



Title IX Update

North Carolina Association of Public Charter
Schools Conference

July 10, 2023

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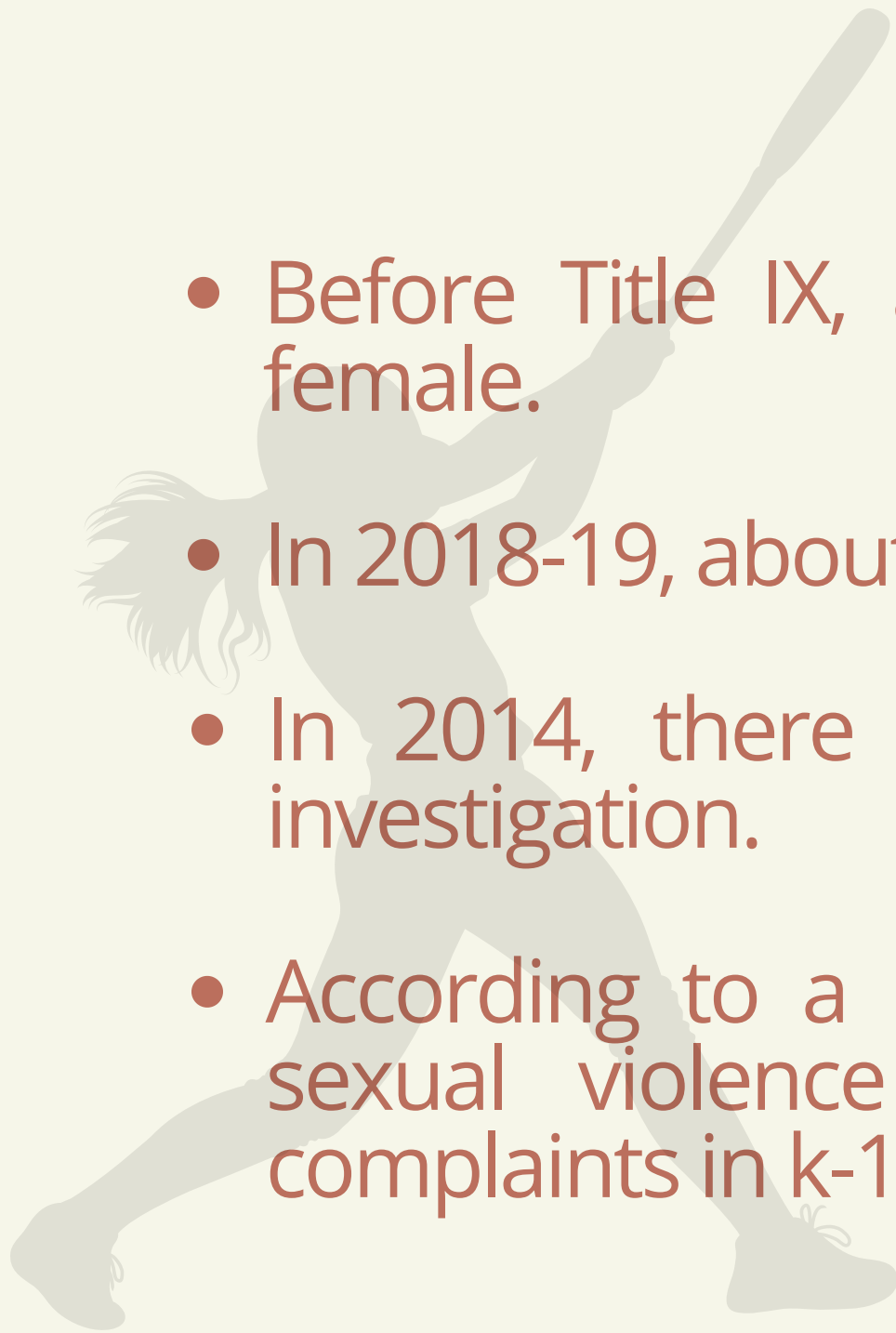


What is Title IX?

"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."

Impact on K-12 Schools

- Before Title IX, about 7 percent of high school athletes were female.
- In 2018-19, about 43 percent of high school athletes were female.
- In 2014, there were only 24 k-12 schools under a Title IX investigation.
- According to a recent article in magazine, there now are 136 sexual violence investigations and 254 sexual harassment complaints in k-12.



Title IX Timeline

June 23, 1972 – Title IX signed into law.

1980 – US Dept of Education established; Title IX will be overseen by its Office of Civil Rights.

August 14, 2020 – New rules go into effect, which increased protections for students accuses of sexual harassment or assault.

January 2021 – On his first day in office, Biden signs an executive order on preventing and combating discrimination on the basis of gender identity, stating that the *Bostock* decision applies to Title IX.

April 2021 – Office of Civil Rights begins a comprehensive review process of rules.

June 23, 2022 – Dept of Ed releases proposed changes to grievance procedure rule that, among other things, strengthen protections for LGBTQI+ who face discrimination based on gender identity or sexual orientation.

Late Summer 2022 – Dept of Ed receives over 240,000 comments on proposed regulations.

April 2023 – Dept of Ed releases proposed changes to Title IX Athletic rules related to male and female athletic teams.

October 2023 – Anticipated release of finals rules for both.

Proposed Changes to Athletic Rules

- Under proposed rules, schools could not impose categorical ban on transgender students participating on a sports team that accords with their gender identification.
- Would give schools flexibility to develop their own policies while protecting students from being denied equal athletic opportunity.
- Would require that sex-related criteria limiting or denying a student's ability to participate be "substantially related to the achievement of an important educational objective."
- Would require that harms be minimized to students whose opportunity to be on a team consistent with their gender identity would be limited or denied.
- Practically speaking, elementary schools and less competitive teams will have a harder time limiting based on gender identity; more competitive teams will have easier time justifying the sex-related criteria.
- Final rule will be released in October.

Proposed Changes to Grievance Rules

- Under proposed rules, Title IX would prohibit all forms of sex discrimination, including discrimination based on sex stereotype, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.
- Would cover harassment that creates a hostile environment (i.e., unwelcome sex-based conduct that is sufficiently severe or pervasive that, on the totality of circumstances and evaluated subjectively and objectively, it denies or limits a person's ability to participate in or benefit from the educational program or activity.)
- Would expand supportive measures and informal resolutions.
- Would require schools to monitor barriers that prevent or dissuade students from reporting instances of sexual harassment and/or discrimination.
- Title IX would apply to conduct that occurs off-campus when respondent is a representative of the school or otherwise engaged in conduct under its disciplinary authority.
- Final rule will be released in October.

The background of the slide is a light blue surface covered with numerous colorful paper cutouts of human figures. These cutouts are in various colors including pink, yellow, light blue, orange, and green. Some figures are male (straight legs), and some are female (flared skirt). They are scattered across the entire background, some overlapping, creating a diverse and inclusive visual theme.

Title IX Refresh

Title IX: Roles and Responsibilities

Title IX Coordinator	Coordinates and conducts reports and complaints. Initiates formal complaints. Implements supportive measures as needed. Trains staff who deal with grievances. Maintain records and files.	Must receive Title IX training.
Investigator	Conducts investigation of complaints. Gathers evidence. Produces a report.	Must receive training. Can be Title IX coordinator but watch for conflicts.
Decision-maker	Evaluates evidence. Rules on relevancy during a hearing. Produces a written determination.	Must receive training. Cannot be the Title IX Coordinator or Investigator.
Appeal designee	Hears appeals.	Must receive training. Cannot be Title IX coordinator, investigator, or decision-maker.

Title IX Elements

- Educational Program
- United States
- Actual Knowledge
- Sexual Harassment



EP (Education Program) +
US (United States) +
AK (Actual Knowledge) +
SH (Sexual Harassment)

IX

EP (Education Progam) +
US (United States) +
AK (Actual Knowledge) +
SH (Sexual Harassment)

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Education Program (EP)

- **Title IX** protects people from discrimination based on sex in **education programs** or activities that receive federal financial assistance.
- Education programs include locations, events, circumstances over which the school/district had substantial control over the respondent and the context in which the sexual harassment occurs.
- On or off campus not dispositive.
- Title IX obligations include incidents that occur off campus if part of the school's operations, or if the school had substantial control over the respondent and context of alleged harassment

EP (Education Program) +
US (United States) +
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United States (US)

Title IX: “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.”

Changes from 2020 included a revision to Section 106.8 of the governing regulations to state that “[t]he requirements of . . . this section apply only to sex discrimination occurring against a person in the United States.”

Also states that institutions’ “non-discrimination polic[ies], grievance procedures that apply to sex discrimination, and grievance process[es] that appl[y] to sexual harassment, do not apply to persons outside the United States.

EP (Education Program) +
US (United States) +
AK (Actual Knowledge) +
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Actual Knowledge (AK)

US DOE does not limit how schools may receive notice of sexual harassment, or who can provide it.

Schools can receive actual knowledge from any person. The person need not be affiliated with the school.

Might be oral report, written, personal observation, newspaper article, social media post, etc.

Schools must respond to notice of alleged facts that, if true, *could be* considered sexual harassment under the 2020 amendments.

All k12 teachers and staff are required to report allegations of misconduct that they have witnessed or heard about to the Title IX Coordinator.

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Sexual Harassment (SH)

Conduct on the basis of sex that satisfies one or more of the following:

Quid pro quo harassment. When an employee conditions an educational aid, benefit, or service on an individual's participation in unwelcome sexual conduct.

Unwelcome conduct on the basis of sex determined by a reasonable person to be so severe, pervasive, *and* objectively offensive that it effectively denies a person equal access to the school's educational program or activity; or

Sexual Assault as defined in the Clery Act, or dating violence, domestic violence, or stalking as defined in the Violence Against Women Act.

"Unwelcome conduct on the basis of sex determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school's educational program or activity."

Unwelcome conduct – focus on the conduct, not the response.

Determinations on severities, pervasiveness, and objective offensiveness depends on a variety of factors including ages of parties, disability status, differences in power, etc.

Objectively offensive – use a reasonable person standard in the complainant's position

No "mens rea" or "intent" needed here.

A complainant does not need to have already suffered a loss or a deprivation of access to a program or activity before they can report a Title IX issue.

Severe, pervasive, AND objectively offensive

Current standard is "SPOO." Recall that the proposed changes would change "and" to "or" (which some call "SORP," for severe OR pervasive).

Proposed changes also would add a subjective standard, meaning one that looks at whether the complainants themselves perceive the conduct as severe or pervasive.

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Read the following and decide whether it meets the current standard. If not, do you think it could meet the standard in the proposed regulations?

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- 2) One instance of non-consensual kissing.

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- 2) One instance of non-consensual kissing.
- 3) One instance of being "flashed" by a fellow student during a class.

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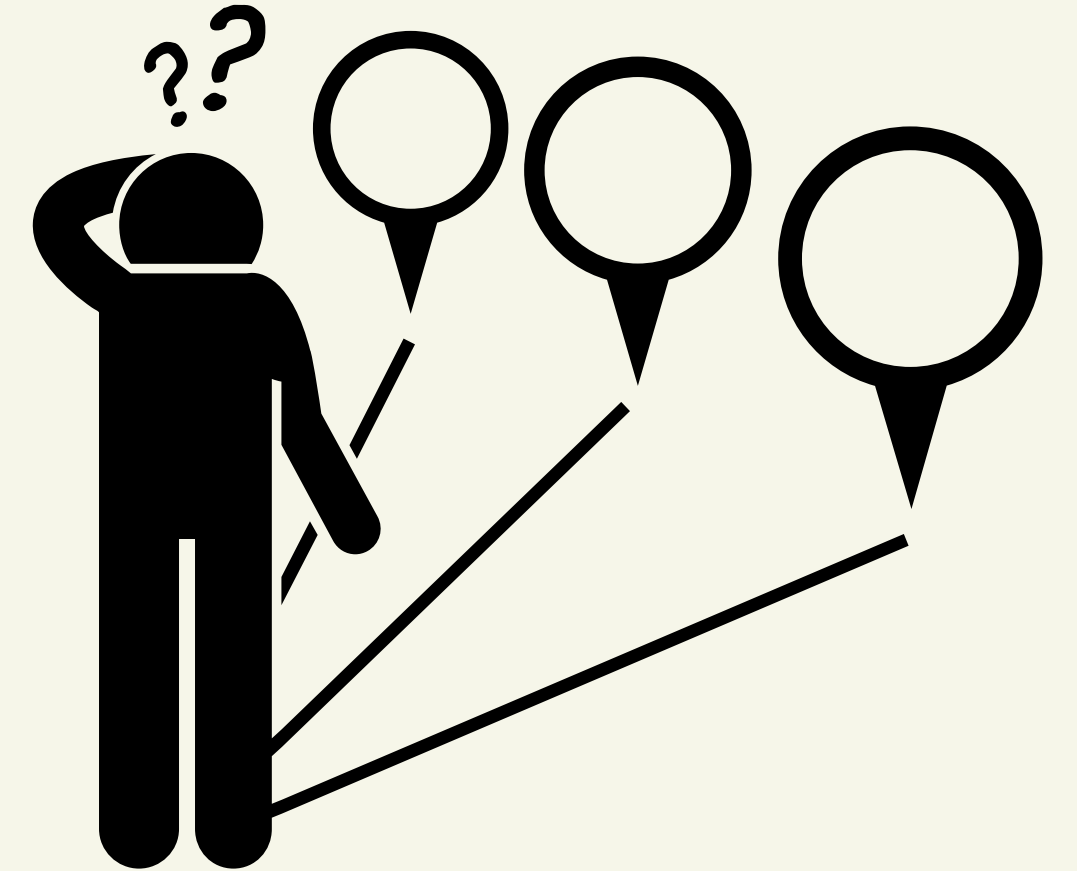
- 1) One instance of being called a gay slur by another student.
- 2) One instance of non-consensual kissing.
- 3) One instance of being "flashed" by a fellow student during a class.
- 4) Repeated verbal insults by one student to another related to gender identity.

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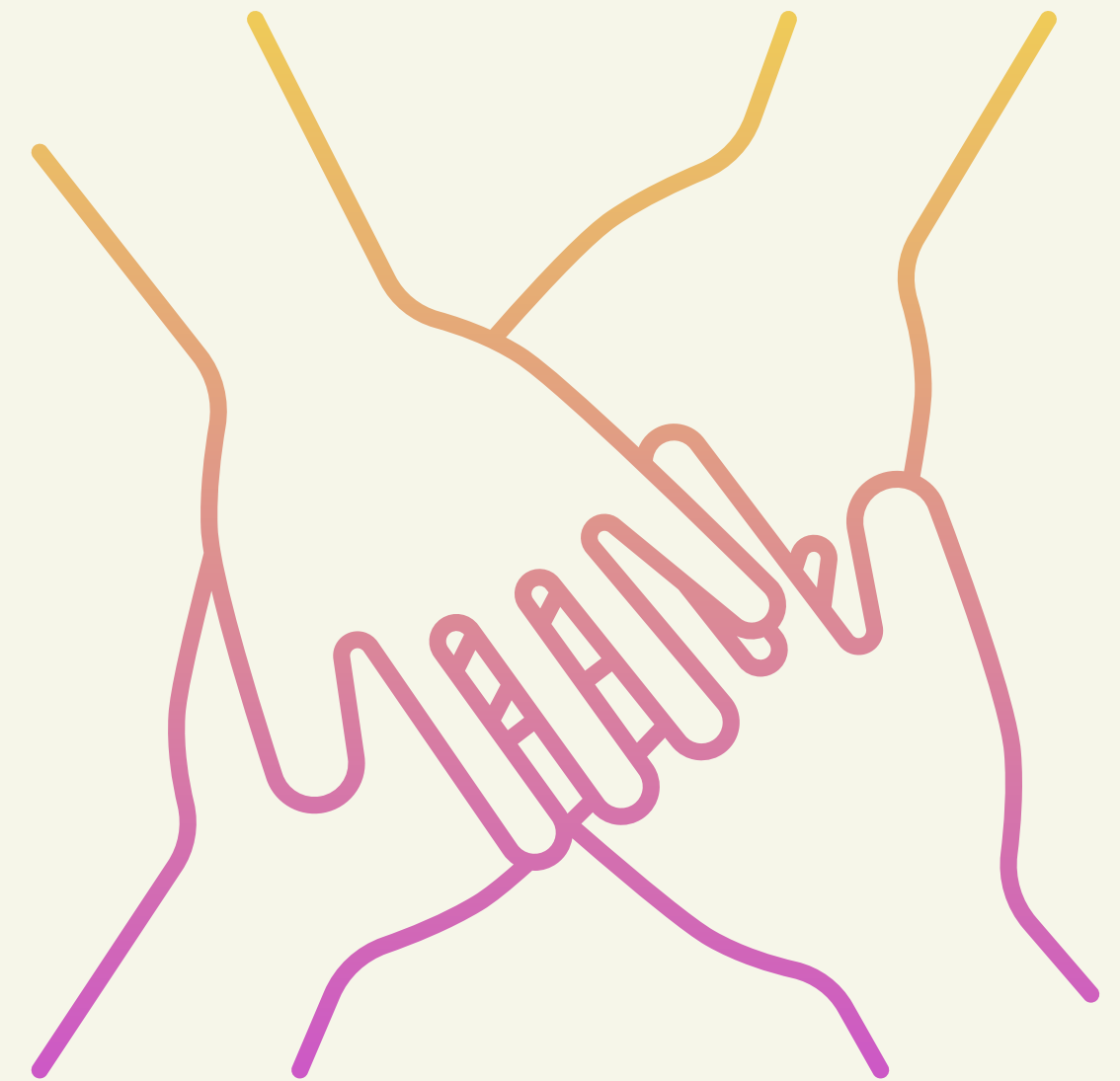
A school in the U.S. has actual knowledge of a potential Title IX concern. Now what?

- School must respond “promptly in a manner that is not deliberately indifferent.”
- Title IX Coordinator should promptly contact the complainant.
- School should offer supportive measures, even if formal complaint not filed.
- Explain to complainant the process for filing a formal complaint.
- Offer supportive measures to respondent if formal complaint is filed.
- Follow a grievance process before imposing discipline or sanctions.
- Be mindful of constitutional rights.
- Keep excellent records.



Supportive Measures

- Offer measures that are “designed to restore or preserve equal access to recipient's education program or activity without unreasonably burdening the other party.”
- Examples: counseling, deadline extensions, other coursework adjustments, modifications of schedules, mutual restrictions on contact between parties, leaves of absence, etc.
- Maintain confidentiality to the extent possible.



Title IX Toolkit



- NCAPCS has toolkit with forms for current regs
- Includes Model Investigative Report, Notices for Meetings, Notices of Informal Resolution, Notices of Right to Review Evidence, Supportive Measures Form, etc.
- Will update Toolkit after rules are finalized

Another Proposed Change: From Reactive to Proactive

- In addition to moving from SPOO to SORP, the proposed changes also move from "not deliberately indifferent" to "reasonable"
- Institutions are encouraged to be more proactive in preventing sexual discrimination
- Institutions need to figure out how to examine barriers to reporting
 - Climate survey
 - Seeking targeted feedback
 - Anonymous feedback
 - User-friendly Title IX materials

Book Bans and Title IX

- Forsyth County in Georgia
- Late 2021, district receives numerous complaints from parents/others regarding books with sexually explicit content and LGBTQI+ content
- In 2022, District moved to remove LGBTQ+ themed books and books with BIPOC characters
- US Dept Office of Civil Rights received a complaint challenging book removal as creating a hostile environment for students based on sex, race, color, or national origin (Title IX and Title VI)
- District's book removal policy was written to only remove sexually explicit material and included a statement that it provides resources to reflect "all students within each school community"
- But OCR investigation found communication from school board meetings indicate hostile environment may have been created
- Also district's response to book screening process did not sufficiently ameliorate any resulting racially and/or sexually hostile environment

Forsyth County Resolution Agreement

- District signed resolution in May 2023
- Agrees to post statements
 - Must be readily available to middle and high school students
 - Explains that book removal only for sexually explicit material
 - Includes note that District strives to provide global perspective and to promote diversity including in school library materials
 - Acknowledges that book removal may have impacted students
 - Informs students that they can contact District Title IX/IX coordinator for supportive measure and lets them to know how to file complaint
- Agrees to Climate Assessment
 - Must administer survey to middle and high school students before end of first semester in 23-24
 - Survey looks at prevalence of harassment on campus and district response to complaints of harassment
 - Must provide opportunity for parents to weigh in on survey
 - Following survey analysis, district must determine whether additional steps needed to improve climate

HYPOTHETICALS

Scenario 1: Middle School Girls

Group of middle school girls goof around, hugging each other, slapping each other's behinds, poking each other with pencils when they sit criss cross.

One of the girl's moms complains that this is sexual harassment.

What do you do?

What if the police get involved?

What to do?

Is a school required to respond if it has notice of alleged misconduct that could meet the definition of sexual harassment but is not certain whether the harassment has occurred?

Yes. At any school level—elementary, secondary, or postsecondary—actual knowledge refers to notice of conduct that could constitute sexual harassment. A complainant is “an individual who is alleged to be the victim of conduct that could constitute sexual harassment” and the definition of actual knowledge refers to “allegations of sexual harassment.” Thus, the preamble explains that a school must respond promptly and appropriately when it receives notice of alleged facts that, if true, could be considered sexual harassment under the 2020 amendments.

Scenario 2: High School Kids

Two high school students are dating, Jane and Bob. Jane is 17 and Bob is 18. Jane goes to the school counselor and says that Bob raped her at her house a week ago. Jane shares that Bob made a video, which is circulating at school.

What do you do?

What if the sex occurred at school?

What if it was consensual?

What do you do about the video?

Dating Violence

Under Title IX, sexual harassment includes sexual assault, which is defined as: “Sexual assault’ as defined in 20 U.S.C. 1092(f)(6)(A)(v), ‘dating violence’ as defined in 34 U.S.C. 12291(a)(10), ‘domestic violence’ as defined in 34 U.S.C. 12291(a)(8), or ‘stalking’ as defined in 34 U.S.C. 12291(a)(30).”

Scenario 3: Middle School Sex

Two middle school students, Kelly and Mike, both kids are 13. Mike makes a video and shares it with other students. Kelly is upset and says it was not consensual sex.

What do you do?

What do you do about the video?

What if the boy withdraws from school?

What if the boy withdraws, but other kids harass Kelly about it?

Scenario 4: Sex/Gender

Fourth grade students are at lunch talking about their parents. Bill shares that he has two dads. Two other students, Paul and Mary, start teasing him every day at lunch after that about his dads.

What do you do?

What if Paul's mom says that their religion says being gay is a sin and their family does not recognize same sex parents?

What if Paul's mom contacts the school and says she does not want Paul sitting with anyone at lunch were LGBTQIA issues are discussed?

What if Bill, then tells Paul and Mary, he wants to be called Sharon and then they start making fun at Bill/Sharon?

Other things to consider

- Bullying under State Law
- Mandatory reporting
- Discipline Code
- Law Enforcement
- Social Services



Title IX and Code of Conduct

From the DOE/DOJ:

Title IX's sexual harassment regulation need not replace a school's more expansive code of conduct and does not prohibit a school from enforcing that code to address misconduct that does not constitute sexual harassment under the 2020 amendments.

OCR encourages schools to develop and enforce their codes as an additional tool for ensuring safe and supportive educational environments for all students. OCR does not enforce school codes of conduct but may investigate complaints that a school's code of conduct treated students differently based on sex, including sexual orientation or gender identity.

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