



Title IX Legal Update

with Laura Anthony and Kate Davis



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Thank you for attending!

Remember – additional information available at:

Title IX Resource Center
at www.bricker.com/titleix

Find us on **Twitter** at
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Upcoming Wednesday Webinars

www.bricker.com/events

- **Sept 30** – A New World in Special Education – Ohio’s Operating Standards & Other Recent Developments
- **Oct 14** – Cash Flow Borrowing
- **Nov 18** – The Labor Landscape – Preparing for Successful Negotiations
- **Jan 6** – Protecting Your Financial Base – The Significance of Tax Valuation Complaints
- **Feb 10** – Signed, Sealed, Delivered – Understanding Construction Procurement for Schools
- **Mar 10** – Buy, Sell or Lease – Real Estate Primer for School Districts
- **Apr 14** – Working with Boosters and Foundations

Agenda

- Transgender students
- Deliberate Indifference
- Dual Enrollment
- Insights on Implementation
- **NEW!** Title IX Toolkit preview



Bostock v. Clayton County Georgia

140 S.Ct. 1731 (2020)

Held that **Title VII** protections against employment discrimination on the basis of sex **include sexual orientation and gender identity**



Adams v. St. Johns County, FL Sch. Dist.

18-13592, U.S. App. 11th Cir. (August 7, 2020)



- Plaintiff Adams is transgender student
- Assigned female at birth; identifies as a boy
- HS forbid Adams from using boys' restroom
- Asserted violation of rights under Title IX and 14th Amendment

The Holding in *Adams*

Transgender student has **constitutional right** (equal protection clause) and **right under Title IX** to use bathroom that **matches their gender identity**



OCR Letter of Enforcement Action

to Connecticut Interscholastic Athletic Conference, et al. (5/15/20, revised 8/31/20)

Dear Attorneys Mizerak, Monastersky, Murphy, Yoder, and Zelman:

The U.S. Department of Education, Office for Civil Rights (OCR) issues this Revised Letter of Impending Enforcement Action¹ in the above-referenced cases. The earlier Letter of Impending Enforcement Action, dated May 15, 2020, has been updated in light of the Supreme Court's holding in *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731 (2020).

The Complainant filed complaints against the Connecticut Interscholastic Athletic Conference (CIAC) and the Glastonbury Board of Education (Glastonbury) on behalf of three high school student-athletes and their parents. The Complainant alleged that the CIAC's policy permitting certain biologically male student-athletes to participate in interscholastic athletics (Article IX, Section B of the CIAC By-Laws, adopted May 9, 2013, and titled, "Transgender Participation" (hereinafter referred to as the Revised Transgender Participation Policy)) discriminated against female student-athletes competing in interscholastic girls' track in the state of Connecticut on the basis of their sex.² Specifically, the Complainant alleged that the Revised Transgender Participation Policy denied girls opportunities to compete, including in state and regional meets, and to receive public recognition critical to college recruiting and scholarship opportunities. The

¹ Section 305 of OCR's *Case Processing Manual* states as follows: "When following the expiration of the 10 calendar day period referenced in CPM subsection 303(g) . . . the recipient does not enter into a resolution agreement to resolve the identified areas of non-compliance, OCR will prepare a Letter of Impending Enforcement Action."

² For the purposes of this letter, the terms "male" and "female" are defined by biological sex. See *Mem. from U.S. Attorney General to U.S. Attorneys Heads of Department Components* (Oct. 4, 2017), available at <https://www.justice.gov/ag/page/file/1006981/download>; see also *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1739 (2020) (leaving undisturbed the government's position, and noting that the Court proceeded "on the assumption that 'sex' signified what the employers suggest, referring only to biological distinctions between male and female.").

Claim: CIAC's policy of permitting biologically male student athletes (who identified as girls) to participate in interscholastic athletics discriminated against female student athletes competing in same program

Bottom Line from OCR's Enforcement Action

- OCR **doubled down** on interpretation of Title IX as prohibiting a school from allowing transgender athlete to participate on the team of the gender they identify with
- **Reasoning**: doing so takes away opportunities from biologically female athletes
- OCR asserts ***Bostock* does not apply to bathroom/athletics** because Title IX permits biological distinctions in those situations

Deliberate Indifference

- Response to sexual harassment is **clearly unreasonable in light of known circumstances**
- At minimum, upon receiving report of sexual harassment, institution has obligation to **provide supportive measures**



Requirements in Final Regulations

- Contact the complainant to discuss the availability of supportive measures
- Let the complainant know that supportive measures are available regardless of whether a formal complaint is filed
- Consider the complainant's wishes regarding supportive measures
- Explain to the complainant the process for filing a formal complaint

Deliberate Indifference and Formal Complaints



- Only initiate process against complainant's wishes when not doing so would be clearly unreasonable in light of known circumstances
- Decision not to investigate when complainant does not wish to file formal complaint will be evaluated under deliberate indifference standard

Deliberate Indifference and Equity

Not deliberately indifferent in treating students equitably when:

- Complainants offered supportive measures
- Grievance process followed before imposing disciplinary sanctions against respondent



Doe v. School District No. 1

Denver Co., August 17, 2020



- Student reports sexual harassment by other students after sexual assault by another student
- Claims multiple reports to school personnel were never investigated and efforts to prevent recurrence were inadequate

Takeaways from *Doe*

- School not deliberately indifferent just because harassment continues
- **BUT** deliberate indifference may be shown by **failure to act to halt misbehavior**
- Act of listening to students (e.g., counseling) is not a remedy in and of itself



Chicago Public Schools



- OCR found multitude of systemic procedural and remedial violations
- Extensive corrective action required
- In months following resolution agreement, 33% increase in filed cases at CPS

Jane Doe v. University of Kentucky

2020 WL 4811393 (6th Cir. August 19, 2020)

- Student plaintiff could proceed with suit against UK alleging deliberate indifference even though technically enrolled at another college which allowed transfer credit
- College of enrollment had been owned by UK; now a landlord-tenant relationship



Bottom Line in *Doe v. UK*



- How could this case be applied in K-12 context?
- Do you have students participating in educational activities with partners?
- Dual enrollment?
- College Credit Plus?



Implementation Issues

Title IX Team Roles

- TIX Coordinator
- Investigator
- Decision Maker
- Appeals Officer
- Informal Resolution Officer
- **All can be outsourced except TIX Coordinator**



Regional Partnerships

85 Fed. Reg. 30,063 (May 19, 2020)



- Schools free to consider alternate investigation and adjudication models
- Possible models include voluntary cooperative orgs and independent professionals operating under auspices of State governments

New OCR Q&A

Issued Sept. 4, 2020



UNITED STATES DEPARTMENT OF EDUCATION
Office for Civil Rights

September 4, 2020

Questions and Answers Regarding the Department's Final Title IX Rule

The Department of Education's Office for Civil Rights, through its new Outreach, Prevention, Education and Non-discrimination (OPEN) Center, issues the following technical assistance document to support institutions with meeting their obligations under the Title IX Rule, which was announced on May 6, 2020, and which became effective on August 14, 2020. Many of the questions were derived from questions posed to the OPEN center through e-mail.

OCR may periodically release additional Question and Answer documents addressing the Title IX Rule.

All references and citations are to the unofficial version of the Title IX Rule, which is available [here](#). A link to the official version of the Rule published in the Federal Register is [here](#).

Disclaimer: Other than statutory and regulatory requirements included in the document, the contents of this guidance do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

Effective Date of the Final Rule

Question 1: Can you please clarify whether the new Title IX rules that went into effect on August 14, 2020, will be applied retroactively?

Answer 1: The Title IX Rule will not be enforced retroactively. In the Preamble to the Rule

Key Takeaways



DOE confirmed that the Title IX rules are **not retroactive** – only apply to harassment that allegedly occurred since Aug 14

Key Takeaways

Can TIX personnel address conduct that does not meet the definition of sexual harassment?

Yes



Key Takeaways



- Clarified “reasonable person” standard in definition of hostile environment
- Acknowledged individuals react to harassment in wide variety of ways
- Schools may not refuse to respond just because complainant is “high functioning” or not showing signs of trauma

Key Takeaways

- Schools may delegate many of the TIX functions – like investigations or decision making
- BUT each district must employ a TIX Coordinator



THE DEPARTMENT'S TITLE IX RULE PROVIDES FLEXIBILITY TO SCHOOLS WITH RESPECT TO DECISION-MAKERS

September 3, 2020



The OPEN Center has recently received questions regarding the responsibilities of a decision-maker in a Title IX due process hearing under the new Rule. (Please note that all references and citations are to the unofficial version of the final regulations, which are available [here](#). A link to the official version of the Rule published in the Federal Register is [here](#).)

The Title IX Rule, at § 106.45(b)(7), requires a postsecondary education recipient's decision-maker(s) to issue a written determination that must include, among other items, the result as to each allegation and rationale for the result, any disciplinary sanctions imposed by the recipient against the respondent, and whether remedies will be provided by the recipient to the complainant.

The Rule does not preclude a recipient from using one decision-maker to reach the determination regarding responsibility, and using another decision-maker, who may be an employee or administrator of the recipient (e.g., a tenure committee), to determine appropriate disciplinary sanctions, including making such decisions in separate hearings. However, both the determination finding responsibility and disciplinary sanctions imposed by the recipient against the respondent must be contained in one single, unitary document, which is the written determination required under §106.45(b)(7). In other words, the recipient's written determination may not be issued piecemeal, as different parts of the grievance proceedings occur.

Recipients should also keep in mind their duty to conclude the grievance process within the reasonably prompt time frames designated in the recipient's grievance process under §106.45(b)(1)(v). Additionally, each decision-maker—whether an employee of the recipient or an employee of a third party, such as a consortium of schools—owes an individual and ongoing duty under § 106.45(b)(1)(iii) not to have a conflict of interest, or bias for or against a single complainant or multiple complainants or respondents.

[Previous Blogs](#)

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OCR issuing clarifications via their blog:

<https://www2.ed.gov/about/offices/list/ocr/blog/index.html>

Is your TIX training provider not giving you materials to post on your site?

- This is a *requirement*
- Recommendation: Forward them OCR's May 18th blog post explaining the requirement
- <https://www2.ed.gov/about/offices/list/ocr/blog/20200518.html>

SCHOOLS MUST POST IMPORTANT INFORMATION REGARDING TITLE IX ON SCHOOL WEBSITES UNDER THE NEW TITLE IX RULE

May 18, 2020



As schools plan and prepare for implementation of the new Title IX Rule, which becomes effective on August 14, 2020, schools may find it necessary to post new information on their websites. OCR will not enforce the new Title IX Rule until the new Rule has become effective, and provides this information to assist schools in preparing to comply the new Title IX Rule.

The new Title IX Rule specifically requires schools to post on their websites:

1. The *contact information* for the school's Title IX Coordinator(s);
2. The school's *non-discrimination policy*; and
3. *Training materials* used to train the school's Title IX personnel.

Information about each of these requirements can be found in the unofficial version of the Title IX Rule posted by the Department, and the Department's commentary about the Rule, which can be viewed [here](#).

Title IX Coordinator Contact Information / Non-discrimination Policy

- Section 106.8(a) requires schools to designate and authorize at least one employee as a Title IX Coordinator and to notify students, employees, applicants, parents and guardians, and others of the Title IX Coordinator's contact information. That information must include the name or title of the Title IX Coordinator, an office address, a telephone number, and an e-mail address.
- Section 106.8(b)(2)(i) requires schools to "prominently display" the Title IX Coordinator's contact information on the school's website, if the school has a website.
- Similarly, § 106.8(b)(1) requires schools to notify students, employees, applicants, parents and guardians, and others that the school does not discriminate on the basis of sex, and that Title IX requires the school not to discriminate. This non-discrimination policy must also be prominently displayed on the school's website, if any, under § 106.8(b)(2)(i).
- These requirements are intended to ensure that a school's entire educational community understands how to contact the Title IX Coordinator to report sex discrimination, including sexual harassment. Section 106.8(a) expressly states that reports can be made at any time, including during non-business hours, by using the Title IX Coordinator's listed telephone number or e-mail address, "or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report."

Training Materials for Title IX Personnel: § 106.45(b)(1)(iii) & § 106.45(b)(10)(i)(D)



Informal Resolution

Preamble Comments

34 C.F.R. 106.45(b)(9)

- A recipient may choose to offer the parties an informal process that resolves the formal complaint without completing the investigation and adjudication, but such a result depends on whether the recipient determines that informal resolution may be appropriate and whether both parties voluntarily agree to attempt informal resolution (P. 1367) (unofficial)
- You must provide a written notice disclosing any consequences resulting from participating in the informal resolution process, including the records that will be maintained could be shared (P. 1367)

Preamble Comments

34 C.F.R. 106.45(b)(9)

- The informal resolution officer must be trained in bias, conflict of interest the same as the investigators and decision makers (P. 1369)
- Informal resolution can take many forms—arbitration, mediation, restorative justice (P. 1370)
- Respondent may agree to discipline as part of informal resolution process (P. 1370)
- There must be a formal complaint prior to engaging in informal resolution (P. 1371)

Preamble Comments

34 C.F.R. 106.45(b)(9)

- Make sure parties understand confidential rules up front (P. 1379)
- You need a written agreement to document the resolution (P. 1384)
- You could do a safety and risk analysis to determine if informal process is appropriate for a given case, but don't have to (P. 1386)

Bricker's Title IX Toolkit Coming Soon!

Model Sexual Harassment Intake Form

Employee Completing Intake: _____
First Name Last Name Po

Complainant(s): [complete and attach an intake form for each Complainant]

- Name: _____
First Name Last Name
- Student: Age _____ Grade in school _____
- Employee: Position _____ Building _____
- Contact Information (and parent/guardian contact information if minor student)

Person(s) Reporting [if different from Complainant(s)]:

First Name Last Name

Title IX Flowchar



Upcoming K-12 Trainings

Register at: www.bricker.com/events

Level 1

- General Title IX Training: Sep 15, Sep 22

Level 2 (All 9:00-11:30am)

- TIX Coordinator/Administrator Training: Sep 17, Oct 1
- TIX Investigator Training: Sep 17, Sep 24
- TIX Decision-Maker Training: Sep 22, Sep 25, Sep 28, Oct 2
- TIX Report Writing for Investigators/Decision-Makers: Sep 24, Oct 1
- TIX Informal Resolution Training (**NEW**): Sep 18, Sep 25

Thank you for attending!

Remember – additional information available at:

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at www.bricker.com/titleix

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