2020 Title IX Regulations: Basic Compliance Training

Meet Your Host

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- Former OCR Civil Rights Attorney (Chicago)
- Experience: Trainings, internal audits, internal investigations, OCR complaints, lawsuits

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In the Zoom Chat
What is your name and title?

Ground Rules

Ask Questions

Participate!
Devices off (unless I ask you to use them!)

TURN OFF CELL PHONES

Keep it hypothetical

This isn’t legal advice

Why Are We Here?

Know the Rules

Sexual Harassment complaint form

THE HILL
New Title IX regulations give expanded rights to those accused of sexual assault on campus...

Inside Higher Ed
New Title IX regulation sets location-based boundaries for sexual harassment...

Department of Education releases new Title IX regulations
Recognize Title IX Sexual Harassment and Related Misconduct

But not just any action, the right action for the conduct at issue!

Why is this so important?

According to a 2017 report from the Justice Department, only 23 percent of all sexual assaults are reported to the police.
Harassment and assault can have long lasting, detrimental effects on victims (Trauma)

Effects on Individuals
- Stress
- Disengagement
- Anger
- Mistrust
- Acting out
- Absenteeism
- Drop-out
- Suicide
- ANXIETY
- DEPRESSION
- PTSD

Effects on Teams
- Decreased focus
- Lost productivity
- Withdrawal
- Neglect
- Absenteeism
- Malingering
- Lack of trust in leadership
- Turnover

Unfair processes can have long lasting, detrimental effects on the accused

Mattress Protest and Its Aftermath

Harassment Is Illegal
Including Sexual Harassment
It’s the right thing to do.

Ice Breaker

Thumbs Up or Down
Have you been directly involved in a Title IX complaint during your time at the Institution?

In the Zoom Chat
What is the most important question you would like answered today?
What is Title IX?

What falls under Title IX?

- Recruitment, Admissions, and Counseling
- Financial Assistance
- Athletics
- Sex-Based Harassment
- Treatment of Pregnant & Parenting Students
- Discipline
- Single-Sex Education
- Employment
- Retaliation

Title IX Statute

(20 U.S.C. §§ 1681–1688)
"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

Title IX Regulations

(34 C.F.R. Part 106 – Amended as of 8/14/2020)
- Prohibit discrimination on the basis of sex
- Establish procedural requirements
  - Policy
  - Detailed Grievance procedure
  - Designation of Title IX coordinator(s)
  - Many many requirements

Other Applicable Laws
### Employment
- Illinois Human Rights Act
- Title VII
- Title IX
- Clery Act/Violence Against Women Act

### Students
- Illinois Human Rights Act
- Preventing Sexual Violence in Higher Education Act
- Title IX
- Clery Act/Violence Against Women Act

### How Does Clery/VAWA Relate to Title IX?
- Contains policy and procedural requirements for addressing complaints of domestic violence, dating violence, sexual assault, and stalking
  - Timely warnings, emergency notifications
  - Requirements following a report
  - Broader AND narrower than Title IX
- ASR and other reporting
- Prevention requirements

### What Does VAWA Require?
- Specific requirements for policies and procedures, including:
  - Description of disciplinary proceedings
  - Steps, anticipated timelines, and decision-making process
  - How to file a complaint
  - Standard of evidence
  - List of all possible sanctions and description of protective measures
  - Prompt, fair, and impartial process
  - Conducted by individuals who receive annual training
  - Advisor of choice
    - Various written notification requirements, including:
      - Written notification about options for accommodations and protective measures
      - Simultaneous notification to parties of certain results

### Required Programming Under VAWA
- Primary prevention and awareness programs for all incoming students and new employees
- Ongoing prevention and awareness campaigns for students and employees
- Range of topics, including definitions of prohibited conduct, resolution procedures, possible sanctions and protective measures, and available resources and options

### Illinois Preventing Sexual Violence in Higher Education Act
- Comprehensive policy and procedure concerning sexual violence, domestic violence, dating violence and stalking
  - Several required components
  - Written explanation of rights and options to survivors
  - Confidential Advisors to survivors
  - Training requirements

### Additional Requirements
- Offer students options to make reports in various ways, including anonymously
- Respond to electronic report within 12 hours
- Define consent in policy
- Participate in campus-wide or regional task force
- Annually report data
When Must the Institution Respond to Sexual Harassment?

It Depends Who [Well, Which Law] You Ask

- Illinois Human Rights Act
- Title VII
- Title IX
- Clery Act/Violence Against Women Act

Employment

- Illinois Human Rights Act
- Title VII
- Title IX
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Students

- Illinois Human Rights Act
- Preventing Sexual Violence in Higher Education Act
- Title IX
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When must a school respond to Title IX sexual harassment?

A recipient with actual knowledge of [Title IX] sexual harassment in an education program or activity against a person in the United States must respond promptly and in a manner that is not deliberately indifferent.

Notice

ACTUAL knowledge

To Title IX Coordinator or “official with authority”

Official with Authority

- Title IX Coordinator
- Any other officials who have been given authority to institute corrective measures on behalf of the recipient

Straight Talk

Who are “Officials With Authority” Here?
What about VAWA/Clery Act?

- CSA = "campus security authority"
  - Special designation under Clery Act
  - Designed to facilitate crime reporting in annual report
- WHO?
  - Anyone with responsibility for campus security
  - Anyone to whom crimes can be reported
  - Anyone with "significant responsibility for student and campus activities" (housing, discipline)
  - Excludes pastoral/professional counselors
- CSA may be considered an "official with authority" under Title IX such that notice to that person constitutes actual knowledge

Campus Security Authority

The relevant titles and capacities are:

President, Provost and those designated to serve in the role of Associate or Assistant Vice Presidents/Provosts; academic deans, directors and department chairs, including those serving in associate or assistant roles; student affairs directors; residential life personnel, including resident advisors; Greek life coordinators; athletic administrators, including directors, assistant directors, coaches, assistant coaches and trainers; student activities coordinators; faculty and staff advisors to IIT recognized student organizations; academic advisors; and Public Safety staff.

Title IX Actual Knowledge

1. Sense
2. Report

Reporting Sexual Harassment: Who, How and When?

- Any person may report sex discrimination, regardless of whether the person is the alleged victim of the reported conduct
- Reports can be made by mail, by telephone, or by email, using the contact information listed for the Title IX Coordinator
- Or by any means that results in the Title IX Coordinator receiving the person's report
- Such a report may be made at any time, including during non-business hours, by using the telephone number or electronic mail address, or by mail to the office address listed for the Title IX Coordinator

Key Roles in Responding to Reports

- Medical providers
- Law enforcement
- Community/outside agencies

Involvement of Law Enforcement

- Complainant has the option to involve law enforcement, including:
  - Notifying law enforcement, including on-campus and local police
  - Request assistance from campus authorities
  - Decline to notify law enforcement or campus authorities
- Orders of protection, no contact orders, restraining orders
Once a school has notice of an allegation that, if true, would constitute sexual harassment, it must respond.

“Well, we didn’t believe there was enough evidence it happened” does not get you past your responsibility to use your Title IX procedures.

What is Sexual Harassment?

It Depends Who [Well, Which Law] You Ask

Employment
• Illinois Human Rights Act
• Title VII
• Title IX
• Clery/VAWA

Students
• Illinois Human Rights Act
• Preventing Sexual Violence in Higher Education Act
• Title IX
• Clery/VAWA

Quid Pro Quo

Quid = Something
Pro = For
Quo = Something
**Title IX Quid Pro Quo**

**Definition:** An employee of the recipient conditioning an aid, service, or benefit of the recipient on an individual’s participation in unwelcome sexual conduct

**New:** Only an employee (not a volunteer, another student, etc.)

**Codified:** Severity and harm presumed

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**Clergy/VAWA**

- Domestic Violence 34 U.S.C. 12291(a)(8)
- Dating Violence 34 U.S.C. 12291(a)(10)
- Stalking 34 U.S.C. 12291(a)(30)

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**Title IX – What is Sexual Harassment?**

**Old Definition**
Unwelcome conduct determined by a reasonable person to be severe, pervasive or persistent as to interfere with or limit a student’s ability to participate in or benefit from school services, activities, or opportunities

**New Definition (8/14)**
Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person’s equal access to the recipient’s education program or activity

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**Unwelcome Conduct**

- Not Consent
- Not Participation
- Not Silence
- Age Matters
- Intoxication Matters
- Culture Matters
- Ability Matters

**reasonable person**

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**Unwelcome vs. Consent**

- Consent under Illinois law
- Consent under your Institution’s policy
- Role of drugs and alcohol on ability to consent
Hostile Environment Factors

Context, Nature, Scope, Frequency, Duration, and Location of the Incidents

Identity, Number, Ages, and Relationships of the Persons involved

Thumbs Up or Down

Is this severe, pervasive, and objectively offensive?

What about.... casual or isolated comments or conduct?

Is this TIX Sexual Harassment?

- Male students photographed themselves outside the student center holding a sign that read “We Love IIT Sluts”
- A report circulated among athletic teams ranked freshman women by how drunk you would have to be to hook up with them
- A female professor repeatedly tells a male student how good he looks after losing weight
- Male students held a “march” chanting “No means yes; yes means anal.”
Is this TIX Sexual Harassment?

A professor tells a student he will give her a good grade if she gives him a backrub alone in his office after class

A female student attempts to grab another student’s breasts during a soccer game

A student sends another student multiple notes calling her a slur used for lesbians, mocking her for having “boy” hair.

A student sends a naked picture to her boyfriend. What if he makes a webpage and shares it with other students?

Title IX Sexual Harassment Must Be “In a Program or Activity”

Program or Activity: Any location, events, or circumstance over which the recipient exhibits substantial control over both the alleged harasser and the “context” in which the harassment occurred

Online & Off Campus

Substantial control over the context?

Schools need only address sex discrimination occurring against a person in the United States under Title IX

TIX DISMISSALS

Mandatory if conduct alleged:
- Not sexual harassment if true
- Did not occur in the school’s program or activity
- Did not occur in the United States

Permissive if:
- Complainant requests to withdraw in writing
- Respondent’s enrollment or employment ends
- Specific circumstances prevent recipient from gathering evidence sufficient to reach a determination (e.g., passage of time, lack of cooperation by complainant)
### Policies on Harassment

- Sexual Harassment Policy
- Title IX Grievance Procedure
- Code of Conduct
- Employee Handbooks etc.

### Compare to Clery

- Clery geography
  - On campus (slightly different reporting requirements for on campus housing)
  - Public property within or immediately adjacent to campus
  - In or on non-campus buildings or property that your college owns or controls

https://www.campussafetymagazine.com/clery/clery-act-geography-definitions-clery-map-examples/

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**Strict Jeopardy**

An individual can **NOT** be tried twice for the same crime.

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**Straight Talk**

Hypothetical

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**How Must the Institution Respond?**
Adequate Response

1. Initial Response/Supportive Measures
2. Investigation
3. Decision
4. Appeal

Title IX Coordinator

• Virginia Foster
• Must be called Title IX Coordinator
• Must meet with alleged victims of sexual harassment (the Title IX Complainant) covered by the new Title IX regulations (can delegate)

Title IX Respondent:
A person who has been reported to be the perpetrator of conduct that could constitute sexual harassment

Title IX Complainant:
A person who is alleged to be the victim of conduct that could constitute sexual harassment NOT a third party who reports
Title IX Sexual Harassment perpetrated against someone else
NOT the Title IX Coordinator, even if the TIXC “signs” a Formal Complaint

New: Initial Response

Title IX Coordinator must promptly, even if no Formal Complaint is filed:
• Contact the Title IX Complainant to discuss the availability of “supportive measures”
• Consider the Title IX Complainant’s wishes with respect to supportive measures
• Inform the Title IX Complainant of the availability of supportive measures with or without the filing of a formal complaint
• Explain the process for filing a Formal Complaint

Initial Response/Supportive Measures

Apply to parties in both reports and Formal Complaints of sexual harassment

Title IX Complainant: A person who is alleged to be the victim of conduct that could constitute sexual harassment
Title IX Respondent: A person who has been reported to be the perpetrator of conduct that could constitute sexual harassment

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Supportive Measures

What Changed?

OLD TERM (OCR Guidance)
• Used terms such as “interim measures” or “interim steps” to describe measures to help a complainant maintain equal educational access
• Implied only available during pendency of investigation, did not mandate offering them, not clear if could be punitive or disciplinary, and did not clarify if available to respondents

NEW TERM (Final Rule)
• Non-punitive, individualized services, offered as appropriate and without charge to a complainant or a respondent before or after the filing of a formal complaint, or where no complaint has been filed (34 C.F.R.106.30(a)).
• Should be designed to restore or preserve equal access to the education program or activity without “unreasonably” burdening the other party

Examples of Supportive Measures
• Counseling
• Course modifications
• Schedule changes
• Increased monitoring or supervision

A supportive measure that completely removes a respondent from an activity would likely be considered punitive, except for “emergency removals” for students and “administrative leaves” for employees

Clery Act Accommodations vs. Supportive Measures

• Complainant/victim must receive notification of existing and available options for available assistance and how to request changes to:
  • Academic, living, transportation, and working situations
  • Protective measures
  • Legal and advocacy assistance
  • Visa and immigration resources

Clery/VAWA

• Notify Parties in writing of various items:
  ✓ Standard of evidence
  ✓ Steps survivors should follow after covered crime
  ✓ Available rights and options internally and externally
  ✓ How confidentiality will be preserved
  ✓ Available resources on- and off-campus
  ✓ Finding and sanctions (and rationale)

Emergency Removal/ Admin Leave

Immediate emergency removal (34 C.F.R. 106.44(c))
• Based on an individualized safety and risk analysis
• Necessary to protect a student or other individual from immediate threat to physical health or safety
• Notice, opportunity to challenge provided “immediately” provided the removal
• Consider other laws, e.g., 58100, “change in placement” under IDEA

Employee administrative leave (34 C.F.R. 106.44(d))
• Not prohibited
• Consider state law, board policy, handbooks, and bargaining agreements
Confidentiality

- Not required to maintain anonymity of Complainant after formal complaint is filed
- Both parties must be identified (if identity is known) in written notice of allegations
- Using party initials or withholding Complainant’s identity is insufficient

Informal Resolution

INFORMAL RESOLUTION IS NOT PERMITTED UNDER THE FOLLOWING CONDITIONS:

- Cannot condition enrollment, employment, or any right on waiver of right to investigation and adjudication of formal complaints under grievance procedure
- Cannot require use of informal resolution process
- Cannot offer informal resolution process until formal complaint is filed
- Not available to resolve allegations that employee sexually harassed a student

INFORMAL RESOLUTION MAY MOVE FORWARD UNDER THE FOLLOWING CONDITIONS:

- Any time prior to reaching a determination, either party may request informal resolution
- Requires voluntary, written consent from both parties
- Any party has a right to withdraw prior to agreement

Informal Resolution Facilitators

- We do not recommend using the Title IX Coordinator or investigator(s) or decisionmakers (complaint and appeal)

Written Notice: Required

- To both parties
- In writing
- Allegations
- Requirements of informal resolution process (including circumstances under which the party cannot resume a formal complaint arising from the allegations)
- Resulting consequences of participating (e.g., records)
New: Formal Complaint Response

34 C.F.R. 106.45(b)

- Requires a number of specific steps for investigating, dismissing, and determining responsibility in formal complaint
- Major shift from previous, more deferential stance toward specific policies and practices for complaint resolution

ANATOMY OF AN INVESTIGATION

- Written notice to the parties
- Choosing an investigator
- Required elements of an investigation

More Steps: Written Notice

- Written notice to known parties “upon receipt of written complaint”
- In sufficient time to allow respondent to prepare a response before any initial interview
- Must include:
  - Notice of grievance process, including any informal resolution process
  - Notice of allegations, in sufficient detail to allow respondent to prepare a response (names of known parties, conduct alleged, date and location of conduct, if known)

More Steps: Written Notice

- Must include:
  - Statement that respondent presumed not responsible and that responsibility determined at conclusion of grievance process
  - Notice of parties’ rights to have an attorney or non-attorney advisor and to inspect and review evidence
  - Notice of any provision in the code of conduct that prohibits knowingly making false statements or providing false evidence during the grievance process
- Must be supplemented if new allegations opened for investigation

Written Notice: Required

- Informal resolution notice
- Notice at start of investigation
- Dismissal notice
- Interview notices
- Report
- Notice why proposed questions not asked on cross and why
- Written determination and notice of appeal rights

Written Notice: Recommended

- Document information to complainant at initial meeting, including supportive measures requested/provided
- Document that review of evidence provided to both parties
- Document opportunity to ask questions, answers, follow-up questions, etc.
Who should investigate?

- Can be the Title IX Coordinator
- But should it?

Who should investigate?

- No “one size fits all” approach
- May need to designate
- Consider the perception of bias
  - Your friendship or other relationship with the accused or their family
  - Your sex/gender identity
  - Your personal conflicts (even if just perceived)
  - Personality conflicts

Contents of an Investigation

- Burden of proof on school
- Certain treatment records cannot be obtained without voluntary, written consent
- No restriction of rights of parties to discuss allegations or gather or present evidence
- Same opportunities for others present during interviews or related proceedings (e.g., attorney or non-attorney advisor)
- Written notice to parties of date, time, participants, purpose, and location of each investigative interview with sufficient time to prepare
- All evidence provided to parties and their advisors with 10 days to respond before report
- Written investigative report fairly summarizes the relevant evidence provided to parties and advisors at least 10 days before hearing or other determination of responsibility

Investigation Best Practices

- Investigation plan
- Follow steps in policies closely
- Coordinate with law enforcement as required by policy and practice
- Remember that both complainants and respondents may be experiencing trauma and other strong emotions
- Consult with Title IX Coordinator and/or counsel as needed
Interviewing Best Practices

- Explain your role as a neutral
- Open-ended questions followed by more tailored follow up
- Allow ample time, don’t interrupt or rush
- Ask “Is there anything else?”
- Ask for other witnesses, evidence, incidents

Interview Notes

- Include: Facts + Statements (consider quotes, but be careful)
- Don’t Include: Conclusions + Judgements
- Label: Name of Witness, Date, Time, Interviewer, Location, Method, Those Present

Notice to Parties in Interviews

- What to expect about future contact (timing, updates, encourage follow-up to you)
- Written copy of policies/procedures
- Notify of retaliation rights – provide specific examples
- No “Gag” order but can warn of retaliation risks

First Amendment Rights

Investigation Plans Aren’t Static

Reassess plan for investigation frequently

Gathering Other Evidence
Warning! Medical Records

- Notice of allegations should not divulge either party’s medical information
- Prohibited from accessing or using medical, psychological, or similar records in grievance process without a party’s (or parent’s) voluntary, written consent

Opportunity to Review Evidence

- Before the investigatory report is completed, evidence relating to the allegations must be sent to each party and advisor and should include all evidence (including that which the school does not intend to rely upon and exculpatory and inculpatory evidence)
- Parties have 10 days to provide a written response

Investigation Report Writing

- Fairly summarizes the relevant evidence
- Provide the report to the parties and their advisors, if any, for their review and written response, at least 10 days before a hearing or other determination of responsibility

Live Hearing

- Questioning
- Cross-examination
- Advisor(s)
- Virtual hearings
Relevance

• Cross-Examination
• Provide reasoning for irrelevance
• Consider all relevant evidence
• Exceptions

Relevance

• Rape shield laws
• Treatment records
• Legally privileged information
• Improper inference
• Prior statements

Decision

Determinations of Responsibility
34 C.F.R. 106.45(b)(6)

• Live hearing required
• Live cross by party advisors required

Decisionmaker(s) (Complaint)

• Cannot be the Title IX Coordinator or the investigator(s)
• Live hearing not required
Rulings on Relevance in Written “Cross”

- Provide reasoning for irrelevance
- Admit and consider all relevant evidence
- Exceptions
  - Sexual behavior (except in limited situations)
  - Legal privilege
  - Treatment records

Written Determination

Identify
- Identify the allegations

Describe
- Describe procedural steps taken

Cite
- Cite potential policy violations

Summarize
- Briefly summarize all relevant evidence

Provide
- Provide statement of result, with rationale, for each allegation

Appeal
- Appeal procedures

Factual Findings

Separate findings for each alleged policy violation
- Focus on material facts (i.e., those that affect outcome)
- Can describe undisputed and disputed facts separately
  - For any facts in dispute, show your work and reasoning

Remedies

- Disciplinary action against perpetrator
- Counseling for perpetrator/victim
- Changes to services or policies
- Remedies for complainant and others
- Etc.!!
5 Appeal

Appeal Process

- Available to both parties
- Three bases for appeal
- Notify party of appeal in writing
- Apply procedures equally for both parties
- Opportunity to submit written statement
- Issue written decision to both parties

Bias, Conflicts of Interest, and Other Fairness Concerns

Decisionmaker(s) (Appeal)
Cannot be the Title IX Coordinator or the investigator(s) or the decisionmaker (complaint)

Bias

The Title IX Coordinator, investigator, decision-maker, or informal resolution facilitator must not have a conflict of interest or bias for or against Complainants or Respondents generally or for or against any individual Complainant or Respondent. And that they not prejudge any matter before them.

In the Chat

What do these words mean to you:
- Prejudgment
- Conflict of Interest
- Bias
5 Min Guided Breakout

What steps can you take to avoid:
- Prejudgment
- Conflict of Interest
- Bias

Recordkeeping

Must maintain the following for 7 years:
- Sexual harassment investigation documents, including:
  - Determination regarding responsibility
  - Recordings or transcripts of live hearing
  - Disciplinary sanctions imposed on Respondent
  - Remedies provided to Complainant
- Appeal and result
- Informal resolution and result
- Actions taken in response to a report of sexual harassment
- Actions taken in response to a formal complaint of sexual harassment

Clery/VAWA Programming

- Primary prevention and awareness programs for all incoming students and new employees
- Ongoing prevention and awareness campaigns for students and employees
- Range of topics, including definitions of prohibited conduct, resolution procedures, possible sanctions and protective measures, and available resources and options
Required Programming Under VAWA

- Primary prevention and awareness programs for all incoming students and new employees
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Questions
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