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Compliance 101: Nondiscrimination Laws

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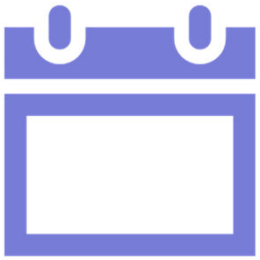
Agenda

- Title VI and Title VII
- Title IX
- PWFA
- ADA and Section 504
- Age Discrimination Act & ADEA
- Best Practices and Takeaways



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Title VI and Title VII

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Title VI

- *"No person in the United States shall, on the ground of **race**, **color**, or **national origin**, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."*

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Application of Title VI

- Prohibits entities that receive federal funding from engaging in race discrimination.
- Applies to any program or activity receiving federal financial assistance.
- Enforced by OCR

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Requirements for Institutions

- Prominently display posters in "reasonable numbers and places" that note that the agencies are subject to Title VI, summarize the requirements, address the availability of Title VI information, and explain procedures for filing complaints.

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Scenario

- Institution has a program, the XYZ program, which awards scholarships to students. The XYZ program is only open to African American students.

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Title VII

- "It shall be an unlawful employment practice for an employer . . . To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .."

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Title VII of the Civil Rights Act of 1964

- Prohibits discrimination in employment (private and public) on the basis of:
  - Race
  - Color
  - Religion
  - National Origin
  - Sex

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Requirements

- Must publicly post notices of Title VII requirements in "prominent and accessible places where notices to employees, applicants and members are customarily maintained"

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Hot Topics

- Dear Colleague Letter from OCR (November 7, 2023)
  - Reminds schools of their legal obligation under Title VI to address discrimination and harassment and provide all students a school environment free from discrimination based on race, color, or national origin
- Numerous recent OCR resolution agreements addressing harassment and discrimination based on ancestry.
- EEOC guidance (September 29, 2023)
  - Incorporating *Bostock v. Clayton County* U.S. Supreme Court decision, which expanded protected characteristic of "sex" to include sexual orientation and gender identity under Title VII.

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Title IX and PWFA

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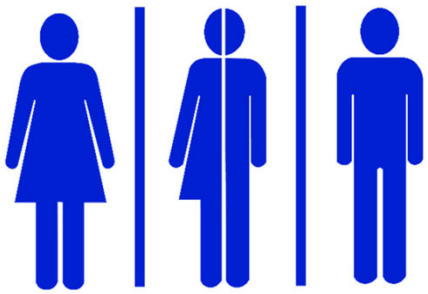
What is Title IX?

- "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. . .."



20 U.S.C. § 1681(a)

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What does Title IX Cover?

- Recruitment, admissions, counseling
- Financial Assistance
- Gender equity in athletics
- Sex-based Harassment, including sexual assault and other forms of sexual violence
- Pregnancy and parenting
- Treatment of LGBTQI+ students
- Discipline
- Single-sex education
- Employment

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Common Areas of Challenge

- Remembering that Title IX covers more than just sexual harassment (gender equity in athletics, pregnancy and parenting)
- Organizational structure
- Following proper procedures – and routing reports appropriately
- Training personnel
- Conflicts of interest/bias

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Compliance Requirements

- Designate a Title IX Coordinator
- Adopt and follow a grievance process to address Title IX Sexual Harassment
- Provide required training
- Document and keep appropriate records

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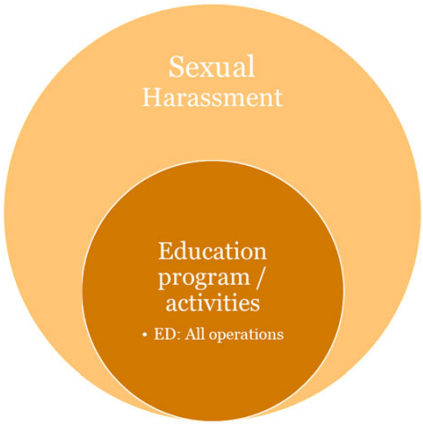
What sexual harassment does Title IX apply to?

- Title IX applies to sexual harassment in the "education program or activity" of a federal funding recipient
- Title IX defines "education program or activity" to include the "operations" of educational institutions
- Title IX does not apply to private conduct occurring in private location that is not part of education program/activity



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What is sexual harassment?

Conduct on the basis of sex that is:

- Quid pro quo harassment
- Hostile environment harassment
- Sexual assault
- Relationship violence
- Stalking

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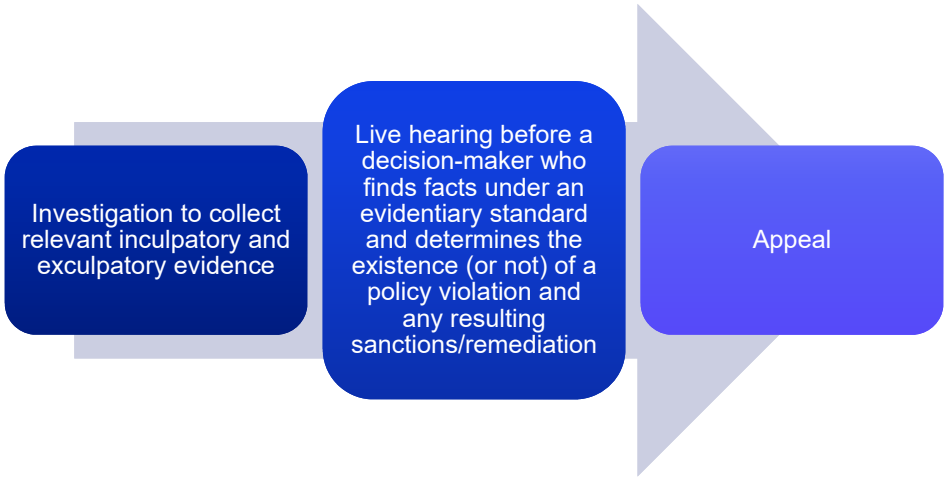
What is the grievance process?



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Scenario

A student files a formal complaint with the Title IX Coordinator stating that she was sexually assaulted by another student while they were on a university-sponsored study abroad trip in Paris.

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Proper Procedures

- Remember what Title IX covers and route claims appropriately
- Educate your Title IX team members
- The formal grievance process must be used for allegations of sexual harassment, including sexual assault
- Informal resolution may be an option
- Post your training materials for your Title IX team members
- Retain your records

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Pregnant Workers Fairness Act

- Pregnancy Protections in Title IX and the ADA
- Relatively new law (effective June 27, 2023) that applies only to accommodations
- Designed to address limitations under Title VII, ADA, and FMLA
- Does not replace federal or state laws that are more protective
- Proposed regulations issued August 11, 2023 (comments were due October 10, 2023)

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Who is protected?

- Employees and applicants of "covered employers" who have known limitations related to pregnancy, childbirth, or related medical conditions
- "Covered employers" include public and private employers with at least 15 employees (among others)

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Areas addressed

- Coverage is the same as Title VII and the ADA
- Reasonable accommodations are available (without undue hardship)
  - To help apply for a job
  - To perform a job
  - To enjoy equal benefits and privileges of employment
  - To temporarily suspend the performance of an essential function of a position (if certain conditions are met)
- Note: PWFA allows workers with uncomplicated pregnancies to seek accommodations, recognizing that even uncomplicated pregnancies may create limitations for workers

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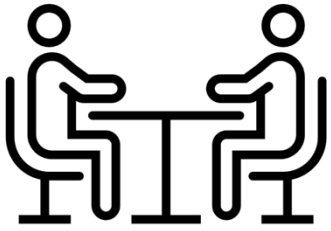
Examples of accommodations

Ability to:

- Sit or drink water
- Receive closer parking
- Have flexible hours
- Receive appropriately sized uniforms and safety apparel
- Have additional break times
- Leave or time off to recover
- Be excused from strenuous and/or unsafe activities



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Covered employers cannot

- Require an employee to accept an accommodation without a discussion
- Deny a job or other employment opportunity based only a need for reasonable accommodation
- Require an employee to take a leave if another reasonable accommodation could be provided
- Retaliate
- Interfere with an individual's right under the PWFA

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Federal Disability Laws

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Federal Disability Laws

- Americans with Disabilities Act
- Section 504 of the Rehabilitation Act of 1973
- Fair Housing Act

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Section 504 & the ADA

- Section 504 prohibits discrimination based on disability in any program or activity operated by a recipient of federal funds.
- ADA
  - Title I: Employment
  - Title II: Public universities/colleges
  - Title III: Private universities/colleges (note: religious organization exception)

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Fair Housing Act

- Prohibits discrimination in housing based on race, color, religion, sex, national origin, familial status, and disability.
- The Act includes physical accessibility requirements for facilities.

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Scope of Covered Activities

Programs, Benefits, Services

- Admissions/recruitment
- Academics
- Financial Aid
- Housing
- Athletics
- Extracurricular activities
- Transportation

Communications

Facilities

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Obligation to Accommodate

- Section 504: Make modifications to academic requirements as are necessary to ensure that such requirements do not discriminate against a qualified student with a disability.
- ADA: Make reasonable modifications in policies, practices, or procedures when necessary to avoid discrimination based on disability.
- FHA: Provide "reasonable accommodations" to afford persons with disabilities an "equal opportunity to use and enjoy a dwelling."

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Limitations on Accommodations

- Institutions are not required to provide accommodations that:
  - fundamentally alter a program
  - conflict with the essential functions of a job
  - pose an undue burden
- Schools do not need to provide the student's preferred accommodation so long as an alternative accommodation is effective.
- Schools need not provide personal devices (e.g., wheelchairs, hearing aids) or personal services (e.g., assistance eating or dressing).

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Common Areas of Challenge

- Academic and work accommodations
- Housing accommodations
- Animals on campus
- Threatening & self-harming Students
- Facility accessibility
- Digital accessibility

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Compliance Requirements: ADA Title II

- ***Designation of responsible employee***.
  - Designate at least one employee to coordinate its compliance efforts
  - Publish the coordinator's name, office address, and telephone number
- ***Complaint procedure.***
  - Adopt and publish grievance procedures providing for prompt and equitable resolution of disability discrimination/harassment complaints.

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Compliance Obligation: Section 504

- ***Designation of responsible employee.***
  - Designate at least one person to coordinate its compliance efforts.
- ***Adoption of grievance procedures.***
  - Adopt grievance procedures that incorporate appropriate due process standards and provide for the prompt and equitable resolution of complaints alleging disability discrimination/harassment.
  - Per OCR enforcement actions, such procedures must apply to complaints from students, employees, or third parties.

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Age Discrimination Laws

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Age Discrimination Act

- The Age Discrimination Act of 1975 prohibits discrimination based on age in programs or activities that receive federal financial assistance.
- The law does not cover employment discrimination (ADEA).

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Compliance Obligations

- ***Designation of responsible employee.***
  - Designate at least one employee to coordinate compliance efforts.
- ***Notice.***
  - Include nondiscrimination based on age in notice of nondiscrimination.
  - Identify the coordinator by name or title, address, and telephone number.
- ***Grievance procedures.***
  - Adopt and publish grievance procedures providing for prompt and equitable resolution of complaints.

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Age Discrimination in Employment Act

It shall be unlawful for an employer-

- to fail or refuse to hire or to discharge any individual or other discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
- to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual or employment opportunities or otherwise adversely affect his status as an employee because of such individual's age . . ..

29 U.S.C. 623(a)

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Application

- Applies to employers with 20 or more employees, including state and local governments
- Protects individuals 40 years of age or older
- Protections include
  - Apprenticeship programs
  - Job notices and advertisements (BFOQ exception)
  - Pre-Employment Inquiries (asking age only allowed if for a lawful purpose)
  - Benefits (although reductions based on age are allowed in certain circumstances)

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Waiver of ADEA rights

- An employer may ask an employee to waive their rights/claims under the ADEA if the waiver:
  - Is in writing
  - Specifically references ADEA rights or claims
  - Does not waive rights or claims that may arrive in the future
  - Is in exchange for valuable consideration
  - Advises the individual in writing to consult an attorney before signing the waiver
  - Provides at least 21 days to consider the agreement and at least seven days to revoke it after signing

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Practice Pointers

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Notices and Procedures

- Publish a notice of nondiscrimination on public-facing website containing required information.
- Adopt formal grievance procedures to address complaints of prohibited discrimination and harassment.

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Policies and Procedures

- Review policies to assure consistent and fair treatment for all students and employees, regardless of personal characteristics.
- Review policies to assure no unintended, adverse impact on particular groups.
- Provide training to the campus community about nondiscrimination policies, where to report, and complaint resolution procedures.

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Respond to Incidents of Discrimination

- Respond and take corrective action when on notice of discrimination or harassment.
- Conduct prompt, thorough, and impartial inquiries designed to reliably determine what occurred.
- Assure responses are reasonable, timely, and effective.

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Process

- Implement policies and procedures in accordance with appropriate level of due process before reaching a finding and/or imposing discipline.
- Assure decision makers and others involved are trained on the process and their role.
- Be vigilant for signs of bias in the process or by decision-makers.

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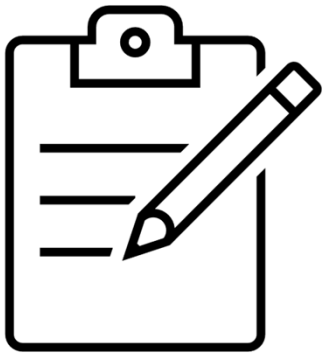
Remediation

- If discrimination or harassment is found, take reasonable, timely, and effective corrective action.
- Act to stop the harassment, eliminate the hostile environment, and remedy the effects of the harassment on the individual who was harassed.
- Take steps to prevent the harassment from recurring, including disciplining the harasser where appropriate.



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