

SEX DISCRIMINATION AND HARASSMENT

Title IX of the Education Amendments of 1972

- No person in the U.S. 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.

Compliance with Title IX

- Recognition by School District leadership that sex discrimination and sexual harassment will not be tolerated
- Policy prohibiting sex discrimination, including sexual harassment as a form of sex discrimination
- Designation of trained employees to coordinate District's responsibilities

Compliance with Title IX

- Development of grievance procedures that outline steps for the filing of complaints
- Provide staff in-service to enable employees to support the District's efforts to prevent sex discrimination and sexual harassment
- Orientation for all students to ensure that students understand what is prohibited under Title IX
- Copy of policies and procedures provided to employees and students

Compliance with Title IX

- Monitor school climate to ensure problems are promptly addressed that could lead to harassment (e.g. social media issues brought to the District's attention)
- Carefully document all harassment incidents and report to outside authorities as required
- Regular assessment of effectiveness of District's anti-harassment efforts

What Constitutes Discrimination Under Title IX

- Making decisions regarding student participation in a school's programs or activities based on a student's sex
- Most common example is athletics
- Females must be provided an equitable opportunity to participate in athletic programs that is comparable to the treatment and benefits provided to male athletes

What Constitutes Discrimination Under Title IX

- 1972
 - 294,000 girls participated in high school sports
 - 1 out of 27 girls enrolled
- 2017
 - 3.4 million girls participated in high school sports
 - 1 out of 3 girls enrolled

What Constitutes Discrimination Under Title IX

- Females must be provided an equitable opportunity to participate in advance placement and honors classes, extracurricular activities, honor societies, opportunities for student leadership and instructional programs
- Pregnant students must be allowed to participate in any of the services and programs offered by schools

What Constitutes Discrimination Under Title IX

- This applies to academic and athletic programs
- Any services provided to students with medical issues must be provided to pregnant students, such as ability to make up missed work

Other Athletic Benefits and Opportunities

- Athletic equipment, uniforms and supplies
- Locker rooms and practice/competition facilities
- Travel/transportation/per diem benefits
- Coaches-experience, quality and salaries
- Games, practice times and schedules
- Publicity
- Academic tutoring

Must Proactively Evaluate Title IX Compliance

What is Sexual Harassment

- Harassment based on sex can amount to discrimination
- Can take many forms such as verbal acts, name-calling, social media messages, and other conduct that may be humiliating or physically threatening
- Sexual comments or jokes about a student's pregnancy, spreading rumors about her sexual activity, making sexual gestures

What is Sexual Harassment

- Title IX is violated if sexual harassment by employees, students or third parties is sufficiently serious that it interferes with a student's ability to benefit from or participate in the school's programs and activities and the harassment is tolerated, ignored or not adequately addressed by school officials

Sexual Harassment Also Includes

- Harassment against employees
- Any unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature
- Includes offensive or unnecessary touching, offensive graffiti, pictures, cartoons, drawings, gestures and written assaults involving phrases with direct or implied sexual meaning
- Perpetrators may be employees or students

Conduct is Unwelcome

- Acceptance of certain conduct does not necessarily mean that it was welcomed
- Acceptance at one time does not mean the same conduct will be acceptable on another occasion

Nature of the Conduct

- Conduct is so pervasive, continuous, severe or abusive that it limits the student's ability to participate in, benefit from or otherwise alters the educational program or activity

Who Is Protected Against Sex Discrimination and Sexual Harassment

- Employees and students-#Me Too
- While the U.S. DOE and the DOJ have withdrawn guidance documents pertaining to gender identity, both Departments specifically stated that all students, including LGBT students, are entitled to learn and thrive in a safe environment

Who Is Protected Against Sex Discrimination and Sexual Harassment

- The Office for Civil Rights will continue to hear all claims of discrimination and will explore every appropriate opportunity to protect all students, including LGBT students, to encourage civility in classrooms

Claim of Harassment What Now?

- Prompt investigation, respecting privacy of all parties
- Immediate and appropriate corrective action to end any discrimination or harassment
- Must take these steps regardless of whether the victim makes a complaint or asks the school to take action (“I want you to know about this but I don’t want you to do anything”)
- Possible interim measures during investigation

Claim of Harassment

- Any employee who suspects or receives notice that a student or group of students may have experienced sex-based discrimination or harassment must notify immediately the Title IX Coordinator for the District

Claim of Harassment

- Confidentiality issues
 - A confidentiality request may limit the school's ability to respond
 - Must still investigate in light of request
 - Cannot let request prevent school from effectively responding to the harassment and preventing further harassment

Claim of Harassment

- Must inform victim that retaliation is prohibited by Title IX and that if victim fears reprisals from alleged harasser, school will take steps to prevent retaliation
- Retaliation may take many forms, including subtle attempts to continue harassment of the victim
- Victim must be made to feel comfortable with reporting further incidents of harassment

Evidence of Harassment Tangible Injuries

- Actual physical evidence appearing as injuries to the victim
- Falling grades
- Lack of motivation
- Refusal to participate in class
- Becoming more of a loner
- Sudden depression
- Other emotional signs, changes in attitude

Evidence of Harassment Intangible Injuries

- No visible evidence
- No changes in grades or extracurricular participation, but student's effort in doing so is different

Davis v. Monroe County Board of Education

- 5th grade boy taunted and touched a 5th grade girl numerous times over 5-month period
- Alleged that 3 teachers and principal failed to help
- 1st element: sexual conduct that is severe, pervasive and objectively offensive
- 2nd element: the harassment must deny the student equal access to an education program or activity

- 3rd element: school must have “actual knowledge”
- 4th element: school responds with “deliberate indifference”
- 5th element: damages

LIABILITY FOR HARASSMENT

- The perpetrator will have individual liability
- District's liability
 - When did someone at school with power to intervene on behalf of the victim become aware that sexual harassment was occurring?
 - Did that person take immediate action to remedy the situation?

OVERVIEW

- Declare intolerance for sex discrimination and sexual harassment
- Encourage students to refuse to be treated in this manner and to report such conduct
- Provide clear consequences for violations
- Follow policy/procedures
- Respond timely, in appropriate manner

Jim Keith
Adams and Reese LLP
Ridgeland, Mississippi
jim.keith@arlaw.com