

# Title IX Sexual Harassment: The Basics and an Update

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LAWYERS NEW TO  
HIGHER EDUCATION

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# Disclaimer

This is a complicated area that can be highly technical – and it’s getting ready to change dramatically.

We’re focusing on big picture issues, but we would encourage you to either stay up to speed on Title IX by monitoring regulations, guidance, and case law.

# Agenda

- What does Title IX cover, and how is it enforced?
- What types of conduct constitute “Sexual Harassment”?
- How are Sexual Harassment claims processed under Title IX?
- What are your next steps in complying with the new regulations?

# 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....”

20 U.S.C. 1681

# What is it?

Title IX is designed to eliminate discrimination on the basis of sex in the education programs and activities of institutions of higher education that receive federal funding.

- There are exceptions to this rule on the next slide.

“Education programs and activities” means everything your institution does.

Discrimination prohibition also protects individuals on the basis of pregnancy and parenting status.



# What is sex?

While sex refers to biological sex, it has been interpreted also to refer to:

- Sex stereotyping (e.g., not masculine/feminine enough)
- Sexual orientation
- Gender identity/expression and transgender status
- Sexual orientation

The prohibition against sex discrimination also prohibits sexual harassment.

# Title IX applies in many situations

- Admissions and Recruitment
- Classrooms
- Housing
- Financial Assistance
- Athletics
- Employment, Compensation, and Benefits
- Any misconduct that involves sex – our focus today

# Exceptions to Title IX

- Certain traditionally sex-separated activities may still discriminate on the basis of sex, such as:
  - Fraternities and sororities (34 CFR 106.14)
  - Men's and women's choruses (34 CFR 106.34)
  - Bathrooms and locker rooms (34 CFR 106.33.)
  - Athletics (34 CFR 106.41)
- Think: If you are making any determinations on the basis of sex, is it (1) permissible under a specific regulation; and (2) consistent with your institution's ethic of care.



# Religious Exemption

- Where an educational institution is controlled by a religious organization, Title IX does not apply where its application would not be consistent with the religious tenets of such organization.
- It is not necessary to file anything with the U.S. Department of Education to claim the exemption, should the need arise. 34 CFR 106.12.

# Enforcement of Title IX

- Administrative Enforcement: Complaint to the U.S. Department of Education's Office for Civil Rights
  - Investigations can be expensive and involved
  - Mediation is available
  - Findings can result in significant monitoring and expenses
  - Federal funding can be removed (though this has never happened)
  - Note: Department of Justice and other agencies, such as the National Institutes of Health and the National Science Foundation, are also involved in these claims.
- Money damages: Litigation
  - Complainants can recover for deliberate indifference to actual notice of discrimination/harassment
  - Respondents can recover for sex discrimination in the administration of disciplinary process (often also claim due process violations and breach of contract)

# Clery Interaction

- The Clery Act imposes certain procedural obligations with regard to cases of sexual assault, dating violence, domestic violence, and stalking
- Not all Clery Act cases are Title IX cases and vice versa
  - For example, not all stalking is on the basis of sex
- Individuals administering these cases must undergo annual training
- Failure to comply with Clery Act may result in enforcement fines of over \$60,000 per violation
- 34 CFR 668.46

# Title IX and Sexual Misconduct

1972



1970's and 1980s: Early focus was on gender equity in intercollegiate sports

1997-2001



- 1997: ED issues guidance regarding sexual harassment
- 1998: *Davis* and *Gebser* cases at SCOTUS
- 2001: ED revises sexual harassment guidance after going through notice and comment

2011



2011: "Dear Colleague" letter imposes new requirements on handling of sexual harassment claims; lawsuits against institutions become more frequent

2017-19



2020



2020



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- 2014: Q&A issued
- 2017: 2011 DCL and 2014 Q&A withdrawn
- 2018: Proposed regulations issued

- May 2020: Finalized regulations are issued
- August 2020: The Final Rule becomes effective
- September 2020: Almost all prior guidance withdrawn

- June 2020: Supreme Court issues *Bostock* decision holding that discrimination on the basis of sexual orientation or gender identity is necessarily also discrimination "because of sex."

2021



- June 2021: ED's new guidance applies *Bostock* to Title IX

2022



- June 2022: Draft proposed regulations released

2023



- April 2023: Proposed regulations to amend athletic regulations regarding gender identity of student athletes
- May 2023: Target date for finalization of regulations
- October 2023: NEW target date for finalization of both sets of regulations



# Sexual Harassment (Title IX)

- 34 CFR 106.30: Conduct on the basis of sex that satisfies one or more of the following:
  - [Quid pro quo] An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
  - [Unwelcome conduct] Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
  - [Clery crimes] Sexual assault, dating violence, domestic violence, or stalking

# Sexual Harassment (Title VII)

- 29 CFR 1604.11: Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:
  - [QPQ] Submission to such conduct is either made explicitly or implicitly a term or condition of an individual's employment;
  - [QPQ] Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
  - [Hostile Environment] Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

# Grievance Process

- Title IX – Extensive grievance process in 34 CFR 106.44 and 106.45; technical compliance requirements
- Title VII – Where employer knows or should have known of the conduct, it must show it took “immediate and appropriate corrective action”

Intake & Assessment

Investigation

Hearing

Written Decision

Informal Resolution?

# Themes for Title IX Compliance (1)

- Respondent is “not responsible” until investigation is complete and adjudication determines otherwise
- No conflict of interest or bias
- Transparency of process
  - Notice to both parties of allegations and rights
  - Right to an advisor of choice (can be an attorney)
  - Both parties review and respond to evidence
  - Living hearing with cross-examination by advisors
  - Potential sanctions listed in policy
- Supportive Measures available for both parties

# Themes for Title IX Compliance (2)

- Provide your policies to campus community
- Train your campus community
  - What is prohibited?
  - What to do if you experience prohibited conduct?
  - What resources are available?
- Keys:
  - Adopt a compliant policy
  - Follow your compliant policy
  - When in doubt, treat parties with equity and fairness



# Scenario: Carrie and Ruby

- Carrie Complainant is an undergraduate student taking Bio 101.
- Ruby Respondent is a graduate student who is teaching as a TA for Bio 101.
- Carrie alleges that Ruby has made some unwelcome comments towards Carrie during office hours. Examples:
  - “It would be easier to tutor you if you weren’t so hot.”
  - “Don’t shake your hair out like that. It makes me think inappropriate thoughts.”
  - “Come back on Tuesday and maybe we can go out afterwards and talk about what’s next for us after this class.”
- Carrie reports this to Campus Safety.

# Intake & Assessment

- Campus Safety → Title IX Coordinator
- Title IX Coordinator outreach to Carrie
  - Policy review
  - Supportive measures
- Does this fall under Title IX jurisdiction?
  - In education program/activity?
  - Occur against a complainant in the United States?
  - Is complainant participating in or attempting to participate in an education program/activity?
  - Potential “sexual harassment” if true?

# Severe, Pervasive, and Objectively Offensive?



- Severe?
- Pervasive?
- Objectively Offensive?

What are the risks if the Coordinator decides to put it through the Title IX process?

What are the risks if the Coordinator decides not to put it through the Title IX process?

Where does it go if there is not Title IX jurisdiction?

# Informal Resolution?

Informal resolution is not available in cases where a student is alleging sexual harassment by an employee.

Is Ruby an employee?

# What to do with Ruby?

Before formal complaint:

- Do we give notice of the allegations before the formal complaint is filed? Not typically.
- If she's an employee, we can put her on administrative leave – but what if we do, and Carrie decides not to file a complaint?
- If she's a student, we can consider emergency removal, but is that appropriate?
- If a mutual no-contact order is requested by Carrie as a supportive measure, Ruby will have to be notified of the order to comply.
- If Ruby knows and needs supportive measures, Ruby can access these through the Coordinator.

# Formal Complaint Received

- Provide the same notice to both parties – see 34 CFR 106.45(b)(2) for a list of what to include
  - Allegations – including names of parties, conduct constituting sexual harassment, date and location of the alleged incident
  - Include formal complaint?
- Both parties treated equitably from here on out in terms of supportive measures and procedures



# Investigation

- Investigator(s) offer interviews to parties and witnesses
- Investigator(s) collect evidence from parties, witnesses, and third parties
  - It is the obligation of the institution, not the parties, to collect the evidence
  - We can ask nicely for evidence but can't demand it
  - If they choose not to provide it, we don't draw an inference solely from that refusal
- Fairly summarize the relevant evidence in a report, including inculpatory and exculpatory evidence
- Let both parties and their advisors see the evidence

# Carrie and Ruby

- What types of information will the investigator want from Carrie?  
From Ruby?
- What types of evidence might be available to corroborate or contradict each party's perspective?
- What if Carrie wants to give your investigator all 200 pages of text messages she and Ruby have ever exchanged?
- What if Ruby wants to give your investigator the results of a polygraph exam showing that the allegations are untrue?

# Investigation: 10/10

- Parties have 10 days to respond in writing to the draft report
- Investigator(s) review response, integrate them into the report as appropriate, and conduct follow-up investigation if necessary
- Final report is issued
- Parties have 10 days to respond in writing to the final report

# Hearing

- A “decision-maker” can be a single hearing officer or a panel
- Pre-hearing conferences are not required but are a best practice
- At hearing, a party’s advisor may conduct cross-examination of the other party and all witnesses
  - Your policy can provide the advisor the opportunity to question their own party if you choose.
- Decision-maker questions both parties and all witnesses
- Decision-maker must verbally rule each question to be “relevant” or not
- Decorum standards govern conduct

# Hearing Issues

- What happens if Carrie chooses not to come to the hearing?
- What happens if Ruby comes to the hearing but refuses to answer any questions from Carrie's advisor?
- What happens if Carrie doesn't bring an advisor to the hearing?

# Written Decision

- 34 CFR 106.45(b)(7) includes specific requirements for a written decision
- Key points:
  - Show your work.
  - Examine the credibility of both parties.
  - Explain how the evidence is being weighed and how the determination was reached.
  - Explain evidentiary decisions in more detail.
  - Explain procedural anomalies if necessary.
- Must include sanctions (if applicable) and be shared with both parties simultaneously.

# Appeals

- Both parties may appeal
- Regulations have three bases of appeal (34 CFR 106.45(b)(8)) but your policy can have more:
  - Procedural irregularity that affected the outcome of the matter;
  - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter;
  - Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

# Tips for Reducing Risk

- Train, train, train!
  - Train your team on how to implement the process.
  - Train your community on preventive education and how to make reports.
  - Train your employees on what to report to the Coordinator.
  - Train your Board on maintaining studious neutrality in cases.
- The outcome is not nearly as important as adhering to a fair process. Follow your policy for a more defensible outcome. Deviations create risk.



# 2023 Regulations?

- ED→OIRA→ED→Federal Register (with effective date)
- Due in October 2023
- Many potential changes, including:
  - Return of the single investigator model for some cases
  - No hearings required (but check your Circuit's due process requirements)
  - Less mandatory reporting for employees
  - More protections for LGBTQ+ individuals
  - Broader definition of sex-based harassment
  - More procedural protections for sex discrimination
  - Broader jurisdiction

# Prepping for New Regs

- What is the process for amending the policy?
- Who must be involved?
- Are they ready to be activated on short notice?
- How does your institution feel about hearings? What is working, and what isn't?

# Where To Go For More Information

- 20 USC 1681
- 34 CFR Part 106
- ED's Office for Civil Rights for Guidance Documents – [www.ed.gov/ocr](http://www.ed.gov/ocr)
- Your favorite case law source for decisions in your jurisdiction
- NACUA website

# Questions?

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