Title IX
and Florida International University Policy

Agenda

1. 2020 Title IX Regulations
2. Other Title IX Requirements
3. FIU’s Sexual Harassment (Title IX) and Sexual Misconduct Policy
4. Other Laws

Section 1
New Title IX Regulations

Who Monitors Title IX Compliance and Why?

- Department of Education, Office for Civil Rights
- The Office for Civil Rights enforces several Federal civil rights laws that prohibit discrimination in programs or activities that receive federal financial assistance from the Department of Education.
Title IX- the law

Title IX of the Education Amendments Act of 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.

June 15, 2020

“Title IX- the law”

It is impossible,” Justice Gorsuch wrote, “to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”

Title IX- some history...and some that remains

- 1998/1999 Gebser and Davis- deliberate indifference
- 2001- Sexual Harassment guidance
- 2007- Dear Colleague on Single Sex Programs
- 2010- Dear Colleague on Harassment and Bullying
- 2011- Dear Colleague Letter on Sexual Harassment (rescinded)
- 2014- Q&A (rescinded)

Title IX background, continued

- 2015- Dear Colleague Letter on Title IX Coordinators
- 2016- Dear Colleague Letter on Transgender Students (Rescinded)
- 2018- revised case processing manual
- 2018- Proposed new regulations
- May 6, 2020.....new regulations!
- August 14, 2020- Effective date
- But.....after January 20, 2021.....
Title IX - what it covers

What does the school pay for or enable, control, own...etc?

- employees, students
- academics
- employment, benefits, opportunities
- extra-curriculars
- on-campus, off-campus (with some caveats)
- athletics
- discipline
- the ability to engage in what the school has to offer

2020 Title IX Regulations

In case you missed it

Title IX For All @Title... - 15h
It’s ironic to hear complaint advocates refer to their anti-due process stance as being pro-civil liberties. Yes, when I think of expanding a quasi-prosecutorial apparatus trampling over due process into every area of life, I think “that’s what civil liberties is all about.”
DOE’s “Summary of Major Provisions of This Regulatory Action”

1. Define the conduct constituting sexual harassment for Title IX purposes
2. Specify the conditions that activate a recipient's obligation to respond to allegations of sexual harassment and impose a general standard for the sufficiency of the schools response
3. Specify situations that require a school to initiate its procedures
4. Establish procedural safeguards that must be incorporated into a recipient's grievance procedures to ensure a fair and reliable factual determination when a school investigates and adjudicates complaints

DOE's View of What the Regulations Accomplish:

1. setting forth clear standards that trigger a recipient's obligation to respond to sexual harassment
2. defining the conduct that rises to the level of Title IX as conduct serious enough to jeopardize a person's equal access to the school's educational program or activity
3. confining recipient's Title IX obligations to respond to sexual harassment of which it has actual knowledge

What the Regulations Mean for Institutions

- Due process focus
  - “Presumption of innocence”
- Notice notice notice notice notice notice notice notice
- Narrow and focused involvement by OCR/DOE
- More "legality" to proceedings
- Training
- Mandatory advisors- schools provide
- More time for evidence review (10 days) and report review (10 days)
- Informal option
- Mandatory reporters changed
- Documentation & record-keeping
- More information out there
- POLICY changes and creation

Who are the compliance stakeholders? NOTICE NOTICE

- HR (employee matters AND the notice to employees and job applicants)
- IT
- General counsel
- Student catalog and handbook folks
- Institutional equity
- Student conduct
- Public safety
- Academics
- Title IX
- Counseling
- Communications/ Marketing
- Admissions
Scope of Title IX is limited

- Applies only to exclusion from participation, denial of benefits, or discrimination based on the basis of sex occurring against a person in the United States (106.8 (d))
- Applies only to conduct within the school’s education program or activity (106.30, 106.44(a))

Do not forget: Clery still applies. An institution’s other policies still apply.

106.30 Definitions

Sexual Harassment

- 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;
- Unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity;
- Sexual assault, as defined in 20 USC 1092(f)(6)(A)(v), dating violence as defined in 34 USC 12291(a)(8) or stalking as defined in 34 USC 12291(a)(30

Focusing In

- So severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity.
- “The reasonable person standard appropriately takes into account whether a reasonable person, in the position of the particular complainant, would find the conduct offensive.”
- “The objective nature of the inquiry simply means that evaluation is made by a reasonable person considering whether, standing in the shoes of the complainant, the conduct would be offensive.”

Quotations from DOE commentary in unofficial version p. 324
Sexual Assault

- Sexual act directed against another person, by force, threat of force, coercion, or without consent, including instances where the person is incapable of giving consent.

- Includes Rape, Sodomy, Sexual Assault with an Object, Fondling, Incest, and Statutory Rape.

Domestic Violence

- Includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.

Dating Violence

- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.
- Includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
- Existence of relationship will be determined based on consideration of the following factors: length of relationship, type of relationship, and frequency of interaction between the persons in the relationship.

Stalking

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
  - (A) fear for his or her safety or the safety of others; or
  - (B) suffer substantial emotional distress
Further Limits to the Scope

- **Actual knowledge** means notice of SH or allegations of SH to a recipient's TIXC 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 does not qualify an employee, even if that employee is an official, as one who has authority to institute corrective measures on behalf of the school.

106.30 Definitions- FORMAL COMPLAINT

Complainant must be participating in or attempting to participate in the school's program or activity at the time of filing the complaint:

1. alleging sexual harassment against a respondent,
2. about conduct within its educational program or activity,
3. requesting initiation of the school's grievance procedures, and
4. filed by a complainant at a time when they are participating or attempting to participate in the school's education program or activity.

Dismissal

- MUST dismiss, as Title IX complaints, complaints that do not satisfy requirements of "Formal Complaint".
- MAY dismiss for other reasons such as request from complainant, respondent no longer at the school, or no ability to gather the information necessary, etc.
- NB: Appeal rights attach, however.
106.30 Definitions: Supportive Measures- TIXC responsible

- Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to C and R before and after the filing of a formal complaint or where no complaint has been filed
- Such measures are designed to (1) restore or preserve access to the recipient’s education program or activity, without unreasonably burdening the other party, (2) protect the safety of all parties and the recipient’s educational environment and (3) deter sexual harassment.

No formal complaint? Just a report?

- Recipient must offer and implement supportive measures designed to effectively restore or preserve the complainant’s access to the recipient’s educational program or activity.
- At the same time it offers supportive measures, Recipient must inform complainant of the right to file a formal complaint at that time or a later date.

106.45: Grievance Procedures MUST

- Treat complainants and respondents equitably
  Equitable resolution for C must include remedies (where responsibility is found) that must be designed to restore or preserve access to the school’s program or activity.
  Equitable resolution for R must include due process protections before any disciplinary sanctions are imposed.
- Require objective evaluation of all relevant evidence
  Includes both in/exculpatory evidence
  Credibility determinations may not be based on someone’s status as R or C
- Coordinators, investigators, and decision makers may not have a conflict of interest or bias
  Must receive training
  Training materials must not promote stereotypes and must promote impartial investigations and adjudications.
- Include presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of grievance process.

106.45: Grievance Procedures & Time frames MUST:

- Include reasonably prompt time frames for conclusion of the grievance process, including for filing and resolving appeals, if any, and a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to C & R of the delay or extension and the reasons why.
  Good cause includes considerations such as the absence of the parties or witnesses, concurrent law enforcement activity, or the need for language assistance or accommodation of disabilities.
106.45 Grievance Procedures - Notice of allegations

Upon receipt of a formal complaint, school must provide the following written notice to the parties who are known:

A) Notice of the school’s grievance procedures

B) Notice of the allegations constituting a potential violation of the school’s code of conduct

including sufficient details known at the time and with sufficient time to prepare a response before any initial interview

SEE THIS SECTION FOR LAUNDRY LIST OF WHAT MUST BE IN THE NOTICE

Ongoing notice requirement when new allegations added to investigation

Grievance Procedures, contd

Provide party whose participation is invited or expected with written notice of date, time, location, participants, purpose of all meetings, with sufficient time for party to prepare to participate.

Must provide live hearing

Each party must be able to ask the other party and any witnesses all relevant questions, including those challenging credibility. Such cross examination must be conducted by the party’s advisor of choice.

Schools must provide advisor to those who do not have one.

Advisor requirement

- Advisor of choice
- Limits on role and rules of decorum
- Cross examination
- Schools must provide for cross examination if a party does not have an advisor
- “Only relevant cross-examination and other questions may be asked of a party or witness.”

Evidence and Report Review

Prior to completion of the report, the recipient must send the parties the evidence that is subject to review and inspection. Parties shall have at least TEN DAYS to provide a written response which the investigator shall consider prior to completion of the written report.

Create an investigative report that fairly summarizes RELEVANT EVIDENCE and, AT LEAST TEN DAYS prior to a hearing, provide a copy of the report to the parties for their review and written response.

MUST include inculpatory and exculpatory evidence.

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Relevant and Probative?

**Relevance**
the tendency of a given item of evidence to prove or disprove one of the elements of the case, or to have probative value to make one of the elements of the case likelier or not.

**Probative**
“tending to prove.” Probative evidence “seeks the truth.” Tends to prove the proposition for which it is proffered.

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Hearing- Live with Cross Examination.

- The decision-maker must explain to the party’s advisor asking questions any decision to exclude questions as not-relevant (include relevant).
- If a party or witness does not submit to cross examination at the hearing, the decision maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility the investigation.
- Provide both parties equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including evidence that the recipient does not intend to rely upon in reaching a determination regarding responsibility the investigation.

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Preponderance of the Evidence

Objectively evaluate
Written Decision Must Include...

- Identification of the code alleged to have been violated
- Description of the procedural steps taken from receipt of the complaint through determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held
- Findings of fact used to support the determination
- Conclusions regarding the application of the code of conduct to the facts.
- Statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility.
- Any sanctions the recipient imposes on the respondent, and any remedies provided by the recipient to the complainant designed to restore or preserve access to the program or activity.
- Findings of fact used to support the determination
- The procedures and bases for an appeal.

Appeal grounds

1. Procedural irregularity
2. New evidence that was not reasonably available at the time of determination regarding responsibility or dismissal was made, that would affect the outcome of the matter
3. The Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias for or against parties generally or the individual party that affected the outcome of the matter
4. Other bases determined by the school, provided offered to both parties

Informal Process

- At ANY TIME prior to reaching a determination
- May include mediation
- That does not involve full investigation and adjudication
- MUST:
  - Provide parties written notice disclosing allegations
  - Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared
  - Obtain parties’ voluntary written consent
- "Travel of the case"
Record-keeping

For a period of SEVEN YEARS

- Each sexual harassment investigation (including determination regarding responsibility, discipline, remedies, etc.)
- Any appeal and result therefrom
- Informal resolutions
- All materials used to train coordinators, investigators, and decision-makers with regard to sexual harassment.

Additional Record-keeping- For Seven years

- Records of any actions, including any supportive measures, taken in response to a REPORT or FORMAL COMPLAINT of sexual harassment

  In each instance, school must document the basis for its conclusion that its response was not clearly unreasonable

  Must document that it has taken measures designed to restore or preserve access to the recipient's educational program or activity

  The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.

Training. 106.45

- All key actors must receive specific training on skills and abilities required by the grievance procedures.
- Training must be kept and put on website.

ACTION! Categorized compliance efforts.
Documents & Process

- **Policy and procedure**
  - Complaint form

- **Notice of policy**
  - Job descriptions, applications, parents, students, employees, parents...

- **Supportive Measures**
  - Anytime. Document what was offered and how it complies with the standards under the regulations

- **Complaint intake and assessment**
  - Form to assess complaint; Notice to Investigate or not to investigate; decisions on interim measures

- **Investigation reports**
  - Consistent regardless of investigator; with required information

- **Hearing**
  - Forms to document how questions assessed; forms documenting decisions per regulations

- **Appeal**
  - Appeal assessment form; notice of decision; remember: this is for decision at the beginning as well as the end (two different forms notices of decision)

- **Notices of investigation, meeting, hearing, case dismissal, outcome.**

Technology & Training

- **Recording equipment and storage**

- **Determine who will train**

- **Training materials go on website**

Staff/People

Understand how the regulations impact staffing needs

- **Hearing officers**

- **Advisors**

- **People to help with coordinating supportive measures**

- **Meetings with parties**

- **Preparing documentation**

- **Training for all students and employees**

- **Investigators**

- **Appeal officers**

Who are you?
Title IX Process

Title IX Still Applies to Other Forms of Sex Discrimination

• Pregnancy and parenting
• Employment
• Athletics

Section 2
Other Title IX Requirements

Athletics Compliance

• Three prong analysis:
  Statistical compliance
  History of adding teams
  No unmet interest
• What must be “equitable”?
What about behavior that falls outside of the “New” Title IX?

Section 3
School Policy

Sex based discrimination and harassment (not Title IX)

Includes gender based discrimination and harassment

FIU Non Title IX Sexual Misconduct

- Domestic violence
- Dating violence
- Gender based harassment
- Non-consensual sexual touching
- Obscene or indecent behavior
- Revenge porn
- Sex based harassment
- Sexual assault
- Sexual exploitation
- Stalking
Consent

- A clear, knowing, and voluntary agreement to engage in specific sexual activity at the time of the activity.

Consent can be communicated by words or actions as long as those words or actions create mutually understandable permission regarding willingness to engage in (and the conditions of) sexual activity.

- See also: coercion and incapacitation

Sex-based Harassment

- Any unwelcome sexual advance, request for sexual favors, and/or other verbal or physical conduct of a sexual nature:
  - Submission to or rejection of such conduct is made implicitly or explicitly a term or condition of a person’s instruction, academic standing, or participation in any University program, activity, or benefit;
  - Submission to, or rejection of, such conduct by an individual is used as a basis for academic or work evaluation;
  - Such conduct creates a hostile environment. A hostile environment exists when the conduct is sufficiently severe, persistent, or pervasive that it unreasonably interferes with, limits, or deprives an individual from participating in or benefiting from the University’s educational, and/or campus-residential experience when viewed both from a reasonable person in similar circumstances and the person in question.

Sexual Assault

- Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration (regardless of whether it includes penetration) by a sex organ of another person, without the consent of the Complainant.

Attempts or assaults to commit Sexual Assault are also included.

Non-consensual Sexual Touching

- Any sexual touching without consent.
- Any intentional touching of a person’s body, including the breasts, buttocks, groin, genitals, or other intimate parts.
- Touching may be under or over clothing.
- Includes making people touch others or themselves.
Domestic Violence

- Violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner by a person similarly situated to a spouse of the victim or by any other person against an adult or youth victim.

Dating Violence

- Violence committed by a person (i) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (ii) where the existence of such a relationship shall be determined based on a consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

Stalking

- A course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others, or suffer substantial emotional distress.

Gender-based Harassment

- Harassment based on gender, sexual orientation, gender identity, or gender expression, including acts of aggression, intimidation, or hostility, whether verbal or non-verbal, graphic, physical, or otherwise, even if the acts do not involve contact of a sexual nature.
Other misconduct

- Sexual exploitation
  Knowingly or recklessly transmitting a sexually transmitted disease or STI (such as HIV) to another individual without the knowledge and consent of the person exposed.

- Stalking
  Course of conduct directed at a specific person that would cause a reasonable person to fear for their safety or the safety of others, or suffer substantial emotional distress.

- Revenge porn
  To publish a sexually explicit image of a person, including any depiction that contains or conveys the personal identification or information of the depicted person by any electronic, digital or other means, including to an Internet website, by text, by email, and/or by through social media without the depicted person’s Consent.

Obscene or Indecent Behavior

- Exposure of one's sexual organs or the display of sexual behavior that would reasonably be obscene or indecent to others

- Recording, photographing, transmitting, showing, viewing, or distributing without consent

- Publishing sexually explicit image without consent

- Observing another individual’s nudity or sexual activity or allowing another to observe consensual activity without consent

Retaliation

- Any words or behavior made to intimidate, threaten, coerce, or discriminate against any individual

- Or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this Regulation.

- For the purpose of interfering with any right or privilege secured by this Regulation (Title IX)

- Respondent, Complainant, Reporting Party, or any other individual or group of individuals

Section 4

Additional Laws
What are the Laws and Policies that guide this work?

- State and federal guidance
  - Title IX, Clery Act, VAWA
  - Title VI/ VII
  - ADA/Section 504
  - ADEA
  - Laws prohibiting discrimination related to pregnancy and pregnancy-related conditions
  - State nondiscrimination laws
  - State and Federal Court case decisions

- School Policies

Let's Talk about Clery!

Clery! What is it?

- Annual report
- Timely warnings
- Response and accommodations
- Prevention and education requirements

What is Discrimination?

- Treating someone differently because of their identity within a protected category
- May be an act of different treatment
- May also be a facially neutral rule or policy that has a disparate impact
- Exception: when there is a legitimate business reason for the rule or policy
What are examples of protected categories?

- Race
- Religion
- Gender/Sex
- Sexual Orientation
- Gender Identity/Expression
- National Origin
- Disability
- Age
- Veteran Status
- Marital Status
- Pregnancy/parenting

Title VII, ADA & ADEA prohibit discrimination and harassment

- Harassment is unwelcome conduct that is based on race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.
- Harassment becomes unlawful where 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.

Overheard...

- “I didn’t intend to offend or harass”
- “Lighten up! It’s just a joke” or “I’d think they’d take it as compliment!”
- “It wasn’t about them” or “they could have left.”
- “They didn’t tell me it offended them!”
- “What about the First Amendment?”

Retaliation

- Anti-discrimination laws also prohibit harassment against individuals in retaliation for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or lawsuit under these laws; or opposing employment practices that they reasonably believe discriminate against individuals, in violation of these laws.
What is not Adverse Action?

- Petty slights, minor annoyances, trivial issues
- Acts motivated by a business reason other than retaliation

Mandatory Reporters

- You hear something, what do you do?
- You're about to hear something, what do you do?

Title IX Process

- Potential Title IX Matter
- Title IX Coordinator reaches out
- Report but no formal complaint
- Notice goes out
- Investigation
- Evidence Review and comment
- Report review and comment
- Supporting measures
- Hearing
- Written outcome
- APPEAL
- Any time before decision
- Informal Resolution

Receiving Information: Options for Next Steps

Do
- Thank them for sharing
- Let them know you are not confidential but that the school does have confidential resources
- Let them know the school has policies
- Contact the appropriate person

Do not
- Minimize or inflame
- Judge or opine
- Discourage
- Investigate or prompt for more information
- Promise confidentiality