

Title IX: Legal Framework and Practical Considerations

Yale University

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Agenda

- Title IX background
 - History
 - Scope of coverage
- Trauma-informed report intake
 - Documentation of intake communications/Maxient
- Supportive Measures
 - Academic, living modifications
 - No-contact directives
 - Other supportive measures
 - Documentation
- Alternative resolution

Title IX Background

Title IX

- Title IX:
 - “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.”
- 2022 marks 50th anniversary of Title IX

1997-2014 Dept. of Ed. Guidance

- 1997 Department of Education Sexual Harassment Guidance
- 2001 Revised Department of Education Sexual Harassment Guidance
- 2011 Dear Colleague Letter
- 2014 Q&A

2017-2018 Dept. of Ed. Activity

- February 2017: Trump Administration withdraws May 2016 Obama Administration guidance on gender identity-based discrimination
- September 7, 2017: Department of Education Secretary Betsy DeVos announces notice and comment process
- September 22, 2017: OCR issued:
 - Dear Colleague Letter (“2017 DCL”) rescinded 2011 DCL and 2014 Q&A
 - Q&A on Campus Sexual Misconduct (“2017 Q&A”)
- November 2018: Notice of Proposed Rulemaking (“NPRM”) posted for public comment

Rulemaking Process – May 2020 Regs.

- Approximately 125,000 public comments were submitted
- May 6, 2020: Final Regulations Posted
 - Officially published in Federal Register May 19, 2020
- August 14, 2020: Final Regulations Effective

June 2021 Gender Identity/Sexual Orientation Notice of Interpretation

- June 2021 Notice of Interpretation: Biden Administration confirms that it will apply rationale of *Bostock v. Clayton County* (SCOTUS 2020) in Title IX context
 - That is, discrimination on basis of sexual orientation and gender identity is discrimination “on basis of sex” under Title IX

June 2021 Gender Identity/Sexual Orientation Notice of Interpretation

- Pursuant to a Federal court order, the Department has been preliminarily “enjoined and restrained from implementing” June 2021 NOI against the states of AL, AK, AZ, AR, GA, ID, IN, KA, KY, LA, MI, MO, MT, NE, OH, OK, TN, SC, SD, WV. *See State of Tenn., et al. v. U.S. Dep’t of Educ.*, (E.D. Tenn.) (July 15, 2022)
- District court held that NOI was “legislative rule” that could only be adopted through notice and comment
- Appeal filed 9/13/22

July 2021 Q&A

- In July 2021 Q&A resource, OCR essentially:
 - Reinforces, with only a few additions, the requirements of the 2020 Title IX regulations
 - Relies heavily upon Preamble language to explain rationale for regulations
- One example of additional language:
 - Schools may use trauma-informed approaches in informal resolution processes
 - In October 2021 letter, OCR indicated that it had no particular trauma-informed IR approach in mind when making this statement, and
 - Will leave it to a school's discretion to determine such approaches, so long as process is conducted impartially and without conflict of interest or bias as required by 106.45

Currently-Pending Rulemaking Process

- Department review of May 2020 Title IX regulations began in March 2021, as directed by an executive order
- Department sought public input from stakeholders and convened a nationwide virtual public hearing in June 2021
- NPRM was published officially in the Federal Register on July 12th, and public had 60 days to submit comments to the Department
- Over 240,000 public comments were received

Currently-Pending Rulemaking Process

- Department will now have to summarize and respond to comments received and issue the resulting final regulations
- Department took 15 months to respond to approximately 125,000 comments to May 2020 regulations
- It will likely be many months before proposed regs become effective
- Until they are, May 2020 regulations remain in effect

Proposed Scope and Definition Changes

- May 2020 regulations:
 - narrowed definition of "hostile environment sexual harassment" and
 - required schools to focus their Title IX procedures on on-campus or program-related conduct that fit within that definition
- Proposed regulations in NPRM roll back that narrowing and essentially restore the definition to that used during the Obama Administration, which is more likely to require investigations of a broader category of unwelcome conduct of a sexual nature

Proposed Scope and Definition Changes

- Consistent with June 2021 Notice of Interpretation, proposed regulations make clear that sex-based discrimination covered by Title IX includes discrimination on the basis of:
 - sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation and gender identity
- Proposed regulations explicitly define discrimination on basis of gender identity as including:
 - “different treatment or separation on the basis of sex in a way that would cause more than de minimis harm, including by adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with their gender identity”

Proposed Procedural Changes

- In contrast to May 2020 regulations, the proposed sex-based harassment for college student regulations would, for example:
 - Allow complaints to be based on both oral and written complaints
 - Allow schools to temporarily separate respondents from the institution to the extent necessary to "protect the safety of the complainant or the [school's] environment"
 - Not require certain complaints to be “dismissed for Title IX purposes”
 - See “Here’s How Title IX Could Change Under Biden’s Proposed Rule,” Chronicle of Higher Education (June 23, 2022)
 - Permit various adjudication models
 - Not require live hearings with cross-examination

Proposed Changes

- Of course, it remains to be seen whether these proposed changes will appear in this form in the final regulations
- Again, until then, May 2020 regulations remain in effect
- Yale University policies and procedures apply until amended by the University

Title IX Scope of Coverage

- Current regulations prohibit discrimination on basis of:
 - Sex
 - Pregnancy and pregnancy-related conditions
- 2021 Notice includes gender identity and sexual orientation
- Current regulations will likely be applied to prohibit discrimination through sex stereotyping
- Prohibited sex discrimination can include:
 - Disparate treatment discrimination
 - Disparate impact discrimination

Yale Policy Scope of Coverage

- Yale University policy prohibits discrimination and harassment on basis of, among other things:
 - sex
 - sexual orientation
 - gender identity or expression
- If ever in doubt, rely upon University policy

University's "education program or activity"

- A University "Program or Activity" includes:
 - any location, event, or circumstance where the University exercises substantial control over both the respondent and the context in which the conduct occurs,
 - any building owned or controlled by a Student organization recognized by the University, and
 - a University campus
- Be mindful of contextual details when receiving reports

Title IX vs. Yale University Definitions

- Please note:
 - The following slides describe how prohibited conduct is defined in Title IX
 - Yale University has the right to, and does, define prohibited conduct more broadly than is required by Title IX
 - For practical purposes, Yale University policies should be your guide for understanding the scope of conduct prohibited by the University

Title IX Sexual Harassment

- Prohibited “sexual harassment” means conduct on the basis of sex that constitutes one or more of the following:
 - An employee conditioning the provision of an aid, benefit, or service on an individual’s participation in unwelcome sexual conduct (i.e., *quid pro quo*);
 - Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to an education program or activity (i.e., hostile environment); or

Title IX Sexual Harassment

- Prohibited “sexual harassment” means conduct on the basis of sex that constitutes one or more of the following:
 - Sexual assault
 - (as defined in Clery Act)
 - Or “dating violence,” “domestic violence,” or “stalking”
 - (as defined in Clery Act/Violence Against Women Act)

Title IX Sexual Assault

Sexual Assault as defined in FBI/UCR/NIBRS includes:

- Rape:
 - The carnal knowledge of a person (i.e., penile-vaginal penetration)
 - without the consent of that person
 - including instances where the person is incapable of giving consent because of their age or because of their temporary or permanent mental or physical incapacity
 - Oral or anal sexual intercourse (i.e., penile penetration) with another person (without Consent including because of age or incapacity)
 - To use an object or instrument (e.g., an inanimate object or body part other than a penis) to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, (without Consent including because of age or incapacity)

Title IX Sexual Assault

Sexual Assault as defined in FBI/UCR/NIBRS includes:

- Fondling:
 - The touching of the private body parts of another person
 - for the purpose of sexual gratification
 - without the consent of that person
 - including instances where the person is incapable of giving consent because of their age or because of their temporary or permanent mental or physical incapacity

Title IX Sexual Assault

- Sexual Assault as defined in FBI/UCR/NIBRS includes:
 - Incest: Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law; or
 - Statutory Rape: Sexual intercourse with a person who is under the statutory age of Consent.

Title IX Dating Violence

- The term “Dating Violence” means violence committed by a person:
 - Who is or has been in a social relationship of a romantic or intimate nature with the victim; and
 - Where the existence of such a relationship shall be determined based on the reporting party’s statement and with a consideration 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.
- Dating Violence includes, but it is not limited to, sexual or physical abuse or the threat of such abuse.

Title IX Domestic Violence

- The term “Domestic Violence” includes 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 jurisdiction where the crime of violence occurred, 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 jurisdiction where the crime of violence occurred

Title IX Stalking

- Stalking occurs when an individual engages in a course of conduct directed at a specific person under circumstances that would cause a reasonable person to:
 - Fear for their safety or the safety of others; or
 - Suffer substantial emotional distress
- The definition of “reasonable person” is a reasonable person under similar circumstances and with similar identities to the complainant
- “Course of conduct” means two or more acts, including but not limited to, acts in which a person directly, indirectly or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about another person, or interferes with another person’s property

Pregnancy and Related Conditions

- Title IX regulation regarding status generally:
 - A university shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.
- Title IX regulation regarding pregnancy and related conditions:
 - A university shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient

Pregnancy and Related Conditions

- Title IX regulation:
 - Universities must treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity

Pregnancy and Related Conditions

- If a university which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.

Trauma-Informed Report Intake



NACUA NOTES

J. Nolan, “Promoting Fairness in Trauma-Informed Investigation Training”

- National Association of College and University Attorneys (“NACUA”) NACUANOTE, February 8, 2018, Vol. 16 No. 5
 - cited once in Title IX regulations Preamble

Updated Holland & Knight white paper version available at:

<https://www.hklaw.com/en/insights/publications/2019/07/fair-equitable-trauma-informed-investigation-training>

- cited 7 times in Title IX regulations Preamble

Traditional Interview Techniques

- Often focus on “who, what, when, where, why”
- Often focus on what questioner thinks they need, e.g.:
 - Developing a chronology
 - Fitting facts into policy violation elements framework
- Questioner’s determinations and (worse yet) pre-determinations of what is relevant, and what is not, can be controlling
 - Questioner often interrupts witness to seek immediate clarification
- Common questioning techniques:
 - Leading questions
 - Yes/no or choice questions
 - Paraphrasing for “clarification”
- “Why did you/why didn’t you” questions that can discourage participation

Trauma-Informed Interview Techniques

- Trauma-informed, witness-centered interview techniques:
 - Are more open-ended
 - Avoid interruption
 - Avoid leading questions
 - Avoid yes/no questions
 - Avoid judgmental questions
- Using trauma-informed, witness-centered techniques does not presume that interview participant has necessarily experienced trauma or affect fairness of process to any party
 - Instead, it accounts for potential effects of trauma and encourages reporting if those effects are present, and also
 - Can facilitate more robust, authentic information sharing from any interview participant

Documentation of Intake Communications

- Current Maxient form fields include:
 - First report vs. update field
 - “Please provide a summary of the incident or behavior reported, including the affiliation of the parties”
 - “When did the concern(s) occur (provide specific date or date range if known, or provide an approximate time frame)?”
 - “How does complainant want to see the matter resolved (if known)?”

Documentation of Intake Communications

- Current Maxient form fields include (continued):
 - Is the complainant seeking any supportive measures? If so, what?
 - “If this is an update to a previous report regarding this matter, please provide any updates, actions taken, referrals made below.
 - Please indicate whether the matter is resolved.”
 - Supporting Documents
 - “Photos, video, email, and other supporting documents may be attached below.
 - 5GB maximum total size.”
 - Note option to “Email me a copy of this report.”

Supportive Measures

Title IX Regulation: Supportive Measures

- Supportive measures are designed to:
 - Restore or preserve access to University's education program or activity without unreasonably burdening the other party
 - Protect the safety of all parties and the University's educational environment, and
 - Deter sexual harassment

Title IX Regulation: Supportive Measures

- Supportive measures should be
 - non-disciplinary, non-punitive individualized services offered as appropriate
 - as reasonably available
 - and without fee or charge to the complainant or the respondent
- Before or after the filing of a formal complaint or
- Where no formal complaint has been filed

Title IX Regulation: Supportive Measures

- May include, for example:
 - Counseling
 - Extensions of deadlines or other course-related adjustments
 - Modifications of work or class schedules
 - Campus escort services
 - Mutual restrictions on contact between the parties
 - Changes in work or housing location
 - Leaves of absence
 - Increased security and monitoring of certain areas of the campus
 - Other similar measures

Supportive Measures - Confidentiality

- Per Title IX regulations, universities:
 - “must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures.”
- Examples of how to apply this rule

Supportive Measures – Documentation

- Per Title IX regulation, universities must maintain for 7 years the following documentation regarding supportive measures provided or not provided in response to each report or formal complaint of sexual harassment:
 - Documentation showing that it has taken measures designed to restore or preserve equal access to the university's education program or activity
 - Could include supportive measures and/or remedies after adjudication
 - If a university does not provide a complainant with supportive measures, then the university must document the reasons why such a response was not clearly unreasonable in light of the known circumstances
 - The documentation of certain bases or measures does not limit a university in the future from providing additional explanations or detailing additional measures taken

Informal Resolution

Informal Resolution

- In 1997, 2001 and 2011 guidance, Department stated:
 - "in cases involving allegations of sexual assault, mediation is not appropriate even on a voluntary basis."
- While some schools used non-mediation informal resolution processes notwithstanding this guidance, many schools read this language broadly and did not use any form of informal resolution practices in sexual assault cases
- Trump Administration's Department rescinded this guidance in 2017 and declared that informal resolution could be used in sexual assault cases if certain safeguards were implemented, and incorporated that position into the May 2020 regulations

Informal Resolution

- Proposed Biden Administration regulations do not revert to a pre-Trump Administration position on this point
 - proposed regulations would permit the use of informal resolution processes in sexual assault and other sex-based discrimination cases
- As with the current regulations, certain safeguards must be followed
- Proposed regulations explicitly state a safety-related caveat that was implied in the current regulations, specifically:
 - "[c]ircumstances when a recipient may decline to allow informal resolution include but are not limited to when the recipient determines that the alleged conduct would present a future risk of harm to others."

Alternative Resolution at Yale

- The following rules apply to all alternative resolutions:
 - The parties must voluntarily consent in writing to participate in an alternative resolution process
 - Yale will never require that they do so or condition the educational, employment, or other rights of parties on the waiver of their right to an investigation and adjudication of formal complaints of sexual misconduct.
 - In order for the parties to proceed with an alternative resolution, the university must agree that an alternative resolution is appropriate to the circumstances of the case.
 - Yale will not offer a process for the alternative resolution of allegations brought by or on behalf of students against Yale employees, including faculty members.

Alternative Resolution at Yale

- The following rules apply to all alternative resolutions (continued):
 - At any time prior to agreeing to an alternative resolution, any party has the right to withdraw from the alternative resolution process and resume or initiate a formal complaint process.
 - If an alternative resolution process is initiated but not completed, records of the process ordinarily will be destroyed.
 - No documents or statements made in the alternative resolution process may be used in a subsequent formal complaint proceeding about the same allegations.

Alternative Resolution at Yale

- The following rules apply to all alternative resolutions (continued):
 - Absent exceptional circumstances, alternative resolutions are not available in cases of behavior, which, if proven, would indicate that the respondent presents a danger to the safety of the Yale community
- Title IX regulations require that informal resolution may only be offered in Title IX Sexual Harassment cases within scope of Title IX if complainant or University files formal complaint
- No formal complaint is required to initiate an alternative resolution process for an allegation of sexual misconduct that is not covered by the Title IX regulations
- Discussion: Deputy Title IX Coordinators' role in alternative resolutions

Questions?



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