

TITLE IX

Understanding New Regulations

Cody Kees

BEQUETTE, BILLINGSLEY AND KEES, P.A.

425 West Capitol Avenue, Suite 3200 Little Rock, AR 72201-3469

Phone: (501) 374-1107

Fax: (501) 374-5092



Title IX

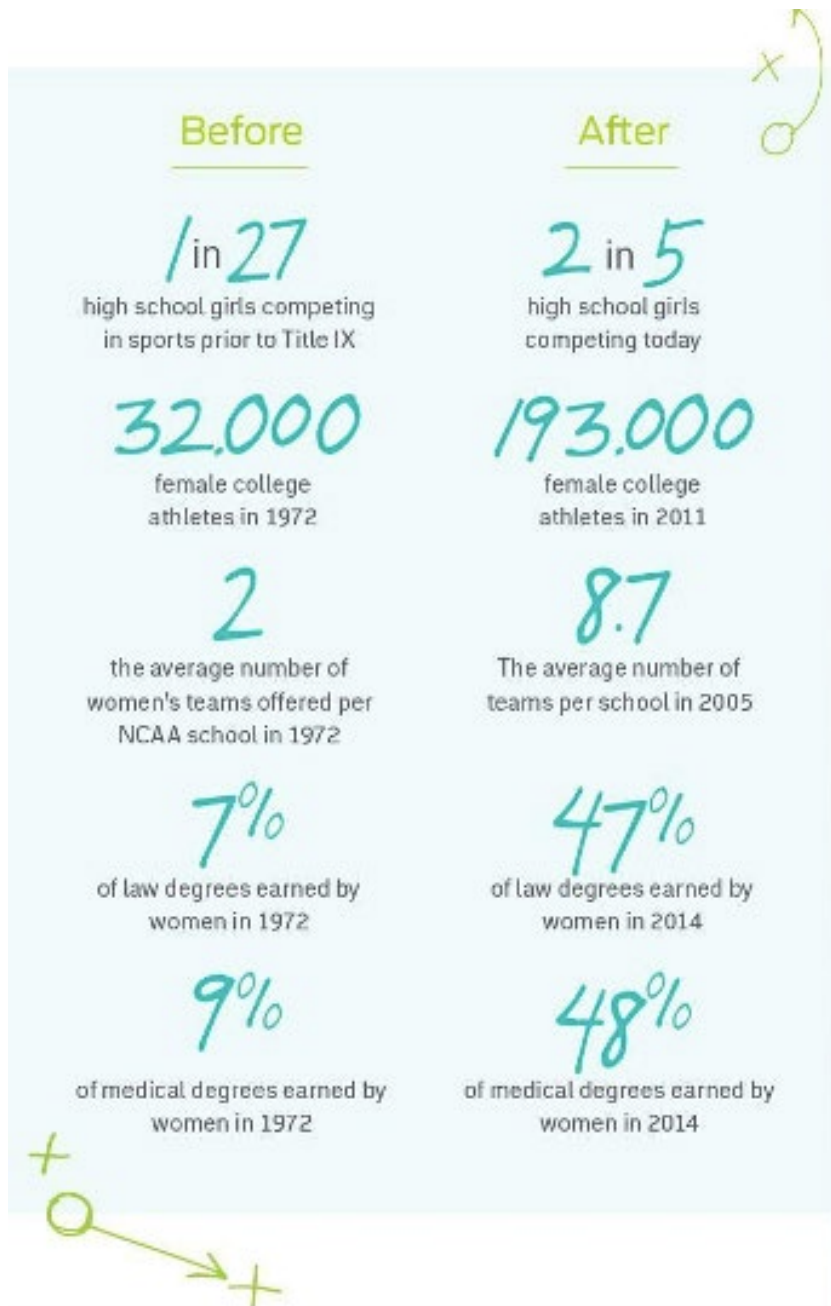
No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any educational program or activity receiving Federal financial assistance.

Title IX of the Education Amendments of 1972

Title IX- very brief history of sexual harassment

- 1975- Department of Ed promulgated rules to enact Title IX; Sexual Harassment was never a consideration
- 1997- DoEd included sexual harassment under Title IX
- 1998- SCOTUS rules an educational entity is liable for Title IX teacher-on-student harassment if it is "deliberately indifferent" to "actual notice" of discrimination *Gebser v. Lago Vista*
- 1999- SCOTUS rules peer-on-peer harassment is actionable under *Davis v. Monroe Bd. Of Ed.*
- 2001- DoEd included "interim measures" to help victims
- 2011 and 2014- Additional guidance on sexual harassment that caused general confusion
- 2017- DoEd guidance on sexual harassment was rescinded
- Title IX of the Education Amendments of 1972

Title IX- 1972:



What's the fuss?

- New Regulations take place **August 14, 2020**
- US Department of Education Guidance document is over 2,000 pages
- Much concern across the nation due to major changes to Title IX during a pandemic
- Significant changes to how Title IX is managed
- Extensive training requirements
- Multiple lawsuits filed across the nation to delay the start date for new regulations with NO success

Examples of Sexual Misconduct

- Unwelcome sexual advances
- Sexual jokes, gossip regarding another's sex life, sexual orientation, or gender identity
- Leering, whistling, obscene gestures
- Sexual assault, violence, threats, stalking
- Insults or threats based on sex or gender
- Change of academic or employment responsibilities based on sex, gender identity or expression, or sexual orientation
- Quid pro quo: "This for that"

Not all reports need to lead to an investigation. If you are unsure or uneasy, report it.

Title IX vs. District Student Handbook

- Student conduct involving sexual discrimination automatically invokes Title IX and must be handled differently than other conduct matters
- Must involve your Title IX coordinator
- Must follow are Title IX procedures

Johnny the Bully- if he is bullying kids because of their funny hair, that can be handled under the bullying policy. If Johnny is targeting girls, because they are girls, then you need to bring in Title IX procedures.

New Definitions of Sexual Harassment

- **Quid Pro Quo-** A school employee conditioning an educational benefit or service upon a person's participation in unwelcome sexual conduct
- **Hostile School Environment-** Unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school's education program or activity
- **Sexual Assault**

Title IX Coordinator

- The regulations require you to appoint a "Title IX Coordinator"
 - The Coordinator must be on your website
 - Also include on website: Office address, email address and phone number
- Need to maintain records of training for the Coordinator
- Coordinator must receive annual training

Mandatory Reporting

- Now, all employees of the District have an obligation to report instances of sexual harassment
- This is consistent with Arkansas child maltreatment reporting

Who is covered (jurisdiction)?

- The complainant **MUST** be a current student or attempting to enroll (does not cover former employees)
- Covers any school event and any location where a school event was taking place (does not cover actions off campus and not school-related)
 - Includes remote/ virtual learning
- If the respondent is no longer enrolled the school *may* end its investigation
- The complainant may withdraw the complaint and the school *may* end its investigation

Online Sexual Harassment

- A student sexually harassing a student online while off campus is not covered under the new rules- no requirement to investigate under Title IX
- **HOWEVER**, if this activity finds its way back to campus then you have an obligation to investigate
- You can **ALWAYS** investigate the matter under your District policies, even if not required by Title IX

Formal Complaint

- School must investigate any complaint, which includes writing or verbal
 - If a student makes a verbal complaint, you can ask the student to write out the complaint
- The Title IX Coordinator may initiate the complaint
- If the complainant withdrawal a complaint, this must be respected and the investigation end under Title IX
 - HOWEVER, the Title IX coordinator can continue to investigate if the complaint is severe and it makes sense to continue
 - I.e., you have multiple complaints against the same student
 - I.e., the complainant has withdrawn the complaint out of fear

Responsibility to Respond

- School must respond to any complaint so it can prove it is not "deliberately indifferent" to a report of sexual harassment.
 - Cannot put your head in the sand
- Ideal Investigation
 - Witness statements
 - Follow-up
 - Notifying Parents (remember confidentiality)
 - Detailed notes by the investigator
 - Reviewing video footage

Grievance Process

- This is the District investigative process and subsequent decision
- Emphasis on "fair, equitable and without bias" process
- Investigation
 - The District has the burden of gathering the evidence
- The investigator(s) cannot be the decision-makers
 - In Arkansas, only the superintendent can recommend expulsion of a student and only the board can expel, so having the principal handle the investigation is appropriate
- BOTH parties get all the evidence collected
- This may feel uncomfortable, but Title IX requires transparency and overrules FERPA concerns
 - Very tricky to navigate
 - Best Practice
 - Use initials when possible
 - Redact student witness names from final report, but witness NEVER get confidentiality
 - Provide adult witness names
 - Notify parents when their student is involved in a Title IX investigation (if under 18)

Grievance Process

- Hearings for k-12 are not required (only colleges)
- A final report must be issued, and parties advised of their outcomes
 - Parties are the complainant and respondent/ accused and their parents
- No timeline for completing an investigation, but must be reasonable

Appeal Process

Either party is allowed an appeal

- If Principal is the decider...then Superintendent could hear the appeal.
- If Superintendent is the decider...then Board can hear the appeal.

Appeals should be allowed for:

- Procedural irregularity
- Newly discovered evidence
- Investigator had a conflict of interest

Mandatory "Supportive Measures"

- Complainant **MUST** be provided supportive measures, despite the findings of your investigation
 - Move student(s) from classes (cannot be punitive)
 - Mental health support
 - Altered schedules for complainant
 - Safe room or safe spaces
- These supportive measures cannot be punitive to any student, complainant or respondent (while the investigation is ongoing)
- Respondent is considered "innocent" during the investigation and therefore, measures cannot be disciplinary against him

Rape Shield

- Not allowed to ask questions or seek evidence about prior sexual acts because they are deemed irrelevant
- **UNLESS** it is used to prove someone other than the respondent committed the offense

Retaliation Prohibited

- All parties, including the witnesses are protected
- New language that says a party can exercise free speech by talking about the investigation, which runs contrary to common practice
 - K-12- there is always a strong emphasis on confidentiality, so be cautious here

Training Required

- All Title IX Coordinators must have training over:
 - Anti-bias training
 - Avoiding stereotypes
 - Reporting requirement for all employees
- Child Maltreatment reporting requirements is necessary every year for all staff

Jane Doe and John Doe

The U.S. Department of Education recently released new Title IX requirements that will become effective Friday, August 14, 2020. The Final Rule defines sexual harassment (including sexual assault, dating violence, domestic violence, and stalking) as unlawful sex discrimination, and imposes important legal obligations on school districts and charter schools.

TITLE IX SEXUAL HARASSMENT: GETTING STARTED CHECKLIST

This non-exhaustive list serves as a starting point for school districts and charter schools.

Superintendent and Principal:

Develop

- Process for responding to sexual harassment
- Process for filing a formal complaint
- Process for responding to formal complaints
- Grievance process
- Appeal process

Determine

- The supportive measures the school will use
- If school will conduct hearings
- Standard of Evidence
- If school will offer informal resolution option

Schools must determine whether they will use the preponderance of evidence standard or the clear and convincing standard for all formal complaints of sexual harassment.

Title IX Coordinator:

Appoint a Title IX Coordinator

Display the Title IX Coordinator's contact information on School's Website

Notify the following groups of the Title IX Coordinator's contact information

- Students
- Parents or Legal Guardians
- Employees
- Applicants for Admission and Employment
- Unions

The Title IX Coordinator's contact information needs to include name or title, office address, e-mail address, and telephone number.

Title IX Personnel Team:

Appoint a Title IX Personnel Team

- Title IX Coordinator
- Investigators
- Decision-Makers

Train the Title IX Personnel Team

- Definition of Sexual Harassment
- Scope of school's education program or activity
- "How to" of school's processes
- How to serve impartially
- Confidentiality Training

Train Decision-Makers and Investigators on issues of relevance

Post materials used to train the Title IX Personnel Team on the school's website

The Title IX Coordinator and the Investigator cannot be Decision-Makers.

