

Title IX, the Clery Act & VAWA

REGIONS PCCS

DALLAS, TX

JUNE 10, 2019



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BACKGROUND



Timeline

1972 – Title IX

2001 – OCR's Title IX Guidance

2011 – Title IX Dear Colleague Letter

2013 – Violence Against Women Act Reauthorization

2017 – New Interim Guidance on Campus Sexual Misconduct

2018 – Proposed Title IX Regulations

Title IX of the Education Amendments of 1972



Prohibits sex discrimination in education programs that receive federal funding.

Sexual harassment, including sexual assault, is a type of sex discrimination that is banned by Title IX.

Sexual harassment creates a hostile environment when it is sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from an education program.



Clery Act:

Every institution must:

Collect, classify and count crime reports and crime statistics.

Issue a **timely warning** for any *Clery Act* crime that represents an ongoing threat to the safety of students or employees;

Issue an **emergency notification** upon the confirmation of a significant emergency or dangerous situation involving an immediate threat to the health or safety of students or employees occurring on the campus.

Publish an annual security report containing safety- and security-related policy statements and crime statistics and distribute it to all current students and employees. Schools also must inform prospective students and employees about the availability of the report.

Submit crime statistics to ED. Each year in the fall schools must participate in a Web-based data collection to disclose crime statistics by type, location and year.

ED can issue civil **finest of up to \$54,789 per violation** for a substantial misrepresentation of the number, location or nature of the crimes required to be reported or for a violation of any other provision of the safety- and security-related *HEA* regulations.



2001 OCR Title IX Guidance

Provides the principles that a school should use to recognize and effectively respond to sexual harassment of students in its program as a condition of receiving Federal financial assistance.

- Describes the regulatory basis for a school's compliance responsibilities under Title IX
- Outlines the circumstances under which sexual harassment may constitute discrimination prohibited by the statute and regulations
- Provides information about actions that schools should take to prevent sexual harassment or to address it effectively if it does occur



2011 Dear Colleague Letter

Was deemed a “significant guidance document” by ED

Detailed schools’ obligations and the appropriate response to sexual harassment and violence

Guidance was repealed by Secretary DeVos in September 2017



Title
IX



Clery
Act



Violence Against Women Reauthorization Act (2013)

Amended the Clery Act to require that schools compile statistics for incidents of

- domestic violence,
- dating violence,
- sexual assault; and
- stalking

(collectively referred to as "sexual misconduct") that occur on or near campus.



Violence Against Women Reauthorization Act (2013)

Updated requirements for school's Annual Security Reports. The ASR must now include:

- The school's ***educational programs*** to promote awareness of sexual misconduct;
- Possible ***sanctions*** school may impose regarding sexual misconduct;
- ***Procedures that victims should*** follow if an incident of sexual misconduct has occurred;
- The school's procedures for conducting a ***disciplinary proceeding*** in cases of alleged sexual misconduct;

Violence Against Women Reauthorization Act (2013)



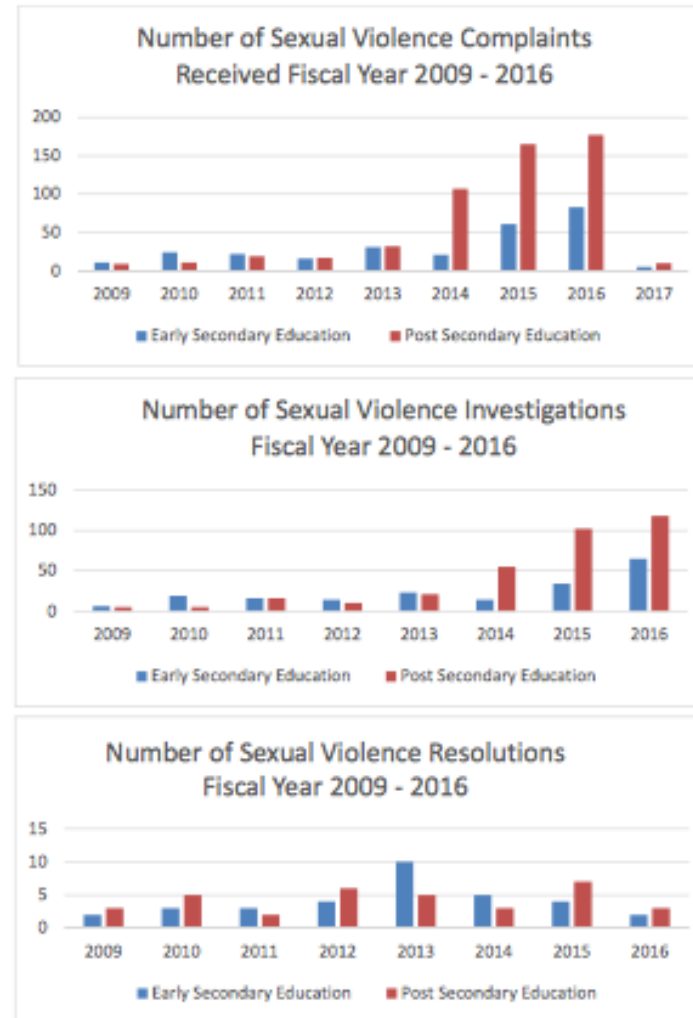
School's Annual Security Report must also include:

- Information about how the school will protect ***confidentiality*** of a victim;
- Written notification to students and employees about ***counseling, health, victim advocacy, legal assistance*** and other services available for victims;
- Written notification to victims about available ***accommodations*** to academic and living arrangements if requested by the victim.

Appendix D: Number of Title IX Complaints, Investigations, and Resolutions

2009-2016

Source: Department of Education, Office for Civil Rights



“The Second Report of the White House Task Force to Protect Students from Sexual Assault,” January 5, 2017, (retrieved from <https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Documents/1.4.17.VAW%20Event.TF%20Report.PDF> [retrieved January 18, 2017])



2017 INTERIM GUIDANCE

What is the Nature of a School's Responsibility to Address Sexual Misconduct?

Whether or not a student files a complaint of alleged sexual misconduct or otherwise asks the school to take action, where the school knows **or reasonably should know** of an incident of sexual misconduct, the school must take steps to understand what occurred and to respond appropriately.

United States Department of Education, Office for Civil Rights, Q&A on
Campus Sexual Misconduct, September 2017,
<https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>

2018 Proposed Title IX Regulations



As stated in the Preamble:

The proposed regulations are intended to promote the purpose of Title IX by requiring recipients to address sexual harassment, assisting and protecting victims of sexual harassment and ensuring that due process protections are in place for individuals accused of sexual harassment.

- Published in the Federal Register on November 29, 2018
- 60-day public comment period originally set to end January 28, 2019 – ***Extended two days to January 30, 2019***



2018 Proposed Title IX Regulations

Schools must:

- Designate Title IX coordinator and provide all students and staff with contact information
- Establish and disseminate policy prohibiting discrimination based on sex
- Adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging sex discrimination



2018 Proposed Title IX Regulations

Proposed § 106.44(a): a school with actual knowledge of sexual harassment in an education program or activity of the school must respond in a manner that is not deliberately indifferent.

Proposed definition of “actual knowledge”

- notice of sexual harassment or allegations of sexual harassment to a school’s Title IX Coordinator or any school official who has authority to institute corrective measures on behalf of the school,
- imputation of knowledge based solely on constructive notice is insufficient to constitute actual knowledge
-



2018 Proposed Title IX Regulations

Proposed § 106.44(a): a school with actual knowledge of sexual harassment in an education program or activity of the school must respond in a manner that is not deliberately indifferent.

- Proposed § 106.44(a) provides that a school is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.
- A school is not deliberately indifferent when in the absence of a formal complaint the school offers and implements supportive measures designed to effectively restore or preserve the complainant's access to the school's education program or activity.



2018 Proposed Title IX Regulations

Grievance procedures for formal complaints of sexual harassment:

- Treat complainants and respondents equitably
- Require an objective evaluation of all relevant evidence and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness
- Coordinator, investigator, and decision-maker must receive training and not have any conflict of interest or bias
- Presumption that the respondent is not responsible for the alleged conduct until a final determination is made
- Include reasonably prompt timeframes for conclusion of the grievance process
- Describe the range of possible sanctions and remedies
- Describe the standard of evidence to be used
- Include appeal procedures (if the school offers an appeal)
- Describe the range of supportive measures available



2018 Proposed Title IX Regulations

Schools must investigate the allegations in a formal complaint. The investigation must:

- Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the school and not on the parties;
- Provide equal opportunity for the parties to present witnesses and evidence;
- Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;
- Provide the parties with the same opportunities to have others present during any grievance proceeding, including the advisor of their choice;
- Provide proper notice to parties whose participation is invited or expected
- Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the complaint allegations;
- Create an investigative report and provide parties with a copy at least 10 days prior to a hearing.



2018 Proposed Title IX Regulations

For institutions of higher education, the school's grievance procedure must provide for a live hearing.

- Each party must be permitted to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.
- Such cross-examination must be conducted by the party's advisor of choice.
- If a party does not have an advisor present at the hearing, the school must provide that party an advisor aligned with that party to conduct cross-examination.



2018 Proposed Title IX Regulations

For institutions of higher education, the school's grievance procedure must provide for a live hearing.

- All cross-examination must exclude evidence of the complainant's sexual behavior or predisposition, unless relevant to prove that someone other than the respondent committed the alleged conduct or is offered to prove consent.
- At the request of either party, the school must provide for cross-examination to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party answering questions.
- If a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility.



2018 Proposed Title IX Regulations

The decision-maker(s) cannot be the same person(s) as the Title IX Coordinator or the investigator(s)

Must issue a written determination regarding responsibility.

Must apply either the preponderance of the evidence standard or the clear and convincing evidence standard.

- Can use the preponderance of the evidence standard only if the school uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction.



2018 Proposed Title IX Regulations

At any time prior to reaching a determination regarding responsibility the school may facilitate an informal resolution process, such as mediation, provided that the school:

Provides to the parties a written notice disclosing—

- The allegations;
- The requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, if any; and
- Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared; and

Obtains the parties' voluntary, written consent to the informal resolution process.

PUBLIC COMMENT PERIOD

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ED-2018-OCR-0064

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Title IX of the Education Amendments of 1972

Docket Folder Summary View all documents and comments in this Docket

Docket ID: ED-2018-OCR-0064 Agency: Department of Education (ED)

Summary:
The Secretary plans to issue a notice of proposed rulemaking to clarify the obligations of recipients of Federal financial assistance in redressing sex discrimination, including complaints of sexual misconduct, and the procedures by which they must do so.

RIN: 1870-AA14 Impacts and Effects: None CFR Citation: 34 CFR 106 Priority: Other Significant

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Primary Documents View All (3)

PR

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal...

Proposed Rule Posted: 02/14/2019 ID: ED-2018-OCR-0064-11187

Comment Period Closed Feb 15, 2019 11:59 PM ET

PR

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal...

Proposed Rule Posted: 01/28/2019 ID: ED-2018-OCR-0064-7922

Comment Period Closed Feb 15, 2019 11:59 PM ET

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Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal...

Comment Period Closed Feb 15, 2019 11:59 PM ET

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Title IX Challenges for Trade & Career Schools



The Proposed Title IX regulations highlight particular issues and challenges for trade and career schools:

- Schools do not have on-campus police or dedicated security forces or investigators.
- The Title IX coordinator at these schools are usually the director or another administrator whose primary job functions pertain to institute operations.
- Given the size of the student body, lack of residential student housing and limited school-sponsored extracurricular activities, incidents of alleged Title IX violations may be infrequent at these types of institutes.

NEVERTHELESS: Title IX applies to all Title IV institutions and these proposed regulations, once finalized, will apply to network institutions



Potential Issues for Final Regs:

Issues for additional consideration in final regulations:

- Requiring separate Title IX coordinator, investigator and decision-maker
- When does a school have knowledge of a Title IX complaint?
- Responsibility to investigate triggered only if formal complaint filed
- Requiring live hearings to allow for cross-examination
- What examination methods are appropriate for cross-examination?
- Requiring schools to provide advisors to conduct cross-examination at hearings
- When does an off-campus incident create a hostile environment on-campus?
- How to accommodate students during an investigation?



Thank You!

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