

TITLE IX AND THE CLERY ACT: THEN AND NOW

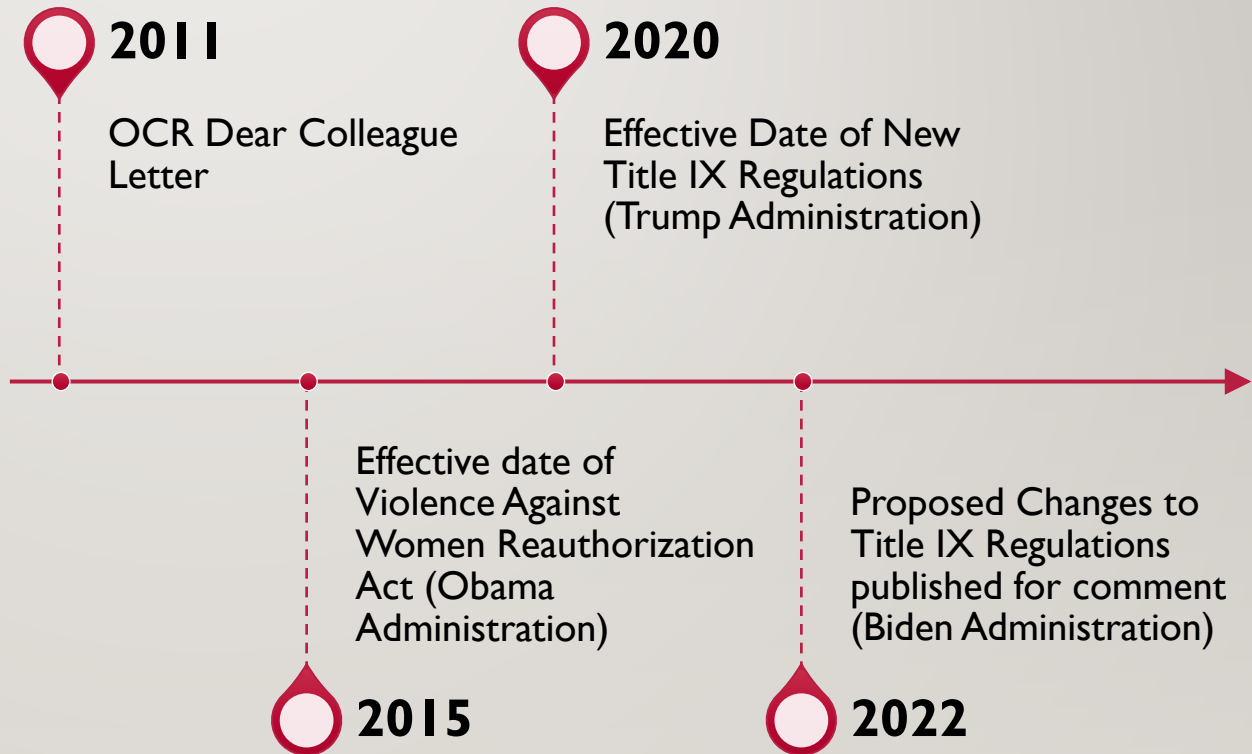
NOVEMBER 7, 2023



WHAT IS TITLE IX?

- “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 (enacted in 1972)

WHERE ARE WE?



WHERE ARE WE NOW?

- The Final Rule is 2,033 pages
 - DOE took three years to draft the new rules
 - 100 days to implement from release date
 - Published in the Federal Register on May 19, 2020. (<https://www.federalregister.gov/documents/2020/05/19/2020-10512/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>)
- Effective date August 14, 2020 – no grace period
- Enforced by the Office for Civil Rights
- Resources
 - Webinars presented by Mackenzie Wilfong, General Counsel for Tulsa Community College, Aleigha Mariott, Director of Student Support and Conduct and Deputy Title IX Coordinator at Oklahoma State University are archived and available at no charge at <https://www.tulsacc.edu/title-ix-regulations-conference>.
 - Additional resources at <https://system.suny.edu/sci/tix2020/>.

MAJOR PROCESS CHANGES

- Revised and uniform definition of sexual harassment across all institutions.
- Sexual harassment defined as conduct on the basis of sex that satisfies one or more of the following:
 - An employee condition educational benefits on participation in unwelcome sexual conduct (i.e. quid pro quo);
 - 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 (as defined in the Clery Act), or dating violence, domestic violence, or stalking as defined in the Violence Against Women Act.

MAJOR PROCESS CHANGES

- Institutions can choose between preponderance of the evidence or clear and convincing as the standard of evidence.
 - Neither standard is defined in the regulations.
 - Must use the same standard for employees **and** students.
- Mandatory reporters (responsible employees) can be a much smaller group.
 - Only required to include the Title IX Coordinator and any official who has the authority to institute corrective measures on behalf of the institution.
- Title IX Coordinator responsible for providing supportive measures (non-disciplinary, non-punitive individual services offered to complaint and respondent).

MAJOR PROCESS CHANGES

- Report is different than a formal complaint
 - Does not trigger investigative or hearing process
 - Must provide information about supportive measures and explain process to file formal complaint
 - Third parties can report
- Formal complaint must be signed (can be digital) by complainant or Title IX Coordinator

MAJOR PROCESS CHANGES

- Formal complaints **must** be dismissed (from the Title IX process) if conduct:
 - Would not constitute sexual harassment even if proved,
 - Did not occur in institution's program/activity, or
 - Did not occur against a person in the United States (study abroad).
- Formal complaints **may** be dismissed (from the Title IX process):
 - If complainant requests to withdraw their complaint
 - If respondent is no longer enrolled or employed
 - When specific circumstances prevent gathering evidence sufficient to reach a determination
- Informal resolution (mediation) is now available unless complaint is a faculty on student issue. Requires specific notice to the parties and voluntary, written consent.

MAJOR PROCESS CHANGES

- All investigations must end with a written report.
- Structured process with specific timelines to allow parties to review investigative report and evidence before the hearing.
- For all decisions (faculty, staff, and students) the institution must have a live hearing with cross-examination by an advisor, which can be done virtually.
 - Only advisor can conduct cross-examination.
 - The institution must provide an advisor “without fee or charge” to any party without an advisor in order to conduct cross-examination (can limit the role to only conducting cross-examination).
 - The decision maker must rule on relevance of questions on the record.
 - Parties and witnesses must attend hearing and submit to live, advisor-led cross-examination. If party or witness does not attend, all statements submitted by absent party must be excluded.
- All training materials used for anyone in the Title IX process must be made public on a website

EMPLOYMENT ISSUES

- This new process applies to employees in addition to students.
- Title VII defines sexual harassment as “severe **or** pervasive” not the Title IX “severe **and** pervasive.” (emphasis added)
- Title VII “knew or should have known” versus Title IX “actual knowledge”
- Title IX you now “must dismiss” a formal complaint if conduct is not against a person in the United States but Title VII applies to United States citizens working abroad.
- Consider including supervisors as mandatory reporters to comply with both Title VII and Title IX.



PROPOSED CHANGES

DEFINITIONS

- Full text of proposed regulations at <https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm.pdf>.
- Prohibit all forms of sex discrimination, including discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity
- Quid pro quo harassment prohibited
- Harassment creating a hostile environment prohibited
 - “Unwelcome conduct this is sufficiently severe or pervasive that, based on the totality of the circumstances and evaluated subjectively and objectively, it denies or limits a person’s ability to participate in or benefit from the recipient's education program or activity.”
- “Program or activity” includes conduct in buildings owned or controlled by a student organization officially recognized by the institution and conduct occurring off campus when respondent is a representative of the recipient or is otherwise engaged in conduct under the recipient disciplinary authority

INSTITUTIONAL OBLIGATIONS

- Moves away from “actual knowledge” standard in 2020 regulations
 - Must take prompt and effective action to end any prohibited sex discrimination, prevent its recurrence, and remedy its effects
- Responsible employee category broadened from 2020 regulations
 - For higher education, any employee with authority to take corrective action, or if the incident involves students, any employee with responsibility for administrative leadership, teaching, or advising
- Excludes confidential employees
- Complainant may file a complaint even if they leave the institution
- Prohibit retaliation, including peer retaliation

INSTITUTIONAL OBLIGATIONS – GRIEVANCE PROCEDURES FOR SEX DISCRIMINATION

- Treat complainants and respondents equitably
- Unbiased decision-makers and investigators
- Presumption of not responsible
- Reasonably prompt timeframes for all major stages
- Reasonable steps to protect privacy of parties/witnesses
- Notice of allegations
- Investigation that allows equal opportunity for parties to present relevant facts/witnesses/evidence
 - Burden on institution to gather sufficient evidence
 - Determination of relevancy of information
 - Provide parties description of evidence and reasonable opportunity to respond
- Informal resolution allowed but not required but NOT when complaint alleges sex discrimination by employee against student

INSTITUTIONAL OBLIGATIONS – GRIEVANCE PROCEDURES FOR SEX-BASED HARASSMENT INVOLVING A STUDENT

- Generally same as sex-based discrimination but with additional requirements
- Written notice of not just allegations, but also dismissal, delays, meetings, interviews, and hearings
- Access to relevant evidence or to a written report summarizing evidence
- Process to assess credibility of parties/witnesses that includes either:
 - Decisionmaker asking relevant questions in meeting/hearing and allowing parties to propose relevant questions
 - Allowing advisor for each party to ask relevant questions to other parties/witnesses during hearing
 - Cannot rely on statements supporting a party's position if the party refuses to answer credibility questions
- Allow advisors for each party
- Hearing allowed but not required
 - Must allow participation from separate locations in any hearing
- Opportunity to appeal based on procedural irregularity, new evidence, and conflict of interest or bias + any other bases offered equally by institution

INSTITUTIONAL OBLIGATIONS

- Broadens protections based on pregnancy or related conditions
- When a student tells an employee of pregnancy or related conditions, employee must provide information about how to contact the Title IX Coordinator
- Title IX Coordinator must:
 - Provide student with option of individualized, reasonable modifications to prevent discrimination and ensure equal access
 - Allow student a voluntary leave of absence for medical reasons and reinstatement upon return
 - Provide a clean, private space for lactation
- Employees must be provided reasonable break time and a clean, private space for lactation

NOW WHAT?



Comment period
ended September 12,
2022



More than 235,000
comments submitted



Timeline unknown



Separate rule-making
to address athletic
participation



CLERY ACT

MAJOR OBLIGATIONS AND WHY WE CARE

- Collect, classify and count crime reports and statistics
- Issue campus alerts and warnings
- Keep a daily crime log, when applicable
- Publish annual security report by October 1, including statistics and policy statements
- Submit crime statistics to Department of Education
- Provide educational programs and campaigns
- Current fine - \$67,544 per violation (adjusted annually for inflation)

WHERE'S THE HANDBOOK?

- 2016 Handbook Edition addressed addition of Violence Against Women Act requirements (2 years after requirements had to be implemented)
- BUT....it was suddenly rescinded in October of 2020
- No new handbook has been released
- Clery Act Appendix for FSA Handbook issued instead (<https://www2.ed.gov/admins/lead/safety/cleryappendixfinal.pdf>)
- Not retroactive
- No impact on Title IX requirements or enforcement

MAJOR FINES

- Penn State - \$2.4 million (2016)
- Michigan State - \$4.5 million (2019)
- UC Berkeley – nearly \$2.4 million (2020)
- Liberty University - \$37.5 million?? (2023)
- <https://studentaid.gov/data-center/school/clery-act-reports>

MAJOR CHANGES – CAMPUS SECURITY AUTHORITIES

- Include: (i) campus police or security department personnel; (ii) individuals with security-related responsibilities; and (iii) individuals or organizations defined in policy as an individual or organization to which crimes should be reported; also includes an “official who has significant responsibility for student and campus activities, including, but not limited to, student housing, student discipline, and campus judicial proceedings
- Institutions have latitude to define
- Should focus on the “significant responsibilities” of an employee for those not meeting (i)-(iii)
- Must include officials with authority to institute corrective measures under Title IX

MAJOR CHANGES – CLERY GEOGRAPHY

- Campus – (i) any building or property owned or controlled by an institution within the same reasonably contiguous geographic area and used by the institution in direct support of, or in a manner related to, the institution’s educational purposes, including residence halls; or (ii) any building that is within or reasonably contiguous to the area identified in paragraph (I) that is owned by the institution but controlled by another person, is frequently used by students, and supports institutional purposes (such as a food or other retail vendor)
 - Eliminated handbook reference to locations within one mile of campus border to be on-campus
 - No specific definition of “reasonably contiguous geographic area”

MAJOR CHANGES – CLERY GEOGRAPHY

- Noncampus building or property – any building or property owned or controlled by a student organization officially recognized by the institution; or any building or property owned or controlled by an institution that is used in direct support of, or in relation to, the institution’s educational purposes, is frequently used by students, and is not within the same reasonably contiguous geographic area of the institution
 - No definition of “officially recognized” – up to institutions to determine
 - Eliminated guidance on inclusion of institution-sponsored trips
- Examples include off-campus research, event or athletic facilities

MAJOR CHANGES – CLERY GEOGRAPHY

- Public property – all public property that is within the same reasonably contiguous geographic area of the institution, such as a sidewalk, a street, other thoroughfare, or parking facility, and is adjacent to a facility owned or controlled by the institution if the facility is used by the institution in direct support of, or in a manner related to the institution's educational purposes
 - May exclude property divided by a fence or wall or property with clearly posted signage that it is not part of campus
 - No specific measurable distance to define adjacent

RESOURCES

- Department of Education Campus Safety: <https://www2.ed.gov/admins/lead/safety/campus.html>
- ACE – A President’s Guide to the Clery Act: <https://www.acenet.edu/Documents/A-President-Guide-to-the-Clery-Act.pdf>
- Clery Center: <https://www.clerycenter.org/>