

Update on Title IX and Sexual Harassment/Assault

Compliance, Risk Avoidance, and Doing the Right Thing

DEBORAH L. BRAKE

ASSOCIATE DEAN, PROFESSOR OF LAW, JOHN E. MURRAY FACULTY SCHOLAR
UNIVERSITY OF PITTSBURGH SCHOOL OF LAW

OCT. 2, 2020

Title IX and Campus Sexual Assault: (How Did We Get Here?)

- ▶ Title IX (1972): “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”
- ▶ 1975 Regulations: Title IX coordinator; “prompt and equitable grievance procedure”
- ▶ Judicial Interpretation: sex discrimination = sexual harassment = sexual assault
 - ▶ Title VII, 1986 (*Meritor Savings Bank*); Title IX, 1992 (*Franklin*); 1998 (*Gebser*) (teacher/coach); 1999 (*Davis*) (student)
- ▶ Executive branch/agency enforcement: 2001 DOE/OCR revised guidance (broader authority than courts)

A Decade of Discontent: 2001-2011

Rights

- ▶ Title IX broadly prohibits sexual harassment
- ▶ Courts hold institutions liable only for deliberate indifference in response to known sexual harassment that is severe and pervasive and interferes with access to education
- ▶ OCR requires prompt and reasonable corrective action once officials knew or should have known of sexual harassment
- ▶ Regulations require fair and equitable grievance procedures for addressing internal complaints of sex discrimination
- ▶ Regulations require every institution to appoint a Title IX coordinator

Reality

- ▶ Sexual assault on campus is prevalent, under-reported, and frequently mishandled (Ctr. for Public Integrity, 2010 Report)
- ▶ The liability standard is difficult to meet; nevertheless, some cases found deliberate indifference (Baylor; Tennessee; CSU; U. Ga.)
- ▶ Weak OCR enforcement; voluntary compliance without penalty; never withdrawn federal funds
- ▶ Many institutions treated sexual misconduct allegations with skepticism; “clear and convincing evidence,” discouraged complaints, failed to investigate
- ▶ Many schools failed to designate or publicize

The Obama Era: Strengthened Enforcement

- ▶ Student activism: Know Your IX, End Rape on Campus, SurvJustice; Media accounts tell stories of survivors and institutional betrayal: The Hunting Ground; Missoula
- ▶ Executive branch response:
 - ▶ DOE/OCR 2011 “Dear Colleague Letter” on Sexual Violence and 2014 Q&A Clarification
 - ▶ OCR: increase compliance reviews; “The List” of institutions under investigation
 - ▶ OCR enforcement actions, public release of Letters of Finding; Montana “blueprint” settlement
 - ▶ 2014 White House Task Force Report, “Not Alone”: 1 in 5 women experience actual or attempted sexual assault while in college

Highlights of 2011 OCR Guidance

- ▶ Schools must not “leave it to the Criminal Justice System” – must respond with appropriate corrective action and “prompt and fair grievance procedures”
- ▶ “interim measures” may be appropriate
- ▶ Heightened proof requirement (“clear and convincing”) is not “equitable”; must use preponderance standard (“more likely than not”)
- ▶ Cautionary note about face-to-face cross examination (chilling, intimidating)
- ▶ Fair and equitable process requires notice, right to see and respond to the evidence (but discretion to use hearing model or investigator model)
- ▶ Equitable process requires equal appeal rights

2016-present: Rescission, Revision

- ▶ Controversy over the 2011 Guidance: no notice & comment; disciplined-student “due process” narratives
- ▶ Trump Admin., Sect’y DeVos, “Title IX Summit” July 2017
 - ▶ (more controversy: C. Jackson, interim OCR director, NYT quote: “90%” of allegations “fall into the category of ‘we were both drunk,’ ‘we broke up, and six months later I found myself under a Title IX investigation because she just decided that our last sleeping together was not quite right’”)
- ▶ Sept. 2017: DOE rescinds the 2011 OCR Guidance; issues brief Q&A; leaves in place 2001 OCR Guidance
- ▶ NPRM issued Nov. 2018, comment period closed Jan. 2020 (100,000 comments, the vast majority critical of NPRM)
- ▶ Final regulations: 85 Fed. Reg. 30026 (May 19, 2020) (effective as of Aug. 14, 2020) (prospective)

New Regulations: Scope of Coverage

- ▶ Applicable to Sexual Harassment ONLY (not race or disability) (intersectionality!)
- ▶ Narrows the definition of sexual harassment under Title IX to only conduct that is severe, pervasive, AND objectively offensive so as to deny equal access to educational opportunity (reasonable person standard applies to each)
- ▶ Other covered conduct: quid pro quo harassment (employee conditions aid, benefit, service on participation in unwelcome sexual conduct); sexual assault, dating violence, domestic violence, stalking (CLERY Act, VAWA definition)
 - ▶ Reg's do not take a position on standard/definition for "consent"
- ▶ Limits Title IX obligations to conduct that occurs where recipient has "substantial control" over both respondent and where it occurred (includes buildings owned or controlled by an officially recognized student organization)
- ▶ Applies to only covered conduct that occurs in the United States
- ▶ At time of filing a formal complaint, complainant must be participating in, or attempting to participate in, the recipient's education program or activity. (But even if not, Title IX coordinator may still file a formal complaint)

New Regulations: Substantive Rights

- ▶ Recipients violates Title IX only **actual notice** and **deliberate indifference** (clearly unreasonable in light of known circumstances)
- ▶ Rejects prior OCR standard requiring recipient to take reasonable responsive action once they knew or should have known
- ▶ Actual Notice must be reasonably specific (case law mixed, but some courts construe to mean notice of the precise incident, not just of risk)
 - ▶ Need not come through a formal complaint
 - ▶ May come from complainant, witness, or third party
 - ▶ Notice to Title IX coordinator or person with authority to institute corrective measures will suffice (but not enough to have obligation to report) (institutions have discretion in who to give such authority)
- ▶ An institution that follows the procedures in the regulations will be found not deliberately indifferent
 - ▶ Does not require respondent to be found responsible
- ▶ Failure to follow a fair process for the accused constitutes sex discrimination *against the accused student*

New Reg's: Substantive Rights, cont.

- ▶ “Supportive Measures”: non-disciplinary, non-punitive, individualized services, reasonably available, free of charge
- ▶ Designed to restore or prevent interruptions of access to education, without unreasonably burdening the other party
- ▶ Examples: counseling, extension of deadlines, course-related adjustments, modifications of class/work schedules, campus escort services, no-contact orders, changes in housing, work assignments, leave of absence, increased security, monitoring.
- ▶ Must be available to complainant or respondent
- ▶ Required whether or not there is a formal complaint

New Regulations: Process

- ▶ Live hearing required, rejects single investigator model
- ▶ Must permit both sides cross-examination, to be conducted by an advisor (need not be a lawyer) (may be via video-conferencing)
- ▶ Standard of evidence: may use either the preponderance OR clear and convincing evidence, BUT must use the same standard for sexual harassment by students as by faculty/employees
 - ▶ Faculty may have C/C due to CBA or following AAUP recommendation
 - ▶ DOE notes grad students otherwise tricky to classify (unionization trend)
 - ▶ DOE stresses fairness among complainants, same standard (but controversial, equity among complainants limited to sexual harassment)
- ▶ Requires a presumption that an accused student is not responsible.
- ▶ Retracts specific timeframes (previously presumptively 60 days)

Navigating Regulatory Uncertainty: What *Should* Educational Institutions Do?

- ▶ Law is a “floor but not a ceiling”: the regulations set minimum requirements but do not stop institutions from exceeding coverage requirements, where permitted
- ▶ Much research shows ongoing challenges in preventing, responding to sexual harassment and assault (women and LGBT students highest risk)
- ▶ A new Administration may rescind and revise the regulations
- ▶ Other statutory obligations remain (incl. Clery Act: “prompt, fair and impartial” disciplinary process)
- ▶ Pending lawsuits challenge the final regs

Navigating Litigation Risk

- ▶ Lawsuits by persons disciplined for sexual misconduct
 - ▶ Doe v. Purdue (7th Cir. 2019): due process (lack of impartial panel, failure to share investigators report prior to hearing; did not let him present witnesses or c-x) and gender bias against men (sexual assault awareness efforts included posting a WaPO article, “men, not alcohol.”; panel found her more credible even though she did not appear)
 - ▶ Increasingly suits by disciplined students survive motions to dismiss: pressure from OCR/DCL plus particularized evidence, unfairness in process (DP failures)
 - ▶ But most fail, including suit by Prof disciplined for sexual relationship with a student; court rejected argument that univ. punishment was based on gender stereotypes infantilizing women
 - ▶ That most persons disciplined are male does not make it sex discrimination
- ▶ Lawsuits by students who alleged sexual assault
 - ▶ Recent cases continue to support claims by assault victims that schools discouraged complaints, failed to act, refused to investigate off-campus assault at fraternity parties, allowed assailant (football player) to transfer with no punishment.

Best Practice #1: Clear policies, Due Process

- ▶ Notice of alleged wrongdoing and specific charges
 - ▶ Clear notice of policy, what is prohibited, procedures, specific charges (incl. changes), particular allegations; *before* investigative interview
- ▶ Opportunity to present and contest evidence
 - ▶ Must be equal opportunities for both sides to present evidence, see the evidence against them, and respond
 - ▶ Training of investigators, decision makers
 - ▶ Cross-examination: Not face to face, use video conferencing; trained advisors
- ▶ Impartial decision maker: avoid bias, conflicts, prejudging (e.g., “complainant” not “victim”; beware statements prejudging based on status as complainant/respondent, and gendered statements)
 - ▶ Train, but beware of bias in training materials
 - ▶ Beware dual roles (investigate, support, decisionmaking)
- ▶ More formality/process required for more serious sanctions

Best Practice #2: Supportive Measures

- ▶ Support, accommodation, protection, to mitigate educational harm, pending resolution; not require complaint
- ▶ Examples: counseling, financial aid services, tutoring, adjust schedules, retake a class, adjust housing, physical escort, protective orders – if “*reasonably available*”
 - ▶ Case law: denial of no-contact order after alleged rape at fraternity; failure to physically separate students 18 months after sexual assault report violated Title IX
- ▶ Presumptive, if affects only the complainant OR if accused agrees
- ▶ Minimize burden on complainant where possible
- ▶ If effect + no agreement, reasonable judgment, balance safety, educational opportunity; give opportunity for review

Best Practice #3: Encourage Reporting, But Presumption of Control by Alleged Victim

- ▶ Under-reporting is common (DOJ, 2016: only 12.5% of rape, 4.3% sexual batteries were reported to any official; AAU, only 25% forced penetration, 13% incapacitation reported)
- ▶ Offer options: anonymous; confidential; request informal resolution; formal complaint (institutional responses will vary)
- ▶ Consider amnesty for drug/alcohol infractions
- ▶ Presumptive victim control over investigation, risk analysis
- ▶ Clearly identify confidential and mandatory reporters
- ▶ Should all employees be mandatory reporters? Difficult Q:
 - ▶ YES: clarity; ease of reporting; maximize services, mitigate harm
 - ▶ NO: interfere with relationships, reduce reporting, harms victims
 - ▶ Hybrid: must report only if student agrees

Best Practice #4: Investigation should be Full, Equitable, Impartial, and Prompt

- ▶ For formal complaints, must investigate if: 1) complainant requests; OR 2) institution determines it's necessary (risk assessment)
- ▶ presumption of full investigation (unless not violate policy; academic freedom; or third party report and victim does not want an investigation, or parties agree to informal resolution)
- ▶ Equal treatment of complainant and respondent; opportunity to review and respond to evidence (at least 10 days before investigative report); equal access to advisor
- ▶ Set presumptive prompt time limits for investigation, written notice of delay, reasons for
- ▶ Identify and train investigators (beware biased training materials); train on trauma-informed, fairness, due process
 - ▶ Note suits by disciplined students: not interviewing witnesses, evidence of bias by investigators or training

Best Practices #5: What to Investigate

- ▶ Schools must dismiss conduct falling outside the regulations under its Title IX policy, but *may* investigate/address violations of its policies under similar procedures
 - ▶ Schools are permitted to use a grievance process that complies with § 106.45 to address allegations that fall outside Title IX OR may use a process that differs from that required by the Title IX regulations
 - ▶ May use the same personnel as for Title IX
- ▶ Schools *may*, but are not required to, dismiss a formal complaint if
 - ▶ The complainant informs the coordinator in writing of desire to withdraw
 - ▶ The respondent is no longer enrolled or employed by the school
 - ▶ There are specific circumstances preventing the school from gathering sufficient evidence (best to prioritize complainant autonomy)