AHLERS COONEY
ATTORNEYS

Title IX Training Webinar

June 24, 2020

Title IX Overview

Topic #1: What is Title IX?

Law: Title IX, 20 § U.S.C. 1681

- Prohibits discrimination "on the basis of sex";
- Education programs and federally funded schools (whether or not sponsored by the educational institution);
- Protects students, employees, applicants, & all other persons

Title IX Implementing Regulations

1) Designation of a Title IX Coordinator to coordinate school's responsibilities
2) Disseminate Notice of Policy/Title IX Obligations/Title IX Coordinator Info
    - Title IX/Sexual Misconduct Policies
    - Anti-Bullying and Harassment Policies
3) *Grievance/Complaint Procedures

Enforcement of Title IX

1) Agency Enforcement – OCR
    - Voluntary resolution
    - Equitable Relief
2) Private Litigation – In Courts
    - Monetary damages
    - Various additional claims: Breach of contract, constitutional claims, etc.
    - Complainant or Respondent as Plaintiff

Enforcement of Title IX

- Standard – *Deliberate Indifference*
    - Plaintiff must prove officials had actual knowledge AND harassment was so severe, pervasive & objectively offensive that it barred the victim from access to their education
    - Can be avoided by "merely responding to harassment in a manner that is not unreasonable"

New Regulations

- Prior Title IX Guidance revoked in **September 2017**
- Proposed Regulations were released **November 16, 2018**
- Public Comment period was open until **January 28, 2019**
- Final Regulations released May 6, 2020 with an implementation date of **August 14, 2020**
- Note:
    - Lawsuits challenging regulations filed;
    - Letters sent to DOE requesting delayed implementation

New Regulations – Major Changes

- Definitions and Jurisdictional Requirements – including Permissive and Mandatory Dismissals
- "Actual Knowledge" Standard on Who has to Report – Different for K12s and Postsecondary
- Investigation and Reports Timelines and Procedures
- Formal Resolution Procedures – Live Hearings and/or Cross-Examination
- Scope: Covers employee-on-employee situations
- Mandatory Appeals on Certain Criteria
- Recordkeeping and Retention Requirements
- Training Requirements

Definitions: Sexual Harassment

1. A school employee conditioning an educational benefit or service upon a person's participation in unwelcome sexual conduct (often called quid pro quo harassment);

   OR

2. 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 school's education program or activity (often called hostile work/educational environment harassment),

   OR

- **Dating Violence:** Violence by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. The existence of such a relationship is determined by:
    - The length of the relationship.
    - The type of relationship.
    - The frequency of interaction between the persons involved in the relationship
- **Domestic Violence:** Includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner, a parent of a shared child, a former or current cohabitor as a spouse or intimate partner, or someone similarly situated to a spouse under domestic or family violence laws. . . , or by any other person against a victim who is protected under the domestic or family violence laws[.]
- **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.
- **Sexual assault**: An offense classified as a forcible or nonforcible sex offense by the FBI's uniform crime reporting system:
    - Rape,
    - Fondling,
    - Incest, or
    - Statutory rape

Scope of "Educational Program or Activity"

- Conduct must occur in "educational program or activity"
    - Does <u>not</u> mean geography – no on/off-campus bright line rule
    - Includes "locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs"
- Conduct must be against a person "in the United States"
    - Does not apply to study abroad
- New:
    - Includes "*any building owned or controlled by a student organization that is officially recognized by a postsecondary institution"*
    - Implication: Greek life and "Theme" houses

Scope– Mandatory Dismissal

- No Title IX jurisdiction?
  - Must "dismiss" the complaint
  - Clarification in Final Rule: Dismissal means dismissed from the Title IX process; the school can still apply another conduct code or offer supportive measures
- Practical Difficulty – Knowing if a complaint implicates Title IX jurisdiction at various stages of the process

Scope– Permissive Dismissal

1) New final rule allows schools to dismiss a complaint (with prompt and simultaneous written notice to the parties) if at any time:

    1) A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations;

    2) The respondent is no longer enrolled or employed by the recipient; or

    3) "Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations."

TOPIC #2: Implementing the New Title IX Regulations

Major Compliance Areas

1) **Policy and Procedures Review and Update**
   - Incorporate new language on jurisdiction and sexual harassment and retaliation definitions
   - Incorporate investigation and hearing/cross-examination procedures
   - Think about: who is going to be our Title IX Coordinator, Investigator(s), Decision-Maker(s) and appeal authorities?
     - Internal or External
   - Revise existing notices and policies, or create "one-stop" policy and procedures for all constituencies – students, faculty/teachers, and staff
   - Review collective bargaining agreements

2) **Record-keeping and Retention**
   - Final Regulations require the following to maintained for SEVEN years:

     1) Each sexual harassment investigation, including determinations, audio or visual recordings, disciplinary sanctions, and any remedies provided to the complainant;

     2) Any appeal and the result therefrom;

3) Informal resolution, if any; and

4) *All materials used to train Coordinators, Investigators, those who facilitate informal resolution, and decision-makers with regard to sexual harassment*.

- Final Rules require the following records to be created and kept for SEVEN years:
- Any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment.
- Document the basis for the conclusion that your response was not deliberately indifferent, and
- Document that you have taken measures designed to restore or preserve access to the recipient's educational program or activity.
- If no supportive measures are given to the complainant, document why it was not clearly unreasonable

3) **Training**
   - Schools must require training for anyone designed as a Title IX Coordinator, Investigator, Decision-Maker, or any other person designated to facilitate an informal resolution on designated topics
   - Training materials:
     - Must not rely on sex stereotypes
     - Must promote impartial investigations and adjudications of formal complaints