



Title IX Update: Where Are We Now, What Have We Learned, and Where Are We Going?

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Presenters

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Agenda

- Understanding the Title IX regulatory requirements and communicating them effectively to the campus community
- Practical Considerations in Staffing and Conducting Title IX Hearings
- Current Litigation and Case Law Update
- Questions and Answers



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Communicating Title IX Regulatory Requirements to the Campus Community

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Title IX Regulations – Where are we now?

- May 6, 2020 – Dept. of Ed. published final regulations regarding sexual harassment under Title IX.
- August 14, 2020 – Title IX regulations implementation deadline
- April 6, 2021 – Dept. of Ed. issued letter on Title IX
 - OCR launching “comprehensive review” and ED anticipates revising regs
- May 17, 2021 – Dept. of Ed announces virtual hearings
- June 7 – 11, 2021 – virtual public hearings



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Title IX Regulations – What can we expect?

- Revisions to regulations take time
- OCR has limited ability to revise current regulations without Notice and Comment rulemaking
 - OCR **MUST** investigate and address violations of its regulations
 - OCR **MAY** focus on regulatory text rather than the Preamble commentary
- Current Title IX regulations can provide basis for private lawsuits against colleges and universities



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Understanding the changes in the 2020 Title IX Regulations

- What is Title IX Sexual Harassment?
 - Quid pro quo by an employee
 - Hostile environment (severe, pervasive, **and** objectively offensive)
 - Sexual assault (includes rape, forcible fondling, statutory rape), dating violence, domestic violence, and stalking as defined in other statutes34 C.F.R. § 106.30(a)
- What is the scope of “education program or activity”?
 - Locations, events, or circumstances over which recipient exercised substantial control over **both** respondent and context
 - Buildings owned/controlled by a student organization34 C.F.R. § 106.44(a)



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Understanding the changes in the 2020 Title IX Regulations

- What is actual knowledge?
 - (For postsecondary): notice to the Title IX Coordinator or to an official able to take corrective action on behalf of the institution
 - *Important*: “Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge.”34 C.F.R. § 106.30(a)
- What must an institution do if they have actual knowledge?
 - Must respond promptly in a manner that is not deliberately indifferent.
 - Deliberately indifferent if response is clearly unreasonable in light of the known circumstances34 C.F.R. § 106.44(a)



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Understanding the changes in the 2020 Title IX Regulations

- Terms defined by the Title IX regulations
 - **Complainant** = individual who is alleged to be the victim of conduct that could constitute sexual harassment
 - **Respondent** = individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment
 - **Formal Complaint** = document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting the recipient investigate the allegation of sexual harassment.
 - **Supportive Measures** = non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available and without fee or charge to both complainants and respondents.
34 C.F.R. § 106.30(a)



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What have we learned?

- While the Title IX regulation definition of sexual harassment is narrow...
 - Community expectations may be broader
 - State laws may be more expansive
 - Other federal laws define similar conduct
- Communication is key



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Explaining differences in policies and procedures

- Title IX Preamble:

[N]othing in the final regulations prevents recipients from initiating a student conduct proceeding or offering supportive measures to students affected by sexual harassment that occurs outside the recipient's education program or activity.

- Options:

- One Policy/Procedure for all conduct
- Multiple Procedures



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Explaining differences in policies and procedures

- Make sure your policy/procedure is clear as to the conduct each addresses
- Publish policies and procedures in a prominent/accessible location *and* translate key documents into other languages
- Document decision and rationale in determining jurisdiction
- Document decision and rationale for Title IX Coordinator filing a Formal Complaint



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Explaining differences in policies and procedures

- Develop reporting process flow chart with key elements
 - What happens when you receive a report?
 - What procedure applies?
 - What is the process for each procedure?
 - What is the outcome for each procedure?
- Develop a Q&A or FAQ
- Prepare template communications



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FORMAL UNIVERSITY RESOLUTION – MISCONDUCT PROCEDURES

At the beginning of the resolution process:

- WRITTEN NOTICE** to the Complainant and the Respondent.
- TRAINED INVESTIGATOR(S)** will conduct a prompt, thorough, fair, and impartial investigation with equal opportunity to be heard, submit evidence, and identify witnesses.
- ADVISOR OF CHOICE** may accompany, support, and advise each party.

At the conclusion of an investigation:

- Investigator will prepare a **Draft Investigation Report** summarizing the information gathered, without recommending findings.
- Investigator will send the **Draft Investigation Report** and all accompanying material to the Complainant and Respondent.
- Complainant and Respondent each have **10 business days** to review and respond to the **Draft Investigation Report**.
- Investigator will prepare a **Final Investigation Report** which will include a recommendation as to whether or not there is sufficient evidence to support a finding of responsibility for prohibited conduct by a Preponderance of the Evidence.
- Title IX Coordinator will send the **Final Investigation Report** to the parties and provide each **10 business days** to review and respond to the **Final Investigation Report**.

Hearing before Decision Maker:

- Title IX Coordinator will appoint a trained, impartial **Decision Maker**.
- Decision Maker** will be provided the **Final Investigation Report** and all evidence collected.
- Live Hearing** with right to have advisor present and questioning of parties and witnesses by and through **Decision Maker**.

WRITTEN DETERMINATION

Decision Maker will issue a **Written Determination Letter** to the parties within **10 business days** following the hearing that identifies all potential party violations, whether there is sufficient evidence to support a finding of Responsibility, the findings of facts, rationale for determination, any disciplinary sanctions, and the procedures and bases for appeal.

The **Written Determination** may be appealed to an **Appeal Officer**. Any sanction issued by the **Decision Maker** will not take effect until the conclusion of the **Appeal**.

Typically, the period from commencement of an investigation through resolution (finding and sanction, if any) will not exceed **90 business days**. This time frame may be extended for good cause.

Reporting Process Flowchart

WHAT HAPPENS WHEN OIE RECEIVES A REPORT?
We receive reports through online reporting from responsible employees and referrals.

Flowchart Key: Process (blue), Decision (green), Action Step (orange)

1. Contact reporting party

2. Intake

3. Assessment

4. Confidential resources and/or supportive measures

5. Referral to campus partner

There are three procedures that potentially apply:

- Title IX Complaint Report:**
 - Investigation Report
 - Investigation
 - Investigation Report
 - Investigation
 - Live Hearing
 - Determination
 - Appeal
- Harassment & Discrimination Student-Resident:**
 - Investigation Report
 - Investigation
 - Investigation Report
 - Investigation
 - Student Conduct Hearing
 - Determination
 - Appeal
- Harassment & Discrimination Faculty/Staff/Personnel:**
 - Investigation Report
 - Investigation
 - Investigation Report
 - Investigation
 - Final Determination By OIE
 - Action taken (to other personnel)
 - Appeal

Flow Chart of Adjudication Process for Allegations of Conduct under the Policy on Prohibited Sexual Harassment under Title IX

Supportive measures are available to both parties during entire process.

Does the Reporting Party want to request an investigation of reported conduct (i.e. the Formal Complaint)?

- NO:** Supportive measures
- YES:** Written notice to Responding Party and Reporting Party

Do both parties agree to an Informal Resolution?

- NO:** Formal Investigation
- YES:** Informal Resolution
 - Parties agree to an Informal Resolution
 - University provides appropriate
 - Voluntary process for both parties
 - If unsuccessful, matter returns to investigation

Formal Investigation:

- EDC Investigation (i.e., evidence gathering, witness interviews)
- Parties review all evidence
- Parties review investigation report

Live Hearing:

- Hearing Panel of three administrators
- Parties and witnesses must be present for information to be considered
- Cross-examination by party's advocate or by University-provided advisor. If no advocate
- Panel determines outcome

Is the outcome accepted by both parties?

- NO:** Outcome is final
- YES:** Outcome is final

Appeals Process:

- Either party appeals
- Appeals Officer
- Does Appeals Officer affirm outcome?
 - NO:** Returns to Hearing Panel
 - YES:** Commences new Hearing Panel

Grievance Process for Title IX Sexual Harassment

SEEK ON THE UNDETERMINED LINK FOR MORE INFORMATION FROM THE OIE WEBSITE

Notes:

- 1. Title IX Coordinator will issue a written determination within 10 business days following the hearing.
- 2. The written determination may be appealed to an appeal officer within 10 business days of the date of the written determination.
- 3. The appeal officer will issue a final determination within 10 business days of the date of the appeal.
- 4. The final determination may be appealed to a hearing panel within 10 business days of the date of the final determination.
- 5. The hearing panel will issue a final determination within 10 business days of the date of the appeal.

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Explaining differences in policies and procedures

- Conduct in-person/virtual informational meetings with the parties
- Train employees and students who interact with potential complainants and respondents
 - RAs, TAs, Student Affairs, HR, PHEs, student orgs
- Develop Resource Guides and Training materials for students and employees
 - Highlight changes to the procedures
 - Quick Guide for Responsible Employees
 - Infographic/Resource Guide on Supportive Measures



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Explaining differences in terminology

- Title IX has a specific definition for “complainant” and “respondent”
 - Does your institution use these terms?
 - If not, make clear how your definitions align with Title IX
- If investigating a consolidated Formal Complaint (e.g., with multiple complainants/respondents or cross-claims), consider language and how you refer to parties



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Explaining appeals and dismissals

- Develop FAQ or Flowchart that explains process for appeals and dismissals
- Highlight when **must** dismiss and when **may** dismiss
 - Be sure to explain what happens next – process ends OR process continues under another procedure
- Carefully map your appeal process
 - When can an appeal be filed?
 - What are the timelines?
 - Do you permit time extensions?



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Key takeaways

- Communicate, communicate, communicate
- Be flexible – if your campus community needs more explanation or resources, develop them!
- Ask for feedback from students, advocates, parties, etc. on your materials, website, etc.
- Be willing to meet with people multiple times and throughout the process



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Practical Considerations in Staffing and Conducting Title IX Hearings

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Why is a Title IX hearing needed?

Every institution must provide live hearings for Title IX grievance proceedings where findings of fact are at issue.

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Who comprises a hearing board?

- **Single Hearing Officer**
- **Board Chair (non voting) + Panelists**
- **Board Chair as voting member**

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What is the role of advisors?

- (1) provide private advice to the party he/she is supporting and;**
- (2) cross examine the opposing party and other witnesses.**

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Who should serve as an advisor?

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How should we conduct the cross examination?

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Case Law Update

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Title IX Regulations – Effective Date

Preamble (May 6, 2020)

- New regulations will take effect August 14, 2020
- The Department will not enforce the new regulations retroactively

OCR Website/Blog Post
(August 5, 2020)

- The Department will only enforce the new regulations as to conduct that allegedly occurred on or after August 14, 2020.

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Effective Date – Court Cases

- *Doe v. Rensselaer Polytechnic Institute*

- United States District Court for the Northern District of New York
- Decided October 16, 2020
- Court granted preliminary injunction
 - Required RPI to apply its Title IX Policy adopted August 14, 2020 to conduct which alleged occurred in 2019



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Doe v. Rensselaer Polytechnic Institute - Background

- Case Background
 - RPI concluded respondent violated its Title IX Policy
 - **On August 11, 2020**, the respondent requested a hearing and application of RPI's new Policy
 - RPI refused to apply its new Policy



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Doe v. Rensselaer Polytechnic Institute – Court’s Concerns

- Preamble discussion regarding retroactive application is unclear
- RPI’s new Title IX Policy conflicted with the OCR blog post
- Department blog post is not an “authoritative statement”
- RPI could have easily applied its new Title IX Policy at the respondent’s hearing
- Under the Department blog post, schools would have to maintain two policies with no end in sight.



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Additional Cases

Doe v. Princeton University

- Decided December 31, 2020
- United States District Court for the District of New Jersey
- The Court rejected Plaintiff’s argument that Princeton improperly used a single-investigator model
 - The new Title IX regulations were not in effect until August 14, 2020
 - According to the Preamble and Department blog, the Department will not enforce the new Title IX regulations retroactively
 - The new Title IX regulations were not effective at any time during the Plaintiff’s proceeding



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Additional Cases

Doe v. Stonehill College

- Decided February 23, 2021
- United States District Court for the District of Massachusetts
- The court rejected the Plaintiff's arguments regarding live hearings
 - The text of the former implementing regulation does not require a live hearing with cross-examination or any other particular procedure.
 - The Title IX statute imposes no requirement of a live hearing with cross-examination.
 - The respondent's due process arguments failed because the College is not a public university



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Additional Cases

Roe v. St. John University

- Decided March 31, 2021
- United States District Court for the Eastern District of New York
- The Court addresses the case under the Title IX regulations in effect at the time of the underlying incidents.



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Key takeaways

- Courts may not give deference to the Department's statements about the effective date of the new Title IX regulations
- Consider the individual facts of the underlying case
- Consider state and federal case law



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Questions and Answers

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Networking Lounge to continue
the conversation**



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