

Title IX & Harassment/Discrimination

2021-2022



Presented by Stephanie Kinkaid
Western Illinois University
August 12, 2021

AGENDA

- Title IX Definitions & Jurisdiction
- Title IX & Other Policies
- College Response to Complaints
- Team players and roles
- Intakes and Investigations
- Informal Resolution
- Hearings
- Appeals
- Confidentiality

What does Title IX cover?

Institutions receiving federal financial assistance-educational programs

ONE POLICY TWO PROCEDURES:

Title VI-discrimination or harassment based on protected class or status

Title VII-discrimination in employment based on protected class or status

GLOSSARY

OCR-Office of Civil Rights

COMPLAINANT: Victim

RESPONDENT: Accused

1P2P: One policy, two procedures

TITLE IX: Big 5 offenses

ALTERNATE PROCESS: Harassment or
discrimination based on protected class NOT
covered by TIX

OWAs: Officials with Authority

WIRC: Victim Services/Advocates

SPOO: Severe, pervasive, objectively offensive

DCFS: Reporting agency for minors

What are examples of educational programs?

Concerts, speeches, games
Sponsored organization activities
Off campus trips organized by institution
Work Study in US
Admissions

Human Resources-recruitment and hiring
Workplace in general
Academic Instruction
Residence Life
Athletics

Title IX applies to sexual harassment in the “education program or activity” of a federal funding recipient

Title IX defines “education program or activity” to include the “operations” of educational institutions

Title IX does not apply to private conduct occurring in private location that is not part of education program/activity

Does Title IX

apply off campus?

Yes if it occurs in an educational activity

Yes if it occurs in a location owned by an organized student group

No if it occurs in a private location that is not part of an educational activity



Examples

Residence Hall

Sorority House

Athletic Center

Hotel floor booked by a student group while on an educational trip

OCR and clarification

You can and should address incidents off campus, but through another policy

Student or employee code of conduct

Offer resources

Reports of incidents before new regulations

Incidents not covered

A private residence

A bar in town

In a car while traveling on a private spring break trip

OTHERS?

Title IX DOES NOT cover incidents abroad but an institution could still pursue action if both parties are students through student code of conduct



Other policies

Student code of conduct

Employee handbooks

Ethics

State laws

What charges fall under Title IX? BIG 5

- Quid pro quo
- Hostile work environment
- Sexual assault
- Dating violence/Domestic violence
- Stalking

Quid pro quo

Usually with a power differential
Someone is offered benefits in exchange
for UNWELCOME sexual favors

EXAMPLES?

Hostile Work Environment

Unwelcome conduct that is severe, pervasive, AND objectively offensive by the reasonable person standard.

The conduct must limit or deny the victim equal access to education or work activities.

SPOO

...

Severe, pervasive, AND objectively offensive

What about 1st Amendment?

- While sexual harassment can be verbal or written in nature, sexual harassment under Title IX does not include conduct that is protected by the First Amendment
- The subjective offensiveness of speech, alone, is not sufficient to create a hostile environment
- The behavior must limit someone's educational or work pursuits
- Each incident must be considered separately
- Behavior is not cumulative

Which policy?

Remember: Some behavior is NOT covered by Title IX or VI/VII. If behavior is not targeted against a protected class or status, it may be an issue falling under HR or student code of conduct.

Also, a person cannot claim harassment if behavior is not targeted them specifically.

The policies are not tools or weapons.

BREAK

The BIG 5

What is sexual assault?

Rape
Sodomy-oral or anal
Sexual assault/penetration of vagina or anus
with an object other than genitals
Incest
Fondling

What is rape?

Having carnal knowledge of a person, without the consent of the victim, including instances where the victim is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity. There is “carnal knowledge” if there is the slightest penetration of the vagina or anus by a foreign object, or the penetration of the mouth with a sex organ, of the other person. Attempted rape is included.

Consent

- Clear
- Coherent
- Ongoing
- Willing
- Incapacitation vs Intoxication-how do we know?
 - Do we know how much consumed?
 - Visual
 - Behaviors
 - What is the difference? How can investigators know?
 - Could the parties have known???
 - Who initiated?
- Legal age of consent-In Illinois, 17

Sodomy

- Oral or anal sexual intercourse with another person without the consent of the victim, including instances where the victim is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

Sexual assault with an object

- Using an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity. An “object” or “instrument” is anything used by the perpetrator other than the perpetrator’s genitalia.

Fondling

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 age or because of temporary or permanent mental or physical incapacity.

Incest

- Sexual relations between parties who are prohibited to marry by law.

Domestic violence

Felony or misdemeanor crimes 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 state, 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 state.

Dating Violence

Dating Violence is violence committed by a person:

1. Who is or has been in a social relationship of a romantic or intimate nature with the victim; and
2. Where the existence of such a relationship will be determined based on of the following factors:
 - The length of the relationship;
 - The type of relationship; and
 - The frequency of interaction between the persons involved in the relationship.

Why does this matter? There could be other violations such as stalking or harassment. Harassment may not meet the threshold for Title IX, but can still be covered under Student Code of Conduct

Stalking

- Engaging in a course of conduct directed at a specific person that would cause a **reasonable person** to:
- Fear for their safety or the safety of others; or
- Suffer substantial emotional distress.

Questions and examples



IMPORTANT THINGS TO KNOW

Title IX is separate from legal charges

Anyone can pursue both legal and TIX complaints

VAWA brochure

Title IX and OCR reporting options

VAWA, Clery, Campus SaVE act

NCAA

State of Illinois

**How do we determine if it
is Title IX or an alternate
process?**

Scenarios

What to consider?

- Do you have jurisdiction?
- Control?
- Is there SPOO? (severity, pervasive, objectively offensive)
- If not, what would you do?
- Other policies?
- What is your legal responsibility, and what is best for the parties?

SCENARIOS-Breakout

#1

Two employees are taking students on a educational trip. Students see text messages between employees with nude photos.

Is it under the control of the university?

What variables change the decision?

How should it be handled?

#2

There are minors on campus for an event. A minor reports to an employee that they were abused years ago by a relative.

What do you do?

What variables change the scenario?

#3

A student employee reports to you that they saw a male student recording a female athlete working out.

What is your responsibility?

What questions do you have?

#4

An employee tells you that their supervisor placed a hand on the small of the employee's back. The employee is uncomfortable.

Is this a Title IX situation?

What variables change the incident?

#5

You overhear that a student you know well was assaulted over the weekend. When you ask the student if they are okay, they respond they are fine.

What do you do?

What are your obligations?

BREAK



Title IX and Title VI/VII

- Title VI/VII
- Quid pro quo
- Sufficiently severe OR pervasive OR objectively offensive
- Handled under Code of Conduct, employee handbook, alternate process

- Title IX
- Quid pro quo by employee or supervisor
- Unwelcome AND sufficiently severe AND pervasive AND objectively offensive
- Any sexual assault/DV/stalking

How do the regulations consider these policies?

- “The Department recognizes that employers must fulfill their obligations under Title VII and also under Title IX. There is no inherent conflict between Title VII and Title IX, and the Department will construe Title IX and its implementing regulations in a manner to avoid an actual conflict between an employer’s obligations under Title VII and Title IX.”
- – Preamble to 2020 Title IX Regulations (also 34 C.F.R. § 106.6(f))

What is a liability for employers under Title VI/VII?

- An employer
- Knew or should have known
- About severe or pervasive sexual harassment
- That a reasonable person would consider intimidating, hostile, or abusive
- By an employee or non-employee over which it has control and
- Failed to take appropriate corrective action

- DELIBERATE INDIFFERENCE STANDARD

What is an institution required to do under Title IX?

Address reports of harassment

Give equitable treatment to everyone

Offer supportive measures

Have a policy that addresses formal complaints before discipline

No deliberate indifference

Team players

- Title IX Coordinator
- Officials with Authority
- Intake Officer
- Investigator(s)
- Informal Resolution Coordinator
- Decision Maker
- Hearing Panel
- Hearing officer/administrator
- Appeals Officer

Reports are triggered through an OWA (Official with Authority)

- Policy must list OWAs
- New regulations no longer require mandated or responsible reports UNLESS state requires that added level of reporting
- New Q&A released last week clarifies that institutions can choose whether employees are mandated reporters
- Usually those in supervisory roles

Next steps

- Title IX Coordinator contacts alleged victim
- Finds out their wishes
- Talks them through the process and options
- Offers supportive measures-Non-disciplinary that do not place burden on one party over the other, reasonable, can be given even if no investigation, can last indefinitely
- If victim cannot be identified, TIX Coordinator should perform an inquiry to attempt to identify. If not possible, the attempt should be recorded and documented.

Supportive Measures

- Referral to counseling, medical, and/or other healthcare services
- Referral to the Employee Assistance Program
- Referral to community-based service providers
- Visa and immigration assistance
- Student financial aid counseling
- Education to the community or community subgroup(s)
- Altering campus housing assignment(s)
- Altering work arrangements for employees or student-employees
- Safety planning
- Providing campus safety escorts
- Providing transportation accommodations
- Implementing contact limitations (no contact orders) between the parties
- Academic support, extensions of deadlines, or other course/program-related adjustments
- Trespass orders
- Timely warnings
- Tuition reimbursement
- Class schedule modifications, withdrawals, or leaves of absence
- Increased security and monitoring of certain areas of the campus
- Any other actions deemed appropriate by the Title IX/VI Coordinator

What about interim removal?

Risk analysis

Must demonstrate an immediate threat of harm to any individual on campus

Removed person is given notice and chance to appeal

Employees can be placed on leave without showing threat if it is addressed in employee policies

Formal Complaint

- It is a document signed by complainant or may be signed by Title IX Coordinator-MUST be signed to proceed
- Documents allegation
- Requests a resolution to the issue
- Can be physically or electronically signed
- TIXC can sign if there are other mitigating factors that increase risk if no resolution is requested by victim

Dismissing a complaint

- We must dismiss if:
- If the victim is not a participant in educational programs at your institution
- The allegation did not take place in the US
- The allegation did not take place in an educational program
- The incident does not meet the criteria for Title IX sexual harassment
- Can still be addressed by another policy
- Documentation must be in file for why a formal complaint is dismissed

Next steps once a formal complaint is signed-**INFORMAL**

If requesting an informal resolution, the IR Coordinator will work with both parties to mediate a solution

Apology

No contact order

Training

Counseling

Agreement

If the IR does not work, the case can become a formal investigation

If an agreement is signed, the case is considered closed

Information gathered in an informal resolution cannot be used in the formal investigation

Informal Resolution



Agreement between parties

Informal Resolution

Who can facilitate?

What does it mean?

What paperwork is filed?

Who sees agreement?

Restorative justice?

When can it be used?

What if it doesn't work?

Formal investigation

...

Steps taken during investigation

Investigators assigned

Best practices-not Title IX Coordinator

Best practices-2 investigators

Advisor assigned to party if there isn't one-not required if alternate process

Advisor should have basic knowledge of Title IX policy

Can be an attorney

Advisor may not speak on behalf of party during investigation

There must be a statement in formal notification letter that respondent is innocent until an investigation proves otherwise

It is up to the institution to prove "guilt"

Both parties must be given a formal notice of allegations/investigation and have access to ALL evidence used in the investigation-info is shared with advisor

Investigators

Investigators must be trained

- Investigators must have 8-10 hours of training
- Training must be posted on website

Investigators must not be biased

Investigation

- Written or electronic copy of complainant's allegations must be given to respondent AND advisor
- Have parties and their advisors sign an agreement
- Respondent has 10 days to prepare own statement
- If there is any additional information provided by either party after the initial statements, a copy of that information must be provided to the other party
- If additional information has been provided, the other party has 10 days to respond to the information in writing, which becomes part of the report

How to interview parties

Tips for success

- Build rapport with party or witness
- Use non-leading questions
- Use language that shows you are listening
- Have a strategy before the interview
- Consider the parties' needs
- Be kind
- Watch tone of voice
- Use body language to your advantage
- Silence can be helpful
- Don't be afraid to ask for answers

(If someone cannot give the information, can you get it any other way?-Witnesses, cameras, swipe cards)

Don't forget the interview closing-give information to party so they can prepare a meaningful and thoughtful statement for the hearing.

Remember that parties have a right to see **ANYTHING** in their file. In fact, they **MUST** know about all evidence.

Trauma informed interviewing

Things to remember

Memory may be faulty-2-3 sleep cycles to remember details

Both parties will be experiencing some form of trauma in most cases.

Use sensory memory

Don't re-traumatize

- Build rapport

- Limit time of interview

- Put person at ease

- Allow silences

- Use low and calm voice

- Give plenty of time

- Allow person to write details down if necessary

- Offer breaks

- Make sure they have a support person if needed

- Realize that details may be jumbled

- Avoid direct eye contact at times

- Avoid standing over the person

- Avoid asking same question multiple times

- Avoid judgmental words and phrases

Investigative Report



- Investigators must give an outline of investigation
- Provide all information gathered, both exculpatory and inculpatory
- Inculpatory-evidence that supports the Complainant's allegations
- Exculpatory-evidence that supports Respondent's statement
- Finding in report? Check your policy. Best practices? Hearing panel or decision maker determines finding. Investigator can recommend
- Report will be given in electronic or written form to both parties 10 days before hearing so that they may prepare for the hearing with advisors
- Both parties can submit a response to the initial report draft, which then becomes part of the report
- If no response is given by either party, hearing can occur at that point
- If there is a written response, both parties have an additional 10 days to prepare for the hearing
- Response becomes part of the report

Can the parties respond to the report draft?



Yes – after they review the evidence provided at least 10 days prior to issuance of the investigation report-in written form



Depending on written responses, additional investigation may be needed



Investigator should consider the written responses in drafting final language of investigation report



Parties must be given access to all inculpatory and exculpatory evidence directly related to the allegations at least 10 days before the investigation report is finalized



Evidence must be provided to a party and their advisor in physical copy or electronically



Any earlier access to the evidence must be provided equally



Once the parties have responded, a final draft of the report is prepared. Notification is then sent to parties and their advisors along with the final report.

BREAK

Hearing

- Hearing administrator-VERY IMPORTANT
- Hearing panel-2-3 members-Best practices
- Decision maker-cannot be Title IX Coordinator
- Advisors MUST cross examine other party-if not present or refuses, another advisor must be offered
- Questions to be asked MUST be approved by hearing administrator before hearing-cannot ask about past sexual history or use inappropriate and/or judgmental language
- Hearing must be recorded
- Hearing must be live or virtually live-can use screens
- All witnesses must attend
- CHECKLIST

Hearing Procedures

- Introduction/Opening statement by hearing administrator
- Investigator(s) testimony or statement
- Statement and questioning of complainant
- Statement and questioning of respondent
- Witness questioning by panel, then questioned by parties' advisors
- Hearing panel may ask questions of investigators
- Ending statement by complainant
- Ending statement by respondent
- Note-Hearing administrator can kick out irrelevant questions
- If a witness refuses cross-examination, testimony cannot be considered
- Administrator should set a time limit for hearing in advance. All participants should stick to schedule.

Hearing panel

1. The members of the panel or decision maker will hear the case and make a determination
2. Sanctions will also be recommended if there is a finding-HR involvement?
3. Decision should be given after the hearing to the Title IX Coordinator
4. The Title IX Coordinator will send the determination letter and sanctions in individualized letters to both parties after considering consistency of sanctions with decision maker
5. This letter should give a clear rationale for finding, evidence considered, and credibility evaluation
6. Documentation of hearing should be in file

How do you weigh evidence?

Not all evidence is equal

Weight may vary depending on factors, such as credibility, level of consistency, corroboration, level of detail, expertise of the witness.

GO OVER HEARING PANEL CHECKLIST

Appeals

Considered for one of following reasons:
Procedural irregularities
New information
Conflict of interest

Must markedly affect outcome or decision



More on appeals

- Not every procedural irregularity affects the outcome
- Appeals are not a chance for parties to re-argue case
- Third parties cannot appeal a decision
- Appeal decision is final

What is the appeals process?

- Both parties should be given 10 days to provide detailed appeal statement
- Both parties are notified if other party appealed and have the opportunity to provide a statement in response to the other parties' appeal
- Appeal officer should provide a clear response to the appeal to both parties with a formulated rationale for decision
- Both parties should be notified simultaneously
- Appeals can be dismissed if the deadline passed, or if one of the three criteria are not met
- Appeal officer is only considering the appeal and not re-hearing the case-no hearing
- Appeal can be
 - 1. Denied
 - 2. Granted with the appeals officer issuing new finding/sanction or
 - 3. Granted with new investigation occurring

Things to know

- Preponderance of evidence is the standard in Illinois, but some states use clear and convincing
- Title IX Coordinator should keep track of consistency in sanctions-rubric?
- There can be NO discipline until after the appeals process
- It is likely that any documents given to parties will be shown on social media and to others-be aware of what you write
- ONLY write facts, not opinions or suppositions
- Strong rationales should be given by hearing panels that supports the finding
- Use a key for names of all participants-BEST PRACTICES
- You must present all information, even that which is not used in a determination

More things to know

- If a witness does not or will not speak to the hearing panel, their testimony may not be used in determination of finding
- If a party refuses to answer a question, what do you do?
- Retaliation
- There can be no gag order in Title IX cases
- ALWAYS be equitable
- What is offered to one must be offered to the other
- What about behavior during investigation?-is it retaliation? Is it harassment?
- What about behavior of advisors in hearing?
- Can an employee refuse to participate?
- Document everything-needs to be in file. If it isn't documented, it didn't happen.

Impermissible stereotypes or language in hearings

What did you expect when you went to someone's room after 10pm while you were drinking?

Don't believe her sorority sisters. They will just protect each other.

No one ever lies about rape.

All athletes are entitled rapists.

Title IX Coordinator should evaluate unless the conflict is with them. Then, the Deputy Title IX Coordinator should step in.

All members of this team should be careful about voicing opinions-be mindful. For example, campaigns supporting only complainants

What if there is a finding?

- Remedies should restore the complainant's educational opportunities
- Make sure both parties have resources
- Sanctions should be consistent
- Continue to monitor sanctions-who does this?

FOLLOW UP

- All correspondence to parties comes from Title IX Office-best practices
- Sanctions need to be discussed with Title IX office ensuring consistency
- Remember that all correspondence should be neutral, simple, concise and never opinionated
- Title IX office must track all sanctions for students AND employees
- Any supportive measures offered still need to be in place if necessary
- Periodic check in with parties is fine

Cultural considerations

Be aware of needs for accommodations due to cultural differences, disabilities, and language barriers.

Be aware of potential biases you may encounter

What are some examples of implicit bias?

<https://implicit.harvard.edu/implicit/>

Confidentiality/Privacy

No gag orders

Can request confidentiality-no guarantees

Privacy vs confidentiality

Institutional response

Social media

Telling your truth vs harassment