the evidence that sex discrimination occurred, whatever the quantity of the evidence is, the decisionmaker must not determine that sex discrimination occurred"
- Notify parties in writing of the outcome, including rationale for the determination
  - Determination letter also summarizes investigation – one report (single-investigator model)
- Notify parties in writing of the procedures and permissible basis for appeal

After a Determination that Discrimination Occurred

- Title IX Coordinator coordinates:
  - the provision and implementation of remedies to a complainant or others identified as having equal access to the school's programs or activities limited or denied by sex discrimination;
  - Imposition of any disciplinary sanctions on a respondent, including notification to the complainant of any disciplinary sanctions
    - Exception to FERPA
  - Appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the school's activity or program
- "Not discipline a party, witness, or others participating in a recipient's grievance procedures for making a false statement or for engaging in consensual sexual conduct based solely on the recipient's determination whether sex discrimination occurred."

Appeals

- Parties must be able to appeal an initial decision by T9C to dismiss complaint as not alleging conduct that would constitute sex discrimination under Title IX
- Must offer an appeal process that is the same as offered in all other comparable proceedings, including proceedings related to other discrimination complaints

Exceptions to the Full Procedure

- Informal Resolution
- Emergency Removal

Informal Resolution

- Optional to offer an informal resolution
  - Title IX Coordinator still has the responsibility to take other appropriate prompt and effective steps to ensure the sex discrimination does not continue or recur
- Person facilitating informal resolution must be different than investigator or decisionmaker
- There may be circumstances where informal resolution is inappropriate, and the school retains discretion to decline to offer informal resolution despite one or both parties' request
- School must not pressure or require the parties to engage in informal resolution, including by conditioning waiver of the right to an investigation and determination as a condition of enrollment or exercise of any right
  - Must obtain parties' voluntary consent

Informal Resolution

- Prior to informal resolution, must provide parties notice – best practice is written– that explains:
  - The allegations;
  - The requirements of the informal resolution process;
  - That, prior to agreeing to a resolution, either party has the right to withdraw and to initiate or resume the grievance procedures;
  - That the parties' agreement to a resolution at the conclusion of the informal resolution process would preclude the parties from initiating or resuming grievance procedures arising from the same allegations;
  - What terms could be included;
  - How or whether the school could disclose information from the informal resolution process during the grievance procedures, if initiated.

Informal Resolution

- Terms that can be included in an informal resolution agreement include but are not limited to:
  - Restrictions on contact; and
  - Restrictions on the respondent's participation in one or more of the school's programs or activities or attendance at specific events including restrictions the school could have imposed as remedies or disciplinary sanctions
- Must have **rules** for informal resolution
  - Facilitators must be trained on these rules

Emergency Removal

- Exception to the general rule that discipline cannot be instituted prior to full process
- Only applicable:
  - Emergency situations, and
  - Where there is a serious and imminent threat to health or safety of the Complainant or any other person
    - This differs from the 2020 regulations in that the 2020 regulations required a threat to physical health or safety
- Only instituted after an individualized safety and risk analysis
- Must provide the respondent with notice and an opportunity to challenge the removal decision immediately following the removal
- Note that Pennsylvania school exclusion rules and IDEA discipline rules regarding change of placement still apply!

FERPA

- If there is a direct conflict between FERPA and Title IX, “such that enforcing FERPA would interfere with Title IX’s primary purpose to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions.”
  - “a recipient must not use FERPA as a shield from compliance with Title IX”

“ a recipient must not redact information or evidence that is relevant to the allegations of sex discrimination and not otherwise impermissible because such redaction would infringe on the right of the parties to receive access to the relevant and not otherwise impermissible evidence, as well as on the parties’ due process rights”

Pregnancy and Parenting

- Policy requirement & Anti-discrimination mandate
- Reporting requirement
  - All employees must know to report a pregnancy to the Title IX Coordinator UNLESS they reasonably believe the Title IX Coordinator knows
- Title IX Coordinator must offer accommodations
- Accommodations
  - Lactation space
  - Reasonably accommodations
  - Leaves of absence

Tips and Takeaways

Major Takeaway

Discipline is PROHIBITED until after the completion of the grievance procedure and a finding that the respondent is responsible for violating the policy prohibiting sex discrimination.

Documentation

- Policy itself
- Report form attached to policy
- Internal tracking system for Title IX Coordinator
  - System to track intake, track reports that turn into complaints, reports that stay as reports, and the disposition of any report
- Checklist for Title IX Personnel to implement policy
- Sample determination reports that summarize investigation and decision, as well as recommend remedies

Best Practices

- Gender Accommodation Plans to memorialize gender accommodations
  - Pros: verifies commitment to expressed gender; helps identify any need for referral for special education evaluation if showing symptoms of gender dysphoria; clarifies expectations for all stakeholders (parents, student, teachers, administrators); follows them from building to building and throughout activities
  - Cons: “outing” the student to parents and teachers; confidentiality within the building; administrative burden
- Accessible reporting form– Can a school-aged child fill it out? How much assistance would be needed? Who is available to assist?
- Prevention and climate
  - Consider climate surveys to keep an eye out for changes in real or perceived discrimination, fairness of processes, ease of reporting
  - Consider comprehensive sex education that explicitly discusses consent and sexuality
  - Foster an environment where adults and students are supported in their decisions to intervene or correct sexually inappropriate behavior (bystanders)

Staffing Considerations

- Have your pool of Title IX Personnel ready to go at a moment's notice
  - Title IX Coordinator may fulfill every role except informal resolution facilitator and appeals decision-maker
  - Investigator and decision-maker can be the same person
    - Best practice in severe or litigious cases, however, is to separate the roles to avoid the appearance of bias or impropriety
- Recommendation:
  - Director of Safety/Director of Pupil Services/High level administrator with student contact = Title IX Coordinator
  - Director of Pupil Services/Guidance Counselor/Principal/Dean of Students = Informal Resolution Facilitator
  - Principals/Dean of Students/Professional = Investigators
  - Principals/Assistant superintendent/Human Resources/Professional/Attorney = Decision-Maker
  - Superintendent/Professional/Attorney = Appeals Decision-Maker
- When to use a professional or attorney?
  - Litigious or threats of litigation
  - Severe allegations, consent issues, close call
  - Appearance of conflict of interest or bias
  - When something just doesn't sit right about using internal staff

Training Considerations

Consider audience: Who needs what?

- Annually - Title IX Coordinator requires training specific to T9C duties under the regulations, board policy and implementation, and record keeping systems
- Annually - Title IX Personnel require training on bias, sex-stereptypes, conflict of interest, and intricacies of the grievance process
    - T9C, Informal Resolution Facilitator, Investigators, Decision-Makers, Appeal Decision-Makers
- Annually - Teachers, coaches, guidance counselors, paraprofessionals, café workers, security guards, bus drivers require training on identification, reporting avenues, and have a working knowledge of the grievance process
- Best Practice - Students and their families require training on their rights, district-wide expectations for behavior, and how to access the grievance process

Vet your trainers! Generic training on the regulations only – without tying it to board policy– is not enough

Action Items

1. Create a compliant policy, easy to use report form, rules for informal resolutions
2. Appoint and train Title IX Coordinator and, if necessary, deputy coordinators at the building level (annual)
3. Train pool of Title IX Personnel, likely principals, deans, administrators at the building level (annual)
4. As needed, train special education supervisors and director (process), Athletic Director (athletics), and social workers (harassment and pregnancy)
5. Inform all employees of recognition and reporting obligations (annual)
6. Inform school community of expectations, consequences, and avenues for reporting
7. Create internal forms for tracking incidents, checklists, sample reports/sentence starters

Case Studies

[LEA Redacted], No. 21128-18-19 (June 3, 2019) (Ford, H.O.)

- Student, who displayed sexually inappropriate behaviors at school, was referred to a "trusted adult" (a Dean of Students) for resolving incidents
  - Student had 76 documented behavioral incidents that year, down from 84 the year before
  - HO found that the District should have known that sending to the Dean wasn't effective
  - District never looked at outside placements. Never revised PBSP. Just kept letting the incidents happen.
  - Parents alleged deliberate indifference under Section 504
- The Dean groomed student and, eventually, sexually assaulted the student
- As a result of the sexual assault, the District offered to find a private placement that would accept student. While applications were pending, would offer parent's preferred placement (homebound, a different campus, 1:1 instruction at school, shortened school day)
  - The District was offering private placement on account of the sexual assault and not to meet the student's IDEA covered special education needs
- The Hearing Officer found no nexus between the proposed private school placement and the student's special education needs. Therefore, there was no deliberate indifference.

In re: Chatham County Sch. Dist., 119 LRP 28556 (Georgia State Ed. Agency March 25, 2019)

- •Student with impulse control educational needs threatened rape, ranked students based on their attractiveness, groped and physically impeded another student's personal space
  - Conduct was found not to be a manifestation of student's disability and student was suspended
- •The District successfully argued that the "conduct was based on 'choice behaviors' that involved planning and forethought…Specifically…[Student] is often around females at church or at youth group and has no issues, which suggests that he controls himself in some contexts, while acting out in others."

L.K.M. v. Bethel Sch. Dist., 121 LRP 217 (W.D. Wa. 2021)

- District's focus on consent exposed it to liability under equal protection principles.
- Student with a disability was unable to communicate her objection to sexualized touching and was disciplined for engaging in lewd conduct.

Greensburg Salem Sch. Dist., No. 19230-16-17, 118 LRP 20990 (Feb. 15, 2018) (Skidmore, H.O.)

- An identified student reported being sexually assaulted by a peer. Student's anxiety increased after the incident, and student stopped attending school. Parent, through counsel, informed the district that Student would not attend until the peer-on-peer harassment and student's resulting anxiety were addressed.
- The District did not re-evaluate the student despite knowing about the newly manifested anxiety after student made the disclosure about sexual assault.
- "This hearing officer concludes that the District had not only the authority but the obligation to take action to correct the discrimination against Student, and that its lack of an appropriate response amounted to a deliberate choice under the law."

J.C. v. Greensburg-Salem Sch. Dist., No. 18-1683, 2019 WL 3845749 (W.D. Pa. Aug. 15, 2019)

Administrative exhaustion of Title IX claim was not required because "a school's duty to provide a FAPE under the IDEA is generally not the basis on which a school's duty to respond to harassment arises."

Jones v. Indiana Area Sch. Dist., 397 F. Supp.2d 628 (W.D. Pa. 2005)

- Identified student was allegedly harassing a non-identified peer and district failed to respond appropriately.
- It took years for the District to assign an aide to the identified student and arranged alternate transportation for student.
- The IEP was modified to include a behavior plan after four years of harassment.

A.T. v. Oley Valley Sch. Dist., No. 17-4983, 2021 WL 5792965 (E.D. Pa. Dec. 7, 2021)

- Summary judgment denied on Title IX and Section 504 claims where student was harassed and bullied at school by numerous peers after an out-of-school sexual assault
- Student developed psychiatric needs after sexual assault and, after one PTE was not returned, eventually evaluated the student and found her eligible for special education
- Student was threatened with discipline from an incident involving substance abuse without a manifestation determination. A functional behavioral assessment was never completed.
- Student transferred out of District to a neighboring district
- Student "requires emotional supports to help her cope with anxiety and distractibility that impedes her academic progress. She would benefit from a small-group, highly-structured therapeutic setting with an academic curriculum at the college preparatory and honors level." However, the district provided only itinerant emotional support and removed her from a therapeutic placement to move her back into the district, which could not provide full-time emotional support.

Steckelberg v. Chamberlain Sch. Dist., 122 LRP 45919 (D.S.D. Nov. 30, 2022)

- District denied student with sexualized behaviors a FAPE when it failed to include supports for addressing the student's behavior in the IEP and failing to fund an appropriate placement when student's home placement wasn't successful
- Out-of-state therapeutic placement was appropriate given student's challenging behavioral needs

Spruill v. Sch. Dist. of Phila., 569 F. Supp.3d 253 (E.D. Pa. 2021)

- Identified student was bullied every day by students who called him homophobic slurs.
- Student took his own life after years of sustained harassment.
- Parent successfully argued that "by failing to implement [student's] IEP and/or develop a plan to keep him safe in school, the School District denied him access to its educational programs and activities."

S.S. v. Raytown Quality Sch. Dist., 121 LRP 100 (W.D. Mo. 2021)

- Student's IEP called for a one-to-one at all times. On a field trip to the zoo, the paraprofessional failed to accompany Student to the restroom.
- Student was sexually assaulted by a classmate.
- The District had prior knowledge of the other student's sexualized conduct.
- "The District's deliberate indifference in failing to supervise Plaintiff and the other student made Plaintiff more vulnerable to, subjected him to, and caused him to undergo harassment by another student."

Cianciotto Cianciotto v. New York City Dept. of Ed., 2022 WL 1294788 (S.D.N.Y. April 22, 2022)

- The Court found that “the facts alleged make out a textbook case of deliberate indifference”
- Parents were told that sex-based bullying was not a topic of conversation for an IEP meeting
- District did not act to keep student safe from future incidents despite being on notice

In re: Sacramento City Unified Sch. Dist., 122 LRP 40101 (California State Ed. Agency Sept. 22, 2022)

- Student targeted female LGBTQ classmates among other troubling behaviors, so the District recommended a special education evaluation.
- During evaluation, student was recommended for expulsion related to his continued threats of rape toward female LGBTQ students.
- Student was found eligible under SLD and OHI
- District filed for expedited due process to remove Student from his placement for not more than 45 school days because maintaining the current placement is substantially likely to result in injury to the child or others.

Thank you

Sweet, Stevens, Katz & Williams