

2020  
Regs  
Rapid  
Response



## New Title IX Regulations for Boards of Trustees and Cabinet-Level Administrators

# Your Faculty



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# TITLE IX REVIEW

## Background & Principles

# Title IX Statute

Title IX of the Education Amendments of 1972 is a federal law intended to end sex discrimination in all areas of education

Ensures sex (and gender) equity in all institutional programs, events, operations involving employees, faculty, students, visitors, and others

Applies to sexual harassment, sexual assault, and sex- (and gender) related relationship violence, stalking, bullying, etc.

# Impact of Sex-based Harassment & Discrimination on the Institution

- Impact on victim support and assistance on system and people
- Retention Issues
- Legal liability
- Reputational Issues
- Demands on fiscal resources
- Demands on human resources
- Safety concerns for the community



# NEW TITLE IX REGULATIONS

## May 6, 2020

# 2020 Title IX Regulations

- Issued May 6<sup>th</sup>, 2020
- Effective and Enforceable August 14, 2020
  - Amend the Code of Federal Regs. and have force and effect of law
  - Some provisions already mandated by case law in some jurisdictions
  - Intervening variables may impact enforcement going forward, e.g. lawsuits/election
- The Regulations:
  - Significant, legalistic, prescriptive, and very due process heavy
  - Enforceable by OCR
  - Preempts state law

# Who's Who

- Complainant
- Respondent
- Title IX Coordinator (TIXC)
- Deputy Coordinators
- Investigators
- Decision-makers
  - Hearing Panel
  - Chair
- Appellate Decision-makers
- Advisors
- Hearing Facilitator(s)





# HIGHLIGHTS OF SUBSTANTIAL COMPLIANCE ELEMENTS

# Standard for Notice

- Regulations do not require a Title IX investigation unless the institution receives **actual notice through a formal complaint**
  - Actual notice = written, signed complaint of sexual harassment to TIXC or appropriate official who has authority to implement corrective measures (OWA)
  - Constructive notice/respondent superior – insufficient to hold institution responsible
- Formal complaints are needed even for informal resolutions under regs.
- All forms of notice to the TIXC requires appropriate supportive measures

- Substantially expanded due process
- Must state a presumption that respondent is not responsible until determination reached in the Notice of Investigation
- Jurisdiction for Title IX cases limited to:
  - Incident occurred in the United States
  - Must have control of the “harasser” and the context of the harassment
    - Incident must have occurred in program or activity of the institution
  - Complainant is member or seeking to be member of institution
  - Must meet definition of Sexual Harassment
- Expands off-campus jurisdiction to buildings and property owned/controlled by recognized student organizations

# Regs Definition of Sexual Harassment

- Sexual Harassment is defined by the regulations as “conduct on the basis of sex” meeting one of the following conditions:
  - An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct (quid pro quo);
  - 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 recipient’s education program or activity; (typically considered Hostile Environment) or
  - “Sexual assault” as defined in 20 U.S.C. 1092(f)(6)(A)(v), “dating violence” as defined in 34 U.S.C. 12291(a)(10), “domestic violence” as defined in 34 U.S.C. 12291(a)(8), or “stalking” as defined in 34 U.S.C. 12291(a)(30).

# Impact on Employees

- Regulations often refer exclusively to “students,” but employees are also protected and held responsible under these standards
- Wholesale revision of faculty resolution/employee grievance processes may be necessary
- Union employees – diminished right to an advisor because of union representation?
- Extends significant due process protections for at-will employees accused of misconduct – not at-will anymore under Title IX?
- More due process for sex discrimination than other forms of discrimination

# Emergency Removal

- May remove a respondent from a recipient's education program or activity only on an emergency basis, and only if IHE:
  - Undertakes an individualized safety and risk analysis,
  - Determines that an immediate threat to the *physical* health or safety of students or employees justifies removal, and
  - Provides the responding party with notice and an opportunity to challenge the decision immediately following the removal
- May place a non-student employee respondent on administrative leave during the pendency of an investigation under current procedures for doing so

# Neutrality, Conflict of Interest

- Grievance process must treat parties “equitably”
  - Must be designed to restore or preserve access to education programs
  - Must include enhanced due process protections before disciplinary sanctions are imposed
- Prohibits conflict-of-interest or bias by Coordinators, investigators, and decision-makers against parties generally or against an individual party
- Mandates training on appropriate investigation, hearing, evidence, credibility, bias, conflict of interest

# Live Hearing/Questioning

- Mandated live hearings for higher education
- Turns resolution process into mini criminal court
- Parties and witnesses must attend hearing and submit to live, advisor-led cross-examination
  - Otherwise **all statements** submitted by absent party must be excluded
- Hearing administrator may not be Title IX Coordinator, the investigator, or the appeals officer
- Provisions for separate rooms, video-based hearing
  - Must be able to clearly hear and see other parties



# Live Hearing/Questioning

- **Must allow live cross-examination** to be conducted exclusively by each party's advisor
  - Verbal, direct, in real time
- Each party must be permitted to ask the other party and all witnesses all relevant questions and follow-up questions
  - Including questions challenging credibility
- Each question must be cleared by hearing administrator as being relevant after being posed
- Questions deemed irrelevant may be excluded with rationale provided
- Must exclude complainant's sexual disposition or prior sexual behavior unless specifically relevant

# Standard of Proof

- Current industry standard is preponderance of the evidence
- OCR says recipients must now apply either the preponderance of the evidence standard or the clear and convincing evidence standard
- Standard of evidence must be consistent for all formal complaints of sexual harassment, regardless of policy or underlying statutory authority
- Must also apply the same standard of evidence for complaints against students as for complaints against employees, including faculty

- Must offer equitable appeal based on determination or dismissal of any allegations
- All parties receive notification of any appeal
- Opportunity for all parties to support or oppose outcome
- Written decision with rationale delivered simultaneously to the parties
- Appeal decision-maker cannot have had any other role in the investigation or resolution process
- “Reasonably prompt” timeframe for producing appeal decision

# RECOMMENDATIONS FOR CHIEF EXECUTIVE OFFICERS AND GOVERNING BOARDS

# Understanding Challenges: Minimizing Risks

- Be aware that new Title IX Regulations create the need for substantial policy changes. Don't slow down the process. You must be compliant on August 14<sup>th</sup>, 2020.
- These are tight budgetary times, but not the time to cut Title IX resource support.
- ATIXA believes that as a result of the regs, Title IX Teams will become the norm, and that they'll need to range from 10-30 members for most campuses.

# Staffing the Title IX Team in 2020

- At least one Title IX Coordinator = 1
- Deputy Coordinators = 3-5
- Investigators = 2
- Hearing Decision-Makers = 4-6 (pool)
- Advisors = 4-6 (pool)
- Appeal Decision-Makers = 1-3 (pool)

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Minimum Recommended Team Members= 10 - 15!

# Understanding Challenges: Minimizing Risks

- Support staffing to ensure compliance.
- Regs greatly expand training requirements – Ensure institution is providing required training (materials to be published on your website for public inspection) at all levels, including your Title IX Coordinator, Title IX Deputies, OWA's, mandated reporters, investigators, advisors, decision-makers and appeals officers.

# Support Title IX Coordinator

- Ensure your institution's Title IX Officer is:
  - Not just a figurehead; has direct access to the Chief Administrative Officer
  - Appropriately trained in the scope of the laws and regulations related to sex and gender misconduct; knowledgeable about Title IX response requirements



# Support Title IX Coordinator

- Title IX compliance must be driven by your Title IX Coordinator, this is not a shared governance issue
  - This includes membership in hearing panels, which should be all administrative in membership, no faculty or student members.
  - Chair will need to be a professionalized role. Panels need experience, not rotation.
  - Will require enormous time commitment for training and each hearing may take 4-5 days in total. Multiple hearings at same time may not be feasible.

# Key Understandings

- Title IX pre-empts conflicting state laws
- Title IX trumps FERPA in areas of conflict
- The flow between your regs-compliant resolution process and any other process used to resolve similar misconduct needs to be as clear as possible. Use flowcharts and infographics.
- Expect formal complaints to decrease and a demand for informal resolution and alternate resolution to increase.
- The resolution process is very complex (and longer) now. See next slide.



# Recognize Boundaries

- Understand the risks of Board or Senior Executives' direct involvement as appeals decisionmakers.
  - Potential conflicts of interest or presumption of bias
  - May create political hot potato
  - Appeal officers must engage in comprehensive training – substantial time commitment
- Ensure legal counsel can support the Title IX Team without taking it over. Conflict of interest potential there is strong.
  - Goal is input without control. Guiding compliance without oversight.

# Remain in the know

## **REMAIN IN THE KNOW: REQUIRE REGULAR REPORTING, TO INCLUDE:**

Aggregate data, without personally identifiable information, that provides an enumeration of all reported incidents:

- The number of reports received by the Title IX officer, broken down by the policy alleged to have been violated
- The number of informal resolutions
- The number of formal investigations conducted
- The disposition of the investigated cases
- Discussion of any observable trends
- Other categories of interest, such as Greeks, athletes, residential v. off campus incidents, year in school
- To be published on a website

# Support Prevention

## Support prevention initiatives, including:

- Appropriate and annual training for key individuals
- Broad publication of resources
  - Written and electronic
  - Link for reporting on institution's mail page
  - A web page with links to critical information (reporting options, policy and grievance process, confidential sources, medical and counseling resources)

# Engage Externally

- Build positive and collaborative community relations
  - MOU with community victim's resource/domestic violence services
  - MOU with community law enforcement
  - Involvement with community leaders
  - MOU with K-12 institutions involved with your IHE
- Verify insurance coverage
  - What is covered?
  - How much?
  - Cover administrators sued personally?

# Check your knowledge

**Take a few minutes to use your school's web page to use “key words” that one might use if seeking resources or information regarding sex-based discrimination or misconduct. See if you find:**

- Student/Employee policies on sexual harassment, sex-based discrimination
- Code of Student Conduct Policy
- Policies addressing Domestic/Dating Violence, Stalking
- Policies on Bullying, or Stalking
- Unethical/Consensual Relationships Policy
- Clery Act Annual Security Report
- Links to critical resources



# Questions?





# Contact Information

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