



Title IX Changes: Key Considerations for ICI

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INDEPENDENT COLLEGES
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Today's Speakers



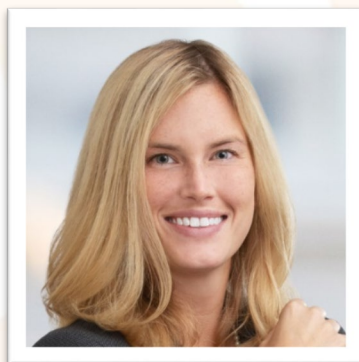
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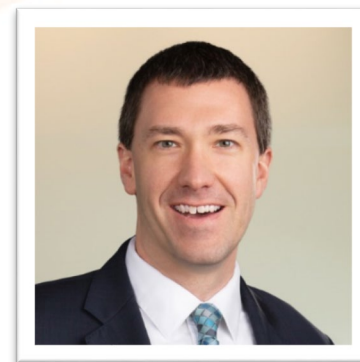
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Discussion Topics:

- Title IX Overview
- Highlight of Regulatory Changes
- Consequences of Potential Noncompliance
- Key questions / topics to consider
- **How we can help:** Title IX Compliance Program Overview



presented by Taylor Hunter, Labor & Employment Department

TITLE IX OVERVIEW

What is Title IX?

Federal civil rights statute that prohibits sex discrimination, sexual harassment, and retaliation in all aspects of the educational experience, including academics, extracurricular activities, and athletics

Title IX of the Educational Amendments of 1972 to the Civil Rights Act of 1964

“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.”

- Indiana Senator Birch Bayh was the author of the bill.
- One focus—equal opportunities in education programs or activities.
- Lesser known focus—prohibiting discrimination among students and/or employees.

Purpose of the Statute

- Funding statute
 - Governs schools, not faculty or students
 - 16,500 local school districts, 7,000 postsecondary institutions, as well as charter schools, for-profit schools, libraries, and museums
- As a funding statute, should not punish schools for things outside knowledge/control
- Contains more procedural requirements than Title VII

Key Issues Covered by Title IX

- Recruitment, admissions, and counseling
- Financial assistance
- Athletics
- Sex-based Harassment
- Pregnant and Parenting Students
- Discipline
- Single-Sex Education (schools, classes, and extracurricular activities)
- Employment
- Retaliation

Key Administrative Requirements

- Establish a system for prompt and equitable resolution of complaints (consistent with new regulations)
- Provide training (consistent with new regulations)
- Disseminate a notice of nondiscrimination
- Designate at least one employee to coordinate efforts to comply with and carry out responsibilities under Title IX (Title IX Coordinator)
- Provide Interim Measures (Victim advocacy, housing assistance, academic support, counseling, health and mental health services, and the right to report the crime to law enforcement)
- Information Collection and Reporting

Grievance Procedures: Basic Principles

- To call witnesses
- To present evidence
- To involve advisors/attorneys
- To access evidence gathered by the school
- To appeal

Title IX Regulations

- Title IX's statutory language is brief.
- Federal government has issued guidance clarifying how it interprets and enforces those regulations
 - Obama 2011 and 2014 guidance
 - Trump 2017 Interim guidance

DeVos revoked Obama-era guidance in September 2017

- Released Q&A “Interim Guidance”
 - removed the preponderance of evidence standard as the appropriate standard of proof for investigating allegations of sexual violence;
 - eliminated the 60-day timeframe from Title IX investigation proceedings;
 - allowed an appeals process initiated either by both parties or solely by accused students; and
 - created an informal resolution option

Guiding Principles

- Rulemaking process rather than mere guidance
- Greater clarity to ensure that all schools clearly understand their legal obligations under Title IX and that all students clearly understand their options and rights
- Fair process for the accused

Proposed Regulations

- Published November 16, 2018. (first Title IX guidance published by OCR to go through a formal notice-and-comment process since 1997)
- Comments were taken until January 30, 2019 (appx. 124,000 comments)
- Final regulations **effective August 14, 2020**
- Remember—the regulations are the law!



presented by Mark Scudder, Labor & Employment Department

KEY CHANGES

What's New?

- Many requirements for hearings:
 - Cross examinations
 - Appointed advisors
 - “Single investigator” model is banned
- Supportive measures for complainants.
- Mandatory training.

Regulations Represent A Significant Change

- Previously, the DOE issued non-binding guidance.
- The regulations codify the new requirements.
- The regulations contain key differences from all previous guidance.

Defines “Sexual Harassment”

- (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct;
- (2) 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 recipient’s education program or activity; or
- (3) “Sexual assault” as defined in 20 U.S.C.1092(f)(6)(A)(v), “dating violence” as defined in 34 U.S.C. 12291(a)(10), “domestic violence” as defined in 34 U.S.C. 12291(a)(8), or “stalking” as defined in 34 U.S.C. 12291(a)(30).

What Places Are Covered?

- Covers sexual harassment occurring “in the school’s education program or activity, against a person in the United States.”
- What is the school’s “education program or activity?”
 - Locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs.
 - Specifically includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

Grievance Procedure Requirements Are Mandatory

- In the Notice of Proposed Rulemaking, schools received a “safe harbor” if they followed all of OCR’s requirements for a grievance procedure.
 - Schools could choose not to follow them.
- Now, the requirements are mandatory—failing to comply violates the regulations and exposes the school to liability.
- Key change: Decision-maker cannot be the Title IX Coordinator or the investigator.

Supportive Measures Are Mandatory

- When a school learns of sexual harassment, its mandatory response must include an offer of supportive measures for the complainant.
- The Title IX Coordinator should promptly contact the complainant to discuss the availability of supportive measures, consider the complainant's wishes with respect to supportive measures, etc.

Hearings Are Required

- For post-secondary schools, the grievance procedure must include live hearings.
- Schools have discretion to have everyone in the same location, or allow some or all of the participants to appear at the live hearing virtually, with a technology enabling participants simultaneously to see and hear each other.
- Schools must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.
- Specifically bars the use of an informal resolution process, such as mediation, to resolve allegations that a school employee sexually harassed a student.

Advisors Must Be Provided

- Schools must allow the parties to have an advisor of their choice present at the hearing.
- If a party does not have an advisor present at the live hearing, the school must provide without fee or charge to that party, an advisor of the school's choice to conduct cross-examination on behalf of that party.
 - The advisor may be, but is not required to be, an attorney.

Standard Of Evidence

- Policy may choose between the “preponderance of the evidence” standard or the “clear and convincing evidence” standard.
 - No requirement to be consistent with other student disciplinary proceedings.
- Must apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty.

Hearing Procedures

- Each party's advisor may ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.
- Only relevant cross-examination and other questions may be asked of a party or witness.
 - The decision-maker must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.
- Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally.

Retaliation Prohibited

- Charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX, constitutes retaliation.
 - Code of conduct violations may be issued for making a materially false statement in bad faith in the course of a grievance proceeding.

Training is Mandatory

- Must train all Title IX personnel on:
 - Key definitions.
 - How to conduct investigations/grievance process.
 - How to be impartial.
- Must provide decision-makers and investigators with training on evidentiary issues.
 - Relevancy.
 - Rape shield protections.
- Must train decision-makers on any technology using at hearings.



presented by Chris Bayh, Litigation Department

CONSEQUENCES OF POTENTIAL NONCOMPLIANCE

Consequences of Potential Noncompliance

Department of Education Office of Civil Rights

- Potential steps
 - Complaint
 - Investigation
 - Enforcement action
- Publication

Consequences of Potential Noncompliance

- Civil suit
 - Private right of action
- Relations: campus, alumni, community, public

Other Impacts and Considerations

- Law enforcement
 - Campus police
 - Local law enforcement
- Privacy and protection
 - FERPA
 - Privilege
 - Public records



moderated by Janylyn Daub, Labor & Employment Department

KEY TAKE-AWAYS/DISCUSSION

Title IX Policy Considerations

- What will be your institution's Standard of Review?
- How will you handle the investigatory and disclosure requirements under the new regulations?
- What resources will you offer for the mandated supportive measures?

Title IX Hearing Considerations

- Who will staff the various roles required by the regulations (coordinator, investigator, advisor, adjudicator)?
- Will you need to outsource?
- How will you fulfill your training responsibilities?
- How will you handle live hearing logistics?
- What are your institution's technology capabilities?



presented by Janilyn Daub, Labor & Employment Department

HOW WE CAN HELP: TITLE IX COMPLIANCE PROGRAM

Title IX Compliance Program Overview

- **Administrators/Title IX Coordinator Training & Policy**
 - **Description:** Webinar Training for Administrators and Title IX Coordinators regarding the new Title IX regulations, developing a revised Title IX policy, and how to perform their roles under the new regulations.
 - **Date:** End of June/beginning of July
 - **Deliverables:**
 - 1. Four-hour virtual training session to be offered on 2 different dates to accommodate participants' schedules
 - 2. Model Title IX Policy, which will be covered during training, including options for modifying the policy, and explanation of the various options

Title IX Compliance Program Overview

- **Investigator Training and Adjudicator/Advisor Trainings**
 - **Description:** In-person training for investigators, adjudicators & advisors
 - **Date:** Late July/early August
 - **Deliverables:**
 - 1. Two- to three-hour in-person training session on investigation of Title IX complaints under the revised regulations, to be offered as a morning session on 2 different dates to accommodate participants' schedules
 - First part of the session will help investigators understand their new and different roles under Title IX
 - Second part of the session will involve a hypothetical fact scenario relating to investigating a complaint under the new regulations
 - 2. Two- to Three-hour in-person training session on Title IX hearings for Adjudicators and Advisors, to be offered as an afternoon session on 2 different dates to accommodate participants' schedules
 - First part of the session will help adjudicators & advisors understand their new and different roles under Title IX
 - Second part of the session will provide further training through a mock hearing

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QUESTIONS?

Submit through the chat
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