

Title IX Emerging Risks and Their Impact on Public Entity Risk

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Our communities are a part of a global environment that is dynamically impacted by forces of nature, political climate, employee population, social media, constituency activity and government programming and mandates.

The COVID Pandemic has materially changed our social norms and life's expectations.

Those expectations are now challenging how our risk strategies function within our community. Identifying and measuring emerging risk as part of the totality of our risk financing mechanisms is difficult in the best of times.

Let's discuss balancing reality with our global and community economic pressures as we plan our future risk management programming.

Learning Objectives:

1. Measure the current state of risk within your organization and your community.
2. Understand the rapidly changing dynamics of the global and national landscape and how it materially affects you and your organization.
3. Develop strategies to reasonably re-examine your risk management programming without placing undue pressure on your personal and professional self.

What is Title IX of the Education Amendments of 1972?

- 20 U.S.C. §1681 *et seq.*, is a Federal civil rights law that prohibits discrimination on the basis of sex in education programs and activities.
- All educational institutions - public and private elementary and secondary schools, school districts, colleges, and universities receiving any Federal funds must comply with Title IX.
- Under Title IX, discrimination on the basis of sex can include sexual harassment or sexual violence, such as rape, sexual assault, sexual battery, and sexual coercion.

Title IX Talking Points

- Prohibits discrimination on the basis of sex
- Promotes equality of opportunity regardless of gender identification
- Enhances opportunities for education and employment

What are an educational institution's responsibilities under Title IX?



<https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-rights-201104.html>

A Responsibility to Respond

- Educational institutions have a responsibility to respond promptly and effectively.
- If a school knows or reasonably should know about sexual harassment or sexual violence that creates a hostile environment, the school must take immediate action to eliminate the sexual harassment or sexual violence, prevent its recurrence, and address its effects.

Knowledge of Harassment or Violence:

Even if a student or his or her parent does not want to file a complaint or does not request that the school take any action on the student's behalf, if a school knows or reasonably should know about possible sexual harassment or sexual violence, it must promptly investigate to determine what occurred and then take appropriate steps to resolve the situation.

Investigative Responsibilities:

A criminal investigation into allegations of sexual harassment or sexual violence does not relieve the school of its duty under Title IX to resolve complaints promptly and equitably.

Required Procedures to Prevent and Resolve Title IX Issues

Policy

- Develop and adopt programming that provides safeguards preventing discrimination on the basis of sex in educational programming and activities
- Must be widely distributed and fluid
- Inquiries are directed to a central point of contact that may be trusted and respected

Title IX Coordinator

- Educational institutions must designate at least one employee responsible for coordinating compliance – “Title IX Coordinator”
- Responsibilities include:
 - overseeing all complaints of sex discrimination;
 - identifying and addressing patterns arising out of complaints; and
 - educating/re-educating opportunities for improvement

Complaint Procedures:

- Adopt and publish grievance procedures for complaints of sex discrimination
- Prompt and equitable investigation and resolution of complaints
- Establish a structure for “the right to adequate, reliable, and impartial” investigation and appeal for both parties
- Timely resolution

Preponderance of Evidence

n. the greater weight of the evidence required in a civil (non-criminal) lawsuit for the trier of fact (jury or judge without a jury) to decide in favor of one side or the other.

This preponderance is based on the more convincing evidence and its probable truth or accuracy, and not on the amount of evidence. Preponderance of the evidence is required in a civil case and is contrasted with "beyond a reasonable doubt," which is the more severe test of evidence required to convict in a criminal trial.

No matter what the definition stated in various legal opinions, the meaning is somewhat subjective.

<https://dictionary.law.com/Default.aspx?selected=1586>

Notification of the Outcome

Every complainant has the right to be notified, in writing, of the outcome of the complaint. Even though federal privacy laws limit disclosure of certain information in disciplinary proceedings:

- Schools must disclose to the complainant information about the sanction imposed on the perpetrator *when the sanction directly relates to the harassed student*. This includes an order that the harasser stay away from the harassed student, or that the harasser is prohibited from attending school for a period of time, or transferred to other classes or another residence hall.
- Additionally, the Clery Act (20 U.S.C. §1092(f)), which only applies to postsecondary institutions, requires that both parties be informed of the outcome, including sanction information, of any institutional proceeding alleging a sex offense. Therefore, colleges and universities may not require a complainant to abide by a non-disclosure agreement, in writing or otherwise.

Measure the Current State of Risk Within Your Organization

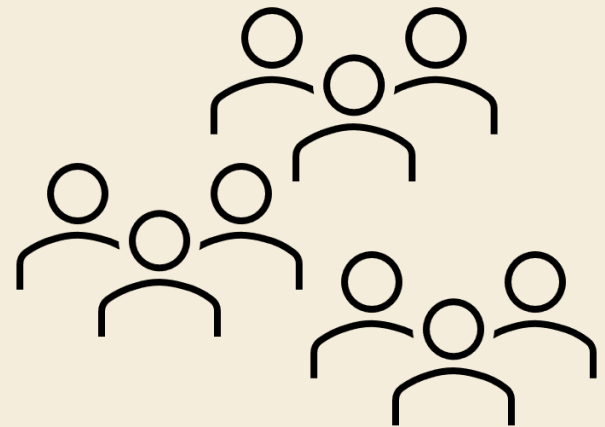
“Three Prong Test for Compliance” in Athletics

Based upon the premise that if men and women participate in an athletics program at the same rate in which they are enrolled, then compliance is assumed.

- Proportionality per rates of enrollment
- Expansion as interests and abilities evolve
- Accommodation of the underrepresented sex

Compliance Criteria for Risk Review

- Recruitment, enrollment and retention
- Organization and staffing
- Program administration
- Funding thresholds
- Size and type of program
- Geographical location
- Community



Global and National Landscape Regarding Title IX

Gender Role

- set of societal norms dictating what types of behaviors are generally considered acceptable, appropriate, or desirable for a person based on their actual or perceived sex
- manifested within society by observable factors such as behavior and appearance
- outward manifestations of personality that reflect the **gender identity**
- Original from cultural expectations levied according to cultural gender classifications

Gender Fluid

A person who does not identify with a single fixed gender or has a fluid or unfixed gender identity.

Gender Identity

- A personal conception of oneself as male or female (or rarely, both or neither).
- Self-identification resulting from a combination of inherent and extrinsic or environmental factors
- One's innermost concept of self as male, female, a blend of both or neither – how individuals perceive themselves and what they call themselves. One's gender identity can be the same or different from their sex assigned at birth.

August 14, 2020 Changes to Title IX

- Summary of Major Provisions of the Department of Education's Title IX Final Rule:
<https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf>
- <https://www.ed.gov/news/press-releases/us-department-education-launches-new-title-ix-resources-students-institutions-historic-new-rule-takes-effect>

Key Provisions of the US DOE new Title IX Regulation:

<https://www.ed.gov/news/press-releases/us-department-education-launches-new-title-ix-resources-students-institutions-historic-new-rule-takes-effect>

- Defines sexual harassment to include sexual assault, dating violence, domestic violence, and stalking, as unlawful discrimination on the basis of sex
- Provides a consistent, legally sound framework on which survivors, the accused, and schools can rely
- Requires schools to offer clear, accessible options for any person to report sexual harassment
- Empowers survivors to make decisions about how a school responds to incidents of sexual harassment
- Requires schools to offer survivors supportive measures, such as class or dorm reassignments or no-contact orders

- Protects K-12 students by requiring elementary and secondary schools to respond promptly when *any* school employee has notice of sexual harassment
- Holds colleges responsible for off-campus sexual harassment at houses owned or under the control of school-sanctioned fraternities and sororities
- Restores fairness on college and university campuses by upholding a student's right to written notice of allegations, the right to an advisor, and the right to submit, cross-examine, and challenge evidence at a live hearing
- Shields survivors from having to come face-to-face with the accused during a hearing and from answering questions posed personally by the accused

- Requires schools to select one of two standards of evidence, the preponderance of the evidence standard or the clear and convincing evidence standard, and to apply the selected standard evenly to proceedings for all students and employees, including faculty
- Provides "rape shield" protections and ensures survivors are not required to divulge any medical, psychological, or similar privileged records
- Requires schools to offer an equal right of appeal for both parties to a Title IX proceeding
- Gives schools flexibility to use technology to conduct Title IX investigations and hearings remotely
- Protects students and faculty by prohibiting schools from using Title IX in a manner that deprives students and faculty of rights guaranteed by the First Amendment

Gender Identification and Title IX

- “On June 15, 2020 the U.S. Supreme Court held that discrimination on the basis of an individual’s status as gay or transgender constitutes sex discrimination within the meaning of Title VII of the Civil Rights Act of 1964. See *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1741 (2020)
- (“[I]t is impossible to discrimination against a person for being homosexual or transgender without discriminating against that individual based on sex.”).
- OCR does not enforce Title VII. Nevertheless, in cases where a complaint alleges that a school’s action or policy excludes a person from participation in, denies a person the benefits of, or subjects a person to discrimination under an education program or activity, on the basis of sex, the *Bostock* opinion guides OCR’s understanding that discrimination against a person based on their sexual orientation or gender identity generally involves discrimination on the basis of sex.”

Bobstock v Clayton County, Georgia

- June 15, 2020
- Supreme Court redefined its interpretation of “sex” under Title VII to encompass sexual orientation and gender identity
- Federally funded entities must ensure the fair treatment of all students playing campus sports, living in residence halls, and opportunities for advancement

Drew Adams v School Board of St. Johns County, Florida

- August 7, 2020
- 11th Circuit: Alabama, Florida and Georgia
- Policy blocked a student identifying as male from using the boy's bathroom because he is not biologically male requiring the individual to use a female or gender-neutral bathroom.
- Judge Beverly Martin:

"We conclude that Title IX ... prohibits discrimination against a person because he is transgender, because this constitutes discrimination based on sex."

March 8, 2021
The White House

“Executive Order on Guaranteeing an
Educational Environment Free from
Discrimination on the Basis of Sex, Including
Sexual Orientation or Gender Identity”

<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/03/08/executive-order-on-guaranteeing-an-educational-environment-free-from-discrimination-on-the-basis-of-sex-including-sexual-orientation-or-gender-identity/>

POLICY: “...all students should be guaranteed an educational environment free from discrimination on the basis of sex, including discrimination in the form of sexual harassment, which encompasses sexual violence, and including discrimination on the basis of sexual orientation or gender identity. For students attending schools and other educational institutions that receive Federal financial assistance, this guarantee is codified, in part, in Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 et seq., which prohibits discrimination on the basis of sex in education programs or activities receiving Federal financial assistance.”

Review of Agency Actions:

(a) Within 100 days of the date of this order, the Secretary of Education, in consultation with the Attorney General, shall review all existing regulations, orders, guidance documents, policies, and any other similar agency actions (collectively, agency actions) that are or may be inconsistent with the policy set forth in section 1 of this order, and provide the findings of this review to the Director of the Office of Management and Budget.

(b) The Secretary of Education shall consider taking additional enforcement actions, as appropriate and consistent with applicable law, to enforce the policy set forth in section 1 of this order as well as legal prohibitions on sex discrimination in the form of sexual harassment, which encompasses sexual violence, to the fullest extent permissible under law; to account for intersecting forms of prohibited discrimination that can affect the availability of resources and support for students who have experienced sex discrimination, including discrimination on the basis of race, disability, and national origin; to account for the significant rates at which students who identify as lesbian, gay, bisexual, transgender, and queer (LGBTQ+) are subject to sexual harassment, which encompasses sexual violence; to ensure that educational institutions are providing appropriate support for students who have experienced sex discrimination; and to ensure that their school procedures are fair and equitable for all.

Strategies to Re-examine Your Risk Management Programming

Circle of Risk Identification and Mitigation



<https://ogc.yale.edu/erm/resources/enterprise-risk-management-framework>

Resources

- National Science Foundation: Office of Diversity and Inclusion;
<https://www.nsf.gov/od/odi/plans/TitleIXComplianceReviewPlan.pdf>
- United States Department of Justice; <https://www.justice.gov/crt/federal-coordination-and-compliance-section-152>
- US Department of Education: OCR (Office for Civil Rights): Resources for LGBTQ Students:
<https://www2.ed.gov/about/offices/list/ocr/lgbt.html>
- US Department of Education: OCR (Office for Civil Rights):
<https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/index.html>
- US Department of Education “Dear Colleague” Letter October 26, 2010:
<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>
- The White House “Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity – March 8, 2021: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/03/08/executive-order-on-guaranteeing-an-educational-environment-free-from-discrimination-on-the-basis-of-sex-including-sexual-orientation-or-gender-identity/>

Resources continued

- Human Rights Campaign; “Sexual Orientation and Gender Identity Definitions;” <https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions>
- Gender spectrum; “Understanding Gender;” <https://genderspectrum.org/articles/understanding-gender>
- Lumen; “Cultural Anthropology; Chapter 10: Sex and Gender;” <https://courses.lumenlearning.com/culturalanthropology/chapter/gender-role/>
- 17-1618 Bobstock v Clayton County (06/15/20); https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf
- Case: 18-13592 US Court of Appeals for the 11th Circuit No. 18-13592; D.C. Docket No. 3:17-cv-00739-TJC-JBT; Drew Adams v School Board of St. Johns County, Florida; https://www.courtlistener.com/pdf/2020/08/07/drew_adams_v_school_board_of_st_johns_county_florida.pdf