GENDER ISSUES FOR EDUCATORS

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PART I

TITLE IX AND NEW PIAA RULES
TITLE IX – DISCRIMINATION BASED ON SEX

Title IX 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.” 20 U.S.C. § 1681, et seq.

The covered education program or activity encompasses all of the educational institution’s operations.
TITLE IX – SEXUAL HARASSMENT

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.

Boards must also have harassment policies that generally include the following examples of harassment:

Examples of conduct that may constitute sexual harassment include but are not limited to sexual flirtations, advances, touching or propositions; verbal abuse of a sexual nature; graphic or suggestive comments about an individual's dress or body; sexually degrading words to describe an individual; jokes; pin-ups; calendars; objects; graffiti; vulgar statements; abusive language; innuendoes; references to sexual activities; overt sexual conduct; or any conduct that has the effect of unreasonably interfering with a student's ability to work or learn or creates an intimidating, hostile or offensive learning or working environment.

TITLE IX – DISCRIMINATION BASED ON SEX

In providing any aid, benefit, or service, a recipient may not, on the basis of sex:

- Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;
- Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;
- Deny any person any such aid, benefit, or service;
- Subject any person to separate or different rules of behavior, sanctions, or other treatment;
- Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition.
- Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person that discriminates on the basis of sex in providing any aid, benefit, or service to students or employees;
- Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.
TITLE IX – DISCRIMINATION BASED ON SEX

1. **Disparate treatment**: Actions that treat similarly situated persons differently because of, or on the basis of, sex.

2. **Disparate impact**: A facially neutral policy, procedure or practice which was not enacted with discriminatory intent has a disparate impact on individuals protected on the basis of their sex. Such practice must lack a substantial legitimate justification.

3. **Retaliation**: Retaliation against a person who has filed a complaint asserting rights under Title IX or who assists in a Title IX investigation is prohibited.

TITLE IX – ACCESS TO CLASSES / SCHOOLS

*Single-Gender Classes and Activities under Title IX*

"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 CFR § 106.34
TITLE IX – ACCESS TO CLASSES / SCHOOLS

Single-gender classes and activities* may be offered within schools, so long as:

i. Each single-sex class or extracurricular activity is based on the School’s important objective;

ii. The School implements its objective in an evenhanded manner;

iii. Student enrollment in a single-sex class or extracurricular activity is completely voluntary; and

iv. All other students, including students of the excluded sex, are provided a substantially equal coeducational class or extracurricular activity in the same subject or activity.

*non-vocational classes/activities

TITLE IX – ACCESS TO CLASSES / SCHOOLS

Schools may offer the following single-gender classes or portion of classes/activities without meeting the requirements on the previous slide:

(i) Contact sports in physical education classes – students may be separated on the basis of sex within physical education classes during participation in wrestling, boxing, rugby, ice hockey, football, basketball, or any other sports the purpose or major activity of which involves bodily contact;

(ii) Ability groupings in physical education classes - students may be grouped within physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex;

(iii) Human sexuality classes – classes or portions of classes that deal primarily with human sexuality may be conducted in separate sessions for boys and girls; and

(iv) Choruses – schools may make requirements based on vocal range or quality that may result in a chorus or choruses of one or predominantly one sex.
A key component Title IX is gender equity and equal opportunities for male and female students to participate in athletic activities.

Schools must offer a choice of sports that accommodates the interests and abilities of male students and female students in an equivalent manner.

Schools are not required to offer exact same sports for girls and boys, but when they do not, the new PIAA mixed gender participation rules will apply.

**TITLE IX – INTERSCHOLASTIC SPORTS**

**Test 1. Proportionality:** Provision of interscholastic participation opportunities for boys and girls in numbers substantially proportionate to their respective enrollments.

**Test 2. Program Expansion:** A history and continuing practice of expanding athletic opportunities for female students that is responsive to their developing interests.

**Test 3. Full Accommodation:** That the interests and abilities of female students have been fully and effectively accommodated by the District’s current interscholastic athletics program.
TITLE IX – OFFICE FOR CIVIL RIGHTS (OCR) ENFORCEMENT

• OCR, an office within the U.S. Dept. of Education, enforces Title IX as well as several other federal education statutes.

• OCR can open a file and conduct a lengthy investigation into District practices, generally, or treatment of a specific student or group of students. Includes production of documents, correspondence with OCR and interviews of all staff involved.

• OCR can initiate administrative proceedings to suspend, terminate, refuse to grant, or defer all federal financial assistance to a district.

• OCR can refer cases to the U.S. Dept. of Justice to enforce any right the U.S. government may have.

PIAA MIXED GENDER PARTICIPATION
PIAA NEW MIXED GENDER PARTICIPATION BY-LAWS

On June 19, 2014, the PIAA passed a Mixed Gender Participation By-law. The purpose of the By-Law was to address issues relating to boys playing on girls’ sports teams and girls playing on boys’ sports teams. The effective date was July 1, 2014.

KEY TERMS

Boys team – a team consisting of all boys

Girls team – a team consisting of all girls

Mixed gender team – a team consisting of both boys and girls

Participation of both boys and girls on a team in any context during a season causes a team to be considered as a mixed gender team for that season.
GENERAL CONSIDERATIONS

The new rule will limit participation on mixed gender teams making it much harder for boys to play on girls teams.

Girls will be allowed to participate on boys teams such as football or wrestling when schools have no comparable options for them.

WHY THE BY-LAW?

Despite real and demonstrable physical differences between similarly aged and trained high school boys and girls, equitable participation by female student athletes must be promoted.

AND

There is a history of under-representation of female student athletes in interscholastic athletics.

Source: PIAA By-law & Release
Dated: June 19, 2014
KEY POINTS

Mixed gender participation is limited to certain circumstances.

If a school has a boys team in a sport, boys at the school are not eligible to play on the school's girls team in that sport and vice versa.
PIAA RULES

Girls may play on boys teams if the school does not sponsor a comparable girls’ team in that sport.

The PIAA does not view softball and baseball as being comparable sports. It does, however, consider boys volleyball and girls volleyball as well as boys lacrosse and girls lacrosse to be comparable sports with one another despite the fact that there are differences in rules for the boys’ version and girls’ version.

PIAA RULES

Boys may play on a girls team if the school does not sponsor a boys team in that sport and if:
1. The overall boys’ athletic program at the school provides fewer opportunities for boys to participate than for girls;
2. The boy would not displace any girl from the team’s rooster;
3. The boy would likely not pose an increase risk of harm to opponents such as size, strength or other characteristics beyond that which would be posed by an average size and skilled participating girl;
4. The boy would not provide his team with a “significant, competitive advantage.” This means that the boy’s participation would likely cause the team to be noticeably more competitive than it would be without the boy’s participation.
POST-SEASON PARTICIPATION

The PIAA does not have a mixed gender classification for its sports.

The By-law states that, for post-season purposes, mixed gender teams, other than a spirit team, will compete only in sport classifications designated for boys.

The By-law does not address whether, in view of the post-season provision for mixed gender teams, a Principal can deny a boy’s participation on a girls’ team on the basis that granting permission would preclude the team from the post-season in the girls’ classification.

THE ROLE OF THE SCHOOL PRINCIPAL

School Principals play an important role in the application of this By-law and they are given considerable discretion by the PIAA.

A Principal may waive the limitation that a girl cannot play on a boys’ team even if the school has a girls’ team in a comparable sport if the Principal believes that the girl’s skill level is such that participation on the girls’ team would not provide meaningful competition for the girl.

In the case of determining whether to allow a boy to participate on the girls team, it is the Principal who determines factors 3 and 4 from the previous slide giving due regard to the health and safety of opponents, particularly in direct contact sports.
IDENTIFICATION OF GENDER FOR SPORTS PARTICIPATION

The PIAA will accept the Principal’s report as to a student’s gender.

The gender that the student identifies as is the gender that should be reported to PIAA for sports participation.

The By-laws passes all liability regarding gender identification on to the District.

WHAT TO DO

Districts should consider developing formal guidelines for making decisions regarding transgender students and relieve the Principal from making individual case-by-case decisions regarding transgender student participation, as such decision often expose the district to liability on the basis of discrimination or bias.

Districts are urged to consult with their Solicitors to ensure the decisions made regarding mixed gender participation are done by meeting the needs of the school without running afoul of state and federal anti-discrimination laws.

Remember, there is a huge overlay with Title IX as well as the discrimination provisions of the Pennsylvania Human Relations Act and related federal laws.
WHEN CAN TEAMS OR INDIVIDUAL REFUSE TO PARTICIPATE AGAINST A MIXED GENDER TEAM?

If a team refuses to participate in a contest against a mixed gender team, the team forfeits the contest.

In sports in which an individual events or matches are conducted, refusal of a contestant to participate in any event or match will result in a forfeiture of that event by that student not by the team.

Schools may opt not to have a mixed gender team or such participation would be consistent with the school’s religious beliefs. This obviously does not apply to public schools.

PART II

LGBT RIGHTS AND PROTECTIONS AGAINST BULLYING AND HARASSMENT
LGBT

**Lesbian, Gay, Bisexual, Transgender...**

Lesbian, Gay, Bisexual all describe sexual orientation.

Transgender is the state of one's gender identity or gender expression not matching one's assigned sex. Transgender is independent of sexual orientation; transgender people may identify as heterosexual, homosexual, bisexual, etc.
LGBT RIGHTS AND PROTECTIONS

There is no state law in Pennsylvania that protects individuals from discrimination on the basis of sexual orientation or gender identity.*

Allegheny County and the City of Pittsburgh both have ordinances that prohibit discrimination on the basis of sexual orientation and gender identity.

*HB and SB 300 are still in committee and would amend the Pa Human Relations Act to include sexual orientation and gender identity.

LGBT RIGHTS AND PROTECTIONS

Title IX does not specifically protect gender identity or sexual orientation, however, in the context of schools, the US Department of Education has explicitly expanded those protections:

Does Title IX protect all students from sexual violence?

Answer: Yes. Title IX protects all students at recipient institutions from sex discrimination, including sexual violence. Any student can experience sexual violence: from elementary to professional school students; male and female students; straight, gay, lesbian, bisexual and transgender students; part-time and full-time students; students with and without disabilities; and students of different races and national origins.
LGBT FAQS

**Bathrooms** – what restroom should students be permitted to use if they do not identify with their birth gender?

**Locker rooms** – do I have to provide a separate changing area for LGBT students?

**Graduation** – do we have to allow a student to be identified by a name other than a birth name at graduation ceremonies? What about selecting the color of robe traditionally assigned by gender?

**Dances** – do we have to allow a non-traditional couple to attend the school dance?

BULLYING AND HARASSMENT
BULLYING AND HARASSMENT

• **Bullying**: an intentional electronic, written, verbal or physical act or series of acts directed at another student or students, which occurs in a school setting, that is severe, persistent or pervasive and has the intent or effect of:
  1. Creating an intimidating or hostile environment that substantially interferes with a student’s education; or
  2. Physically, emotionally or mentally harming a student; or
  3. Placing a student in reasonable fear of physical or emotional harm; or
  4. Placing a student in reasonable fear of damage to or loss of personal property.

BULLYING AND HARASSMENT

• Reports of bullying are to be made to a teacher, the school principal, counselor or social worker – verbally or in writing.

• Complaints shall be investigated promptly, a written report made, and corrective action taken when allegations are substantiated.

• School principal is responsible for making sure this process occurs.
BULLYING AND HARASSMENT

• **Harassment**: verbal, written, graphic or physical conduct relating to an individual's race, color, national origin/ethnicity, gender (including gender identity or expression), age, disability, sexual orientation or religion when such conduct:
  1. Is sufficiently severe, persistent or pervasive that it affects an individual's ability to participate in or benefit from an educational program or activity or creates an intimidating, threatening or abusive educational environment;
  2. Has the purpose or effect of substantially or unreasonably interfering with an individual's academic performance; OR
  3. Otherwise adversely affects an individual’s learning opportunities.

• “Each staff member shall be responsible to maintain an educational environment free from all forms of harassment.”

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**Bullying and Harassment**

**Morrow v. Balaski (3d Cir. 2013)**

- The Blackhawk School District was recently successful in defending a bullying case involving 2 sisters. The sisters had been subject to threats, assaults and racial intimidation by peers. One incident involved an assault in the school cafeteria for which the perpetrator was suspended for 3 days. She was charged in juvenile court and no-contact order was issued. Despite the order, the perpetrator was permitted to return to the school. The family filed suit claiming that the perpetrator should have been expelled.
- The Court held that school officials do not have a constitutional duty to protect students from bullies, they need only refrain from enhancing the danger in violation of substantive due process rights.
Bullying and Harassment: Gender

Although there may not be a constitutional duty to protect a student from bullies, there is a statutory obligation to investigate and take remedial actions to address sex based harassment and bullying.

Title IX’s sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity and OCR accepts such complaints for investigation. Similarly, the actual or perceived sexual orientation or gender identity of the parties does not change a school’s obligations. Indeed, lesbian, gay, bisexual, and transgender (LGBT) youth report high rates of sexual harassment and sexual violence. A school should investigate and resolve allegations of sexual violence regarding LGBT students using the same procedures and standards that it uses in all complaints involving sexual violence.

Bullying and Harassment: Gender

Harassment can occur even when the victim and perpetrator are of the same sex.

A school’s obligation to respond appropriately to sexual violence complaints is the same irrespective of the sex or sexes of the parties involved. Title IX protects all students from sexual violence, regardless of the sex of the alleged perpetrator or complainant, including when they are members of the same sex. A school must investigate and resolve allegations of sexual violence involving parties of the same sex using the same procedures and standards that it uses in all complaints involving sexual violence.
Bullying and Harassment: Disabilities

• “Bullying of a student with a disability that results in the student not receiving a meaningful educational benefit constitutes a denial of a free appropriate public education (FAPE) under the IDEA.”
  ◦ This is true whether the bullying is related to the child’s disability or not
  ◦ School has responsibility to ensure that the child continues to receive FAPE in accordance with his/her IEP

• Bullying of students with disabilities may also constitute discriminatory harassment prohibited under Section 504 and/or Title II of the ADA.

• Students with disabilities are disproportionately affected by bullying. Twyman & Saylor, et al. (2010).

Bullying and Harassment: Disabilities

Suggests specific strategies to prevent and respond to bullying, which include:
  ◦ Possibly reconvene the student’s IEP Team to determine whether, as a result of the bullying, the student’s needs have changed and the IEP needs to be revised accordingly
  ◦ Warns that placement in a more restrictive “protective” setting to avoid the bullying may constitute a denial of the IDEA’s requirement that the school provide FAPE in the LRE. Ensure that any change is due to a verified, documented safety concern or because the child can no longer receive FAPE in the current LRE placement.
  ◦ If the student engaged in the bullying behavior is a student with an IEP, the student’s team should review the IEP to determine if additional supports and services are needed to address the inappropriate behavior.
CYBERBULLYING

- Cyberbullying
  Bullying may include acts that occur outside of school if those acts are intentional, electronic, verbal or physical, are directed at another student or students, are severe, persistent or pervasive, and have the effect of:
  - (i) substantially interfering with a student’s education;
  - (ii) creating a threatening environment; OR
  - (iii) substantially disrupting the orderly operation of the school.

Bullying and Harassment Complaints and Investigations

All complaints of bullying and harassment shall be investigated promptly and corrective action taken when complaints are substantiated!

RESPONSE – When a complaint is received:

1. Determine whether conduct complained of, if true, is bullying and/or harassment as defined by your Board Policy
2. Parent/guardian of alleged victim and alleged perpetrator are contacted
3. Principal or designee (e.g., asst. principal, school counselor, social worker) conducts prompt investigation
4. Written report of findings should be provided to the parents of both the victim and the perpetrator
5. Appropriate discipline and other interventions must be implemented if there is a finding of bullying or harassment.
Bullying and Harassment
Complaints and Investigations

Seek assistance from your solicitor if:

• Principal, school employee or independent contractor of the District is alleged perpetrator of the conduct
• The parent/guardian and child are represented by an attorney in relation to the allegations
• The parent/guardian is alleging discrimination related to the bullying/harassment (e.g. bullying or harassment because of the child’s sex, disability or race)
• Conduct is particularly severe in nature, for example:
  ◦ Sexual assault and/or inappropriate touching of a sexual nature
  ◦ Severe physical violence
  ◦ Victim has been hospitalized or threatened suicide due to the purported incident
  ◦ Where the parent/guardian is withholding the student from his or her school program due to the alleged conduct
• The school makes a determination and the parent disputes the conclusion.

Bullying and Child Abuse

Q: If a student is accused of bullying, can he/she be reported for child abuse? How is child on child abuse determined?

A: After a full investigation by the principal some incidents maybe categorized as child on child abuse as described in Child Protective Services Laws.

Suspected child on child abuse includes a child who is assaulted, sexually harassed, bullied or other violation that represents abuse anytime, anywhere before, during and after school. CHILDLINE report must be made. This is in addition to any school discipline and/or charges filed with the local magistrate. If CYF believes it is warranted, they will complete a full investigation within 30 days, and the school is required to cooperate with all investigations.
Thank you!

Additional comments or questions:

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