



# Navigating the Maze of Title IX Compliance

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## Agenda

- What is Title IX
- History of Title IX
- Current Regulation
- Proposed Regulations
- What to Anticipate in 2024
- Q&A



## What is Title IX

- A federal civil rights law passed as part of the Education Amendments of 1972
- This law protects people from sex-based-discrimination in education programs or activities that receive Federal financial assistance
- Frequently thought of in the context of athletics, but it also covers sexual harassment and sexual assault committed against students
- Applies to federally funded institutions



## History of Title IX

- Prior to 2020, the application of Title IX to sexual harassment and assault on campus was limited to sub-regulatory guidance from the Department of Education and Office of Civil Rights
- The Obama administration focused on protecting complainants
  - 2011 Dear Colleague Letter
  - Mandatory Preponderance of the Evidence standard
- The Trump administration focused on due process, including the rights of respondents
  - Rescinded all guidance, including any from the Obama administration
  - Held formal rulemaking process
  - Issued new rules on May 6, 2020 which became effective on August 14, 2020



## Focus of 2020 Regulations

- Definitions
- Jurisdiction
- Notice
- What constitutes a complaint and duty to respond
- Supportive Measures
- Separation of Duties
- Decision Makers and Live Hearing Board
- Advisor of Choice requirement



## Definitions

- Move away from focus on sexual misconduct and assault to broadly defined “sexual harassment”
  - Quid pro quo sexual harassment by employees
  - Sexual assault, dating violence, domestic violence, and stalking, as defined by the Clery Act and FBI criminal codes
  - Any other “unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it denies a person access to the recipient’s education program or activity”



## Jurisdiction

- Applies to “persons in the United States”
- Schools are only obligated to investigate if the incident occurred during a school sponsored educational program or activity, and on school’s premises or controlled properties
- The institution must have control over the respondent
- The institution must dismiss the complaint if allegations do not meet Title IX definition of sexual harassment



## Notice

- “Actual notice” to the institution
  - “Responsible employee” vs. “any official of the institution who has authority to institute corrective measures”
- Notice requirements for the respondent
  - Must receive notice and information on who filed the complaint, which conduct constituted sexual harassment, date of the Title IX violation





## Deliberate indifference standard of response

- “Institutions must respond “promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.”



## Actual Knowledge and Formal Complaint

- Initial response to “actual knowledge” of report of sexual harassment
  - The Title IX coordinator is responsible for
    - contacting the complainant
    - explaining the process for filing a formal complaint
    - offering supportive measures (including to the respondent)
  - Institutions must conduct an investigation if, and only if, a formal complaint of harassment is filed
- “Formal complaint”
  - A written document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the institution investigate the allegation of sexual harassment
  - Formal complaints can only be filed by a complainant or the Title IX coordinator



## Complaint

- What happens once a formal complaint is filed?
  - Institutions are required to dismiss formal complaints alleging conduct that does not meet the new, narrower definition of sexual harassment, but can still respond under the student conduct code
  - Institutions must comply with the required grievance process when conducting an investigation
  - If, after conducting a risk analysis and determining that an accused student poses an immediate threat to the health or safety of a student or other individual, institutions are allowed to remove such a student from campus, provided the student receives notice and an opportunity to respond
  - Institutions are permitted to place accused employees on administrative leave



## Complaint Dismissal

- Institutions are also required to dismiss formal complaints if
  - The victim withdraws the complaint
  - The accused individual is no longer a student or employee at the institution
  - Circumstances prevent the institution from gathering sufficient evidence to reach a determination



## Compliant grievance process

- Prompt and equitable
- Training for all involved (and training materials must be published online)
- Schools may use their own employees or outsource
- Objective evaluation of evidence, avoid conflicts of interest
- Presumption that the respondent is not responsible
- Describe the supportive measures, as well as sanctions and remedies, that are available
- Specify the standard of evidence to be used (preponderance of evidence or clear and convincing)
- Detail the procedures available for appeals, if any
- Preclude the use of questions that would violate a legally recognized privilege, unless waived



## Informal Resolution Process

- Informal resolution is not an option to resolve allegations that an employee sexually harassed a student; these must be handled through the formal grievance process
- Institutions may offer, but cannot require, an informal resolution process, such as mediation, in lieu of a full investigation and adjudication
- The institution is required to disclose information about the informal and formal resolution processes and receive voluntary written consent from the parties to pursue an informal process



## Investigations

- During investigations, institutions are required to
  - Assume the burden of gathering evidence (note that medical treatment records cannot be accessed or used without consent)
  - Provide both parties equal opportunity to discuss the allegations, gather evidence and present witnesses
  - Permit both parties to be accompanied to proceedings by advisors of their choice, although an advisor's participation may be limited by the institution
  - Provide written notice and sufficient preparation time for any meetings related to the investigation or disciplinary process
  - Provide equal access to evidence and an opportunity to respond to such evidence
  - Provide both parties with an investigative report for review and response



## Supportive Measures

- The Title IX coordinator is responsible for coordinating supportive measures for both the complainant and the respondent
- “To restore or preserve equal access to the recipient’s education program or activity”
- Should be offered whether or not a formal complaint is filed
- Should be provided at no cost to each party
- Cannot be punitive





## Examples of Supportive Measures

- Leave of absence
- Counseling
- Deadline extension on assignments/exams
- Schedule changes
- Parking
- Security



## Separation of Duties

- Title IX Coordinator
  - Receives report of the complaint
  - Offers supporting measures
  - Determines whether the complaint rises to the level of Title IX
  - Drafts notices
  - Coordinates and moves the process along
- Decision Makers
  - Attend and preside over the Live Hearing
  - Review evidence, listen to cross-examination, witness statements, etc.
  - Rule on question relevance
  - Make determination of Title IX policy violation for each allegation



## Separation of Duties

- Investigators
  - Investigate the allegations
  - Interview both parties and witnesses
  - Collect evidence
  - Write the investigative reports
- Advisors of Choice
  - Chosen by each party
  - If one party does not have one, the institution must provide one for the cross examination
  - Participate in the live hearing to cross-examine the other party and the witnesses
- Appellate Officer
  - Both parties may appeal
  - Must be someone other than the original decision maker



## Live Hearing

- Institutions are required to provide a live hearing and must allow advisors for both parties to ask relevant questions and cross-examine the other party and witnesses
  - Cross-examination may not be conducted by a party personally. If a student does not have an advisor to conduct the cross-examination, the institution must provide an advisor of its choice
  - At the request of either party, an institution must permit cross-examination to occur with the parties located in separate rooms
  - Institutions are not allowed to rely on statements made by a party or witness who does not submit to cross-examination (however, new guidance permits consideration by the decision-maker)
  - Only relevant cross-examination and other questions may be asked of a party or witness, as determined by the decision-maker, who must explain any decision to exclude a question
  - Cross-examination may not include questions about a complainant's sexual behavior or disposition, unless it is offered to establish consent or to demonstrate that another party is responsible for committing the violation



## Retention of Records

- Institutions must create an audio recording or transcript of the live hearing and make it available to the parties
- The decision-maker, who cannot be the Title IX coordinator or investigator, must issue a written determination regarding responsibility
- Institutions must maintain complete records about all investigations, appeals, informal resolutions, training materials, and supportive measures for seven years



## Appeal

- Basis for an appeal
  - Procedural irregularities
  - New evidence
  - Any bias or conflict of interest on the part of the Title IX coordinator, investigator, or decision-maker
- Appeal cannot be heard by the same official who made the original decision



## Proposed Regulations

- July 11, 2022, USDOE released the proposed Title IX rule and solicited public comment
- Overview of proposed changes
  - Obligation to respond to “any sex discrimination that has occurred in its education program or activity, prevent its recurrence, and remedy its effects”
  - “On the basis of sex” interpreted more broadly to include sexual orientation, gender identity, sex characteristics, sex stereotypes, pregnancy and related conditions



## Proposed Regulations

- Expands definition of “quid pro quo” harassment to include “explicit” or “implicit” unwelcome sexual conduct
- Sexual harassment to include “hostile environment harassment” and includes both subjective and objective evaluation of “totality of circumstances” when evaluating whether the person was denied or limited ability to participate in the educational program or activity
- Harassment no longer needs to occur in the US if it occurred during the educational program or activity





## Proposed Regulations

- Significantly expands which employees must notify Title IX Coordinator of any conduct that may constitute sexual harassment
  - Anyone who has authority to take corrective action or, for incidents involving students, has responsibility for administrative leadership, teaching, or advising in the recipient's education program or activity must report to Title IX Coordinator
  - All other employees are obligated to notify the Title IX Coordinator or provide an individual with the Title IX Coordinator's contact information and information about reporting
- Once notified, Title IX Coordinator would be required to take certain steps even if there has been no request to initiate the grievance process
- Must provide supportive measures to both parties
- May remove a respondent from school in limited circumstances
- May place employee on administrative leave for the duration of the investigation



## Proposed Regulations

- May use informal resolution process for certain complaints with agreement from both parties and must use a facilitator (cannot be a decision-maker or an investigator)
- Title IX Coordinator must initiate a grievance process for any “complaint,” which includes any “oral or written request to the institution to initiate the institution’s grievance procedures”
- Notice of the complaint must be provided to both parties, including relevant details (names, details of the allegation, date, place, etc.)



## Proposed Regulations

- Both parties may choose to have advisors of choice
- Both parties must be given reasonable time to review evidence gathered during the investigation
- Decision-maker(s) must be able to question both parties and witnesses during meetings or during a live hearing
- Cross examinations are permitted, but questions are not required to be asked by advisors of choice



## Proposed Regulations

- On determination of responsibility, must provide written notice to both parties
- Must provide ability to appeal to both parties
- Expands training requirements for all employees, including additional specific trainings for Decision-Makers, Facilitators, Investigators
- Title IX Coordinator must be trained on all specific duties
- Schools must prohibit retaliation



## Proposed Regulations

- Pregnancy and pregnancy-like conditions must be treated the same as any other temporary disability
- Must inform students of prohibition of discrimination based on pregnancy and pregnancy-like conditions
- Must provide access to reasonable modifications to activity or program
- Must allow for voluntary leave of absence
- Must provide private space for lactation



## What to Expect in 2024

- Final Rule anticipated now at the earliest Winter, 2024
- Implementation Spring, 2024
- Almost 250,000 comments were submitted
- USDOE must review and respond to each comment



# Q&A

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