An Introduction to Managing Title IX Sexual Harassment on Campus

Thompson Coburn LLP
Title IX Training Series | July 2020
Thompson Coburn LLP

- Full-service law firm with over 380 attorneys.
- Offices in Chicago, Los Angeles, St. Louis, Dallas, and Washington, D.C.
- Higher education practice provides legal counsel, compliance, and training services to colleges and universities.
Purpose of Training Series

The Title IX rule effective August 14, 2020, creates a new and specific process by which postsecondary institutions must manage complaints of covered sexual harassment on campus.

The TC Title IX Training Series is designed to provide foundational training to those individuals who will help to administer this required process, including Title IX coordinators, investigators, adjudicators, advisors, appeal officers, and individuals responsible for managing informal resolutions.
Institutions of higher education are welcome to use this foundational training series at their discretion, and to post the series to their websites as part of their Title IX training materials (a requirement under the new rule). TC also is available to prepare custom Title IX training sessions, hearing simulations, and other assistance with Title IX matters (contact Aaron Lacey or Scott Goldschmidt).
Curriculum for Training Series

The foundational training series includes the following six sessions:

1. Introduction to Managing Title IX Sexual Harassment
2. Formal Complaints of Title IX Sexual Harassment
3. Investigations & Informal Resolutions
4. Hearings
5. Determinations
6. Appeals
## Syllabus for this Session

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Title IX
Fundamentals
The Title IX Statute

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in education programs and activities and employment.

- Covers not only equity in athletic programming, but all forms of discrimination based on sex.
- Protects students and employees.
- Applies to all institutions that receive federal financial assistance, either directly or indirectly.
- Enforced by the Office of Civil Rights.

20 U.S.C. §1681 et seq.
Sex-Based Discrimination

What is sex-based discrimination?

• The term is not defined in Title IX.
• “The Department follows the Supreme Court’s approach in interpreting conduct “on the basis of sex” to include conduct of a sexual nature or conduct referencing or aimed at a particular sex.”
• Includes sexual harassment (e.g., unwelcome sexual advances, requests for sexual favors), and sexual violence, which is a subset of sexual harassment (e.g., dating violence, domestic violence, sexual assault, or stalking)

The Title IX Regulations

Amplify the statute considerably, requiring institutions to:

- Disseminate a policy which includes a non-discrimination statement.
- Designate a Title IX Coordinator.
- Adopt and publish grievance procedures that are prompt and equitable and allow for adequate, reliable, and impartial investigation of complaints.
- Take action to address and prevent sex-based discrimination.

34 CFR 106.8.
The Title IX Regulations

With regard to students, specifically prohibit discrimination in:

- Admission and recruitment
- Education programs or activities
- Housing
- Facilities
- Counseling
- Financial and employment assistance
- Health insurance and benefits
- Marital or parental status
- Athletics

34 CFR Part 106.
**The Title IX Regulations**

With regard to *employment*, specifically prohibit discrimination in:

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34 CFR Part 106.
The New Rule & Sexual Harassment
## Title IX Timeline

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<tr>
<td>June 23, 1972</td>
<td>Title IX of the Education Amendments of 1972</td>
</tr>
<tr>
<td>July 21, 1975</td>
<td>ED publishes 34 CFR Part 106, which implements Title IX.</td>
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<tr>
<td>March 13, 1997</td>
<td>ED publishes Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties.</td>
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<td>June 22, 1998</td>
<td>Gebser v. Lago Vista Ind. Sch. Dist., 524 U.S. 274 (1998) (holding that an individual may only recover monetary damages under Title IX when a school official with authority to institute corrective measures has actual notice of the harassment but is deliberately indifferent to it).</td>
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<td>May 24, 1999</td>
<td>Davis v. Monroe Cty. Bd. of Educ. , 526 U.S. 629 (1999) (holding that a school can be liable under Title IX for student-on-student sexual harassment, but only if the school is deliberately indifferent to known sexual harassment, the respondent is under the school's disciplinary authority, and the behavior is so severe, pervasive, and objectively offensive that it denies access to the school's program and activities).</td>
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<td>Jan. 2001</td>
<td>Following significant judicial activity, ED publishes <a href="https://example.com">Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties</a>. ED draws distinction between standards for administrative enforcement and standards for private litigation.</td>
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<td>Nov. 13, 2000</td>
<td>ED updates Title IX rules to incorporate the Civil Rights Restoration Act’s broadened definitions of “program or activity” and “program.”</td>
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<tr>
<td>Oct. 25, 2006</td>
<td>ED updates Title IX rules to clarify and modify requirements regarding single-sex schools, classes, and extracurricular activities in elementary and secondary schools.</td>
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<tr>
<td>April 2011</td>
<td>ED publishes <a href="https://example.com">DCL</a> with extensive guidance concerning school responsibilities for preventing and addressing sexual harassment and sexual violence.</td>
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<tr>
<td>April 2014</td>
<td>ED publishes <a href="https://example.com">Questions and Answers</a> on Title IX and Sexual Violence, further clarifying guidance articulated in 2001 Guidance and 2011 DCL.</td>
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<tr>
<td>Sept. 2017</td>
<td>ED publishes DCL rescinding April 2011 DCL as well 2014 Q&amp;A on Campus Sexual Misconduct.</td>
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<tr>
<td>Nov. 2018</td>
<td>On November 29, 2018, ED publishes the official version of its proposed Title IX rule in the Federal Register. The first significant rule concerning sexual misconduct since 1975.</td>
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<tr>
<td>May 2020</td>
<td>On May 19, 2020, ED publishes the official version of its final Title IX rule in the Federal Register.</td>
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<tr>
<td>August 14, 2020</td>
<td>Effective Date of new Title IX Rule.</td>
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Controversial, and already challenged, ED’s new rule is its first regulation addressing sexual harassment since 1975.

The new rule articulates a complex framework for managing allegations of sexual harassment on campus.
Discrimination Based on Sex: Institutions are obligated to adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any form of prohibited sex discrimination occurring against a person in the United States. 34 CFR 106.8(c)-(d).

Title IX Sexual Harassment: With or without a formal complaint, institutions with actual knowledge of Title IX sexual harassment occurring in an education program or activity of the school against a person in the United States must respond promptly in a manner that is not deliberately indifferent and complies with 34 CFR 106.44(a).

Formal Complaint of Title IX Sexual Harassment: In response to a formal complaint of sexual harassment, institutions must follow a Title IX formal complaint process that complies with the new standards set forth in 34 CFR 106.45.
New Definitions of Key Terms

- Sexual Harassment
- Complainant
- Respondent
- Consent
- Actual Knowledge
- Supportive Measures
- Formal Complaint

34 CFR 106.30(a) (August 14, 2020)
Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- 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 school’s education program or activity;
- an employee of the school conditioning the provision of an aid, benefit, or service of the school on an individual’s participation in unwelcome sexual conduct; or
- sexual assault, as defined in the Clery Act, or dating violence, domestic violence, or stalking as defined in VAWA.

34 CFR 106.30(a) (August 14, 2020).
Sexual Harassment

What is the basis for the new definition of sexual harassment?

- From one administration to the next, the Department has consistently maintained that the standards the agency uses to determine Title IX compliance do not need to align with those established by the Supreme Court in *Gebser* and *Davis*.
- Without surrendering this discretion, this Department has chosen “to build these final regulations upon the foundation established by the Supreme Court…”
- This Department “believes it would be beneficial for recipients and students alike if the administrative standards governing recipients’ responses to sexual harassment were aligned with the standards developed by the Supreme Court in private actions…”

Sexual Harassment

Does this definition prohibit all harassing or offensive remarks?

• No. Unwelcome conduct must be severe, pervasive, and objectively offensive. But schools can still address such remarks in a variety of ways.

Does quid pro quo harassment need to be severe, pervasive, and objectively offensive? How about Clery/VAWA offenses?

• No. Only the “unwelcome conduct” prong of the sexual harassment definition must be severe, pervasive, and objectively offensive. A victim of quid pro quo sexual harassment or Clery/VAWA sex offenses, has been effectively denied equal access to education.
Complainant. An individual who is alleged to be the victim of conduct that could constitute sexual harassment.

Respondent. An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

Consent. The Assistant Secretary will not require schools to adopt a particular definition of consent with respect to sexual assault.

- Some schools are under state law requirements to apply a particular definition of consent for purposes of campus sexual misconduct policies.
Responding to Title IX Sexual Harassment
Responding to Title IX Sexual Harassment

An institution must respond to sexual harassment, with or without a formal complaint, when:

- the school has actual knowledge of the alleged sexual harassment;
- the alleged sexual harassment occurred in an education program or activity of the school; and
- the alleged sexual harassment was against a person physically located in the United States.

34 CFR 106.44(a) (August 14, 2020).
Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a school’s Title IX Coordinator or any official of the school who has authority to institute corrective measures on behalf of the institution.

- The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the institution.

34 CFR 106.30(a) (August 14, 2020).
Actual Knowledge

Who can make a report?
• Any person (including bystanders or anonymous reports).

Who is an official with authority to institute corrective measures on behalf of the institution?
• This is a fact-specific determination. Per the Preamble, possibly supervisors and deans. Schools can identify such individuals in a list.

Which employees must report sexual harassment to the Title IX Coordinator?
• As to employees who are not the Title IX Coordinator or Officials with Authority, schools have wide discretion to craft and implement their own employee reporting policy.
An education program or activity of the school includes “locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.”

34 CFR 106.44(a) (August 14, 2020).
How does an institution determine what constitutes a program or activity?

• “It’s a fact specific inquiry. The key questions are whether the recipient exercised substantial control over the respondent and the context in which the incident occurred.”

What if a student is sexually assaulted outside of an education program or activity but later suffers Title IX sexual harassment in an education program or activity?

• Title IX would only cover the act of sexual harassment in an institution’s education program or activity, but the institution may still choose to address the prior assault through its own process or code of conduct.

Physical Location

The complainant must be a person physically located in the United States.

- The Department acknowledges that individuals experiencing sexual harassment while outside of the country (i.e., studying abroad) would not be covered.
- However, it would appear that sexual harassment perpetrated online against an individual physically located in the United States could be covered, even if the perpetrator were located outside of the country.

34 CFR 106.44(a) (August 14, 2020).
Elements of a Sufficient Response
Institutions must respond “promptly” and “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.”

In the proposed rule, the Department offered additional detail regarding conduct that would, or would not, constitute deliberate indifference. The final rule does not include this language.

34 CFR 106.44(a) (August 14, 2020).
Elements of a Sufficient Response

However, the final rule does specify that a Title IX Coordinator must promptly contact the complainant to:

- discuss the availability of supportive measures;
- consider the complainant’s wishes with respect to supportive measures;
- inform the complainant of the availability of supportive measures with or without the filing of a formal complaint; and
- explain to the complainant the process for filing a formal complaint.

A failure to satisfy these specific requirements could be characterized as deliberate indifference.

34 CFR 106.44(a) (August 14, 2020).
Further, the final rule specifies that a school’s response must treat complainants and respondents equitably by offering supportive measures to a complainant, and by following a compliant grievance process before the imposition of any disciplinary sanctions against a respondent. Once again, a failure to satisfy these requirements could be deemed deliberate indifference.

34 CFR 106.44(a) (August 14, 2020).
Elements of a Sufficient Response

Does the deliberate indifference standard relieve recipients of their obligation to respond to every known allegation of sexual harassment?

• No.

In the absence of a formal complaint, are there circumstances where an institution would initiate a grievance process against the respondent to avoid being deliberately indifferent?

• Yes. The Title IX Coordinator may sign a formal complaint to initiate a grievance process. Examples noted in the Preamble are threat, serial predation, violence, or weapons.

Interim & Supportive Measures
An institution would be permitted to remove a respondent from campus on an emergency basis, provided:

- that the school undertakes an individualized safety and risk analysis;
- determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal; and
- provides the respondent with notice and an opportunity to challenge the decision immediately following the removal.

An institution also would be permitted to place a “non-student employee respondent” on administrative leave during the “pendency of [its] grievance process.”

34 CFR 106.44(c)-(d) (August 14, 2020).
Interim Measures: Removal / Leave

What does the “individualized safety or risk analysis” require?

• “…more than a generalized, hypothetical, or speculative belief that the respondent may pose a risk to someone’s physical health or safety.”

What does it mean that an individual can challenge their removal “immediately” after removal?

• This is fact-specific, but is generally understood as occurring without delay, as soon as possible, given the circumstances.

Interim Measures: Removal / Leave

Is self-harm grounds for emergency removal?

• Yes, when the threat arises from allegations of sexual harassment. But it is important for institution’s to consider and comply with the ADA.

Do respondents who are employees receive the same due process protections with respect to emergency removals (i.e., post-removal notice and opportunity to challenge the removal)?

• Yes.
Supportive measures means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.

Such measures are designed to restore or preserve equal access to the school’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the school’s educational environment, or deter sexual harassment.

34 CFR 106.30(a) (August 14, 2020).
Examples of Supportive Measures

- Counseling
- Extensions of deadlines or other course-related adjustments
- Modifications of work or class schedules
- Campus escort services
- Mutual restrictions on contact between the parties
- Changes in work locations
- Changes in housing locations
- Leaves of absence
- Increased security and monitoring of certain areas of the campus

34 CFR 106.30(a) (August 14, 2020).
Supportive Measures

The school must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the school to provide the supportive measures.

The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.
Formal Complaints of Title IX Sexual Harassment
A formal complaint of Title IX sexual harassment means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment.

The phrase “document filed by a complainant” means a document or electronic submission that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.

34 CFR 106.30(a)-(b) (August 14, 2020).
Formal Complaint

- A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail... and by any additional method designated by the school.

- At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the school with which the formal complaint is filed.

34 CFR 106.30(a) (August 14, 2020).
Formal Complaint Process

- Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party, and must comply with applicable Title IX requirements.

- For the purpose of addressing formal complaints of sexual harassment, a school’s formal complaint policy and process must comply with a wide range of specific requirements set out in the new rule, including those on the following slide.

34 CFR 106.45(b) (August 14, 2020).
# Formal Complaint Process

- **Core Requirements**
  - Details 10 core requirements of formal complaint process

- **Complaint Dismissal**
  - Grounds for dismissal and procedural requirements

- **Consolidation**
  - Complaint consolidation in specific circumstances

- **Notice of Allegations**
  - Requirements for initial and ongoing notice to parties

- **Investigations**
  - 7 required elements of formal investigation

- **Informal Resolutions**
  - Permits informal resolution where appropriate

- **Hearings**
  - Hearing requirements, including cross-x and advisors

- **Determinations**
  - Requirements for adjudicators and determinations

- **Appeals**
  - Grounds and procedures for appeals

- **Recordkeeping**
  - Record maintenance requirements for specified periods

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34 CFR 106.45(b)(1)-(10) (August 14, 2020).
Recordkeeping
For each formal complaint of Title IX sexual harassment, the institution must maintain records for 7 years that include:

• records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment;
• the basis for the school’s conclusion that its response was not deliberately indifferent;
• documentation that the school took measures designed to restore or preserve equal access; and
• if the school did not provide supportive measures, the reasons why such a response was not clearly unreasonable in light of the known circumstances.

34 CFR 106.45(b)(10) (August 14, 2020).
If there was an adjudication, the records also must contain:

- any determination regarding responsibility;
- any audio or audiovisual recording or transcript;
- any disciplinary sanctions imposed on the respondent;
- any remedies provided to the complainant;
- any appeal and the result; and
- any informal resolution and the result.
Recordkeeping

Apart from any specific proceeding, institutions also must keep for 7 years, all materials used to train Title IX Coordinators, investigators, adjudicators, and any person who facilitates an informal resolution process. Further, schools must make these training materials **publicly available on their websites**.
Additional Considerations
The new rule specifically prohibits retaliation, providing that no school “or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part.”

34 CFR 106.71(a) (August 14, 2020).
Title VII of the Civil Rights Act of 1964 generally prohibits discrimination in the workplace, and has been interpreted by the Supreme Court to prohibit sexual harassment.

In the Preamble to the new rule, the Department observes that it “is aware that Title VII imposes different obligations with respect to sexual harassment, including a different definition, and recipients that are subject to both Title VII and Title IX will need to comply with both sets of obligations.”
Relationship to Title VII

This having been acknowledged, the Department concludes that “nothing in these final regulations precludes an employer from complying with Title VII. The Department recognizes that employers must fulfill both their obligations under Title VII and Title IX, and there is no inherent conflict between Title VII and Title IX.”

Resources
Office of Civil Rights

OCR Title IX Blog
- Will include new guidance on a rolling basis.

OCR Email Address
- OPEN@ed.gov
- May be used for submitting inquiries regarding the new Title IX rule.
Title IX Rule Comparison

• Shows the changes the new rule will make to 34 C.F.R. Part 106 as of August 14, 2020.
## Higher Ed Webinar Series

### 2019 | 2020 Series Calendar

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<td>October 2019</td>
<td>Merging Institutions of Higher Education: Corporate and Tax Considerations</td>
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<td>Higher Education &amp; Immigration: Five Evolving Areas to Watch</td>
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<td>The CARES Act for Higher Education: Strategy and Implementation</td>
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<td>May 2020</td>
<td>ED’s New Title IX Rule: A Detailed Examination</td>
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If you would like to register for our webinars, email srichter@thompsoncoburn.com and we will send you a link as we open each webinar for registration.
### Webinars on Demand

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<th>The CARES Act for Higher Education: Strategy and Implementation</th>
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<td>Contingency Planning for Distressed Institutions of Higher Education</td>
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*Images and logos not included in the natural text representation.*
ED issues instructions to Higher Ed to obtain CARES Act funds

Earlier this afternoon, the U.S. Department of Education sent a letter to institutional leaders detailing the process for securing the first round of relief funds under the Coronavirus Aid, Relief, and Economic Security ("CARES") Act. The Department has included a breakdown of the funds each institution will receive under the Higher Education Emergency Relief Fund, as well as a Certificate of Agreement that must completed.

Learn More

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Aaron Lacey is the leader of Thompson Coburn’s Higher Education practice, host of the firm’s popular Higher Education Webinar Series, and editorial director of REGucation, the firm’s higher education law and policy blog.

BORROWER DEFENSE RULE: Reporting Guide
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