



Sexual Harassment Title IX

A Presentation of Training Topics for:



Who is your presenter?

- Michael Davis, Ph.D. – [Equity Consulting, LLC](#)

Informal Resolution of Title IX Cases in Higher Education

An Analysis of ADR Opportunities Under the New Regulations

By Michael J. Davis

ON MAY 26, 2020, THE U.S. DEPARTMENT OF EDUCATION released its most recent regulations on sexual harassment, including sexual assault as a particularly egregious form of harassment, under Title IX of the Education Amendments Act of 1972.¹² These regulations presume about 25% of all Title IX grievances will be resolved by a method of “informal resolution” through alternative dispute resolution (ADR) following the effective date of the regulations.³ The regulations have been challenged by multiple federal lawsuits and are potentially subject to injunction, but otherwise became effective August 14, 2020.⁴

Section 106.45(b)(9) of the final regulations explicitly permits the pursuance of “informal resolution” of all Title IX investigations initiated by a college or university system with the voluntary, informed and written consent of the parties.⁵

complaint, with the voluntary consent of both the complainant and respondent, which may encourage some complainants to file a formal complaint where they may have been reluctant to do so if a full investigation and adjudication was

Title IX resolution by ADR methods is required by regulatory language to be “reasonably prompt” in the same manner as a full investigation. The autonomy of colleges and universities is rather broad in terms of choosing

Orienting Yourself: Title IX is about GENDER

- There are other laws that focus on other protected class statuses such as religion, disability, age, and race. Title IX concerns itself with sex based discrimination.
- It is possible to have harassment and violence that does not have a nexus with sex. But when it does have a NEXUS WITH SEX, Title IX is applicable.
- Currently, Title IX applies only to the educational programs or activities of the institution. The proposed new regulations will include off-campus conduct that AFFECTS educational programs and activities too.

Terminology and Some
Hypotheticals to get us Started

Some Terminology

- Complainant: Person who may have been a victim of discrimination, harassment, or retaliation.
- Respondent: the accused party.
- Coordinator: Individual empowered to oversee institutional prevention, response, and remedies. Collector of campus climate information and wide angle lens.
- Investigator: Appointed to write an investigative report.
- Decision-Maker: Decider of any punitive outcomes or non-responsibility.

Terminology Note

- We do not use the language: victim, assaulter, accuser, assailant, suspect, plaintiff, defendant, etc.
- We do not call a hearing a trial. We do not call
- Title IX clinical jargon uses: Complainant, Respondent, and almost always uses the descriptor: “allegedly” ... get in the habit!

Hypothetical Situation

- In the residential facilities a couple in the incipient phase of their courtship is watching television while sitting on the couch.

Hypothetical Situation

- While on the elevator with an acquaintance, one colleague corners another colleague, presses her finger into his chest and says “I saw you look me up and down and I need you to know I will not tolerate your creepy leering and staring, why are all men like this?”

Hypothetical Situation

- A clerical employee received a risqué joke via email from a supervisor. Did not think much of it, other than being surprised at the inappropriateness of it. Another sexual joke was sent to their email three weeks later. And another one day after that.

Hypothetical Situation

- One student offers beer to another student while hanging out and listening to music...they both continue to drink heavily throughout the night. When one student wakes up, they are surprised to notice the other student lying across their body, half undressed.

Life on the Front Lines

Life on the Front Lines

- You may be a person who has to respond to someone in crisis. It could be someone who recently experienced a sexual assault. What are the most important things to do in such a situation?

Life on the Front Lines: Best Practices

- Primary responder stays with the RP, so that the RP is not juggled from one person to another in the immediate reporting phase.
- Call the Title IX Coordinator as soon as reasonably practicable. You might be needed as an intermediary between the TIXC and the RP, to facilitate immediate supportive measures such as walking them over to the police, or a counselor, or in contacting an emergency contact. Do what you can to find a secondary responder (a campus professional).

Life on the Front Lines: Best Practices

- Once you have identified a secondary responder, task that person with finding the RP's emergency contact information so that the TIXC can have it. Task them with identifying basic data like: dorm room number, grade level...
- Prior to the arrival of the TIXC, you can begin assessing the **reporting posture** in order to brief the TIXC.

Life on the Front Lines: Best Practices

- Get the RP to a safe space.
- Do NOT juggle them around.
- Do not begin an investigation on your own, but you might subtly begin taking steps for evidence preservation with the consent of the RP.
- Do everything the TIXC tells you to do. But if the situation is an emergency crime, law enforcement and medical attention come first no matter what.
- Ask the RP if they are familiar with what a SANE Nurse is, and if not, gently and deliberately describe their importance in these early moments.

Notice how none of this requires detailed knowledge of Title IX policy or law?

Title IX (The Statute)

Title IX of what law?

- When we refer to titles, we are referring to a section of a specific set of laws.
- Title IX is shorthand for:

Title IX of the Education Amendments Act of 1972

Other famous shorthand titles?

Title VII of the Civil Rights Act of 1963

Title II of the Americans with Disabilities Act of 1990

It all started with a 1972 Statute Passed by Congress

20 U.S. Code § 1681 – Sex

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

What is discrimination under Title IX?

- It's not an easy question! For decades there was PROFESSIONAL DEBATE about what types of conduct constituted discrimination under the Title IX language. There REMAINS a substantial professional debate.
- But in 2011 the Department of Education sent out a DEAR COLLEAGUE LETTER specifically saying that HARASSMENT was a type of DISCRIMINATION, and that colleges were not doing enough about it.

Considering the Dear Colleague Letter

The famous 'Dear Colleague Letter'

- Although it has since been rescinded, the DCL was a major turning point in the understanding of Title IX law, for the first time making 100% clear that Dept of Ed expected Universities and Colleges to END, REMEDY, and PREVENT types of sexual harassment including sexual violence beyond the scope of other applicable laws.
- What did it say?

DIRECT QUOTES: The famous 'Dear Colleague Letter'

- Education has long been recognized as the great equalizer in America. The U.S. Department of Education and its Office for Civil Rights (OCR) believe that providing all students with an educational environment free from discrimination is extremely important. The sexual harassment of students, including sexual violence, interferes with students' right to receive an education free from discrimination and, in the case of sexual violence, is a crime.

DIRECT QUOTES: The famous 'Dear Colleague Letter'

- The statistics on sexual violence are both deeply troubling and a call to action for the nation. A report prepared for the National Institute of Justice found that about 1 in 5 women are victims of completed or attempted sexual assault while in college. The report also found that approximately 6.1 percent of males were victims of completed or attempted sexual assault during college.

DIRECT QUOTES: The famous 'Dear Colleague Letter'

- **If a school knows or reasonably should know** about student-on-student harassment that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects.

What has happened since the DCL?

- Different Presidential Administrations have differing approaches toward and philosophies regarding sexual harassment on college campuses.
- Trump Admin believed that a mere DCL was not regulatory law, and that using a DCL to clarify law amounted to “regulation by memo.”
- Implemented Notice and Comment Rulemaking under the Administrative Procedures Act: **resulting in the 2020 Regulations that became effective in August of 2020.**

Considering the Regulations

August 2020 Regulations

- The Final Rule allows the institution to choose whether to have mandatory reporting for all employees, or to designate some employees to be confidential resources for college students to discuss sexual harassment without automatically triggering a report to the Title IX office.
- For all schools, notice to a Title IX Coordinator, or to an official with authority to institute corrective measures on the college's behalf, charges a school with **actual knowledge** and triggers the school's response obligations.

DIRECT QUOTE: Carl Albert Policy on Reporting

A Complainant or any other person can report an alleged sexual harassment incident to an administrator who has the authority to institute corrective measures (**Vice President for Academic Affairs, Vice President for Student Affairs, Vice President of Enrollment Management, TRiO Director, Residential Housing Coordinator, Director of Sallisaw Campus, Director of Campus Police**) or a **Title IX Coordinator** at: title9carlalbert.edu. Reports will be forwarded to the **Deputy Title IX Coordinator** for student-to-student reports or the Title IX Coordinator for a report involving an employee.

The College is considered to have **actual knowledge** of sexual harassment or allegations of sexual harassment when one of the above-named administrators and/or a Title IX Coordinator has received a report, and the College must respond promptly...

Industry Standard Best Practice

- Even if your name is not on the list, there are still many reasons to bring the matter to the attention of someone on the list.
- RATIONALE:
 1. The regulations are always subject to change, and often change (one change is coming in October!) and sometimes require broader reporting responsibilities.
 2. Other forms of liability, as well as job description implications.
 3. To protect members of the campus community.

Industry Standard Best Practice

Report information relevant to, and likely to assist a Title IX Coordinator's wide angle lens on the safety of the institution – **not just information you are personally sure is harassment.**

You are not in a position to have all the facts. You are not in a position to know whether an allegation was or was not harassment.

You do not have the same wide angle lens the TIXC does.

Industry Standard Best Practice

- If a student begins to confide in you, you are permitted and in fact encouraged to interrupt them and say “I just want you to know I might be obligated to share this information with other Campus professionals.”
- This is a matter of personal dignity and respect. You can always refer them to a fully confidential alternative such as a counselor, who has **NO REPORTING OBLIGATIONS** unless there is a direct threat.

Industry Standard Best Practice

- It may be advisable to inform a student (or other RP) that their “full and detailed” story about their experience may best be told to an investigator, if they want to avoid the issue of telling their story several times over. (This is unavoidable, but we can take steps to decrease the issue)
- It is advisable in some cases to advise an RP to begin documenting their statements before memory fades.
- MEMORY FADES FAST and becomes faulty fast.

Walking through a Title IX Timeline

Typical Title IX Timeline

1. Report is made
2. Title IX Coordinator informed
3. Complainant contacted by TIXC; supportive measures implemented
4. Complainant files formal complaint
5. TIXC launches investigation, sends investigation notices
6. Parties secure advisors
7. Investigator is appointed, begins collecting information
8. Evidence is shared with the parties and their advisors

Typical Title IX Timeline

10. Investigator releases final Investigative Report taking into account parties statements on the evidence.
11. Responses to the Final Investigative Report Submitted.
12. Hearing Held
13. Decision-Maker renders outcome statement
14. Sanctions implemented (if needed)

At any point during investigation phase: informal resolution is an option

What is “harassment” under Title IX – lets get down to details

August 2020 Regulations: Understanding the Details

- What is Harassment???
 - A school employee conditioning an educational benefit or service upon a person's participation in unwelcome sexual conduct (often called "**quid pro quo**" harassment);
 - 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 (often called **hostile environment harassment**); or
 - **Sexual assault, dating violence, domestic violence, or stalking** (as those offenses are defined in the Clery Act, 20 U.S.C. § 1092(f), and the Violence Against Women Act, 34 U.S.C. § 12291(a)).

What is Sexual Assault?

- 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.
- Sex Offenses: Any sexual act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent.
 - 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 age or temporary or permanent mental incapacity.
 - Incest—Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
 - Statutory Rape—Sexual intercourse with a person who is under the statutory age of consent.

What is Dating Violence?

- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.
- The existence of such a relationship shall be determined based on the reporting party's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.
- Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse. Dating violence does not include acts covered under the definition of domestic violence.

What is 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;
 - 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.

What is Stalking?

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his/ her safety or the safety of others; or suffer substantial emotional distress.

More on Stalking

- Course of conduct 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.
- Substantial emotional distress means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.
- Reasonable person means a reasonable person under similar circumstances and with similar identities to the victim.

Retaliation in a nutshell

- When a Respondent, or the University itself, takes adverse action against a complainant or someone who has supported or provided information in a complaint, AND the adverse action is for retaliatory motive, then the retaliation is prohibited.
- The nexus between **adverse action** and **retaliatory motive** is crucial.
- While tricky, the motive *can* be inferred from the circumstances.

Further Relevant Details (beyond
the definitions of harassment) in
the 2020 Regulations

August 2020 Regulations: Understanding the Details

- Distinction between a report and a formal complaint!
 - **Report:** Information about an allegation of discrimination or harassment.
 - **Formal Complaint:** written and signed request by the complainant for an investigation OF THE INFORMATION IN A REPORT.

August 2020 Regulations: Understanding the Details

What is required after a report is received?

- Title IX Coordinator must reach out to any potential complainants promptly.
- Must offer supportive measures.
- Must inform complainant about how to file a formal complaint!

August 2020 Regulations: Understanding the Details

What is required after a formal complaint is received?

- Full grievance process. Investigation; hearings (unless informal resolution is approved).
- Determinations are made on the basis of the “preponderance of the evidence” evidentiary standard. **“Is it more likely than not that the Respondent committed misconduct as defined in policy?”**

Gatekeeping

- It is important to note that sometimes a formal complaint is made for conduct that is not covered by Title IX. In these instances the TIXC will not launch a Title IX investigation, and will dismiss the matter (at least for Title IX purposes).
- BUT: the conduct alleged may fall under another policy at the college!

Sexual Conduct Requires
Consent...but Consent can be
tricky.

DIRECT QUOTE FROM POLICY: Let's Talk About Consent

Consent shall be considered effective consent when **informed, freely and actively given**, using **mutually understandable words or actions** that indicate a willingness to participate in mutually agreed upon sexual activity. Initiators of sexual activity are responsible for obtaining effective consent. **Silence or passivity is not effective consent.** The use of intimidation, coercion, threats, force, or violence negates any consent obtained. Consent is not effective if obtained from an individual who is incapable of giving consent due to lack of consciousness, age, mental disability, or incapacitation due to the use of drugs or alcohol. The determination regarding the presence or absence of consent shall be based upon the totality of the circumstances present in a particular case, including the context in which the alleged incident occurred.

Discussion Points

- **Alcohol and mitigated consent.**
- **Alcohol and the importance of the “initiating party.”**
- **Alcohol and the Respondent**
- **Amnesty:** best practice where other policy violations of lesser magnitude on the part of the complainant and witnesses are punitively ignored **so as not to disincentivize Title IX reporting!**

Immediacy of an Incident

- Some incidents require immediate communication, on campus presence of professional responders with knowledge of Title IX policies, and sometimes **IMMEDIATE PRELIMINARY INVESTIGATION**. Emphasis is on the safety of the complainant, witnesses, and then on the preservation of evidence.
- Sometimes reports occur months after an incident, but nonetheless require swift implementation of supportive measures.

Preservation of Evidence

YOU MIGHT PLAY A ROLE IN THIS:

- Video footage, when does it backup, when does it get written over?
- Electronic information, is it backed up, does it expire?
- Witnesses: are they still available?

- Remember: memory fades fast and quickly becomes less reliable.

Some Best Practices

- Develop a relationship with your local hospital and get an understanding of how often a SANE Nurse is on duty, and what those time windows are. What are the alternative hospitals that might have SANE Nurses?
- Do you want to have a victim advocate on campus?
- Do you need a MOU with law enforcement?
- Make sure campus police considers both the law enforcement aspect of sexual assault AND the civil side...since they are both available to complainants and both very different processes.
- Who needs to be in possession of your VAWA Pamphlets?

Talking a party or witness through their rights

- Advisors and rights to advisors
- Investigations and investigative reports
- Evidence review period (10 days)
- IR Review period (10 days)
- Burden of proof (Preponderance standard)
- Timeline and delays
- Mandatory and discretionary dismissal

Mandatory and discretionary dismissal

College must dismiss a complaint (**At least for Title IX Purposes**) that...

That does not describe conduct that meets the definition of sexual harassment;

That alleges sexual harassment that did not occur in the school's education program or activity;

That alleges sexual harassment that did not occur in the U.S.

Mandatory and discretionary dismissal

- The College may dismiss a complaint if...

If the complainant notifies the Title IX Coordinator in writing that the complainant wishes to withdraw the formal complaint or some of its allegations;

If the respondent is no longer enrolled or employed by the college; or

If specific circumstances prevent the college from gathering evidence sufficient to reach a determination about the allegations.

Informal Resolution

- Informal resolution is technically not very informal!
- Mediation
- Negotiation
- Agreement-Based Resolution (separate from Mediated or Negotiated)

- Often useful when parties are not interested in hearings and formalities and merely want safety and finality.

- Crucially: Complainant, Respondent, and INSTITUTION must agree.

Remaining Requirements or Best Practices

- Put your non-discrimination statement on all relevant documents. Put a link to the Title IX Coordinator email.
- Do not make statements indicating assent/agreement to allegations or defenses – all campus professionals should be unbiased. Respondents have a presumption of not responsible all the way until a hearing rendering!
- Police investigations have priority, but Dept of Ed expects simultaneous Title IX investigation when possible.
- Remedies must maintain equity for the complainant; supportive measures cannot be punitive.

Your Title IX Attitude and Posture

- We should have inclusive programs that do not make some people feel like outsiders and others like insiders.
- We should try not to make assumptions about gendered violence and harassment.
- The needle can be moved on climate: as evidenced by many institutions having wildly different climates!

Why do victims avoid reporting, or report late?

- Concern about their own reputation.
- Concern about the Respondent reputation.
- Concern about not being believed.
- Concern about not having sufficient evidence.
- Intimidated by the process or policy.
- Intimidated by the police, or concern that police or Title IX officials will be dismissive.
- Parents.
- Friends.
- Hassle.

Quasi-Trial is both Good and Bad

The Good:

- Cross Examination may improve witness reliability
- Full hearing and Investigative Report is high-touch due process

The Bad:

- Hearings are scary and can be intimidating.
- Evidence collection can be invasive, very invasive.
- Cross Examination under the current advisor system can be AWFUL

Keep Your Students and Staff Informed

- Tell students and staff you can provide them information any time they want. Make sure they know the institutional policy.
- Current rules allow for SUPPORTIVE MEASURES without even filing a formal complaint. Reinforce this fact often.
- Current rules reinforce that free speech is protected, and the threshold for harassment is a high bar. BUT the threshold will soon be lowered again. Title IX is always in regulatory flux.

The best solution is stopping problems before they become aggravated

- When someone complains, the right course of action is to begin to open channels of communication before a problem festers and accumulates severity over time.
- Anonymous reporting options are a life-saver for many hesitant complainants.
- **BYSTANDER INTERVENTION IS A HUGE COMPONENT OF PREVENTION.**

Sexual Ignorance is a Problem

- Students are sometimes naïve about sex and sexual interactions. They may not know the concept of consent very well, they may be bad communicators and therefore not obtain consent very effectively. They may not know their way around intoxicants, and they may not be able to identify sexual harassment when they see it.
- Sometimes employees have boundary issues borne of lack of familiarity with a professional environment. Some cultures are informal, and the college is a formal setting – this requires diligent supervisory coaching of employees.

Are you sexually ignorant?

- Generational gaps cause us to misunderstand the parties and witnesses, and sometimes language is not used the same way we talk. This is not just a matter of jargon: students sometimes have trouble articulating things using specifics.
- **Title IX Investigators are in a constant battle against testimonial vagueness.**

Final Thoughts

- Phones and social media.
- Social proximity: athletics; debate; band; clubs/orgs; housing
- Workplace relationships and fallout from them
- Write every email like it starts with “ladies and gentlemen of the jury...” (open records is sunshine, sunshine a disinfectant)
- Depositions
- FERPA and Need to Know
- Resident Assistants and Locus of Knowledge

QUESTIONS?