



Title IX Considerations in K-12 Education

Holly Hadden

Assistant General Counsel
SC Department of Education

Molly M. Spearman – State Superintendent of Education

Title IX

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

- Title IX, Education Amendments of 1972

History of Title IX

- Title IX was enacted on June 23, 1972.
- Though often mistaken as a “sport’s law,” Title IX was intended to grant women greater access to educational programs.
- Prior to Title IX, women had less access to scholarships, “male” educational programs (such as medicine), and faced more restrictive rules.

Application of Title IX

- Students and staff
- Any program or activity under the operation of the local educational agency (LEA), including employment applications and student admissions
- Does not apply to any acts occurring against a person outside of the United States.



The Amendments

- “...added specific, legally binding steps that schools must take in response to notice of alleged sexual harassment.”
(July 2021 OCR Q&A)
- If followed correctly, the amendments can help protect a LEA from being found in violation of Title IX.

Sexual Harassment

Conduct on the basis of sex that satisfies one or more of the following:

- A LEA's employee conditioning the provision of aid, benefit, or service on an individual's participation in unwelcome sexual conduct.
- Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the education program or activity.
- Sexual assault, dating violence, domestic violence, or stalking, as defined in cited federal laws.

The Parties

- Complainant – an individual who is alleged to be the victim of conduct that could constitute sexual harassment.
- Respondent – an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

Title IX Coordinator

- The Title IX Coordinator will be the designated employee that is responsible for coordinating the LEA's efforts to comply with Title IX law.
- The LEA must notify applicants for admission and employment, students, legal guardians, and staff of the Title IX Coordinator's name or title, office address, email address, and telephone number.

Title IX Coordinator

- The contact information must be prominently displayed on the LEA's website, if applicable, and in any handbooks or catalogs available to students, guardians, staff, and future applicants.
- Anyone, even if they are not the alleged victim, can report sex discrimination, including sexual harassment, to the Title IX Coordinator.

Title IX Policy

- A Title IX Policy must also be prominently displayed on the LEA's website and in any handbooks or catalogs.
- The policy must state that the LEA does not discriminate on the basis of sex in the education program or activity that it operates, and that this non-discrimination is required by Title IX. The policy must note that the non-discrimination statement extends to admissions and employment.
- Must include a statement directing any questions about the policy or Title IX to the Title IX Coordinator, the OCR's Assistant Secretary, or both.

General Response

- A LEA with actual knowledge of sexual harassment in their educational program or activity must respond promptly in a manner that is not deliberately indifferent.
- For a K-12 public school, “actual knowledge” occurs when any employee receives notice of sexual harassment or allegations of sexual harassment.

General Response

- Must treat complainants and respondents equitably by offering supportive measures and following a grievance process before any disciplinary action against respondent.



General Response

- Nothing in Title IX prevents a LEA from placing a non-student employee on administrative leave while the Title IX action is a pending grievance.
- Title IX also allows for the emergency removal of a student respondent if the LEA undertakes an individualized safety and risk analysis that determines an immediate threat to the physical health or safety of others. Respondent must be notified of the removal and allowed an opportunity to challenge the decision. The LEA must also consider any state laws and other student rights laws, such as the IDEA, when removing a student.

General Response

- The LEA must offer supportive measures to complainant and consider complainant's wishes with the supportive measures. Complainant must be informed of the supportive measures available and must be told how to file a formal complaint.

Supportive Measures

- Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, without fee or charge to complainant or respondent.
- May be offered before or after a formal complaint. A formal complaint need not be filed.

Formal Complaints

- A document filed by a complainant or the Title IX Coordinator, that alleges sexual harassment against a respondent and requests the LEA to investigate the allegation.
- To file a formal complaint, the complainant must be participating in or attempting to participate in, the LEA's educational program or activity.
- The complainant's signature is required, but may be done electronically.

Grievance Process

- All formal complaints must go through a detailed, written grievance procedure.
- The process must treat complainants and respondents equally.
- The process will include, at least, an investigation and a final determination of responsibility.

Grievance Process

- Describe the range of, or a list of, the possible disciplinary actions or remedies the LEA may implement following the determination of responsibility.
- Must describe the range of supportive measures available to complainants and respondents.

Grievance Process

- Include reasonably prompt time frames for the conclusion of the process, with an allowance for temporary delays or limited extensions based on good cause, such as the absence of a party or law enforcement activity.
- If there is a delay or extension, notice should be sent to the parties stating the reason for the action.

Grievance Process

- Requires an objective evaluation of all evidence. Credibility determinations cannot be based on a person's status as complainant, respondent, or witness.



Grievance Process

- State the standard of evidence the LEA will use for all sexual harassment complaints against employees and students.
- The LEA may choose either a preponderance of the evidence or a clear and convincing evidentiary standard.

Grievance Process

- After receiving a formal complaint, a notice of the allegations must be sent to all known parties. This notice includes a copy of the grievance procedures, sufficient details of the allegations to prepare a response before any interview, and a statement that the respondent is deemed not responsible for the conduct and that a determination of responsibility will be made at the end of the grievance process.

Grievance Process

- The notice must also inform both parties that they are allowed an advisor of their choice to inspect and review evidence.
- If the LEA's code of conduct prohibits knowingly making false statements or submitting false information during the grievance process, this must be noted in the notice of allegations.

Grievance Process

- If new allegations arise during the investigation of an initial formal complaint, and the LEA decides to investigate the new allegations, then a notice of additional allegations must be sent to the known parties.



Grievance Process

- During an investigation, the burden of proof and gathering sufficient evidence rests on the LEA, not the parties.
- However, the LEA cannot access, consider, disclose, or otherwise use a party's medical records without voluntary, written consent from the party or their legal guardian.

Grievance Process

- The process must not require, allow, rely upon, otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding the privilege has waived it.

Grievance Process

- Parties must be given opportunity to present witnesses and evidence.
- The LEA cannot restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.

Grievance Process

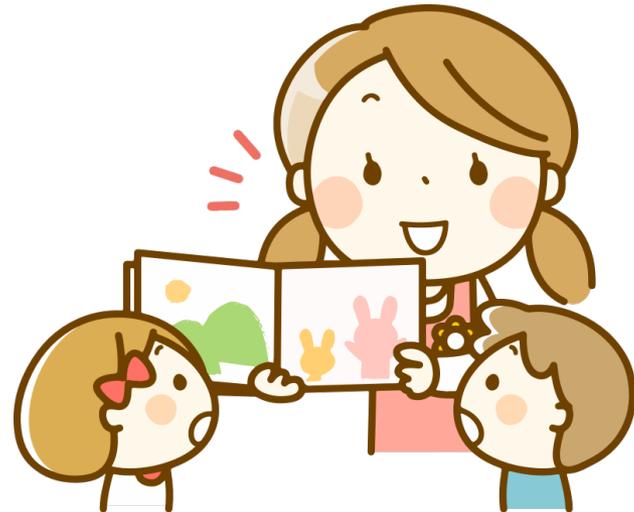
- If a party is invited or expected to participate, notice must be given with the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate.

Grievance Process

- The parties must be given the same opportunities to have others present during any grievance related meeting or proceeding.
- The LEA cannot limit the choice or presence of the parties' advisor but may establish restrictions on how much the parties' advisor may participate in any grievance related meeting or proceeding. The restrictions must apply equally to both parties.

Grievance Process

- All parties must be given an equal opportunity to inspect and review evidence directly related to the allegations and obtained during the investigation, even if the evidence is not relied on for final determination.



Grievance Process

- At the end of the investigation, an investigative report that fairly summarizes relevant evidence must be created.
- The investigative report must be created at least ten days prior to a hearing or other time of determination of responsibility.

Grievance Process

- The investigative report will be sent to each party and the party's advisor, in an electronic format or hard copy.
- The parties have ten days to review the report and provide a written response. The investigator will consider this response before completing the investigative report.

Grievance Process

- For K-12 schools, live hearings are optional.
- If an LEA chooses to have live hearings, there are further rules in Title IX to ensure that the hearing complies with due process for all parties.



Grievance Process

- After an investigative report is sent to the parties and prior to the determination of responsibility, the decision-maker must afford each party the opportunity to submit written, relevant questions for any party or witness. Each party must be provided with the answers and allowed limited follow-up questions.

Grievance Process

- Questions about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless offered to prove someone other than respondent committed the alleged conduct or concerns specific incidents with respondent and are offered to prove consent.
- If any question is excluded, the decision-maker must explain to the proposing party why the question is not relevant.

Written Determination

- At the end of the investigation, the decision-maker must issue a written determination regarding responsibility.
- The determination must identify the allegations that potentially constituted sexual harassment.



Written Determination

- It must describe the procedural steps taken from receipt of the complaint to the determination, including notices to parties, interviews, methods used to gather evidence, etc.
- Will include a findings of fact section that support the determination.

Written Determination

- Conclusions regarding the application of the LEA's code of conduct to the facts.
- A statement of, and rationale for, the result as to each allegation. This will include a determination regarding responsibility, as well as any sanctions for respondent or remedies for complainant.

Written Determination

- The LEA must provide the determination to both parties simultaneously. The determination does not become final until after an appeal is completed or after an appeal would no longer be considered timely.
- If remedies are provided, the Title IX Coordinator is responsible for their effective implementation.

Complaint Consolidation

- If the allegations arise from the same set of facts or circumstances, multiple complaints against one respondent, or by multiple complainants against multiple respondents, or by one party against the other party, then the complaints can be consolidated.

Dismissing a Complaint

- Complaints must be dismissed:
 - If the conduct alleged does not constitute sexual harassment, even if proved
 - Did not occur in the LEA's educational program or activity
 - Did not occur against a person in the US

Dismissing a Complaint

- Complaints may be dismissed:
 - If the complainant notifies the Title IX Coordinator in writing that they wish to withdraw the complaint or any of the specific allegations in the complaint.
 - The respondent is no longer enrolled in or employed by the LEA.
 - Specific circumstances prevent the LEA from gathering sufficient evidence to reach a determination of responsibility.

Dismissing a Complaint

- If a complaint is dismissed, notice must be sent simultaneously to both parties to notify them of the dismissal and the reason for it.
- Even if the complaint is dismissed, the LEA may choose to act on the alleged conduct based on another provision in their code of conduct.

Remedies

- Must be designed to restore or preserve equal access to the LEA's educational program or activity.
- Can include the same types of actions offered as supportive measures.
- Need not be non-disciplinary or non-punitive, and need not avoid burdening the respondent.

Appeals

- The grievance procedures must include instructions on how to file an appeal and on what bases appeals are allowed. This information must also be included in the determination regarding responsibility.



Appeals

- Appeals must be offered for:
 - Procedural irregularity that affected the outcome.
 - New evidence that could affect the outcome and was not reasonably available at the time the determination was made.
 - The Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias that affected the outcome.

Appeals

- Appeals may be offered equally to both parties for other bases.
- If an appeal is filed, the other party must be notified in writing and appeal procedures implemented equally for both parties.
- Both parties must be given reasonable, equal opportunity to submit a written statement in support of or challenging the outcome.

Appeals

- A new appellate decision-maker then issues a written decision describing the result of the appeal and the rationale for the result.
- The written decision must be provided simultaneously to both parties.



Informal Resolution

- Informal resolutions, such as mediation, may be offered to the parties, unless the respondent is an employee and the complainant is a student.
- Informal resolutions do not involve full investigations and adjudications.
- However, if offered, they do have certain rules that must be followed under Title IX.

LEA Staff

- An investigator and decision-maker will be needed to investigate the formal complaint and issue a final determination of responsibility. At least one other decision-maker will be needed for possible appeals.
- The Title IX Coordinator, the investigator, and the decision-maker must all remain unbiased and free from conflicts of interests. This means the LEA will need a separate individual for each role, and potentially back-ups should a case of conflict arise.

LEA Staff

- Any LEA staff participating in the Title IX process (coordinators, investigators, decision-makers, and anyone facilitating informal resolutions) will need detailed training. The training includes much of what we have discussed already, and the requirements are listed in the law at § 106.45(b)(1)(iii).

Record Keeping

- The LEA must keep full and complete records – including audio or audio-visual records if applicable – of any Title IX investigation, determination, disciplinary actions, remedies, and appeals.
- Records must be kept of any informal resolution.

Record Keeping

- All materials used to train Title IX Coordinators, investigators, decision-makers, and anyone who facilitates an informal resolution, must be made public on the website, if applicable, or by request of the public.



Record Keeping

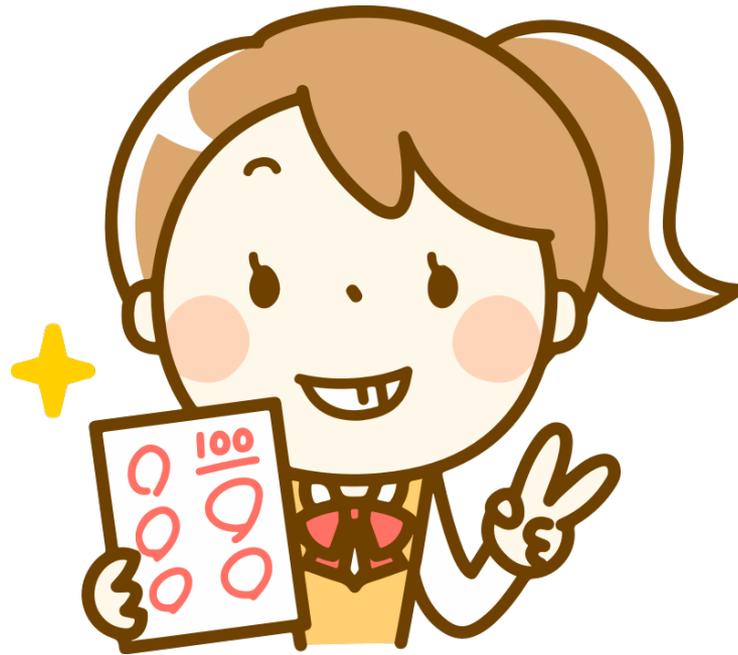
- Records must be maintained on every response to sexual harassment, including any supportive measures offered, why the response was not deliberately indifferent, and what measures were taken to restore or preserve access to the educational program or activity.

Record Keeping

- If supportive measures were not provided, the LEA must document why that response was not clearly unreasonable in light of known circumstances.
- Documenting certain reasons or measures does not limit the LEA in the future from providing additional explanations or detailing additional measures taken.

Record Keeping

- All records maintained under the provisions of Title IX must be kept for a period of seven years.



Retaliation

- No one may intimidate, threaten, coerce, or discriminate against anyone for the purpose of interfering with any right or privilege secured by Title IX.
- Complaints alleging retaliation may be filed and dealt with according to the grievance procedures required for sexual harassment.

Basic Laws

- LGBT+ students receive the same protections as all students. All applicable anti-bullying laws and policies apply.



Title IX

- The current federal guidance is that Title IX protects LGBT+ individuals from discrimination based on sexual orientation and gender identity.
- Courts have also continued to interpret the law as applicable to LGBT+ individuals based on legal precedent.

Title IX

- On June 15, 2020, the US Supreme Court issued a new ruling on Title VII, which prohibits discrimination on the basis of sex for employment purposes.
- In *Bostock*, the Court ruled that Title VII prohibited discrimination based on an employee's sexual orientation or transgender identity.

Title IX

- On August 26, 2020, the 4th Circuit Court of Appeals ruled that a school district's bathroom policy violated Title IX. The policy required students to use specially built single stall bathrooms or the bathroom of the gender identified on their records when they entered the school system.

Title IX

- The Court cited the Supreme Court’s earlier Title VII ruling, quoting language that stated “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.” *Bostock*, 140 S. CT. at 1741.

Title IX

- The Court also noted the former student, Gavin Grimm, experienced physical and psychological trauma due to the district's bathroom policy.
- The special use single stall bathrooms were not located in the same area as Gavin's classes, and as the only person using those specific bathrooms, Gavin felt singled out and punished for his transgender identity.

Title IX

- The Court further noted that:
 - Gavin used the boys bathroom for weeks without issue.
 - Had Gavin enrolled as a new student, the district would not even be aware of his transgender status since his name and birth certificate were legally changed.
 - Although student privacy is a valid concern, students shared bathrooms without issues and transgender students are not more likely than cisgender students to engage in “peeping” behavior.

Title IX

- On June 28, 2021, the US Supreme Court declined to review Gavin's case. This means that until another case states otherwise, Gavin's case law is the legal precedent.
- A similar case in the 11th Circuit received a similar outcome, with the noted difference that the case was ruled on under the Equal Protection Clause rather than Title IX.



CHEA

- On February 26, 2020, several organizations filed a complaint against the SCDE to stop enforcement of Section 59-32-30(A)(5) of South Carolina’s Comprehensive Health Education Act (CHEA).
- This section prohibited discussion of “alternate sexual lifestyles” in any context outside of instruction concerning sexually transmitted diseases.

CHEA

- The court case was brought under the 14th Amendment's Equal Protection Clause.
- As the agency tasked with enforcing the CHEA, the SCDE had previously asked the Attorney General's Office for an opinion on this matter. On February 28, 2020, the AG's Office issued an opinion that a court would find the provision to be unconstitutional under the Equal Protection Clause.

CHEA

- Because the legislature has not changed the law, it is still written in the SC Code of Laws.
- However, to avoid litigation on the issue, the SCDE entered into a Consent Decree and Judgement that states the provision will “no longer be enforced, applied, or relied on” by any school or district.

PowerSchool

- On August 10, 2021, the SCDE sent a memo to district superintendents and applicable personnel to inform them of upcoming changes to PowerSchool.
- The update will allow for new fields – preferred gender and preferred name.



PowerSchool

- The state-sponsored student information system (SIS) will continue to pull from the legal gender and legal name fields for legal documents and permanent records.
- The preferred gender and name fields will allow for schools and districts to use that information for any non-legal document.
- Districts are encouraged to establish local policies on the use of the new fields.

Staff

- There is no current law that demands a teacher use a student's preferred gender or name. However, there may be district policies to consider.
- A student or parent could file suit against an educator, school, and/or the district for failing to use a student's preferred gender.

Cross

- The newest court case is from Virginia and likely stems from the results of the Gavin Grimm case.
- The Virginia DOE created model policies for local school districts to implement in order to better serve transgender students.
- Each district in the state has expressed different views on adopting these policies.

Cross

- In one county, an educator named Byron Cross spoke at a district school board meeting to oppose the transgender policy being discussed.
- At the time, he stated he would never use a student's preferred pronouns because he felt that would be in conflict with his religious beliefs.

Cross

- The district fired Cross, saying he had caused a disruption at the board meeting.
- Cross then sued the district, alleging unlawful termination. He asked the court to temporarily restrain the district from terminating him while the lawsuit was ongoing. The court granted that request.

Cross

- In this case, it should be noted that Cross was engaging in a protected activity by informing an elected board of his opinion on a proposed policy.
- Cross had not caused disruption in a school setting and there was no evidence provided that he caused harm to any students.

Kluge

- This is the fact pattern I receive questions on the most.
- A k-12 public school teacher in Indiana was fired for refusing to use a student's preferred name and pronouns. After his termination, he filed suit against the district for discrimination based on failure to accommodate his religious beliefs and retaliation.

Kluge

- The educator, Kluge, served as a music and orchestra teacher in the school.
- After the school began instructing staff to use students' preferred names and pronouns, Kluge and several other staff members let their supervisors know they did not support the policy. The other staff members ultimately accepted the school's policy, but Kluge did not.

Kluge

- The school initially attempted to make accommodations and it was agreed he would refer to students using only their last names. The school also tasked a separate staff member with handing out orchestra uniforms, as some uniforms were gender-specific.



Kluge

- The school had a Equality Alliance club that included at least four transgender students in 2019.
- Two of the students, Aidyn and Sam, stated they felt Kluge was discriminating against them by using only their last names. During the club meetings, students alleged that Kluge avoided acknowledging transgender students in class. He also made frequent mistakes using the last name only policy, falling back to first names and adding gendered honorifics for students.

Kluge

- The school received testimony from Aidyn and Sam, creating a record that showed Kluge's behavior was harming students.
- During the 2017-18 school year, the school informed Kluge he would not be able to use the last name only accommodation after that year. They stated the accommodation was no longer reasonable due to its detrimental effect on the students.

Kluge

- The court ruled the accommodation was an undue hardship to the district. As a public school district, they had an obligation to support all of their students, and that by providing the accommodation to Kluge it was incurring an undue hardship by failing to allow the district to provide an equal and open education to all.

Questions?

Holly Hadden

hhadden@ed.sc.gov

803-734-1807

