Title IX: Where Are We Now, Where Might We Go?

Presented by the
National Association of College and University Attorneys (NACUA)

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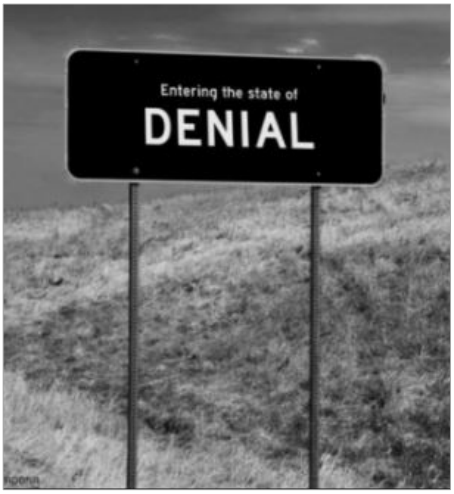
Where are we now?



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Biden wants to scrap Betsy DeVos' rules on sexual assault in schools. It won't be easy.

Inclusion of Transgender Student Athletes Violates Title IX, Trump Administration Says

Grants | Laws

Lawsuits Aim to Block DeVos's New Sexual Misconduct Rules

ARCHIVED INFORMATION

Secretary DeVos Takes Historic Action to Strengthen Title IX Protections for All Students

New regulation defines sexual harassment, requires supportive measures for survivors, restores due process on campus

MAY 6, 2020

Betsy DeVos's controversial new rule on campus sexual assault goes into effect

U.S. Department of Education Withdraws 2011 "Dear Colleague Letter" and 2014 Q&A on Sexual Misconduct; New Guidance Document Issued

Department of Education Issues New Interim Guidance on Campus Sexual Misconduct

Lawmakers Examine Higher Ed's Response to Sexual Assault

The Ed Dept's new Clery Act guide raises new questions

Melissa Carleton, a higher education attorney, asks whether the department will defer to colleges' interpretations of the campus crime law.

Men's rights activists are attacking women's scholarships and programs. The DOE is listening.

The Department of Education is investigating Title IX complaints from men who say universities discriminate against them in supporting female students.

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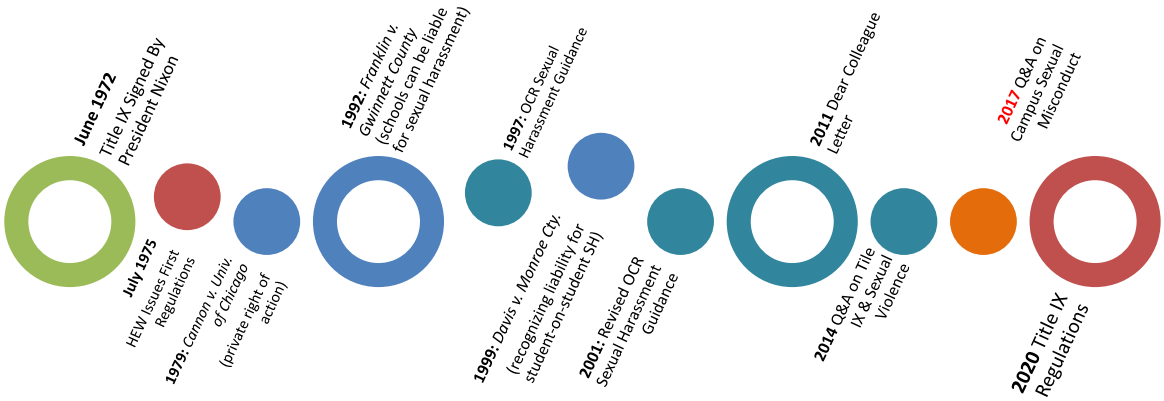

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Positive Elements of 2020 Final Rule

- Express incorporation of domestic violence, dating violence, and stalking
- Opportunities for Informal Resolution
- Requirements and Standards for Supportive Measures
- Flexibility to utilize virtual technology for investigations/hearings
- Bright lines for jurisdiction/enforcement?

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Some Challenges . . .

- Definition of "Sexual Harassment"
- Elimination of broad "Responsible Employees" requirement
  - Replaces with concept of "actual knowledge," defined as knowledge by Title IX Coordinator or a person with "authority to institute corrective measures on behalf of the recipient"
- "Title IX" Jurisdiction limited
  - "Sexual harassment" occurring in "education programs and activities"
  - "Off campus" conduct outside EP&A outside of USA outside Title IX jurisdiction
- Investigation & Evidentiary Complications
- Live Hearings & Cross-Examination
- Application to Employees

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Where We Might Go

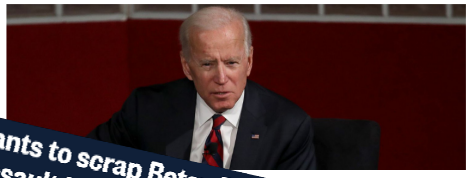
- The million-dollar question: *Will a change in administration lead to a change in the regulations, and when?*

Strengthen Title IX and Clery Act enforcement. The Trump Administration has rolled back important protections for student survivors by rescinding the Obama-Biden Administration's 2011 Title IX guidance. Any backstepping on Title IX is unacceptable. The Biden Administration will restore the Title IX guidance for colleges, including the 2011 Dear Colleague Letter, which outlined for schools how to fairly conduct Title IX proceedings. Biden will also increase fines imposed on colleges for Clery Act violations, or failing to report statistics about campus safety, as well as develop stronger enforcement protocols to oversee reporting under the U.S. Department of Education.

EDUCATION

Biden vows 'quick end' to DeVos' sexual misconduct rule

Biden disavowed Education Secretary Betsy DeVos' Title IX rule.



Biden wants to scrap Betsy DeVos' rules on sexual assault in schools. It won't be easy.

The Trump administration's Title IX regulations prioritize students accused of sexual misconduct instead of their accusers, victims' advocates say.

Education

With DeVos out, Biden plans series of reversals on education

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Where We Might Go

- How might changes play out? Several less-likely options:
  - Higher Education Act Reauthorization?
  - Other statutory solution, such as H.R. 5388?

    *"***To provide that the Secretary of Education may not issue or enforce certain rules that weaken the enforcement of the prohibition of sex discrimination applicable under title IX of the Education Amendments of 1972."** (Slotkin, D-MI)
  - Ongoing litigation?
    - Summary judgment imminent in 18-AG suit led by PA AG (D.D.C.)
    - Bench trial held in mid-November in Victims Rights Law Center et al v. DeVos (D.Mass.); leave to file amended complaint granted
    - What effect will a Biden DOJ have on these pending suits?

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Where We Might Go

- How might changes play out? More likely:
  - Repeal and replace Title IX Sexual Harassment regulations
    - Single change in rules is less disruptive to institutions
    - Relatively longer effectiveness of existing rules
  - Repeal Title IX Sexual Harassment regulations; replace later
    - Quicker; could presumably implement very quickly if simply repealing
    - Would involve at least two more changes in Title IX landscape
    - What rules would apply in the interim?
  - In either case, what will enforcement look like in time period where Biden OCR is responsible for enforcing the regulations?

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Where We Might Go

- How might changes play out? What controversial features of the regulations will be kept, and which will be abandoned?
  - Will the scope of what constitutes "sexual harassment" and requires a prescribed response be expanded? E.g.:
    - Severe *and/or* pervasive?
    - Participating in programs and activities at the time of the formal complaint?
    - Application to employees?

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Where We Might Go

- How might changes play out? What controversial features of the regulations will be kept, and which will be abandoned?
  - Will the response obligations be significantly changed? E.g.:
    - Formal complaint requirement?
    - Live hearing requirement?
    - Cross-examination and exclusionary rules?
    - Role of advisors?
    - Disclosure limitations regarding outcomes?

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Where We Might Go

- How might changes play out? What difference will new rules make to institutions that are in jurisdictions where:
  - State or federal courts have already enshrined many of the regulations' obligations in the case law?
  - State legislatures have passed laws that conflict with the regulations or set higher process floors than the Biden rules may embrace?

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Digging In:
Thorny Challenges Presented by the Title IX Regulations and Some Practical Considerations for Implementation

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Policies and Procedures

- Issue: What are an institution's options for structuring policies and procedures for sexual misconduct?
  - Option #1: Same policy/procedures for all behaviors
  - Option #2: Different policy/procedures for Title IX behaviors and other forms of sexual misconduct
  - Option #3: Parallel or branched approached

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Policies and Procedures

- What are some common implementation challenges?
  - Two different policies/procedures sometimes make it difficult to determine where the conduct appropriately falls
  - Lack of clarity may be a disincentive for some complainants to file a formal complaint or otherwise participate
  - Mandatory dismissal if only one policy/procedure difficult for parties to understand and creates added confusion

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Practical Considerations

- There is no one size fits all approach
- Two different procedures for students may make it difficult to explain why the same conduct is handled differently depending on whether it takes place as part of educational program or activity
- One procedure for employees may make it difficult to appropriately respond to conduct that would otherwise fall under Title VII
- Hypotheticals

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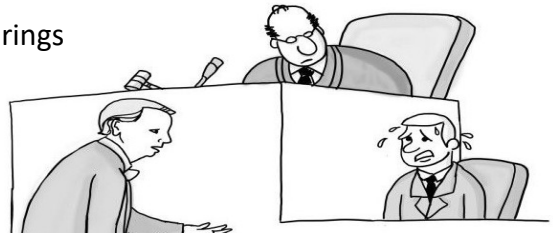
Live Hearing and Cross-Examination Related Implementation Challenges and Issues

- Choice of advisors for employees and students and structure/documentation of engagement
- Scope of advisor's engagement and relevancy determinations
- Submission to cross-examination by witnesses and ability to use witness statements to investigator in hearing outcome determination
- Attendance of emotional support persons at hearings



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Issue 1: Choice of advisors for students and employees and structure/documentation of engagement

34 C.F.R. § 106.45(b)(6)(i) provides:

- If a party does not have an advisor present at the live hearing, the institution must provide an advisor without fee or charge to that party.
- The advisor may be, but is not required to be, an attorney.

The preamble (85 Fed. Reg. 30,340 (May 19, 2020)) further provides that equal competency for both parties is not required.

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Practical Considerations

- What options do I have for selecting advisors and pros/cons of each?
  - Option #1: Employees
    - Potentially relatively inexpensive; greatest control; no scheduling issues
    - Not trained to conduct cross-examination; potential political pressures
  - Option #2: Attorneys
    - Trained to conduct cross-examination; greater control; attorney-client relationship
    - Expensive; furthers legalistic approach to student conduct and employment proceedings
  - Option #3: Others
    - Inexpensive, avoids potential bias of employees (particularly at very small institutions)
    - Not trained to conduct cross-examination (but may have other relevant skillsets); Difficult to find; Least amount of control; potential political pressures

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Practical Considerations

- What are potential structures of engagement?
  - Option #1: Scope of employment/volunteers/pro bono
  - Option #2: Hourly
  - Option #3: Flat fee
  - Option #4: Stipend

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Practical Considerations

- How should an institution document, if at all, the engagement?
  - Is it even necessary?
  - What potential terms could be included in an engagement letter?
    - Role/scope of advisor's work
    - Confidentiality/FERPA
    - Defense and indemnification
    - Media inquiries
    - Training obligations
    - Document retention

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Practical Considerations

- How should an institution document, if at all, the engagement?
  - What additional terms might be considered for attorney-advisors?
    - No privilege between advisor and institution
    - Student engages advisor; University pays
    - Redacted invoices so as not to reveal confidences
    - Insurance requirements
    - Limits on future representation

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Issue 2: Scope of Advisor's Responsibilities and Relevancy Determinations

34 C.F.R. § 106.45(b)(6)(i) provides:

- Cross-examination must be conducted by each party's advisor
- If a party does not have an advisor, recipient must provide one at no cost

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Practical Considerations

- What is the scope of the advisor's engagement?
  - Option #1: Limited solely to cross examination
  - Option #2: Beyond cross-examination…What does that mean?

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Practical Considerations

- Even if scope limited to cross-examination, how can an institution handle relevancy determinations and possibility of appealable error?
  - Option #1: Preclude advisors from challenging
  - Option #2: Allow advisors to challenge
  - Option #3: Allow hearing officers to cure potential error

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Issue 3: Submission to cross-examination by witnesses and ability of to use witness statements to investigator

34 C.F.R. § 106.45(b)(6)(i) provides:

- A party or witness must submit to cross examination at the live hearing.
- Otherwise, the decisionmaker cannot rely on a statement of that party or witness in reaching a determination regarding responsibility.

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Practical Considerations

- If a witness is interviewed, but does not appear at the live hearing, can the hearing officer take into account the witness's statement to the investigator?
  - Scenario #1: Witness is willing to appear and answer questions at the hearing
  - Scenario #2: Witness is not willing to appear and answer questions at the hearing

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Issue 4: Hearing Participants – Emotional Support Persons

- The preamble (85 Fed. Reg. 30,339 (May 19, 2020)) provides:

  The sensitivity and high stakes of a Title IX sexual harassment grievance process weigh in favor of protecting the confidentiality and identity of the parties to extent feasible…the Department thus declines to authorize that parties may be accompanied to a live hearing by persons other than the parties' advisors, or other persons for reasons 'required by law.'

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Practical Considerations

- How can emotional support persons provide support during hearing?
  - Potential Workaround #1: Separate Breakout Room
  - Potential Workaround #2: "Disability Accommodation Lite"
  - Potential Workaround #3: "No Disclosure/No Foul"

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Other Practical Implementation Challenges

- Evaluating "off-campus" incidents
- Complications for virtual investigations/adjudications
- Assigning investigative/adjudicative/appeal responsibilities to administrators

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Intersection with State Law

34 C.F.R. § 106.6(h) *Preemptive effect.* To the extent of a conflict between State or local law and Title IX . . . The obligation to comply with [Title IX] is not obviated or alleviated by any State or local law.

Texas Education Code	Title IX Regs
TEC § 51.281(4) [HB 1735] TEC 51.251(5) [SB 212] "**Sexual Harassment**" defined as "unwelcome, sex-based verbal or physical conduct that: (A) in the employment context, unreasonably interferes with a person 's work performance or creates an intimidating, hostile, or offensive work environment; **or** (B) in the education context, is sufficiently severe, persistent, or pervasive that the conduct interferes with a student's ability to participate in or benefit from educational programs or activities at a postsecondary educational institution."	**34 C.F.R. § 106.3(a)** *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. 2291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

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Example: Not Preemptive

Tex. Edu. Code § 51.252(a) [SB 212]	34 CFR § 106.44
"An employee of a postsecondary educational institution who, **in the course and scope of employment**, witnesses or receives information regarding the occurrence of an incident that the employee **reasonably believes constitutes sexual harassment, sexual assault, dating violence, or stalking** and is alleged to have been **committed by or against a person who was a student enrolled at or an employee of the institution** at the time of the incident **shall promptly report the incident to the institution's Title IX coordinator** or deputy Title IX coordinator."	(a) 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**. **34 CFR § 106.30(a)** **Actual knowledge** means notice of sexual harassment or allegations of sexual harassment to a recipient's **Title IX Coordinator or any official of the recipient who has authority to institute corrective measures** on behalf of the recipient . . . . **The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient. . . .** **Formal complaint means a 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.

Example: Not Preemptive

Texas Education Code	Title IX Regs
SB 212: If a **student withdraws or graduates** from an institution pending a disciplinary charge alleging sexual misconduct, the institution "**may not end the disciplinary process or issue a final transcript to the student until the institution makes a final determination of responsibility**" and must "expedite" the disciplinary process to accommodate "the student's and the alleged victim's interest in a speedy resolution." [TEC 51.287(a)] **HB 449:** "If a **student** withdraws from a postsecondary educational institution pending disciplinary charges that may result in the student becoming ineligible to reenroll in the institution for a reason other than an academic or financial reason, **the institution may not end the disciplinary process until the institution makes a final determination of responsibility**, including, if applicable, a determination of whether the student will be ineligible to reenroll in the institution for a reason other than an academic or financial reason." [TEC 51.9364(c)]	**34 CFR § 106.45(b)(3)** (ii) **The recipient may dismiss the formal complaint or any allegations therein**, if at any time during the investigation or hearing: a complainant notifies the Title IX Coordinator inwriting that the complainant would like to withdraw the formal complaint or any allegations therein**; the respondent is no longer enrolled or employed by the recipient**; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

Intersection with State Law: Other Considerations

- Separate/Supplemental Administrative reporting requirements
- Student/Employee Training Requirements
- State-specific policy elements and statements
- Potential Civil/Administrative liability

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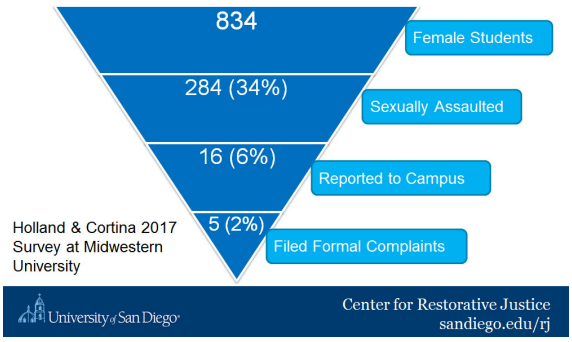
Informal Resolution

- Deep, almost universal dissatisfaction with the investigation/adjudication model for dealing with student misconduct
- Legitimate concerns re pre-2011 DCL informal practices
- Goal: Establish an alternative to the investigation/adjudication model which is rigorous and more in line with educational role of colleges and universities?
- Traditional Options: Mediation, Facilitated Dialogue, Education/Community Service
- Growing Opportunity: Restorative Justice



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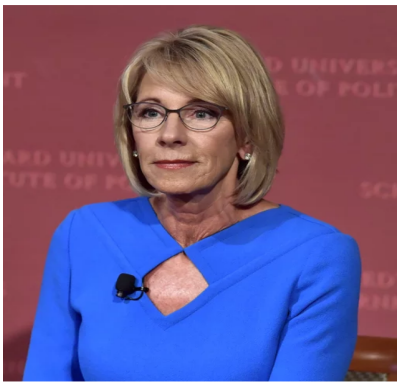
TIME

Sexual Assault Survivor to Betsy DeVos: Mediation Is Not a Viable Resolution

- "I am deeply worried that allowing mediation as a resolution to all forms of sexual violence at schools' discretion will result in schools pressuring survivors to participate."
- "Survivors of sexual violence should not be asked to compromise, self-reflect or reconcile relationships with someone that assaulted them."
- "[M]ediation perpetuates the myth that sexual assault is simply a misunderstanding between two people, rather than what is really is: a violent abuse of power."



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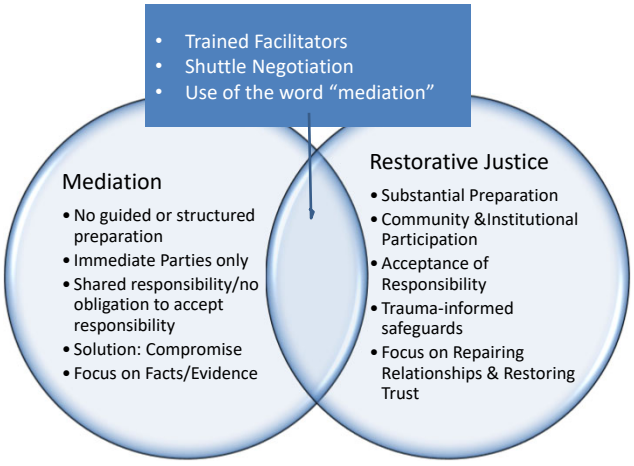
Mediation v. Restorative Approaches



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Implementation Challenges in the Employment Arena

- Application of Title IX Grievance Procedures to Unions
- Limits on HR decisions – When do otherwise "normal" supervisory actions implicate Title IX?
- Faculty and Staff Disciplinary Processes that Occur After Title IX Grievance Procedures, e.g., Tenure Revocation
- Interplay of Title VII and Title IX

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Application of Title IX Grievance Procedures to Unions

- What's the issue?
  - Title IX implementation requirements do not include any accommodation for existing labor contracts
  - Institutions required to renegotiate labor contracts to comply with the Title IX regulations
  - Tensions inherent in compliance with Title IX regulations versus fulfilling terms of existing labor contracts
  - Practical considerations in the absence of successful negotiations

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Application of Title IX Grievance Procedures to Unions

- Why does it matter?
  - The Title IX regulations pre-empt the terms of labor contracts
  - The application of the Title IX grievance procedures is generally a mandatory subject of bargaining
  - In the event of an impasse, institutions need to weigh the relative legal, operational, and political risks of imposing a labor contract change against failing to comply with Title IX

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Application of Title IX Grievance Procedures to Unions

- Potential Bargaining Issues:
  - Standard of proof
  - Who serves as a hearing officer
  - Institution's discretion to determine whether conduct triggers Title IX grievance procedures
  - Title IX Coordinator's discretion to implement supportive measures

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Practical Considerations

- Understand and assess your risks
- Analyze how to handle Title IX cases involving union members without updated contract
  - What is the scope of grievance procedures?
  - Review of underlying liability determination may trigger Title IX and Clery requirements
  - Consider allowing Title IX process plus grievance procedures, arguing only remedies reviewable
- Weigh pros and cons of affording additional opportunities to challenge Title IX allegations absent an updated labor contract versus imposing contractual changes

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Challenges in the Employment Arena

- What about "normal" workplace supervisory issues?
  - Employees in the mail room have been complaining about Leslie Leerer for years. Taylor Tattler complains about Leslie frequently, reporting that Leslie stares, lingers in people's offices, and "acts creepy." Lately Leslie has started making admiring comments about co-workers' physical appearances.

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Challenges in the Employment Arena

- What about "normal" workplace supervisory issues?
  - How do we train HR/managers about the limits of "local control"?
  - Escalation of all gender-based issues for triage?
  - Counseling employees regarding conduct *vs.* formal action
  - What about Title IX conduct for which no formal complaint is filed?
  - Overlap with obligations under Title VII (*more on this later*)

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Adjacent reminder . . . .

34 C.F.R. § 106.8. Designation of responsible employee and adoption of grievance procedures.

(b) *Complaint procedure of recipient.* A recipient shall adopt and publish **grievance procedures providing for prompt and equitable resolution** of student and **employee** complaints alleging any action which would be prohibited by this part.

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Challenges in the Employment Arena

- What do we do with faculty? Serious faculty misconduct that could implicate tenure or employment that is also Title IX Sexual Harassment . . .
  - Faculty resolution or grievance procedures provide one process
  - 34 C.F.R. § 106.45 provides another

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Challenges in the Employment Arena

- What do we do with faculty?
  - 34 C.F.R. § 106.45 is fundamentally about the process for a finding:
    - "the recipient must follow a grievance process that complies with § 106.45 *before imposing disciplinary sanctions*"
  - Regulation is not really concerned with what the sanction is (so long as respondents are on notice of what the sanction could be):
    - "recipients have unique knowledge of their own educational environment and . . . are best positioned to make decisions about which . . . disciplinary sanctions are appropriate against a respondent who is found responsible for sexual harassment."

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Challenges in the Employment Arena

- One potential solution:
  - Faculty go through a unified Title IX process
  - If there is a responsible finding, the decisionmaker imposes either
    - A sanction that is appealable through the faculty process; or
    - A sanction that *is itself* a referral into the faculty process for a (faculty-handbook compliant) determination of tangible actions
  - To be compliant, the faculty process should not relitigate the merits

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Communication, Collaboration, and Community

- Communicating constantly-shifting rules, expectations, and procedures
- Ensuring rights, options, and resources are clearly presented and reiterated to all parties
- Increased focus on training and prevention – how do we do this effectively?
- Effective training and communication for senior leadership

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Challenge: The Evolving Role of the Title IX Coordinator

- Historically: focus on compliance
- Elimination of single investigator model
- Back to foundations: Title IX requires all institutions to "designate and authorize at least one employee to ***coordinate***" compliance with Title IX [34 C.F.R. § 106.8(a)]
- Visibility and Access to TIX Coord. & Office
- **Opportunity**: Establishing robust Training & Prevention + Advocacy roles (often through deputy coordinator designations)

Mark Dodici, *The Daily Princetonian*

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Key Takeaways

- Title IX regulations have created thorny implementation issues
- Those challenges are not likely to go away anytime soon
- Institutions will need to continue to wrestle with thorny implementation issues
- You are not alone

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