



Title IX for Housing and Athletics

The Law (20 U.S. Code § 1681)

Title IX states:

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.

Other Laws:

Title VII and Title VI of the Civil Rights Act of 1963

Title II of the Americans with Disabilities Act of 1990/2008

Title IX Timeline

- Law passed in 1972 as part of the Higher Education Amendments Act
- Dear colleague letter (2011)
- VAWA Amendments to Clery (2014 regulations)
- Department of Education Regulations (August 2020)
- Department of Education Regulations [in limbo] (August 2024)

- Title IX protects both students and employees, AND other participants in an educational program or activity.

A (short) breakdown of Title IX Prohibitions

1. Discrimination

2. Harassment

A. Sexual Assault (Rape, fondling, and incest)

B. Dating and Domestic Violence

C. Stalking

D. Quid Pro Quo

E. Hostile Environment

3. Retaliation

Education Program or Activity

- Includes “locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs”
 - Includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution
 - Complainant must be participating in, or attempting to participate in, the recipient’s educational program or activity at the time of filing a Formal Complaint

Clery CSA versus Title IX Mandatory Reporter

- Your status as a CSA requires you to report on-campus crimes.
- Your status as a Mandatory Reporter under Title IX requires you to report full scope of details known about possible harassment, discrimination, and retaliation in ANY education program or activity, whether on campus or off.

Title IX Liability?

- Office of Civil Rights - U.S. Department of Education
- Private right of action against schools, colleges, universities.
- FITZGERALD V BARNSTABLE: Possibility of individual liability...?

What is a report? What is a complaint?

- A report is information about an alleged Sexual Harassment violation communicated to the Title IX Coordinator. A report will prompt the Title IX Coordinator to notify a Complainant about supportive measures and discuss the process to file a formal complaint, but it does not prompt a Title IX investigation or hearing process. A report is not required to be in writing and can be filed by any individual. A report can include an oral report, written report, personal observation, a newspaper article, an anonymous report, or other various means.

What is a report? What is a complaint?

- Formal Complaint: A document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the College investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the College with which the formal complaint is filed.

Housing and Athletics

- You are on the front lines of significant personal interaction.
- This means you must FIRMLY draw a professional line: (1) You are not fully confidential (2) You must maintain detached and impersonal to an extent in order to be perceived and trusted as a professional (3) This is especially difficult for young professionals – who are frequently new hires in these areas.

Housing and Athletics Professionalism

1. Maintain professional and detached demeanor.
2. Avoid entangling relationships of any kind, treat people equitably.
3. Avoid risqué or otherwise problematic jokes, innuendos, etc.
4. Never assume that time and proximity always equal trust.
5. Avoid personal cell use with students and colleagues, text messages and social media in particular.
6. Professional “aura” in demeanor, dress, and mannerisms.

For those who are Supervisors...

- The buck stops with you. Even if you lack knowledge, you will then be scrutinized for a culture of non-transparency within your department. You must demand reporting from your subordinates and encourage a culture of reporting.
- Hire carefully – screen intentionally for whether you can trust the employment candidate with Title IX.
- Do not **ever, ever, ever** discourage or disincentivize complaints.

What does the Department of Education say?

- “A recipient institution that receives Department funds must operate its education program or activity in a nondiscriminatory manner free of discrimination based on sex, including sexual orientation and gender identity.”
- The precise scope of Title IX and “on the basis of sex” is hotly contested currently in the Federal Courts.
- The applicable regulations are also contested.

What is Title IX Retaliation according to OCR?

- “Also, no recipient or other person may **intimidate**, **threaten**, **coerce**, or **discriminate** against any individual for the purpose of interfering with any right or privilege secured by Title IX or its implementing regulations, or **because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in a proceeding under Title IX.**”

Mandatory Reporting

Employees are expected to report information they become aware of that **may** constitute sex discrimination (including harassment and retaliation) in any program or activity **no matter whether that information is incomplete or uncertain**, so that a trained investigator can inquire deeper into the matter when and if necessary.

Therefore: **even the slightest hint of possible discrimination, harassment, or retaliation creates a reporting burden.**

Avoid Self-Delegation

- Do not investigate potential discrimination, harassment, or retaliation on your own – simply report facts as you have them immediately.
- Definitely do not conduct interviews! Parties have rights that you may inadvertently violate. Among these rights are highly particularized notice requirements prior to an investigation.

In Your Professional Role:

- Consider how to foster an environment where individuals feel more safe coming forward and reporting discrimination, harassment, and retaliation.
- Have frank and semi-frequent reinforcement of your openness to such complaints, and SIGNAL this by putting reporting information (Title IX Contact information, pamphlets, etc) in prominent places in lobbies, locker rooms, break rooms, etc.

In Your Professional Role:

- Retaliation is a high risk, because of its sweeping definition.
- When you personally notice or merely “hear about” any kind of intimidation or slandering, etc, in relation to a person who has made a complaint, or even merely participated in a complaint process, this must be reported to the Title IX Coordinator.

What happens after a report
to the Title IX Coordinator?

Mandatory and Discretionary Dismissals

The Title IX Coordinator is obligated to dismiss a formal Title IX complaint or any allegations therein if, at any time during the investigation or hearing, it is determined that:

- The conduct alleged in the formal complaint would not constitute sexual harassment, even if proved; and/or
- The conduct did not occur in an educational program or activity controlled by the College (including buildings or property controlled by recognized student organizations), and/or
- The College does not have control of the Respondent; and/or
- The conduct did not occur against a person in the United States.

Mandatory and Discretionary Dismissals

- **The Title IX Coordinator has the discretion to dismiss a formal Title IX complaint or any allegations therein if, at any time during the investigation or hearing, it is determined that:**
- A Complainant notifies the Title IX Coordinator in writing that the Complainant would like to withdraw the formal complaint or any allegations therein
- The Respondent is no longer enrolled in or employed by the recipient
- Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

Before an investigation

- Supportive Measures
- Pre-Investigation Process Documents for the parties
 - Investigation Process Overview & Policy
 - VAWA/Clery Handouts
 - Investigation and Hearing Flow Chart
 - Investigation Notice
 - Information about Informal Resolution

Notice

- Must provide notice of the allegations of sexual harassment, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. §106.45(b)(2)(A)
- For an employee respondent, can interview the respondent without disclosing the complainant's identity, as long as no disciplinary action is taken without following the grievance process. 85 Fed. Reg. 30287

List of Notice Requirements

- The letter of notification must include the following and take place PRIOR TO ANY INVESTIGATIVE MEETING OF ANY KIND:

[§106.45(b)(2)(B)]:

- Statement that respondent is presumed not responsible and that a determination of responsibility is made at the conclusion of the grievance process
- Inform parties they may have an advisor of their choice, who may be an attorney
- Inform parties they may inspect and review evidence.
- Inform parties of any provision in policy/code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.
- Written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to participate.

Supplemental Notice

- If the investigation uncovers additional allegations which were not included in the initial notice, must provide notice of the additional allegations to the involved parties whose identities are known. §106.45(b)(2)(ii)

Who has the burden of proof?

- The burden is now clearly on the institution to compile evidence.
 - Never, EVER, characterize the complainant in a way that makes it sound like evidence production is their burden. It is an institutional burden, and any evidence coming from the Complainant is merely requested from them by the institution.

Evidence Gathering

- Must provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence. §106.45(b)(5)(ii)
 - Parties do not have a right to depose others or issue subpoenas. 85 Fed. Reg. 30306
- Cannot restrict the parties' ability to discuss the allegations being investigated. §106.45(b)(5)(iii)

Evidence Review

- Both parties must have an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations, including the evidence upon which the institution does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence, whether obtained from a party or other source. § 106.45(b)(3)(vi)
 - Inculpatory – evidence that tends to show Respondent is responsible
 - Exculpatory – evidence that tends to show Respondent is not responsible

Presumption of not-responsible, for the Respondent

- It is a REQUIREMENT of Title IX Regulations that investigators and hearing decision-makers maintain an understanding that the Respondent is presumed not-responsible for misconduct until all the evidence has been collected and analyzed, and a hearing has ended, and deliberations have begun.
- In your role, you should also maintain neutrality as much as possible, pending the process.

What if you are a witness?

- You might be asked to testify at a hearing.
- You might be asked to speak about what you know with a Title IX investigator.
- If the Title IX case overlaps with a criminal or civil case, you might receive a subpoena to testify in a court of law. You may also be requested by police to provide information to law enforcement.

Discussing Specifics

Harassment as defined in the regulations

- (i) An employee conditioning educational benefits on participation in unwelcome sexual conduct (i.e., quid pro quo);
- (ii) 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
- (iii) Sexual assault (as defined in the Clery Act), or dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA).

Unwelcome Conduct and the Reasonable Person Standard

- Look at the conduct as if you were a reasonable person *in the same position*, and *same unique circumstances* of the complainant's position in the case. (The position itself may be contested)
- Would a reasonable person in such a position feel the conduct was unwelcome?
- Dept. of Ed. Says: “[it]depends on a constellation of factors including the ages and numbers of parties involved.” 85 Fed. Reg. 30150

Dating Violence, Domestic Violence, Sexual Assault, and Stalking

- These are defined in policy using the mandatory Clery Act definitions from the 2014 regulations.
- No “severe, pervasive, and/or objectively offensive” analysis is needed – only a determination of whether the definitions are met.
- Even a single instance of sexual assault can be a violation.
- Definition of consent is highly important in these cases.

What is Sexual Assault?

- The Clery amendments state that sexual assault is, “[a]n offense that meets the definition of rape, fondling, incest, or statutory rape as used in the FBI's UCR program...”
- Those corresponding definitions are:

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.

Further Advice

Remember other Civil Rights

- Race; Ethnicity; religion; national origin; genetic information; age; veteran status
- Nondiscrimination laws are very similar, even if not as regulated (or micromanaged, as some would say) as gender/sex.

Institutional definition of “Consent”

- Title IX and its regulations do not define sexual consent. But CASC does.
- Effective Consent: is 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 ingestion of drugs or alcohol. Consent can be revoked at any time.

Police and Title IX

- Not all prohibitions under Title IX are crimes, but some are.
- The regulations put the complainant in the drivers seat when it comes to police reporting in a non-emergency case.
- In an emergency case, professionals should always alert law enforcement.
- Different interests are at stake, and different burdens of proof.
- Simultaneous investigation!

End, Prevent, Remedy

