Federal Laws and Regulations

Introduction to Relevant Federal Law: VAWA & Title IX

Focus on Title IX Final Rules

Procedural Fairness and Conflicts of Interest

Learning Objectives: Week 2
FEDERAL LAWS AND REGULATIONS GOVERNING TITLE IX INVESTIGATIONS

Title IX
- Admissions & Financial Aid
- Facilities
- Athletics
- Unequal Pay

VAWA
- Crimes of Sexual Violence

Clery
- Primary Crimes
- Hate Crimes
- Missing Persons
- Drug, Alcohol & Weapons
- Timely Warning
- Emergency Notification

* State Law?

TITLE IX AND CLERY
THE VIOLENCE AGAINST WOMEN ACT, AND ITS IMPACT ON TITLE IX AND THE CLERY ACT

- Broader jurisdiction than Title IX Final Rules
- Disciplinary procedures must include a fair, prompt, and impartial investigation and resolution and be conducted by “officials” who receive “annual training”
- Must publish all available sanctions (not a range)
- Mandatory written notifications
- Access to an advisor, who may be an attorney
- Publish a statement of the standard of evidence that will be used for the violation (2016 Handbook 8-16)
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

DOMESTIC VIOLENCE

A felony or misdemeanor crime of violence committed—
• By a current or former spouse or intimate partner of the victim;
• By a person with whom the victim shares a child in common;
• By a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner;
• By a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred; or
• By any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.
SEXY ASSAULT

An offense that meets the definition of rape, sodomy, sexual assault with an object, fondling, incest, or statutory rape as used in the FBI’s UCR program and included in Appendix A of this subpart.

SEX OFFENSES

Any sexual act directed against another person, without the consent of the victim (consent NOT defined in the regulations), including instances where the victim is incapable of giving consent.

A. **Rape** — The penetration, no matter how slight, of the 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.

B. **Sodomy** — Oral or anal sexual intercourse with another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

C. **Sexual Assault With an Object** — The use of an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.
SEX OFFENSES

Any sexual act directed against another person, without the consent of the victim (*consent NOT defined in the regulations*), including instances where the victim is incapable of giving consent.

A. **FONDLING** — The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity.

B. **incest** — Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

C. **Statutory Rape** — Nonforcible sexual intercourse with a person who is under the statutory age of consent.

STALKING

The term “stalking” means engaging in a course of conduct directed at a specific person that would cause a reasonable person to—

A. fear for their safety or the safety of others; or
B. suffer substantial emotional distress.
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 of the Education Amendments of 1972
**Sex discrimination** includes all forms of sexual harassment, including verbal harassment and sexual violence
- by employees, students, or third parties
- against employees, students, or third parties.

Also?
- Unequal pay based on gender
- discrimination on the basis of pregnancy
- unequal distribution of athletic funds
- unequal admissions and financial aid practices.

**WHAT IS “SEX DISCRIMINATION?”**
1997/2001 Sexual Harassment Guidance
April 2011 Dear Colleague Letter
April 2014 Q&A Dear Colleague Letter
September 2017 Dear Colleague Letter
November 2018 Notice of Proposed Rulemaking (“NPRM”)

May 19, 2020: Title IX Final Rules (eff 8/14/20)

**RELEVANT DOCUMENTS**

- Narrows definition of “sexual harassment” under Section 106.30
- Shrinks scope of institutional jurisdiction over Title IX complaints
- Mandatory investigatory procedures
- Live hearing requirement with cross-examination
- Conflicts of interest and bias rules, including separation of investigatory and adjudicatory roles

**TITLE IX FINAL RULE: MAJOR CHANGES**
• Not all matters historically considered “Title IX” cases fall within this scope
• Narrows the geographic scope of institution’s obligation to respond
• Narrows the types of “sexual harassment” subjected to Title IX investigation and adjudication
• Conduct falling outside scope may still be resolved through a non-Title IX process

TITLE IX FINAL RULE: SCOPE

TITLE IX: SEXUAL HARASSMENT

2001 Revised Sexual Harassment Guidance

• Quid Pro Quo Sexual Harassment, or
• Hostile environment, which means conduct that is “sufficiently serious” to deny or limit a student’s ability to participate in or benefit from the school’s program based on sex.

Title IX Final Rule

• (Employee) Quid Pro Quo, or
• Unwelcome conduct that a reasonable person would determine is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the educational institution’s education program or activity, or
• Sexual assault, dating violence, domestic violence, or stalking [Clery/VAWA definitions]
TITLE IX: JURISDICTION

- Only within the United States
- On-campus, or
- Off-campus, only if location is part of “operations” and institution has substantial control over the place and the respondent
  - Example: Building owned or controlled by institution and used by officially-recognized organization
- Possibly: Online harassment where network/software/hardware is part of “operations” and institution has substantial control

WHEN REQUIREMENTS KICK IN: THEN AND NOW

2001 Revised Sexual Harassment Guidance

Complaint/report by faculty, staff, students, or even third parties.

Jurisdiction over both parties is not required for institutional obligations to kick in!

Title IX Final Rule

Complaint/report to TIXC or official with authority to institute corrective measures.

Responsible employee framework not mandated, but allowed.

Jurisdiction over both parties is not required for some institutional obligations to kick in.
• Title IX Coordinator will offer parties supportive measures, even where no formal complaint is filed

• Examples of supportive measures (See, 85 Fed. Reg. 30026, 30401)
  • counseling
  • extensions of deadlines or other course-related adjustments
  • modifications of work or class schedules
  • campus escort services
  • restrictions on contact between the parties (no contact orders)
  • changes in work or housing locations
  • leaves of absence
  • increased security & monitoring of certain areas of campus

**Title IX: Intake Process and Supportive Measures**

**Title IX: Emergency Removals**

• **CAUTION**: Interim suspensions are prohibited for Title IX student-respondents
  • Department of Education considers them **disciplinary sanctions**

• Emergency Removal may be used where
  • Person poses threat of immediate **physical** harm
  • Threat arises from allegations of sexual harassment
  • Depends on individualized safety and risk assessment

• Must provide “immediate” opportunity to challenge removal
  • Need not be a formal hearing
• Institutions **must** investigate all “formal complaints” filed with the Title IX Coordinator

• Who can file a formal complaint?
  • A person who is currently participating in the education programs or activities of the institution
  • A person who is **attempting** to participate in those programs or activities
  • The Title IX Coordinator

• Multiple complaints arising from same incidents can be consolidated

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The college will protect privacy to the extent possible under the law

The Coordinator has to balance confidentiality with:

• Communications necessary to fulfill legal duties
• The safety of other members of the college community.
### Timing
- Send to parties as soon as practicable after filing of formal complaint
- No investigative interviews until parties have sufficient time to review allegations

### Contents
- Allegations of sexual harassment
- Identities of parties, if known, including the complainant’s name
- Date, time, and location of the incident, if known
- Parties’ basic procedural rights
- Presumption of non-responsibility

### Advisor
- Notice must inform parties of right to advisor, who may be attorney
- School does not need to pay for attorney
- Reasonable restrictions ok...
- Unless they conflict with cross-examination role

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**NOTICE OF ALLEGATIONS AND RIGHT TO ADVISOR**

**MANDATORY AND DISCRETIONARY DISMISSAL**

- Institutions **must** dismiss formal complaints that don’t fall within the statutory criteria for the Title IX grievance process
  - Institution may still investigate through a non-Title IX process

- Institutions **may** dismiss complaints that do meet the criteria if:
  - Complainant notifies TIXC in writing they would like to withdraw the formal complaint/any allegations in it;
  - Respondent is not enrolled/employed by the institution; or,
  - Specific circumstances prevent the institution from gathering evidence sufficient to reach a determination

- Any party may appeal a dismissal determination
**Evidence Collection**
- Interviews of parties & witnesses after Notice of Allegations
- Both inculpatory & exculpatory evidence must be collected
- Evidence will be directly related to the allegations
- May include evidence that institution does not intend to rely on

**Evidence Sharing**
- Mandatory inspection process with 10-day min. review period
- Parties may review evidence with advisors present
- May set reasonable rules (e.g. confidentiality agreement)

**Investigative Report**
- Summarizes relevant evidence directly related to allegations
- Cannot make determination regarding responsibility
- Parties have opportunity to review at least 10 days before hearing

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**INVESTIGATIVE PROCESS**

- **Final Rules**
  - Require publication of a time frame based on a specific number of days with room for "good cause" delay
  - Final Rules anticipate balance between prompt resolution and adequate time to prepare and respond to charges

- **Case Law:**
  - Standard is "reasonableness"
  - Cannot be "lengthy and unjustified," or in breach of code

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**PROMPT INVESTIGATION**
Final Rules:
- Reasonable search expected, but cases may be dismissed where “specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.” 34 C.F.R. 106.45 (3) (ii).

Courts:
- Concerns where investigators appear to be ignoring critical evidence or do not live up to their own representations or the guarantees within the code of conduct.

All parties, advisors, witnesses, and decision-makers may be physically present in the same location, or
- They may participate remotely via secure technology, but
- All parties, advisors, witnesses, and decision-makers must be able to see and hear one another.

CODE WORD TWO: QUINN
• **Questioning Process**
  • Decision-maker asks questions of the parties and witnesses
  • Advisors ask “relevant” cross-examination questions
  • Decision-maker decides if questions are relevant

• **Relevance Determination**
  • **General rule:** does the question make a fact at issue more or less likely to be true?
  • Specific exclusions governing Title IX hearings:
    • “Rape Shield” (with two exceptions). 34 C.F.R. § 106.45(6)(I).
      • Offered to prove someone else committed alleged conduct
      • Offered to prove consent
    • Privileged information. 34 C.F.R. § 106.45(1)(x).
    • Undisclosed medical records. See, 85 Fed. Reg. 30026, 30294
    • Duplicative questions. See, 85 Fed. Reg. at 30331.

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**RELEVANT QUESTIONS**

**CODE WORD TWO: QUINN**

**CROSS-EXAMINATION**

**CODE WORD TWO: QUINN**

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**33**

All parties & witnesses must “submit” to cross-examination for their statements to be considered

• Decisions can be made in the absence of a party or witnesses, but cannot be based on their out-of-hearing statements
• No inference of responsibility from decision not to testify

Applies in all Title IX cases, including those not necessarily resting on credibility

“Submit” means answering all questions posed
• Where party or witness does not answer a relevant question, none of their statements can be used in determination of responsibility

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**34**
• Identify the **allegations** potentially constituting sexual harassment;
• Describe the **procedural steps** taken;
• Identify **findings of fact** supporting the determination;
• Identify which **section of the Code of Conduct** respondent has/has not violated.
• **For each allegation**, provide statement of and rationale for:
  • the result, including a **determination regarding responsibility**;
  • any **disciplinary sanctions** imposed on the respondent; and
  • whether **remedies** designed to restore or preserve equal access to recipient’s education program or activity will be provided to complainant; and
• Describe the recipient’s **appeal** procedures.

**DETERMINATION REGARDING RESPONSIBILITY**

Title IX Final Rules mandate both parties have access to an appeal:
• For (1) dismissal of formal complaint and (2) determination regarding responsibility
• On three appeal grounds:
  • **Procedural irregularity** that affected the outcome of the matter (i.e. failure to follow institution’s own procedures);
  • **New evidence** that was not reasonably available at the time the determination or dismissal was made, that could affect the outcome of the matter;
  • TIX Coordinator, investigator, or decision-maker had a **conflict of interest or bias** for/against an individual party or complainants or respondents in general, that affected the outcome of the matter.

**APPEAL**
CONFLICTS OF INTEREST AND BIAS

• Courts assume investigators & decision-makers are honest "unless actual bias, such as personal animosity, illegal prejudice, or a personal or financial stake in the outcome can be proven." Doe v. Trustees of Boston College, 892 F.3d 67, 84 (1st Cir. 2018).

• Student would have to prove:
  1. Investigator/decision-maker was biased against them because of their gender identity, race, or status as a member of another protected class
  2. Investigator/decision-maker’s adverse actions “flowed” from that bias

BIAS AS DUE PROCESS VIOLATION
**Prohibited Conflicts of Interest and Bias**

- Conflict of interest/bias for or against complainants and respondents generally
  - **CAUTION:** “Believe All Women” (or All Men)
- Conflict of interest/bias for or against the specific parties
- Overlapping investigator, decision-maker, & appeals roles

**Not a per se conflict or bias**

- Gender, research interests, work history
- Advocacy background
- TIX Coordinator serving as TIX Investigator
- TIX Coordinator serving as facilitator in informal resolution process