Lesson 1
2021 Refresher and Update
Introduction and Overview
Introduction

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Overview of the Course

Lesson 1: Introduction and Overview
Lesson 2: Title IX regulations refresher
Lesson 3: “Living the regs”/Common Mistakes
Lesson 4: Update
Lesson 5: Wrap Up and Assessment of Knowledge
Learning Objectives

- Review the Title IX regulations
- Understand lessons learned “living the regs”
- Recognize common mistakes made in investigations
- Understand updates in sub-regulatory guidance that could impact compliance

Disclaimers

- Not legal advice
- Cannot possibly cover everything
- Pre-Requisite: Core Title IX U course for Title IX Investigators
- Rapidly evolving space, must continue professional development
See you in Lesson 2!
Lesson 2
Title IX
Regulations Refresher

Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 et seq

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.
How is Title IX Enforced?

- Office for Civil Rights
- Courts
Evolution of Title IX

- 2011 Title IX Guidance
  Dear Colleague Letter

- 2013 Title IX Guidance
  Dear Colleague Letter

- 2015 Title IX Guidance
  Dear Colleague Letter on Title IX Coordinators

- 2018 Notice of Proposed Rulemaking

- August 14, 2020
  Implementation Deadline for New Title IX Regulations

- 2020 Title IX Guidance
  Revised Sexual Harassment Guidance

- 2020 Title IX Guidance
  Q & A on Title IX & Sexual Violence

- 2020 Title IX Guidance
  Dear Colleague Letter Withdrawing 2011 and 2014 Guidance

- May 6, 2020
  Title IX Regulations

- April 6, 2021
  DOE Launches Comprehensive Review of Title IX Regulations

Title IX Regulations Refresher
REGULATIONS REQUIREMENTS
OVERVIEW

Prescriptive Title IX Process
Officials with Authority
Policies and Procedures
Team and Training
Coordinator with Authority

Title IX Team

1. Investigator
   May be the same as the Title IX Coordinator

2. Decision-Maker
   May NOT be the same as the Title IX Coordinator OR Investigator

3. Appellate Decision-Maker
   May NOT be the same as the Title IX Coordinator, Investigator, OR Decision-Maker

4. Informal Resolution Facilitator
   May be the same as the Title IX Coordinator (ONLY if policy allows for Informal Resolutions)
Sexual Harassment

Conduct on the basis of sex that satisfies ONE OR MORE of the following:

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.

3. "Sexual Assault," "Dating Violence," "Domestic Violence" or "Stalking" as defined in the Clery Act.

Sexual Assault

- Rape
- Statutory Rape
- Fondling
- Incest
**SEXUAL ASSAULT**

**Sexual Assault:** An offense that meets the definition of rape, fondling, incest or statutory rape as used in the FBI’s Crime Reporting system. A sex offense is any sexual act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent.

**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.

**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 his/her age or because of his/her 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.

**DOMESTIC VIOLENCE**

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; or
- 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.
DATING VIOLENCE

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 based upon the reporting party’s statement with consideration of the following factors:

(i) The length of the relationship
(ii) The type of relationship
(iii) 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.

STALKING

Stalking: Engaging in a course of conduct directed at a specific person that would cause a reasonable person to

(1) Fear for the person’s safety or the safety of others; or
(2) Suffer substantial emotional distress.

For purposes of this definition:

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.
Location Matters...

Sexual Harassment + Education Program or Activity

FORMAL TITLE IX GRIEVANCE PROCESS

1. Report of Sexual Harassment
2. Formal Complaint + Notice of Allegations
3. Investigation
   - Review/Response to Directly Related Evidence
   - Review/Response to Written Report
4. Hearing
   - Live
   - Cross Exam
5. Appeal
   (determination re: responsibility/ Formal Complaint)
Regulations say:
Initial Response to Formal Complaint

- NOTICE OF ALLEGATIONS
  - UPON RECEIPT OF FORMAL COMPLAINT
  - INCLUDES SUFFICIENT DETAILS
  - PRESUMED NOT RESPONSIBLE
  - ADVISOR OPTION
  - INFORMAL RESOLUTION OPTION
  - STANDARD OF EVIDENCE
  - RIGHT TO REVIEW
  - PROVISION FOR FALSE STATEMENTS
- SUPPORTIVE MEASURES FOR RESPONDENT
- UPDATES TO NOTICE OF ALLEGATIONS AS NECESSARY

Supportive Measures/Options

- SUPPORTIVE MEASURES
  - PROMPTLY
  - REGARDLESS OF WHETHER FORMAL COMPLAINT
    - BURDEN ON INSTITUTION, NOT THE PARTY
- FORMAL COMPLAINT
  - BY COMPLAINANT OR TITLE IX COORDINATOR
  - ALLEGED SEXUAL HARASSMENT AGAINST RESPONDENT
  - REQUEST INVESTIGATION
**Regulations say:**

**Investigation of Formal Complaint**

- Notice of meetings with sufficient time to prepare
- Opportunity for advisors
- Not restrict discussion or fact gathering
- Equal opportunity to present witnesses
- Burden on institution, not the parties

**Regulations say:**

**Opportunities for Review**

- Provide both parties equal opportunity
- Inspect and review evidence directly related to the allegations
  - Prior to completion of report
  - At least 10 days
- Investigative report
  - 10 days prior to hearing
Regulations say: Informal Resolution

- NOT REQUIRED FOR INSTITUTION TO ALLOW OR FOR PARTIES TO PARTICIPATE
- AFTER FORMAL COMPLAINT
- PRIOR TO DETERMINATION
- NOTICE, AGREEMENT WRITTEN CONSENT, ABILITY TO WITHDRAW
- NOT WHEN RESPONDENT IS EMPLOYEE AND COMPLAINTANT IS A STUDENT

Regulations say: Written Report

- FAIRLY SUMMARIZES RELEVANT EVIDENCE
- YOU ARE NOT MAKING A DETERMINATION OF RESPONSIBILITY
Regulations say: Written Determination

- MUST INCLUDE:
  - Identification of Allegations
  - Description of Procedural Steps Taken
  - Findings of Fact
  - Conclusions regarding Application of Facts to the Code of Conduct/Policy
  - Statement of and Rationale for the Determination of Each Allegation
  - Statement of and Rationale for the Sanctions/Remedies Procedures and Permissible Basis for Appeal

Regulations say: Appeals/Conflict of Interest

- THREE BASES FOR APPEAL PROVIDED – PROCEDURAL IRREGULARITY, NEW EVIDENCE, CONFLICT OF INTEREST/BIAS
- **AVOID CONFLICT OF INTEREST/BIAS**
- THOROUGH, FAIR AND IMPARTIAL INVESTIGATION
See you next lesson!
Lesson 3: Living the Regs/Common Mistakes

LIVING THE REGS

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What Are You Investigating

- Does everything go through one process or is it bifurcated?
  - Reports related to
    - Culture
    - Non-Title IX Sexual Misconduct
    - Pregnancy
    - Discrimination
    - Other

Incomplete Policy Definitions

- All Sexual Harassment as defined by the regulations including:
  - Rape
  - Fondling
  - Statutory Rape
  - Incest
  - Domestic Violence
  - Dating Violence
  - Stalking
FAILURE TO UPDATE THE NOTICE OF ALLEGATIONS

- New Allegations/Additional Alleged Violations
- Change in Date/Time/Location
- Update of Name of a Party

Inequitable Treatment of the 10 Day Review Periods

✓ Access to Information
✓ Extensions
✓ Providing to Advisor
NOT PLANNING AHEAD FOR 10 DAY REVIEW PERIODS

- Evidence shared:
  - Documents
  - Evidence
  - Videos
  - Photos
- Organization
- Communications about the review
- What to do with the responses

FAILURE TO KEEP DETAILED RECORDS AND INVESTIGATIVE FILE

- Organized
- Clear
- Accessible
- Up to Date
FORGETTING ABOUT VAWA AND CLERY IN NON-TITLE IX SEXUAL MISCONDUCT/HARASSMENT

- Advisors
- Support
- CSA Requirements
- Reporting
- Timely Warnings
- Etc.

SHOWING YOUR WORK VS OVERLY COMPLEX REPORT
CLUNKY TRANSITIONS

- Into Title IX Process
- Into Other Campus Process (Code of Conduct, Non Title IX etc.)
- Into Informal Resolution Process
- Out of Informal Resolution Process
- Into Hearing Process

See you next lesson!
Lesson 4
Update

How is Title IX Enforced?

Office for Civil Rights

Courts
Evolution of Title IX

- **2011 Title IX Guidance**: Dear Colleague Letter
- **2015 Title IX Guidance**: Dear Colleague Letter on Title IX Coordinators
- **2018 Notice of Proposed Rulemaking**: To Amend Title IX Regulations
- **August 13, 2020**: Implementation Deadline for New Title IX Regulations
- **2014 Title IX Guidance**: Q & A on Title IX & Sexual Violence
- **2017 Title IX Guidance**: Dear Colleague Letter Withdrawing 2011 and 2014 Guidance
- **May 6, 2020**: Title IX Regulations
- **April 6, 2021**: DOE Launches Comprehensive Review of Title IX Regulations

The Change in Administration

- **April 6, 2021**: DOE Launches Comprehensive Review of Title IX Regulations

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Why Significant?

BIDEN WAS VP TO PRESIDENT OBAMA
BIDEN AND VAWA
BIDEN AND TITLE IX

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Department of Education Sub-Regulatory Guidance

Reminder

All Department of Education Guidance prior to the new regulations archived by Trump DOE, and Biden DOE has archived Trump DOE guidance as well.
Guidance Regarding The Regs

- May 2020 – January 2021: Various guidance released by OCR on the new regulations in blog posts
- Office for Civil Rights Open Center Response Repository

Biden and the Regulations

April 6, 2021 Announcement:

Department of Education’s Office for Civil Rights Launches Comprehensive Review of Title IX Regulations to fulfill President Biden’s Executive Order guaranteeing an educational environment free from sex discrimination

“The U.S. Department of Education’s Office for Civil Rights (OCR) today announced a comprehensive review of the Department’s regulations implementing Title IX of the Education Amendments of 1972, as part of implementing President Biden’s March 8 Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity.”

In a letter to students, educators, and other stakeholders, OCR outlined plans to solicit the public’s input on the regulations, ultimately leading to possible revisions through a notice of proposed rule making.”

April 20, 2021: New DOE Blog – “Let’s Talk About Title IX”
PROPOSED RULE ANTICIPATED: MAY OF 2022

Bottom Line: Constantly Evolving
Guidance: Discrimination
Sexual Orientation/Gender Identity

Bostock v. Clayton County

2020: Supreme Court held Title VII prohibition on discrimination based on sex covers discrimination on the basis of gender identity and sexual orientation
Discrimination based on sex to include gender identity or sexual orientation?

**Regulations:** Do not define sex

- **June 16, 2021:** U.S. Department of Education’s OCR issued a Notice of Interpretation explaining that it will enforce Title IX’s prohibition on discrimination on the basis of sex to include: (1) discrimination based on sexual orientation; and (2) discrimination based on gender identity.

See you next lesson!
Lesson 5
Wrap Up and Assessment

Reminders

✓ Procedural guardrails in regs
✓ Theme: Equity in process
✓ Help out your decision makers
✓ Regulations will not be revised quickly
✓ Know your role for matters outside of non-Title IX sexual harassment/misconduct
Learning Objectives

- Review the Title IX regulations
- Understand lessons learned “living the regs”
- Recognize common mistakes made in investigations
- Understand updates in sub-regulatory guidance that could impact compliance
- Evaluate your current role and apply knowledge to future work

List of Course Downloads

- Title IX Regulations
- OCR Guidance
- Executive Orders
- Compliance Aids
Questions???

We are here for you!
Email us at: info@titleixu.com