

ASBA PreConference – September 2015

Title IX – Sexual Orientation and Transgender Accommodation

I. Title IX

What is Title IX?

Title IX of the Elementary and Secondary Education Act (ESEA) prohibits sex discrimination in federally funded schools and universities:

“[N]o 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.”

What is OCR?

The Office of Civil Rights of the U.S. Department of Education enforces the civil rights of students. OCR's jurisdiction includes investigation of complaints of students alleging violation of Title VI of the Civil Rights Act (race, color, national origin), Section 504 of the Rehabilitation Act (disability), and Title IX of the Elementary and Secondary Education Act (ESEA) (sex).

OCR explains its interpretation of Title IX and identifies areas of concern to public schools through “Dear Colleague Letters” (DCLs) issued by the Secretary or Undersecretary of the U.S. Department of Education.

What must school districts do to comply with Title IX?

School districts have been sued for violation of Title IX by students who are victims of sexual harassment or violence. Courts have ruled that Title IX requires that (i) the harassment must be severe, pervasive and persistent; (ii) school officials had actual knowledge of the harassment and were deliberately indifferent in response to it; and (iii) the harassment denied the student educational benefit.

OCR interprets Title IX to impose on school districts a higher standard of care. It asserts that Title IX requires that (i) the harassment must be severe, pervasive, or persistent; (ii) school officials knew or should have known of the harassment; (iii) the school's response failed to stop the harassment; and (iv) the harassment interfered with the student's education

services. In essence, OCR will find a Title IX violation if it concludes that a school negligently failed to protect a student from sexual harassment. Compliance requires three major actions:

- Dissemination of Notice of Anti-Discrimination Policies and Procedures
- Identification of Title IX Coordinator
- Adoption and Implementation of Complaint and Grievance Procedures

OCR also emphasizes that schools should provide “training for administrators, teachers, and staff and age-appropriate classroom information for students . . . to ensure that they understand what types of conduct can cause sexual harassment and that they know how to respond.”

A few important words of warning: In the April 2014 DCL, OCR provides extensive guidance regarding what school districts must do and should do to meet the requirements of Title IX. School districts should carefully review, with assistance from legal counsel, what steps should be taken to bring the district into compliance.

If OCR investigates a Title IX complaint, what will it expect the school district to do to resolve the complaint?

OCR views every complaint as an opportunity to do a checkup on a school district to ensure that the school district is in compliance with Title IX and employing best practices to protect students from illegal discrimination. In connection with any complaint, OCR will review a school district’s policies and procedures and may require evidence of training and other steps taken to comply with Title IX.

OCR may require a school district to take remedial action even if it finds the allegations of a complaint inconclusive or unfounded. Likewise, remedial actions may be required as a condition for a simplified investigation and resolution of a complaint.

II. Protection and Accommodation of Lesbian, Gay, Bisexual and Transgender (LGBT) Students

What has OCR said about Title IX’s coverage of LGBT discrimination?

OCR has not issued a DCL that focuses exclusively on LGBT issues. However, OCR issued a DCL in April 2014 concerning Title IX and the problem of sexual violence in schools and universities and, in the DCL, OCR confirms

what it had previously only hinted at, that discrimination on the basis of gender includes harassment or violence based on the victim's LGBT status.

OCR made the following policy statements about LGBT discrimination:

Title IX protects all students from sexual violence, regardless of the sex of the alleged perpetrator or complainant, including when they are members of the same sex. A school must investigate and resolve allegations of sexual violence involving parties of the same sex using the same procedures and standards that it uses in all complaints involving sexual violence.

Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity and OCR accepts such complaints for investigation.

Similarly, the actual or perceived sexual orientation or gender identity of the parties does not change a school's obligations. Indeed, lesbian, gay, bisexual, and transgender (LGBT) youth report high rates of sexual harassment and sexual violence. A school should investigate and resolve allegations of sexual violence regarding LGBT students using the same procedures and standards that it uses in all complaints involving sexual violence.

The fact that incidents of sexual violence may be accompanied by anti-gay comments or be partly based on a student's actual or perceived sexual orientation does not relieve a school of its obligation under Title IX to investigate and remedy those instances of sexual violence.

Three Basic Rules for School Officials:

1. The school (including its employees and policies) cannot discriminate against a student because the student is LGBT.
2. A district must protect a student from acts of harassment, bullying, and violence because of the student's LGBT status.
3. A transgender student must be treated according to his or her gender identity with regard to any valid gender-based rules of the school.

Student Trans-Law & How OCR and Courts Are Evolving:

1. A transgender student is potentially protected from discrimination on the basis of gender by Title IX.
2. OCR and the U.S. Justice Department have recently taken the position that students are protected from discrimination under Title IX on the basis of their real or perceived gender identity. The

government's legal position is based on two rulings of the U.S. Supreme Court regarding workplace harassment and Title VII of the Civil Rights Act. In those cases, the Court ruled that Title VII protects workers from harassment based on "sexual stereotypes."

3. Whether the Supreme Court's rulings regarding workplace harassment under Title VII are directly applicable to Title IX and the rights of transgender students is debatable. Several federal circuit and district courts have ruled that Title IX does not protect students on the basis of their gender identity. Two federal district courts have looked specifically at the question of whether Title IX requires that a transgender student be permitted to use a restroom or locker room based on the student's gender identify. In both cases, the courts ruled against the student.
4. The law regarding Title IX and transgender students in Arizona will not be established until a ruling is made by the Ninth Circuit Court of Appeals or the U.S. Supreme Court.

Common LGBT Accommodation Situations:

- Student is transgender and identifies as male. Parent asks for meeting with principal to discuss the student's needs at school.
- Student wants school to change name and gender in records.
- Student needs to use a restroom. Which one?
- Student needs hotel room assignment for field trip. Which one?
- Student wants to try out for basketball team. Which one?
- Principal wonders if she should tell teachers that a student is transgender.
- Teacher feels he should warn parents of a female student who is flirting with the student.
- Transgender student reports to principal that several students in a class have nick-named him "T-man" and make jokes about him behind his back. He mentions that he believes his teacher is aware of what is going on and has done nothing about it.
- Student wears LGBT Pride T-Shirt to school. Anonymous "Warriors for Christ" student group sends social media posts warning student he will be beaten if he wears the T-shirt again. Principal asks if student can or should be told to not wear the T-shirt.