



R³ Resources: A Primer on Title IX for Scouting: What Every Boy Scout and Girl Scout Official Needs to Know

So, you're new to Title IX? Welcome. Here's a primer to get you started.



Stay up to date on the current ATIXA news at
www.atixa.org

A Primer on Title IX for Scouting

Background

First, Title IX isn't the actual name of the law. That's just a shorthand for where it was located in the United States Code originally when it was enacted in 1972. It's now located at 20 USC § Section 1681. Title IX allows the Boy Scouts and Girl Scouts to maintain single sex membership, but all other requirements of Title IX are applicable to scouting entities that are supported by federal funds. What requirements? Read on...

Title IX is a law that prohibits sex discrimination in federally-funded education programs. Most schools and scouting programs in the United States are subject to Title IX¹.

What's sex discrimination? It means someone is excluded from or effectively denied access to an education program because of sex. That exclusion could take the form of outright denial because someone is a man (boy) or woman (girl). That's called differential treatment discrimination. Someone could also be denied or excluded as the result of sexual harassment, sexualized bullying, sexual violence, intimate partner violence, stalking, hazing, or any number of other abusive behaviors that are sexual in nature or directed to someone because of sex. Title IX will also protect someone if they're discriminated against because of pregnancy, adoption, abortion, parenting, or childbirth, all of which are related to sex.

¹ Although Title IX does not apply to the membership practices of scouting organizations, all other programs and activities of federally-funded scouting organizations are subject to Title IX.

Title IX in Action

What should someone do if they are being discriminated against? We hope they will report it. Tell a scouting official. Every organization subject to Title IX is required to designate a Title IX Coordinator whose job it is to help report concerns. The Title IX Coordinator is also responsible for making sure the organization addresses the concerns by providing what's called a remedy. The simple requirement is designed to ensure the discrimination ends, reasonably prevent it from recurring, and restore access to the education program².

If an organization or a Title IX Coordinator won't enforce someone's rights to educational access without sex discrimination, they have recourse. Complaints can be filed with various government enforcement agencies, often called Offices for Civil Rights (OCR). Most cabinet level departments have OCRs (e.g., HUD, ED, HHS, Energy, NASA, EEOC, DOJ). For someone wishing to file a complaint about scouting, the Department of Education's (ED) OCR is a likely location for filing a complaint, but it depends on who is filing the complaint and in what kind of federally funded program someone experiences discrimination. Title IX protects students, scouts, staff, volunteer leaders, teachers, and administrators.

If that doesn't work, lawsuits are an option. While Title IX litigation can be expensive, long, and stressful, sometimes it's important to prove someone's rights have been violated. To have a "day in court," complainants will need to consult a lawyer who specializes in Title IX litigation. There have been thousands (literally) of Title IX lawsuits in the US courts, even the Supreme Court.

² Title IX also governs athletics equity, though this is not directly pertinent to scouting. There is a right to participation in sports and to equitable funding within equitable programs, without exclusion on the basis of sex. Separate, but equal, team participation is generally permitted under Title IX sports, but not in other educational programs. Title IX is best known for its role in creating athletics access irrespective of sex, but in May 2020 the government has published a set of new rules on Title IX, called regulations, that are not about sports at all. More on that below.

Regulatory Environment for Scouting.

Let's turn to the regulatory environment for scouting. Title IX goes back to 1972, so there is a long history here. The government writes statutes that are often vague. Title IX itself is only 37 words long. So, departments like ED write extensive regulations explaining to recipients how to comply. The original regulations on Title IX were published in 1975. Then ED's OCR issued guidance in 1997 and replaced it in 2001. Those guidelines have been enforced by OCR ever since. OCR has also issued a series of Dear Colleague Letters which are considered sub-regulatory guidance and don't have the force of law, meaning that OCR shouldn't enforce them as standards, but recipients should make good faith efforts to adhere to them. Two such letters of significance were published in 2011 and 2014 by the Obama Administration, but were withdrawn in 2017 by the Trump Administration. Now, the 2020 regulations have been issued by OCR, the first significant new rules in 45 years.

The 2020 regulations have the force of law. This means that any OCR can enforce them through lawsuits or restricting federal funds for non-compliant schools and organizations. It also means that courts may enforce them. Courts may have their own rules for enforcing Title IX, but they are expected to look to the regulations when questions of interpretation arise.

The regs are very prescriptive. OCR hasn't been thrilled with the fact that many recipients of federal funds have historically ignored their Title IX compliance obligations. OCR also isn't thrilled with the way many recipients have used Title IX over the last ten years as an excuse to be biased toward victims/survivors and ignore the due process rights of those who are accused. So due process is a big theme of the new regs. And, a level playing field is what should exist under Title IX, right? Men (boys) should not be advantaged over women (girls), and women (girls) should not be advantaged over men (boys). Of course, these regs are controversial. Some people think they don't protect the accused enough. Others think they go way overboard and protect the accused at the expense of victims/survivors.

Standards vs. Best Practices

Do these regs frame everything a program administrator has to do to comply with Title IX? Not even close. They don't mention pregnancy or bullying. Or gender. Or athletics. So, these regs are narrowly focused on addressing sexual harassment and related acts of misconduct. In fact, it may be helpful to think of the regs as setting the floor as the basis for required actions of recipients when sexual harassment occurs³. This base is what we call the industry standards. Again, the regs don't include all the industry standards applicable under Title IX, but they set industry standards for those areas that they do address.

Is the base good enough? For some, it will be, but most recipients strive to achieve what are called best practices, which are the ceiling. So, the regs set the floor of industry standards, but many recipients are committed to going beyond compliance, by aiming for the ceiling of best practices. Where do we find those? Well, best practices are emerging and evolving all the time, but one of the best places to find them is through ATIXA. Our association is all about pushing beyond compliance to genuine commitment to programmatic excellence.

Due Process and Transparency Taking Center Stage

What are the themes we should be paying attention to in these regs? Well, in addition to pretty clearly defined due process requirements, with many hoops to jump through, the regs reflect a commitment to transparent resolution of discrimination allegations by funding recipients. They lay out complex standards for investigating possible policy violations, to ensure an investigation that is thorough, reliable, and impartial.

As youth behaviors become more abusive and complex, more is required of the officials who will be investigating. Frameworks for formal written notice, collection and sharing of evidence, rights to advisors, the assembly of a comprehensive investigation report, the obligation to issue a formal, written letter of outcome, and equitable appeal rights are all detailed.

³ Federally, acts like sexual violence, stalking, intimate partner violence (IPV), bullying, hazing, etc., are seen as forms of sexual harassment that can create a hostile environment on the basis of sex. So, we'll just refer to sexual harassment here, but know we are talking about a broad spectrum of sexual misconduct.

Due Process and Transparency Taking Center Stage - cont.

OCR envisions small bureaucracies of well-trained Title IX officials in every organization. Provisions address duties to report misconduct and the obligation to train all individuals who are a part of your Title IX team. For many organizations, it's become common to fold sexual harassment under anti-bullying policies and efforts, but that isn't going to fly with the new OCR framework. Sexualized bullying is a subset of sexual harassment, not the other way around. Title IX investigations are a very different animal than the simple, short conduct code investigations organizational administrators do every day.

Conclusion

OCR envisions small bureaucracies of well-trained Title IX officials in every organization. Provisions address duties to report misconduct and the obligation to train all individuals who are a part of your Title IX team. For many organizations, it's become common to fold sexual harassment under anti-bullying policies and efforts, but that isn't going to fly with the new OCR framework. Sexualized bullying is a subset of sexual harassment, not the other way around. Title IX investigations are a very different animal than the simple, short conduct code investigations organizational administrators do every day.

By: Brett A. Sokolow, Esq., President ATIXA, The Association of Title IX Administrators www.atixa.org

CONTACT INFORMATION

Brett A. Sokolow, Esq.
President, ATIXA
610-644-7858

Brett.Sokolow@atixa.org
www.atixa.org
www.tngconsulting.com