Title IX

Who Monitors Title IX Compliance and Why?
- Department of Education, Office for Civil Rights
- The Office for Civil Rights enforces several Federal civil rights laws that prohibit discrimination in programs or activities that receive federal financial assistance from the Department of Education.

Title IX - the law
Title IX of the Education Amendments Act 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.

What is Discrimination?
- Treating someone differently because of their identity within a protected category
- May be an act of different treatment
- May also be a facially neutral rule or policy that has a disparate impact
- Exception: when there is a legitimate business reason for the rule or policy.
“It is impossible,” Justice Gorsuch wrote, “to discriminate against a person for being nonsexual or transgender without discriminating against that individual based on sex.”

June 15, 2020

Title IX- some history…and some that remains

- 1998/1999 Gebser and Davis- deliberate indifference
- 2001- Sexual Harassment guidance
- 2007- Dear Collegue on Single Sex Programs
- 2010- Dear Colleague on Harassment and Bullying
- 2011- Dear Colleague on Sexual Harassment (rescinded)
- 2014- Q&A (rescinded)

Title IX background, continued

- 2015- Dear Colleague Letter on Title IX Coordinators
- 2016- Dear Colleague Letter on Transgender Students (Rescinded)
- 2018- Revised case processing manual
- 2018- Proposed new regulations
- May 6, 2020-...new regulations!
- August 14, 2020- Effective date

Title IX- what it covers

What does the school pay for or enable, control, own…etc?

- employees, students
- employment, benefits, opportunities
- the ability to engage in what the school has to offer
- athletics
- academics
- extra-curriculars
- on-campus, off-campus (with some caveats)
- discipline

2020 Title IX Regulations

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In case you missed it

Title IX For All

It's ironic to hear complainant advocates refer to their anti-
due process stance as being pre-civil liberties. Yes, when I
think of expanding a quasi-
prosecutorial apparatus
traploring due process
into every area of life, I think
"that's what civil liberties is all
about."

Know Your IX

Only about 8% of all sexual
assaults involving middle
school, high school, and
college students occur on
school property. That means
@BetsyDeVosED's rule would
require schools to dismiss
92% of all reports of sexual
assault.

DOE's "Summary of Major Provisions
of This Regulatory Action"

- Define the conduct constituting
  sexual harassment for Title IX
  purposes
- Specify the conditions that
  activate a recipient’s obligation
to respond to allegations of
  sexual harassment and impose
  a general standard for the
  sufficiency of the schools
  response
- Specify situations that require
  a school to initiate its procedures
- Establish procedural safeguards
  that must be incorporated into a
  recipient’s grievance procedures
to ensure a fair and reliable
  factual determination when a
  school investigates and
  adjudicates complaints

DOE's View of What the Regulations Accomplish:

- Setting forth clear standards
  that trigger a recipient’s
  obligation to respond to
  sexual harassment
- Defining the conduct that
  rises to the level of Title IX as
  conduct serious enough to
  jeopardize a person’s equal
  access to the school’s
  educational program or
  activity
- Confining recipient’s Title IX
  obligations to respond to
  sexual harassment of which it
  has actual knowledge

What the Regulations Mean for Institutions

- Due process focus
- Notice-notice notice-notice notice-notice
- Barreling and focused involvement by
  DOE/ED, just think Clery 2.0 Here...
- More legalese to proceedings
- Testing
- Mandatory advisors- schools provide
- More time for evidence review (30 days)
- Notice-notice notice-notice notice-notice
- CFOs involved in procedures
- Mandatory reporters changed
- Documentation & record keeping
- More information out there
- Reports can be requests for information
- POLICY changes and creation
- Initial notice of a complaint, schools send
  appropriate notices to known victim or bother

Who are the compliance stakeholders?

- HR (employee matters AND the
  notice to employees and job
  applicants)
- IT
- General counsel
- Institutional equity
- Student conduct
- Academics
- Counseling
- Admissions

Scope of Title IX is limited

- Applies only to exclusion from
  participation, denial of benefits,
  or discrimination based on the
  basis of sex occurring against a
  person in the United States
  (106.8 (d))
- Applies only to conduct within
  the school’s education program
  or activity (106.30, 106.44(a))

Do not forget: Clery still applies. An institution’s other policies still apply.
106.30 Definitions

**Sexual Harassment**
- 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 on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity;
- Sexual assault, as defined in 20 USC 1092(f)(1)(A)(ii), dating violence as defined in 24 USC 13291(a)(1)(B), domestic violence as defined in 24 USC 13291(a)(ii) or stalking as defined in 24 USC 13291(a)(18)

**Focus In**
- So severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity.
- "The objective nature of the inquiry simply means that minimization is made by a reasonable person considering whether, standing in the shoes of the complainant, the conduct would be offensive."
- "The reasonable person standard appropriately takes into account whether a reasonable person, in the position of the particular complainant, would find the standard offensive."

**Sexual Assault (UCR definition)**
- The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.

**Domestic Violence**
- Includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person similarly situated to a spouse of the victim, under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.

**Dating Violence**
- Violence committed by a person—(A) who is or has been in a social relationship of a romantic or intimate nature with the victim, AND
- (B) where the existence of such a relationship shall be determined based on a consideration of the following factors:
  - (i) The length of the relationship.
  - (ii) The type of relationship.
  - (iii) The frequency of interactions between the persons involved in the relationship.

**Stalking**
- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
  - (A) Fear for his or her safety or the safety of others; or
  - (B) Suffer substantial emotional distress.
Further Limits to the Scope

- Actual knowledge: means notice of SH or allegations of SH to a recipient’s TIXC or any official of the recipient who has authority to institute corrective measures on behalf of the recipient.
- The mere ability or obligation to report sexual harassment does not qualify an employee, even if that employee is an official, as one who has authority to institute corrective measures on behalf of the school.

106.30 Definitions- FORMAL COMPLAINT

- alleging sexual harassment against a respondent,
- about conduct within the respondent’s educational program or activity,
- requesting initiation of the school’s grievance procedures, and
- filed by a complainant at a time when they are participating or attempting to participate in the school’s educational program or activity.

Dismissal

- MUST dismiss, as Title IX complaints, complaints that do not satisfy requirements of “Formal Complaint”
- MAY dismiss for other reasons such as request from complainant, respondent no longer at the school, or no ability to gather the information necessary, etc.
- NB: Appeal rights attach, however.

106.30 Definitions: Supportive Measures- TIXC responsible

- Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fear or change to C and R before and after the filing of a formal complaint or where no complaint has been filed.
- Such measures are designed to (1) restore or preserve access to the recipient’s educational program or activity, without unreasonably burdening the other party, (2) protect the safety of all parties and the recipient’s educational environment and (3) deter sexual harassment.

No formal complaint? Just a report?

- Recipient must offer and implement supportive measures designed to effectively restore or preserve the complainant’s access to the recipient’s educational program or activity.
- At the same time it offers supportive measures, Recipient must inform complainant of the right to file a formal complaint at that time or a later date.

106.45: Grievance Procedures MUST

- Treat complainants and respondents equitably.
- Reasonable accommodation for C must include remedies.
- Reasonable accommodation for R must also include reasonable accommodations before any disciplinary actions are taken.
- Include presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.
- Coordinators, investigators, and decision makers may not have a conflict of interest or bias.
- No expert testimony.
- Training materials must not promote stereotypes and must promote impartial investigations and adjudications.
- Require objective evaluation of all relevant evidence.
- Include both ex parte evidence.
- Credibility determinations may not be based on assessment of status or sex.

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106.45: Grievance Procedures & Time frames MUST:

- Include reasonably prompt time frames for conclusion of the grievance process, including for filing and resolving appeals, if any, and a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to C & R of the delay or extension and the reasons why.

106.45 Grievance Procedures- Notice of allegations

- Upon receipt of a formal complaint, school must provide the following written notice to the parties who are known:
  - A) Notice of the school’s grievance procedures
  - B) Notice of the allegations constituting a potential violation of the school’s code of conduct

- Include sufficient details known at the time and within sufficient time to prepare a response before any initial interview.

- See the section for alleged list of what must be in the notice.

- Ongoing notice requirement when new allegations added to investigation.

Grievance Procedures, contd

- Provide party whose participation is invited or expected with written notice of time, place, location, participants, purpose of all meetings, with sufficient time for party to prepare to participate.

- Must provide live hearing.

- Each party must be able to ask the other party and any witnesses all relevant questions, including the cross-examining party.

- Cross examination must be conducted by the party’s advisor of choice.

- Schools must provide advisor to those who do not have one.

Advisor requirement

- Advisor of choice
- Limits on role and rules of decorum
- Cross examination
- Schools must provide for cross examination if a party does not have an advisor
- “Only relevant cross-examination and other questions may be asked of a party or witness.”

Evidence and Report Review add 20+ days

- Prior to completion of the report, the recipient must send the parties the evidence that is subject to review and inspection. Parties shall have at least TEN DAYS to provide a written response which the investigator shall consider prior to completion of the written report.

- All evidence must be available at hearing so that the parties can refer to it. (what if school and parties disagree whether something is relevant?!) Create an investigative report that fairly summarizes relevent evidence and, at least ten days prior to the hearing, provide a copy of the report to the parties for their review and written response.

Relevant and Probative?

Relevance

- The tendency of a given item of evidence to prove or disprove one of the elements of the case, or to have probative value to make one of the elements of the case likely or not.

Probative

- “Tending to prove.” Probative evidence “tends to prove the truth.” Tends to prove the proposition for which it is proffered.
Hearing - Live with Cross Examination.

- The decision-maker must explain to the party's advisor asking questions any decision to exclude questions as not-relevant (include relevant).
- If a party or witness does not submit to cross examination at the hearing, the decision maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility the investigation.

Written Decision Must Include...

- Identification of the code alleged to have been violated.
- Description of the procedural steps taken from receipt of the complaint through investigation, including any communications with the parties, interviews with parties and witnesses, site visits, and any other evidence, and hearings held.
- Findings of fact used to support the determination.
- Conclusions regarding the application of the code of conduct to the facts.
- Statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility.
- Any sanctions the recipient imposes on the respondent, and any remedies provided by the recipient to the complainant designed to restore or preserve access to the program or activity.
- The procedures and bases for an appeal.

Appeal grounds

- Procedural irregularity
- New evidence that was not reasonably available at the time of determination regarding responsibility or dismissal was made, that would affect the outcome of the matter
- The Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias for or against parties generally or the individual party that affected the outcome of the matter
- Other bases determined by the school, provided offered to both parties

Informal Process

- At ANY TIME prior to reaching a determination
- May include mediation
- May not include formal investigation and adjudication
- MUST:
- Provide parties written notice disclosing
  - Any consequences resulting from participating in the informal resolution process, including any final determination that will be maintained or could be shared
  - Obtain parties' voluntary written consent
  - Each sexual harassment investigation (including determination regarding responsibility, discipline, remedies, etc.)
  - Any appeal and result therefrom

Record-keeping

For a period of SEVEN YEARS

- Each sexual harassment investigation (including determination regarding responsibility, discipline, remedies, etc.)
- Informal resolutions
- All materials used to train coordinators, investigators, and decision-makers with regard to sexual harassment.
Additional Record-keeping: For Seven years

- Records of any actions, including any supportive measures, taken in response to a REPORT or FORMAL COMPLAINT of sexual harassment.
- The records are maintained under the policies of the recipient's educational program or activity.
- The records are maintained for seven years following the date on which the recipient decided to end the complaint process.
- The recipient uses reasonable measures designed to ensure the privacy of the individual who is the subject of the complaint.

Training. 106.45

- All key actors must receive specific training on skills and abilities required by the grievance procedures.
- Training must be kept and put on website.

RELEVANCE. BIAS. PROCESS.

Documents & Process

- Policy and procedure: Complainant first.
- Notice of policy: The complainant and any witness shall be notified in writing of the right to appeal.
- Supportive Measures: Any action to be taken shall be in line with the regulations.
- Complaint intake and assessment: From the date on which the complaint is made to the date of the complaint.
- Investigation reports: The documents regarding the investigation, including any supportive measures.
- Hearing: The documents regarding the hearing, including any supportive measures and the final decision.
- Appeal: The documents regarding any appeals, including any supportive measures.
- Notices of investigation, meeting, hearing, case dismissal, outcome.

Technology & Training

- Recording equipment and storage: The documents regarding any recording equipment.
- Determine who will train: The documents regarding the training of the key actors.
- Training materials go on website: The documents regarding the training materials.

Staff/People

- Hearing officers
- Advisors
- People to help with coordinating supportive measures
- Meetings with parties
- Preparing documentation
- Training, for all students and employees
- Investigators
- Appeal officers
Section 4
Additional Laws

What are the Laws and Policies that guide this work?
- State and federal guidance
  - Title II, Civil Rights Act
  - Title IX
  - ADA
  - Americans with Disabilities Act
  - ADEA
  - Laws prohibiting discrimination related to pregnancy and pregnancy-related conditions
  - State and Federal Court case decisions
- School Policies
  - Sexual Orientation Policy
  - Sexual Violence and Sexual Harassment Policy
  - Violence in the Workplace Policy
  - Ethics Code of Conduct
  - Other contracts

Let’s Talk about Clery!

Clery!
- Annual report
- Timely warnings
- Response and accommodations
- Prevention and education requirements

Sex based discrimination and harassment (not Title IX)
- Includes gender based discrimination and harassment

What can sexual harassment look like?
- Derogatory statements
  - “She’s really aggressive for a woman”
  - “How tough are you?”
  - “You should dress more ladylike/dainty”
  - “You’re too macho”
- Unwanted Sexual Advances
  - Cat-calls
  - Comments on someone’s physical attractiveness
  - Repeated requests for someone’s contact information
  - Repeated requests for dates

Nonverbal Sexual Harassment
- Sexually explicit gestures directed at an individual
- Stares intended to shock someone, based on sex
- Treating all comments on an appearance as non-sexual
- Displaying sexually explicit images

Physical Sexual Harassment
- Intentional touching of a sexual nature
- Petting or grabbing someone without consent
- Sexual assault
- Date rape or domestic violence
What are examples of protected categories?

- Race
- Religion
- Sex
- Marital Status
- Age
- National Origin
- Disability
- Gender Identity/Expression
- Pregnancy/parenting

Title VII, ADA & ADEA prohibit discrimination and harassment

- Harassment is unwelcome conduct that is based on race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.
- Harassment becomes unlawful where 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.

Overheard...

- “I didn’t intend to offend or harass”
- “Lighten up! It’s just a joke” or “I’d think they’d take it as a compliment”
- “It wasn’t about them” or “they could have left.”
- “They didn’t tell me it offended them!”

Petty Slights Do Not Violate the Law

- Petty slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of illegality.
- To be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to reasonable people.

Retaliation

- Anti-discrimination laws also prohibit harassment against individuals in retaliation for exercising a right to discriminate, testifying, or participating in any way in an investigation, proceeding, or lawsuit under these laws; or opposing employment practices that they reasonably believe discriminate against individuals, in violation of these laws.

What is not Adverse Action?

- Petty slights, minor annoyances, trivial issues
- Acts motivated by a business reason other than retaliation
### Receiving Information: Options for Next Steps

**Do**
- Thank them for sharing
- Let them know you are not confidential but that the school does have confidential resources
- Let them know the school has policies
- Contact the appropriate person

**Do not**
- Minimize or inflame
- Judge or blame
- Discourage
- Investigate or prompt for more information
- Promise confidentiality