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The Impact of Title IX Regulations on Faculty and Employees

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Agenda

Understanding Title IX and Title VII Procedures

Legal Principles Guiding Procedural Options

Decision Points – Options to Consider

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Understanding Title IX and Title VII Procedures

New Title IX Regulations – Employees

- Impose additional procedural requirements
- Only for allegations meeting new sexual harassment definition
- Expressly contemplate "dual" compliance approach with Title IX and Title VII

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When Do IX Obligations Kick In?

- "A recipient with actual knowledge of sexual harassment in an **education program or activity** of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent."
- "'education program or activity' includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution."

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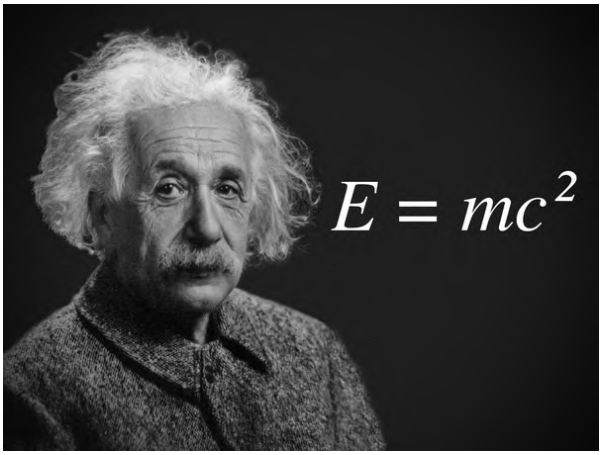
Hearing = "Formal Complaint" + "Sexual Harassment"

Formal complaint:

- "document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent **and** requesting that the recipient investigate the allegation of sexual harassment."

"At the time of filing" complainant must:

- be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed."



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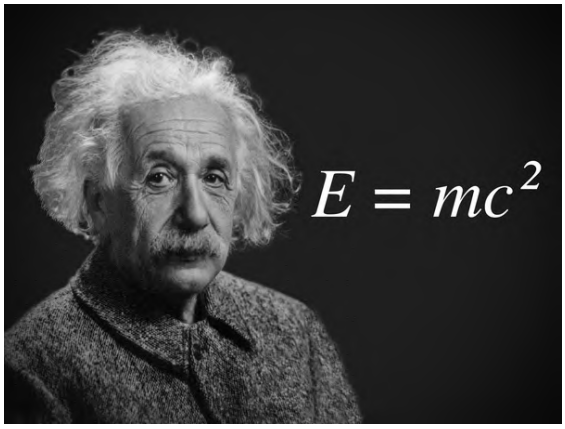
Hearing = "Formal Complaint" + "Sexual Harassment"

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; or
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).



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Live Hearing Required

"If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions."

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Some Relevant Comments From Preamble

- Title IX regulations apply to employee claims of sex harassment.
- "The Department is aware that Title VII imposes different obligations with respect to sexual harassment, including a different definition, and recipients that are subject to both Title VII and Title IX will need to comply with both sets of obligations. . . . . there is no inherent conflict between Title VII and Title IX."
- "These regulations do not preclude a recipient from enforcing a code of conduct that is separate and apart from what Title IX requires, such as a code of conduct that may address what Title VII requires. Accordingly, recipients may proactively address conduct prohibited under Title VII, when the conduct does not meet the definition of sexual harassment in § 106.30, under the recipient's own code of conduct, as these final regulations apply only to sexual harassment as defined in § 106.30."
- "These final regulations do not preclude a recipients' obligation to honor additional rights negotiated by faculty in any collective bargaining agreement or employment contract, and **such contracts must comply with these final regulations**."

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"No Inherent Conflict"?

Common Title VII Response Now

- Typically resolved by internal investigation
- Initiated by formal or informal complaint or constructive knowledge
- No advisor required
- Resolution does not require active complainant
- May or may not result in formal report

Title IX Regs Requirements

- Discipline requires regimented investigation & hearing process
- Formal complaint only
- Advisor entitled to participate in hearing
- Need participating complainant
- Requires formal report & other documentation

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Legal Principles

Title VII:

- Institution must promptly and thoroughly investigate when it knows **or should have known** about sexual harassment & take reasonable steps to prevent and promptly correct
- Harassment definition: severe **or** pervasive
- Don't have to wait until harassment becomes unlawful

- No hearing requirement in Title VII
- No hearsay rules in Title VII which would allow employers to disregard statements secured during investigation
- Employment-at-will: employer can determine why and how of separation

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Legal Principles

- Private Right of Action
  - Circuit split – several circuits limit employees to damages claims pursuant to Title VII
  - Title IX violations subject only to administrative enforcement (in some circuits)
- Subject Matter Scope
  - Title IX regulations limited to allegations of sexual harassment (under new definition)
  - Title VII applies to sexual harassment plus other discrimination, including sex, race, color, religion, or national origin

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Practical Considerations

- Faculty and Unionized Employees
  - Many already have existing procedures for addressing discrimination/harassment issues
  - Lack control to unilaterally adjust
  - DOE: "can be renegotiated"
- Title IX process: **expert witnesses**
  - Entirely new
  - Complicated

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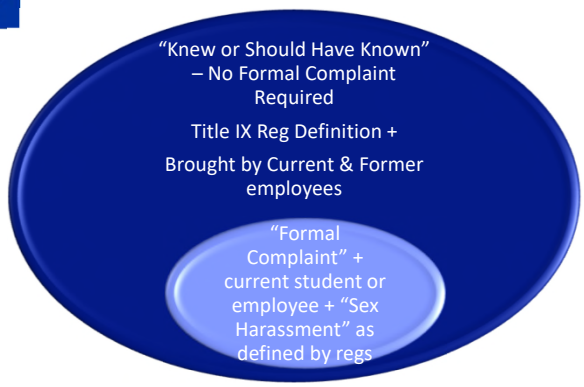
Two Broad Categories



1. VII obligations but no IX obligations (**easy**: no need to follow IX policies)
   - Learn of discrimination but no formal complaint
   - Discrimination does not meet IX definition of SH
   - Complainant no longer employed or a student
2. Parallel VII and IX obligations (**complicated**)
   - Quid pro quo, "severe and pervasive," VAWA crimes
   - Complainant currently employed or a student
   - Formal complaint

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Hypothetical One

- Employee A complains to HR that co-worker Employee B sexually propositioned A on one occasion at work.
- Employee B denies the allegation.
- Employee C corroborates A's account.

1. Is IX implicated here?
2. Would a typical VII harassment policy cover this?
3. How should institution respond in satisfying obligations under VII and IX?

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Hypothetical Two

- Employee A goes to HR to express concerns that Supervisor is making sexual comments to Employee B on a regular basis.
- HR reaches out to Employee B who confirms the sexual comments but says, "I don't want you to do anything about it. I'm not filing a formal complaint."

1. Is IX implicated here?
2. Is VII implicated here?
3. How should institution respond in satisfying obligations under VII and IX?

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Institutional Decision Points

1. Will we apply IX rules/procedures to all allegations of sex discrimination (or other types of discrimination) regardless of whether they are technically covered by IX regs, or only to allegations of IX harassment?
2. Assuming we have different rules/procedures, how will we clarify nature of sexual harassment allegations as much as possible at the outset of handling?
3. How will we handle sex harassment claims in the absence of a "formal complaint"?
4. How will we handle complaints from former students/employees?

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Hypothetical Three

- Employee A reports that Dean repeatedly sexually touched Employee A & that this sexual touching was witnessed by Employee B.
- HR interviews Employee B who confirms that Dean has repeatedly touched Employee A in a sexual and unwelcomed way. Employee B, though, says he does not want to get involved and will not participate in any sort of hearing. Fearful of the Dean, Employee A also refuses to participate in any hearing.
- How should HR respond in satisfying obligations under VII and IX?

1. Is IX implicated here?
2. Is VII implicated here?
3. What is likely result of IX hearing process?
4. Are there VII concerns with this?
5. How to reconcile?

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Institutional Decision Points

1. If a respondent is cleared of a Title IX violation, will school still consider disciplining pursuant to Title VII?
2. What if reason for no IX finding is absence of witnesses at hearing (but investigation uncovered facts supporting discipline)?
3. If answer to (1) is "yes," how will this be memorialized in policy?
4. If answer to (1) is "yes," how will process unfold?

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Hypothetical Four

- Employee A claims Supervisor is subjecting A to pervasive and severe racial **and** sex harassment.
- During interviews, Employees B, C, D, and E corroborate the claim with extensive, consistent detail.
- At the hearing, Employee A fails to appear, only Employee B testifies, and panel decides "not responsible"
- Investigative report clearly supports finding of severe or pervasive, unwelcome sexual conduct.

1. Is IX implicated here?
2. Is VII implicated here?
3. How do you proceed as a practical matter?

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Institutional Decision Points

1. Will there be separate tracks running at same time? VII before IX? IX before VII?
2. How will we memorialize in policy?

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Potential Option

- Determine if allegations meet IX sex harassment definition, from current student/employee, with formal complaint
  - If definitely "no," dismiss from IX process, but consider Title VII process or other applicable code of conduct
  - If "yes," apply IX procedures
- At close of investigation (either process), contemplate employment action if warranted (IX allows administrative leave)
- If IX process applies, conduct hearing and evaluate Title VII determination at close of such process
- Add some IX process to Title VII (e.g., advisor presence, share evidence via preliminary report)

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Other Questions

1. If employee refuses to participate in HR investigation of Title VII claim, can that employee be subject to discipline?

Retaliation: "intimidation, threats, coercion or discrimination, including charges against an individual for code of conduct violations conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation"

2. Can parties be instructed to not discuss investigation with others?

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Other Questions

3. "At will" employment – still exist when sexual harassment is at issue?
4. State law

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