Training for Title IX Coordinators: What You Need to Know Right Now About the New Final Rule

Fall 2020
Disclaimer

This training video provides general legal advice about certain topics related to the U.S. Department of Education’s regulation and enforcement of Title IX of the Education Amendments Act of 1972 and specifically with respect to the Title IX regulatory changes released on May 6, 2020 and effective on August 14, 2020. This is a quickly-evolving area, and substantial changes to applicable law, rules, regulations, and enforcement policies in the near term seem likely. We assume no responsibility to update this training video notwithstanding changes in the law. Please note that this presentation does not address state or local laws, rules, or regulations which may be material in evaluating the subject matter of this training video. Finally, this presentation offers general guidance about its topic and does not offer specific legal advice about any particular circumstance, investigation, hearing, or matter.
Session Agenda

I. Where we are: Context and Framework

II. Overview of Required Changes
   - BREAK -

III. Intake and Jurisdictional Analysis
   - BREAK -

IV. Investigation & Adjudication Procedures

V. Handling Cases the New Rule Leaves Out
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.
Title IX’s Purpose

GENDER DISCRIMINATION

Prohibitions on participation

Unequal funding of athletics

Pregnancy Discrimination

Sexual Harassment
  - Sexual Assault
  - Stalking
  - Domestic/Dating Violence
  - Verbal/expressive
Discrimination based on sex should be prohibited in education.

Sexual Harassment is a form of prohibited sex discrimination.

Dear Colleague, address sexual assault or else.

You must use these policies and procedures.

Key Dates in the Evolution of Title IX:

- 1972: Discrimination based on sex should be prohibited in education
- 1997: Sexual Harassment is a form of prohibited sex discrimination
- 2011: Dear Colleague, address sexual assault or else
- 2020: You must use these policies and procedures
The 2011 and 2014 Guidance did…

- Focus attention on the issue of sexual violence
- Raise the profile of Title IX Coordinators
- Result in a near-universal adoption of the “preponderance” standard
- Encourage more students to report incidents of sexual misconduct
- Raise concerns that Respondents were being treated unfairly
- Not change the actual law of the land
The Final Rule is More than Guidance

- The Title IX process is now legally mandated.

- The scope has formally expanded to include intimate partner violence and stalking.

- A Final Rule is not easily made or unmade.

- The Final Rule is about how to implement Title IX’s prohibition of sexual harassment.
Key Message for Your Community

More is staying the same than is changing.

And an important postscript for leadership:

In many instances, we have real control – freely granted by the Department of Education – over what kind of change does happen.
Overarching Goals of Final Rule

1. Narrow the scope of incidents that fall within the law

2. Recalibrate the procedural balance between complainants and respondents
• Single policy applies to employees and students alike
• “Stop, prevent, remedy” → “non deliberate indifference”
• Many definitions standardized, but consent left up to each school
• Definition of sexual harassment narrowed
• Any discretionary elements must apply equally to complainants and respondents
TWO BUCKETS

Title IX Sexual Harassment (TIXSH)
Forms of harassment on the basis of sex that fall within the Final Rule’s definition of sexual harassment and jurisdictional scope. These cases must be handled in accordance with the Final Rule.

Other Sexual Harassment (OSH)
Forms of harassment on the basis of sex that do not fall within the Final Rule’s definition of sexual harassment and/or jurisdictional scope.

Schools may decide for themselves how to handle OSH cases.
REQUIRED CHANGES:  Moderate

• No required training for students
• No required training for all employees
• Training required for coordinators, investigators, decision makers (hearings & appeals), and informal resolution facilitators (if any)
• Required topics:  definition of sexual harassment, scope of “program or activity,” conduct of process, relevancy determinations, impartiality, technology for live hearing
• Training materials must be posted to website
REQUIRED CHANGES: Extensive

- Anyone can report sexual harassment, but few are required to (by this law)
- If coordinator has actual knowledge of TIXSH, must reach out to complainant
- Coordinator must explain supportive measures and option to file a formal complaint
- Investigation required only if complainant (or coordinator) files a formal complaint
- All formal complaints must undergo dismissal analysis
• Supportive measures should be provided regardless of whether formal complaint is filed
• Coordinator should engage in interactive process with complainant and document outcome
• Coordinator should also assess whether respondent needs supportive measures
• Support services are non-punitive and should not unreasonably burden the other party
• No discipline can take place prior to resolution except emergency removal/administrative leave
REQUIRED CHANGES: Moderate

- Cannot use the “single investigator” model
- Parties must receive advance notice of the charges, investigatory interviews, etc.
- Parties must have opportunities to provide, review, and respond to evidence
- Relevant evidence must be summarized in an investigative report
- Investigators must be able to spot jurisdictional issues (dismissal) and additional potential violations (notice)
REQUIRED CHANGES: Extensive

• Hearings may be virtual, but they must be live such that everyone can see and hear each other
• There must be opportunity for cross examination conducted by advisors (who may be attorneys)
• The parties must receive a written rationale for the final outcome
• Informal resolution can be an option if both parties agree to it
• At any point before reaching agreement, either party can choose to resume the formal process
REQUIRED CHANGES: None

• Final Rule does not address prevention efforts
Coordinator Flow Chart

Actual Knowledge →  →  →  →  →
When are you required to respond?

**Obama Era Guidance**

- Whenever a Responsible Person knew of a possible incident.

  (Any employee who a student might reasonably perceive to have authority to address situation or responsibility to report it.)

- Whenever a Responsible Person knew or reasonably should have known about a possible incident.

We are responsible for responding to a huge universe of incidents.
When are you required to respond?

Final Rule

► Whenever the Title IX Coordinator or an official with authority to institute corrective measures knows of a possible incident. (Schools have wide discretion to designate who these officials are.)

► Only whenever one of these officials actually knows of a possible incident.

► And if one of them is the harasser, that doesn’t count.
What’s the Difference?

A student tells Professor Torrico that she was assaulted over the weekend and can’t concentrate on schoolwork. Professor Torrico gives her an extension on the upcoming paper, and promises he won’t mention it to anyone. Obama era? Final Rule era?

Same scenario as before except that this time, Professor Torrico remembers his Title IX training and calls you after the student leaves his office. Obama era? Final Rule era?
Final Rule pro:
More fair to schools. And no forced divulgence

Final Rule con:
Abuse goes undiscovered & undeterred?

Good news:
Your school can set the balance*

Practical note:
Don’t make “untraining” a top priority
WHO CAN REPORT?

Anyone. At any time. In any manner.

WHO MUST REPORT?

A small group of administrators who have authority to institute corrective measures on behalf of the school.
Designate the individuals (those who have authority to institute corrective measures) whose knowledge of a possible incident triggers an obligation to respond.
OBLIGATION TO RESPOND POP QUIZ

• A student informs you verbally that she is feeling pressured to date a campus security guard. **YES**

• A student emails you that she suspects her roommate is being sexually harassed by an ex-boyfriend. **YES**

• The mother of a 20-year-old student leaves a voicemail that her son is being stalked. **YES**

• An anonymous note shoved under your door complains that Professor Adams tells dirty jokes in class on a regular basis. **YES**
Coordinator Flow Chart

Actual Knowledge → Contact Complainant →

→

→
Complainant is not a current student or employee

Complainant is not named
Contacting the Complainant

1. Inform the Complainant that supportive measures are available (regardless of whether they choose to file a formal complaint or not).

2. Consider the Complainant’s wishes with respect to supportive measures.

3. Explain:
   * The process for filing a formal complaint,
   * The grievance process, and
   * Any informal resolution options.
Coordinator Flow Chart

Actual Knowledge → Contact Complainant → Explain Supportive Measures →
SUPPORTIVE MEASURES

What  Individualized services offered as appropriate, as reasonably available, and without fee or charge

When  Before or after filing of a formal complaint (or when no complaint is filed)

Why  To restore or preserve access to education, protect safety, or deter sexual harassment

How  May not be punitive or unreasonably burden the other party
No disciplinary sanctions against respondent until grievance process is completed.
PHEW – AN EXCEPTION!

Emergency Removal
• Individualized safety and risk analysis
• Immediate threat of physical health or safety
• Immediate opportunity to challenge decision

Administrative Leave
• For non–student employee respondents
• During the pendency of the grievance process

* Watch out for IDEA/Section 504/ADA
SUPPORTIVE MEASURES POP

• Facilitate the complainant receiving counseling  
  YES

• Assist the complainant with academic accommodations  
  YES

• Put a hold on the respondent representing the school in athletic events or other competitions until the case is resolved  
  NO

• Issue a mutual no-contact order preventing the parties from interacting with each other  
  YES
What is the Grievance Process?

- Formal Complaint
  - Complainant’s decision
  - Notice

- Investigation
  - Present evidence
  - Review evidence

- Adjudication
  - Live hearing
  - Questioning

- Informal Resolution
  - Mutual consent
  - Mutual agreement
How does a Formal Complaint get filed?

1. Does Complainant want to file a formal complaint?
   - **YES**
   - Is Complainant currently participating?
     - Yes // File Complaint
     - No // Is case appropriate for Coordinator Complaint?
       - Yes // File Complaint
       - No // No Complaint

2. **NO**
   - Is case appropriate for Coordinator Complaint?
     - Yes // File Complaint
     - No // No Complaint

Answer:
By the Complainant or the Title IX Coordinator
IS CASE APPROPRIATE FOR A COORDINATOR COMPLAINT?

If overriding complainant wish...

Violence, threats, indications of predation, ability to prove case without complainant cooperation.

If overriding eligibility problem...

Continuing risk to current students/employees or educational environment
Coordinator Flow Chart

Actual Knowledge  ➔  Contact Complainant  ➔  Explain Supportive Measures  ➔  Explain Grievance Process  ➔  Provide Supportive Measures

Formal Complaint  ➔  ➔  ➔  ➔
FORMAL COMPLAINT

• Must be in writing (document or electronic)

• Must allege sexual harassment and request investigation

• Must be signed (physically or digitally)
No secrets from the respondent or last-minute surprises.
FORMAL NOTICE TO ALL PARTIES

- Explanation of grievance process and informal resolution
- Sufficient details of allegations (who, what, when, where)*
- Presumption of non-responsibility; determination made at conclusion of process
- May have an advisor of choice who may be an attorney
- May inspect and review evidence
- Note any “false statement” rule in code of conduct

If additional allegations will be investigated, supplemental notice must be given
YOUR POLICY ON FALSE STATEMENTS

• Materially false statement

• Made in bad faith

• By itself, adverse determination on responsibility is not enough to support a charge
ACTION ITEMS

☑ Designate the individuals (those who have authority to institute corrective measures) whose knowledge of a possible incident triggers an obligation to respond

☑ Check Code of Conduct re false statement provision
## ADVISORS

<table>
<thead>
<tr>
<th>You Must…</th>
<th>You May…</th>
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<tbody>
<tr>
<td>Allow each party to use their advisor of choice</td>
<td>Limit each party to one advisor</td>
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<td>Allow the advisor to be present at all meetings, interviews, etc.</td>
<td>Place limits on the advisor’s role</td>
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<td>Have the advisors conduct the live questioning at the hearing</td>
<td>Require that questions be relevant, respectful, and non-abusive</td>
</tr>
<tr>
<td>Ensure that each party has an advisor at the hearing</td>
<td>Provide an advisor of your choice</td>
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Coordinator Flow Chart

1. Actual Knowledge
2. Contact Complainant
3. Explain Supportive Measures
4. Explain Grievance Process
5. Provide Supportive Measures
6. Formal Complaint
7. Formal Notice
8. Dismissal Analysis (Mandatory)
Overarching Goals of Final Rule

1. Narrow the scope of incidents that fall within the law

2. Recalibrate the procedural balance between complainants and respondents
IF A FORMAL COMPLAINT IS FILED...

1. **Who** is the complainant?

2. **Where** did the incident(s) take place?

3. **What** type of conduct occurred?
THRESHOLD QUESTION 1: WHO
WAS THE COMPLAINT “A PERSON IN THE US” AT
THE TIME OF THE INCIDENT?

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.
MANDATORY DISMISSAL

If the complainant was not in the United States at the time of the incident…

the school must dismiss that portion of the formal complaint as a Title IX matter.
THRESHOLD QUESTION 2: WHERE DID THE INCIDENT(S) TAKE PLACE?

- On Campus
- Programs/Activities
- Anywhere if impact is felt in school

Obama Era
THRESHOLD QUESTION 2: WHERE DID THE INCIDENT(S) TAKE PLACE?

Final Rule
Substantial Control over Context (Where)

Your education programs & activities

Locations
Residence halls
Classrooms
Campus grounds
Greek houses

Events
School sporting events
School festivals

Circumstances
Athletics
Extracurriculars
Clinics/Internships

Everything Else

Private off-campus housing

Off-campus bars or restaurants

Off-campus parties

Personal travel
When do e-interactions take place in our education program or activity?

- Physical Location of Parties
- Hardware
- Platform/Network
- Event/Activity
E–INTERACTIONS POP

• Working from home on a school-issued laptop, a professor sends pornography to colleague
  * Hardware    * Platform/Network

• Students are listening to a Zoom lecture from home on personal devices. One sends another a harassing note in the private chat.
  * Platform/Network    * Event/Activity

• A student uses an iPhone to send nude photos of their ex to three friends. One of the friends is on campus.
  * Physical location
Did this e-interaction take place in our education program or activity?

One student keeps texting another explicit messages despite being asked to stop.

Physical Location of Parties?
Both off campus

Hardware?
Both using personal cell phones

Platform/Network?
Both on cellular or home networks

Event/Activity?
Always happens late at night
MANDATORY DISMISSAL

If the incident did not take place within the school’s education program or activity…

the school must dismiss that portion of the formal complaint as a Title IX matter.
Partnership in which your institution participates
1. **Who** is the complainant?
2. **Where** did the incident(s) take place?
3. **What** type of conduct occurred?
THRESHOLD QUESTION 3: WHAT TYPE OF CONDUCT OCCURRED?

1. Sexual Assault
   Dating and Domestic Violence
   Stalking

2. A school employee conditioning the provision of an aid, benefit, or service on participation in unwelcome sexual conduct

3. Unwelcome conduct*
   (Expressive: verbal, written, electronic, body language)

* 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.
What constitutes sexual harassment?

OBAMA ERA: “Unwelcome conduct of a sexual nature,” that includes “unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.”

FINAL RULE: “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.”
Title IX is not a “civility code” prohibiting all unwelcome conduct.
New Definition of Sexual Harassment

A single threat of rape (not pervasive)

Catcalls on the way to class on a daily basis (not severe)

Daily threat of rape that results in student failing a class

Conduct that is severe and pervasive, but not objectively offensive

Conduct that is severe, pervasive, AND objectively offensive, but does not effectively deny equal access
MANDATORY DISMISSAL

If the incident does not fall within one of the three prongs of Title IX Sexual Harassment (TIXSH)…

the school must dismiss that portion of the formal complaint as a Title IX matter.
MANDATORY DISMISSAL POP QUIZ

• Complainant sexually assaulted by fellow student at his off-campus apartment.  DISMISS
• Complainant propositioned by professor and offered higher grade at University’s study abroad program in Luxembourg  DISMISS
• Student in clinical nursing program sexually harassed by patient at hospital  KEEP
• Student pushed to the ground on athletic field by angry boyfriend – just one occasion  KEEP
• Professor tells student that he is her type and she could give him the climax of his life  DISMISS
YOUR ANALYSIS OF THE FORMAL COMPLAINT

What happens if the answer to any of the three questions doesn’t take the case over the Title IX threshold?

- Who
- or
- Where
- or
- What
MANDATORY DISMISSAL

The school must dismiss that portion of the Formal Complaint as a Title IX matter.

Promptly send notice written notice of the dismissal (and reasons therefore) to the parties simultaneously.
Coordinator Flow Chart

Actual Knowledge → Contact Complainant → Explain Supportive Measures → Explain Grievance Process → Provide Supportive Measures

Formal Complaint → Formal Notice → Dismissal Analysis (Mandatory) → Dismissal Analysis (Voluntary)
VOLUNTARY DISMISSAL

1. Complainant no longer wishes to proceed

2. Respondent no longer works at/attends the school

3. Not enough information available to pursue case

Promptly send notice written notice of the dismissal (and reasons therefore) to the parties simultaneously.
Coordinator Flow Chart

Actual Knowledge → Contact Complainant → Explain Supportive Measures → Explain Grievance Process → Provide Supportive Measures

Formal Complaint → Formal Notice → Dismissal Analysis (Mandatory) → Dismissal Analysis (Voluntary) → Appeal of Dismissal
Appeal of a Dismissal

- Required for both parties on these grounds:
  1. Procedural irregularity
  2. New evidence
  3. Bias that affected the outcome
  4. Any other ground school allows
- Different decision maker than decided dismissal (and not Coordinator or Investigator)
- Both parties may submit written statement
- Written decision must give result & rationale
**ACTION ITEMS**

- Designate the individuals (those who have authority to institute corrective measures) whose knowledge of a possible incident triggers an obligation to respond.

- Check Code of Conduct re false statement provision.

- Consider adding grounds for appeal of dismissal.
Coordinator Flow Chart

Actual Knowledge → Contact Complainant → Explain Supportive Measures → Explain Grievance Process → Provide Supportive Measures

Formal Complaint → Formal Notice → Dismissal Analysis (Mandatory) → Dismissal Analysis (Voluntary) → Appeal of Dismissal

Consolidation → → → → →
CONSOLIDATION

• Complainant’s allegations against multiple respondents
• Multiple complainants’ allegations against one or more respondents
• The parties’ allegations against each other

Note: In each case the allegations must arise out of the same facts or circumstances
CONSOLIDATION POP QUIZ

• Student A alleges ex-girlfriend hit her; ex-girlfriend alleges Student A stalked her

• Five students who attended a fraternity party allege they were groped by a gauntlet of members

• Student alleges that after assault by soccer player, she was repeatedly sexually harassed by player’s teammates

• Three students allege that they were “roofied” and sexually assaulted by the same respondent, one in March, one in April, and one in May
Coordinator Flow Chart

- Actual Knowledge
- Contact Complainant
- Explain Supportive Measures
- Explain Grievance Process
- Provide Supportive Measures

Formal Complaint
- Formal Notice
- Dismissal Analysis (Mandatory)
- Dismissal Analysis (Voluntary)
- Appeal of Dismissal

Consolidation

Informal Resolution
INFORMAL RESOLUTION PROCESS(ES)

- Parties must opt in (in writing)
- Either party may opt out and resume formal process at any point prior to agreement
- Must be clear with parties about when return to formal process is foreclosed
- Must be clear about records that could be maintained or shared
- Can’t use if complainant is student and respondent is employee
What if the respondent is a student employee?
ACTION ITEMS

- Designate the individuals (those who have authority to institute corrective measures) whose knowledge of a possible incident triggers an obligation to respond.

- Check Code of Conduct re false statement provision.

- Consider adding grounds for appeal of dismissal.

- Create/reform informal resolution process.
Coordinator Flow Chart

1. Actual Knowledge → Contact Complainant → Explain Supportive Measures → Explain Grievance Process → Provide Supportive Measures
2. Formal Complaint → Formal Notice → Dismissal Analysis (Mandatory) → Dismissal Analysis (Voluntary) → Appeal of Dismissal
3. Consolidation
4. Informal Resolution → Investigation

Additional Notes:
- (Mandatory) indicates mandatory steps in the process.
- (Voluntary) indicates optional steps.
- Appeal of Dismissal is a separate stage following the formal process.
So you have a Title IX case, now what?
Three Possible Paths

Supportive Measures Only
- Help the Complainant stay in school
- No discipline for Respondent

Informal Resolution
- Voluntary resolution that involves both parties
- Examples include mediation and restorative justice

Grievance Process
- Most formal and adversarial process
- Could result in discipline of the Respondent, including expulsion

The decision of which path to take is driven primarily by the Complainant.
Overarching Goals of Final Rule

1. Narrow the scope of incidents that fall within the law

2. Recalibrate the procedural balance between complainants and respondents
Grievance Process includes “due process”

- Adequate notice
- Statement of Specific Charges
- Right to review/present evidence
- All evidence available
- Opportunity to be heard
- Live hearing
- Cross Examination
Investigation

- No use of the single investigator/adjudicator model
- Training required for investigators (published)
- Investigators must be impartial
- Burden of gathering evidence is on school
- Parties entitled to equal opportunity to present evidence
- No gag orders
- Parties entitled to review evidence (10-day response period) prior to finalization of investigative report
Investigator(s) must create an investigative report that fairly summarizes the relevant evidence.

At least 10 days prior to the hearing, the report must be provided to each party and advisor.
Hearings

- May be virtual, but must be live

- Recording or transcript required

- Decision maker(s) can’t be coordinator or investigator

- If party does not have an advisor, school must provide an advisor (not necessarily attorney) of school’s choice at no cost to student
Cross Examination

- Questioning done by advisor (parties may not question each other directly)
- Direct, in real time, with audio & visual
- Relevancy requirement, vetting by decision maker(s)
- Rape shield and other and limitations
- Refusal to submit to cross exam = all other statements (including documents) disqualified
  - Even if witness unavailable
  - Even statements against interest
Standard of Evidence

- Either preponderance of the evidence or clear and convincing

- Apply the same standard of evidence to all formal complaints of TIXSH

- Apply the same standard for formal complaints by/against students as for formal complaints by/against employees, including faculty
ACTION ITEMS

- Designate the individuals (those who have authority to institute corrective measures) whose knowledge of a possible incident triggers an obligation to respond
- Check Code of Conduct re false statement provision
- Consider adding grounds for appeal of dismissal
- Create/reform informal resolution process
- Select standard of proof, taking into account that it must be applied in all TIXSH cases
Determination of Responsibility

- Written, simultaneous notification to both parties
  
  Identification of the allegations

  Description of all procedural steps

  Findings of fact supporting the determination

  Conclusions regarding the application of the recipient’s code of conduct to the facts

  Statement/rationale for result as to each allegation including determination regarding responsibility, and any disciplinary sanctions or remedial measures

  Appeal rights
Appeal of a Determination

- Required for both parties on these grounds:
  1. Procedural irregularity
  2. New evidence
  3. Bias that affected the outcome
  4. Any other ground school allows
- Different decision maker (and not Coordinator or Investigator)
- Each parties may submit a written statement
- Written decision must describe result and rationale
HOLD ON – LET’S GET BACK TO...

- One student raping another in an off-campus apartment
- A professor making regular inappropriate remarks that aren’t “severe”
- Level 4 harassment on social media of student who is taking online class from outside the country
SO WE CAN’T DO ANYTHING ABOUT THOSE INCIDENTS????

Yes

You Can

“Dismissal does not preclude action under another provision of the school’s code of conduct.”
TWO BUCKETS

Title IX Sexual Harassment (TIXSH)
Forms of harassment on the basis of sex that fall within the Final Rule’s definition of sexual harassment and jurisdictional scope. These cases must be handled in accordance with the Final Rule.

Other Sexual Harassment (OSH)
Forms of harassment on the basis of sex that do not fall within the Final Rule’s definition of sexual harassment and/or jurisdictional scope.

*Schools may decide for themselves how to handle OSH cases.*
WHAT TO DO WITH OSH?

Student complains that a public safety employee makes flirty remarks to him whenever he sees him, about once a week.

Not Level 4 – not severe

Professor complains that the Dept. Chair told her, “women don’t belong in this field, but I sure do like to watch you coming and going.”

Not Level 4 – not pervasive

Student complains that his ex-girlfriend, also a student, has been following him home every time he leaves campus and sitting outside his house in her car for hours.

Not in school’s program or activity

Student complains she was sexually assaulted by two older students in the restroom of a local bar.

Not in school’s program or activity
A school may address sexual harassment affecting its students or employees that falls outside Title IX’s jurisdiction in any manner the school chooses, including providing supportive measures or pursuing discipline.

- Department of Education’s Summary of Major Provisions of the Title IX Final Rule
JURISDICTIONAL ANALYSIS

Who? Where? What?

Title IX Office

Yes, Title IX

No, not Title IX
WAIT, ARE YOU TELLING ME THAT DOE WILL LET US...

• Refer OSH cases to other offices for investigation and discipline?
  YES

• Use the same procedures and personnel we will be using for Title IX cases to investigate and discipline OSH cases?
  YES

• Use our current Obama-era procedures (or our old pre-Obama procedures) to investigate and discipline OSH cases?
  YES

• Run simultaneous parallel procedures for different aspects of the same course of conduct?
  YES

• Just ignore non-Title IX cases and do nothing about them?
  MAYBE

• Charge an individual with non-Title IX code of conduct violations so that we don’t have to deal with Title IX at all?
  NO
YOU CAN KEEP OSH CASES IN THE TITLE IX OFFICE

Student complains that a public safety employee makes flirty remarks to him whenever he sees him, about once a week.

Professor complains that Dept. Chair told her, “women don’t belong in this field, but I sure do like to watch you coming and going.”

Student complains she was sexually assaulted by two older students in the restroom of a local bar.

Student complains that his ex-girlfriend, also a student, has been following him home every time he leaves campus and sitting outside his house in her car for hours.
YOU CAN FARM OUT OSH CASES TO OTHER OFFICES

Student complains she was sexually assaulted by two older students in the restroom of a local bar.

Professor complains that Dept. Chair told her, “women don’t belong in this field, but I sure do like to watch you coming and going.”

Student complains that his ex-girlfriend, also a student, has been following him home every time he leaves campus and sitting outside his house in her car for hours.
YOU CAN IGNORE (SOME) OSH CASES
HANDLING OSH CASES USING TITLE IX PROCEDURES

- Reduced need for jurisdictional sorting
- Increased consistency and reduced confusion about procedures
- Feels less arbitrary & reduced risk of due process suits

- Stuck with onerous Title IX procedures for handling every case
POSSIBLE APPROACHES TO OSH CASES

Option A: Maximize use of new TIX procedures
- Keep all sexual harassment (TIXSH and OSH) in the Title IX Office and handle them under the Final Rule’s Title IX procedures.

Option B: Push to HR & Student Conduct
- Send all OSH cases out of the Title IX office. Limit the Title IX office to handling TIXSH cases under the Final Rule’s Title IX procedures.

Option C: Use existing Title IX procedures
- Keep all sexual harassment (TIXSH and OSH) in the Title IX Office. Handle TIXSH cases under the new Final Rule and OSH cases under existing Title IX procedures.
ACTION ITEMS

- Designate the individuals (those who have authority to institute corrective measures) whose knowledge of a possible incident triggers an obligation to respond
- Check Code of Conduct re false statement provision
- Consider adding grounds for appeal
- Create/reform informal resolution process
- Select standard of proof, taking into account that it must be applied in all TIXSH cases
- Determine how to handle OSH cases
Determine how to respond to OSH cases:

- Ensure that Codes/Handbooks cover all OSH that you wish to be able to address
- Determine which office will be responsible for handling which type of OSH
- Determine (if relevant) how cases will be transferred from one office to another
- Determine which procedures the relevant office will use in addressing OSH
- Determine whether/how supportive measures will be provided to OSH victims
For Title IX assistance, contact Team Lead Josh Whitlock at joshwhitlock@parkerpoe.com or 704-335-6622
Legal Disclaimer

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This presentation is not intended and should not be construed as legal advice.

Understanding of the law is evolving rapidly in this area. This presentation is our best attempt to summarize the current state of the law and is subject to change.