



Investigating Complaints of Past Misconduct: Challenges and Considerations for Title IX Coordinators and Investigators

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PRESENTED JANUARY 11, 2022



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Agenda

- Review of the Regulations
- Challenges and Considerations



Case Study: Quarantine

You are the Title IX Coordinator and receive a signed formal complaint from a student who reported being sexually assaulted off-campus by multiple members of the debate team. The Complainant reported that the incident(s) occurred on January 18, 2021, while at a party that wasn't supposed to occur due to quarantine mandates.

What do you do?

What must you consider?

Is this a “Title IX” case?

If so, what challenges exist?

If not, where will it go at your institution?

REVIEW OF THE REGULATIONS



Title IX: Applicability/Jurisdiction



1-Definition-Behavior, as alleged, meets definition of sexual harassment in regs

2-Persons-Participating in/attempting to participate; substantial control of Respondent

3-Location-Within educational program or activity AND in the United States

1-Definition of Sexual Harassment-2020 Regs



Sexual harassment means 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" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

2-Jurisdiction of Person



“At the time of filing a formal complaint...the complainant must be participating in or attempting to participate in the education program or activity”



The institution must exercise control over the Respondent



All regulations apply to students and employees

3-Jurisdiction of Activity (Location)



Behavior must occur as part of the “education program or activity”

- Locations, events, or circumstances over which the recipient exercised substantial control over the context in which the sexual harassment occurs
- And any building owned or controlled by a student organization that is officially recognized

Must occur in the United States (including US territories)

Mandatory Dismissal



For it to be covered under Title IX, it must meet:

- Definitions
- Jurisdiction of person
- Jurisdiction of activity



If it does NOT meet these requirements...

- Mandatory dismissal
- Can go to different resolution process

Does Not Preclude Action



Student Conduct



Human Resources



Other Options

BUT—NO Policy Shopping! If it meets the jurisdictional requirements of Title IX, it is Title IX or bust! (i.e., cannot push to another policy simply because someone doesn't want to file through Title IX....)

May Dismiss



Complainant Withdraws
Complaint



Respondent No Longer
Enrolled/Employed



Prevented from
Gathering Evidence

CONSIDERATIONS AND CHALLENGES

- PAST MISCONDUCT
- JURISDICTION OF NEW RULES
- DATE OF OCCURRENCE



Case Study: Hotline



Your institution's President contacts you, the Title IX Coordinator. She states that a complaint has come through the Ethics Hotline alleging the now Provost engaged in sexually harassing conduct approximately 9 years while he was the Chair of the English Department. Specifically, the reporter, who has since graduated but was a graduate student at the time, states that the now Provost touched her breasts without her consent while the two were at a school-related conference in another state. The President would like this investigated and resolved immediately and a report prepared for the Board as soon as possible.

What do you do?

What must you consider?

Is this a "Title IX" case?

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“Past Misconduct”-Policy Jurisdiction Based on Date of Occurrence

“THE TITLE IX RULE IS EFFECTIVE ON AUGUST 14, 2020, AND IS NOT RETROACTIVE”

“Consistent with the Department’s statements in the preamble to the Title IX Rule regarding non-retroactivity, the Rule does not apply to schools’ responses to sexual harassment that allegedly occurred prior to August 14, 2020. The Department will only enforce the Rule as to sexual harassment that allegedly occurred on or after August 14, 2020. With respect to sexual harassment that allegedly occurred prior to August 14, 2020, OCR will judge the school’s Title IX compliance against the Title IX statute and the Title IX regulations in place at the time that the alleged sexual harassment occurred. In other words, the Rule governs how schools must respond to sexual harassment that allegedly occurs on or after August 14, 2020.”

[Office for Civil Rights Blog - 20200622 \(ed.gov\)](#)

Additional Challenge



Complaint from incident that reportedly occurred before the regs went into effect, but policy/procedure in place now looks significantly different.

- How will the parties feel about this?
- Should you rely on policy in place at time but procedures that are in place now?
- How do you reconcile what a student gets now versus what was in place at the time the incident reportedly occurred?



“Past Misconduct”-Policy Jurisdiction Based on Date on Location

- Location of incident-Does location of incident play a role in determining policy jurisdiction in reports of past misconduct?

“Past Misconduct”-Other Challenges



Passage of time means diminished memories for witnesses

Noncooperating parties and/or witnesses (no ability to compel, appropriately—our process is about opportunity and access)

Parties leaving institution (students and employees)

Capacity to report what occurred

Fear of retaliation

Fear of live hearing and cross examination

No trusted advisor

Prelim and final reports- construction, understanding, feedback



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Upcoming D. Stafford Classes

- **Title IX Coordinator IN PERSON**
 - May 23-26, 2022
Wentworth Institute of Technology in Boston, MA
- **Title IX Coordinator Training-VIRTUAL**

Class 1 (Virtual) will be held on over the following dates:

February 1, 2022;

February 8, 2022;

February 15, 2022;

February 22, 2022; and

March 1, 2022.

Class 2 (Virtual) to be held:

October 10-14, 2022

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April 25-29, 2022

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