

# Nine Ways Title IX Protects High School Students

By Lee Green, J.D. on May 15, 2018

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## Title IX – Public Law 92-318 of the Education Amendments of 1972

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.

### The Scope of Title IX

June 23, 2017 was the 45th anniversary of the enactment of Title IX, a broadly written prohibition on gender discrimination in educational institutions, which although applicable to all programs and activities, curricular and extracurricular, offered by high schools and colleges, is best known for its application to sports. The imprecise guidance provided by the mere 37 words of the original statute resulted in the issuance over the next 4½ decades of a series of implementing regulations designed to clarify the obligations of school districts and universities to those the law was intended to protect, including students – regulations that made it clear that although Title IX does apply to athletic programs, it also pertains to safeguarding the rights of students in a wide range of educational settings.

Listed in no particular order of importance, the following are nine ways in which Title IX protects high school students, the nuances of each requiring thorough understanding by school and athletics personnel, along with strategic planning to develop and implement policies designed to ensure compliance with the Title IX statute, its supporting regulations and the extensive set of guidances issued over the years by the Department of Education's Office for Civil Rights (OCR), the federal agency charged with the responsibility of enforcing the law.

### 1. Sports Participation Opportunities

The best-known way in which Title IX protects students is through its requirement that schools provide the historically underrepresented gender in sports – females – with equal opportunity to participate in athletic activities. The OCR evaluates compliance with this mandate using what is referred to as the “three-prong test,” a rubric that provides three alternative compliance options, only one of which must be satisfied to fulfill a school's obligation regarding sports participation opportunities:

1. Substantial Proportionality: Whether participation opportunities for female students are provided in numbers substantially proportionate to their enrollment at the school; or
2. History & Continuing Practice: Whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the

female enrollment at the school; or

3. Full & Effective Accommodation: Whether it can be demonstrated that the athletic interests and abilities of the members of the school's female enrollment are being fully and effectively accommodated through the sports presently offered by the institution.

Details regarding how a school should evaluate its compliance with each of the three components may be found in the [OCR's Title IX Resource Guide](#).

## 2. Other Sports Benefits and Opportunities

In addition to equal sports participation opportunities, Title IX protects students by requiring that schools also provide to the historically under-represented gender in athletics – females – equivalence in the “other athletic benefits and opportunities” that accompany sports participation. The OCR evaluates compliance with this requirement using what it refers to internally as its “laundry list” – 11 categories of benefits reflecting the quality of the sports offerings at a school, a classification scheme also represented by the acronym PLAYING FAIR.

1. Protective athletic equipment, uniforms and athletic supplies
2. Locker rooms and practice/competition facilities
3. Allocation of travel/transportation/per diem benefits
4. Years of experience, compensation and quality of coaches
5. Institutional housing and dining facilities and services
6. Nature of publicity, marketing and media services
7. Game and practice times and scheduling
8. Facilities for and access to athletic training and medical services
9. Academic tutoring services for student-athletes
10. Institutional support services for athletic programs
11. Recruiting resources provided to athletic programs

Details regarding how a school should evaluate its compliance with each of the 11 categories may be found in the OCR Athletics Investigators Manual, the audit guide used by OCR personnel during formal Title IX investigations by the agency, [here](#).

### 3. Sexual Harassment & Sexual Violence

Title IX also protects students by prohibiting sexual harassment and sexual violence in educational institutions, both of which are manifestations of gender discrimination, by requiring schools to implement strategies to safeguard students from such behavior perpetrated by school personnel or peers and requiring schools to effectively address such misconduct when it occurs on campus or in connection with any educational or extracurricular program. Sexual harassment may be “quid pro quo” – where pressure is exerted on the victim to engage in a sexual relationship through explicit or implied threats of negative consequences for refusal – or “hostile environment” – where unwelcome words or actions of a sexual nature are inflicted on the victim in a severe or pervasive manner resulting in the creation of a hostile educational environment.

Based on U.S. Supreme Court rulings in *Gebser v. Lago Vista I.S.D.* (1998) and *Davis v. Monroe County Board of Education* (1999), schools and personnel in the hierarchy of vicarious liability will be held strictly liable (automatically responsible) for sexual harassment against a student when someone in a position to take remedial action has knowledge that the harassment is occurring and exhibits deliberate indifference to correcting the situation.

*Knowledge plus deliberate indifference.*

These two criteria for the imposition of automatic liability on schools and personnel reinforce the need for educational institutions to enact substantive sexual harassment policies, reporting mechanisms, investigatory procedures and dispute resolution processes that will adequately protect students and shield against legal exposure.

Details regarding how a school should develop and implement a legally valid sexual harassment policy under Title IX may be found in the Department of Education’s September 22, 2017 Q & A on [Campus Sexual Misconduct](#), and the OCR’s January 19, 2001 [Revised Sexual Harassment Guidance](#).

### 4. Hazing, Bullying & Cyberbullying

Title IX also protects students against other forms of harassment in educational settings. Many of the initiation rituals imposed on students by school athletics teams, clubs and other organizations involve words or actions of a sexual nature that result in the hazing being classified as hostile environment sexual harassment. Similarly, many of the forms of misconduct used in school settings to bully or cyberbully

students involve words or actions of a sexual nature that bring the behavior under the purview of hostile environment sexual harassment.

Therefore, much of the hazing, bullying and cyberbullying that occur in schools falls under the coverage of Title IX. Furthermore, the same U.S. Supreme Court legal standard established in the Lago Vista ISD and Monroe County Board of Education cases – strict liability whenever there is knowledge and deliberate indifference – encompasses many of the hazing, bullying and cyberbullying incidents in schools.

Also applicable to these forms of harassment are the hazing laws that have been enacted in 44 states and D.C. (to review the precise language of your jurisdiction's law, use the [interactive map](#)) and the bullying laws that have been enacted in all 50 states and D.C. (to review the specific text of your jurisdiction's law, use the [interactive map](#)).

Details regarding how a school should develop and implement a legally valid hazing, bullying and cyberbullying policy under Title IX may be found in the Department of Education's September 22, 2017 Q & A on [Campus Sexual Misconduct](#) and the OCR's January 19, 2001 [Revised Sexual Harassment Guidance](#).

## 5. Other School Activities

Title IX also protects students against any type of gender discrimination in other school programs, both curricular and extracurricular, including the failure to provide equal opportunity in a school's STEM offerings (science, technology, engineering and math); discrimination in fine arts courses and activities such as theatre, orchestra, band and choir; and gender bias in single sex classes and programs outside of those explicitly authorized in the law's implementing regulations.

Details regarding Title IX's application outside the realm of sports may be found online in the publication titled [Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance](#), issued on October 25, 2006 and available full-text.

## 6. Pregnant & Parenting Student-Athletes

Title IX protects the rights of pregnant and parenting students – both girls and boys – by prohibiting schools from applying any rule concerning parental, family or marital status that treats persons differently on the basis of sex or discriminating against or excluding any student from its education programs or activities on the basis of pregnancy, childbirth, termination of pregnancy or recovery therefrom.

Details regarding Title IX's application to such students in secondary schools, including the accommodations that must be granted in the curriculum and in extracurricular activities to address the educational needs of students who become pregnant or have children, may be found in the policy guidance issued by the OCR in June of 2013 titled [Supporting the Academic Success of Pregnant & Parenting Students Under Title IX](#).

## 7. LGBTQ Students

Although conflicting views exist as to whether LGBTQ status confers protected class status under federal and state anti-discrimination laws, it is clear that Title IX protects all students who experience sexual harassment or gender-oriented bullying, irrespective of the sex of the victim or the alleged perpetrator(s). This includes instances of such harassment or bullying where the perpetrator and victim are of the same gender. LGBTQ students have the same rights as other students under Title IX to accommodations, to a prompt and equitable complaint process, and to be free from retaliation. Likewise, the legal obligation of a school to appropriately respond to sexual harassment and bullying and to support a victim's continued access to equal educational opportunities are the same regardless of the sexual orientation, gender identity and gender presentation of the victim. Schools must have procedures in place consistent with Title IX for accepting reports of harassment or bullying of LGBTQ students, for investigating such complaints as required under Title IX, and for resolving such disputes using the same policies and procedures used in all complaints of harassment and bullying of students.

With regard to transgender students, in May of 2016, the U.S. Departments of Education and Justice jointly issued a landmark guidance clarifying that the definition of gender in Title IX was gender identity, not gender at birth, and that students would therefore have access to all school facilities based on gender identity. Although the new presidential administration withdrew the guidance in February of 2017, the Department of Education has explicitly stated that despite the fact it will no longer process complaints from transgender students about restrictions on access to restrooms, locker rooms and shower facilities, transgender students are still protected by Title IX with regard to all other equal access issues regarding educational programs and activities and the right to be free from sexual harassment and bullying.

Details regarding how a school should develop and implement a legally valid policy for addressing issues involving LGBTQ students under Title IX may be found in the Department of Education's September 22, 2017 Q & A on [Campus Sexual Misconduct](#) and the OCR's January 19, 2001 [Revised Sexual Harassment Guidance](#).

## 8. Retaliation Against Reporters of Title IX Violations

Title IX also protects students by providing a cause of action for financial damages to anyone who is retaliated against for reporting a violation of the statute. In the case of a high school coach fired for identifying Title IX inequities involving his girls basketball team, *Jackson v. Birmingham Board of Education* (2005), the U.S. Supreme Court ruled that Title IX prohibits not only gender discrimination in educational programs and activities, but also retribution – explicit or implied – against anyone who reports Title IX violations or advocates for improved Title IX compliance strategies by a school.

Therefore, student-athletes, along with school personnel such as teachers, coaches and Title IX Coordinators, and third parties such as parents, community members and media, are protected against any

form of reprisal for informal or formal complaints of Title IX problems.

Details regarding how schools should develop and implement policies to ensure avoidance of any type of retribution against individuals reporting alleged Title IX violations that might be construed as retaliation can be found in the [OCR's Dear Colleague Letter On Retaliation](#) issued on April 24, 2013.

## 9. Title IX Coordinators

Title IX also protects students through its mandate that every school district must have in place a Title IX Coordinator whose role is to develop policies to protect the young people enrolled in the district from all forms of gender discrimination; to implement in-service programs to educate all district employees, students and other constituents regarding the district policy; to develop a process for receiving reports of such discrimination; to conduct substantive and timely investigations of reports; and to implement legally valid dispute resolution procedures for dealing with reports of gender discrimination against students.

Details regarding the obligations of school districts related to Title IX Coordinators can be found in the OCR's April 24, 2015, [Dear Colleague Letter On Title IX Coordinators](#).