

Title IX Overview and COVID Liability

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Where are we now?

- The Final Rule is 2,033 pages
 - DOE took three years to draft the new rules
 - 100 days to implement from release date
 - Published in the Federal Register on May 19, 2020.
(<https://www.federalregister.gov/documents/2020/05/19/2020-10512/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>)
- Effective date August 14, 2020 – no grace period

Preparation for Implementation

- Developed and co-presented a four-part webinar series with Mackenzie Wilfong, General Counsel for Tulsa Community College, for the state in July to aid with understanding the 2,000 page regulations and with drafting new policies and processes.
 - All conference materials and templates were provided in Word and made available open-source.
 - The webinars are archived at <https://www.tulsacc.edu/title-ix-regulations-conference>. Accessible at no charge.
 - Additional resources at <https://system.suny.edu/sci/tix2020/>.
- Currently collaborating with more than 20 institutions across the state to issue a state-wide request for proposals for decision-makers, advisors, and informal resolution facilitators and to share resources for their training.
- By now each of your institutions should have a significantly revised Title IX policy on your website.

Major Process Changes

- Revised and uniform definition of sexual harassment across all institutions.
- Sexual harassment defined as conduct on the basis of sex that satisfies one or more of the following:
 - An employee condition educational benefits on participation in unwelcome sexual conduct (i.e. quid pro quo);
 - Unwelcome conduct that a reasonable person would determine is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the educational institution's education program or activity; or
 - Sexual assault (as defined in the Clery Act), or dating violence, domestic violence, or stalking as defined in the Violence Against Women Act.

Major Process Changes

- Institutions can choose between preponderance of the evidence or clear and convincing as the standard of evidence.
 - Neither standard is defined in the regulations.
 - Must use the same standard for employees **and** students.
- Mandatory reporters (responsible employees) can be a much smaller group.
 - Only required to include the Title IX Coordinator and any official who has the authority to institute corrective measures on behalf of the institution.
- Title IX Coordinator responsible for providing supportive measures (non-disciplinary, non-punitive individual services offered to complaint and respondent).

Major Process Changes

- Report is different than a formal complaint
 - Does not trigger investigative or hearing process
 - Must provide information about supportive measures and explain process to file formal complaint
 - Third parties can report
- Formal complaint must be signed (can be digital) by complainant or Title IX Coordinator

Major Process Changes

- Formal complaints **must** be dismissed (from the Title IX process) if conduct:
 - Would not constitute sexual harassment even if proved,
 - Did not occur in institution's program/activity, or
 - Did not occur against a person in the United States (study abroad).
- Formal complaints **may** be dismissed (from the Title IX process):
 - If complainant requests to withdraw their complaint
 - If respondent is no longer enrolled or employed
 - When specific circumstances prevent gathering evidence sufficient to reach a determination
- Informal resolution (mediation) is now available unless complaint is a faculty on student issue. Requires specific notice to the parties and voluntary, written consent.

Major Process Changes

- All investigations must end with a written report.
- Structured process with specific timelines to allow parties to review investigative report and evidence before the hearing.
- For all decisions (faculty, staff, and students) the institution must have a live hearing with cross-examination by an advisor, which can be done virtually.
 - Only advisor can conduct cross-examination.
 - The institution must provide an advisor “without fee or charge” to any party without an advisor in order to conduct cross-examination (can limit the role to only conducting cross-examination).
 - The decision maker must rule on relevance of questions on the record.
 - Parties and witnesses must attend hearing and submit to live, advisor-led cross-examination. If party or witness does not attend, all statements submitted by absent party must be excluded.
- All training materials used for anyone in the Title IX process must be made public on a website

Employment Issues

- This new process applies to employees in addition to students.
- Title VII defines sexual harassment as “severe **or** pervasive” not the Title IX “severe **and** pervasive.” (emphasis added)
- Title VII “knew or should have known” versus Title IX “actual knowledge”
- Title IX you now “must dismiss” a formal complaint if conduct is not against a person in the United States but Title VII applies to United States citizens working abroad.
- Consider including supervisors as mandatory reporters to comply with both Title VII and Title IX.

Now What?

- Continue evaluating processes and policies for changes that should be implemented.
- Have a solid Title IX Coordinator.
- Develop checklists and forms.
- Election outcome will have a direct impact on regulations.

COVID-19 Liability

- Potential negligence claims
 - Must show institution had a duty, breached that duty, the breach caused harm and the plaintiff suffered actual loss or damage
 - What are institutions' duties? Not clear until litigated.
 - How to prove? Difficult to show not exposed somewhere other than campus.

COVID-19 Liability

- Employment considerations - <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>
- Follow guidance of federal and state employees
- Have a process for accommodation requests and follow it.

COVID-19 Liability - Waivers

- To waive or not to waive?
- Consider waiver for *voluntary* activities.
 - Example language: I understand an inherent risk of exposure to COVID-19 exists in any public place where people are present. COVID-19 is an extremely contagious disease that can lead to severe illness and death. By participating in the Activity, I voluntarily assume all risks related to exposure to COVID-19.

COVID-19 Liability - Contracts

- Review “force majeure” clauses.
- Confirm clause includes pandemics/epidemics.
- Look carefully at what happens if clause is triggered.
 - Are both parties completely relieved of performance under the contract?
 - What if contract has been partially performed when the clause is triggered?
 - What would be best for institution?

COVID-19 Liability - Contracts

- Consider including a “funding out” clause for multi-year contracts in the event funds are unavailable to satisfy contract.
 - Example: If, in the judgment of the Vice President for Finance at INSTITUTION, at any time during the term of this Agreement sufficient funds are not appropriated or if funds become otherwise unavailable to continue the functions to be performed by this Agreement, INSTITUTION may terminate such contract at the end of the then current fiscal year.

Questions?