

Title IX - Updates for Career Colleges in 2023

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By:

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Roadmap

- Part 1 – History
- Part 2 – Current regulations
- Part 3 – Trends in the courts
- Part 4 – Hypos
- Part 5 – Proposed new regulations
- Part 6 – Practice tips for compliance

Part I – Title IX history

- 1972** Sex discrimination in education prohibited.
Title IX of the Education Amendments Act of 1972, 20 U.S.C. §1681(a) (1972) (“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”)
- 1979** Court recognizes a private right of action to enforce Title IX.
Cannon v. University of Chicago, 441 U.S. 677 (1979).

Part I – Title IX history

1992 Sexual harassment is a form of sex discrimination & damages may be available in addition to injunctive relief.
Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992) (“when a *teacher* sexually harasses and abuses a student,” the teacher discriminates on the basis of sex and damages are available in an action brought to enforce Title IX).

1998 Court clarified the actual knowledge and deliberate indifference standards.
Gebser v. Lago Vista Independent School Dist., 524, U.S. 274 (1998) (Damages may not be recovered for *teacher-student* sexual harassment in an implied private action under Title IX unless a school district official who at a minimum has authority to institute corrective measures on the district's behalf has *actual notice of, and is deliberately indifferent to, the teacher's misconduct*).

Part I – Title IX history

- 1999** Court recognized liability for peer sexual misconduct
Davis v. Monroe County Board of Education, 526 U.S. 629 (1999)
 (“recipients [need not] ‘remedy’ peer harassment, ... [nor] ‘ensur[e] that ... students conform their conduct to’ certain rules ... Title IX imposes no such requirements. On the contrary, the recipient must merely respond to known peer harassment in a manner that is ***not clearly unreasonable.***”)
- 2001** Schools should take action to prevent and to address sexual harassment.
OCR Title IX Guidance

Part I – Title IX history

- 2005** Retaliation now also actionable under Title IX.
Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 125 S. Ct. 1497, 161 L. Ed. 2d 361 (2005) (retaliation against a person because that person has complained of sex discrimination is a form of intentional sex discrimination encompassed by Title IX's private cause of action)
- 2011** OCR detailed requirements for schools to proactively address sexual misconduct on campus.
OCR Dear Colleague Letter. (Repealed 2017).

Part I – Title IX history

2013

Schools now required to:

- Track incidents of domestic violence, dating violence, sexual assault, and stalking in Annual Security Report.
- Publish a sexual misconduct policy
 - how to report sexual misconduct
 - disciplinary procedure
 - sanctions for violations
 - confidentiality
- Annual training
- Ongoing awareness and prevention efforts

VAWA Reauthorization Act.

Part I – Title IX history

- 2020 Current Title IX regulations became effective.
- 2022 New Title IX regulations proposed, not yet effective.
- 2023 Court takes no action on transgender youth sports ban.
West Virginia v. B. P. J., by Jackson, No. 22A800, 2023 WL 2801383, at *1 (U.S. Apr. 6, 2023).
- 2023 US Department of Education proposed new rule banning across the board bans on transgender participation in athletics.
OCR proposed new athletics regulations (Apr. 6, 2023).

Part 2 - Current Title IX Regs (8/2020)

- Must designate **Title IX Coordinator**
- Must **post non discrimination statement** and how to make reports
- Must respond to sexual harassment/misconduct reports in way that is not “deliberately indifferent”
 - Must offer **supportive measures** for all “reports” and complaints
- If “Formal Complaint” → must investigate
- No discipline/remedies ALLOWED unless:
 - Formal complaint
 - Finding of responsibility after live hearing and cross exam by school provided advisors.
- Neutral, unbiased investigators, Title IX Coordinators, Lots of training
- No conclusions without sharing and written input from parties (10 days)
- Narrow definition of sexual harassment
- Not responsible presumption
- Mandatory /permissive dismissal rules
- Investigator must share equally all information that is directly related .
- Cannot require confidentiality
- Must allow **live hearing, cross exam, offer evidence**
 - Must provide advisors for cross exam and all meetings
- Decision maker /hearing officer must allow all relevant questions -
 - Rape shield questions not relevant
- No hearsay
- Simultaneous, equal, clear notices
- Appeals must be heard by person(s) not involved earlier.
- Permits **informal resolution** if all consent.
- Applies to **employees** too – requires same disciplinary safeguards and same standards of proof.
- Etc., etc., etc.

Summarizing the Current Title IX Provisions

§106.30 **What is Sexual Harassment** – conduct on the basis of sex that satisfies one or more of the following:

1. “Quid Pro Quo” - an employee of the recipient provides a benefit or service expecting unwelcome sexual conduct in exchange;
2. Unwanted conduct that is so severe, pervasive and objectively offensive that it denies a person equal access to the education program or activity; or
3. Any of the following: “Sexual assault,” “dating violence,” “domestic violence,” or” stalking.”

Summarizing the Current Title IX Provisions

§106.8 The Regulations adopted in 2020 require the educational institution to take three main steps:

- Designate a Title IX Coordinator who can accept complaints in person, by telephone, mail, or via electronic mail;
- Implement a wide circulation of the Title IX Policy, and
- Adopt a Grievance Procedure

Summarizing the Current Title IX Provisions

§106.44(a) **The General Response Required to Sexual Harassment** under Title IX—A recipient with actual knowledge of sexual harassment, must respond promptly in a manner that is **not deliberately indifferent**, i.e. clearly unreasonable in light of the known circumstances.

- What type of response is required?
- An explanation of supportive measures available to the complainant and ascertain what supportive measures the complainant wishes to receive
- Explain that the supportive measures are available whether they file a formal complaint or not
- A complete explanation of the process of filing a grievance, a formal complaint

Summarizing the Current Title IX Provisions

§106.71 **Retaliation is prohibited.** No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX.

Summarizing the Current Title IX Provisions

§106.45 The Grievance Process – Basic Requirements

- Treat the complainant and the respondent equitably
- An objective evaluation of all relevant evidence must be made
- There must be no bias or conflict of interest
- There must a presumption that the respondent is not responsible for the alleged conduct until a full determination is made at the conclusion of the grievance process
- Describe the range of disciplinary sanctions and remedies

Summarizing the Current Title IX Provisions

§106.45 Grievance Process

- Include a reasonably prompt time frame for the conclusion
- Specify whether the standard of evidence to be used to determine responsibility will be “preponderance of the evidence” or “clear and convincing”
- Describe the procedures and bases for an appeal to be filed
- Describe supportive measures to both complainants and respondents
- Do not require, allow or rely on questions or evidence that seeks disclosure of information that is protected by a legally recognized privilege unless the person holding the privilege has waived it

Summarizing the Current Title IX Provisions

Notice of the Allegations §106.45(b)(2)

Written notice of the grievance policy must be given to both parties describing:

- The Grievance procedure and its main elements
- A description of the allegations of sexual harassment
- Written notice that the respondent is presumed not responsible for the alleged conduct and that a decision is made at the end of the grievance process.
- Each party may have an advisor of their choice
- The written notice must inform the parties of the recipient's code of conduct prohibiting knowingly making a false statement or knowingly submitting false information during the grievance process

Part 3 – Trends in the Courts

- Lots of cases brought by respondents
- Anonymous parties – John Doe and Jane Roe
- Employment cases
- Retaliation
- Plaintiff's allege Title IX violations
 - Bias
 - Title IX sex discrimination
 - Equal Protection
 - Hostile School Environment Claim under Title IX
 - Unfair process and due process allegations (live hearings, cross examination, exclusion of evidence)
- Plaintiffs also allege:
 - Violation of state law
 - Breach of contract
 - Defamation
 - Constitutional violations
 - Other forms of discrimination (disability, race, etc.)

Intersecting Obligations

- Title IX regulations 2020
- State law requirements. E.g., 24 P.S. §20-2003-J (requires 24/7 anonymous reporting; policy; amnesty for alcohol consumption)
- VAWA / Clery – crime tracking, policy and training
- Contractual promises made in student handbooks/academic catalogs/employee handbooks/union grievance processes/annual security reports. E.g., *Doe v. USciences*, (3d Cir. May 29, 2020).
- Standards of Accreditation

Part 4 – Hypo 1

Dental Intern Skylar asked one of the dental assistants for extra help with moulding skills. They agreed to meet after the office closed. Program Coordinator Cameron was there too and insisted on conducting the training. Cameron made several off-color jokes and invaded Skylar's personal space repeatedly. Cameron suggested they finish the training over dinner. Skylar did not show. Skylar failed to report to the internship and stopped attending classes at the school. Cameron repeatedly sent texts to Skylar asking why Skylar had missed the dinner/training.

Skylar met with the Title IX coordinator to file a Complaint, but expressed a strong desire to act anonymously.

Can/should TIXC investigate on the basis of an anonymous complaint?

Part 4 – Hypo 1

*Per the current, Title IX regs, a formal complaint under Title IX must contain the complainant's physical or digital signature, or otherwise indicate that the complainant is the person filing the formal complaint. Therefore, an anonymous complaint is not possible. But PA law **requires** that schools accept anonymous reports.*

Does Skylar's dropping out of the internship program preclude the filing of a complaint? *At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity. Is Skylar attempting to participate?*

What are the possible repercussions to the school/site? To Cameron?

Loss of federal funding? Loss of his job? Discipline. Look to school's policy, as the current regulations require a listing of disciplinary sanctions for students and employees.

Does it make a difference if Cameron is an employee/agent of the school versus and employee of the internship site? *It depends. Look to the school's policy. Look to the agreement between the school and the site.*

Are informal resolutions procedures available? *No, not if one is an employee of the site or the school.*

Part 4 – Hypo 2

Student C left an event to find an available restroom in another building, and Students R1 and R2 made verbal, catcalls and sex-based comments and noises. Once C was inside the restroom, C could hear R1 and R2 continue their sexual taunting. C remained in the restroom for several minutes, eventually calling C's partner who arrived to escort C home. C filed a Title IX complaint, the TIXC promptly interviewed C, C's partner, R1, R2, and other witnesses, and issued a no contact order. The school investigated, and conducted a hearing and issued findings that R1 and R2 did not violate the sexual harassment policy. C filed suit alleging:

- R1 and R2 repeatedly violated the no contact order, sitting at C's table in the lunchroom and taunting C.
- The students, their parents, and witnesses were not separated/divided during the hearing.
- Despite the rules, R1's mother confronted C and C's mother during the hearing
- Students were allowed to congregate and gather in hallways outside of the hearing room
- One of the panel members was friends with R2

Part 4 – Hypo 2

Was the school liable for allowing a hostile school environment in violation of Title IX?

No, the court concluded that because one instance of sex-based verbal harassment and the course of conduct that followed, although unsettling, did not rise to the level of severe or pervasive, and the college took timely measures to end the harassment.

Cash v. Lees-McRae Coll., 811 F. App'x 190 (4th Cir. 2020)

Part 5 – Proposed Title IX Regs (7/22)

- Must designate **Title IX Coordinator**
- Must **post non discrimination statement** and how to make reports
- Must respond to ~~sexual~~ sex-based harassment/misconduct reports in way that is not “deliberately indifferent” and take prompt and effective action to end any sex discrimination, prevent recurrence and remedy its effects
 - Must offer **supportive measures** for all “reports” and complaints
- If ~~“Formal Complaint”~~ any oral or written report → must investigate
- No discipline/remedies ALLOWED unless:
 - ~~Formal complaint~~
 - Finding of responsibility after grievance proceeding ~~live hearing and cross exam by school provided advisors.~~
- Neutral, unbiased investigators, Title IX Coordinators, Lots of training
- No conclusions without sharing and written input from parties (~~10 days~~)
- ~~Narrow~~ Broader definition of sexual harassment
- Not responsible presumption
- ~~Mandatory~~/permissive dismissal rules
- Investigator must share equally a description of all information that is directly related relevant and not impermissible due to privilege/rape shield
- ~~Cannot~~ require confidentiality but can’t restrict evidence gathering
- ~~Must~~ allow **live hearing, cross exam, offer evidence**
 - Must provide advisors for cross exam and all meetings
- Decision maker /hearing officer must allow all relevant questions -
 - Rape shield questions not relevant
- No hearsay
- Simultaneous, equal, clear notices
- Appeals must be heard by person(s) not involved earlier.
- Permits **informal resolution** [for peer complaints] if all consent.
- Applies to **employees** too – requires same disciplinary safeguards and same standards of proof.
- Etc., etc., etc.

Part 5 – Proposed New Regulations 2022

- Expanded coverage for sexual misconduct
 - Need not wait for formal complaint
 - Covers pregnancy and related conditions
 - Covers sexual orientation and gender orientation
 - Severe OR pervasive (instead of severe, pervasive, AND objectively offensive)
 - Off campus conduct and conduct outside the U.S. can be covered when it affects campus conduct
- Religious exemptions still apply

Part 5 – Proposed New Regulations 2022

Two Grievance Procedures

106.45 Sex discrimination

- Must treat all C and R equitably
- No conflicts of interest and no biases for or against Cs/Rs
- Decision maker may be same person as TIX coordinator or investigator
- Presumption of not responsible
- Reasonable timeframes
- Reasonable steps to protect privacy while not preventing evidence gathering
- Require objective evaluation of all relevant, permissible evidence
- Exclude impermissible evidence (privilege, rape shield)
- Provide that the recipient (not C or R) has burden to prove sex discrimination
- Equal opportunity to present fact witnesses
- Provide equal opportunity to review and respond to investigator's description of relevant, permissible evidence
- Provide a **process** for decision maker to access credibility
 - Allow decision maker to ask parties and witnesses questions either during individual meetings or at a live hearing.
 - Allow follow up questions proposed by the parties
 - Never allow questioning by parties directly
- Use preponderance of the evidence standard
- For harassment complaints:
 - Provide range of supportive measures to both C and R
 - Provide list of potential discipline/remedies
 - Complete process before disciplining
- Appeals optional

106.46 Sex-based harassment involving a student. Has all the requirements of 106.45 plus a couple more:

- Provide parties with written notice of allegations (expanded content) with sufficient time for parties to prepare a response and stating the presumption of nonresponsibility, and the specific code violations, etc.
- Allow advisors, who may be attorneys
- May delay for certain safety reasons
- May dismiss or allow withdrawal, but must allow appeal of dismissal
- Must provide party notice of investigatory interviews with sufficient time to allow party to prepare to participate
- Allow equal opportunity for advisor participation/restrictions on participation
- May allow expert witnesses equally
- Must allow reasonable extensions of deadlines (written notice with reason and good cause)
- Equitable access to relevant, permissible evidence, summary description or investigation report prior to any live hearing
- Discretion for live hearing
- Must take reasonable steps to prevent unauthorized disclosure of information and evidence
- Procedures for decision maker to evaluate proposed questions
- Must not rely on any statement of party that supports party's position if party does not respond to questions related to credibility
- Provide written determinations
- Provide appeals

Part 5 – Proposed New Regulations 2022

- Expanded Protections for Pregnant Students
 - No discrimination based on parental, family, or marital status
 - No discrimination based on pregnancy
 - If a student tells an employee of the student's pregnancy or related conditions (childbirth, termination of pregnancy, lactations) → the employee must:
 - (1) tell the student how to notify the Title IX Coordinator for assistance
 - (2) provide the Title IX Coordinator's information

Part 5 – Proposed New Regulations 2022

Expanded Obligations of Title IX Coordinator

Must (as proposed):

- Provide reasonable modification for students with pregnancy or related conditions
 - Allow voluntary leave of absence
 - Allow voluntary access to comparable portion of program/activity
 - Provide lactation space
- Be trained
- Keep records
- Respond to reports of sex discrimination
- Offer and coordinate supportive measures
- Initiate, coordinate, oversee grievance and disciplinary procedures/informal resolutions
- Monitor for barriers
- Take **other** prompt and effective steps to ensure that sex discrimination does not continue or recur

May:

- Consult with disability support
- Act as decision maker in grievance process

Part 5 – Proposed New Regulations 2022

- All Employees Expanded Responsibilities
 - Notify the Title IX Coordinator of potential sex discrimination
 - Notify students how to (1) seek confidential assistance; and (2) initiate grievance procedures
 - Respond to students who disclose pregnancy/related conditions.

Part 5 - Proposed Title IX Provisions 2023

New Proposed Rule April 6, 2023:

- No outright bans on transgender students from participating on athletic teams
- The regulation would allow schools the flexibility to develop their own policies to promote goals of fairness and prevention of sports-related injuries
- Criteria must factor in the sport, level of competition, and grade or education level to which the rules apply. The Dept. of Education expects that elementary school students would generally be able to participate since they focus on building team work, fitness and skills of the sport. We expect college teams more focused on competitive success will be permitted more leeway to adopt sex-related rules.

Part 6 – Practice Tips

1. Look at the big picture and don't get bogged down by the details.

Practice Tips

2. Make sure your school has a non-discrimination statement and a place to file reports 24-7, including, anonymously, posted on your website
 - Name a Title IX Coordinator
 - Publish the name and contact information
 - Include LGBTQIA+ and pregnancy discrimination
 - Offer accommodations for pregnant students
 - Have a system to keep track of reports AND the college's response to each report.

Practice Tips

3. Respond to every report that comes in.
 - Offer ***supportive measures to both C & R***
 - Ride to hospital/police
 - Support person to help report to police, help preserve evidence, etc.
 - Know which hospitals have SANE nurses
 - Partner with PAAR and other community groups
 - Offer escorts, rescheduled classes, information on protection from abuse
 - Counseling
 - Mutual no-contact order
 - Allow appeals of supportive measure decisions.
 - Describe options for formal complaints/investigations/informal complaints.
 - Post information and contact information for range of support services available in community as well as in school.

Practice Tips

4. Remember, under the current regulation, you can't discipline a respondent until after a hearing determines responsibility.

Practice Tips

5. Use live/virtual hearings for discipline – especially for suspensions/expulsions.

Provide the basics

- Notice – what conduct is prohibited?
- Notice – What conduct broke what rule?
- Opportunity to tell own side/defend
 - Live hearing with opportunity to present evidence and question witnesses by advisors.
- Written decisions
- Appeal rights
- Follow your policy

Practice Tips

6. Publish a Policy

- Write a Policy that your school employees and students can follow
- Include instructions on how to report
- Include information for pregnant students
- Include possible sanctions and remedies
- Include a definition of consent school will use (look to PA model policy).
- Provide copies of your policies to complainants and respondents
- Refer to your policy often so you can be sure to follow it.

Practice Tips

7. Training

- Ongoing programs for students
 - Bystander training
 - VAWA – must train about school’s policies and procedures, state’s definitions of crimes, and warning signals
- Onboarding/Periodic training for all employees
- Additional training for individuals charged with receiving reports/complaints, investigating, conducting disciplinary hearings, making decisions, hearing appeals, advising students.

Practice Tips

8. Be Prepared

- Consider writing rules of decorum and procedure to hand out when complaints are received along with your policy.
- Consider forms for support services, grievance processes, hearing rules, rules of decorum, investigation reports, decisions, appeal rights, etc.
- Consider hiring attorneys when needed to help out, especially when bigwigs (owners, deans, board members) are named as respondents
 - Investigators
 - Hearing officers
 - Decision makers
 - Advisors

Practice Tips

9. Check in with Risk Management

- Many insurance companies will offer training materials for employees, staff, students, or programs you might be able to adapt for your purposes
- Consider reporting **all** reports/formal complaints to insurance. Insurance may cover the cost of hiring external investigators and attorneys.
- Add informed counsel to your panel counsel.

Practice Tips

10. Consider Using Student Disclosure Statements
 - Require students to sign statements promising to abide by behavior/decorum standards?
 - Require them to agree that the processes outlined in the school's policies are fundamentally fair?

Practice Tips

11. Clinical / Job Experience Programs

- Add language to agreements with clinical partners stating both school and site are responsible for compliance and will cooperate in any investigation/report of discrimination or misconduct
- Create and circulate Internship Fact Sheets making sure both students and site supervisors understand the rules, know how to ask questions, and know how to make reports. Are one-on-one meetings permitted? After hours? Is alcohol consumption permitted? Sexual innuendos? Personal space violation? Compliments on appearance? Social media use? What should a student do if they have concerns?

Practice Tips

12. Be on the look out for the finalized version of the new regulations. They might have all kinds of new things in them.

QUESTIONS?

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