



Hogan  
Lovells

# Title IX

## Area Cooperative Educational Services

Maree Sneed

1 & 2 November 2017

# Agenda

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- Title IX and its foundations
- Title IX issues
  - Bullying and sexual harassment
  - Sexual violence
  - Transgender students
  - Athletics
  - Pregnancy/parenting
  - Single-sex education
  - Career and Technical Education (CTE)
  - Discipline
- Title IX Coordinator's responsibilities



# True or False

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- Title IX protects only girls and women; Title IX does not apply to boys and men.



# True or False

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- Under Title IX, to be harassment, the alleged harasser must intend to harm the victim.



# True or False

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- Under Title IX, a school district must complete an investigation of alleged harassment 10 days.



# True or False

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- A school district would violate Title IX if it provided bus transportation for the boys' basketball team for games and parents provided transportation for the girls' basketball team.



# True or False

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- Under Title IX, a school may exclude a pregnant student from being president of the student government.





# Title IX and its foundations

# What is Title IX, and why did Congress enact it?

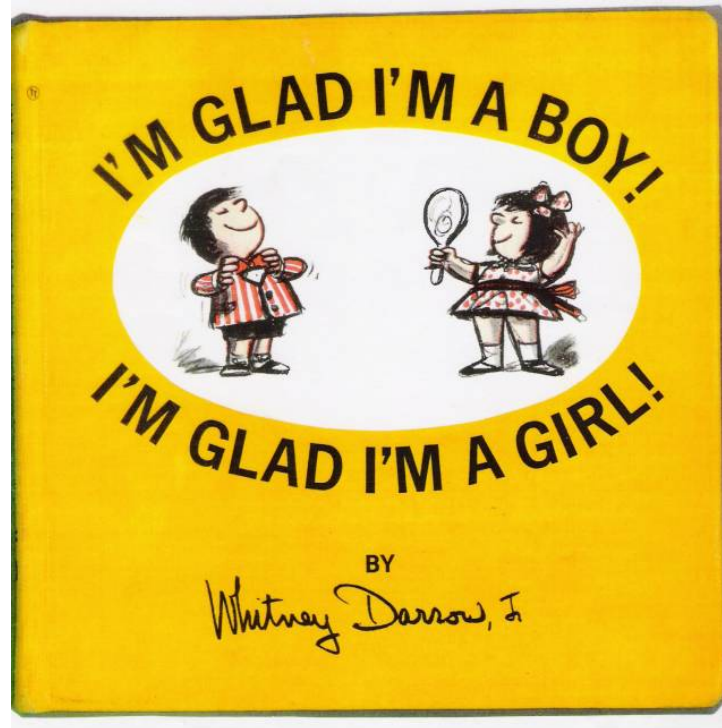
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*Western High School Girls' Basketball, Washington, DC, 1899. (Courtesy Library of Congress Prints and Photographs Division)*

# What is Title IX, and why did Congress enact it?

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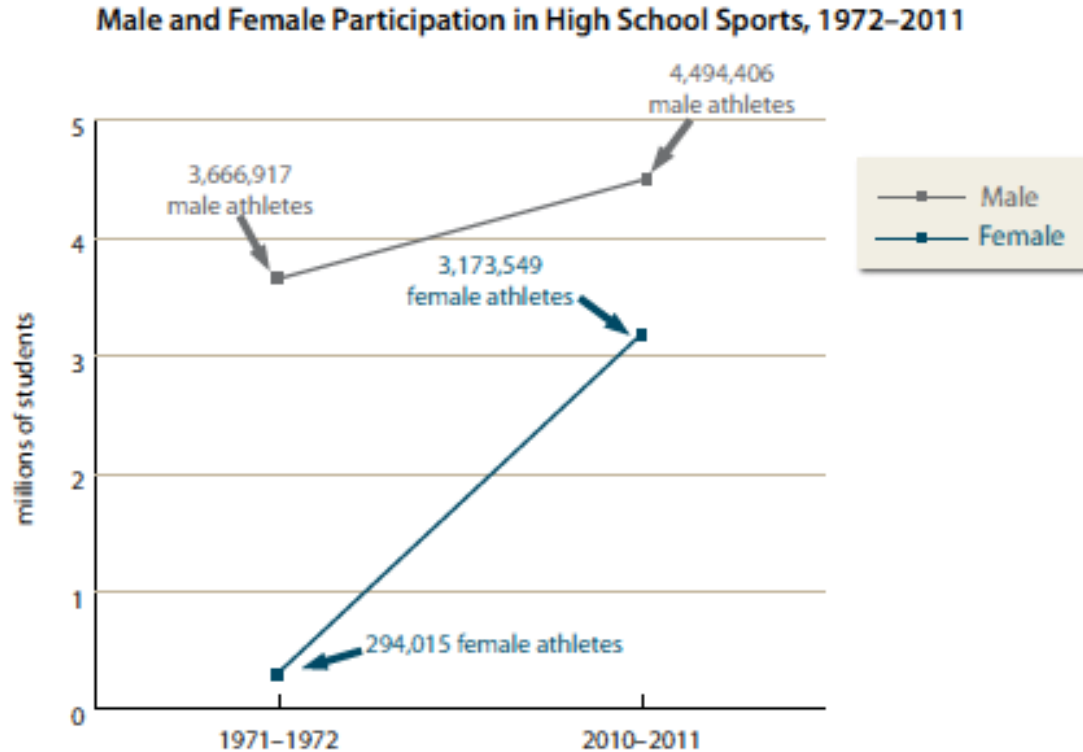


# What is Title IX, and why did Congress enact it?

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# What is Title IX, and why did Congress enact it?



Source: National Federation of State High School Associations (2011).



# What is Title IX, and why did Congress enact it?

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- “In the 1960s, “[e]qual rights, social justice, and equal opportunities in education and employment were dominant and popular themes. **Patsy Mink of Hawaii rose in this cultural climate. As the first woman of color to be elected to Congress, she was no stranger to race and sex discrimination.** Turned down by twenty medical schools, Mink pursued law. But no law firm would hire her. She entered politics in order to fight for gender and racial equality. **In 1972 Mink and Edith Green, a Democrat from Oregon who focused on women’s issues, education, and social reforms, introduced Title IX, and were responsible for its passage.** Fellow politician Daniel Patrick Moynihan would later state that Title IX was one of the most important pieces of education legislation in the history of the Republic.”



Source: Barbara Winslow, “The Impact of Title IX.”

# Title IX: The law

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- Title IX of the Education Amendments of 1972 (20 U.S.C. §§ 1681 et seq.) prohibits *sex discrimination in education and in employment*.
- "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."



# What institutions are covered by Title IX?

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- Institutions receiving federal funding
- School districts, colleges/universities, charter and for-profit schools and athletic associations
  - Organizations receiving “significant assistance” from these
- Educational programs offered by non-educational institutions that receive federal funds, such as libraries, prisons, and museums



# Who is protected by Title IX?

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- Elementary through professional school
- Both staff and students
- Both men/boys and women/girls
- Heterosexual, gay, lesbian, bisexual, and transgender persons
- People with and without disabilities
- People of different races and national origin
- U.S. citizens and non-citizens (including undocumented persons)



# What is discrimination “on the basis of sex”?

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- Title IX does not prohibit discrimination on the basis of sexual orientation.
- But Title IX does protect all students – regardless of actual or perceived sexual orientation – from sex-based discrimination and harassment.
  - Title IX prohibits harassment of students for exhibiting stereotypical characteristic for their sex or for failing to conform to such stereotypes.
  - Title IX prohibits sexual harassment regardless of whether the harasser and the victim share the same gender.

## EXAMPLE?

- Title IX protects pregnant students and those with related medical conditions.

# What is discrimination “on the basis of sex”?

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## **Intentional Discrimination**

- Intent to harm is not required – being treated differently based on sex is enough
- Usually proved by “circumstantial,” not “smoking gun” evidence

## **Disparate Impact Discrimination**

- Practices that do not explicitly target one gender but that nonetheless harm one group
- Put the policy in context: Are more members of one group affected by the policy?



# What is discrimination “on the basis of sex”?

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Could any of these scenarios be considered discrimination in violation of Title IX?

1. Guidance counselors consistently tell male students about opportunities to take coding classes, but fail to mention those opportunities to female students.
2. Teachers consistently call on boys more than girls.
3. Recruitment materials feature only girls in child care classes.
4. A principal refuses to promote a woman to assistant principal because he believes it will be better for her after she has a child.



# What is discrimination “on the basis of sex”?

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Could any of these scenarios be considered discrimination in violation of Title IX?

1. A school requires students to pass a weight lifting test before allowing them to enroll in an computer course, and more girls than boys fail the test.
2. An employer that is hiring construction laborers requires applicants to have a high school diploma, and boys tend to have somewhat higher dropout rates than girls.
3. A school refers students for internships based on psychological tests that measure “ambition” and “drive,” and girls have lower scores than boys on these criteria.
4. African-American girls who are referred to the principal’s office by their teachers are more likely to receive suspensions than their peers for similar behavior.

# Retaliation

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- If an individual (student, parent, teacher, coach, etc.) complains formally or informally to a school about a potential violation of Title IX, the school must not retaliate (including intimidating, threatening, coercing, or in any way discriminating against the individual) because of his or her complaint.





# Retaliation

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- The U.S. Supreme Court addressed this issue in 2005: *Roderick Jackson v. Birmingham Board of Education*.
- Facts: Roderick Jackson, a teacher in the Birmingham, Alabama, public schools, brought suit against the Birmingham Board of Education (Board) alleging that the Board retaliated against him because he had complained about sex discrimination in the high school's athletic program.
- Lower federal courts: The District Court dismissed Jackson's complaint because it thought that Title IX did not prohibit retaliation, and the Court of Appeals for the Eleventh Circuit agreed.
- U.S. Supreme Court: "We consider here whether the private right of action implied by Title IX encompasses claims of retaliation. We hold that it does where the funding recipient retaliates against an individual because he has complained about sex discrimination."





# Retaliation

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- What could be considered retaliation for a student?
- Adverse treatment, which can include:
  - Suspension or expulsion;
  - Reduction in grades;
  - Denial of permission to participate on teams, or change in position on team, or amount of playing time; or
  - Harassment in class or on field.





# What is OCR? What does it do?

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- The U.S. Department of Education's Office for Civil Rights
- What OCR does:
  - Policy guidance
  - Technical assistance
  - Civil Rights Data Collection (CRDC)
  - Enforcement
    - Complaint process
    - Compliance reviews



***“The mission of the Office for Civil Rights is to ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights.”***

# Some Definitions

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- Law
- Regulations
- Dear Colleague Letters
- Questions & Answers

# Selected OCR Title IX Policy Guidance

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- Dear Colleague Letter (“DCL”) on Title IX, and Q&A on Campus Sexual Misconduct (Sept. 22, 2017)
- DCL on Title IX and Transgender Students (May 13, 2016) (*withdrawn and rescinded, Feb. 22, 2017*)
- DCL on Obligation of Schools to Designate a Title IX Coordinator (April 24, 2015)
- Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities (December 1, 2014)
- DCL on Supporting the Academic Success of Pregnant and Parenting Students (June 25, 2014)
- Questions and Answers about Title IX and Sexual Violence (April 29, 2014) (*withdrawn, Sept. 22, 2017*)

# Selected OCR Title IX Policy Guidance, continued...

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- DCL on the prohibition against retaliation under Federal civil rights laws (April 24, 2013)
- DCL on Addressing Sexual Harassment/Sexual Violence (April 4, 2011) (*withdrawn, Sept. 22, 2017*)
- DCL on Schools' Obligations to Protect Students from Student-on-Student Harassment on the Basis of Sex; Race, Color and National Origin; and Disability (October 26, 2010)
- DCL on Accommodating Students' Athletic Interests and Abilities: Standards for Part Three of the "Three-Part Test" (April 20, 2010)
- DCL on Sexual Harassment (Jan. 25, 2006)
- Revised Sexual Harassment Guidance (Jan. 19, 2001)

# A quick caveat regarding ED regulations and guidance

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- President Trump's Regulatory Reform Executive Orders: Series of EOs issued in January and February requiring agencies to review all existing regulations focusing on whether the regulations: eliminate jobs, are outdated, or where costs exceed benefits.
- ED appointed a Regulatory Reform Task Force at the end of April that will:
  - Canvas ED's regulations and policy-oriented guidance, including Dear Colleague Letters;
  - Seek input from the public on existing regulations and guidance documents; and
  - Make recommendations about which should be repealed, replaced, or modified.
- There are some changes already (e.g., transgender guidance and sexual violence guidance withdrawn; OCR investigation scope limited).

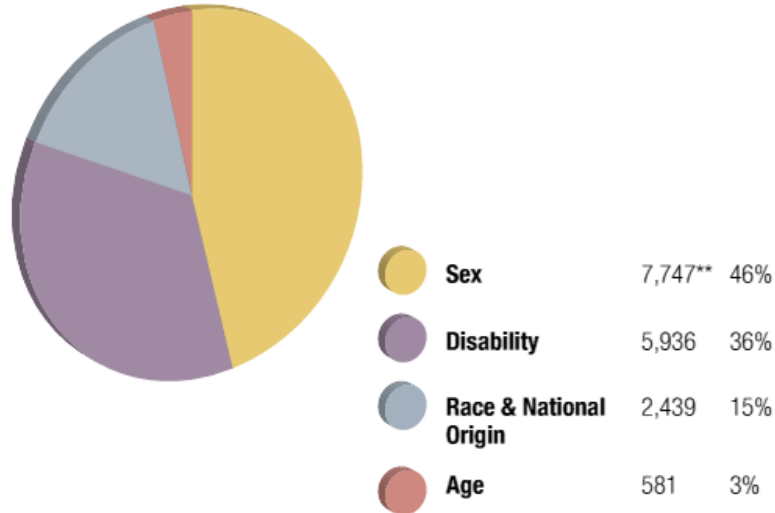
# A quick caveat regarding ED regulations and guidance

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- In September 2017, OCR withdrew the statements of policy and guidance reflected in:
  - 2011 Dear Colleague Letter on Addressing Sexual Harassment/Sexual Violence (April 4, 2011) and
  - Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities (December 1, 2014).
- ED announced that it intends to engage in a rulemaking process to develop new regulations related to Title IX.
- In the interim, ED issued a new Q&A on Campus Sexual Misconduct (Sept. 22, 2017) and said that it would continue to rely on previous guidance (2006 DCL, 2001 Revised Sexual Harassment Guidance).

# What is OCR? What does it do?

**Figure 3:** Percentage of Complaints Received by Type of Alleged Discrimination\* (FY 2016)



\* The numbers above do not reflect the total number of complaints received in FY 2016 because some complaints cover more than one statute and because a small percentage of complaints received in FY 2016 have not yet been categorized by statute.

\*\* 6,157 of these are multiple complaints from an individual.

- **Complaints and compliance reviews (FY 2016) by the numbers:**

- 16,720 complaints received
- 13 compliance reviews (proactive investigations)
- 8,625 cases resolved
  - “Resolved”: dismissal, administrative closure, finding of no violation, early complaint resolution, or resolution agreement
  - Includes cases received prior to FY2016
  - 1,116 resolutions





# What is OCR? What does it do?

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- In FY2016, OCR received 346 complaints of retaliation under Title IX.
- Example (from FY2014): Cartwright Elementary School District (AZ) – “In November 2013, OCR resolved a complaint that a school did not respond in a timely and appropriate way to a student’s concerns about harassment by peers . . . and that it disciplined her more harshly and ultimately withdrew her from enrollment in retaliation for bringing her concerns to the school’s attention. [T]he district agreed to submit to OCR for review its policies and procedures relating to handling complaints of harassment and related penalties, addressing non-discrimination, and tackling retaliation; to train district staff on related issues, including prohibition against retaliation; and to reassess the student’s needs and reinstate her with proper educational and behavioral supports.”

# Bullying and sexual harassment

# Title IX: The law

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# Connecticut Law: Bullying

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- How does Connecticut law define **bullying**?
  - The repeated use by one or more students of a written, oral, or electronic communication, such as cyberbullying, directed at or referring to another student attending school in the same school district; **OR**
  - A physical act or gesture by one or more students repeatedly directed at another student attending school in the same school district, that:
    - Causes physical or emotional harm or damage to the student's property;
    - Places the student in reasonable fear of harm to himself or herself, or of damage to his or her property;
    - Creates a hostile environment at school for the student;
    - Infringes on the rights of such student at school; or
    - Substantially disrupts the education process or the orderly operation of a school.



## Connecticut Law: Bullying

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- “‘Bullying’ shall include, but not be limited to, a written, oral or electronic communication or physical act or gesture based on any actual or perceived differentiating characteristic, such as **race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity or expression, socioeconomic status, academic status, physical appearance, or mental, physical, developmental or sensory disability**, or by association with an individual or group who has or is perceived to have one or more of such characteristics”

-- Conn. Gen. Stat. § § 10-222d



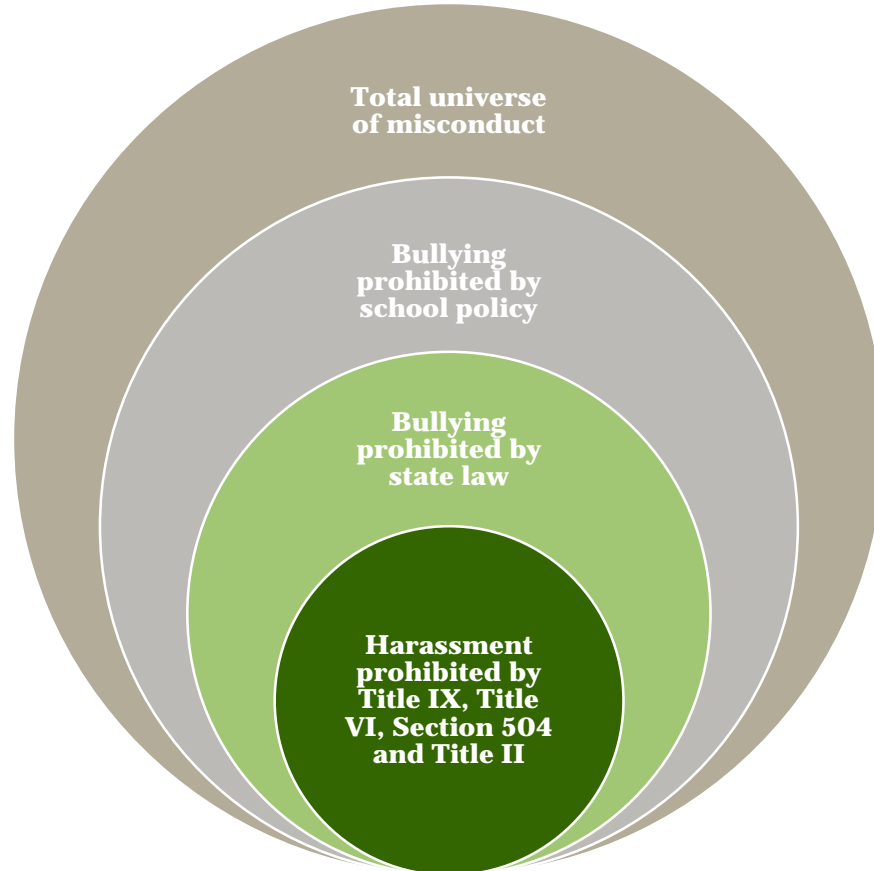
# Connecticut Law: Bullying

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- How does Connecticut law define **cyberbullying**?
  - “[A]ny act of bullying through the use of the Internet, interactive and digital technologies, cellular mobile telephone or other mobile electronic devices or any electronic communications.”
    - “**Mobile electronic device**” means any hand-held or other portable electronic equipment capable of providing data communication between two or more individuals, including, but not limited to, a text messaging device, a paging device, a personal digital assistant, a laptop computer, equipment that is capable of playing a video game or a digital video disk, or equipment on which digital images are taken or transmitted.
    - “**Electronic communication**” means any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photo-optical system.
- Is one action enough to qualify as bullying or cyberbullying?
  - **NO** – under Connecticut law, bullying requires “*repeated*” written, oral or electronic communication.



# The Universe of Bullying & Harassment



# Cyberbullying

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## Background

- The growth of the Internet has provided and will continue to provide many educational benefits for students.
- However, the Internet, cell phones, and social media have also provided students with new, harder-to-monitor ways to bully and harass each other.





# Cyberbullying

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- Cyberbullying is defined by Stopbullying.gov as “bullying that takes place using electronic technology. Examples of cyberbullying include mean text messages or emails, rumors sent by email or posted on social networking sites, and embarrassing pictures, videos, websites, or fake profiles.”
- Many instances of cyberbullying occur through social networking sites, such as Facebook, Twitter, YikYak, Snapchat, Instagram, and YouTube.
- Cyberbullying can occur 24 hours a day, 7 days a week. No matter where or when it occurs, its effects can impact a child’s educational experience.



# Sexting and Cyberbullying

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- “Sexting” is the sending or receiving of text messages with sexual content, such as pictures or videos that contain nudity.
- Teens in several states – some as young as 14 – have been charged with the creation and distribution of child pornography and sexual exploitation of a minor.
- When there is a harassing aspect to sexting, and that harassment is “sufficiently serious that it creates a hostile environment,” a school district’s failure to adequately address that harassment could violate Title IX.





# Sexting and Cyberbullying in the News

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## **“Snapchat bullying triggers suicide.”**

- *WLIX* (Lansing, Michigan) (June 9, 2016)

## **“Snapchat murder, rape threat spurs 100 to attend anti-bullying rally; student charged”**

- *PennLive.com* (February 22, 2017)

## **“Sexting Case Rocks Colorado Town”**

- *Wall Street Journal* (November 8, 2015)

## **“Cyberbullying Is a Bigger Problem Than Screen Time Addiction”**

- *The New York Times* (July 16, 2015)



# Sexting and Cyberbullying

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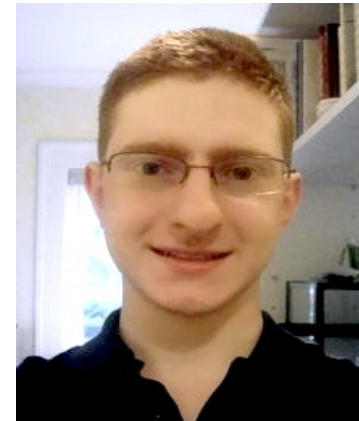


*“Queens girl, 12, hangs herself  
after being cyberbullied ”*

NY Post (May 23, 2013)

*“Jumping off the  
gw bridge sorry”*

Facebook Post by Tyler Clementi  
(September 22, 2010)



# Emerging Issues in Cyberbullying

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- Several victims of cyberbullying and their families have sued students and school districts for libel, defamation and other similar torts.
- Some schools have attempted to charge students with cyberbullying when they comments online that are disparaging to school staff.

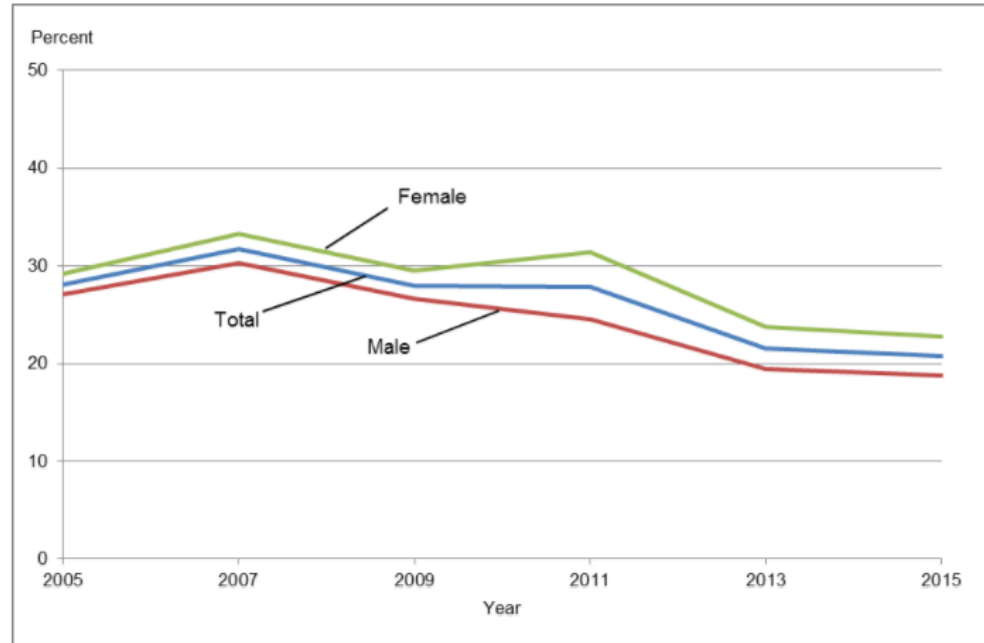




# Why is bullying such a “hot” topic?

- According to the National Center for Education Statistics, student-reported bullying has slightly decreased since 10 years ago but plateaued since 2013. About 1 in 5 students report being bullied at school.

Percentage of students, ages 12–18, who reported being bullied at school during the school year: Selected years, 2005 through 2015

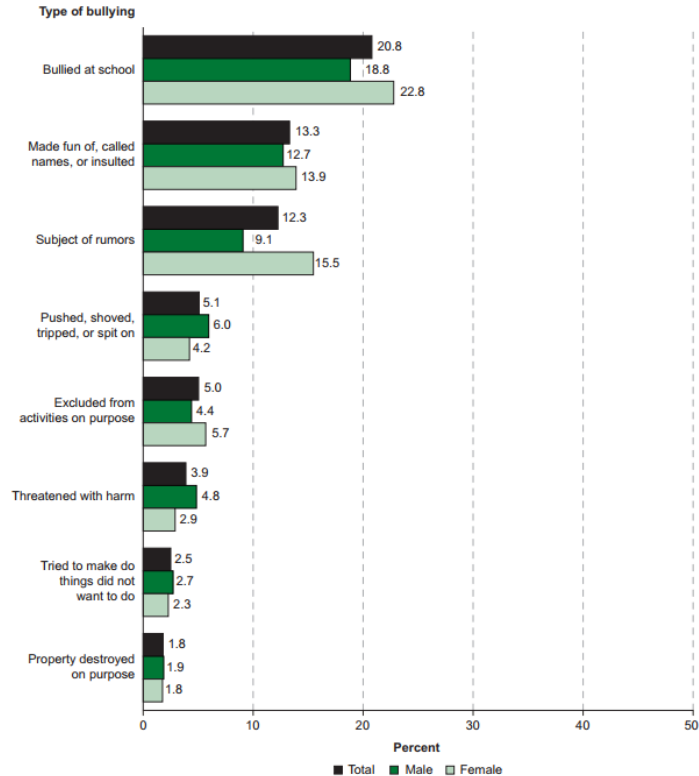


SOURCE: U.S. Department of Justice, Bureau of Justice Statistics, School Crime Supplement (SCS) to the National Crime Victimization Survey, 2005 through 2015. See *Digest of Education Statistics 2016*, table 230.40.

# Why is bullying such a “hot” topic?

- Percentage of students who reported being bullied at school in 2015, by type:
  - Bullied (total) – 20.8%
  - Made fun of, called names, or insulted – 13.3%
  - Subject of rumors – 12.3%
  - Pushed, shoved, tripped, or spat on – 5.1%
  - Excluded on purpose – 5.0%
  - Threatened with harm – 3.9%
  - Attempted coercion to do something they did not want to do – 2.5%
  - Property destroyed – 1.8%

Figure 11.1. Percentage of students ages 12–18 who reported being bullied at school during the school year, by type of bullying and sex: 2015

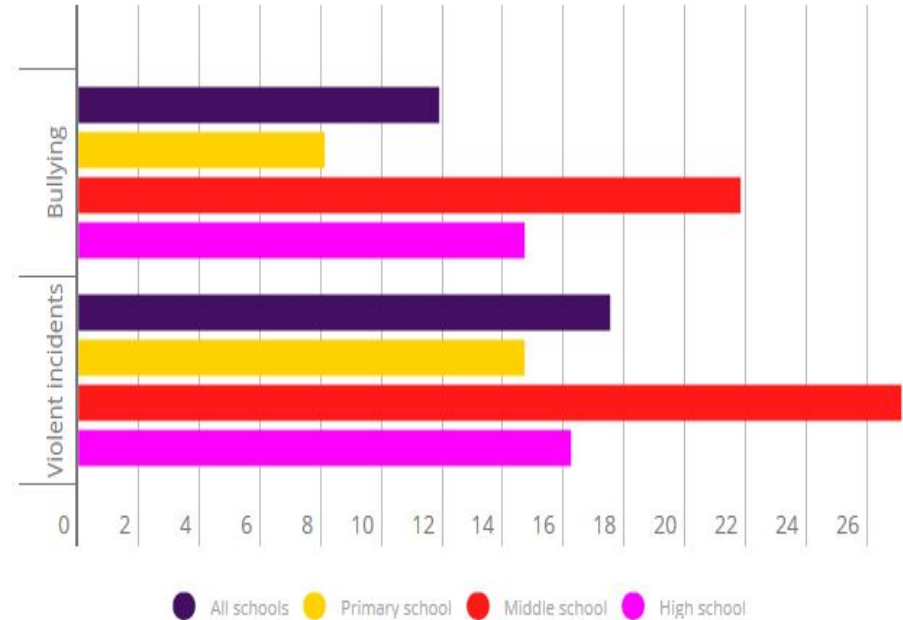


NOTE: "At school" includes in the school building, on school property, on a school bus, and going to and from school. Students who reported experiencing more than one type of bullying at school were counted only once in the total for students bullied at school.  
SOURCE: U.S. Department of Justice, Bureau of Justice Statistics, School Crime Supplement (SCS) to the National Crime Victimization Survey, 2015.

Source: NCES, Indicators of School Crime and Safety (2016).

# Why is bullying such a “hot” topic?

- Female students are more likely than male students to report being bullied at school (23% vs.19%)
- Middle schoolers report the highest rates of bullying (21.8%)
- Reports of being bullied by grade level:
  - Grade 6 – 31%
  - Grade 8 – 22%
  - Grade 12 – 15%



Percent of schools reporting bullying incidents daily or at least once a week.





# Why is bullying such a “hot” topic?

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## Impacts of bullying

- Victims of bullying are at increased risk of . . .
  - Psychological and emotional problems:
  - Low self-esteem, high anxiety, depression
  - Suicide ideation and attempts
  - Physical health problems
  - Headache, backache, sleeping problems, bedwetting
- Perpetrators of bullying are at increased risk of . . .
  - Substance use, academic problems, and violence later in adolescence and adulthood

# Why is bullying such a “hot” topic?

## Headlines and public campaigns

- “Obituary of 15-year-old who killed self cites school bullies” -- *The Washington Post* (June 23, 2017)
- “Muslim Schoolchildren Bullied By Fellow Students And Teachers” -- *NPR* (March 29, 2017)
- “After years of alleged bullying, an Ohio teen killed herself. Is her school district responsible?” -- *The Washington Post* (May 23, 2016)



*“[We must] dispel the myth that bullying is just a harmless rite of passage or an inevitable part of growing up. It’s not.”*

President Obama (March 10, 2011)

# What is harassment?

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- Harassment may be verbal, written, or other conduct that is threatening or harmful.
  - It does not have to include intent to harm, be directed at a specific target, or involve repeated incidents.
  - It is only a small part of the larger universe of bullying or cyberbullying activity.





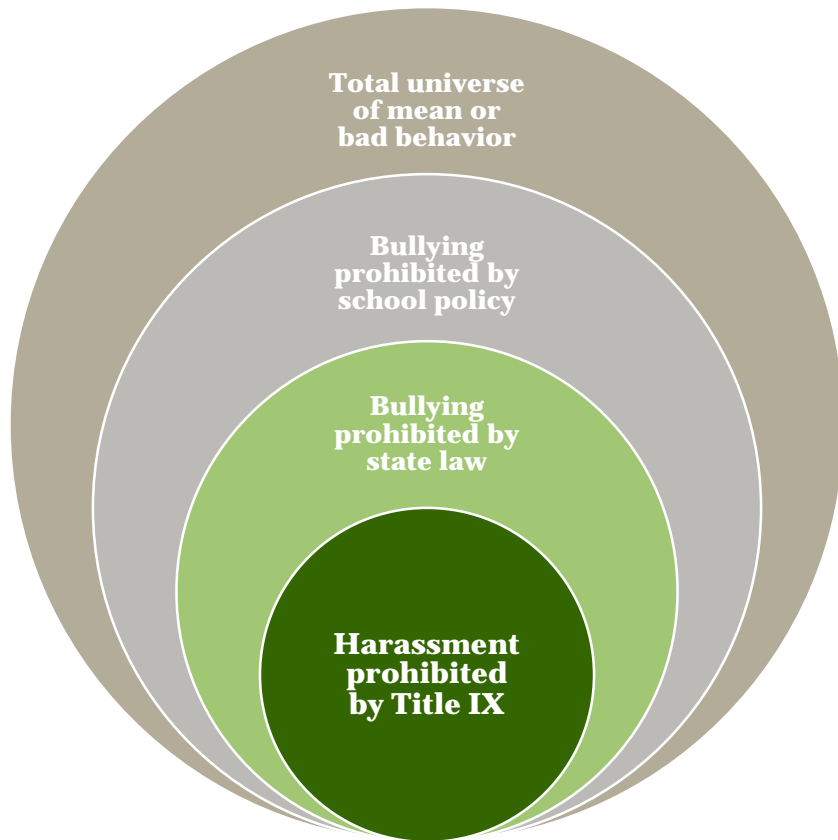
# What is sexual harassment?

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- OCR has defined sexual harassment as “unwelcome conduct of a sexual nature.”
- What could that mean?
  - unwelcome sexual advances
  - requests for sexual favors
  - verbal, nonverbal, or physical conduct of a sexual nature
  - name-calling
  - graphic and written statements, which may include use of cell phones or the Internet
  - conduct that may be physically threatening, harmful, or humiliating

# When is bullying considered harassment under Title IX?

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# What is sexual harassment?

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- What constitutes “harassment” for which schools are legally responsible under Title IX? The misconduct must:
  1. Have a nexus to school;
  2. Be based on a protected category (i.e., sex);
  3. Be sufficiently severe or pervasive to create a hostile environment; and
    - “Harassment creates a hostile environment when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student’s ability to participate in or benefit from the services, activities, or opportunities offered by a school.”
  4. Be known or reasonably should be known to school administrators

# Is this sexual harassment?

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- When OCR initiated its investigation, the Student last attended Central Valley High School. At the time of the Student's interview with OCR, he had decided not to complete his education with the District.
- The Student informed OCR that he was bullied and harassed by other students based on his sexual orientation and failure to meet the gender norms of his peers. He was called derogatory names based on his appearance and sexual orientation, and was subjected to verbal taunts of a sexual nature. The Student was getting into physical fights with other students who were harassing him, which led to his being disciplined and, eventually, expelled.
- The Student felt that teachers had heard some of the verbal harassment, but did nothing to stop it. He told school staff about the harassment. The Student also provided notice of the harassment to District officials at his expulsion hearing, where he told the expulsion panel that he experienced harassment at the school based on how he dresses, acts, and speaks.

# Hypothetical

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- Is this harassment?
- If so, what type of harassment?
- Was the school deliberately indifferent?
- What, if anything, should the school have done differently?





# Is this sexual harassment?

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A high school student sends topless photos of herself to her boyfriend via Snapchat throughout their 3-month relationship, expecting the photos will automatically delete after 10 seconds. The boyfriend takes a screenshot of one of the photos. Following their break-up some weeks later, he texts the screenshot to some teammates, who in turn post suggestive comments on the girl's social media pages. When she consults her guidance counselor, the counselor hesitates to act because the photos were taken voluntarily outside of school, have not been shown on campus, and the bullying has not explicitly mentioned the photos.

# Hypothetical

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- Is this harassment?
- If so, what type of harassment?
- Was the school deliberately indifferent?
- What, if anything, should the school have done differently?

# Is this sexual harassment?

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- Shortly after enrolling at a new high school, a female Student had a brief romance with another student.
- After the couple broke up, other male and female students began routinely calling the new Student sexually charged names, spreading rumors about her sexual behavior, and sending her threatening text messages and emails.
- One of the Student's teachers and an athletic coach witnessed the name calling and heard the rumors, but identified it as 'hazing' that new students often experience. They also noticed the Student's anxiety and declining class participation.
- The school attempted to resolve the situation by requiring the Student to work the problem out directly with the other students.

# Hypothetical

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- Is this harassment?
- If so, what type of harassment?
- Was the school deliberately indifferent?
- What, if anything, should the school have done differently?

# What is sexual harassment?

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- On October 26, 2010, OCR issued a Dear Colleague Letter addressing bullying and harassment in schools.
  - The letter warns that school districts that fail to appropriately identify, thwart, and remedy bullying and harassment risk violating federal civil rights laws and losing federal funds.
  - “[S]ome student misconduct that falls under a school’s anti-bullying policy also may trigger responsibilities under one or more of the federal antidiscrimination laws enforced by [OCR].”
- The 2010 Dear Colleague Letter:
  - Clarified responsibilities of districts to prevent incidents of harassment and bullying, and
  - Provided examples (including the example above describing the experiences of a new high school student) of harassment and bullying for which OCR may find that a district violated federal civil rights laws.



# What is sexual harassment?

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- OCR has said that “[h]arassment does not have to include intent to harm, be directed at a specific target, or involve repeated incidents.”
- Sexual harassment can be perpetrated by a teacher, student or third party.
- People of the same sex can harass one another other.
- Harassment can happen on school grounds, but it can also happen at sporting events, at an off-campus program, or off campus (i.e., online)



# What must schools do?

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- A school must address harassment incidents “about which it knows or reasonably should have known.”
  - A school has such notice where a “responsible employee knew, or in the exercise of reasonable care should have known about the harassment.”
- A school must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring.
  - A school must take “immediate and appropriate action” to investigate.



# What are some of the risks of violating Title IX?

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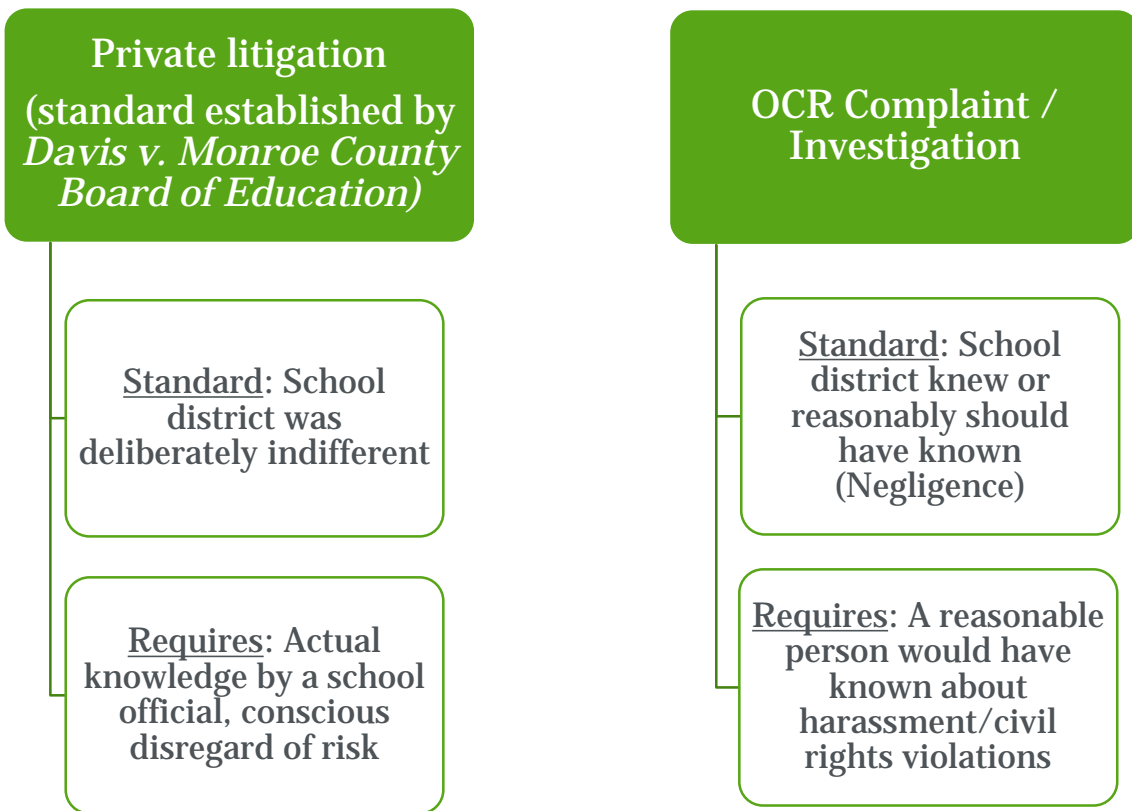
- **Private litigation**
  - Students (and parents on behalf of their children) have a private right of action under Title IX.
  - Therefore, students and their parents may sue school districts for money damages when those districts fail to adequately address harassment in violation of Title IX.
  - With increasing frequency, parents are pursuing lawsuits when – in the parents’ opinion – the district fails to respond appropriately to bullying or harassment.
- **OCR complaint/investigation**
  - A student, parent, or third party can submit a complaint to OCR, and OCR will investigate.
  - OCR may initiate its own investigations.
  - OCR may refer a case of non-compliance to the U.S. Department of Justice.
- **These actions could occur simultaneously, though there are different standards of liability**





# Standards of liability

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# Deliberate Indifference

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- What is deliberate indifference?
- Why does it matter?



# Recent examples of private litigation

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- *Doe v. Board of Education of Community High School District 218* (June 19, 2017)
- Minor child, Jane Doe, through her parents, brought suit against the school district, Board of Education, superintendent, principal, assistant principals, and physical education teacher, alleging that physical education teacher videotaped Jane Doe as she disrobed in a locker room
- The complaint alleged that the school district previously had received reports that the teacher had engaged in inappropriate sexual conduct, and that the teacher had been warned to stay away from other students
- The U.S. District Court for the Northern District of Illinois found that the school district was not deliberately indifferent



# Recent examples of private litigation

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- *Fenner v. Freeburg Comm. High School District (S.D. Ill. 2016)*
- Katrina Fenner, on behalf of her son, filed suit against Freeburg Community High School District 77
- Fenner alleged that her son was hazed by senior members of the men's soccer team, and was harassed over social media continuously.
  - Civil Rights: Claimed that this was harassment on the basis of sex because the girl's soccer team did not have similar hazing rituals. Furthermore, she alleged that the administration knew about the hazing rituals but did nothing to prevent them.
- These claims survived a motion to dismiss in federal court.

# OCR complaints/investigations of sexual harassment

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- In FY2016, OCR:
  - Received 673 complaints involving sexual/gender harassment
- In FY 2015, OCR:
  - Received 536 complaints and resolved 375 complaints involving bullying and sexual harassment and
  - Initiated and resolved 2 compliance reviews related to bullying and sexual harassment.

# OCR complaints/investigations of sexual harassment

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## Lifecycle of a bullying/harassment claim: monitoring

1. OCR monitors school districts' responses to bullying and harassment.

### Monitoring tool: Civil Rights Data Collection (“CRDC”)

- Mandatory survey through which OCR collects data directly from school districts
  - All districts now participate in the CRDC
  - Data is collected for one school year at a time
- School districts must collect and report new data bullying and harassment allegations, policies, and disciplinary measures
- Tracks harassment and bullying on the basis of disability, race, color, national origin, sex, sexual orientation, and religion

# OCR complaints/investigations of sexual harassment

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## Lifecycle of a bullying/harassment claim: investigation

2. OCR will investigate a district's response to bullying and harassment.
- Investigations can be initiated through complaints or compliance reviews
    - Complaint process: filed with OCR by impacted citizens
      - OCR evaluates thousands of complaints received to determine whether it has the authority to investigate.
    - Compliance reviews: initiated by OCR
      - OCR has authority to proactively initiate compliance reviews.
  - During an investigation, OCR acts as a “neutral” fact finder.
  - At the close of an investigation, OCR determines whether a school district has complied with its obligations under federal civil rights laws.

# OCR complaints/investigations of sexual harassment

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## Recent changes in requirements for OCR investigations

- *OCR Instructions to the Field re Scope of Complaints*
  - Circulated to OCR staff on June 8, 2017
  - Decisions about whether to expand the scope of investigations are now made on a case-by-case basis rather than determined by the category of complaint
  - Eliminates specialized treatment of certain types of complaints – including certain sexual violence and Title VI complaints – that automatically triggered institution-wide investigations
  - Requirements included multi-year reviews of similar claims aimed at detecting patterns of discrimination and increased oversight from OCR headquarters
  - OCR leadership says this change will make investigations more efficient and responses more timely
  - Administrative backlog and slow response time were given as the main reasons for the change in policy





# OCR complaints/investigations of sexual harassment

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## Recent changes in requirements for OCR investigations

- *OCR leadership explanation of new approach*
  - Emphasized that the role of OCR has not changed, still “to enforce the civil rights guaranteed to our nation’s students by certain civil rights laws”
  - Argued that civil rights enforcement is not being scaled back
    - Critics have voiced concerns over the combination of the withdrawal of OCR’s Dear Colleague Letter on transgender students with these investigative changes
  - Aims to be less confrontational and more cooperative during investigations
  - Methods of policymaking – moving away from DCLs
    - The new administration will not regulate via Dear Colleague Letters, but will use notice and comment procedures for new regulations
    - Previously issued Dear Colleague Letters may be opened up to negotiated rulemaking



# OCR complaints/investigations of sexual harassment

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## Recent changes in requirements for OCR investigations

- *Take-aways*

- There are many blanks still to be filled in about the new administration's approach to investigations
  - What types of investigations will be prioritized?
  - What policies will be developed in unsettled areas of the law, such as rights of transgender students?
- Schools that are investigated will likely not experience the expansive, drawn out investigations that became more common in recent years
- OCR will aim to resolve complaints quickly

# OCR complaints/investigations of sexual harassment

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## Lifecycle of a bullying/harassment claim: Outcomes of findings

3. School districts that fail to respond appropriately to bullying and harassment may face:
  - OCR enforcement;
  - lawsuits by DOJ; and/or
  - private litigation.
- OCR usually will enforce compliance through one of the following mechanisms:
  - Seeking early complaint resolution;
  - Entering into a consent decree or voluntary resolution agreement;
  - If OCR determines that a violation has occurred and the district refuses to resolve the violation, referral to the DOJ for investigation for possible enforcement via litigation; or
  - Seeking to terminate federal funds (Note: This has never happened.)

# OCR enforcement via Consent Decree: Anoka-Hennepin

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- Complaint submitted to DOJ that a female student was being “harassed by peers” for being “too manly.” Other female students reported similar teasing. Some male students were being called “gay boys” and “girly.”
- DOJ opened an investigation (Nov. 2010), and OCR joined investigation (Jan. 2011)
  - Used authority under Title IX, Title IV, and ED regulations which prohibit discrimination on the basis of sex (Remember: OCR will consider harassment based on not conforming to gender stereotypes as harassment on the basis of sex)
- DOJ and OCR visited the district multiple times
  - Conducted interviews with students, parents, teachers, staff, and administrators
  - Reviewed more than 7,000 pages of documents
- In July 2011, six students filed federal lawsuits against the school district, school board, and several school administrators.
- In August 2011, OCR and DOJ joined settlement discussions with the District, SPLC, and NCLR.

# OCR enforcement via Consent Decree: Anoka-Hennepin

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- All parties entered into Consent Decree, filed in U.S. District Court for the District of Minnesota
  - When fully implemented, Consent Decree will resolve complaint.
  - District agreed to:
    - Review and improve its policies and procedures concerning sex-based harassment by working with an Equity Consultant;
    - Hire or appoint a Title IX and Equity Coordinator;
    - Conduct training for all faculty, staff, and students; clarify policies for reporting and responding to harassment;
    - Hire a Mental Health Consultant to assist students subject to harassment;
    - Create an Anti-bullying/ Anti-harassment Task Force;

# OCR enforcement via Consent Decree: Anoka-Hennepin

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- Consent Decree (cont'd)
  - Administer an anti-bullying survey each year;
  - Identify harassment “hot spots” and monitor these trouble areas;
  - Ensure that all middle and high schools have a peer leadership program addressing harassment;
  - Hold annual meetings between superintendent and students at each middle and high school; and
  - Provide compliance reports to DOJ and OCR each trimester.
- Consent Decree in effect for five years, in which DOJ and OCR to monitor and to provide technical assistance as needed.
  - This could include additional visits, interviews, reports, or training.



# OCR enforcement via Resolution Agreement: Pasadena USD

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- Complaint filed with OCR by parent
  - Daughter has autism and receives 1:1 special education assistance.
  - Complaint cited multiple instances of verbal and physical harassment based on sex, race, and disability
- Subjects of OCR Investigation:
  - District policies prohibiting discrimination
  - District investigation procedures
- Findings:
  - District's investigation was prompt and thorough (interviewed witnesses, students, complainant), but notification of parties, recordkeeping, and responsiveness to multiple instances of harassment were insufficient.





# OCR enforcement via Resolution Agreement: Pasadena USD

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- Pasadena and OCR entered into a Resolution Agreement.
  - Within 5 months of the agreement, Pasadena to:
    - Provide all district educators and students with education on preventing bullying and harassment;
    - Provide OCR with an overview of its bullying/harassment plan; and
    - Provide OCR with a copy of most recent annual climate survey results.
  - Within 30 days of the agreement,
    - School district to disseminate guidance to administrators on reporting findings to complainants any time it conducts an internal harassment investigation.







# Practically speaking, what does Title IX require?

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- Title IX requires each school district to have at least one Title IX Coordinator.
- Title IX requires each school district to have an anti-discrimination policy and grievance process to address sex discrimination, including sexual harassment.
- The policy must be widely distributed and available on an on-going basis.
- School districts have a legal obligation to take steps to prevent harassment and address harassment.
  - OCR advises: “Although a student's request to have his or her name withheld may limit the school's ability to respond fully to an individual complaint of harassment, other means may be available to address the harassment. . . . Examples include conducting sexual harassment training for the school site or academic department where the problem occurred, taking a student survey concerning any problems with harassment, or implementing other systemic measures at the site or department where the alleged harassment has occurred.”



# Before a complaint is made, a school district should:

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1. Regularly train all school personnel to identify harassment that they observe or that is reported to them;
2. Regularly train all school personnel on district anti-harassment policies, procedures, and complaint processes;
3. Identify one school-level and one district-level staff member to whom reports of harassment may be made;
4. Identify staff members to serve as investigators when complaints of harassment are received;
5. Ensure that all staff who investigate are trained and know the district's anti-harassment policies and procedures and civil rights laws enforced by OCR; and
6. Regularly train students on the district's anti-harassment policies and procedures, including how to identify and report harassment.



# You receive an allegation of harassment: Now what?

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## Preliminary issues

- Is there a particular timeframe within which an investigation must be completed?
  - OCR has opined that schools have “a responsibility to respond promptly and effectively.”
- If a school doesn’t know about harassment, then does it have an obligation to end it?
  - “[I]f the school knows or reasonably should know about the harassment, the school is responsible for taking immediate effective action to eliminate the hostile environment and prevent its recurrence.”



# You receive an allegation of harassment: Now what?

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## Preliminary issues, continued

- The student and parent do not want to file a formal complaint. Is the school's responsibility over?
  - No. "Regardless of whether the student who was harassed, or his or her parent, decides to file a formal complaint or otherwise request action on the student's behalf (including in cases involving direct observation by a responsible employee), the school must promptly investigate to determine what occurred and then take appropriate steps to resolve the situation."
- The police have started investigating. Is the school's responsibility over?
  - No. "[B]ecause legal standards for criminal investigations are different, police investigations or reports may not be determinative of whether harassment occurred under Title IX and do not relieve the school of its duty to respond promptly and effectively."
- After the school resolves the complaint, it has no further obligations, right?
  - No. It must ensure there is no retaliation and that the harassment is not recurring.

# You receive an allegation of harassment: Now what?

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Once a complaint is made:

1. Immediately take steps to ensure that the alleged victim and the alleged harasser are kept separate during the investigation and
2. Investigate the alleged harassment fully and promptly.

Note: Please keep in mind that the steps taken in an investigation should be adjusted according to the particular facts of the alleged harassment, including the age, disabilities, or other sensitivities of the alleged victim, the alleged harasser, and the witnesses.

# You receive an allegation of harassment: Now what?

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- Does the school need to protect the student's or complainant's confidentiality?
  - Protect confidentiality to the extent possible.
- “In all cases, a school should discuss confidentiality standards and concerns with the complainant initially. The school should inform the student that a confidentiality request may limit the school's ability to respond. The school also should tell the student that Title IX prohibits retaliation and that, if he or she is afraid of reprisals from the alleged harasser, the school will take steps to prevent retaliation and will take strong responsive actions if retaliation occurs. If the student continues to ask that his or her name not be revealed, the school should take all reasonable steps to investigate and respond to the complaint consistent with the student's request as long as doing so does not prevent the school from responding effectively to the harassment and preventing harassment of other students.” (2001 Guidance)

# You receive an allegation of harassment: Now what?

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Continued...

“OCR enforces Title IX consistent with the federally protected due process rights of public school students and employees. Thus, for example, if a student, who was the only student harassed, insists that his or her name not be revealed, and the alleged harasser could not respond to the charges of sexual harassment without that information, in evaluating the school's response, OCR would not expect disciplinary action against an alleged harasser.

At the same time, a school should evaluate the confidentiality request in the context of its responsibility to provide a safe and nondiscriminatory environment for all students. The factors that a school may consider in this regard include the seriousness of the alleged harassment, the age of the student harassed, whether there have been other complaints or reports of harassment against the alleged harasser, and the rights of the accused individual to receive information about the accuser and the allegations if a formal proceeding with sanctions may result.”

# You receive an allegation of harassment: Now what?

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## **Act immediately to end harassment**

- Acting immediately sends a message that the harassment is not acceptable.
- It may be appropriate to provide “interim measures,” individualized services offered as appropriate to either or both the reporting and responding parties involved in an alleged incident of sexual misconduct, prior to an investigation or while an investigation is pending.
  - For example: Counseling, extensions of time, modifications of class schedules, restrictions on contact, etc.
- Inform complainants about their Title IX rights, any available resources (such as counseling, health, and mental health services), and their right to file a complaint with local law enforcement.



# You receive an allegation of harassment: Now what?

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## **Investigations are important**

- It is the right thing to do!
  - Investigations are necessary to ensure equal access to education.
- Legal reasons:
  - A school district must be able to demonstrate to a complaining student or parent, OCR, and/or DOJ that it has appropriately investigated and responded to all allegations of harassment.
  - If a school district knows about harassment but does not do anything, its failure to act may create liability.

# You receive an allegation of harassment: Now what?

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## Investigate all allegations of harassment

- The inquiry must be prompt, thorough, and impartial. Consider the following steps:
  - First, make an investigation plan including what questions to ask, who to interview, and logistics
  - 1. Review applicable statutes, regulations, and school district policies and procedures. Follow all applicable policies and procedures throughout the investigation. Determine whether state/local law requires notifying law enforcement officers.
  - 2. Ask the complaining student or staff member for a full narrative of the facts. Written complaint forms are very helpful.
  - 3. Review the student/staff files of every individual allegedly involved in the incident. Reviewing the files will provide the investigator with key background facts that can inform his or her questioning of the victim, the alleged harasser, and witnesses.
  - 4. Interview all alleged victims (which may or may not include the complainant). Consider asking: how the alleged harassment has affected the victim and whether the victim has any notes, emails, text messages, documentation, or other physical evidence.
  - 5. Interview other witnesses to the extent necessary.
  - 6. Interview the alleged harasser(s).
  - 7. Review the notes from the interviews. Follow up on any factual inconsistencies. Re-interview as necessary.
- Note: Provide interviewees – whether they are the victim, a witness, or the alleged harasser – with appropriate translation services if the interviewee is an English Language Learner.

# Investigation steps applied

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(1) Review applicable statutes, regulations, and school district policies and procedures. Follow all applicable policies and procedures throughout the investigation.

- As investigator, your first step is to review the district's anti-harassment policies and procedures. Follow those procedures throughout your investigation!

# Investigation steps applied

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(2) Ask the complaining student or staff member for a full narrative of the facts. Written complaint forms are very helpful. A written form ensures that the investigator collects all relevant information, including:

- Who, what, when, where;
  - Race, ethnicity, and gender of victim;
  - Students, teachers, and other staff involved;
  - Witnesses to the incident; and
  - The specific nature of the alleged harassment.
- As soon as possible, provide the complainant with a written complaint form. Check to ensure that she provides all the information above. Review her responses carefully before conducting any further interviews.

# Investigation steps applied

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(3) Review the student/staff files of every individual allegedly involved in the incident. Reviewing the files will provide the investigator with key background facts that can inform his or her questioning of the victim, the alleged harasser, and witnesses.

(4) Interview all alleged victims (which may or may not include the complainant).

In addition to the standard factual information listed in #2 above, the investigator should consider asking the victim(s) the following questions:

- How did you react to the harassment?
- How has the alleged harassment affected you and your experience at school?
- Are there any other students, teachers, or staff that might have relevant information?
- Do you have any notes, emails, text messages, documentation, or other physical evidence related to the incident?
- How would you like to see this situation resolved?

# Investigation steps applied

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## (5) Interview other witnesses, as necessary.

- A full investigation includes interviews with all potential witnesses, even if the first few witnesses interviewed have provided identical information.
- The investigator should consider asking the following questions:
  - Describe the alleged harasser's general behavior toward the victim.
  - What, if anything, did the victim tell you about the incident?
  - Do you know of anyone else who might have relevant information?
  - Are you aware whether the alleged harasser has ever engaged in similar conduct in the past?
- Be sure that you have captured all potential witnesses by encouraging your interviewees to list any other students or school personnel who could possibly have information about the incident.

# Investigation steps applied

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## (6) Interview the alleged harasser(s).

- The investigator should ask the alleged harasser about the basic facts surrounding the incident and give the alleged harasser an opportunity to explain the reasons for his or her actions.

# Investigation steps applied

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## (7) Review the notes from the interviews.

- Follow up on any factual inconsistencies. Re-interview witnesses, as necessary.
- If the alleged harasser says something that directly contradicts what the complainant reported to you, circle back with the complainant to clarify her version of the events.



# Tips for an effective investigation

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- Be strategic. Use your review of the relevant law and policies as a guide to what you need to find out.
- Be consistent! Follow the same investigative processes for each harassment complaint.
- Develop a checklist of questions before each interview.
- Interview questions should elicit the facts, but should be open-ended so as to allow the interviewees to tell their side of the story.
- Ask follow-up questions if needed (“Is there anything else you think we should know?”).
- Take notes either during the interviews or immediately following the interviews. The notes should state the facts, not the investigator’s opinions.
- Provide interviewees – whether they are the victim, a witness, or the alleged harasser – with appropriate translation services if the interviewee is an English Language Learner.

# After an investigation

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- Provide written notice of the outcome of disciplinary proceedings to both parties concurrently.
- The content of the notice may vary depending on the underlying allegations and the age of the students.
- Inform the reporting party's parents (or directly to the student, if the student is 18):
  - Whether the school found that the alleged conduct occurred;
  - Any individual remedies offered to the reporting party or any sanctions imposed on the responding party that directly relate to the reporting party; and
  - Other steps the school has taken to eliminate the hostile environment, if applicable.

# You receive an allegation of harassment: Now what?

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## **Be careful about the language you use**

- What do you think about the following comments?
  - A teacher said that a student “gives back about as much as he gets” and that he just “needs to stay away from certain kids” and “learn how to make life easier for himself.”
  - A teacher said that a student “brought some of this on himself.”

*(Eilenfeldt v. United C.U.S.D. #304 Board of Education)*

## “Dangerous Words,” compiled by Nat’l Women’s Law Center

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- Just ignore it.
- He puts his arms around everyone.
- Why can’t you learn to accept a compliment?
- You must have wanted it - otherwise you would have told him no.
- That’s how they do things where he comes from.
- It’s a joke. Lighten up.
- No one’s filed a charge so our hands are tied.
- We’ve never had a complaint, so we don’t have a problem.
- This kind of behavior is all a part of growing up.
- It’s a matter of hormones, we can’t control that.
- If we had to discipline every student who used bad language we’d never get anything else done.
- It’s just a prank that got out of hand.
- Oh well, boys will be boys.

# You receive an allegation of harassment: Now what?

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## **Take steps to stop the harassment from happening again.**

- Once a district has determined that harassment has occurred, the district must take appropriate steps to end harassment.
- The nature of those steps will depend on a number of factors, including the ages of the victim(s) and the harasser(s), the nature of harassment, and the pervasiveness of harassment.
- Generally, school districts take some or all of the following steps:
  1. Discipline the harasser(s) appropriately.
  2. If appropriate, engage in conflict resolution procedures involving the harasser and his or her victim.
  3. If necessary, provide services to the victim to address the effects of the harassment.
  4. Prevent retaliation.

# You receive an allegation of harassment: Now what?

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## **Take steps to stop the harassment from happening again (cont.)**

- Provide training or other interventions for harassers and/or the larger school community.
- Inform parents and students about the harassment incident and the school district's response.
- Distribute anti-harassment materials to students and parents.
- Ensure that the victim and his or her family know how to report subsequent problems with harassment.
- Conduct follow-up inquiries to confirm that there have not been any new instances of harassment or instances of retaliation.

# You receive an allegation of harassment: Now what?

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**It may be appropriate for a school to take interim measures during the investigation of a complaint. Examples:**

- Rearrange schedules;
  - Provide counseling, medical services, and academic support (tutoring); and
  - Remove negative grades or evaluations that resulted from the harassment from the student's record, or allow a student to retake a test or class.
- 
- Note: In 2017, ED said that “[i]n fairly assessing the need for a party to receive interim measures, a school may not rely on fixed rules or operating assumptions that favor one party over another, nor may a school make such measures available only to one party. Interim measures should be individualized and appropriate based on the information gathered by the Title IX Coordinator, making every effort to avoid depriving any student of her or his education. The measures needed by each student may change over time, and the Title IX Coordinator should communicate with each student throughout the investigation to ensure that any interim measures are necessary and effective based on the students’ evolving needs.”

# You receive an allegation of harassment: Now what?

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## What would you do?

- A high school's basketball team is in the state finals. A student files a complaint alleging that a teammate sexually assaulted her on the bus on the way to the semi-finals game. The school informs the complainant that she must provide her own transportation to the state finals, and should not ride the team's designated bus.
- A middle school student reports that several boys in her class have sent her nude photographs of themselves and others; they appear on her iPhone and then disappear. The school tells the complainant to turn her phone off during the school day.



# Sexual violence



# What is sexual violence?

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- Sexual violence is a form of sexual harassment prohibited by Title IX.
- “Sexual violence” is defined by OCR as “physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent (e.g., due to the student’s age or use of drugs or alcohol, or because an intellectual or other disability prevents the student from having the capacity to give consent).”
- A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, sexual abuse, and sexual coercion.
- Sexual violence can be carried out by school employees, other students, or third parties.



# OCR sexual violence enforcement

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- In FY 2016, OCR:
  - Received 260 complaints related to sexual violence, including 83 against K-12 schools.
- In FY 2015, OCR:
  - Received 229 complaints related to sexual violence, including 65 against K-12 schools;
  - Resolved 83 complaints related to sexual violence; and
  - Began 2 compliance reviews and resolved 1 investigation related to sexual violence.



# Why is sexual violence a focus under Title IX?

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- According to an AP Investigation released in May 2017:
  - 17,000 reports of K-12 student-on-student sexual violence were filed between 2011 and 2015
    - Such attacks are “greatly under-reported”
    - For every adult-on-student incident that was reported, seven student-on-student assaults were reported
  - Schools are the second-most common place for children to be assaulted

## **Sexual Assault by Fellow Students: 17,000 Reports in 4 Years, AP Investigation Finds**

by THE ASSOCIATED PRESS

July 7, 2017

**EDUCATION WEEK**

Welcome, Site Licensee  
Full Premium Access!

**AP Investigation Reveals Hidden Horror of Sex Assaults by K-12 Students**



# Sexual violence as sexual harassment

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- On April 4, 2011, OCR issued a Dear Colleague Letter addressing sexual violence in schools.
- The Dear Colleague Letter:
  - Clarified that Title IX, which prohibits discrimination on the basis of sex, covers sexual violence; and
  - Provided detailed guidance on districts' obligations to take “immediate and effective steps” to address incidents of peer-on-peer sexual violence.
- Like the OCR letter on bullying and harassment, the Dear Colleague Letter warned that districts that fail to take prompt and effective steps to address incidents of sexual violence risk losing federal funds or being referred to DOJ for litigation.
- *The 2011 DCL was withdrawn on September 22, 2017.* OCR said it will continue to rely on its 2001 Revised Sexual Harassment Guidance and 2006 DCL on Sexual Harassment.



# Sexual violence as sexual harassment

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- On April 29, 2014, OCR issued additional guidance in a Q&A letter concerning obligations to address sexual violence as a form of sexual harassment under Title IX.
- The Q&A letter:
  - Further clarified the legal requirements and guidance in the 2011 DCL;
  - Provided examples of proactive efforts schools can take to prevent sexual violence; and
  - Provided remedies schools may use to end sexual violence, prevent its recurrence, and address its effects
- *The 2014 Q&A was withdrawn on September 22, 2017.* OCR said it will continue to rely on its 2001 Revised Sexual Harassment Guidance and 2006 DCL on Sexual Harassment.

# Sexual violence as sexual harassment

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## Parties of the same sex

- Title IX prohibits sexual harassment regardless of the sex of the harasser, i.e., even if the harasser and the person being harassed are members of the same sex. (2001 Guidance)
  - A school should include examples of same-sex sexual violence in any explanation about the particular type of conduct that could violate the school's prohibition on sexual violence.
  - School staff should receive appropriate training about working with LGBT students and same-sex sexual violence.

# Sexual violence as sexual harassment

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## Parties with disabilities

- When students with disabilities experience sexual violence, Title IX and federal civil rights laws may be relevant to a school's obligation to investigate and remedy such incidents.
- Students with disabilities may need:
  - help learning about sexual violence, or
  - services as a result of sexual violence.
- A student may develop the need for special education after experiencing sexual violence.



# District obligations concerning sexual violence

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## Case study: Palo Alto USD

- Palo Alto Unified School District was determined to be noncompliant with Title IX
  - Multiple instances of sexual harassment and sexual assault of students, both in and out of school
- Resolution Agreement signed March 2017
- The following examples are excerpted complaints from the Palo Alto investigation and the District's response to each. Consider what the district did well and what it should have done differently.

# District obligations concerning sexual violence

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## Case study: Palo Alto USD

### **Reported Conduct**

- Off-campus sexual assault of female student by a male student
- Female student's parent gave Palo Alto High School oral notice of the assault
- After assault was reported, female student harassed at school and on social media by classmates

### **District Response**

- Referred student to on-campus and off-campus counseling
- Assisted student in filing police report
- Gave student an exam waiver so she would not have to return to campus
- Interviewed alleged perpetrator, other witnesses
- Attempted to find source of retaliatory harassment
- Did not provide outcome of either investigation to complainant



# District obligations concerning sexual violence

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## Case study: Palo Alto USD

- What did Palo Alto do right in this instance?
- What should Palo Alto have done differently?

# District obligations concerning sexual violence

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## Case study: Palo Alto USD

### Reported Conduct

- Male student allegedly locked a female student in a bathroom at an off-campus party and told her he would not let her out unless she performed sex acts on him
- 2 students reported the incident to an Assistant Principal

### District Response

- Assistant Principal relayed report to Title IX coordinator
- Female student's counselor met with her
  - Informed of counseling resources
  - Informed of right to file UCP complaint or police report
  - Encouraged her to report any subsequent harassment
- Met with accused student
  - Warned not to harass other student
  - Notified his parent of the allegation, made parent aware of counseling resources
- Followed up with female student's parent, who notified school of police report filing
- School monitored parties but did not provide notice of an outcome to either party



# District obligations concerning sexual violence

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## Case study: Palo Alto USD

- What did Palo Alto do right in this instance?
- What should Palo Alto have done differently?

# District obligations concerning sexual violence

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## Case study: Palo Alto USD

### Reported Conduct

- Student A reported being stalked by Student B
- Student A had recently broken up with B because of B's possessive tendencies
- Student B knew A's class schedule and routes home, allegedly harassed A both on- and off-campus
- Student A alleged B's conduct caused A to be tardy and could not focus on school work when B was visible outside A's classroom
- Student B once followed A as A walked home and physically assaulted A, resulting in B's arrest
  - School was notified
- Student A received an Emergency Protective Order requiring B to stay 300 yards away
  - School was notified

### District Response

- Assistant Principal offered counseling for Student A
- Administrators suggested having a campus security supervisor monitor Student A between classes to ensure Student B did not approach
- School eventually suspended Student B in order to comply with the Protective Order
- Student A's parents say they were not provided information on sexual harassment complaint procedures



# District obligations concerning sexual violence

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## Case study: Palo Alto USD

- What did Palo Alto do right in this instance?
- What should Palo Alto have done differently?

## Another case study

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### **Middle school football team forfeits season after racially insensitive video**

The football team at Short Pump Middle School in Henrico County, Va., forfeited their season after a few players posted a racially insensitive video to Snapchat - <http://time.com/4992998/virginia-school-football-snapchat-video/>

- Time, October 23, 2017



## Another case study continued

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### **Middle school football team forfeits season after racially insensitive video**

Police in Short Pump, Virginia are investigating a Snapchat video showing local white middle school football players faking sexual assault on African American students - <https://youtu.be/SNOHG4Jeyvk>

- Washington Post, October 22, 2017

# Transgender students

# Bullying and harassment based on sex

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## Transgender students

- The legal obligations of schools for accommodating and protecting transgender students is in flux
- Timeline of federal transgender policy developments over the last 2.5 years:

**January 2015**  
**OCR Public Letter to Private Citizen**  
Instructed school to follow students' gender identity, not sex assigned at birth



**May 2016**  
**OCR DCL**  
Detailed obligations rooted in deference to gender identity (accommodations, no requirement of medical diagnosis, how to address discrimination)



**February 2017**  
**OCR DCL**  
Previous OCR Letter and OCR DCL  
**repealed**



**June 2017**  
**OCR Internal Memo**  
OCR issues internal memo explaining that discrimination, bullying, and harassment of transgender students are still covered by Title IX

# OCR internal memo on transgender students

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## OCR Instructions to the Field re Complaints Involving Transgender Students

- Issued June 6, 2017
- Summary:
  - OCR should rely on Title IX and its implementing regulations in evaluating complaints of sex discrimination
  - Specified that OCR may assert subject matter jurisdiction over:
    - Failure to promptly and equitably resolve a complaint of sex discrimination
    - Failure to assess whether sexual or gender-based harassment (including not using preferred pronouns)
    - Retaliation against a transgender student after discrimination concerns raised
    - Different treatment based on sex stereotyping
- Also provided script for dismissing claims from transgender students



# Legal events following revocation of OCR DCL (Feb. 2017)

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- March 3, 2017: 13 states dropped their suit against the 2016 DCL
  - Were arguing that it improperly redefined sex discrimination under Titles VII and IX
  - Suit dismissed 9 days after revocation of OCR letters
- March 6, 2017: Supreme Court vacated and remanded Gloucester Cty. School Bd. v. G.G.
  - Sent transgender bathroom case back to 4th Circuit for reconsideration in light of withdrawal of DCL; the 4<sup>th</sup> Circuit in turn remanded the case to the federal district court
- May 2017: *Whitaker v. Kenosha Unified School District*
  - 7th Circuit upheld a preliminary injunction that will prevent school district from forcing the plaintiff, a transgender student, to use the bathroom of his sex assigned at birth rather than his gender identity
  - Court found plaintiff could suffer irreparable harm if forced to use other bathroom and that his chances to succeed on the merits are “better than negligible”
  - Argued and decided after the revocation of the Obama administration transgender guidance

# Legal events following revocation of OCR Transgender Guidance (February 2017)

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- On June of 2017, Connecticut State Department of Education issued guidance on civil rights protections for transgender students.
- Guidance addresses a range of topics and states that “issues that arise often must be resolved in context of local communities, and school district leaders should consult their legal counsel regarding how the applicable laws and regulations may affect the policy decisions they are making for their schools.”

# Legal events following revocation of OCR Transgender Guidance (February 2017)

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- Connecticut Guidance states that “students and parents/guardians have the right to enforce Title IX directly by filing a lawsuit in court and/or seeking enforcement by appropriate state authorities. . . [s]tudents and parents/guardians also have the right to enforce protections against gender identity discrimination established by Connecticut law.”

# Legal events following revocation of OCR Transgender Guidance (February 2017)

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- Connecticut Guidance states that “[b]ecause of uncertainty concerning how OCR will handle complaints of gender identity discrimination during the Trump administration, CSDE recommends that students, parents and guardians, file complaints with OCR and CHRO if they are unable to resolve issues directly with the school district.”



# Legal events following revocation of OCR Transgender Guidance (February 2017)

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- **An Example of Topic in Connecticut Guidance**
  - “Students are not required to produce documents that reflect gender identity in order to have the right to be treated consistent with their gender identity . . . schools are expected to treat students consistent with the student’s state gender identity even if the education records or identification documents indicate a different sex. Similarly the school’s obligation to treat a student consistent with the student’s gender identity or expression does not require notice from parent or guardian.”

# Legal events following revocation of OCR Transgender Guidance (February 2017)

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- **Another Example in Connecticut Guidance**
  - “Under federal and state laws, CSDE policies and procedures and Executive Order No. 56, schools are required to provide access to the restroom that corresponds to a student’s gender identity at school, even when this differs from their sex assigned at birth. . . In communicating with students, families and staff about this requirement, schools may find it helpful to note that a private restroom option will be made available to any student.”



# Legal events following revocation of OCR DCL (Feb. 2017)

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- June 2017: OCR's Sparta, Ohio OCR investigation closed
  - Elementary school case involving transgender student's access to the bathroom of their gender identity
  - Case closed because the student settled with the school district
  - Earlier OCR findings that a student had suffered discrimination at school withdrawn, citing revocation of the 2016 DCL
    - Unusual to withdraw a federal investigator's legal conclusion
- August 25, 2017: *Doe v. Boyertown Area School District*
  - School district implemented a policy to allow transgender students to use facilities consistent with their gender identities
  - Parents of cisgender students objected to having to share facilities with transgender students
  - Third Circuit rejected the families' request for a preliminary injunction, finding no violation of Title IX

Athletics

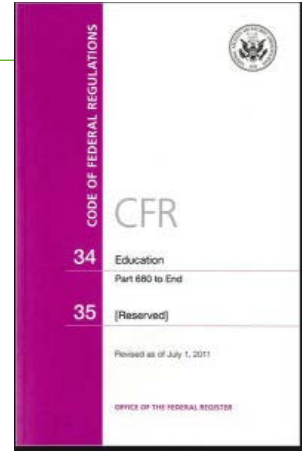
# Athletics

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- Federal regulations provide:

“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.”

-- 34 C.F.R. 106.41(a).



# Athletics

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## Participation in Athletics Before and After Title IX

School Year	Boys	Girls
1971-1972	3,666,917	294,015
2016-2017	4,563,238	3,400,297

# OCR enforcement of equal access to athletic opportunities

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- In FY 2016, OCR:
  - Received 6,251 complaints related to equal access to athletic opportunities and benefits (*note*: More than 6,000 of the complaints were filed by a single complainant)
- In FY 2015, OCR:
  - Received 1,771 complaints and resolved 1658 complaints related to equal access to athletic opportunities and benefits, and
  - Started 5 compliance reviews involving equal access to athletic opportunities and benefits and resolved 1 review.

# OCR enforcement of equal access to athletic opportunities

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- The Women's Sports Foundation, founded by Billy Jean King, notes the following benefits of sports:
  - High school girls who play sports are less likely to be involved in an unintended pregnancy; more likely to get better grades in school and more likely to graduate than girls who do not play sports.
  - As little as four hours of exercise a week may reduce a teenage girl's risk of breast cancer by up to 60%; breast cancer is a disease that afflicts one out of every eight American women.
  - Girls and women who play sports have higher levels of confidence and self-esteem and lower levels of depression.
  - Girls and women who play sports have a more positive body image and experience higher states of psychological well-being than girls and women who do not play sports.

(Source: Women's Sports Foundation, "Benefits – Why Sports Participation for Girls and Women".)



# ED's Three-Part Test

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- Schools are providing equal participation opportunities to their male & female students if:
- Prong 1: Athletic participation opportunities for males and females are *substantially proportionate* to their respective enrollments; **OR**
- Prong 2: The school has a *history and continuing practice* of expanding athletic participation opportunities for the underrepresented sex (which is demonstrably responsive to the developing interests and abilities of the members of that sex); **OR**
- Prong 3: The school has *fully and effectively accommodated* the interests and abilities of the underrepresented sex with its present program.



# ED's Three-Part Test: Prong One (proportionality)

- **Participation should be proportionate to enrollment.**
- **Example: OCR Resolution Agreement with Portland Public Schools (Maine) (September 2013)**
  - OCR conducted a compliance review, and determined that in 2010-11, girls were underrepresented in the District's athletics program, with a disparity of 3.64%. In 2011-12, that disparity remained and even grew slightly to 3.74%.

## PORTLAND SCHOOL DISTRICT STUDENT POPULATION\*

	2010-11		2011-12	
<b>Males</b>	1,195	51.33%	1,110	49.91%
<b>Females</b>	1,133	48.67%	1,114	50.09%
<b>Total</b>	<b>2,328</b>		<b>2,224</b>	

*\*Data provided by the District and the Maine Dept. of Education*

## PORTLAND SCHOOL DISTRICT ATHLETIC PARTICIPATION\*

	2010-11		2011-12	
<b>Male Athl.</b>	830	54.97%	793	53.65%
<b>Female Athl.</b>	680	45.03%	685	46.35%
<b>Total</b>	<b>1,510</b>		<b>1,478</b>	

*\*Data compiled from team rosters and coach interviews*



## ED's Three-Part Test: Prong One (proportionality)

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- Example (continued): OCR Resolution Agreement with Portland Public Schools (Maine) (September 2013)
  - OCR determined how many athletic participation opportunities the school district would need to create at each of its schools in order to be in compliance with Title IX.
  - OCR noted that “[i]t is also possible that the two high schools could collaborate – as they currently do with girls’ hockey – if there is an insufficient number of students to create a team at either school but there would be a sufficient number to create a combined team.”

# ED's Three-Part Test: Prong One (proportionality)

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- Cheerleading is not a “sport” for purposes of complying with Title IX.
- *Biediger v. Quinnipiac University*, 691 F.3d 85 (2nd Cir. 2012)
  - The court held that competitive cheerleading did not count for purposes of complying with Title IX.
  - The court held: “For purposes of determining the number of genuine varsity athletic participation opportunities that Quinnipiac afforded women students, the district court correctly declined to count: . . . any of the 30 roster positions for women's competitive cheerleading because that activity was not yet sufficiently organized or its rules sufficiently defined to afford women genuine participation opportunities in a varsity sport.”
  - The court cited the district court’s observation “that competitive cheerleading is not yet recognized as a ‘sport,’ or even an ‘emerging sport,’ by the NCAA.”

# ED's Three-Part Test: Prong Two (Program Expansion)

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- **The school has a history and continuing practice of expanding athletic participation opportunities for the underrepresented sex.**
  - Look at the historical record for the school district
  - Examine whether the school district's plan is demonstrably responsive to the developing interests and abilities of the members of the underrepresented sex

# ED's Three-Part Test: Prong Two (Program Expansion)

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- **Example: OCR Resolution Agreement with Portland School District (Maine)**

“In analyzing this part of the Three Part Test, OCR reviewed the start date (or best estimate) for every sport offered by the District that had a recorded history. The District informed OCR that the start dates of many additional sports were unknown or could not be defined with any accuracy because they were started long ago. . . .OCR reviewed team pictures from the early 1900s that indicated that boys’ football and baseball started at approximately the same time. . . . The District has canceled or combined sports teams for the underrepresented sex in the past few years, . . .

“Based on this information, OCR concluded that the District could not demonstrate both a ‘history’ and ‘continuing practice’ of program expansion for its underrepresented sex. While there were periods of time in the District’s history when it increased participation opportunities for girls, there were significant periods of time when little or no expansion occurred and other, more recent periods of time when the District shrunk its program offering for girls. Accordingly, OCR determined that the District did not meet part two of the Three Part Test.”

# ED's Three-Part Test: Prong Three (Full and Effective Accommodation)

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## **The school has fully and effectively accommodated the interests and abilities of the underrepresented sex.**

- OCR will consider the following:
  - Is there unmet interest in a particular sport?
    - Does the institution use nondiscriminatory methods of assessment when determining athletic interests and abilities of students?
    - Was a viable team eliminated?
    - Were there multiple indicators of interest?
    - Were there multiple indicators of ability?
    - How often are assessments conducted?
  - Is there sufficient ability to sustain a team in the sport?
  - Is there a reasonable expectation of competition for the team?
- OCR advised in its 2010 Dear Colleague Letter that “[i]f the answer to all three questions is ‘Yes,’ OCR will find that an institution is not fully and effectively accommodating the interests and abilities of the underrepresented sex and therefore is not in compliance with” the third prong.”

## ED's Three-Part Test: Prong Three (Full and Effective Accommodation)

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### **The school has fully and effectively accommodated the interests and abilities of the underrepresented sex.**

- Surveys alone are not sufficient to determine compliance, regardless of the response rate.
- Non-responses to surveys are not definitive evidence that there is a lack of interest or ability in athletics.
- An institution is not required to administer a survey to be in compliance with this prong, and OCR advised that it does not evaluate just surveys when determining compliance. OCR stated in the 2010 Questions and Answers: “A survey is only one indicator that may be used as part of an overall assessment of interests and abilities of the underrepresented sex.”



# Athletics

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- Boys' and girls' athletics programs must be equal overall,\* including:
  - Scheduling
  - Travel
  - Coaching
  - Locker rooms/facilities
  - Medical/training services
  - Publicity
  - Recruiting
  - Tutoring
  - Housing/dining
  
- \* No “booster club” exception

# Hypothetical

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- Parents of girls on the softball team complain to you that your school does not provide the same facilities and opportunities that are provided for boys' athletic teams. The parents say that the school is discriminating against female athletes in the following areas: funding; equipment; game and practice times; travel; coaching opportunities; locker rooms and publicity.
- Parents claim that the baseball team has 7 coaches and the softball team has one coach. In addition, they say that the baseball team has a brick locker room with central heat/air, restroom facilities and coaches' office and the softball team locker room is a trailer with no heat or air and no offices.
- What do you do?

# Pregnant and parenting students

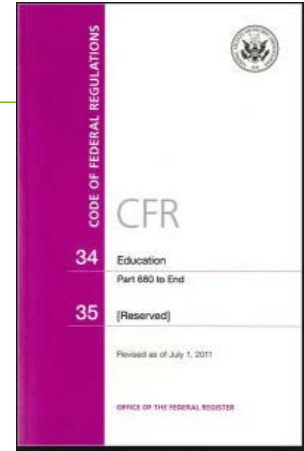
# Pregnant and parenting students

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Federal regulations provide:

“A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient..”

34 C.F.R. 106.40(a).



- No exclusion: Schools may not exclude a pregnant student from participating in any part of an educational program, such as advanced placement or honors classes, extracurricular programs, interscholastic sports, honor societies, and opportunities for student leadership.
- Special services: “If a school provides special services, such as homebound instruction or tutoring, for students who miss school because they have a temporary medical condition, it must do the same for a student who misses school because of pregnancy or childbirth.”

## Pregnant and parenting students: 2013 OCR Dear Colleague Letter and Pamphlet

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- Assistance: “To ensure a pregnant student’s access to its educational program, when necessary, a school must make adjustments to the regular program that are reasonable and responsive to the student’s temporary pregnancy status. For example, a school might be required to provide a larger desk, allow frequent trips to the bathroom, or permit temporary access to elevators.”
- Absences: “A school must excuse a student’s absences because of pregnancy or childbirth for as long as the student’s doctor deems the absences medically necessary. When a student returns to school, she must be allowed to return to the same academic and extracurricular status as before her medical leave began,” including the ability to make up work.
  - “A school may offer the student alternatives to making up missed work, such as retaking a semester, taking part in an online course credit recovery program, or allowing the student additional time in a program to continue at the same pace and finish at a later date, especially after longer periods of leave. The student should be allowed to choose how to make up the work.”

## Pregnant and parenting students: 2013 OCR Dear Colleague Letter and Pamphlet

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- Medical certification: “A school may require a pregnant student or student who has given birth to submit medical certification for school participation only if the school also requires such certification from all students with physical or emotional conditions requiring the attention of a physician.”
- Alternative programs: “A school may provide information to its students about the availability of an alternative program, but it may not pressure a pregnant student to attend that program. A pregnant student must be allowed to remain in her regular classes and school if she so chooses.”
- Teacher policies: “Schools must ensure that the policies and practices of individual teachers do not discriminate against pregnant students.”
  - “[I]f a teacher’s grading is based in part on class attendance or participation, the student should be allowed to earn the credits she missed so that she can be reinstated to the status she had before the leave.”

- **Harassment**: “Title IX prohibits harassment of students based on sex, including harassment because of pregnancy or related conditions.”
  - “Harassing conduct can take many forms, including
    - verbal acts and name-calling,
    - graphic and written statements, and
    - other conduct that may be humiliating or physically threatening or harmful.
    - Particular actions that could constitute prohibited harassment include making sexual comments or jokes about a student’s pregnancy, calling a pregnant student sexually charged names, spreading rumors about her sexual activity, and making sexual propositions or gestures.”



# Pregnant and parenting students: Hypothetical

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- Linda Locker is four months pregnant. She continues to attend mainstream instruction, and participate in the honor society. She wants to participate in physical education class. She no longer fits her gym clothes, but brought a pair of plain gray sweatpants and a plain gray sweatshirt from home. The teacher told her to sit quietly in the bleachers because it was better for her, and that she could only receive credit when dressed in the school-approved gym uniform. Linda expressed interest in participating in Model United Nations and competing to be on a float in the spring fling parade; the assistant principal eliminated her name from consideration for both activities. One of Linda's teachers approaches you, and explains the information above.

## Pregnant and parenting students:

### National Women's Law Center Recommendations

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- Ensure compliance with Title IX and a welcoming school climate
- Excuse absences for illness or medical appointment of student's child
- Flexibility in scheduling
- Goal-setting and guidance, encouragement
- Individualized graduation plans
- Home instruction during maternity leave
- Child care, transportation assistance
- Secondary pregnancy prevention
- Access to social services and health care
- "Parenting" classes teaching range of life skills
- Outreach to dropouts

# Single-sex classes and programs

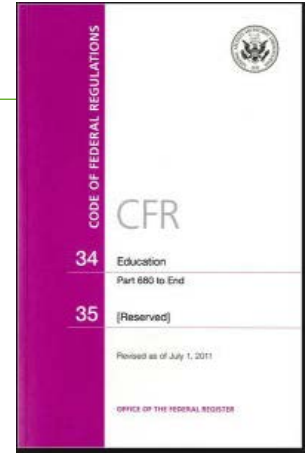
# Single-sex programs

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Federal regulations provide the following general standard:

“Except as provided for in this section or otherwise in this part, a recipient shall not provide or otherwise carry out any of its education programs or activities separately on the basis of sex, or require or refuse participation therein by any of its students on the basis of sex...”

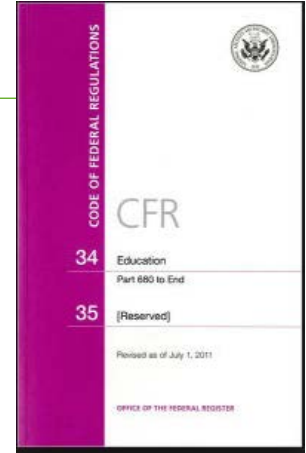
34 C.F.R. 106.34(a).



# Single-sex programs

Federal regulations (34 C.F.R. 106.34(a)) provide:

“Except as provided for in this section or otherwise in this part, a recipient shall not provide or otherwise carry out any of its education programs or activities separately on the basis of sex, or require or refuse participation therein by any of its students on the basis of sex...”



Grouping students on the basis of sex is permitted for:

- Contact sports in gym class
- Ability grouping in gym class
- Human sexuality class
- Chorus (based on vocal range or quality)

# Single-sex classes and extra-curricular activities: How to do it

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Federal regulations (34 C.F.R. 106.34(b)) provide:

“[A] recipient that operates a nonvocational coeducational elementary or secondary school may provide nonvocational **single-sex classes or extracurricular activities**, if—

- (i) Each single-sex class or extracurricular activity is based on the recipient's important objective—
  - (A) To improve educational achievement of its students, through a recipient's overall established policy to provide diverse educational opportunities, provided that the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective; or
  - (B) To meet the particular, identified educational needs of its students, provided that the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective;
- (ii) The recipient implements its objective in an evenhanded manner;
- (iii) Student enrollment in a single-sex class or extracurricular activity is completely voluntary; and
- (iv) The recipient provides to all other students, including students of the excluded sex, a substantially equal coeducational class or extracurricular activity in the same subject or activity.”

In order to implement its objective in an evenhanded manner, “[a] recipient that provides a single-sex class or extracurricular activity . . . may be required to provide a **substantially equal single-sex class or extracurricular activity** for students of the excluded sex.”

# Title IX and single-sex education

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In 2014, OCR published a Dear Colleague Letter addressing single-sex elementary and secondary classes.



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

**Questions and Answers on Title IX and Single-Sex Elementary and Secondary  
Classes and Extracurricular Activities\***

The Office for Civil Rights (OCR) of the U.S. Department of Education (Department) has received a number of questions about the legality, under the Department's regulations implementing Title IX of the Education Amendments of 1972 (Title IX), of single-sex elementary and secondary classes and extracurricular activities offered by recipients of funding from the Department.<sup>1</sup>

# Single-sex classes and extra-curricular activities: Hypothetical

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- At the faculty meeting, the principal announces that the school will begin offering Calculus as a single-sex class at the beginning of the next school year. The statement is made without any explanation, or details about the roll out of the initiative.
- How should the Title IX Coordinator respond?



# Single-sex classes and extra-curricular activities

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- In 2014, ACLU filed an OCR complaint against a Florida school district alleging that it had a single-sex classroom approach that violates Title IX.
- The complaint stated, in relevant part:

“By training teachers that boys and girls learn differently, and teaching girls and boys differently based on expectations about the talents, capacities and preferences of each sex, the District has created a hidden curriculum that is harmful to all students. Girls are encouraged to work quietly and discuss their feelings and personal problems. They’re expected to be cooperative and noncompetitive. Boys are encouraged to move around, compete and are not encouraged to discuss their feelings. . . . Girls are taught mathematics in a way that makes it less abstract and consequently gives girls the message that they are not good at abstract mathematics. Boys are taught literature in a way that makes stories highly concrete and fact-based and does not encourage them to connect with characters’ emotions. These sex stereotypes limit opportunities for boys and girls alike. ”

# Gender equity in career and technical education

# OCR Guidance on gender equity in CTE

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UNITED STATES DEPARTMENT OF EDUCATION  
*Office for Civil Rights*  
*Office of Career, Technical, and Adult Education*

June 15, 2016

Dear Colleague:

Career and Technical Education (CTE) programs are critical to strengthening our economy and securing a brighter future for our nation. Ensuring that all students have access to high-quality secondary and postsecondary CTE programs is central to achieving the equity that our nation's civil rights laws require.

The Department's Office of Career, Technical, and Adult Education (OCTAE) and Office for Civil Rights (OCR) join together in this letter to make clear to recipients<sup>1</sup> that all students, regardless of their sex or gender,<sup>2</sup> must have equal access to the full range of CTE programs offered.<sup>3</sup>



# OCR guidance on gender equity in CTE

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- Purpose

- Regardless of sex or gender, students should have equal access to the full range of available Career and Technical Education courses.

- Goals

- Eliminate discriminatory practices.
- Take proactive steps to expand participation of students in fields where one sex is traditionally underrepresented.

- Desired Results

- Increase overall participation and success in high-growth fields, for both men and women.

# OCR guidance on gender equity in CTE

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- The DCL gives several examples of best practices to promote gender equity:
- Conduct counseling, recruitment, and admission practices in a nondiscriminatory manner.
  - Give the same types of information and materials to all students.
- Portray a broad range of occupational opportunities to all students.
  - Do not filter your information to students based on stereotypical assumptions about their interests and abilities.
- Include persons of different sexes at recruitment and information fairs.
  - Also, ensure that promotional materials depict persons of different sexes.
- Routinely assess your school's progress toward gender equity.
  - Gather data on gender enrollment by class; have students complete surveys; and follow up with counselors, teachers, and other staff.



# Gender equity in CTE: Hypothetical

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- A high school is planning to sponsor a career day for all students to promote its information technology program. This is the only promotional effort that the high school will undertake for its information technology program. All of the current students and recent graduates of the program who will be invited to speak at the career day are male, even though some female students are currently enrolled in and have recently graduated from the program. The high school has not revised its promotional materials in a number of years, and all of the materials distributed at the career day depict males and use male pronouns to refer to students in the program. The high school only distributed these promotional materials at the career day and did not distribute them to members of the student community who did not attend the career day.

Discipline



# Title IX: Discipline

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- Civil Rights Data Collection (“CRDC”)
- Mandatory survey through which OCR collects civil rights data directly from school districts via a web-based collection tool.
  - OCR relatively recently implemented certain changes to its data collection.
    - All districts participate in the CRDC (instead of only a representative sample).
    - Data is being collected only for one school year (not for two years, as in the past).
- School districts must collect and report new data on allegations of bullying and harassment, bullying and harassment policies, and students disciplined for bullying and harassment.
- The CRDC materials describe harassment or bullying on the basis of (i) disability, (ii) race, color, national origin, and (iii) sex.





# Title IX: Discipline

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- The CRDC website allows the public to view data for specific schools and districts, and compare data across multiple schools or districts.





# Title IX: Discipline

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- Disparate treatment – Questions to consider:
  - Did the school limit or deny educational services, benefits, or opportunities to a student or group of students of a particular race by treating them differently from a similarly situated student or group of students of another race in the disciplinary process?
  - Can the school articulate a legitimate, nondiscriminatory reason for the different treatment?
  - Is the reason articulated a pretext for discrimination?



# Title IX: Discipline

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- Disparate Impact – Questions to consider:
  - Has the discipline policy resulted in an adverse impact on students of a particular race as compared with students of other races?
  - Is the discipline policy necessary to meet an important educational goal?
  - Are there comparably effective alternative policies or practices that would meet the school's stated educational goal with less of a burden or adverse impact on the disproportionately affected racial group, or is the school's proffered justification a pretext for discrimination?

# Title IX: Discipline

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- **Examples of recommendations from DCL:**
  - Safe, inclusive, and positive school climates that provide students with supports such as evidence-based tiered supports and social and emotional learning
  - Training and professional development for all school personnel
  - Appropriate use of law enforcement
  - Positive interventions rather than student removal
  - Data collection and responsive action

# Title IX Coordinators



# What are the responsibilities of Title IX Coordinators?

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- A Title IX coordinator's responsibilities include:
  - Overseeing a school's response to Title IX reports and complaints.
  - Identifying and addressing any patterns or systemic problems revealed by the reports or complaints.
  - Staying informed of all complaints raising Title IX issues.
  - Having no other responsibilities that may pose a conflict with Title IX responsibilities.
- Title IX gives coordinators broad protection from retaliation
  - Investigations cannot be impeded
  - Adverse actions cannot be taken because of investigation



# What are the responsibilities of Title IX Coordinators?

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- Be prepared to:
  - Stay abreast of developments related to Title IX, its implementing regulations, and guidance from federal agencies
  - Investigate complaints
  - Educate your colleagues, students, and your community about Title IX
  - Revise your policies and procedures, as appropriate
  - Resolve complaints promptly



# What are the responsibilities of Title IX Coordinators?

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- On April 25, 2015, OCR published a resource guide for Title IX coordinators.
- The resource guide includes:
  - an overview of the scope of Title IX;
  - a discussion about Title IX’s administrative requirements;
  - a discussion of key Title IX issues (such as athletics and discipline);
  - references to federal resources; and
  - recommended best practices.





# True or False

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- Title IX protects only girls and women; Title IX does not apply to boys and men.



# True or False

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- Under Title IX, to be harassment, the alleged harasser must intend to harm the victim.



# True or False

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- Under Title IX, a school district must complete an investigation of alleged harassment 10 days.



# True or False

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- A school district would violate Title IX if it provided bus transportation for the boys' basketball team for games and parents provided transportation for the girls' basketball team.



# True or False

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- Under Title IX, a school may exclude a pregnant student from being president of the student government.



# Contact Us

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## Maree Sneed

Partner, Washington, DC

Maree Sneed is recognized in the education industry as a lawyer who helps school districts, independent schools, educational institutions, and educational companies solve their most complex problems. For three decades, clients have sought Maree's advice as a result of her experience working in the education system, her legal acumen, her public policy work, and her ability to make connections between the education and legal arenas.

Maree has advised clients in the education sector on a broad range of issues, including social media, bullying and cyberbullying, harassment, sex and race discrimination, English language learners, and magnet schools. She also advises on privacy, including the Family Educational Rights and Privacy Act; special education/IDEA; equitable access and opportunities; integration and desegregation; school facilities; contracts; Title IX, Title VI, and 504 compliance; and charter schools.



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Education

### Education

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B.A. University of Oklahoma - 1970



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