



**Title IX Coordinator Training
Online Course: Fundamentals of
the August 2020 Regulatory
Requirements**

**Module 1: Jurisdiction and Other
Threshold Topics**

Amy C. Foerster, Partner, Troutman Pepper Hamilton
Sanders LLP
Melinda Grier, Melinda Grier Consulting PC
Janet P. Judge, Partner, Holland & Knight LLP

Course Overview

- Jurisdiction and Other Threshold Topics
- Formal Complaints, Investigations, and Grievance Procedures
- Policy and Training Obligations



Title IX Final Regulation

- Effective August 14, 2020
- Where to Begin
 - Inventory
 - Implementation Plan



PLAN & DOCUMENT YOUR EFFORTS

- Inventory
 - Current Title IX Procedures
 - Clery Act Policies & Compliance
 - Student Conduct Code
 - HR Policies & Agreements
 - State or Local Laws or Regulations
- Implementation Plan
 - What?
 - Who?
 - When?

**Jurisdiction: What,
Who, Where, When,
How?**

WHAT?

DEFINITION OF SEXUAL HARASSMENT

§106.30(a): Sexual Harassment to include one or more of the following:

1. Quid Pro Quo
2. Hostile Environment
3. Clery Definitions

QUID PRO QUO

1. Conditioning provision of an aid, benefit, or service on participation in unwelcome sexual conduct
2. Carried out by an employee

HOSTILE ENVIRONMENT

- Unwelcome sexual conduct
- “So severe, pervasive, *and* objectively offensive” (2020)
 - Pattern or practice or sustained and non-trivial (2001)
- “Effectively denies equal access”
 - Denies or limits a student’s ability to participate in or benefit from (2001)
 - Interferes with or limits a student’s ability to participate or benefit from (2011)
- “Determined by a reasonable person”
 - “[S]tanding in the shoes of the complainant.” (Preamble, p. 514)

CLERY DEFINITIONS

- Sexual Assault – a forcible or non-forcible sex offense under the FBI UCRS (as defined by the Clery statute)
 - Rape, attempted rape, sodomy, fondling, statutory rape
- Dating Violence – violence by a person who is or has been in a romantic or intimate relationship (Clery statute)
- Domestic Violence – violence by a current or former spouse or intimate partner, co-parent, living partner, youth or other under state law
- Stalking – fear for safety or safety of other or suffer substantial emotional distress

COMPARE TO

- Institution Conduct Code
- Court standards
- Title VII
- State law

WHO?

IN ADDITION TO STUDENTS...APPLIES TO EMPLOYEES

§106.51 Employment

- “No person shall, on the basis of sex, be excluded from participation in, or denied benefits of, or be subjected to discrimination in employment...”
- Remains unchanged by current amendments

WHAT'S NEW THEN...

- 2011 Guidance directed at student-on-student sexual violence
- Courts and OCR have relied on Title VII when considering employees' complaints alleging sexual harassment even under Title IX.
- OCR acknowledges differences, expects institutions of higher education (IHEs) to comply with both Title IX and Title VII requirements.
 - OCR will try to “avoid an actual conflict” regarding employer's obligations. (Preamble p. 1511.)

OTHER CHANGES

- Requires IHEs to handle allegations by employees, including at-will employees, using the same procedures it uses for students
- Independent contractors and volunteers are *not* considered employees who may create *quid pro quo* Title IX liability.
- Actions by non-employees may create liability for other types of sexual harassment. (Preamble p. 448)
- Volunteers who experience discrimination *may* be covered. (Preamble p. 1544)

TITLE VII – SEXUAL HARASSMENT DEFINITION

- Conduct
 - Unwelcome sexual advances
 - Requests for sexual favors
 - Other verbal or physical conduct of a sexual nature
- Viewed by a reasonable person in the Complainant’s position

WHEN...

- Submission becomes a term or condition of employment
- Rejection is used as the basis for an employment decision
- The conduct unreasonably interferes with work performance or creates a hostile, intimidating or offensive environment

EMPLOYEE-EMPLOYEE HARASSMENT

- Employer’s knowledge
 - Knew or should have known
- Immediate and appropriate corrective action
 - Reasonably calculated to end the harassment and prevent recurrence
- Actions by third parties

SUPERVISOR LIABILITY

- Tangible Employment Action
 - Strict liability
- No tangible employment action
 - Employer takes reasonable care to prevent and correct promptly
 - and*
 - Employee unreasonably failed to use employer's preventive or corrective options

INSTITUTIONAL REQUIREMENTS

- Contractual Obligations
 - Collective bargaining agreements
 - Employee handbooks
 - Individual employee contracts



OTHER LEGAL REQUIREMENTS

- Conflicting state requirements
 - State laws
 - State administrative rules and regulations
- Choice of IHE to accept federal funding

OTHER ISSUES

- Procedures
 - Serial or parallel
 - Clearly identify what applies to employees
- Student employees
- Clergy obligations to employees
- Notification to all employees and applicants (§106.8)

WHERE?

JURISDICTION

- No distinction between on- or off-campus
 - If in a location, at an event, or in circumstances that meet the definition
- Only in the United States
 - Harassment must occur against a person *in the United States*
 - Study abroad & foreign employment

BUT DON'T FORGET...

- May apply other institutional conduct standards and procedures
- Clery applies to students and employees regardless of location.
- Title VII applies to U.S. citizens working for U.S. corporations abroad.

EDUCATION PROGRAM OR ACTIVITY

- §106.44(a): Locations, events, or circumstances over which IHE exercises substantial control over *both* the respondent and the context in which the sexual harassment occurred
- Any building owned or controlled by a recognized student organization
- Training on the scope of the institution program or activity

WHEN?

ACTUAL KNOWLEDGE

- §106.30 (a): Notice to Title IX Coordinator or *any official who has authority to institute corrective measures*
- Sexual harassment or allegations of sexual harassment
- No vicarious liability, constructive notice or “should have known”

OFFICIAL WITH AUTHORITY

- Authority to institute corrective measures
- Not an official with authority (OWA)
 - An official with only the ability or obligation to report
 - An official with only the ability or obligation to inform student about how to report
 - An official having been trained to report or inform students how to report
- Respondents are not OWAs

IMPLEMENTATION ISSUES

- Institutions determine who is OWA
 - Institutions decide who must, may or may only with a student’s consent report sexual harassment.
 - Make a list of who has authority
 - Need not give notice of all OWAs only Title IX Coordinator information
- Responsible employees
 - No longer in regulations
 - Institutions now may want to re-conceptualize if or how they will designate.
 - May require employees to inform IHE
 - Resident Assistants

RETALIATION §106.71(a)

- No retaliation by any person to interfere with any right “secured by Title IX”
- No retaliation for
 - Making a report or complaint
 - Participating or refusing to participate
- Filing charges regarding conduct that arises out of the “same facts or circumstances” but does not involve sex discrimination

CONFIDENTIALITY

- IHEs must keep confidential the identity of any individual
 - Who has made a report or filed a complaint
 - Who has been reported as a perpetrator
 - Who has been a witness
- Exceptions
 - FERPA
 - Legal obligations
 - Carry out the purposes of these regulations

RETALIATION AGAINST EMPLOYEES

- Future employment decisions
- Employment references
- Licensing Boards

HOW?

THE INITIAL REPORT

- Anyone may report
 - Not automatically a formal complaint
- Institution response to notice
 - Offer of supportive measures
 - Explanation of formal complaint process
 - Compare to Clery

MAKING REPORTS

- Who
 - Any individual
 - alleged to be the victim of conduct that could be sexual harassment
 - Distinguish from Formal Complaint
- Against Whom
 - Any individual
 - Reported as perpetrator of conduct that could be sexual harassment
 - Distinguish from Formal Complaint

INSTITUTION RESPONSE

- Promptly contact the Complainant to discuss the availability of supportive measures
 - Consider complainant's wishes
 - Make clear available with or without formal complaint
- Explain the process for filing a formal complaint
- Treat complainants and respondents equitably
- Consider Clery obligations

SUPPORTIVE MEASURES §106.30(a)

- Non-disciplinary, non-punitive individualized services
 - Impose actions that are disciplinary sanction or not supportive measure only *after* a grievance process
- Appropriate, reasonably available, free to complainant or respondent
- Restore equal access without unreasonably burdening the other party
- Confidential, if possible

EMERGENCY REMOVALS §106.44(c)

May remove respondent from *education program or activity* if:

- Conduct an individualized safety and risk analysis,
- Determine that respondent poses an immediate [imminent] threat to the *physical* health or safety of *anyone* justifying removal,
- The threat arises from the allegations of sexual harassment, and
- Provide opportunity for respondent to challenge removal immediately thereafter.

BUT...



- This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the American with Disabilities Act.
- Review disability policies regarding danger to self or others

EMERGENCY REMOVALS

Other Points to Consider:

- Not limited to instances of sexual assault
- Who will conduct the assessment and make the decision?
- Beyond verbalized threats, what information will be considered?
- Institution can determine the scope of removal.
- No specific timeframes – may (not required to) reassess
- What will respondent’s ability to challenge it look like?
- Separate from non-student employee Administrative Leave

Note

The content of this presentation is to provide news and information on legal issues and all content is provided for informational purposes only and should not be considered legal advice.

The transmission of information in this presentation does not establish an attorney-client relationship with the recipient. The recipient should not act on the information contained in this presentation without first consulting retained legal counsel.

If you desire legal advice for a particular situation, you should consult an attorney.
