



Wright State President's Council
Title IX Training – Nov. 16, 2022



Disclaimer

- Title IX is in a perpetual state of change. Watch for further updates, and expect to see policy revisions on a regular basis as case law and guidance develop.

2

Discussion Rules

- Questions are encouraged!
- “For the sake of argument...”
- Be aware of your own responses and experiences
- Follow up with someone if you have questions or concerns
- Take breaks as needed

Agenda

- Institutional Ethic of Care
- Title IX + Clery + *Baum*: A History
- What is Prohibited?
- How to Make a Report
- What Happens When a Report Is Made?
- Keys to Minimizing Title IX Liability

4

Exercise

- What are the top three values that are fundamental to both our conduct and Title IX process? (one word each)
- What is the most important thing we want students to take away from these procedures? (three words or less)

You have 90 seconds. Go.

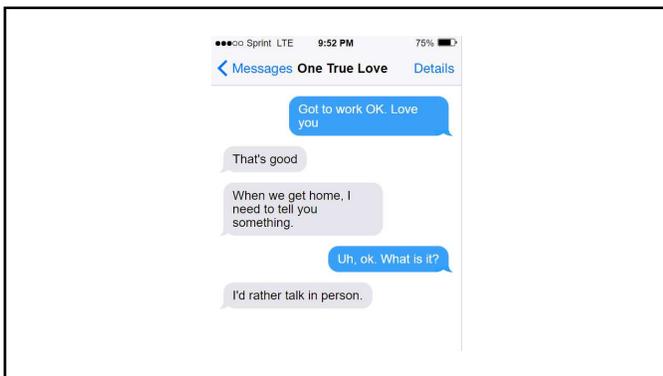
Institutional Ethic of Care

- The values you build into your investigative/adjudicative procedures
- The values you build into your community
- The way you treat members of your campus community
- The way you expect members of your campus community to treat each other

Note: Your ethic of care should be consistent across the institution.

Roles in the Process

- Our court system is adversarial. Is that what your process is?
- Does your process have the equivalent of the police and the prosecutors, or is your process something different entirely?



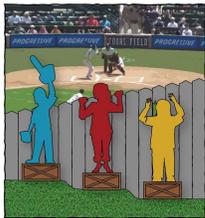
Overarching Themes

- Have a compliant process.
- Comply with your process.
- When your policy isn't clear, choose the answer that comports with your institutional ethic of care.
- Transparency is incredibly important in every part of the process.
- Attention to privacy builds trust.

“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...”

- 20 U.S.C. 1681(a)

Title IX is an **equity** statute – meant to make sure that our community members have equitable access to our programs and activities.



EQUALITY



EQUITY

A Brief History of IX (1 of 2)

- 1972 – Title IX of the Education Amendments of 1972 is enacted into law
- 1975 – Department of Health, Education and Welfare issues regulations about enforcement (including athletics)
- 1986 – *Meritor Savings Bank v. Vinson* – Sexual harassment is a form of sex discrimination, in violation of Title VII
- 1997 – Department of Education issues guidance on sexual harassment in schools; notice and comment process begins
- 1999 – *Davis v. Monroe County Bd. of Educ.* – Schools can be held liable for student-on-student sexual harassment

A Brief History of IX (2 of 2)

- 2001 – OCR issues guidance indicating that institutions must address sexual harassment, including between students
- 2011 – Dear Colleague Letter (withdrawn) includes sexual assault as sexual harassment; provides protections for victims (and therefore both parties)
- 2014 – Q&A (withdrawn) addresses issues raised by 2011 DCL
- 2018 – Proposed regulations
- 2020 – Adoption of new regulations
- 2021 – New DCL withdraws “suppression rule” in regulations

13

Clery Act in Context

- April 5, 1986 – Jeanne Clery is raped and murdered at Lehigh University
- 1990 - Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act – tied to Higher Education Act funding
- 2013 – Violence Against Women Act amends the Clery Act with regard to sexual assault, dating violence, domestic violence, and stalking procedures
- July 1, 2015 – Current regulations go into effect
- 2016 Handbook – Issued to give detailed guidance on compliance
- October 9, 2020 – 2016 Handbook is rescinded; new Appendix put in place; updated January 19, 2021

14

Where does Clery fit?

- Title IX policies handle sexual assault, dating violence, domestic violence, and stalking when:
 - The complainant is currently participating or attempting to participate in your education program or activity and
 - The conduct occurred in your education program or activity and
 - The conduct occurred against a person in the United States

Both laws protect the rights of parties in these cases.

15

Doe v. Baum

- 6th Circuit Case, decided Sept. 7, 2018
- The court held that “if a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder.”

Ohio’s public institutions of higher education have provided live hearings with some form of cross-examination since even before the *Baum* decision.

16



The New Definition of Sexual Harassment Under Title IX

Plus Issues relating to Sexual Assault, Dating Violence, Domestic Violence, and Stalking

Sexual Harassment - IX

- **Sexual harassment** means unwelcome, sexual, sex-based and/or gender-based verbal, written, online and/or physical conduct that takes place on campus or part of an education program or activity within the United States and satisfies one or more of the following:
 - Sexual Violence – Sexual Assault (any sexual act directed against another person without consent); Dating Violence; Domestic Violence; Sex/Sexual based stalking
 - Quid Pro Quo – When a University employee conditions the provision of an aid, benefit, or service of the University on an individual’s participation in unwelcome sexual conduct.
 - Unwelcome Sexual Conduct – determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to WSU’s education program or activity.

18

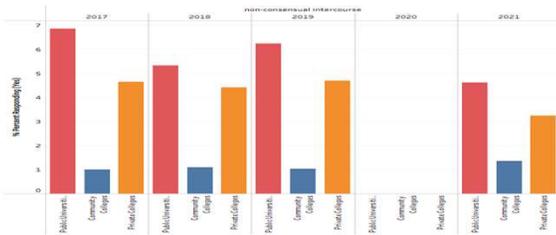
Sexual Violence (1 of 4)

Sexual Assault

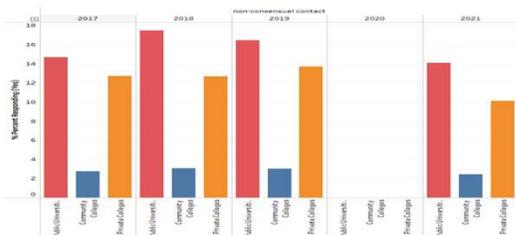
- Rape (non-consensual penile/vaginal penetration)
- Sodomy (non-consensual oral/anal penetration)
- Sexual Assault with an Object (penetration with object or body part other than genitalia)
- Fondling – Must be done “for the purpose of sexual gratification”
- Incest – Closer in kin than second cousins
- Statutory rape – Complainant is under age 13, or under age 16 and the respondent is 18 or older

19

Sexual Assault Data ODHE Survey – Non-Consensual Intercourse



Sexual Assault Data ODHE Survey – Non-Consensual Contact



Sexual Violence (2 of 4)

- Dating Violence**

- An act of violence committed on the basis of sex by a person who is or has been in a romantic or intimate relationship with the complainant. The existence of such a romantic or intimate relationship is determined by the length of the relationship, the type of relationship, and the frequency of interactions between the individuals involved in the relationship.

22

Sexual Violence (3 of 4)

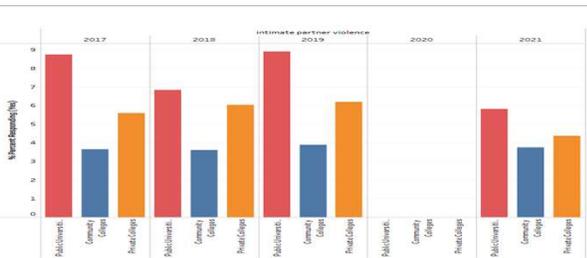
- Domestic Violence**

An act of violence committed on the basis of sex by:

- A current or former spouse or intimate partner of the complainant;
- A person with whom the complainant shares a child in common;
- A person who is cohabitating with, or has cohabitated with, the complainant as a spouse or intimate partner;
- A person similarly situated to a spouse of the victim under the domestic/family violence laws of the jurisdiction;
- Any other person against an adult or youth victim who is protected from that person's acts under the domestic/family violence laws of the jurisdiction

23

ODHE Data - IPV



24

Sexual Violence (4 of 4)

• Sex/Sexual Based Stalking

Engaging in a course of conduct directed at a specific person on the basis of sex that would cause a reasonable person with similar characteristics under similar circumstances to:

- Fear for the person's safety or the safety of others; or
- Suffer substantial emotional distress.

25

Stalking – Course of Conduct

“Course of Conduct”

- Under VAWA regulations: means **two or more acts**, including, but not limited to, acts in which the stalker 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.

26

Stalking – Reasonable Person

“Reasonable person”

Under VAWA regulations: means a reasonable person under similar circumstances and with similar identities to the victim.

27

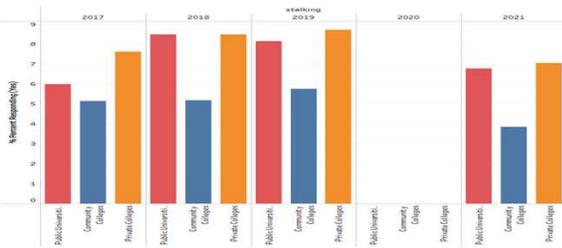
Stalking – Substantial Emotional Distress

“Substantial emotional distress”

Under VAWA regulations: means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

28

ODHE Data - Stalking



29

Sexual Harassment: Quid Pro Quo

- Only applies to employee respondents (can be any complainant)
- DOE interprets this broadly to encompass implied *quid pro quo*
- No intent or severe or pervasive requirements, but must be unwelcome
- “[A]buse of authority is the form of even a single instance...is inherently offensive and serious enough to jeopardize educational access.”

Sexual Harassment: Davis/Gebser

- The second prong: severe, persistent, and objectively offensive and deny equal access (which is not the same as under Title VII)
- Does not require intent
- Reasonable person standard – means a reasonable person in the shoes of the complainant (30159)

Severe

- Takes into account the circumstances facing a particular complainant
- Examples: age, disability status, sex, and other characteristics
- Preamble discussion states that this removes the burden on a complainant to prove severity (30165)

Pervasive

- Preamble indicates pervasive must be more than once if it does not fall into the above (30165-66)
- Preamble reminds us that quid pro quo and Clery/VAWA (domestic violence, dating violence, stalking) terms do not require pervasiveness

Objectively Offensive

Reasonable person is very fact-specific (30167)

- Because so fact-specific, different people could reach different outcomes on similar conduct, but it would not be unreasonable to have these different outcomes
- Preamble notes that nothing in the Regulations prevents institutions from implicit bias training

Retaliation (1 of 2)

No 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 Policy, 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.

Retaliation (2 of 2)

No person may intimidate, threaten, coerce, or discriminate against any individual for the purpose Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report of formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX, constitutes retaliation.

Remember Title VII

- Title VII still applies to protect employees from sexual harassment
- Title VII definition:
 - Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when (a) submission to or rejection of this conduct explicitly or implicitly affects an individual's employment, or (b) unreasonably interferes with an individual's work performance or creates an intimidating, hostile or offensive work environment.

37



Scope of your Education Program/Activity

(Including everything your institution does, plus a bit more)

Jurisdiction

“Education program or activity”

“includes **locations, events, or circumstances** over which the recipient 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.”
 §106.30(a)

39

Education Program or Activity

Locations, events, or circumstances with substantial control – the easy ones:

- Residence halls
- Classrooms
- Dining halls

40

Not an Education Program or Activity

Locations, events, or circumstances without substantial control:

- **Anything** outside of the United States;
- Privately-owned off campus apartments and residences that do not otherwise fall under the control of the postsecondary institution (example: privately owned apartment complex not run by a student organization)

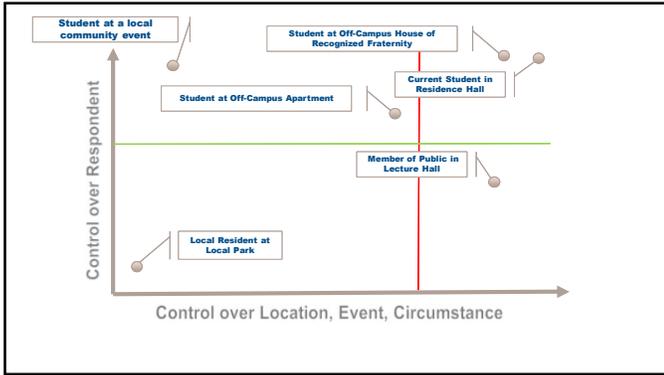
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Education Program or Activity

Depends on fact-analysis under “substantial control”:

- Conventions in the United States?
- Holiday party for an academic department?
- Professor has students over to house?

42

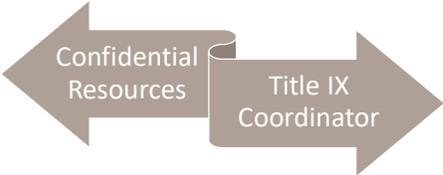




How to Make a Report

Or, what do you do with an allegation of Prohibited Conduct?

If You Are The Complainant



45

If You Become Aware Of Allegations

You have two separate reporting obligations:

1. If the allegations could constitute sexual harassment, you must report what you know to the Title IX Coordinator (Shannon Norton).
2. If the allegations constitute a felony and/or child abuse, you must report what you know to the police.

46

You May Have The Missing Piece



WHAT'S NEXT?

What Happens When A Report Is Received

Time for options and supports.

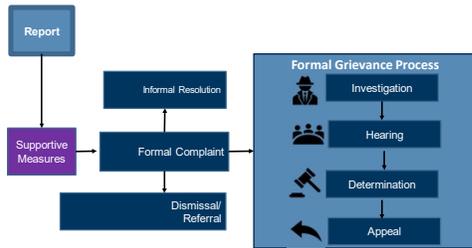
Intake

A report is any information received regarding a potential policy violation.

Result of report: Coordinator sends an email to the potential complainant inviting further discussion regarding options and supportive measures.

49

Overview of the Process



50

A Report versus a Formal Complaint

- Report – Any information received regarding potential policy violation
 - Result of report: Coordinator sends an email to the potential reporting party, inviting further discussion
 - Supportive measures are offered
- Formal complaint – A written document that:
 - Is filed by the reporting party or signed by the Title IX Coordinator
 - Alleges sexual harassment against a responding party
 - Requests that the University investigate the allegation of sexual harassment

51

**Overview of the Process:
Supportive Measures (1 of 5)**

- Non-disciplinary and non-punitive
- Individualized
- "As reasonably available"
- Without fee or charge to either party
- Available at any time (regardless of whether a formal complaint is filed)

52

**Overview of the Process:
Supportive Measures (2 of 5)**

Designed to:

- **restore or preserve access** to the University's education program or activity, without unreasonably burdening the other party;
- protect the safety of all parties and the University's educational environment; and
- deter sexual harassment

53

**Overview of the Process:
Supportive Measures (3 of 5)**

- Counseling
- Extensions of deadlines (course-related adjustments)
- Modifications of work/class schedules
- Campus escort services
- Mutual contact restrictions
- Changes in work or housing locations
- Leaves of absence
- Increased security and monitoring of certain areas of the campus
- "and other similar measures"

54

Overview of the Process: Supportive Measures (4 of 5)

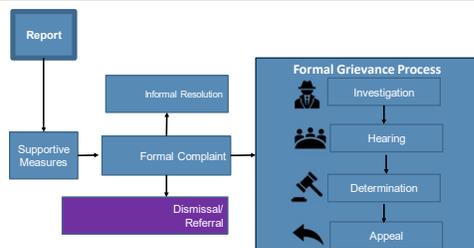
Role of the TIXC upon receiving a report:

- promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30,
- 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

Overview of the Process: Supportive Measures (5 of 5)

- Must maintain confidentiality to the greatest extent possible
- Note: Title IX Coordinator may ask other staff members to help with accommodations and may not be able to tell them all the details as to *why*.

Dismissal/Referral



Dismissal from Title IX

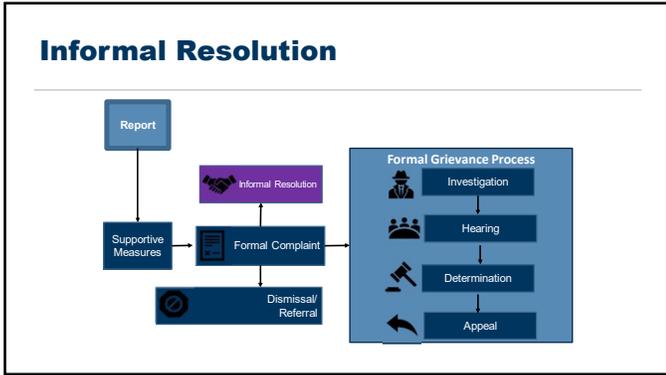
- The University may dismiss a formal complaint from the Title IX process in certain circumstances detailed on the next few slides
- If a dismissal occurs, the University may refer the allegations to another process (student conduct, employee discipline, etc.)

Mandatory Dismissal from Title IX

- Complainant was not participating/attempting to participate in education program/activity at the time complaint was filed
- Conduct not alleged to have occurred within education program/activity
- Conduct did not occur in the United States
- Complaint, if proved, does not constitute a potential violation of Title IX Sexual Harassment

Discretionary Dismissal from Title IX

- Complainant withdraws complaint in writing
- Respondent is no longer enrolled in/employed by University
- "Specific circumstances prevent [the University] from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein"



Overview of the Process: Informal Resolution (1 of 2)

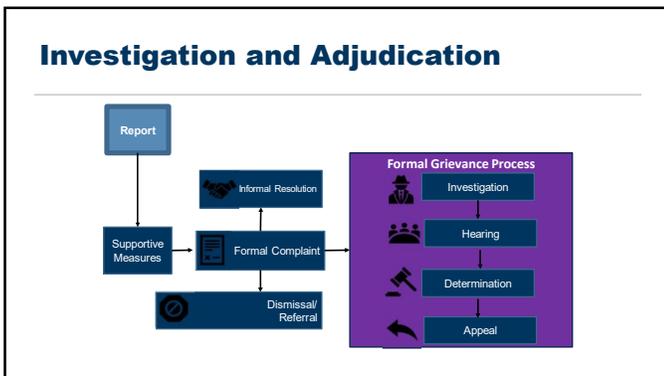
- At any time prior to the determination regarding responsibility, the University may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication
- University cannot require this and also cannot offer **unless a formal complaint is filed**

Overview of the Process: Informal Resolution (2 of 2)

- University can offer informal resolution if:
 - Provides written notice to the parties
 - Obtains the parties' voluntary, written consent to the informal process

University **cannot** offer this option with regard to reports of employee Title IX sexual harassment of a student





Notice of Allegations to Both Parties

34 C.F.R § 106.45(b)(2) 1 of 3

- Must include sufficient details known at the time, and with sufficient time to prepare a response before any initial interview
- Sufficient details include:
 - Identities of the parties
 - Conduct allegedly constituting sexual harassment
 - Date/location of alleged incident

Consider attaching the formal complaint.

Notice of Allegations to Both Parties

34 C.F.R § 106.45(b)(2) 2 of 3

- Needs to be supplemented if new allegations are to be included
- Must include statement that respondent is **presumed not responsible** for alleged conduct and that determination regarding responsibility is made at the conclusion of the grievance process
- Must inform the parties that they may have advisor of their choice who may be an attorney and who may inspect and review evidence

Notice of Allegations to Both Parties

34 C.F.R § 106.45(b)(2) 3 of 3

- Must inform parties of any provision in the code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the formal process

Overview of the Process: Investigation (1 of 4)

- Only of a formal complaint
- Burden of proof and evidence gathering rests with University
- Cannot access, require, disclose, or consider treatment records of a party without that party's voluntary, written consent
- Provide equal opportunity for parties to present witnesses (fact and expert)

**Overview of the Process:
Investigation (2 of 4)**

- Provide equal opportunity for parties to present inculpatory and exculpatory evidence
- Not restrict ability of either party to discuss or gather and present relevant evidence
- Provide parties same opportunities to have others present during the grievance process, including advisor of choice

**Overview of the Process:
Investigation (3 of 4)**

- Provide written notice of date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings with sufficient time to prepare
- Provide both parties equal opportunity to inspect and review any evidence obtained in the investigation – University must send to party and party's advisor with at least **10 days to submit a written response before completion of investigation report**

**Overview of the Process:
Investigation (4 of 4)**

- University must make **all** such evidence subject to inspection and review at any hearing
- Create an **investigation report at least 10 days before a hearing** that fairly summarizes the relevant evidence and send to each party and party's advisor
- The parties get a chance to submit a written response within 10 days of receiving the finalized report



Conducting a Hearing

Overview of the Process: Hearings

- Must provide a live, cross-examination hearing
- Advisors ask only relevant cross-examination questions—no party-on-party questioning
- May be virtual, but must be recorded or transcribed
- The office that administers the hearing differs based on the identity of the Respondent.
 - Student: Office of Community Standards and Student Conduct
 - Staff: Human Resources
 - Faculty: Provost Office

74

Provision of Advisors

If a party does not have an advisor present at the live hearing, the recipient **must provide** without fee or charge to that party, an advisor **of the recipient's choice**, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party. (106.45(b)(6)(i) and preamble 30339)

75

Other Support People?

- Not in the hearing, unless required by law (30339)
- "These confidentiality obligations may affect a recipient's ability to offer parties a recipient-provided advisor to conduct cross-examination in addition to allowing the parties' advisors of choice to appear at the hearing."
- ADA accommodations-required by law
- CBA require advisor and attorney?

76

The Hearing

- Your policy does not include detailed requirements for hearings, which leaves your decision-makers with discretion.
- Not discretionary:
 - Preponderance of the evidence standard
 - Decision in writing within 15 days
 - Complying with decorum standards

77

Hearing Flow: Example

- Script
- Complainant → Respondent → Witnesses
- More script
- Decision is made in closed session
- Written decision distributed

78

Relevancy Rulings

- After each question that is asked by an advisor, the decision-maker must orally make a determination as to whether the question is relevant before the party or witness answers.

79

Decision-Maker Questions

- Decision-makers can and should ask questions to ensure that they are getting the information they need to make the best decision.

80



Minimizing Liability

Minimizing Liability (2 of 2)

- ~~Make sure all the cases come out in favor of ...~~
 - Note: The outcomes have **nothing to do with liability**. Liability is based on whether we do what we say we will do, and what we're required to do.
- Have a robust employee and student training program
- Train your Title IX team to implement the process appropriately
- Support a culture of reporting
- Keep your policy and process compliant
- Follow your compliant policy and process!

How to Support the Process

- Be role models, in both your training and conduct
- Report to the Title IX Coordinator all information suggesting any form of sex discrimination or sexual misconduct **as soon as possible**
- Report felonies and child abuse to law enforcement
- Stay neutral when a case is ongoing
 - Your participation in any capacity will be viewed as "the University" taking sides
 - Anyone who calls to talk about Title IX should be referred to the Coordinator
 - If they call you to complain about the Coordinator, refer them to the Coordinator's supervisor
- Keep information highly confidential

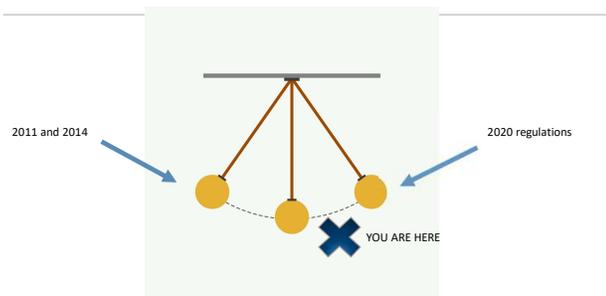


The Basics

- 554 pages of text
- Released on June 23, 2022 (50th anniversary of Title IX)
- Comment period ran through September 12th
- Next:
 - The U.S. Department of Education is reviewing all 240K+ comments.
 - It will prepare final regulations, and a preamble that responds to concerns raised in the comment process.

85

Proposed Title IX Regulations



86

Proposed Changes

- “Sex discrimination” and “Sex-Based Harassment” definitions
 - Sex discrimination includes SBH
 - SBH includes a “hostile environment” definition similar to Title VII
 - Special procedures for SBH allegations involving a student as a party
- Single investigator model would be permissible for some institutions – but not for your public institution due to *Doe v. Baum*

87

Proposed Changes – Streamlining

- No more 10/10 day review of evidence
- No more preparation of a duplicative investigative report
- Easier to move quickly through the investigation process

88

Proposed Changes – Reporting

- Higher Ed employees sometimes must report to Title IX Coordinator and sometimes can, instead, provide notice as to how to contact the Coordinator
- No prohibition against maintaining a rule that all employees must report

89

Transgender Students

- Proposed Title IX regulations suggest that institutions should treat individuals in accordance with their gender identity
- Executive Order (June 15, 2022) – Supports LGBTQI+ students impacted by “harmful State and local laws and practices”
 - A federal court issued a stay on enforcing this EO in Ohio.
- Transgender participation in athletics is not covered in the proposed Title IX regulations; ED expects to issue separate proposed regulations on this topic

90
