Key Title IX Sexual Harassment Information for Campus Leadership
Providing Steady Direction in an Uncertain Time
Agenda

1. Understanding the Context
2. Ensuring Effective Compliance
3. Avoiding Dangerous Mistakes
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.
Title IX’s purpose is to remove barriers.

- Prohibitions on participation based on sex
- Inequitable support for men’s and women’s athletics
- Pregnancy Discrimination
- Sexual Harassment
  - Sexual Assault
  - Stalking
  - Domestic/Dating Violence
  - Verbal/expressive
Shifting Emphasis from the Top

2011-2016 Guidance
- Wide net for conduct
- Heavy focus on Complainants

2020 Regulations
- Force of law
- Narrower net for conduct
- Heavy focus on Respondents
The 2020 Regulations Created Two Categories

**Title IX Sexual Harassment (TIXSH)**

- Stalking in EPA
- Dating/domestic violence in EPA
- Sexual assault in EPA
- Quid pro quo harassment in EPA
- “Level 4” expressive harassment in EPA

**Other Sexual Harassment (OSH)**

- Stalking not in EPA
- Dating/domestic violence not in EPA
- Sexual assault not in EPA
- Quid pro quo harassment not in EPA
- “Level 4” expressive harassment not in EPA
- Lesser expressive harassment in EPA
- Anything outside of the country

EPA = Education Program or Activity
Title IX Sexual Harassment

Title IX Formal Grievance Process

Required documents:
• Complaint
• Notice
• Investigative Report
• Determination
• Appeal

Official hearing with cross examination
Advisors/Lawyers

No Title IX Requirements

Due Process Rights

Other Sexual Harassment

BUT:
• Campus SaVE Act
• Title VII
• State laws
• School Policies
Protections for Respondents in Title IX Cases

- Presumption of non-responsibility. No discipline prior to conclusion of adjudication process
- Written notice of allegations and time to prepare for interview
- Opportunity to review all relevant evidence prior to hearing
- Right to cross examine Complainant and other witnesses in real time at “live” hearing
Late-Breaking **DOE Guidance** for the 2021-22 School Year

**Q & A**

on the Title IX Regulations on Sexual Harassment

Released: July 20, 2021

https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf

Guided by:

- **Executive Order on Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity**
- **Executive Order on Preventing and Combatting Discrimination on the Basis of Gender Identity or Sexual Orientation**

Appendix: 18 pages of sample policy provisions

Comprehensive review of Title IX regulations ongoing

New regulations expected May 2022
Hey, if you want to, you can do this…

The Department of Education’s Q & A encourages schools to exercise discretion in the following areas*:

- Undertake prevention methods that best serve the needs and values of your educational community (Q & A #3)
- Develop and enforce codes of conduct as an additional tool for ensuring safe and supportive educational environments (Q & A #7)
- May provide supportive measures to Complainants whose allegations do not fall within Title IX (Q & A #7, 9)
- Implement rules of decorum for conducting the live hearing (rules must apply equally to all parties) (Q & A #43, 44, 49)
- May require additional individuals to report knowledge of sexual harassment to the TIX Coordinator (Q & A #19)

* The discretionary actions must not conflict with the 2020 Title IX regulations
Ensuring Effective Compliance
What does it take to resolve cases successfully?

1. Title IX Coordinator who is unbiased and has excellent judgment
   - Coordinates with HR and student conduct
   - Treats both Complainants and Respondents with fairness and respect
   - Responds in a matter that is not deliberately indifferent and not unreasonable under the circumstances

2. Clear procedures for handling all sexual harassment cases (Title IX and OSH)

- Dept of Education regs and other applicable laws
- Risk mitigation principles
- Institutional values
Carefully selected Title IX team with adequate training and resources to carry out the formal grievance process mandated by the 2020 rules

• **Serve impartially**, including by avoiding prejudgment of the facts at issue, conflicts of interest, sexual stereotyping, and bias

• **Investigation**: Conduct witness interviews, collect evidence of all types, determine which evidence is “directly related” to the allegations, and write an investigative report

• **Adjudication**: Hold hearings, make on-the-spot judgments about which questions will be allowed, weigh evidence against the evidentiary standard, write a determination
Legal Assistance May Be Especially Helpful When…

- The Respondent is an employee and the Complainant is a student
- The case is populated by litigious parties and/or contentious lawyers
- A matter could become high profile
Three Key Basics

Reporting

Supportive Measures

Prevention/Education
Avoiding Dangerous Mistakes
Ensuring Effective Compliance

A Strong Team

Clear Policies & Procedures

Robust Training
An Ounce of Prevention for Common Problems

1. Failure to put systems in place to make sure staff followed school policies and procedures, including data maintenance;

2. Failure to understand the scope of the school’s program and activities;

3. Failure of high-level officials to register that they must report Title IX matters to the Title IX office and not attempt to handle them within their departments or schools.
New President pledges to restore trust in preventing campus sexual assault
The Mistake

Untouchable Respondent

The Fix

Long term
Build a culture of respect for your values and an ethic that no one is above the rules.

Immediate
Communicate to your Title IX Coordinator (and all staff) that you will support the fair and impartial enforcement of sexual misconduct rules across the board.
The Mistake

- Untouchable Respondent
- Over-Reliance on Victims to Pursue

The Fix

Develop clear standards for when Coordinators should pursue cases in the absence of Complainant action, paying close attention to patterns of misconduct and situations involving abuse of authority.
The Mistake

- Untouchable Respondent
- Over-Reliance on Victims to Pursue
- Employee Awareness without Action

The Fix

Continue to mandate that all employees (except confidential resources) report knowledge of sexual harassment directly to the Title IX Coordinator.
The Mistake

- Untouchable Respondent
- Over-Reliance on Victims to Pursue
- Employee Awareness without Action
- Viewing Complaints in Isolation

The Fix

Centralize information.

Develop procedures to allow investigators and adjudicators to review evidence of other alleged incidents of sexual misconduct.

Provide guidance as to how to appropriately weigh such evidence.
Thank you.
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