

SWIER LAW FIRM, PROF. LLC

Nationally Recognized Legal Solutions

South Dakota
Public School Leaders
and Title IX

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SWIER LAW FIRM'S EDUCATION LAW PRACTICE GROUP

Having the right legal counsel to guide your school district through the increasingly complex area of education law is essential to the success of any South Dakota school system.

Swier Law Firm's Education Law Practice Group understands the challenges facing South Dakota's education community. Our attorneys, which include a certified school psychologist and former legal counsel for the South Dakota Department of Education, have a tremendous depth of experience and a practical approach to dealing with the myriad of legal issues faced by our state's school districts. Combining a thorough understanding of national, state, and local educational concerns with long-standing relationships within the educational community, our Education Law Practice Group brings a practical, solutions-oriented approach to counseling your school district.

The Group's attorneys serve as general counsel to boards of education throughout South Dakota, as well as special counsel to many school districts and other educational entities, including the School Administrators of South Dakota. Our experience and familiarity with the needs of South Dakota's school districts enhances our ability to provide legal services efficiently and with individualized attention.

General Information

Title IX's protection applies to all elementary and secondary schools, colleges and universities - public or private - that receive federal financial assistance. The protection extends to all aspects of these institutions' education programs and activities. Title IX prohibits all forms of sex discrimination, including gender-based harassment, sexual harassment, and sexual violence.

Title IX protects all students from sex discrimination, including sexual violence. Any student can experience sexual violence - from elementary to high school; male and female students; straight, gay, lesbian, bisexual and transgender students; students with and without disabilities; and students of different races and national origins.

When students with disabilities experience sexual violence, federal civil rights laws other than Title IX may also apply to a school's responsibility to investigate and address such incidents. Some students may require additional assistance and support. For example, a student with an intellectual disability may need additional help in learning about sexual violence.

Definitions

What Is Title IX ?

In June 1972, President Richard Nixon signed Title IX of the Education Amendments of 1972 into law.

Title IX is a federal law prohibiting discrimination on the basis of sex in all education programs and activities operated by recipients of federal funds. It states: “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 educational program or activity receiving Federal financial assistance.”

Most often, Title IX is associated with inequity in collegiate athletics, because that is where efforts at achieving gender equality have concentrated. However, the Department of Education’s Office for Civil Rights (OCR) has also issued guidance and enforced the law’s application to sex discrimination, which includes sexual harassment and sexual violence.

What is sexual violence?

Sexual violence refers to physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent (e.g., due to the student’s age or use of drugs or alcohol, or because an intellectual or other disability prevents the student from having the capacity to give consent). A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, sexual abuse, and sexual coercion. Sexual violence can be carried out by school employees, other students, or third parties. All such acts of sexual violence are forms of sex discrimination prohibited by Title IX.

What is a Title IX “investigation”?

An “investigation” refers to the process a school uses to resolve Title IX sexual violence complaints. This may include the fact-finding investigation and any hearing and decision-making process a school uses to determine: (1) whether or not the alleged conduct occurred; and (2) if the conduct occurred, what actions the school will take to end the sexual violence, eliminate the hostile environment, and prevent its recurrence.

School Response

How does Title IX apply to student-on-student sexual violence?

Under Title IX, federally funded schools must ensure that students of all ages are not denied or limited in their ability to participate in or benefit from the school's educational programs or activities on the basis of sex. A school violates a student's rights under Title IX regarding student-on-student sexual violence when the following conditions are met: (1) the alleged conduct is sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's educational program (i.e. creates a hostile environment); and (2) the school, upon notice, fails to take prompt and effective steps reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects.

How does OCR determine if a hostile environment has been created?

The Office of Civil Rights (OCR) considers a variety of factors to determine if a hostile environment has been created and also considers the conduct in question from both a subjective and an objective perspective. Specifically, OCR's standards require that the conduct be evaluated from the perspective of a reasonable person in the alleged victim's position, considering all the circumstances. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the conduct is physical. In fact, a single or isolated incident of sexual violence may create a hostile environment.

When does OCR consider a school to have notice of student-on-student sexual violence?

OCR considers a school to have notice of student-on-student sexual violence if a responsible employee knew, or in the exercise of reasonable care should have known, about the sexual violence.

A school can receive notice of sexual violence in many different ways. Some examples of notice include: a student may have filed a grievance with or otherwise informed the school's Title IX coordinator; a student, parent, friend, or other individual may have reported an incident to a teacher, principal, campus law enforcement, staff in the office of student affairs, or other responsible employee; or a teacher may have witnessed the sexual violence.

The school may also receive notice about sexual violence in an indirect way, from sources such as a member of the local community, social networking sites, or the media. In some situations, if the school knows of incidents of sexual violence, the

exercise of reasonable care should trigger an investigation that would lead to the discovery of additional incidents.

For example, if school officials receive a credible report that a student has perpetrated several acts of sexual violence against different students, that pattern of conduct should trigger an inquiry as to whether other students have been subjected to sexual violence by that student. In other cases, the pervasiveness of the sexual violence may be widespread, openly practiced, or well-known among students or employees.

In these cases, OCR may conclude that the school should have known of the hostile environment. In other words, if the school would have found out about the sexual violence had it made a proper inquiry, knowledge of the sexual violence will be imputed to the school even if the school failed to make an inquiry.

What are a school's basic responsibilities to address student-on-student sexual violence?

When a school knows or reasonably should know of possible sexual violence, it must take immediate and appropriate steps to investigate and determine what occurred (subject to various confidentiality provisions). If an investigation determines that sexual violence created a hostile environment, the school must take prompt steps reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects.

Is a school required to protect the complainant?

Yes. Title IX requires a school to protect the complainant and ensure his or her safety as necessary. This includes taking interim steps before the final outcome of any investigation. The school should take these steps promptly once it has notice of a sexual violence allegation and provide the complainant with updates on the status of the investigation. If the school determines that the sexual violence occurred, the school must continue to take these steps to protect the complainant and ensure his or her safety, as necessary.

Does Title IX cover employee-on-student sexual violence, such as sexual abuse of children?

Yes. Title IX also protects students from other forms of sexual harassment (including sexual violence and sexual abuse), such as sexual harassment carried out by school employees. Sexual harassment by school employees can include unwelcome sexual advances; requests for sexual favors; and other verbal, nonverbal, or physical conduct of a sexual nature.

How should a school respond to sexual violence when the alleged perpetrator is not affiliated with the school?

The proper response will differ depending on the level of control the school has over the alleged perpetrator. For example, if an athlete or band member from a visiting school sexually assaults a student at the home school, the home school may not be able to discipline or take other direct action against the visiting athlete or band member. However (subject to any confidentiality provisions), it should conduct an investigation into what occurred and report the incident to the visiting school. Even though a school's ability to take action against a particular perpetrator may be limited, the school must still provide appropriate remedies for the complainant. This may include providing support services for the complainant and issuing new policy statements making it clear that the school does not tolerate sexual violence and will respond to any reports about such incidents.

Procedural Requirements

A school's obligation to respond appropriately to sexual violence complaints is the same irrespective of the sex or sexes of the parties involved. 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.

Title IX's regulations have three key procedural requirements. Each school must:

1. disseminate a notice of nondiscrimination;
2. designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX; and
3. adopt and publish grievance procedures providing for the prompt and fair resolution of student and employee sex discrimination complaints.

Investigations

The precise steps in a school's Title IX investigation will depend on the type of allegations, the age of the students involved, the size and structure of the school, state or local legal requirements, and lessons from prior experiences. However, in every case, a school's Title IX investigation must be adequate, reliable, impartial, prompt and include the opportunity for both parties to present witnesses and other evidence. Every person involved in conducting a school's Title IX investigations must have training or experience in handling a complaint and a familiarity with the school's grievance procedures.

The investigation may include (1) conducting interviews of the complainant, the alleged perpetrator, and any witnesses; (2) reviewing law enforcement investigation documents (if applicable); (3) reviewing student and personnel files; and (4) examining other relevant documents or evidence. Remember that while a school has flexibility in how it structures its investigation, a school must provide the complainant any rights that it provides to the alleged perpetrator. A balanced and fair process that provides the same opportunities to both parties will result in a sound and supportable decision.

How does a school's Title IX investigation compare with a law enforcement investigation?

A law enforcement investigation is intended to determine whether an individual violated criminal law. At the conclusion of the law enforcement investigation, if the individual is tried and found guilty, he or she will be subject to criminal penalties. The United States Constitution provides criminal defendants numerous protections, including the right to legal counsel, the right to a speedy trial, the right to a jury trial, the right against self-incrimination, and the right to confront their accusers. Also, government officials responsible for criminal investigations normally have discretion as to which complaints from the public they will investigate.

However, a Title IX investigation does not result in the incarceration of an individual. Therefore, the same procedural protections and legal standards are not required. Further, while a criminal investigation is initiated at the discretion of law enforcement authorities, a Title IX investigation is not discretionary - a school has a duty under Title IX to investigate and resolve complaints promptly, fairly, and provide a safe and nondiscriminatory environment for all students. Because the standards for pursuing and completing criminal investigations are different from those used in Title IX investigations, the termination of a criminal investigation without an arrest or conviction does not affect the school's Title IX obligations.

Conclusion

Title IX provides safeguards for all students. While it appears to be simple on the surface, the law is complex to navigate. Pitfalls along the way can become stumbling blocks not only to the school district but also to impacted students. Swier Law Firm's Education Law Practice Group is at the forefront of this issue. Our solutions can help safeguard schools, communities and students.

For more information, please visit our website at SwierLaw.com.

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