



## **Title IX Training Webinar**

**June 24, 2020**

### **Title IX Overview**

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#### **Topic #1: What is Title IX?**

**Law: Title IX, 20 § U.S.C. 1681**

- Prohibits discrimination “on the basis of sex”;
- Education programs and federally funded schools (whether or not sponsored by the educational institution);
- Protects students, employees, applicants, & all other persons

#### **Title IX Implementing Regulations**

- 1) Designation of a Title IX Coordinator to coordinate school’s responsibilities
- 2) Disseminate Notice of Policy/Title IX Obligations/Title IX Coordinator Info
  - Title IX/Sexual Misconduct Policies
  - Anti-Bullying and Harassment Policies
- 3) \*Grievance/Complaint Procedures

#### **Enforcement of Title IX**

- 1) Agency Enforcement – OCR
  - Voluntary resolution
  - Equitable Relief
- 2) Private Litigation – In Courts
  - Monetary damages
  - Various additional claims: Breach of contract, constitutional claims, etc.
  - Complainant or Respondent as Plaintiff

## Enforcement of Title IX

- Standard – *Deliberate Indifference*
  - Plaintiff must prove officials had actual knowledge AND harassment was so severe, pervasive & objectively offensive that it barred the victim from access to their education
  - Can be avoided by “merely responding to harassment in a manner that is not unreasonable”

## New Regulations

- Prior Title IX Guidance revoked in September 2017
- Proposed Regulations were released November 16, 2018
- Public Comment period was open until January 28, 2019
- Final Regulations released May 6, 2020 with an implementation date of August 14, 2020
- Note:
  - Lawsuits challenging regulations filed;
  - Letters sent to DOE requesting delayed implementation

## New Regulations – Major Changes

- Definitions and Jurisdictional Requirements – including Permissive and Mandatory Dismissals
- “Actual Knowledge” Standard on Who has to Report – Different for K12s and Postsecondary
- Investigation and Reports Timelines and Procedures
- Formal Resolution Procedures – Live Hearings and/or Cross-Examination
- Scope: Covers employee-on-employee situations
- Mandatory Appeals on Certain Criteria
- Recordkeeping and Retention Requirements
- Training Requirements

## Definitions: Sexual Harassment

1. A school employee conditioning an educational benefit or service upon a person's participation in unwelcome sexual conduct (often called quid pro quo harassment);  
OR
2. Unwelcome conduct on the basis of sex that is so severe, pervasive and objectively offensive that it effectively denies a person equal access to the school's education program or activity (often called hostile work/educational environment harassment);  
OR

- **Dating Violence:** Violence by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. The existence of such a relationship is determined by:
  - The length of the relationship.
  - The type of relationship.
  - The frequency of interaction between the persons involved in the relationship
- **Domestic Violence:** Includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner, a parent of a shared child, a former or current cohabitor as a spouse or intimate partner, or someone similarly situated to a spouse under domestic or family violence laws. . . , or by any other person against a victim who is protected under the domestic or family violence laws[.]
- **Stalking:** Engaging in a course of conduct directed at a specific person that would cause a reasonable person to—a) fear for his or her safety or the safety of others; or b) suffer substantial emotional distress.
- **Sexual assault:** An offense classified as a forcible or nonforcible sex offense by the FBI’s uniform crime reporting system:
  - Rape,
  - Fondling,
  - Incest, or
  - Statutory rape

#### Scope of “Educational Program or Activity”

- Conduct must occur in “educational program or activity”
  - Does not mean geography – no on/off-campus bright line rule
  - Includes “locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs”
- Conduct must be against a person “in the United States”
  - Does not apply to study abroad
- New:
  - Includes “any building owned or controlled by a student organization that is officially recognized by a postsecondary institution”
  - Implication: Greek life and “Theme” houses

### Scope– Mandatory Dismissal

- No Title IX jurisdiction?
  - Must “dismiss” the complaint
  - Clarification in Final Rule: Dismissal means dismissed from the Title IX process; the school can still apply another conduct code or offer supportive measures
- Practical Difficulty – Knowing if a complaint implicates Title IX jurisdiction at various stages of the process

### Scope– Permissive Dismissal

- 1) New final rule allows schools to dismiss a complaint (with prompt and simultaneous written notice to the parties) if at any time:
  - 1) A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations;
  - 2) The respondent is no longer enrolled or employed by the recipient; or
  - 3) “Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations.”

## TOPIC #2: Implementing the New Title IX Regulations

### Major Compliance Areas

- 1) **Policy and Procedures Review and Update**
  - Incorporate new language on jurisdiction and sexual harassment and retaliation definitions
  - Incorporate investigation and hearing/cross-examination procedures
  - Think about: who is going to be our Title IX Coordinator, Investigator(s), Decision-Maker(s) and appeal authorities?
    - Internal or External
  - Revise existing notices and policies, or create “one-stop” policy and procedures for all constituencies – students, faculty/teachers, and staff
  - Review collective bargaining agreements
- 2) **Record-keeping and Retention**
  - Final Regulations require the following to be maintained for SEVEN years:
    - 1) Each sexual harassment investigation, including determinations, audio or visual recordings, disciplinary sanctions, and any remedies provided to the complainant;
    - 2) Any appeal and the result therefrom;

3) Informal resolution, if any; and

4) *All materials used to train Coordinators, Investigators, those who facilitate informal resolution, and decision-makers with regard to sexual harassment.*

- Final Rules require the following records to be created and kept for SEVEN years:
- Any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment.
- Document the basis for the conclusion that your response was not deliberately indifferent, and
- Document that you have taken measures designed to restore or preserve access to the recipient's educational program or activity.
- If no supportive measures are given to the complainant, document why it was not clearly unreasonable

3) **Training**

- Schools must require training for anyone designed as a Title IX Coordinator, Investigator, Decision-Maker, or any other person designated to facilitate an informal resolution on designated topics
- Training materials:
  - Must not rely on sex stereotypes
  - Must promote impartial investigations and adjudications of formal complaints