

CAPPS 40th Annual Conference
Light The Way !!!

“Revolution 9”

“...number 9...number IX...number 9...”

The 2024 Remake of the Title IX Regulations
A High-Level Review of Key Changes

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We have no special connection to the Beatles, their music or vibes.

We do not claim this presentation will be entertaining...but it may be enlightening.

Revolution IX - Overview

July 12, 2022 * April 19, 2024 * August 1, 2024

- ▶ 8 Lawsuits - injunctions barring new Title IX reg in 26 states, upheld by SCOTUS in August 16, 2024 ruling
- ▶ Not barred in California, except schools with students who are members in 1 of 3 associations:
- ▶ (1) Young America's Foundation, (2) Female Athletes United, (3) Moms for Liberty
- ▶ If not non-barred, school must comply with 2024 Reg
- ▶ If campuses in barred/unbarred states, 2 sets of rules
- ▶ Where barred, Trump August 2020 Reg controls, so keep doing what you have been doing

Revolution IX - Highlights New Reg

Issue	2024 Reg	2020 Reg
1. Sex Discrimination Scope	Includes sexual orientation , gender identity , pregnancy	Not included - view that 1972 law does not authorize broader definition
2. Hostile Environment Harassment	Limits or Denies Participation in program or activity	Effectively Denies Participation
3. Location	Conduct in buildings owned/controlled or subject to disciplinary authority - <u>Anywhere</u>	Not outside program/activity or outside U.S.
4. Notice of Offense	All non-confidential employees - must notify T9 Coordinator (train)	Actual Knowledge of T9 Coordinator & employees with authority to correct

Revolution IX - Highlights New Reg

Issue	2024 Reg	2020 Reg
5. Student Autonomy on Filing Complaint	Former student may file complaint. T9 Coordinator only if imminent/serious threat to health/safety or to equal access to education	T9 Coordinator could file complaint, former student could not
6. Response Obligations	Promptly and Effectively treat parties equitably, offer supportive measures, grievance process	Treat parties equitably, offer supportive measures to Complainant, not unreasonable
7. Informal Resolution Voluntary	If sex discrimination complaint or information	Allowed only if formal complaint first filed
8. Grievance Procedures, Proof	Burden Proof: Preponderance unless CC in other matters	Clear and Convincing

Revolution IX - Highlights New Reg

Issue	2024 Reg	2020 Reg
9. Grievance Procedures Hearing	Live Hearing Optional. But opportunity for parties to present witnesses/evid. in separate Adjudicator mtgs with each party, Adj. asks proposed Qs, transcripts	Live Hearing & Live C-X Required; Advisors Question Witnesses
10. Grievance Procedures Adjudicator	Option for T9 Coordinator as Investigator and Adjudicator	Adjudicator must be separate from T9 coordinator and investigator
11. Pregnancy Protections	Provide lactation spaces & breaks, LOA, accomdtns.	1975 Regs generally prohibit pregnancy discrimination
12. Retaliation Prohibition	Threats, coercion, intimidation by school or students	Retaliation prohibited, but not defined to include students

Revolution IX - Highlights New Reg

Issue	2024 Reg	2020 Reg
13. Prohibition of More Than De Minimis Harm Caused by Policies or Practices Preventing Participation Consistent With Gender Identity	<p>Cannot separate/treat person differently based on sex or gender identity, if this causes more than de minimis harm.</p> <p><u>Except</u> sex-separate living facilities or teams.</p> <p><i>*In NPRM/lawsuits, ED says denial of access to <u>bathrooms, showers</u> aligning with gender identity, or <u>pronouns</u>, is more than de minimis harm/violation</i></p>	<p>Not addressed, as gender identity not addressed as “sex” in 2020 Reg, based on view that “sex” as used in 1972 statute did not encompass gender identity</p>

Title IX - Clery Act Timeline

Title IX
1972

1990
Clery Act

2011
Title IX Dear
Colleague Letter

VAWA
Reauthorization
2013

2017
Obama
Interim
Guidance
on Sexual
Misconduct

Trump
Title IX
Regulations
2020

2024
New Biden
Title IX
Regulations



Title IX of the Education Amendments of 1972 - Civil Rights Act of 1964

Prohibits **sex discrimination** in all education programs (kindergarten to professional schools and post-graduate programs) that receive federal funding.

- ▶ **Sexual harassment**, including **sexual assault**, is a type of sex discrimination that is banned by Title IX (as more closely defined by VAWA in 2013)
- ▶ Title IX passed to address **inequities** in **educational programs** and **activities** for **girls** and **women**

Clery Act of 1990 (Jeanne Clery, murdered student)

Every institution must:

- ▶ Collect, classify, and count crime reports and crime statistics.
- ▶ Issue timely warning for any *Clery Act* crime representing an **ongoing threat** to the **safety** of students or employees.
- ▶ Issue an **emergency notification** upon confirmation of **significant emergency** or **dangerous situation** with **immediate threat** to **health or safety**
- ▶ Publish annual security report containing safety and security policy statements and crime statistics, and distribute to current students and employees and inform prospective students about access to report
- ▶ **Submit crime statistics to ED.** Each year **by October 1** schools must upload to Web-based data collection crime statistics by type, location, and year.
- ▶ **Civil fines of up to \$69,733 per violation** for substantial misrepresentation of number, location, or nature of the crimes required to be reported or for a violation of any other provision of safety and security related *HEA* regulations.

2001 OCR Title IX Guidance

Provides principles school should use to recognize and effectively respond to sexual harassment of students as a condition of receiving federal financial assistance.

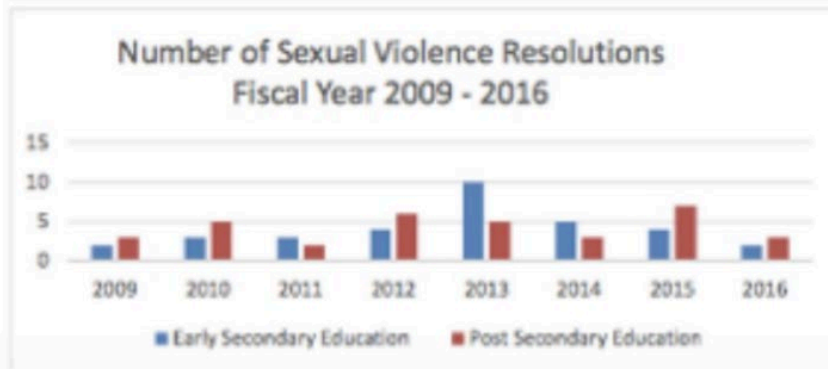
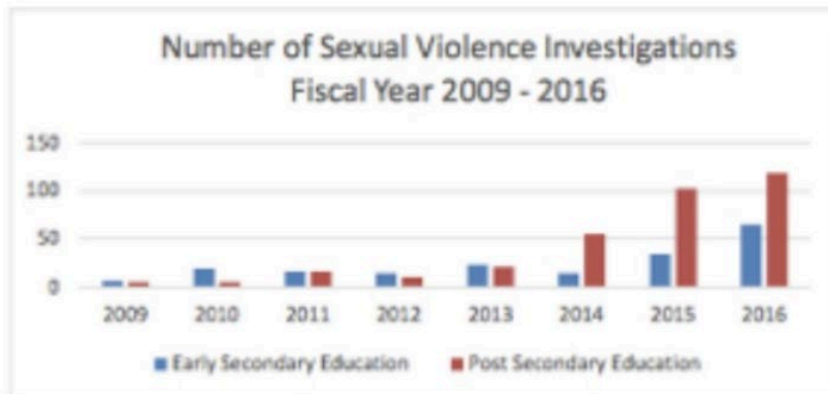
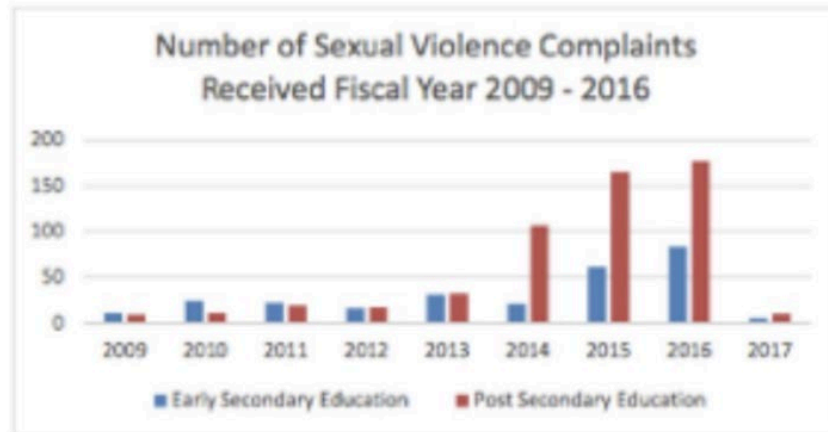
- ▶ Describes the **regulatory basis** for a school's compliance responsibilities under Title IX
- ▶ Outlines the circumstances under which **sexual harassment** may constitute discrimination prohibited by the statute and regulations
- ▶ Provides information about **actions** that schools should take **to prevent sexual harassment** or to address it effectively if it does occur

2011 Dear Colleague Letter

- ▶ Was deemed a “significant guidance document” by ED
- ▶ Detailed schools’ obligations and the appropriate **response to sexual harassment and violence**
- ▶ Guidance was **repealed by Trump Administration** in September 2017

Appendix D: Number of Title IX Complaints, Investigations, and Resolutions

2009-2016 Source: Department of Education, Office for Civil Rights



“The Second Report of the White House Task Force to Protect Students from Sexual Assault,” January 5, 2017, (originally retrieved from <https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Documents/1.4.17.VAW%20Event.TF%20Report.PDF> [January 18, 2017])

Retrieved from: <http://www.changingourcampus.org/resources/not-alone/Second-Report-VAW-Event-TF-Report.PDF> (June 20, 2022)

Violence Against Women Reauthorization Act (2013)

Amended the definition of “sexual assault” under the Clery Act and added three new crimes for Clery crime reporting purposes:

- ▶ domestic violence
- ▶ dating violence
- ▶ stalking

Violence Against Women Reauthorization Act (2013)

Updated ASR requirements to include content on:

- ▶ School's *education programs* must promote awareness of sexual misconduct;
- ▶ Possible *sanctions* schools may impose regarding sexual misconduct;
- ▶ *Procedures victims should follow* if an incident of sexual misconduct has occurred;
- ▶ School's procedures for conducting a *disciplinary proceeding* in cases of alleged sexual misconduct;

2014 White House Task Force - First Report Findings:

- ▶ **One in five** women is sexually assaulted in college
- ▶ Most often by someone she knows
- ▶ Most often not reported
- ▶ Many survivors feel isolated, ashamed, or to blame
- ▶ Although less often, men also victims

Source: Not Alone, The First Report of the White House Task Force to Protect Students From Sexual Assault, April, 2014, accessed June 20, 2022,
<https://www.justice.gov/ovw/page/file/905942/download>

BJS 2016 Campus Climate Survey

- ▶ Bureau of Justice Statistics: pilot campus climate survey addressing key Task Force goals and issues concerning reporting of rape and sexual assault in self-report surveys.
- ▶ Completed surveys collected from more than **23,000 undergraduate students** at **nine schools**
 - ▶ Data collection occurred March through May 2015
- ▶ The overall **prevalence rate** for completed **sexual assault** experienced by undergraduate females, averaged across the nine schools, was **10.3%**

”Campus Climate Survey Validation Study Final Technical Report,” (January 2016).
Bureau of Justice Statistics, accessed January 21, 2016
(<http://www.bjs.gov/content/pub/pdf/ccsvsftr.pdf>)

Non-Traditional Higher Education Challenges

Title IX & the Clery Act/VAWA requirements present unique challenges to postsecondary trade and career schools.

- ▶ Typically **no** on-campus **police** or dedicated security forces.
- ▶ **Title IX coordinator** at these schools is often the director or **another administrator** whose primary job functions pertain to school operations.
- ▶ Given the size of the student body, lack of residential student housing, and limited school-sponsored extracurricular activities, incidents of **sexual misconduct** may be **infrequent** at these types of institutes.

Non-Traditional Higher Education Challenges

Commenters have noted **significant compliance burden** these regulations place on small institutions.

- ▶ Commenters have referenced requirement for **institutional disciplinary proceedings** for alleged sexual harassment (including dating violence, domestic violence, sexual assault, or stalking under VAWA).
- ▶ In response, Department has noted institutions are **not making determinations of criminal responsibility** but whether the institution's own rules have been violated.
- ▶ Department further has noted **students at smaller institutions** should have **same protections** as their counterparts at larger institutions.

Challenges in Creating Title IX Regulations

On May 6, 2020, then-U.S. Secretary of Education Betsy DeVos' Press Release, upon the publication of the Trump Administration's Title IX Regulations:

*“This new regulation requires schools to act in meaningful ways to **support survivors** of sexual misconduct, **without sacrificing** important **safeguards** to ensure a fair and transparent process. We can and must continue to fight sexual misconduct in our nation's schools, and this rule makes certain that fight continues.”*

Challenge: Fair & Effective Process for Both Victims & Alleged Offenders

Some Background on New Title IX Rules ...

- ▶ **August 2020** - Title IX Regulations promulgated under Trump Administration became effective (original regs 1975, clarifying regs 2006)
- ▶ **April 2021**: U.S Department of Education Office for Civil Rights (OCR) undertook comprehensive review of the Department's existing regulations, orders, guidance, policies, and other similar agency actions, including the 2020 Rules
 - ▶ Public hearings June 7 to 11, 2021 (over 30,000 written comments)
- ▶ **July 12, 2022 - ED released NPRM for new Rules.**
 - ▶ **240,085** public comments received by ED
 - ▶ 2020 Title IX regulations - Over 140,000 public comments
 - ▶ ED originally said final regulations may be published in May 2023
- ▶ **FINAL REGULATIONS PUBLISHED APRIL 19, 2024**
- ▶ **Effective Date: August 1, 2024**: sort of...for 24 states...including CA & DC, but regulation currently enjoined in 26 states and some colleges in other states

New Title IX Rule Released 4/19/24

- ▶ The unofficial version of the final regulations is available [here](#) (1,577 pages)
- ▶ In addition, the Department has released:
 - ▶ a [fact sheet](#),
 - ▶ a [summary](#) of the major provisions of the final regulations, and
 - ▶ a [resource](#) for drafting Title IX policies & procedures
- ▶ Official version published in the Federal Register on April 29, 2024
 - ▶ Official version available [here](#)

Stated Effective Date 8/1/24

General Response to Sexual Harassment (2020 Rules)

A recipient with **actual knowledge** of sexual harassment in an education program or activity of the recipient against a person in the United States, 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

General Response to Sexual Harassment (2024 Rules)

A recipient with **knowledge** of conduct that reasonably may constitute sex discrimination in its education program or activity must **respond promptly** and effectively

Legal Challenges to New Title IX Rules

- ▶ 8 lawsuits in AL, AR, KS, LA, OK, TN & TX (2 cases)
- ▶ Injunctions in lawsuits apply to 26 states (5th, 6th, 10th, 11th Circuits) blocking ED's enforcement of the new Title IX rules
 - ▶ Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, & Wyoming
 - ▶ **California is NOT an enjoined State...yet**
 - ▶ Injunctions apply to any school in ANY State with a student who is a member of: (1) **Young America's Foundation**, (2) **Female Athletes United**, & (3) **Moms for Liberty**
 - ▶ Over 400 school districts/600 colleges are affected

Legal Challenges to New Title IX Rules

- ▶ Most common challenges are to sexual orientation and gender identity provisions but also to definition of sex based harassment and procedural safeguards for accused
- ▶ While 26 states challenging, other states are supporting
- ▶ ED appealed injunction rulings to the US Supreme Court
 - ▶ Argued even if injunctions allowed for sexual orientation and gender identity provisions, rest of regs should go into effect
 - ▶ **Supreme Court, 5-4 August 16 ruling, upheld injunctions**
 - ▶ Expects “appropriate dispatch” by Federal Circuit Courts
- ▶ Appeals continue - 6th Circuit argument this month
- ▶ NOTE: Federal district courts upheld 2020 Title IX regulations against legal challenges with minor modifications

Legal Challenges to New Title IX Rules

- ▶ New Title IX regulations relied on Supreme Court 2020 Title VII **Bostock** case holding employers violate **Title VII** prohibition against sex discrimination if they fire employees based on sexual orientation or transgender status, but most decisions so far say *Bostock* not applicable to Title IX
- ▶ **Purpose of Title IX** is “to **protect ‘biological women** from discrimination in education...DoE’s reinterpretation of Title IX ...would subvert Congress’ goals...by **subordinat[ing]** the fears, concerns, and **privacy interests of biological women** to the **desires of transgender biological men to shower, dress and share restroom facilities** with their female peers.”
Kansas v. DOE, U.S. Dist. Ct. KS. Mem. Order, July 2, 2024, p.23.

Legal Challenges to New Title IX Rules

- ▶ Where does this leave schools now?
 - ▶ Two sets of rules depending on campus location
 - ▶ And whether school has any student in (i) Young America's Foundation, (ii) Female Athletes United, or (iii) Moms for Liberty
 - ▶ Will a court issue a nationwide injunction?
 - ▶ Will ED **voluntarily defer** effective date until all court issues are resolved? *Any bets?*
 - ▶ *If any CA student in 1 of 3 associations, follow 2020 Reg*
 - ▶ *Otherwise, adopt 2024 Reg policy or might see lawsuit; suits threatened against school districts in AZ, PA & WI*
- Higher ED Dive 9-24-24*

Legal Challenges to New Title IX Rules

ED Statement regarding the New Rules:

*As of July 31, 2024, pursuant to Federal court orders, the Department is currently enjoined from enforcing the 2024 Final Rule in the states of Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming; the Department is also currently enjoined from enforcing the 2024 Final Rule at the schools on the list located at <https://www2.ed.gov/about/offices/list/ocr/docs/list-of-schools-enjoined-from-2024-t9-rule.pdf>. Per Court order, this list of schools may be supplemented in the future. The **Final Rule** and these resources do **not currently apply** in **those states and schools**. Pending further court orders, the Department's Title IX Regulations, as amended in 2020 (2020 Title IX Final Rule) remain in effect in those states and schools.*

Clery Act Basics

Clery Act Requirements - The Basics

Clery Act Requirements – The Basics	
<ul style="list-style-type: none">• Collect, classify, and count crime reports and statistics	
<ul style="list-style-type: none">• Issue campus alerts and warning notices	<ul style="list-style-type: none">• Publish an Annual Security Report (Due date: October 1)
<ul style="list-style-type: none">• Disclose missing student notification procedures, when applicable	<ul style="list-style-type: none">• Submit crime and fire statistics to the Department, when applicable
<ul style="list-style-type: none">• Disclose procedures for institutional disciplinary actions	<ul style="list-style-type: none">• Provide educational programs and campaigns
<ul style="list-style-type: none">• Keep a daily crime log, when applicable	<ul style="list-style-type: none">• Disclose fire safety information, when applicable

Clery Act Appendix for FSA Handbook, p. 1

Clery Crimes

Criminal Offense

- ▶ Murder/Non-negligent manslaughter
- ▶ Negligent manslaughter
- ▶ Rape
- ▶ Fondling
- ▶ Incest
- ▶ Statutory Rape
- ▶ Robbery
- ▶ Aggravated assault
- ▶ Burglary
- ▶ Motor vehicle theft
- ▶ Arson

VAWA Offenses

- ▶ Domestic Violence
- ▶ Dating Violence
- ▶ Stalking

Arrests & Disciplinary Actions

- ▶ Weapons
- ▶ Drug abuse violations
- ▶ Liquor law violations

Hate Crimes



The tools you need for Campus Safety and Security analysis

Get Data for One School

Search for a school to view general information and the past three years of safety- and security-related statistical data for the entire school or by campus.

Compare Data for Multiple Schools

Select up to four schools to see a side-by-side comparison of aggregated data for the most recent year, along with an option to view the number per 1000 students.

Download Custom Data

Select the safety- and security-related statistical data you are interested in for one or more years and download data for a customized group of schools.

Generate Trend Data

Select a subject area and a question that you are interested in, and then see the answer for a selected year, build a table, and see a graph that shows the trend over time. You can customize your results by various institutional characteristics such as public or private, 2-year or 4-year, or state.

Download Data

Download the complete data file for all institutions from a single data collection. Files will include all data submitted by all institutions in the selected survey year.

What is the Campus Safety and Security Data Analysis Cutting Tool?

The Campus Safety and Security Data Analysis Cutting Tool is brought to you by the Office of Postsecondary Education of the U.S. Department of Education. This analysis cutting tool was designed to provide rapid customized reports for public inquiries relating to campus crime and fire data. The data are drawn from the OPE Campus Safety and Security Statistics website database to which crime statistics and fire statistics (as of the 2010 data collection) are submitted annually, via a web-based data collection, by all postsecondary institutions that receive Title IV funding (i.e., those that participate in federal student aid programs). This data collection is required by the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act and the Higher Education Opportunity Act.

<https://ope.ed.gov/campussafety/#/>

Clery Reporting

Clery Geography

You must disclose statistics for reported Clery crimes that occur:

- ▶ **on campus**
- ▶ **on public property** within or immediately adjacent to the campus, and
- ▶ **in or on noncampus buildings or property** that institution owns or controls

Clery Geography: On-Campus

Under Clery, the **on-campus** category encompasses the following:

- ▶ Any building or property owned/controlled by school within same reasonably contiguous geographic area and used in direct support or related to educational purposes (including residence halls); and
- ▶ Any building/property, within or reasonably contiguous to properties described above, owned by the institution but controlled by another person, which is frequently used by students and supports institutional purposes (e.g., food or retail vendor).

For Clery reporting, campus is buildings and properties that meet all of the following criteria:

- ▶ Institution owns or controls them;
- ▶ Reasonably contiguous to one another; and
- ▶ Directly support/relate to the institution's educational purposes

Clery Geography: On-Campus

Institutions that lease space in strip malls:

- ▶ Your campus consists is any space in strip mall covered by your written agreement.
- ▶ If the lease includes parking lot, or selected spaces, include the lot (or selected spaces) as part of your campus.
- ▶ If your students use stairwells or elevators or hallways to access school space, include them as part of your campus.
- ▶ Do not include strip mall's stores, restaurants, offices, etc., because your institution doesn't control them.

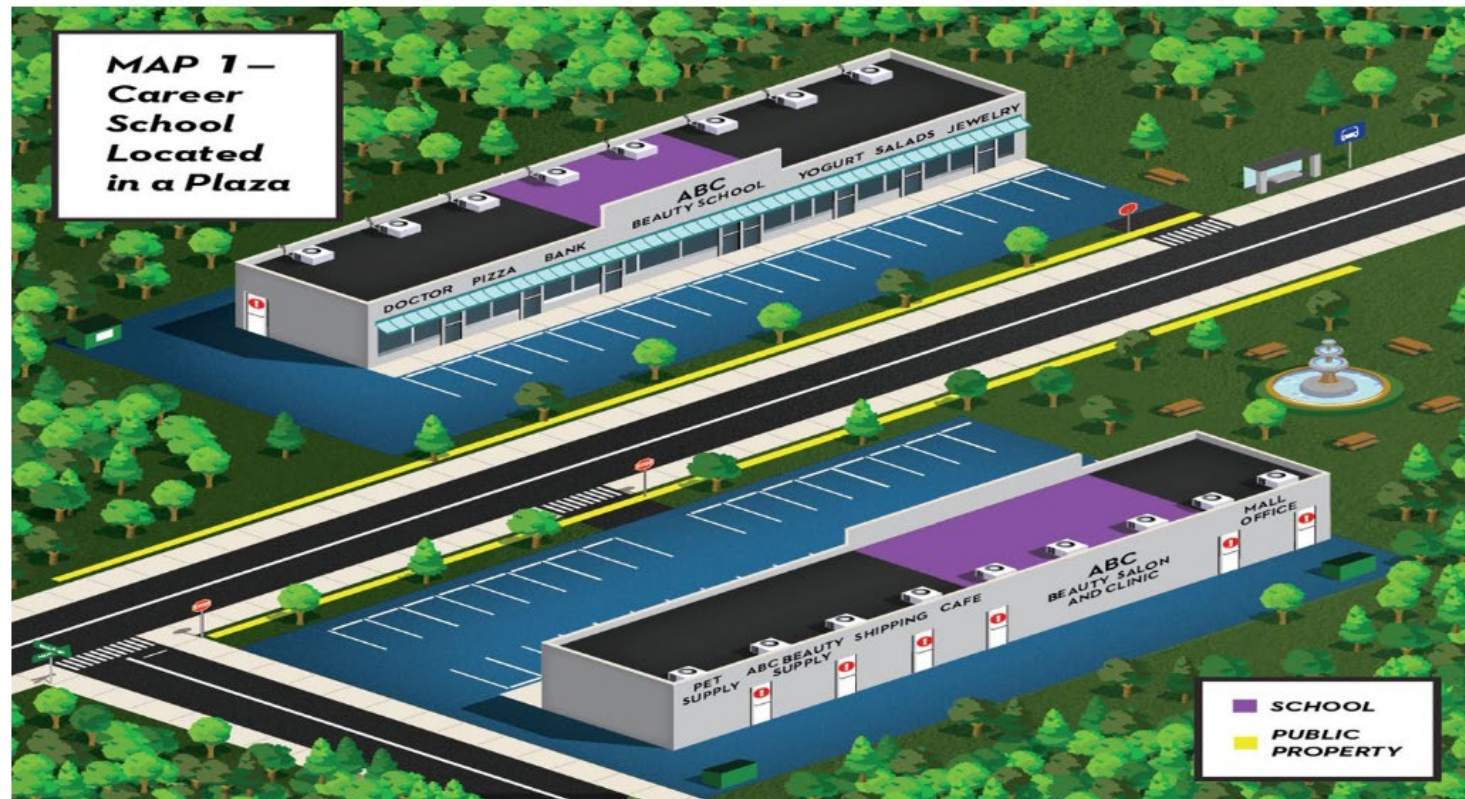
Clery Geography: Public Property

- ▶ *“All public property...within the same reasonably contiguous geographic area of...institution, such as a sidewalk, a street, other thoroughfare, or parking facility...adjacent to a facility owned or controlled by the institution if...used...in direct support ...or related to the institution’s educational purposes.”*
- ▶ Property must be: 1) public (e.g., publicly-owned); 2) within or adjacent to campus; and 3) accessible from campus.
- ▶ Excludes any private property, may exclude areas divided by a fence or wall or property with posted signs indicating not part of the campus or that trespassing is prohibited.
- ▶ ED has no specific distance definition for “adjacent” public property.

Clery Geography: Noncampus

- ▶ Clery definition of noncampus buildings or property is:
 - ▶ any building or property owned/controlled by **student organization** officially recognized by institution; or
 - ▶ any building or property **owned/controlled** by **school** used in direct support or in relation to **educational purposes**, frequently used by students, and not within same contiguous geographic area of the institution.
- ▶ Noncampus: two distinct types buildings/properties:
 - ▶ those owned or controlled by officially recognized student organizations, and
 - ▶ those owned or controlled by your institution.

CLERY GEOGRAPHY SIMPLIFIED



Copied from U.S. Department of Education, 2023 FSA Training Conference for Financial Aid Professionals, *Breakout Session #01, The Clery Act: Common Mistakes and How to Avoid Them*, https://fsapartners.ed.gov/sites/default/files/attachments/2024-01/2023FSAConfSessionBO1CleryActCommonMistakes_Final.pdf, (retrieved August 28, 2024)

Space versus Program Agreements

If school sends students to an off-campus site for internships, externships, clinical training, or student teaching:

- ▶ If school **owns/controls site** or any space at site, include site or the specified space in non-campus category.
- ▶ If school doesn't own/control the space, don't include it.
- ▶ If school has agreement to send students to off-campus location for one of the aforementioned reasons, but agreement is for **program purpose**, not use of physical space, school does **not** have **control** of location and **doesn't** need to **include** statistics for crimes occurring there.

U.S. Department of Education, Office of Postsecondary Education, The Handbook for Campus Safety and Security Reporting, 2016 Edition, Washington, D.C., 2016, p. 2-21. NOTE: THIS HANDBOOK GUIDANCE HAS BEEN RESCINDED AS OF OCTOBER 9, 2020.

Space versus Program Agreements

Example:

Written agreement to send students to a privately owned hospital for clinical training, but no written agreement for use of the hospital or any space within the hospital. No need to include crime statistics for any crimes that occur there.

- ▶ However, if school rents classroom space at some hospital for students, required to include crime statistics for that space, as well as for public areas, such as lobby or hallways and elevators used to access that space for period specified in the agreement.

U.S. Department of Education, Office of Postsecondary Education, The Handbook for Campus Safety and Security Reporting, 2016 Edition, Washington, D.C., 2016, p. 2-21. **NOTE: THIS HANDBOOK GUIDANCE HAS BEEN RESCINDED AS OF OCTOBER 9, 2020.**

Sexual Harassment Definition

The background of the slide is white with abstract blue geometric shapes on the right side. These shapes include overlapping triangles and polygons in various shades of blue, ranging from light sky blue to a dark navy blue. The shapes are layered, creating a sense of depth and movement.

Common Elements of 2020 & 2024 Rules

Definition of Sexual Harassment

Definition of sex-based harassment includes:

- ▶ Quid Pro Quo harassment (*no change from 2020 Rules*)
- ▶ VAWA Offenses (*no change from 2020 Rules*)
 - ▶ Domestic Violence
 - ▶ Dating Violence
 - ▶ Sexual Assault
 - ▶ Stalking

2024 Title IX Rules: Definition Sexual Harassment

- ▶ *Hostile environment harassment*
- ▶ Hostile Environment: unwelcome **sex-based conduct** that, based on totality of circumstances, is subjectively and objectively **offensive** and so **severe** or **pervasive** that it limits or denies a person's ability to **participate in** or **benefit from** school's education program or activity
- ▶ “Sex” includes sexual orientation and gender identity
- ▶ **California**: “each **postsecondary educational institution** [must] **...eliminate a hostile environment...**that impairs the access of students to equal educational opportunity.” *Cal. Ed. Code § 66252 (f)* (emphasis added)
- ▶ “No person shall be subjected to **discrimination** on...basis of disability, **gender, gender identity, gender expression**, nationality, race or ethnicity, religion, **sexual orientation...by any postsecondary educational institution** that receives, or benefits from, **state financial assistance** or enrolls students who receive **state student financial aid.**” *Cal. Ed. Code § 66270* Donahoe Equity in Higher Education Act, 2019

2024 Title IX Rules: Hostile Environment

- ▶ Regulations apply to every school and to all sex discrimination occurring under a school's education program or activity in the United States, including:
 - ▶ Conduct that occurs in a building owned or controlled by approved student organization
 - ▶ Conduct subject to school's disciplinary authority

A school has an obligation to address a sex-based hostile environment under its education program or activity, even when some **conduct** alleged to be contributing to the hostile environment occurred **outside** the recipient's **education program or activity** or **outside** the **United States**.

2024 Title IX Rules: Hostile Environment

Factors Whether a Hostile Environment exists:

- i. Degree to which conduct affected complainant's **ability to access** the recipient's education program or activity;
- ii. Type, frequency, and duration of the conduct;
- iii. Parties' **ages, roles** within school's education program or activity, previous **interactions**, and other factors about each party relevant to evaluating effects of conduct;
- iv. Location of the conduct and context in which it occurred; and
- v. Other sex-based harassment in school's education program or activity

2020 Title IX Rules - Definition of Sexual Harassment

2020 Title IX Regulations §106.30 Definitions. *Sexual harassment* includes:

*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*

Note: 2024 Rules use the standard of "limits or denies"

2020 Title IX Rules

Equal Access to Program or Activity

- ▶ Does not require showing a complainant **dropped** out of school, **failed** a class, had a **panic attack**, or otherwise reached a “breaking point” in order to report and receive school’s supportive response to sexual harassment.
- ▶ Evaluating whether a **reasonable person** in complainant’s position would deem alleged harassment to deny a person “equal access” to education protects complainants against school officials inappropriately judging how complainant has reacted to the sexual harassment.

2020 Title IX Rules

Equal Access to Program or Activity

2020 Rules do not require complete exclusion from an education, but rather denial of “equal” access.

Signs of enduring unequal educational access due to severe, pervasive, and objectively offensive sexual harassment may include:

- ▶ skipping class to avoid a harasser,
- ▶ a decline in a student’s grade point average, or
- ▶ having difficulty concentrating in class;

No concrete injury required to conclude serious harassment would deprive a reasonable person in complainant’s position of ability to access school’s education program or activity on an equal basis with persons who are not suffering such harassment.

Identifying and Reporting Sexual Misconduct

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Domestic Violence

“**Domestic violence**” includes felony or misdemeanor crimes committed by current or former spouse or intimate partner of victim under family or domestic violence laws of jurisdiction receiving funding, and, for victim services, includes use or attempted use of **physical abuse** or **sexual abuse**, or a pattern of any other coercive behavior committed, enabled, or solicited to gain or maintain power and control over a victim, including verbal, psychological, economic, or technological abuse that may or may not constitute criminal behavior, by a person who—

- A. is a **current or former spouse or intimate partner** of the victim, or person similarly situated to a spouse of the victim;
- B. is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner;
- C. shares a child in common with the victim; or
- D. commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction.

34 USC §12291(a)(12)

Examples of Domestic Violence

Scenario 1: A student's wife is waiting for her husband outside of his on-campus classroom building. She attacks her husband with a knife when he exits the building. Include this as one on-campus incident of Domestic Violence and one on-campus Aggravated Assault.

Scenario 2: A neighbor reports yelling in the apartment next door in a university housing complex. The officer who arrives at the apartment finds a husband and wife having an argument. Neither party reports any physical injuries and neither party reports being intimidated. Do not include this incident in your *Clery Act* statistics.

Scenario 3: An employee reports to the campus police that her ex-husband has physically assaulted her four times. All four assaults occurred at the employee's private residence; however, he has also recently showed up in the noncampus parking lot outside her office and threatened to hurt her. Include one noncampus Domestic Violence incident for the Intimidation that occurred in the noncampus parking lot. Do not include the Aggravated Assaults in your *Clery Act* statistics because they did not occur on *Clery Act* geography. Do not include the Intimidation as a Hate Crime in your *Clery Act* statistics because there was no evidence that it was motivated by bias. Also include one incident of noncampus Stalking (Stalking is discussed below).

Scenario 4: A father argues with his son at a football game in the on-campus stadium. He eventually hits his son, breaking his jaw. Include this as one on-campus incident of Domestic Violence and one Aggravated Assault.

Dating Violence

The term "**dating violence**" means **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 interaction between the persons involved in the relationship.

34 USC §12291(a)(11)

Examples of Dating Violence

Scenario 1: A female student cuts her ex-boyfriend with a knife during an altercation in an on-campus dining hall. Include this as one incident of on-campus Dating Violence and one on-campus Aggravated Assault.

Scenario 2: A female student reports that her boyfriend forced her into nonconsensual sex in her on-campus dorm room. Include one Rape in both the on-campus category and the on-campus student housing facility category, and one incident of Dating Violence in both the on-campus category and the on-campus student housing facility category.

Scenario 3: After a party on campus, John walked back to his apartment in a noncampus housing complex with Matt, whom he has hooked up with a few times over the past month. When they reached John's apartment, it became clear that Matt was angry that John had been talking with other men at the party, causing Matt to punch two holes in the wall and threaten to beat John if he sees him flirting with any other men on campus. John now fears for his safety around Matt. Include one incident of noncampus Dating Violence for the threat of physical abuse.

Scenario 4: A dating couple is arguing on a public sidewalk in front of a campus building. The male slaps the female and her face is red. Include this as one public property incident of Dating Violence.

Sexual Assault

“**Sexual assault**” means any nonconsensual sexual act proscribed by Federal, tribal, or State law, including when victim lacks capacity to consent.

Rape - penetration, no matter how slight, of 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.***

Sex Offenses - any sexual act directed against another person, ***without consent of the victim,*** including instances where the victim is incapable of giving consent.

- A. *Fondling* - touching private body parts of another person for purpose of sexual gratification, without consent of victim, including instances where victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity.
- B. *Incest* - Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
- C. *Statutory Rape* - Sexual intercourse with person under statutory consent age

Examples of Sexual Assault

Scenario 1: A female student reports that she was raped by an unidentified male while jogging along a campus trail. Include this as one on-campus Rape.

Scenario 2: A female student reports that her ex-boyfriend had sex with her in her campus residence hall room while she was unconscious after a night of drinking alcohol. Include this as one Rape in the on-campus category and one Rape in the on-campus student housing facility category. Also include one incident of Dating Violence in both the on-campus and on-campus student housing facility categories (Dating Violence is discussed on pages 3-36 and 3-37).

Scenario 3: A male student reports that another male student fondled him in a campus building while telling him that he was glad they could finally be alone. Include this as one on-campus Fondling.

Scenario 4: A female student reports to the campus police that she was raped in her car in a parking lot on her school's campus by students from another college. Include this as one on-campus Rape.

Scenario 5: Three female students report that they were each raped by five male students at an off-campus fraternity house owned by a recognized fraternity. Each male raped each of the female students. Include this as three noncampus Rapes.

Scenario 6: A female student reports that an unknown male attempted to rape her on a city-owned sidewalk outside a classroom building on campus, but that he was frightened away by another pedestrian before completing the attack. Include this as one public property Rape.

Scenario 7: A woman is walking on a public sidewalk in front of your campus and a man pinches her buttocks as he runs by her. Include this as one public property Fondling only if the victim reports that it was sexual in nature.

Scenario 8: A female student reports that she has been raped three times since January by someone who lives in the same on-campus student housing facility. All three of the sexual assaults occurred in this housing facility. Include this as three Rapes in both the on-campus category and on-campus student housing facility category.

Scenario 9: A 21-year-old student has sex with a 15-year-old juvenile in the student's on-campus apartment. There is no use of force or threat of force (the statutory age of consent is 16). Include this as one Statutory Rape in the on-campus category and one Statutory Rape in the on-campus student housing facility category.

Scenario 10: Campus police respond to a call from the dean reporting that an unknown man exposed himself to a group of female students on campus. Do not include this incident in your *Clery Act* statistics as it is not a *Clery Act* crime.

U.S. Department of Education, Office of Postsecondary Education, The Handbook for Campus Safety and Security Reporting, 2016 Edition, Washington, D.C., 2016, p. 3-8. **NOTE: THIS HANDBOOK GUIDANCE HAS BEEN RESCINDED AS OF OCTOBER 9, 2020.**

Consent

In both VAWA & final Title IX regulations, the Department of Education considered and *chose not* to define consent.

- ▶ At minimum, consent definition should recognize that:
 - ▶ consent is a voluntary agreement to engage in sexual activity;
 - ▶ someone who is incapacitated cannot consent;
 - ▶ past consent does not imply future consent;
- ▶ silence or an absence of resistance does not imply consent;
- ▶ consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another;
- ▶ consent can be withdrawn at any time; and
- ▶ coercion, force, or threat of either invalidates consent.

Affirmative Consent - What Is It?

- ▶ “Affirmative consent” is defined as an **affirmative, conscious, and voluntary** agreement to engage in sexual activity.
 - ▶ Affirmative consent must be given by all parties to sexual activity.
 - ▶ Neither lack of protest or resistance nor silence constitutes consent
 - ▶ Consent may be withdrawn at any time.
- ▶ Often referred to as “Yes Means Yes”

Example of Affirmative Consent Standard

N.Y. Education Law Sec. 6441. AFFIRMATIVE CONSENT TO SEXUAL ACTIVITY. Every institution shall adopt the following definition of affirmative consent as part of its code of conduct:

- ▶ Affirmative Consent is a **knowing**, **voluntary**, and **mutual** decision among all participants to engage in sexual activity.
- ▶ Consent can be given by words or actions, as long as those words or actions create **clear permission** regarding willingness to engage in the sexual activity.
- ▶ Silence or lack of resistance, in and of itself, does not demonstrate consent.

Affirmative Consent - Required Standard?

- ▶ Under VAWA & Title IX, it is optional to adopt affirmative consent standard to determine whether student has given consent to sexual activity.
 - ▶ BUT: If state law requires affirmative consent, then school must comply with state law standards
- ▶ Affirmative consent standard is distinguishable from standards applicable to criminal proceedings in certain ways.
 - ▶ Affirmative consent standard does not apply in criminal context.
 - ▶ Criminal trier of fact may consider whether an individual affirmatively consented, but that alone not determinative of whether consensual.
 - ▶ Other evidence of consent or lack, such as body language or silence, may also be considered in the analysis of whether a crime occurred.
 - ▶ Under affirmative consent law, whether a victim affirmatively consented is by itself determinative of whether wrongdoing occurred.

Stalking

“***Stalking***” means 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**.

Course of conduct means two or more acts, including but not limited to, acts in which stalking directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person’s property.

Reasonable Person means a reasonable person under similar circumstances and with similar identities to the victim.

Substantial emotional distress means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

34 USC §12291(a)(36); 34 CFR 668.46

Recording Stalking Reports

- ▶ When recording reports of stalking that include activities in more than one calendar year, an institution must record a crime statistic for each and every year in which the course of conduct is reported to a local police agency or to a campus security authority. *34 CFR 668.46(c)(6)*
- ▶ Department of Education believes that this approach strikes a balance by ensuring that stalking is adequately captured in an institution's statistics without inflating the number of incidents of stalking by counting each behavior in the pattern.

Violence Against Women Act; Final Rule, 79 Fed. Reg. 62722 (October 20, 2014)

Recording Stalking Reports

- ▶ An institution must record each report of stalking as occurring at only first location within institution's Clery geography in which:
 - ▶ A perpetrator engaged in stalking course of conduct; or
 - ▶ A victim first became aware of stalking.
- ▶ If stalking occurs on more than one institution's Clery geography and is reported to a campus security authority at both institutions, then both institutions must include the stalking in their statistics.

34 CFR 668.46(c)(6)

Examples of Stalking

Scenario 1: A female student reports that she is being followed by a man she met at her job at a café off-campus. He began showing up at the café and would not leave her alone. Since then she has also noticed him following her around campus and she fears for her safety. Include this as one incident of Stalking on-campus since the first occurrence on *Clery Act* geography occurred when the victim noticed the perpetrator following her on-campus.

Scenario 2: Several students belonging to the university association of Hispanic students have reported being watched or followed by the same unknown man on various parts of campus. All of the students reported fearing for their safety as a result of his behavior but none of the students saw the man more than once. Do not include this as Stalking in your *Clery Act* statistics because, given that the man has never approached the same student more than once, the course of conduct was not directed at a single individual.

Scenario 3: A female student reported that she is afraid for her safety because her ex-boyfriend has been sending harassing emails to her private email account over the past several weeks. She opened the first five emails in her off-campus apartment. However, earlier that day she opened another email on her mobile phone while walking on campus. She came directly to the Campus Police to report the behavior. The location of the ex-boyfriend when he was sending the harassing messages is unknown. Include this as one on-campus Stalking because the first incident in the course of conduct to occur on *Clery Act* geography was the victim reading the email on-campus.

Examples of Stalking (continued)

Scenario 4: A male student reports that his ex-girlfriend has been sending him harassing text messages. The ex-girlfriend attends another university 200 miles away. While at home over summer break, the ex-girlfriend showed up at the student's house every day asking if he has a new girlfriend at school. Now that he has returned to school, she sends him daily text messages threatening to "check-in" on him on-campus. The ex-girlfriend sends these text messages late at night and the victim receives them when he is inside his on-campus dorm room. Include one incident of Stalking in both the on-campus category and in the on-campus student housing facility category **if the male student fears for his safety as a result of this behavior.**

Scenario 5: A male student reported a Stalking course of conduct to Campus Police during the spring semester. During the investigation, Campus Police established that the first incident in the Stalking course of conduct to occur on *Clery Act* geography took place on public property. When the student returned to campus for the fall semester, the Stalking continued when the perpetrator repeatedly waited for the victim in the hallway outside the victim's dorm room in an on-campus student housing facility. Since the spring and fall Stalking incidents involved the same victim and the same perpetrator, the fall incidents should be considered a continuation of the Stalking course of conduct that started in the spring. Include this as one Stalking incident on public property.

U.S. Department of Education, Office of Postsecondary Education, The Handbook for Campus Safety and Security Reporting, 2016 Edition, Washington, D.C., 2016, p 3-41.

NOTE: THIS HANDBOOK GUIDANCE HAS BEEN RESCINDED AS OF OCTOBER 9, 2020

Effects of Sexual Violence

- ▶ **Depression.** There are many emotional and psychological reactions that victims of rape and sexual assault can experience. One of the most common of these is depression.
- ▶ **Flashbacks.** During a flashback, memories of past traumas feel as if they are taking place in the current moment.
- ▶ **Post-Traumatic Stress Disorder.** After a traumatic event, it is typical to have feelings of anxiety, stress, or fear, making it difficult to adjust or cope for some time afterwards.

New Title IX Regulations (stated eff. date August 1, 2024)

New Title IX Rule Released 4/19/24

New Regulations Effective 8/1/24

- ▶ The unofficial version of the final regulations is available [here](#) (1,577 pages)
- ▶ In addition, the Department has released:
 - ▶ a [fact sheet](#),
 - ▶ a [summary](#) of the major provisions of the final regulations, and
 - ▶ a [resource](#) for drafting Title IX policies & procedures
- ▶ Official version published in the Federal Register on April 29, 2024
 - ▶ Official version available [here](#)

Title IX Coordinator

2024 ED Handbook

<https://www.ed.gov/sites/ed/files/about/offices/list/ocr/docs/impact-on-title-ix-coordinator-duties>

Title IX Coordinator

Every postsecondary institution must designate a Title IX Coordinator.

Title IX does not categorically exclude particular employees from serving as Title IX coordinators.

- ▶ When designating a Title IX coordinator, avoid designating an employee whose other job responsibilities may create a conflict of interest.
- ▶ A dedicated, full-time Title IX coordinator is the ideal.
- ▶ Designating a full-time Title IX coordinator will also minimize the risk of a conflict of interest.
- ▶ Some colleges and universities may not have the resources to support a full-time position.
- ▶ If FT not practical, ensure person has **all qualifications, training, authority and time to address all complaints raising the Title IX issues.**

Title IX Coordinator Responsibilities

Responsible for monitoring and overseeing school's compliance with Title IX and prevention of sexual misconduct.

- ▶ Knowledgeable and trained in school's policies and procedures and relevant state and federal law.
- ▶ Advise individuals about school and community resources and reporting options.
- ▶ Provide assistance to school employees regarding how to respond appropriately to report of the Title IX-related prohibited conduct and related retaliation.

Title IX Coordinator Responsibilities

(continued)

- ▶ Ensures effective implementation of school's sexual misconduct policies and procedures.
- ▶ Oversees training of employees/students, prevention, and education efforts and annual reviews of climate and culture.
- ▶ Oversees school's response to Title IX reports and complaints and leads efforts to identify and address any patterns or systemic problems revealed by such reports and complaints.
- ▶ Must be given training, authority, and visibility necessary to fulfill these responsibilities.

Publish Notice of Non-Discrimination

Institutions must give Notice of Non-Discrimination to students, applicants, employees and public, stating:

- a) School **does not discriminate** on basis of sex and prohibits sex discrimination
- b) **Inquiries** about Title IX can be made to Title IX Coordinator, OCR, or both
- c) **Contact information** for Title IX Coordinator
- d) Where to locate **nondiscrimination policy & grievance procedures**
- e) How to **report** and make **complaints** of sex discrimination

Notice of non-discrimination must be included on **school's website, handbook, catalog, announcement, bulletin,** & application forms, hallway posters.

Title IX Training Requirements

- ▶ All employees must be trained on obligation to address sex discrimination and what constitutes sex discrimination
- ▶ Investigators, decisionmakers, etc. must also be trained on school's grievance procedures, how to serve impartially w/o bias, and understanding meanings of "relevant" evidence and types of impermissible evidence
- ▶ Facilitators of informal resolutions must be trained on informal resolution process, how to serve impartially w/o bias
- ▶ Title IX Coordinators must be trained in responsibilities as Title IX coordinators, school's recordkeeping policies and obligations, and other training necessary for their role

All must receive training on their responsibilities promptly upon hiring or change of position and annually thereafter.

VAWA (Clery Act) Training Requirements

Institutional disciplinary hearings must be:

“conducted by officials who receive annual training on the issues related to domestic violence, dating violence, sexual assault, and stalking and how to conduct an investigation and hearing process that protects the victims and promotes accountability”

20 USC 1092(f)(8)(iv)(I)(bb)

- Persons appointed as adjudicators/hearing officials must have training appropriate to that role.
- How to serve impartially and avoid conflicts
- The meaning of “relevant” with respect to evidence
- **ALL TRAINING RECORDS KEPT FOR 7 YEARS AND COPIES AVAILABLE TO PUBLIC UPON REQUEST** (2020 Reg required website posting).

VAWA Prevention and Education

Clery Act requires that an institution's annual security report include a statement of policy that addresses the institution's programs to prevent dating violence, domestic violence, sexual assault, and stalking.

- ▶ The statement must include
 - i. A description of the institution's primary prevention and awareness programs for all incoming students and new employees, and
 - ii. A description of the institution's ongoing prevention and awareness campaigns for students and employees

VAWA Primary Prevention Programs

Defined in regulations as programming, initiatives, and strategies that are intended to stop dating violence, domestic violence, sexual assault, and stalking before they occur through:

- ▶ The promotion of positive and healthy behaviors that foster healthy, mutually respectful relationships and sexuality,
- ▶ encourage safe bystander intervention, and
- ▶ seek to change behavior and social norms in healthy and safe directions

34 CFR 668.46(j)(2)(iv)

VAWA Prevention and Education

Prior OCR guidance (rescinded September 2017) recommended the following topics (as appropriate) be covered in student training:

- ▶ Title IX and what is sexual violence under the school's policies;
- ▶ school's definition of consent, including examples;
- ▶ how school analyzes if conduct was unwelcome under Title IX;
- ▶ reporting options, including formal reporting and confidential disclosure options and any reporting timeframes;
- ▶ school's grievance procedures; and
- ▶ disciplinary code provisions relating to sexual violence and consequences of violating those provisions.

VAWA Prevention and Education

Additional recommended student training topics (OCR guidance):

- ▶ effects of trauma;
- ▶ role alcohol and drugs often play in sexual violence incidents;
- ▶ strategies and skills for bystander intervention;
- ▶ how to report sexual violence to campus or local law enforcement;
- ▶ Title IX's protections against retaliation;
- ▶ encouraging students to report incidents of sexual violence;
- ▶ educating students about persons on campus to whom they can confidentially report incidents of sexual violence.

When is a School Obligated to Respond to A Sex Discrimination Allegation?

Responding Under 2024 Title IX Rules

Ensuring Schools Learn of Possible Sex Discrimination:

- ▶ Employees at institution, with authority for corrective action or with responsibility for administrative leadership, teaching, or advising, are obligated to notify the Title IX Coordinator.
- ▶ All others are obligated to either notify the Title IX Coordinator OR provide complainant with Title IX Coordinator contact information and information about how to make a complaint
- ▶ Title IX Coordinator must monitor the school's program or activity for barriers to reporting and take steps reasonably calculated to address such barriers

Responding Under 2020 Title IX Rules

- ▶ *School with actual knowledge of sexual harassment in an education program or activity against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.*
- ▶ *A school is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.*
- ▶ A recipient's response must treat complainants and respondents equitably.

2020 Title IX Rules: When does a recipient have “actual knowledge?”

- ▶ **Actual knowledge** means **notice** of sexual harassment or allegations of sexual harassment **to** **Title IX Coordinator** or any **official** with authority to institute **corrective measures** or to any employee of an elementary and secondary school.
 - ▶ This standard is not met when the only person with actual knowledge is the respondent.
- ▶ **Imputed knowledge** based on vicarious liability or constructive notice is **insufficient**.
- ▶ Mere ability or obligation to report sexual harassment or to inform a student how to report sexual harassment, or having been trained to do so, does not mean person has **corrective measures authority**

Title IX Coordinator Response to Sex Discrimination (2024 Rules)

- ▶ Treat equitably complainant and respondent
- ▶ Offer and coordinate supportive measures, as appropriate, for complainant.
- ▶ Notify complainant, or complainant unknown, individual who reported conduct, of grievance procedures and informal resolution process, if available and appropriate.
- ▶ If complaint is made, notify respondent of grievance procedures and informal resolution process (if applicable)
- ▶ In response to complaint, initiate school's grievance procedures or informal resolution process

Title IX Coordinator Response to Sex Discrimination (2024 Rules)

- ▶ In absence of a complaint or a withdrawal, make fact-specific determination, based on factors in regulation, if Title IX Coordinator may/should initiate complaint
- ▶ If Title IX Coordinator initiates complaint, notify the complainant prior to doing so and appropriately address reasonable concerns about the complainant's safety or the safety of others.
- ▶ Regardless of whether complaint is initiated, take other appropriate prompt and effective steps to ensure that sex discrimination does not continue, in addition to providing remedies to an individual complainant

Supportive Measures

Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent

- Must **not unreasonably burden** either party
- School must provide party timely opportunity to seek modification or reversal of any decision to provide, modify, or terminate supportive measures applicable to them
- Generally - must not disclose information about any supportive measures unless necessary to provide measures
 - If complainant or respondent is student with a disability, Title IX Coordinator may consult with Section 504 Coordinator

Supportive Measures *(continued)*

Supportive measures may include (but not limited to):

- ▶ counseling,
- ▶ extensions of deadlines or other course-related adjustments,
- ▶ campus escort services,
- ▶ increased security and monitoring of certain areas of the campus,
- ▶ restrictions on contact applied to one or more parties,
- ▶ leaves of absence,
- ▶ changes in class, work, housing, or extracurricular or other activity, and
- ▶ training and education programs related to sex-based harassment

Options for Assistance Following Incident

Immediate Assistance

- ▶ School should identify and provide contact information for trained on and off campus advocates and counselors who can provide immediate confidential response in crisis situation
 - ▶ obtain needed resources
 - ▶ explain reporting options
 - ▶ help navigate reporting process
- ▶ Provide emergency numbers for on and off campus safety, law enforcement, and other first responders
- ▶ Identify health care options, both on and off campus

Ongoing Assistance

- ▶ Counseling, Advocacy, and Support - On and Off Campus

Partnering with Local Crisis Centers

- ▶ Schools can strengthen sexual prevention and response programs by developing **partnerships with local rape crisis centers**.
- ▶ These partnerships can be formalized through a **Memorandum of Understanding (MOU)** or other agreement between the parties.
- ▶ Rape crisis center services generally include:
 - ▶ 24-hour crisis intervention
 - ▶ medical and legal advocacy,
 - ▶ counseling for survivors
 - ▶ professional training about sexual violence,
 - ▶ community education,
 - ▶ develop prevention programming, and
 - ▶ assistance in developing policies to address sexual violence.

The background features abstract, overlapping geometric shapes in various shades of blue, ranging from light sky blue to deep navy blue. These shapes are primarily located on the right side of the frame, creating a modern, dynamic feel. The text is centered on a white background.

Be Fair
Be Prompt
Be Impartial

Basic Fairness

John Doe v. Brandeis University, (U.S. DC Mass.), March 31, 2016

Case brought by student found guilty of violating university's policies against sexual misconduct.

Brandeis University is private university located in Massachusetts.

In its ruling, court noted:

- ▶ Brandeis is not governmental entity or public university.
- ▶ It is not bound by requirements of Sixth Amendment.
- ▶ Its proceeding was not a criminal prosecution.
- ▶ It is not generally role of the federal courts to tell private university how to conduct its affairs.

Basic Fairness *(continued)*

Nonetheless, Court found Brandeis's authority to discipline its students is not entirely without limits.

- ▶ Although relationship between university and its students is essentially contractual, university's disciplinary actions may also be reviewed by courts to determine whether it provided "basic fairness" to the student.
- ▶ ***Put simply, a fair determination of the facts requires a fair process, not tilted to favor a particular outcome, and a fair and neutral fact-finder, not predisposed to reach a particular conclusion.***

Basic Fairness *(continued)*

- ▶ Court concluded accused student plausibly alleged that school did not provide him with “basic fairness.”
- ▶ There is no one-size-fits-all answer to question of what constitutes “basic fairness” a student is due.
- ▶ Answer may vary depending upon the competing interests at stake, include such factors as:
 - ▶ Magnitude of alleged violation,
 - ▶ Likely sanctions and other consequences of a finding of guilt, and
 - ▶ School’s experience and aptitude in resolving disputes of that nature.

Basic Fairness *(continued)*

Two principal threads to “fairness” inquiry:

- ▶ **Procedural Fairness** - whether process used to adjudicate matter was sufficient to provide accused student a fair and reasonable opportunity to defend himself.
- ▶ **Substantive Fairness** - even if procedure was fair, whether decision was unduly arbitrary or irrational, or tainted by bias or other unfairness.

Procedural Fairness

In *Brandeis* case, Court found that university failed to provide procedural protections to accused student which are basic due process:

1. No Right to Notice of Charges
2. No Right to Counsel
3. No Right to Confront Accuser
4. No Right to Cross-Examine Witness
5. No Right to Examine Evidence or Witness Statements
6. Impairment of Right to Call Witnesses and Present Evidence
7. No Access to Special Examiner's Report
8. No Separation of Investigatory, Prosecution, Adjudication
9. No Right to Effective Appeal
10. Burden of Proof

Substantive Fairness

Brandeis Court stated one of most basic components of fairness is unbiased and neutral fact-finder.

- ▶ Accused students are entitled to have cases decided on merits - on particular facts of their case set in proper context - and not according to application of unfair generalizations or stereotypes or social pressures to reach a certain result.
- ▶ Court found reason to believe University's Special Examiner decided accused student's guilt based on unfair generalizations, stereotypes or logical fallacies and basic fairness of proceeding was affected by that approach.

Things to Consider During Investigation & Adjudication

No Bias or Conflict of Interest

2024 Reg safeguards to maintain integrity/prevent bias misconduct:

- ▶ § 106.45(b)(1) requires school to treat complainants and respondents equitably;
- ▶ § 106.45(b)(3) requires grievance procedures to include presumption that respondent is not responsible for alleged sex discrimination until determination is made at conclusion of grievance process;
- ▶ § 106.45(b)(5) requires school to take reasonable steps to protect privacy of parties and witnesses during grievance procedures;
- ▶ § 106.45(b)(6) requires objective evaluation of all relevant and not otherwise impermissible evidence and provides that credibility determinations will not be based on a person's status as a complainant, respondent, or witness.
- ▶ Schools must train investigators how to serve impartially
- ▶ Schools must offer an appeal process

No Bias or Conflict of Interest *(continued)*

Department recognizes that a Title IX Coordinator, investigator, or decisionmaker may sometimes have relationships with students, particularly at smaller institutions, which could create conflict of interest or bias for or against an individual complainant or respondent.

- ▶ Schools must ensure **investigator** or **decisionmaker** for any particular complaint **be free of conflicts** of interest or **bias**.
- ▶ School has flexibility in ensuring personnel are unbiased:
 - ▶ **prohibiting** Title IX personnel from pursuing **close relationships** with students,
 - ▶ training **other employees** to perform Title IX roles to be available if conflicts, or
 - ▶ hiring **outside personnel** when if conflicts arise

Preservation of Evidence

Part of Advance Training to Students, Especially Women Is Following:

Victims of sexual assault, domestic violence, or dating violence should consider seeking medical attention as soon as possible.

- ▶ Important that victim of sexual assault not bathe, douche, smoke, change clothing, or clean the bed/linen where assault occurred so that evidence to prove criminal activity be preserved.
- ▶ In circumstances where victims do not opt for forensic evidence collection, health care providers can still treat injuries and take steps to address health concerns.
- ▶ Victims of sexual misconduct are encouraged to also preserve evidence by saving text messages, social networking pages, other communications, and keeping pictures, logs and other documents that maybe useful in school or police investigation.

Coordination with Drug Free School Policy

Federal Guidance:

- ▶ Students may be reluctant to report instances of sexual misconduct because they fear being disciplined pursuant to the school's alcohol or drug policies.
- ▶ School should encourage students to report all instances of sexual misconduct, taking into consideration importance of reporting sexual misconduct in addressing violations of the School's alcohol and drug policies.
- ▶ This means that, whenever possible, school should respond educationally rather than punitively to student alcohol or drug policy violations associated with reported sexual misconduct.

Emergency Removal

School may remove a respondent from education program or activity on an emergency basis, if school:

- ▶ Undertakes an individualized safety and risk analysis,
- ▶ Determines that an imminent and serious threat to physical health or safety of any student or other individual arising from allegations of sex discrimination justifies removal, and
- ▶ Provides respondent with notice and opportunity to challenge decision immediately following removal.

Administrative Leave for Employees: School may place an employee on administrative leave during pendency of a grievance process.

Prohibited Disclosures of Personally Identifiable Information

Schools must not disclose personally identifiable information obtained in the course of complying with Title IX except in the following circumstances:

- ▶ When school has obtained prior written consent
- ▶ When information is disclosed to a parent, guardian, or other authorized legal representative
- ▶ To carry out the purposes of Title IX
- ▶ As required by Federal law, Federal regulations, or the terms and conditions of a Federal award; or
- ▶ To the extent such disclosures are not otherwise in conflict with Title IX or this part, when required by State or local law or when permitted under FERPA

Informal Resolution Process

Final 2024 regulations offer of **informal resolution process** if appropriate whenever school receives complaint of sex discrimination or has information about conduct that reasonably may constitute sex discrimination.

- ▶ Participation in informal resolution must be **voluntary**.
- ▶ Informal resolution is **not permitted** in situations in which an **employee** allegedly engaged in sex-based harassment of an **elementary school** or **secondary school student** or if process would conflict with Federal, State, or local law

Neurobiology of Sexual Assault

- ▶ Victim often describes attack multiple times in excruciating detail
 - ▶ usually 24-48-72 hours after attack
 - ▶ emotionally very difficult
- ▶ Story can come out very disorganized
- ▶ Reliving the assault described as “Secondary Victimization”
- ▶ PTSD is a gateway to physical health problems.

Neurobiology of Sexual Assault

- ▶ Neurobiology of trauma will cause victims to have unstable emotions
 - ▶ Does not mean victim is lying
- ▶ Neurobiology of Memory
 - ▶ Difficult for victims to recall events of assault because of way memory of assault has been stored in the brain
 - ▶ When victim's story seems disjointed, does not mean victim is lying
 - ▶ Rather, sign that victim is having difficulty piecing things together based on how event is stored in their memory

Victim Credibility Challenges

- ▶ Lack (alleged/actual) of Physical Resistance
- ▶ Delayed Reporting
- ▶ Inconsistent or Untrue Statements

Perpetrator Characteristics

No two sex offenders are exactly alike.

Recent high-profile cases include:

- ▶ School teachers, coaches, & officials
- ▶ Clergy
- ▶ Community leaders
- ▶ Family members
- ▶ Popular entertainers

Offenders can be same or different biological sex as victim.

No “typical profile” of a perpetrator of sexual harassment.

Cultural Awareness - Unique Factors

When investigating sexual misconduct, note **some populations** may have **factors**, e.g, age, culture, disabilities, gender, language, affecting decision making and responses. Examples of **vulnerable populations** are:

- ▶ Native Americans
- ▶ Immigrants - documented and undocumented
- ▶ Individuals in prostitution
- ▶ Individuals with disabilities
- ▶ individuals with substance addictions
- ▶ Individuals with limited English proficiency
- ▶ Individuals who have previously been sexually assaulted
- ▶ Lesbian, gay, bisexual, transgender individuals
- ▶ Minors or Seniors

Grievance Procedures Under 2024 Title IX Rules

The background features abstract, overlapping geometric shapes in various shades of blue, ranging from light sky blue to deep navy blue. The shapes are primarily triangles and polygons, creating a dynamic, layered effect on the right side of the slide.

Grievance Procedures -2024 Reg

Grievance Procedures for All Sex Discrimination Complaints:

▶ General requirements:

- ▶ Equitable treatment of complainants and respondents
- ▶ Title IX Coordinator, investigators, and decisionmakers must **not** have conflicts of interest or **bias**.
 - ▶ *Decisionmaker may be the same person as the Title IX Coordinator or investigator* (*not under 2020 Reg*)
- ▶ Presumption that respondent is not responsible for the alleged conduct until a final determination is made
- ▶ Reasonably **prompt timeframes** for all major stages.
- ▶ Reasonable steps to protect **privacy** of parties and witnesses

Grievance Procedures -2024 Reg *(contin)*

- ▶ Objective evaluation of all relevant and not otherwise impermissible evidence
- ▶ Exclusion of certain types of evidence (privileged, medical, past sexual history)
- ▶ **Grievance Procedures for All Sex Discrimination Complaints:**
- ▶ Notice of allegations to the parties
- ▶ Dismissals permitted in certain circumstances if school offers an appeal and, as appropriate, supportive measures and remedial steps
- ▶ Consolidation where complaints are from same facts/ circumstances
- ▶ <https://www.ed.gov/sites/ed/files/about/offices/list/ocr/docs/resource-nondiscrimination-policies> ED guidance on policies

Grievance Procedures *(continued)*

Grievance Procedures for All Sex Discrimination Complaints:

- ▶ *A process that enables the decisionmaker to question parties and witnesses to adequately assess credibility*
- ▶ Clear processes for the determination of whether sex discrimination occurred
- ▶ **Preponderance of evidence** standard, unless other standard used in comparable proceedings (**clear/convincing 2020 Reg**)
- ▶ An appeal process
- ▶ Parties permitted to participate in an informal resolution process if school has one
- ▶ Describe range of possible supportive measures and disciplinary sanctions & remedies

Title IX Coordinator Initiated Complaints

In absence of complaint or with withdrawal of complaint, Title IX Coordinator has authority to initiate complaint under school's grievance procedures. To make fact-specific determination to do so, Title IX Coordinator must consider at least following factors:

- ▶ Complainant's request not to proceed with initiation of complaint
- ▶ Complainant's reasonable safety concerns with initiation of complaint
- ▶ Risk that additional acts of sex discrimination would occur if complaint is *not* initiated
- ▶ Severity of alleged sex discrimination, including whether discrimination, if established, would require removal of respondent from campus or imposition of another disciplinary sanction to end discrimination and prevent its recurrence

Title IX Coordinator Initiated Complaints

(continued)

- ▶ Age and relationship of parties, including whether respondent is an employee of school
- ▶ Scope of alleged sex discrimination, including information suggesting a pattern, ongoing sex discrimination, or sex discrimination alleged impacting multiple individuals
- ▶ Availability of evidence to assist a decisionmaker in determining whether sex discrimination occurred
- ▶ Whether school could end alleged sex discrimination and prevent recurrence without initiating its grievance procedures

Title IX Coordinator Initiated Complaints

(continued)

- ▶ After considering relevant factors, if Title IX Coordinator determines alleged conduct presents **imminent** and **serious threat** to **health or safety** of **complainant** or **other person** or **prevents** school from ensuring **equal access** on basis of sex to education program or activity, Title IX Coordinator may initiate a complaint.
- ▶ If initiating a complaint, Title IX Coordinator must give prior **notice** to **complainant** and **address** reasonable **concerns** about **safety** of complainant of others with **supportive measures**.
- ▶ Whether or not complaint initiated, take appropriate prompt and effective steps, in addition to steps to effectuate **remedies** for individual **complainant**, to **ensure sex discrimination** does **not recur** at school's education program or activity.

Notice of Allegations

Upon initiation of grievance procedures, school must provide notice of the allegations to parties including following:

- ▶ Outline of grievance procedures and any informal resolution process;
- ▶ Sufficient information to allow parties to respond to allegations, including identities of parties involved in incident(s), conduct alleged to constitute sex discrimination, and date(s)/location(s);
- ▶ Statement that retaliation is prohibited; and
- ▶ Statement parties are entitled to equal opportunity to access evidence or an accurate description of evidence
 - ▶ if school provides description of evidence, parties are entitled to equal opportunity to access evidence upon request.

Dismissal of a Complaint

School may dismiss complaint for any of following reasons:

- ▶ School unable to identify respondent after taking reasonable steps to do so
- ▶ Respondent is not participating in school's education program or activity and not employed by school (jurisdictional)
- ▶ Complainant voluntarily withdraws complaint, Title IX Coordinator declines to initiate a complaint, and school determines that without complainant's withdrawn allegations, any remaining allegations of conduct from other sources if proven would not constitute sex discrimination under Title IX
- ▶ School determines conduct alleged in complaint, even if proven, would not constitute sex discrimination under Title IX

Consolidation of Complaints

- ▶ School may **consolidate two or more complaints** of sex discrimination:
 - ▶ Made by one complainant against more than one respondent,
 - ▶ Made by more than one complainant against one or more respondents,
 - ▶ Made by one party against another party

If the allegations of sex discrimination arise out of the **same facts or circumstances**.

Grievance Procedures - Investigation

Investigation Requirements

- ▶ Burden on school to gather evidence and decide what is relevant or impermissible - must conduct investigation
- ▶ Equal opportunity for parties to present fact witnesses and other evidence.
- ▶ Equal opportunity for parties to...
 - ▶ Access relevant and not otherwise impermissible evidence or an accurate description of evidence
 - ▶ Reasonable opportunity to respond to evidence
- ▶ School must take reasonable steps to prevent and address unauthorized disclosures

Grievance Procedures - Process Protections

Additional Requirements for Postsecondary School

- ▶ Written notice of allegations, dismissals, delays, meetings, and proceedings
- ▶ Equal opportunity to have advisor/lawyer of party's choice at any meeting or proceeding
- ▶ Equal opportunities, if allowed by school, to have persons besides advisor present at any meeting or proceeding.
- ▶ Permitting, but not requiring, school to allow expert witnesses, if determination applies equally to both parties
- ▶ Reasonable extension of timeframes on a case-by-case basis for good cause with written notice to parties, including reason for the delay

Grievance Procedures - Process Protections

Additional Requirements for Postsecondary Schools (contin.)

- ▶ Equal opportunity to access relevant/not impermissible evidence or a written report summarizing such evidence
- ▶ A process enabling *decisionmaker* to *question parties* and *witnesses* to adequately assess credibility of party or witness when credibility is in dispute and relevant
- ▶ Permitting, but not requiring, a live hearing (contrast: 2020 Reg required live hearings)
- ▶ Permitting a decisionmaker to weigh credibility of party or witness, including when party or witness refuses to respond
- ▶ Simultaneous written notice of determination to parties
- ▶ Appeal opportunity

Relevant & Permissible Evidence

- ▶ Relevant evidence/relevant questions must be related to the allegations of sex discrimination under investigation
- ▶ Questions are relevant if seeking evidence to show whether alleged sex discrimination occurred, and evidence is relevant if it may aid a decisionmaker in determining whether the alleged sex discrimination occurred.
- ▶ Evaluation of whether questions are relevant includes consideration of whether the question is both related to the allegations of sex discrimination under investigation and will aid in showing if alleged sex discrimination occurred
- ▶ **School - investigator/hearing official -must exclude questions or evidence that are not relevant**

Relevant & Permissible Evidence

The following types of evidence generally impermissible with exceptions noted below:

- ▶ Evidence protected under a **legal privilege**, unless the person owning the privilege waives it
- ▶ **Treatment records** maintained by a physician, psychologist, or other recognized profession, unless written consent is given
- ▶ Evidence related to complainant's **sexual interests** or **prior sexual conduct**, unless offered to prove someone other than respondent committed alleged conduct or is offered to prove consent (e.g., evidence that complainant was “flirty” or “promiscuous” or “slept around” not permissible)

Relevant & Permissible Evidence

- ▶ Access to Investigator's Report: school must provide both parties an equal opportunity to access relevant and not otherwise impermissible evidence or same written investigative report that accurately summarizes this evidence
- ▶ Access to Evidence on Request: If school provides access to an investigative report, must further provide parties with an equal opportunity to access relevant and not otherwise impermissible evidence upon request of any party.

Assessing Credibility & Due Process

- ▶ **2020 Regulations** require live hearings with advisor-conducted cross-examination
- ▶ **New 2024 Regulations provide greater flexibility and options for schools to consider:**
 - ▶ Single-investigator/adjudicator model with no live hearing
 - ▶ Still need process for evaluating credibility of witnesses and parties
 - ▶ Live hearing with questioning from decisionmaker
 - ▶ Live hearing with questioning by parties' advisors
 - ▶ Combination of different methods based on circumstances described in school's grievance procedures

Assessing Credibility & Due Process

If school chooses not to conduct a live hearing:

- ▶ Must allow **investigator** or **decisionmaker** to **ask questions** during individual meetings with a party or witness;
- ▶ Must allow each party to **propose questions** wants to be asked of other parties or witnesses decisionmaker or investigator during individual meetings, including follow-up meetings;
- ▶ Must provide each party with an audio or audiovisual recording or transcript with enough time for party to have a reasonable opportunity to propose **follow-up questions** for **further meeting(s)**

Assessing Credibility & Due Process

If school chooses to conduct a live hearing:

- ▶ Must allow decisionmaker to ask questions during hearing
- ▶ Must allow each party to **propose questions** to be asked by decisionmaker of other parties or witnesses and/or allow an advisor for each party to ask questions of other parties and any witnesses during the live hearing
- ▶ Must allow parties, on request, to **participate from separate locations** using technology and create an audio or audiovisual **recording** or **transcript** of any live hearing and make it available to parties

Assessing Credibility & Due Process

2024 Regs provide small school flexibility, but questions on Due Process.

United States Sixth Circuit Court of Appeals held colleges and universities must allow for live questioning in front of a neutral fact-finder. [Doe v. Baum, et al.](#), Case No. 17-2213 (6th Cir. Sept. 7, 2018)

- Court said written statements cannot substitute for cross-examination
- But court also said accused student does not have right to personally confront accuser or other witnesses (advisor conducted questioning OK)

USDOE says 2024 rules are consistent with Due Process requirements

- ▶ Baum decision calls into question single investigator/adjudicator model, at least for public schools in Sixth Circuit (MI, OH, KY & TN)
- ▶ Single investigator/adjudicator model challenged in pending lawsuits
- ▶ Unclear whether a live hearing with questions from decisionmaker (rather than party advisors) would satisfy Due Process under Baum

Adjudication Procedures

Evidentiary Standard:

- ▶ In evaluating parties' evidence, a school must use the **preponderance of the evidence** standard of proof unless the school uses the clear and convincing evidence standard in all other comparable proceedings.
 - ▶ **Clear and convincing evidence** means that the party must present evidence that leaves one with a **firm belief or conviction** that it is **highly probable** that the factual contentions of the claim or defense are true.
 - ▶ **Preponderance of the evidence** is a lower standard of proof, which means that a panel must find based on the evidence that the respondent is **more likely than not** to have violated school policy.

Adjudication Procedures

- ▶ Standard of proof in criminal proceedings is higher than standard of proof used in campus disciplinary proceedings.
 - ▶ In criminal proceedings, there must be evidence that proves **beyond a reasonable doubt** that unlawful sexual activity took place.
 - ▶ In contrast, campus disciplinary proceedings will use a **preponderance of the evidence** (unless the clear and convincing evidence standard is used in other comparable proceedings).
 - ▶ 2020 Reg required **clear and convincing evidence**

Investigator Reports

Investigators should be aware reports are used for more than mere documentation of incidents.

Reports may be used by:

- ▶ Respondent's attorneys to develop defense
- ▶ Police as part of investigation
- ▶ Prosecutor and others in criminal proceeding
- ▶ Evidence in civil trial
- ▶ State board, Accrediting Agency, and/or OCR in complaint proceeding
- ▶ Media

Report facts (circumstances) and conclusions based on them

Avoid speculation and conjecture

Adjudicator's Written Determination

PSE School must provide written determination to parties at same time whether sex-based harassment occurred, which includes:

- i. A description of **allegations** of sex-based harassment;
- ii. Information about **policies and procedures** school used to evaluate allegations;
- iii. Decisionmaker's **evaluation of evidence** and **determination** whether sex-based harassment occurred;
- iv. If decisionmaker finds sex-based harassment occurred, any **disciplinary sanctions** school will impose on respondent and whether **other remedies** will be provided to complainant and any other affected students; and
- v. School's **appeal procedures**

Sanctions & Other Remedies

- ▶ Disciplinary Sanctions should be:
 - ▶ Fair and appropriate given the facts of case;
 - ▶ Consistent with school's handling of similar cases;
 - ▶ Adequate to protect safety of campus community; and
 - ▶ Reflective of seriousness of sexual misconduct.
- ▶ Sanctioning decision must be communicated in writing to both complainant and respondent.
- ▶ List of possible sanctions for students determined to have violated school's policies must be included in school's policies in catalog and/or student handbook

Sanctions & Other Remedies

- ▶ For any student determined to have committed sexual discrimination offense, school also may...
 - ▶ Receive appropriate education and/or training related to the sexual misconduct violation
 - ▶ Recommend counseling or other support services for student
- ▶ Whatever outcome of hearing process, complainant may request ongoing or additional accommodations, and Title IX Coordinator should determine whether such measures are appropriate.

Sanctions & Other Remedies

- ▶ On broader scale school may also determine that **additional measures** advisable to address **impact** of incident on **school community**:
 - ▶ Increased **monitoring**, supervision, or security at locations or activities where the misconduct occurred
 - ▶ Additional **training** and educational materials for students and employees
 - ▶ Revision of the **school's policies** relating to sexual misconduct
 - ▶ **Climate surveys** regarding sexual misconduct

Appeals

School must offer both parties appeal from determination whether sex-based harassment occurred and from school's dismissal of complaint or any allegations therein, on any of following grounds:

- ▶ **Procedural irregularity** that affected outcome;
- ▶ **New evidence** that would change outcome and was not reasonably available at time determination was made; and
- ▶ Title IX Coordinator, investigator(s), or decision-maker(s) had a **conflict of interest or bias** that would change the outcome.

Grievance Procedures: 2020 Regulation

Key Points

- ▶ Complainant must file formal written complaint to have school conduct an investigation
- ▶ Investigation must be separate from adjudication process
 - ▶ Parties must receive written investigation report at least 10 days prior to live hearing
- ▶ Requires a live-hearing for postsecondary institutions

Grievance Procedures: 2020 Reg Key Points

- ▶ Cannot use a single investigator/adjudicator model
- ▶ Decisionmaker must not be Title IX Coordinator or investigator
 - ▶ Title IX Coordinator allowed to be investigator under 2020 Rules
- ▶ Live cross-examination required
 - ▶ Party advisors conduct cross-examination
 - ▶ Parties not allowed to personally cross-examine each other

Recordkeeping Requirements

Institutions must retain records for **seven years**:

- ▶ Documentation of each complaint
- ▶ Documentation of actions school took to respond to notices of sex discrimination
- ▶ **Title IX training materials**
 - ▶ Must be made available upon request
 - ▶ NOTE: **2020 Title IX Rules** require schools to post their Title IX training materials on their **websites**

Retaliation Prohibited

Retaliation defined as:

- ▶ (1) intimidation, threats, coercion, discrimination against a person
- ▶ (2) by school, another student, or employee or person authorized by school to provide aid, benefit, or service under school's education program or activity
- ▶ (3) for purpose of (i) interfering with any right or privilege secured by Title IX or regulations or (ii) because person has reported possible sex discrimination, made a sex-discrimination complaint, or participated or refused to participate in any way in a school's Title IX process.

Peer retaliation defined as retaliation by one student against another student, is also prohibited

2020 Rule prohibited retaliation but did not define it.

The background features abstract, overlapping geometric shapes in various shades of blue, ranging from light sky blue to deep navy blue. These shapes are primarily located on the right side of the slide, creating a modern, dynamic feel.

Other Changes Under 2024 Title IX Rules

Pregnancy & Related Conditions

Schools must:

- ▶ Provide reasonable modifications for students
- ▶ Allow student a **voluntary LOA** for the medically necessary time and reinstatement upon return
- ▶ Ensure time accommodations for students from class schedule for lactation and access to clean, private **space** for **lactation**
- ▶ Provide **employees** with reasonable **break time** for **lactation** and ensure they can access a clean and **private lactation space**
- ▶ **Not addressed in 2020 Regs**

Transgender Students - 2016/2017

Joint Dear Colleague Letter issued by DOJ & ED on 5/13/16 (Obama)

- ▶ Treated student's **gender identity** as student's **sex** for Title IX purposes
- ▶ School could not treat a transgender student differently from way it treated other students of same gender identity
- ▶ Failure to treat students consistent with their gender identity may have created or contributed to a **hostile environment** in violation of Title IX

***JOINT DOJ & ED LETTER WITHDRAWN BY TRUMP ADMINISTRATION
2/17/17***

EXECUTIVE ORDER 14021, 86 Fed. Reg. 13,803 (March 11, 2021)(Biden)

[A]ll students should be guaranteed an educational environment free from discrimination in the form of sexual harassment, which encompasses sexual violence, and including **discrimination on the basis of sexual orientation or gender identity.**

Transgender Students - 2021

OCR Notice of Interpretation - Published in Federal Register
June 22, 2021

In 2020, the Supreme Court in *Bostock v. Clayton County*, 140 S. Ct. 1731, 590 U.S. 644 (2020), concluded discrimination based on sexual orientation and discrimination based on gender identity inherently involve treating individuals differently because of sex.

- ▶ *Bostock* reached this conclusion in context of Title VII of the Civil Rights Act, which prohibits sex discrimination in employment.

Department issued this Interpretation to give notice that it interprets Title IX's prohibition on sex discrimination to include discrimination based on sexual orientation and gender identity.

Sexual Orientation & Gender - 2024 Regs

- ▶ Prohibit **separating** or **treating** any person **differently based on sex** in a manner that subjects that person to **more than de minimis harm** (except in very limited circumstances)
- ▶ **Policies/practices** that **prevent participation** in a school's education program or activity **consistent with gender identity** impose **more than de minimis harm** on the basis of sex and violate Title IX
- ▶ Is denying use of **restroom/locker facilities** consistent with student's **gender identity** more than de minimis harm?
- ▶ Does allow gender identity facility choice harm others?
- ▶ Unisex facilities (privacy stalls) - low harm alternative?
- ▶ Good faith efforts on gender-consistent pronouns/names

State Laws: if conflict, Title IX prevails

Issues Addressed

- ▶ Affirmative Consent
- ▶ Transcript Notations
- ▶ Mandatory Reporting
- ▶ Access to Medical Attention
- ▶ Memorandums of Understanding
- ▶ Climate Surveys
- ▶ Good Samaritan Provisions

CALIFORNIA

- ▶ Cal. Ed. Code § 221.5 (f): right of **K-12 students** for facilities, teams, names aligning with gender identity
- ▶ **Donahoe Equity in Higher Ed Act**: all PSE schools receiving state aid must not discriminate on basis of sex, sexual orientation, gender identity. Cal. Ed. Code § 66270. **Effect? Same as new Title IX Reg?**
- ▶ CA public colleges must use gender identity pronouns/names of trans students and keep correct records

New Title IX Rules - Eff. 8-1-24

But Opposition ... But ED Warning

- ▶ Legislation introduced under Congressional Review Act to overturn the new Title IX Rules
 - ▶ Realistically - unlikely to get signed into law even if it passes both houses
- ▶ At least 26 states in 8 lawsuits against final rules
 - ▶ USDOE has warned schools that they must comply with Title IX regulations as a condition of receiving federal funds
 - ▶ Federal courts have issued injunctions preventing ED from enforcing the new rules in these 26 states
- ▶ The Supreme Court's decision in *Brightstar Loper Enterprises v Raimondo* overturning Chevron doctrine may change things

New Title IX Rules Eff. 8-1-24

Things to Consider:

- ▶ Review Non-Discrimination Policy
- ▶ Update Notice of Non-Discrimination
 - ▶ Publication in catalog, website, applications, etc.
- ▶ Training
 - ▶ All need some, some need more
- ▶ Update Grievance Policies & Procedures
 - ▶ Live hearing, single investigator/adjudicator
- ▶ Develop plan to address transgender requests

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Chris has 30 years of experience providing legal, financial and management services to owners and career school operators. Chris is a CPA (inactive) and spent 9 years as in-house legal counsel and CFO for a multi-state cosmetology school group, overseeing Title IV compliance and accreditation. A frequent speaker on Title IV issues, he served as alternate negotiator representing for-profit schools at the U.S. Department of Education's negotiated rule making sessions regarding the borrower defense to repayment regulations.

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With Chris, Ron co-chairs the Rouse Frets Law Group's higher education practice and also handles business litigation and business transactions. Over the past 32 years, Ron has represented institutions on program reviews, administrative proceedings, student claims, state and federal court litigation, changes of ownership, and accrediting and state licensing agency disputes.

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