



Spring 2021 Virtual CLE Workshop • April 14-16, 2021

Higher Education Discrimination Law: Turbulence, Transitions, and Triumphs

**Title IX Regulatory Compliance and Enforcement under the Trump-Era
Regulations During the Biden Administration**

John DiPaolo, *General Counsel*, UC Hastings College of Law

Jeffrey Nolan, *Attorney*, Holland & Knight

Emily Babb, *AVC for Equal Opportunity & Title IX*, University of Denver

1

Presenters

- **John DiPaolo** is General Counsel and Secretary at University of California Hastings College of the Law. His roles in education law have included deputy assistant secretary for policy in the Office for Civil Rights and deputy general counsel for postsecondary education at the U.S. Department of Education; member in the higher education practice at Cozen O'Connor; and senior fellow at the Lawyers' Committee for Civil Rights Under Law in the education project.
- **Jeffrey Nolan** is Senior Counsel at Holland & Knight and served on American Council of Education's (ACE) Title IX Working Group that prepared ACE's comments to the 2020 Title IX regulations and authored a White Paper and NACUANOTE on fair, equitable trauma-informed investigation approaches cited approvingly in the 2020 Title IX regulations.
- **Emily Babb** is Associate Vice Chancellor for Equal Opportunity & Title IX at the University of Denver. Prior to joining DU, she was the AVP for Title IX Compliance at the University of Virginia and spent 12 years at the U.S. Department of Education Office for Civil Rights in the Dallas and Cleveland regional offices.



2

NACUA materials, PowerPoint slides and recordings available as part of this program are offered as educational materials for higher education lawyers and administrators. They are prepared by presenters and are not reviewed for legal content by NACUA. They express the legal opinions and interpretations of the authors.

Answers to legal questions often depend on specific facts, and state and local laws, as well as institutional policies and practices. The materials, PowerPoint slides and comments of the presenters should not be used as legal advice. Legal questions should be directed to institutional legal counsel.

Those wishing to re-use the materials, PowerPoint slides or recordings should contact NACUA (nacua@nacua.org) prior to any re-use.

Introduction to Title IX Actions the Biden Administration Could Take

- On April 6, 2020, the US Department of Education's Office for Civil Rights (OCR) issued a letter on Title IX.
- OCR is launching a "comprehensive review" of the current regulations and other administrative documents regarding Title IX, and anticipates revising the regulations.

Introduction to Title IX Actions the Biden Administration Could Take

- The letter also stated
 - The 2020 Title IX regulations are still in effect.
 - OCR will issue a Q&A in "the coming months" that will provide its view on schools' obligations under those regulations, including areas of discretion schools have.

What can we expect?

- Revision of regulations to take over a year
- Meanwhile, OCR's has limited ability to blunt the impact of the current regulations
 - Courts defer to agency interpretations of regulations where language is genuinely ambiguous. (*Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).)
 - These regulations, unlike the prior regulations, are fairly specific.
 - OCR's regulations *require* it to investigate and address violations of its regulations (34 CFR 100.7; 34 CFR 106.81.)

What can we expect (cont'd)?

- Additionally, current regulations can provide a basis for private lawsuits against universities.
- See, e.g., *Doe v. Rensselaer Polytechnic Inst.*, No. 1:20-CV-1185, 2020 WL 6118492 (N.D.N.Y. Oct. 16, 2020).

Critical Concerns for Title IX Actions the Biden Administration Could Take

- Therefore, critical concerns, right now, include:
 - Navigating the Relatively Narrow Title IX Coverage in the Face of Broader More Expansive Institutional Obligations
 - Determining whether conduct is Title IX conduct and addressing conduct that falls outside of Title IX
 - Using witness statements or other written hearsay evidence, such as police reports and expert reports during a hearing
 - Faculty disciplinary proceedings/tenure revocation procedures
 - Overlap between Title VII and Title IX
 - Use of Informal Resolution

Navigating a Narrowed Title IX in the face of broader, more expansive obligations

- Title IX Regulation definition of Sexual Harassment is ***Narrow***
 - Specific definitions
 - In United States
 - In education program or activity
- ***However,***
 - Community expectations may be broader
 - State laws may be more expansive
 - Other federal laws define similar conduct

Managing Title IX expectations

- Community standards for response based on prior ED guidance and Dear Colleague Letters
- Disciplinary procedures for off campus conduct
- Use of Informal Resolution
- Expansive definition of Supportive Measures

Navigating choice v. requirements in policies

Policies and Procedures

- One procedure v. Multiple Procedures
- Preponderance of the evidence v. clear and convincing evidence
- Investigator model v. hearing for non-Title IX

Other Laws

- State law requirements v. Title IX regulations
 - Transcript notation laws
 - Evidentiary standard requirements
 - Cross-examination requirements

What is Title IX conduct? How to address other conduct of concern?

- The Title IX regulations obligate an institution to respond to allegations
 - Of sexual harassment
 - That occur within its program or activity
 - Of which it has actual knowledge.

(34 CFR 106.44)

What is Title IX conduct?

- Sexual harassment
 - Quid pro quo
 - Hostile environment (severe, pervasive, *and* objectively offensive)
- Sexual assault (includes rape, forcible fondling, statutory rape), dating violence, domestic violence and stalking as defined in other statutes.

What is Title IX conduct?

- Occurring within a recipient's program or activity
 - 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

What is Title IX conduct?

- Actual knowledge
 - (For postsecondary): notice to the Title IX coordinator or to an official able to take corrective action on behalf of institution.

How to address other conduct of concern?

- What about incidents an institution might have previously prohibited under its Title IX policy ("Non-Title IX Sexual Harassment")? E.g.,
 - Misconduct that is severe and objectively offensive, but not pervasive?
 - Misconduct occurring between two students, during school year, but not in a context controlled by the institution?

How to address other conduct of concern?

- Non-Title IX Sexual Harassment allegations:
Regulations say
 - Must dismiss Title IX complaint, in writing.
 - May address under other codes.

How to address other conduct of concern?

- How to Address Non-Title IX Sexual Harassment
 - Option 1: Don't regulate it.
 - Option 2: Regulate it through different procedures from Title IX procedures
 - Option 3: Regulate it through parallel procedures that are basically the same as your Title IX procedures

How to address other conduct of concern?

- How to Address Non-Title IX Sexual Harassment
 - Option 1: Don't regulate it.
 - Pros:
 - Less student conduct to oversee
 - Avoid the complexity of dismissing a Title IX matter while opening a student conduct matter.
 - Cons
 - You may care about some of this conduct
 - Your community may care about some of this conduct.

How to address other conduct of concern?

- How to Address Non-Title IX Sexual Harassment
 - Option 2: Regulate it through different procedures from Title IX procedures
 - Pros
 - Allows you to regulate conduct that institution and community may care about.
 - You can do so while avoiding the procedural demands of the Title IX regulations
 - Cons
 - (as compared with Option 1): Dismissal of Title IX followed by opening of conduct matter.
 - (as compared with Option 3): Extra complexity to move between different procedures.

How to address other conduct of concern?

- How to Address Non-Title IX Sexual Harassment
 - Option 3: Regulate it through parallel procedures that are basically the same as your Title IX procedures
 - Pros
 - Allows you to regulate conduct that institution and community may care about.
 - (as compared with Option 2): One set of procedures to manage
 - Cons
 - (as compared with Option 1): Dismissal of Title IX followed by opening of conduct matter.
 - (as compared with Option 2): You are stuck with procedural demands of Title IX regs for all such matters.

How to address other conduct of concern?

- For options 2 and 3, suggestions for minimizing confusion of parties:
- (1) Seamless transfers.
- (2) Emphasize continuity in Title IX dismissal letters.
- (3) Complement written communications with verbal to answer questions and de-mystify the procedural technicalities.

Promising practices around using witness statements or other written hearsay evidence, such as police reports and expert reports during a hearing

Witness Statements and Other Written Hearsay

- Pertinent regulation language:
 - “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 . . .” 34 C.F.R. § 106.45(b)(6).
- Regulation language may be read reasonably as providing that if a witness appears and generally responds to questions, then documents they have created or their extra-hearing statements to others may be considered.
- Trump Administration Preamble to regulations and technical assistance is more complicated

Witness Statements and Other Written Hearsay

- Pros and cons of:
 - reading regulation language in this way
 - **vs.** strict adherence to Preamble language and Trump Administration technical assistance
- Consider potential effects of forthcoming Biden Administration technical assistance?

Witness Statements and Other Written Hearsay

- At the least under current regulations:
 - Where regulation language applies directly and literally
 - institutions should strive to promote party and witness participation through all practical means
 - in order to avoid the potentially draconian results of the exclusionary rule
- Discussion of:
 - Examples and
 - Suggested approaches

Promising practices regarding the participation of investigators as witnesses in live hearings

Investigators as Witnesses

- 34 C.F.R. 106.45(b)(6)(i) contemplates the parties' equal rights to cross-examine any witness, which could include the investigator, and ask *relevant* questions.
- 34 C.F.R. 106.45(b)(1)(ii) grants parties equal opportunity to present witnesses, which may include investigators.

Investigators as Witnesses

- Draft a policy/procedure that identifies the Investigator may be a witness.
 - "The Hearing Officer will also hear from relevant witnesses, including the Investigator."
 - "The Decision Maker and parties will request the presence of the Investigator or any other witness they deem relevant to the determination."
- Draft Rules of Decorum
- Decision Maker must independently reach a determination

Faculty disciplinary proceedings/tenure revocation procedure interactions with regulations

Faculty Disciplinary Proceedings

- Regulations require institutions to respond to formal complaints of covered sexual harassment by following a grievance process that complies with specific procedural requirements outlined in the regulations, many of which may not be found in faculty disciplinary proceedings and/or tenure revocation proceedings
- Any provisions, rules or practices that an institution adopts as part of its Title IX grievance process other than those specified in the regulations must apply equally to both parties (34 C.F.R. § 106.45(b))
- Traditionally, faculty disciplinary proceedings and/or tenure revocation proceedings are framed as involving the institution and the respondent faculty member as “parties”, and typically do not provide procedural rights to individual complainants

Faculty Disciplinary Proceedings

- Where a determination of responsibility is made through a formal grievance process, institutions must provide “remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent.” 34 C.F.R. § 106.45(b)(1)(i).
- “Remedies must be designed to restore or preserve equal access to the [institution’s] education program or activity.” *Id.*
- Remedies may include “supportive measures” provided to the complainant, and they may also include disciplinary, punitive measures imposed on the respondent. *Id.*
- Beyond this, the non-binding Trump Administration Preamble to the regulations reflects a “hands off” philosophy.

Faculty Disciplinary Proceedings

- Regulations provide that while an institution may choose to use either the preponderance of the evidence standard or the clear and convincing evidence standard, it must:
 - “apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment.”

34 C.F.R. § 106.45(b)(1)(vii).

Faculty Disciplinary Proceedings

- Given all this, the most cautious approach from a Title IX perspective under the Title IX regulations would be to assume that a faculty disciplinary and/or tenure revocation proceeding involving Title IX Conduct :
 - Must include all of the procedural requirements outlined in section 106.45
 - Must provide all procedural rights to individual complainants and faculty respondents, and
 - Must apply the same standard of evidence as are applied in student or staff respondent cases involving Title IX Conduct
- Some colleges and universities have done this, usually by handling faculty respondent sexual misconduct cases through a distinct procedure, or a separate track within their traditional faculty discipline procedure

Faculty Disciplinary Proceedings

- Many institutions, however, do not have separate faculty discipline and/or tenure revocation procedures for Title IX Conduct cases involving faculty respondents
- Such institutions should consider how they will reconcile that approach with the equal party participation, procedural and standard of evidence requirements of the May 2020 Title IX regulation outlined above
- January 15, 2021 Trump Administration technical assistance (Question 8) should also be considered
 - See https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-part1-20210115.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=

Faculty Disciplinary Proceedings

- While each institution will obviously have to work with counsel to analyze such nuanced issues for themselves, one alternative could involve a deliberate separation of the responsibility and sanction aspects of a faculty disciplinary and/or tenure revocation process that involves Title IX Conduct
- This approach would be relatively more defensible if the following conditions are observed:
 - the institution would of course need to provide each party to a Title IX Conduct matter access to a formal grievance process that includes all of the elements specified in the regulation, including an equal right to appeal a finding of responsibility within the scope of that process;
 - the merits of a finding of responsibility for Title IX Conduct would have to be determined exclusively within such a Title IX-compliant process;

Faculty Disciplinary Proceedings

- This approach would be relatively more defensible if the following conditions are observed (continued):
 - as a corollary to the first two points on the previous slide, the subsequent process should be concerned exclusively with sanctions (e.g., whether termination of employment and/or revocation of tenure is an appropriate sanction given the policy violation found through the Title IX regulation-compliant process);
 - to the extent that the subsequent process is initiated by the institution (as opposed to a grievance process initiated by the employee), referral to the subsequent process for the consideration of employment status-related action under the subsequent process should be considered a sanction, and the possibility of such referral should be listed as a potential sanction in the list or range required by the regulations; and
 - whatever might occur in a subsequent faculty or staff process, it should not undermine the complainant's right to equal access

Overlap between Title VII and Title IX

"The Department recognizes that employers must fulfill their obligations under Title VII and also under Title IX. There is no inherent conflict between Title VII and Title IX, and the Department will construe Title IX and its implementing regulations in a manner to avoid an actual conflict between an employer's obligations under Title VII and Title IX."

Overlap between Title VII and Title IX

- Universities who are also employers have obligations under Title VII and Title IX
 - 34 C.F.R. 106.30 defines a **Complainant** as "an individual who is alleged to be the victim" and a **Respondent** as "an individual who has been reported to be the perpetrator."
- ED issued January 15, 2021 Questions and Answers Regarding the Department's Title IX Regulations
- Preamble confirms that the 106.45 grievance process applies whether complainant or respondent is student or employee

Overlap between Title VII and Title IX

- The Department acknowledges in the Preamble that Title VII imposes different obligations with respect to sexual harassment, including a different definition; however recipients must comply with both laws.
 - The regulations do not preclude a recipient from enforcing a code of conduct that is separate from what Title IX requires, such as a code that would address Title VII conduct.

Overlap between Title VII and Title IX

- The Department declined to adopt "severe or pervasive" as the standard.
- Department affirmed that nothing in the regulations precludes a recipient-employer from addressing conduct that is "severe or pervasive" following a mandatory dismissal.
- Title VII does not preclude an employer from allowing employees to file formal complaints or from providing notice to an employee such as notice of allegations against the employee or notice of the dismissal of any allegations as required by the Title IX regulations.

Scenario

- Respondent is a tenured faculty member at ABC University.
- Complainant is a first year, non-tenured faculty member at ABC University.
- Complainant and Respondent are colleagues in the same department. Complainant does not report to Respondent; however, Respondent assigns committee memberships to faculty colleagues.
- During Complainant's interview, prior to hire, Respondent commented on Complainant's sexy skirt, asked if she was married, and told her she "smelled nice."
- Since joining ABC University, Respondent has repeatedly made similar comments to Complainant and greets Complainant every morning with a full body hug, which often includes touching her butt and back.

Scenario *continued*

- During Complainant's first semester teaching, Respondent asked her to dinner once per week and suggested they should go somewhere "intimate." Complainant declined each invitation.
- During Department meetings, Respondent always sits next to Complainant, often scooting his chair closer so his leg touches hers. Complainant has asked Respondent to not sit next to her and to not touch her. Respondent replies that this is the only available seat.
- Respondent told Complainant that he'll be the next department chair and he can make her time at ABC University better then tries to kiss Complainant who steps away.
- During winter break, Respondent and Complainant co-teach a University-sponsored study abroad program. Respondent tells Complainant they should share a hotel room and tells her she's "hot."

Scenario *continued*

- Complainant stops attending Department meetings because she is uncomfortable being around Respondent.
- Complainant tells the Department Chair that she does not want to co-teach future courses with Respondent because he makes her uncomfortable.
- Respondent declines to assign Complainant to any department committees.

Scenario *continued*

- Is this Title IX Sexual Harassment or should this be processed under another code of conduct?
- How do you explain the differences in processes to Complainant and Respondent?
- Are there different offices responsible for different types of conduct, such as Human Resources versus Title IX office at your institution?
- Anything else to consider?

Use of Informal Resolution

Use of Informal Resolution

- Brief background
- Current opportunities
- Current challenges
- Future advocacy in Title IX rulemaking process