

# SCICU Webinar

The Interplay Between Title IX and Title VII,  
Title IX and VAWA, and New Title IX Rules  
on Hearings and Informal Resolution

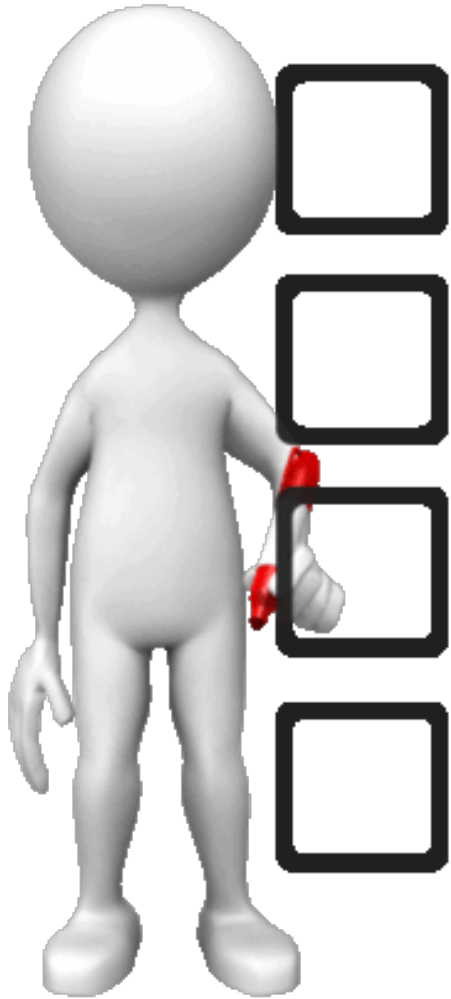
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# Topics:



Intersection of Title IX and VAWA

Intersection of Title IX and Title VII

Live Hearings under the New Rules

The Informal Resolution Process under the New Rules



# Title IX and VAWA



# Title IX

- **Prohibits** → Prohibits discrimination based on sex in education programs or activities that receive Federal financial assistance
- Also prohibits sexual discrimination and sex harassment, which includes acts of sexual violence, and retaliation for filing a complaint or speaking up about rights protected under Title IX.
- **Action** → If a school has actual knowledge of an instance of prohibited conduct constituting sexual harassment in the U.S., Title IX requires the University to take prompt action to address it.

# Section 304 of VAWA

- **Policies and Procedures** → Requires policies and procedures to address sexual violence, domestic violence, dating violence, and stalking.
- **Education Programs** → Requires education programs, prevention programs, and awareness campaigns on sexual violence, domestic violence, dating violence, and stalking.
- **Resources** → Requires information about available resources, law enforcement options, and protective measures such as changes to living situations or class schedules.

- When the Department adapted the *Davis* definition of sexual harassment in the final regulations, it expressly included Clery Act/VAWA sex offenses.
- Under the Final Rule, sexual harassment includes sexual assault, dating violence, domestic violence, or stalking as those offenses are defined in the Clery Act, 20 U.S.C. § 1092(f), and the Violence Against Women Act, 34 U.S.C. § 12291(a)).

# July 2014 “Dear Colleague” Letter

- Addressed implementation of amendments to the Violence Against Women Reauthorization Act of 2013 (VAWA)
- Issued by the Office of Postsecondary Education

# July 2014 “Dear Colleague” Letter

- Reads in part, “VAWA did not affect in any way Title IX . . . its implementing regulations, or associated guidance issued by the Department’s Office for Civil Rights (OCR). Nothing in the Clery Act, as amended by VAWA, alters or changes an institution’s obligations or duties under Title IX as interpreted by OCR.”





# VAWA Reauthorization

- President Obama signed a bill reauthorizing the **Violence Against Women Act on March 7, 2013.**
- Included in VAWA's reauthorization was the Campus Sexual Violence Elimination Act or the "Campus SaVE Act"



- Beginning on October 1, 2014, VAWA declared that schools must report Campus SaVE Act compliance in their Annual Clery Act Security Reports.
- This meant (and means) reporting the following in the ASR by October 1 of each year:

1) Policies related to programs to prevent dating violence, domestic violence, sexual assault, and stalking

- Requiring the school to **report** its policies related to programs to prevent dating violence, domestic violence, sexual assault, and stalking

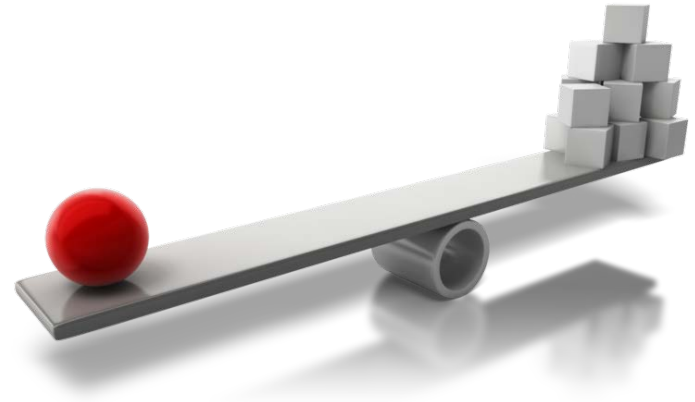
... means the school had to **adopt** programs to prevent dating violence, domestic violence, sexual assault, and stalking; and

- 2) Prevention and awareness programs for **all** new and continuing students and employees addressing rape, acquaintance rape, dating violence, domestic violence, sexual assault, and stalking.
- 3) The procedures the institution will follow once an incident of dating violence, domestic violence, sexual assault, or stalking has been reported



These must include:

- A statement that the institution prohibits dating violence, domestic violence, sexual assault, and stalking
- The evidentiary standard (**preponderance of the evidence**) used during institutional disciplinary proceedings



- The jurisdiction's definition of dating violence, domestic violence, sexual assault, and stalking
- The jurisdiction's definition of consent in reference to sexual activity
- “Safe and positive” options for bystander intervention to prevent harm or intervene when there is a risk of dating violence, domestic violence, sexual assault, or stalking

- Warning signs of abusive behavior and how to avoid potential attacks
- Sanctions and protective measures that can be imposed after a final determination of an institutional disciplinary procedure regarding rape, acquaintance rape, dating violence, domestic violence, sexual assault, or stalking.

- Procedures victims should follow if a sex offense, dating violence, domestic violence, sexual assault, or stalking has occurred, including —
- The importance of preserving evidence to prove criminal dating violence, domestic violence, sexual assault, or stalking, or to support a protection order.
- To whom the alleged offense should be reported.



- Notice of the victim's options to—

Notify law enforcement authorities,  
including on-campus and local police.

Be assisted by campus authorities to notify  
law enforcement authorities if the  
complainant chooses.

Decline to notify authorities.



- Where applicable, the rights of complainants and the institution's responsibilities regarding orders of protection, no-contact orders, restraining orders, or similar lawful orders issued by a criminal, civil, or tribal court.
- Disciplinary procedures for cases alleging dating violence, domestic violence, sexual assault, or stalking
- The procedures must include a **clear statement** that disciplinary proceedings shall:

- Provide a prompt, fair, and impartial investigation and resolution; and
- Be conducted by officials who receive **annual training** on dating violence, domestic violence, sexual assault, and stalking and how to conduct an investigation and hearing process that protects the safety of complainants and promotes accountability.

- State that the accuser and the accused are equally entitled to have others (*e.g.*, witnesses) present during a disciplinary proceeding
- This includes having an advisor of their choice at any prehearing meeting or any hearing
- If advisors are allowed, an attorney can be selected to serve in that capacity



- The accuser and the accused must be simultaneously notified in writing of—

The outcome of any disciplinary proceeding based on dating violence, domestic violence, sexual assault, or stalking;

Procedures for the accused and the victim to appeal the results;



- Any **change** in the results of the hearing before they become final; and
- When disciplinary proceeding results become final.
- How complainants' confidentiality will be protected to the extent allowed by law.



- Written notice to students and employees about counseling, health, mental health, victim advocacy, legal assistance, and other services available on-campus and in the community.
- A written explanation of a student or employee's rights and options, *regardless of whether the crime took place on campus or off campus*

Institutions participating in a program under Title IV **must** develop and distribute the above *statements of policy* as part of its ASR report

In other words, to remain eligible for federal financial aid, the institution must adopt Title IX policies containing **all of the these terms . . .**



- . . . and report on the policies in the ASR.
- Effectively, although Title IX was not amended, as of October 1, 2014, these are Title IX policy requirements.
- In other words, VAWA's amendment to the Clery Act (Campus SaVE) contains numerous, stealth Title IX policy requirements.

# In addition:

- The new Title IX rules changed the definition of sexual harassment.
- This includes defining sexual harassment as actions that are “so severe, pervasive, *and* objectively offensive that it effectively denies a person equal access to the school’s education program or activity.”

# VAWA and Title IX

- When the Department of Education adapted the *Davis* definition of sexual harassment in the final regulations, it expressly included VAWA sex offenses.
- Thus, under the Final Rule, sexual harassment includes sexual assault, dating violence, domestic violence, or stalking as those offenses are defined in the Violence Against Women Act, 34 U.S.C. § 12291(a)).





# The Intersection of Title IX and Title VII

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Title VII of the Civil Rights Act of 1964 (Title VII), generally prohibits discrimination in the workplace, including discrimination based on sex.

The Supreme Court's legal standard for analyzing harassment claims—including sexual harassment claims—primarily focuses on whether the alleged conduct is “severe or pervasive”

# Title IX Employment Claims

## *Background*

Title IX prohibits sex-based employment discrimination in federally assisted schools, educational programs, and activities.



### **Discrimination**

The prejudicial treatment or consideration of a person, racial group, minority, etc. based on category rather than individual characteristics, excluding or restricting members of one or more categories of people on the grounds of race, sex, or age.

# Covered employers

- Title IX covers colleges and universities
- Private businesses that are educational affiliates or co-recipients of federal grants
- Contract affiliates of colleges and universities
- Companies that hire interns
- Hospitals and academic medical centers



## **B. Other businesses that can be impacted**

2. Recipients of Federal financial assistance from any funding agency that is subject to the Title IX common rule





## **B. Other businesses that can be impacted**

2. Recipients of Federal financial assistance from any funding agency that is subject to the Title IX common rule



- The **common rule** provides for enforcement of Title IX as it applies to educational programs or activities operated by recipients of Federal financial assistance from participating agencies.
- It is published in the Federal Register, Volume 65, Number 169.





## Participating agencies:

- Nuclear Regulatory Commission
- Small Business Administration
- National Aeronautics and Space Administration
- Department of Commerce
- Tennessee Valley Authority
- Department of State
- Agency for International Development
- Department of Housing and Urban Development
- Department of Justice
- Department of the Treasury
- Department of Defense

## Participating agencies:

- National Archives and Records Administration
- Department of Veterans Affairs
- Environmental Protection Agency
- General Services Administration
- Department of the Interior
- Federal Emergency Management Agency
- National Science Foundation
- Corporation for National and Community Service
- Department of Transportation

# **Other Federal agencies that have published regulations to implement Title IX :**

- Department of Agriculture
- Department of Health and Human Services
- Department of Energy
- Department of Education

***Practice pointer:*** grant applicants and awardees should carefully read grant materials to determine whether Title IX applies.

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- Grantees can include foundations, non-for-profits, churches, and other private businesses.
- In short, Title IX applies to the educational programs or activities of any business or entity receiving financial assistance from the previously listed participating agencies.



# New Title IX regulations

- The new Title IX regulations require educational institutions to address incidents of sexual assault and sexual harassment involving both students and employees.
- For some schools, the new rules will redefine schools' obligations with regard to incidents of sexual assault and harassment involving employees under Title IX.

- Title IX can apply to incidents only involving employees because Title IX also protects *employees* of educational institutions, programs, and activities against sex discrimination and harassment.
- However, Title IX's deliberate indifference standard is lower than the standard imposed on employers under Title VII.
- Under the new Title IX rules, employee-on-employee incidents do not trigger the school's formal Title IX grievance process



- The new rules apply to complaints brought by or against employees, and are not limited to complaints involving students or student-respondents.
- Provides that nothing in the rule diminishes rights available to any individual under Title VII, which prohibits sex discrimination in an employment context.

- the new regulations require schools to "adopt and publish grievance procedures" to address sexual harassment complaints under Title IX brought by employees.
- This can be an alternative HR process.

# Differences between Title IX and Title VII

- *Actual Knowledge*: Under Title IX, schools are not obligated to take action unless they have actual knowledge of allegations of sexual harassment.
- Under Title VII, a school can be held liable based on actual or constructive knowledge of sexual harassment.

- *Jurisdiction*: Under the new Title IX rules, schools are only responsible for addressing sexual harassment that occurs in the U.S. under an education program or activity.
- Under Title VII, a school can be held liable for extraterritorial sexual harassment.

- *Standard of Proof:* For Title IX, the standard for legal liability remains deliberate indifference.
- Under Title VII, a plaintiff must also establish that the employer failed to take prompt and appropriate corrective action.

- *Standard of Proof*: Under the new rules, schools can choose the burden of proof for Title IX adjudications: the lower burden of "preponderance of the evidence," or the higher burden of proof, "clear and convincing."
- Under Title VII, schools generally use a preponderance of the evidence as the burden of proof.

- *Live Hearing*: Institutions of higher education must provide for live hearings for formal complaints of sexual harassment.
- The school must also create an audio or audiovisual recording or transcript of the live hearing and make it available to the parties for inspection.
- Title VII has no such requirement.



- *Cross-Examination*: Cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor and never by a party personally.
- Title VII has no such requirements.

- *Single-Investigator Model*: Under the new Title IX rules, the investigator cannot be the same person who determines whether the respondent is guilty.
- Title VII does not speak to this from the standpoint of complaints or investigations, and many EO/AA offices use this model for sexual harassment complaints.

- *The Parties' Rights:* Under Title IX, the investigator must provide all parties an equal opportunity to examine all evidence gathered during the investigation that is directly related to the allegations.
- Under Title VII, the first time the respondent sees a copy of any report of investigation can literally be after filing an EEOC Charge, and only then if the report is included in the employer's response. Otherwise, the first time the respondent sees the report could be if he or she files a lawsuit and receives it during discovery.

- *Informal Resolution*: Schools can offer informal resolution options, such as mediation, to the parties, but both parties must give voluntary, informed, written consent.
- However, schools cannot offer informal resolution for allegations that an employee sexually harassed a student.
- Title VII does not speak to this, but many schools do allow informal resolution of Title VII complaints.

- *Recordkeeping Requirements:* Under the new rules, schools must maintain Title IX records for seven years.
- Title VII does not speak to this, but legally, if an EEOC charge, OCR complaint, or lawsuit is filed, the institution is required to issue a document hold to ensure that all pertinent records are preserved.

# Severe *and* Pervasive versus Severe *or* Pervasive

The new rules define Title IX sexual harassment as actions that are “so severe, pervasive, *and* objectively offensive that it effectively denies a person equal access to the school’s education program or activity.”

The Supreme Court’s legal standard for analyzing Title VII harassment claims—including sexual harassment focuses on whether the alleged conduct is “severe *or* pervasive”

- Employees can be respondents in a student-initiated Title IX complaint
- Only student complainants can initiate a formal complaint and trigger the formal grievance process requirements, but . . .
- Employees can be subject to the grievance process outlined in the regulations if a formal Title IX complaint is filed against them by a student.

# Other differences between students and employees

- The new regulations allow a school to place a non-student employee on administrative leave pending the conclusion of the grievance process.
- The Title IX Coordinator can dismiss a formal complaint if "the [employee]-respondent is no longer ... employed by" the school. 34 C.F.R. § 106.45(3)(ii).



# Title IX and Title VII Preemption

- The Fourth Circuit has not squarely addressed whether Title VII preempts employment discrimination claims brought under Title IX.
- However, there is authority within the circuit suggesting that Title VII and Title IX employment discrimination claims can proceed simultaneously, particularly where the plaintiff seeks equitable relief.

The comments to the new regulations read that:

- Title VII protects more than just employee's rights
- Therefore, the new regulations state that they may not be “read in derogation of any individual's rights rather than just any employee's rights under Title VII.”

**Question:** Is the next step extending Title IX to non-employees, such as applicants or staffing service workers?



# Questions?

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# Presenter:



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Lisa Karen Atkins has over 25 years' experience as legal counsel providing litigation defense, client counseling, and day-to-day legal advice to public and private colleges and universities, university boards, multi-campus systems, academic medical centers, clinical affiliates, vocational schools, private employers who partner with public and private institutions, clinical practicum programs, and internship, cooperative education (classroom-based education combined with practical work experience), and apprenticeship programs. She is co-lead and co-founder of the Ogletree Deakins Higher Education Practice Group and has served as general counsel for a mid-major, division I, Carnegie-classified doctoral/high research, land-grant university; as associate general counsel for the sixth-largest higher education system in the United States; and as an assistant general counsel for a major, division I, doctoral/very high research land-grant University and multi-campus system. She is also a former University Chief of Staff and a former Assistant Attorney General, a role in which she successfully defended numerous lawsuits against public higher education institutions, board members, officers, faculty, and staff.