Title IX Update: Where Are We Now, What Have We Learned, and Where Are We Going?

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Presenters

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Agenda

• Understanding the Title IX regulatory requirements and communicating them effectively to the campus community
• Practical Considerations in Staffing and Conducting Title IX Hearings
• Current Litigation and Case Law Update
• Questions and Answers
**Title IX Regulations – Where are we now?**

- May 6, 2020 – Dept. of Ed. published final regulations regarding sexual harassment under Title IX.
- August 14, 2020 – Title IX regulations implementation deadline
- April 6, 2021 – Dept. of Ed. issued letter on Title IX
  - OCR launching “comprehensive review” and ED anticipates revising regs
- May 17, 2021 – Dept. of Ed announces virtual hearings
- June 7 – 11, 2021 – virtual public hearings

**Title IX Regulations – What can we expect?**

- Revisions to regulations take time
- OCR has limited ability to revise current regulations without Notice and Comment rulemaking
  - OCR **MUST** investigate and address violations of its regulations
  - OCR **MAY** focus on regulatory text rather than the Preamble commentary
- Current Title IX regulations can provide basis for private lawsuits against colleges and universities
Understanding the changes in the 2020 Title IX Regulations

• What is Title IX Sexual Harassment?
  • Quid pro quo by an employee
  • Hostile environment (severe, pervasive, and objectively offensive)
  • Sexual assault (includes rape, forcible fondling, statutory rape), dating violence, domestic violence, and stalking as defined in other statutes
  34 C.F.R. § 106.30(a)

• What is the scope of “education program or activity”?
  • Locations, events, or circumstances over which recipient exercised substantial control over both respondent and context
  • Buildings owned/controlled by a student organization
  34 C.F.R. § 106.44(a)

Understanding the changes in the 2020 Title IX Regulations

• What is actual knowledge?
  • (For postsecondary): notice to the Title IX Coordinator or to an official able to take corrective action on behalf of the institution
  • Important: “Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge.”
  34 C.F.R. § 106.30(a)

• What must an institution do if they have actual knowledge?
  • Must respond promptly in a manner that is not deliberately indifferent.
  • Deliberately indifferent if response is clearly unreasonable in light of the known circumstances
  34 C.F.R. § 106.44(a)
Understanding the changes in the 2020 Title IX Regulations

• Terms defined by the Title IX regulations
  • Complainant = individual who is alleged to be the victim of conduct that could constitute sexual harassment
  • Respondent = individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment
  • Formal Complaint = document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting the recipient investigate the allegation of sexual harassment.
  • Supportive Measures = non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available and without fee or charge to both complainants and respondents.

34 C.F.R. § 106.30(a)

What have we learned?

• While the Title IX regulation definition of sexual harassment is narrow…
  • Community expectations may be broader
  • State laws may be more expansive
  • Other federal laws define similar conduct
• Communication is key
Explaining differences in policies and procedures

• Title IX Preamble:

  Nothing in the final regulations prevents recipients from initiating a student conduct proceeding or offering supportive measures to students affected by sexual harassment that occurs outside the recipient’s education program or activity.

• Options:
  • One Policy/Procedure for all conduct
  • Multiple Procedures

Explaining differences in policies and procedures

• Make sure your policy/procedure is clear as to the conduct each addresses

• Publish policies and procedures in a prominent/accessible location and translate key documents into other languages

• Document decision and rationale in determining jurisdiction

• Document decision and rationale for Title IX Coordinator filing a Formal Complaint
Explaining differences in policies and procedures

- Develop reporting process flow chart with key elements
  - What happens when you receive a report?
  - What procedure applies?
  - What is the process for each procedure?
  - What is the outcome for each procedure?

- Develop a Q&A or FAQ
- Prepare template communications
Explaining differences in policies and procedures

- Conduct in-person/virtual informational meetings with the parties
- Train employees and students who interact with potential complainants and respondents
  - RAs, TAs, Student Affairs, HR, PHEs, student orgs
- Develop Resource Guides and Training materials for students and employees
  - Highlight changes to the procedures
  - Quick Guide for Responsible Employees
  - Infographic/Resource Guide on Supportive Measures

Explaining differences in terminology

- Title IX has a specific definition for “complainant” and “respondent”
  - Does your institution use these terms?
  - If not, make clear how your definitions align with Title IX
- If investigating a consolidated Formal Complaint (e.g., with multiple complainants/respondents or cross-claims), consider language and how you refer to parties
Explaining appeals and dismissals

• Develop FAQ or Flowchart that explains process for appeals and dismissals
• Highlight when **must** dismiss and when **may** dismiss
  • Be sure to explain what happens next – process ends OR process continues under another procedure
• Carefully map your appeal process
  • When can an appeal be filed?
  • What are the timelines?
  • Do you permit time extensions?

Key takeaways

• Communicate, communicate, communicate
• Be flexible – if your campus community needs more explanation or resources, develop them!
• Ask for feedback from students, advocates, parties, etc. on your materials, website, etc.
• Be willing to meet with people multiple times and throughout the process
Practical Considerations in Staffing and Conducting Title IX Hearings

Why is a Title IX hearing needed?

Every institution must provide live hearings for Title IX grievance proceedings where findings of fact are at issue.
Who comprises a hearing board?

- Single Hearing Officer
- Board Chair (non voting) + Panelists
- Board Chair as voting member

What is the role of advisors?

(1) provide private advice to the party he/she is supporting and;
(2) cross examine the opposing party and other witnesses.
Who should serve as an advisor?

How should we conduct the cross examination?
Title IX Regulations – Effective Date

Preamble (May 6, 2020)

• New regulations will take effect August 14, 2020
• The Department will not enforce the new regulations retroactively

OCR Website/Blog Post (August 5, 2020)

• The Department will only enforce the new regulations as to conduct that allegedly occurred on or after August 14, 2020.
Effective Date – Court Cases

• **Doe v. Rensselaer Polytechnic Institute**
  
  • United States District Court for the Northern District of New York
  
  • Decided October 16, 2020
  
  • Court granted preliminary injunction
    
    • Required RPI to apply its Title IX Policy adopted August 14, 2020 to conduct which alleged occurred in 2019

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**Doe v. Rensselaer Polytechnic Institute** - Background

• Case Background
  
  • RPI concluded respondent violated its Title IX Policy
  
  • **On August 11, 2020**, the respondent requested a hearing and application of RPI’s new Policy
  
  • RPI refused to apply its new Policy
**Doe v. Rensselaer Polytechnic Institute – Court’s Concerns**

- Preamble discussion regarding retroactive application is unclear
- Department blog post is not an "authoritative statement"
- Under the Department blog post, schools would have to maintain two policies with no end in sight.
- RPI’s new Title IX Policy conflicted with the OCR blog post
- RPI could have easily applied its new Title IX Policy at the respondent’s hearing

**Additional Cases**

*Doe v. Princeton University*

- Decided December 31, 2020
- United States District Court for the District of New Jersey

- The Court rejected Plaintiff’s argument that Princeton improperly used a single-investigator model
  - The new Title IX regulations were not in effect until August 14, 2020
  - According to the Preamble and Department blog, the Department will not enforce the new Title IX regulations retroactively
  - The new Title IX regulations were not effective at any time during the Plaintiff’s proceeding
Additional Cases

*Doe v. Stonehill College*

- Decided February 23, 2021
- United States District Court for the District of Massachusetts

The court rejected the Plaintiff’s arguments regarding live hearings:
- The text of the former implementing regulation does not require a live hearing with cross-examination or any other particular procedure.
- The Title IX statute imposes no requirement of a live hearing with cross-examination.
- The respondent’s due process arguments failed because the College is not a public university.

Additional Cases

*Roe v. St. John University*

- Decided March 31, 2021
- United States District Court for the Eastern District of New York

The Court addresses the case under the Title IX regulations in effect at the time of the underlying incidents.
Key takeaways

• Courts may not give deference to the Department’s statements about the effective date of the new Title IX regulations
• Consider the individual facts of the underlying case
• Consider state and federal case law

Questions and Answers
Join us June 22, 2021 at 2:00 pm ET for the “Meet the Experts” Networking Lounge to continue the conversation

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