

The Four Corners of Title IX Regulatory Compliance: Intermediate

Professor Peter Lake

Charles A. Dana Chair and Director of the Center for
Excellence in Higher Education Law and Policy
Stetson University College of Law
Senior Higher Education Consulting Attorney
Steptoe & Johnson PLLC

Julian Williams

Vice President for Compliance, Diversity and Ethics
George Mason University

Day 1

Welcome!

- * Speakers
 - * Julian Williams
 - * Peter Lake
- * Who can help?
 - * Tim Arth, ACPA
 - * Jennifer Lake (941-961-4575)
- * Participant Introductions
- * About the Hotel and Orlando
- * Meals/Breaks
- * Please silence your cell phone, but if you have to leave the room to take an important call, do it!

How we will use our time...

- * Lecture and PowerPoint
- * Case Studies and Table-Top Exercises
- * WE HOPE FOR LOTS OF DIALOGUE,
DISCUSSION AND SHARING!

Learning Outcomes

(Topics will be integrated into discussion of the *Four Corners* and with Case Studies)

- * Develop a stronger sense of points of dynamic tension in Title IX work
- * Improve skills in Title IX administration and coordination of campus efforts
- * Understand nuances of “grievance process” approaches and promising “grievance process” practices
- * Become a stronger trainer, and trainer of trainers, in Title IX work
- * Interface compliance and educational approaches to Title IX administration
- * Establish foundations for being more proactive and preventative in Title IX work
- * Develop the knowledge and skills necessary for advanced study of Title IX and potential mastery of the subject

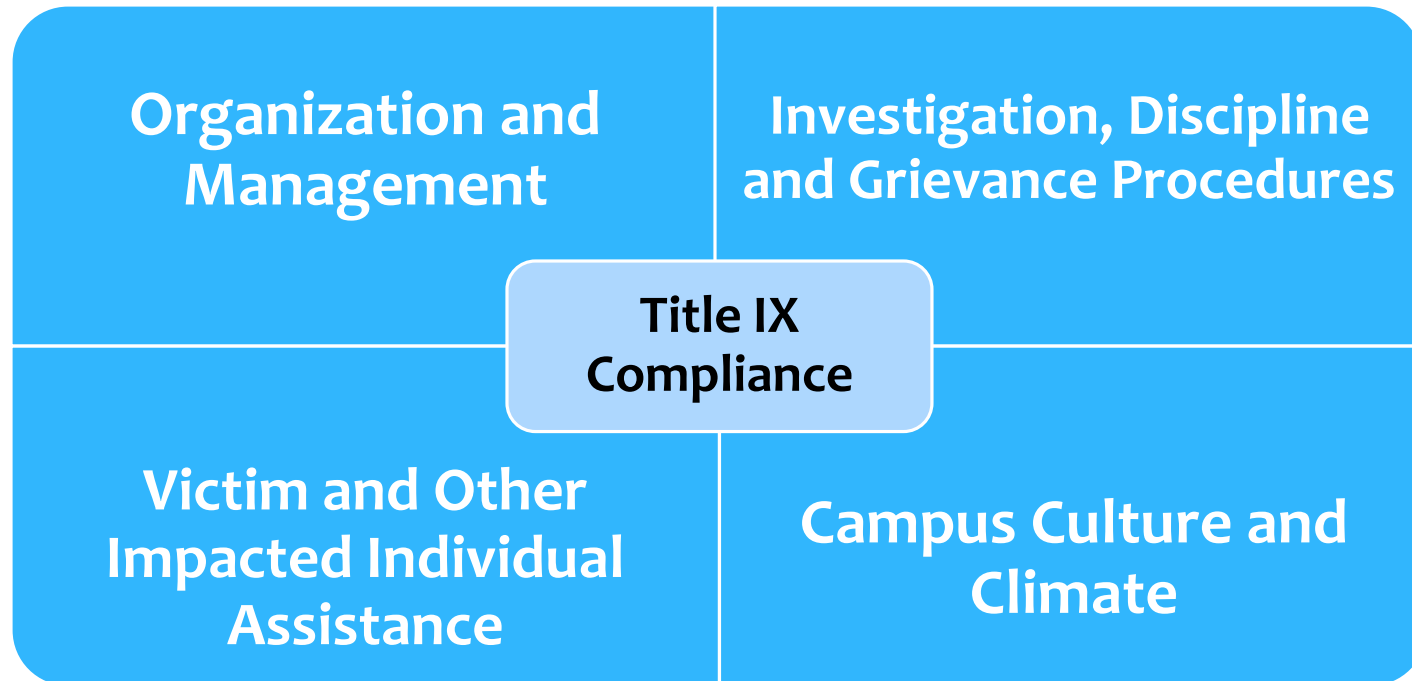
Final Assessment

Remember, there
will be a written
assessment!

We will discuss this
at the end of our
time on Day 3.



A Refresh on the *Four Corners of Title IX* Regulatory Compliance Model



Peter Lake, *The Four Corners of Title IX Regulatory Compliance: A Primer for American Colleges and Universities* (Hierophant Enterprises, Inc. 2017).

How Campuses are Using the *Four Corners Model*...

- * Bentley University
 - * One of the first adopters of the framework
 - * Use the framework as an internal audit tool, an organizing device for campus efforts, and an instructive model in presentations and trainings
- * Brigham Young University
 - * Based a 2017 internal audit report for improving Title IX campus response on the *Four Corners* model
- * University of North Dakota
 - * Has a committee dedicated to each corner (very large institution)

How are the *Four Corners* impacted by the proposed new Title IX regulations announced by the Dept. of Education in November 2018?

Most of the Title IX Changes Fall into Corner 2: Investigation, Discipline and Grievance

Many of the proposed new regs follow the September 2017 interim guidance:

Peter Lake, *'Interim' Guidance on Title IX Creates Confusion, Not Clarity*, Chron. of Higher Educ. (Sept. 24, 2017),

<http://www.chronicle.com/article/Interim-Guidance-on/241282>.

Title IX Updates: Proposed New Regs

- * **NOTABLE COMMENT:** Jerry Falwell letter to Dept. of Education/Betsy DeVos
- * **RECORD SETTING COMMENTS:** Notice and Comment Period—Over 100,000 comments
- * **GAME OF THRONES:** Fate of regulations, whenever and however they drop, uncertain—likely to be tested in court, may face Congressional response.
- * **REGULATIONS IMPLY FUTURE NEW GUIDANCE:** No new guidance, although we might expect to receive some related to new regulations when finalized.
 - * President Trump signs executive orders on legal impact of “guidance” from administrative agencies.
- * **RETREAT OR FORWARD ASSAULT:** Enforcement efforts have not been as numerous or comprehensive; but watch for the potential for enforcement of existing regulations against IHE’s. Notably Clery Act and Safe and Drug Free Schools and Communities Act enforcement.
 - * In Sept. 2019, the U.S. Dept. of Education levied an unprecedented **\$4.5 million Clery Act fine** against Michigan State Univ. after an investigation of the Nasser sexual abuse crimes.

Title IX Updates Continued


- * Congress—Reauthorization of Higher Ed Act/expanding LGBTQ rights?
- * 2020 Campaign— President Trump and several Democratic Contenders.
 - * Example: Joe Biden (VAWA) (prominent in 2011 Title IX regulatory drop, inter alia)
 - * Gun violence in schools etc./Cost and affordability/K-12 vs. Title IX issues (Which issues will dominate national debate? How prominent will safety issues become in light of other political issues?)
- * Courts and the litigation explosion (More to come... Sixth Circuit/California Appellate Court, etc.)
- * #MeToo and similar/related movements: Watch for broader connections with social justice issues.
- * Single sex organizations and the 21st Century

New Research on Sexual Predation and Prevalence

- * Serial sexual predation: “More than 87% of alcohol-involved sexual assault was committed by serial perpetrators. Fraternity men and student athletes were significantly more likely to commit alcohol-involved sexual assault than other men on campus.”
 - * Foubert, J.D., Clark-Taylor, A., & Wall, A. (2019). “Is campus rape primarily a serial or single time problem? Evidence from a multi-campus study.” *Violence Against Women*. DOI: 10.1177/1077801219833820.
- * Prevalence: “One in four” statistic was affirmed by the most recent Association of American Universities survey (October 15, 2019)
 - * Rate of nonconsensual sexual contact by physical force or inability to consent was 26.4% for undergraduate women, 10.8% for graduate and professional women, and 6.9 % for undergraduate men (all stats are slightly higher than 2015 survey results)
- * However, some still believe statistics to be “bogus.” See Emily Yoffe, *Joe Biden's Record on Campus Due Process Has Been Abysmal. Is It a Preview of His Presidency?* Reason (Nov. 12, 2019).

Brief Recap of September 2017 “Interim”/“Substantial Guidance”

- * Rescission of April 4, 2011 DCL and 2014 Q&A
- * 2001, 2006, 2015 guidance, etc. was still *in*
- * Much of the 2011 and 2014 rescinded guidance was based on 2001; some of 2015 relies on 2011, 2014, 2001
- * VAWA/SaVE untouched
- * Confused?
- * Little changed operationally, particularly in light of the Wesley College resolution from 2016/recent litigation (*Doe v. Brandeis Univ.* (D. Mass. 2016))
- * Higher ed was scolded *again*.
- * Choices? No Thanks???
- * Prominent footnotes in 9/22/17 DCL to sources in the field → “Regulatory truth”



We will now discuss the new proposed regulations and keep them in mind for this training. But as of today, they are not yet finalized...regulations are currently at the White House's Office of Management and Budget (OMB). Meetings on the Title IX regulations are scheduled at OMB until the end of January.

Proposed New Title IX Regulations

§ 106.8 Designation of coordinator, dissemination of policy, and adoption of grievance procedures

(a) *Designation of coordinator.* Each recipient must designate at least one employee to coordinate its efforts to comply with its responsibilities under this part. The recipient must notify all its students and employees of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated pursuant to this paragraph.

§ 106.8 Cont'd

(b) Dissemination of policy.

(1) Notification of policy. Each recipient must notify applicants for admission and employment, students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by title IX and this part not to discriminate in such a manner. Such notification must state that the requirement not to discriminate in the education program or activity extends to employment and admission (unless Subpart C does not apply to the recipient) and that inquiries about the application of title IX and this part to such recipient may be referred to the employee designated pursuant to section 106.8(a), to the Assistant Secretary, or both.

§ 106.8 Cont'd

(2) *Publications.*

(i) Each recipient must prominently display a statement of the policy described in paragraph (b)(1) of this section on its website, if any, and in each handbook or catalog that it makes available to persons entitled to a notification under paragraph (b)(1) of this section.

(ii) A recipient must not use or distribute a publication stating that the recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by this part.

§ 106.8 Cont'd

(c) *Adoption of grievance procedures.* A recipient must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part and of formal complaints as defined in section 106.44(e)(5). A recipient must provide notice of the recipient's grievance procedures, including how to report sex discrimination and how to file or respond to a complaint of sex discrimination, to students and employees.

(d) *Application.* The requirements that a recipient adopt a policy and grievance procedures as described in this section apply only to exclusion from participation, denial of benefits, or discrimination on the basis of sex occurring against a person in the United States.

§ 106.12 Educational institutions controlled by religious organizations

(b) *Assurance of exemption.* An educational institution that seeks assurance of the exemption set forth in paragraph (a) of this section may do so by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part that conflict with a specific tenet of the religious organization. An institution is not required to seek assurance from the Assistant Secretary in order to assert such an exemption. In the event the Department notifies an institution that it is under investigation for noncompliance with this part and the institution wishes to assert an exemption set forth in paragraph (a) of this section, the institution may at that time raise its exemption by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization, whether or not the institution had previously sought assurance of the exemption from the Assistant Secretary.

§ 106.44 Recipient's response to sexual harassment.

(a) *General.* 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 in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

§ 106.44 Cont'd

(b) Specific circumstances. (1) A recipient must follow procedures consistent with section 106.45 in response to a formal complaint. If the recipient follows procedures (including implementing any appropriate remedy as required) consistent with section 106.45 in response to a formal complaint, the recipient's response to the formal complaint is not deliberately indifferent and does not otherwise constitute discrimination under title IX.

§ 106.44 Cont'd

(2) When a recipient has actual knowledge regarding reports by multiple complainants of conduct by the same respondent that could constitute sexual harassment, the Title IX Coordinator must file a formal complaint. If the Title IX Coordinator files a formal complaint in response to the reports, and the recipient follows procedures (including implementing any appropriate remedy as required) consistent with section 106.45 in response to the formal complaint, the recipient's response to the reports is not deliberately indifferent.

§ 106.44 Cont'd

(3) For institutions of higher education, a recipient is not deliberately indifferent when in the absence of a formal complaint the recipient offers and implements supportive measures designed to effectively restore or preserve the complainant's access to the recipient's education program or activity. At the time supportive measures are offered, the recipient must in writing inform the complainant of the right to file a formal complaint at that time or a later date, consistent with other provisions of this part.

§ 106.44 Cont'd

(4) If paragraphs (b)(1) through (b)(3) of this section are not implicated, 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, consistent with paragraph (a) of this section, respond in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

§ 106.44 Cont'd

(5) The Assistant Secretary will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient merely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence.

§ 106.44 Cont'd

(c) *Emergency removal.* Nothing in this section precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the health or safety of students or employees justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision shall not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or title II of the Americans with Disabilities Act.

(d) *Administrative leave.* Nothing in this section precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of an investigation.

§ 106.44 Cont'd

(e) *Definitions.* As used in this part:

(1) *Sexual harassment* means:

(i) 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;

(ii) 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; or

(iii) Sexual assault, as defined in 34 CFR 668.46(a).

§ 106.44 Cont'd

(2) *Complainant* means an individual who has reported being the victim of conduct that could constitute sexual harassment, or on whose behalf the Title IX Coordinator has filed a formal complaint. For purposes of this subsection, the person to whom the individual has reported must be the Title IX Coordinator or another person to whom notice of sexual harassment results in the recipient's actual knowledge under section 106.44(e)(6).

(3) *Respondent* means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

§ 106.44 Cont'd

(4) *Supportive measures* means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve access to the recipient's education program or activity, without unreasonably burdening the other party; protect the safety of all parties and the recipient's educational environment; and deter sexual harassment. Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the institution to provide the supportive measures. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

§ 106.44 Cont'd

(5) *Formal complaint* means a document signed by a complainant or by the Title IX Coordinator alleging sexual harassment against a respondent about conduct within its education program or activity and requesting initiation of the recipient's grievance procedures consistent with section 106.45.

§ 106.44 Cont'd

(6) *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, or to a teacher in the elementary and secondary context with regard to student-on-student harassment. Imputation of knowledge based solely on respondeat superior or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is also the respondent. 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 recipient.

§ 106.45 Grievance procedures for formal complaints of sexual harassment.

(a) *Discrimination on the basis of sex.* A recipient's treatment of a complainant in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX. A recipient's treatment of the respondent may also constitute discrimination on the basis of sex under title IX.

(b) *Grievance procedures.* For the purpose of addressing formal complaints of sexual harassment, grievance procedures must comply with the requirements of this section.

§ 106.45 Cont'd

(1) *Basic requirements for grievance procedures.*

Grievance procedures must—

(i) *Treat complainants and respondents equitably.* An equitable resolution for a complainant must include remedies where a finding of responsibility for sexual harassment has been made against the respondent; such remedies must be designed to restore or preserve access to the recipient's education program or activity. An equitable resolution for a respondent must include due process protections before any disciplinary sanctions are imposed;

§ 106.45 Cont'd

(ii) Require an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence – and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness;

§ 106.45 Cont'd

(iii) Require that any individual designated by a recipient as a coordinator, investigator, or decision-maker not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. A recipient must ensure that coordinators, investigators, and decision-makers receive training on both the definition of sexual harassment and how to conduct an investigation and grievance process, including hearings, if applicable, that protect the safety of students, ensure due process protections for all parties, and promote accountability. Any materials used to train coordinators, investigators, or decision-makers may not rely on sex stereotypes and must promote impartial investigations and adjudications of sexual harassment;

§ 106.45 Cont'd

(iv) Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process;

§ 106.45 Cont'd

(v) Include reasonably prompt timeframes for conclusion of the grievance process, including reasonably prompt timeframes for filing and resolving appeals if the recipient offers an appeal, and a process that allows for the temporary delay of the grievance process or the limited extension of timeframes for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include 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 Cont'd

- (vi) Describe the range of possible sanctions and remedies that the recipient may implement following any determination of responsibility;
- (vii) Describe the standard of evidence to be used to determine responsibility;
- (viii) Include the procedures and permissible bases for the complainant and respondent to appeal if the recipient offers an appeal; and
- (ix) Describe the range of supportive measures available to complainants and respondents.

§ 106.45 Cont'd

(2) *Notice of allegations.*

(i) *Notice upon receipt of formal complaint.* Upon receipt of a formal complaint, a recipient must provide the following written notice to the parties who are known:

(A) Notice of the recipient's grievance procedures.

§ 106.45 Cont'd

(B) Notice of the allegations constituting a potential violation of the recipient's code of conduct, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved in the incident, if known, the specific section of the recipient's code of conduct allegedly violated, the conduct allegedly constituting sexual harassment under this part and under the recipient's policy, and the date and location of the alleged incident, if known. The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process. The written notice must also inform the parties that they may request to inspect and review evidence under paragraph (b)(3)(viii) of this section and inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

§ 106.45 Cont'd

(ii) *Ongoing notice requirement.* If, in the course of an investigation, the recipient decides to investigate allegations not included in the notice provided pursuant to paragraph (b)(2)(i)(B) of this section, the recipient must provide notice of the additional allegations to the parties, if known.

§ 106.45 Cont'd

(3) *Investigations of a formal complaint.* The recipient must investigate the allegations in a formal complaint. If the conduct alleged by the complainant would not constitute sexual harassment as defined in section 106.44(e) even if proved or did not occur within the recipient's program or activity, the recipient must dismiss the formal complaint with regard to that conduct. When investigating a formal complaint, a recipient must—

§ 106.45 Cont'd

- (i) Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties;
- (ii) Provide equal opportunity for the parties to present witnesses and other inculpatory and exculpatory evidence;
- (iii) Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;

§ 106.45 Cont'd

(iv) Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, and not limit the choice of advisor or presence for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties;

§ 106.45 Cont'd

(v) Provide to the party whose participation is invited or expected written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings with a party, with sufficient time for the party to prepare to participate;

§ 106.45 Cont'd

(vi) For recipients that are elementary and secondary schools, the recipient's grievance procedure may require a live hearing. With or without a hearing, the decision-maker must, after the recipient has incorporated the parties' responses to the investigative report under paragraph (b)(3)(ix) of this section, ask each party and any witnesses any relevant questions and follow-up questions, including those challenging credibility, that a party wants asked of any party or witnesses. If no hearing is held, the decision-maker must afford each party the opportunity to submit written questions, provide each party with the answers, and allow for additional, limited follow-up questions from each party. With or without a hearing, all such questioning must exclude evidence of the complainant's sexual behavior or predisposition, unless such evidence about the complainant's sexual behavior is offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the evidence concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent. The decision-maker must explain to the party proposing the questions any decision to exclude questions as not relevant;

§ 106.45 Cont'd

(vii) For institutions of higher education, the recipient's grievance procedure must provide for a live hearing. At the hearing, the decision-maker must permit each party to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at a hearing must be conducted by the party's advisor of choice, notwithstanding the discretion of the recipient under subsection 106.45(b)(3)(iv) to otherwise restrict the extent to which advisors may participate in the proceedings. If a party does not have an advisor present at the hearing, the recipient must provide that party an advisor aligned with that party for to conduct cross-examination. All cross-examination must exclude evidence of the complainant's sexual behavior or predisposition, unless such evidence about the complainant's sexual behavior is offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the evidence concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent. At the request of either party, the recipient must provide for cross-examination to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party answering questions. The decision-maker must explain to the party's advisor asking cross-examination questions any decision to exclude questions as not 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;

§ 106.45 Cont'd

(viii) Provide both parties an 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 the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format, such as a file sharing platform, that restricts the parties and advisors from downloading or copying the evidence, and the parties shall have at least ten days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject herein to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination; and

§ 106.45 Cont'd

(ix) Create an investigative report that fairly summarizes relevant evidence and, at least ten days prior to a hearing (if a hearing is required under section 106.45) or other time of determination regarding responsibility, provide a copy of the report to the parties for their review and written response.

§ 106.45 Cont'd

(4) Determination regarding responsibility.

(i) The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. To reach this determination, the recipient must apply either the preponderance of the evidence standard or the clear and convincing evidence standard, although the recipient may employ the preponderance of the evidence standard only if the recipient uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction. The recipient must also apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty.

§ 106.45 Cont'd

- (ii) The written determination must include—
 - (A) Identification of the section(s) of the recipient's code of conduct alleged to have been violated;
 - (B) A description of the procedural steps taken from the receipt of the complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
 - (C) Findings of fact supporting the determination;
 - (D) Conclusions regarding the application of the recipient's policy to the facts;

§ 106.45 Cont'd

(E) A 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 recipient's education program or activity;

(F) The recipient's procedures and permissible bases for the complainant and respondent to appeal, if the recipient offers an appeal.

§ 106.45 Cont'd

(iii) The recipient must provide the written determination to the parties simultaneously. If the recipient does not offer an appeal, the determination regarding responsibility becomes final on the date that the recipient provides the parties with the written determination. If the recipient offers an appeal, the determination regarding responsibility becomes final at either the conclusion of the appeal process, if an appeal is filed, or, if an appeal is not filed, the date on which an appeal would no longer be considered timely;

§ 106.45 Cont'd

(5) *Appeals*. A recipient may choose to offer an appeal. If a recipient offers an appeal, it must allow both parties to appeal. In cases where there has been a finding of responsibility, although a complainant may appeal on the ground that the remedies are not designed to restore or preserve the complainant's access to the recipient's education program or activity, a complainant is not entitled to a particular sanction against the respondent. As to all appeals, the recipient must: (i) notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties; (ii) ensure that the appeal decision-maker is not the same person as any investigator(s) or decision-maker(s) that reached the determination of responsibility; (iii) ensure that the appeal decision-maker complies with the standards set forth in section 106.45(b)(1)(iii); (iv) give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome; (v) issue a written decision describing the result of the appeal and the rationale for the result; and (vi) provide the written decision simultaneously to both parties.

§ 106.45 Cont'd

- (6) *Informal resolution.* At any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient—
- (i) Provides to the parties a written notice disclosing—
 - (A) The allegations;
 - (B) The requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, if any; and
 - (C) Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared; and
 - (ii) Obtains the parties' voluntary, written consent to the informal resolution process.

§ 106.45 Cont'd

(7) *Recordkeeping.*

(i) A recipient must create, make available to the complainant and respondent, and maintain for a period of three years records of--

(A) Each sexual harassment investigation including any determination regarding responsibility, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve access to the recipient's education program or activity;

(B) Any appeal and the result therefrom;

(C) Informal resolution, if any; and

(D) All materials used to train coordinators, investigators, and decision-makers with regard to sexual harassment.

§ 106.45 Cont'd

(ii) A recipient must create and maintain for a period of three years records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient must document the basis for its conclusion that its response was not clearly unreasonable, and 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.

Gray-Space and Questions ☺

- * *Preponderance OR Clear and Convincing*
- * Advisors
- * Cross Examination
- * Mediation
- * “Potted plants”/lawyers/inequity in advisors
- * Single investigator out?
- * Responsible employees?
- * Appeals
- * Managing Bias

Key Takeaways

- * Revisit Corner 2 practices.
 - * Perform due diligence and make record of it.
- * Make sure to offer protective measures to all.
- * Expect more litigation.
- * Ask OCR for clarification.
- * “Fundamental fairness”
- * SCOTUS?
- * Implications of Regulations If Placed Under Title IX—Fee shifting?
- * Stay the course! The mission of Title IX—to *reduce or eliminate barriers to educational opportunity created by sex discrimination*—will endure!

State Law and Case Updates

Trends in State Law

- * Tennessee Free Speech Bill Section 7 (Definitions of sexual harassment and hostile environment)
- * Commonwealth of Virginia/California laws on sexual assault
- * Oregon, Utah and others provide confidentiality for victim advocates
- * Affirmative consent (California)
- * North Carolina and North Dakota require lawyers be allowed to participate in certain conduct hearings
- * Texas Senate Bill 212 (takes effect on 1/1/20 and has specific Title IX reporting requirements for employees— employees can be terminated for failing to report a Title IX-related incident)
- * Regional justice centers?

Causes for Litigation

Why so many court cases against colleges? Lessons learned...

- * “Ambush”
- * Inconsistency of Internal Results
- * Bias and Fairness
- * State law mandates
- * Following Policies?
- * Overly Legalistic Policies and Procedures
- * Relationship to Criminal Justice
- * Loss of Trust—Authenticity and Transparency (Mission Rectification)
- * War Chests

Some Notable Recent Title IX Cases

Doe v. Baum, No. 17-2213 (6th Cir. 2018)

- * Cross-Examination
- * Univ. of Michigan
- * “If a public university has to choose between competing narratives to resolve a case, it must give the accused student an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder.”

Some Notable Recent Title IX Cases

Haidak v. Univ. of Massachusetts Amherst et al. (1st Cir. 2019)

- * Male student accused of sexual misconduct on a study abroad trip. Haidak was ultimately expelled.
- * Plaintiff argued that his due process rights were violated because he was not afforded the opportunity to directly challenge the complainant's allegations via cross-examination. He also argued that his Title IX rights were violated because the process was biased against him.
- * “[W]e have no reason to believe that questioning of a complaining witness by a neutral party is so fundamentally flawed as to create a categorically unacceptable risk of erroneous deprivation. We also take seriously the admonition that student disciplinary proceedings need not mirror common law trials. . . . If we were to insist on a right to party-conducted cross-examination, it would be a short slide to insist on the participation of counsel able to conduct such examination, and at that point the mandated mimicry of a jury-waived trial would be near complete.”
- * Conflicts with 6th Circuit court decisions and proposed Title IX guidance from the Dept. of Education.

Some Notable Recent Title IX Cases

John Doe v. Allee, Cal. App. 2d (Jan. 4, 2019)

- * Cross-Examination
- * Student at the University of Southern California was expelled after an allegation of sexual misconduct.
- * "We hold that when a student accused of sexual misconduct faces severe disciplinary sanctions, and the credibility of witnesses (whether the accusing student, other witnesses, or both) is central to the adjudication of that allegation, fundamental fairness requires, at a minimum, that the university provide a mechanism by which the accused may cross-examine those witnesses, directly or indirectly."

Presiding Judge Thomas Willhite

Some Notable Recent Title IX Cases

John Doe v. Purdue University, et al. (June 2019)

- * U.S. Court of Appeals, 7th Circuit
- * Purdue student was suspended for a year and expelled from the Navy ROTC program after an allegation of sexual misconduct. This prevented Doe from receiving his scholarship and prevented him from pursuing a career in the Navy.
- * He brought claims against Purdue under both the Fourteenth Amendment (due process) and Title IX (gender discrimination).
- * Doe alleged, among other things, he was not able to view the evidence against him, not able to cross examine the complainant, not able to present exculpatory evidence, and that two out of the three hearing panel members had not read the investigative report.
- * The Court of Appeals determined that Doe did have a protected property interest and, viewing the allegations favorably to Doe, that Doe raised issues as to whether campus used a fundamentally unfair process (allegedly Doe was denied seeing the evidence against him, panel members relied on accusations rather than the evidence, and the complainant was found to be more credible than Doe without ever being interviewed). Doe pointed to a Washington Post article “Alcohol Isn’t the Cause of Sexual Assault. Men Are” that was posted on a university website as evidence that he was discriminated against based on his gender as well.

Some Notable Recent Title IX Cases

***Fogel v. Univ. of the Arts, et al*, E.D. Pa., 2019**

- * Erroneous Outcome
- * Professor claims he was “terminated without a hearing after a biased investigation based on allegations that he greeted one colleague at a meeting with a kiss and mistakenly gave another a hotel room key instead of a business card.” Colleen Flaherty, *A Male Professor, Wronged by Title IX?*, Inside Higher Ed (April 4, 2019).
- * “Professor Fogel sues the University for violating Title IX under an ‘erroneous outcome’ theory.”
- * “[P]laintiffs claiming a Title IX violation under an ‘erroneous outcome’ theory ‘must allege particular facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding.’ But the plaintiff must allege more than an erroneous outcome. To survive a motion to dismiss, the plaintiff must also allege ‘particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding.’”
- * Judge denied the university’s motion to dismiss.

SCOTUS Cases Pertaining to LGBTQ Rights: Title VII

Three employment cases currently before the U.S. Supreme Court

- * *Zarda* and *Bostock* cases alleges employment termination due to sexual orientation
- * *Stephens* involves a transgender woman who experienced an adverse employment outcome after coming out as transitioning
- * In all three cases, plaintiffs argue that their firing was a violation of their civil rights.
- * Court will potentially decide the meaning of “sex” for purposes of sex discrimination, resolving disputes in the lower federal courts
- * Cases raise *Title VII* issues and may have future implications for Title IX
- * Will SCOTUS follow the 2nd Circuit in *Zarda*?
 - * “Because one cannot fully define a person’s sexual orientation without identifying his or her sex, sexual orientation is a function of sex. Indeed sexual orientation is doubly delineated by sex because it is a function of both a person’s sex and the sex of those to whom he or she is attracted. **Logically, because sexual orientation is a function of sex and sex is a protected characteristic under Title VII, it follows that sexual orientation is also protected.**”

Harvard Finals Clubs

- * Harvard sought to penalize same-sex sororities, fraternities and finals clubs in 2016
 - * Harvard severed ties with Finals Club groups in the 1980s because of their refusal to admit women. Since that time, few all-women groups were formed.
 - * Surveys suggested clubs were linked to higher prevalence of sexual misconduct.
- * Harvard was sued twice in different venues in 2018
- * Plaintiffs claim banning these clubs is a violation of Title IX and associational rights. Some say women's groups will be disproportionately affected.
- * Now, the College will penalize extracurricular groups who have leaders associated with any Unrecognized Single-Gender Social Organization (USGSO). Newly enacted campus policy bans undergraduate members of any single-gender social clubs from holding RSO leadership position or captaining an athletic team.
 - * “Student Organizations who are found to have elected a member of a USGSO to a leadership position will be put through the Student Organization Discipline process and that student will be removed from the leadership position.” Narayanan & Zwickel, *Harvard To Discipline Student Groups Led by Members of Unrecognized Social Organizations*, The Harvard Crimson (Oct. 2, 2019).

Hazing Death of Max Gruver at LSU

- * 2017 death of an 18-year pledge after hazing involving alcohol
- * Phi Delta Theta fraternity (now banned from LSU until 2033)
- * Ten fraternity members were charged criminally
- * Parents of decedent brought a Title IX claim against LSU
- * Parents allege that LSU did not treat hazing as aggressively with the fraternities as it did with the sororities
- * Title IX suit survived the motion to dismiss in July 2019
- * Watch the Title IX case carefully....

Hazing Death of Max Gruver at LSU Continued

- * “Gruver’s parents filed a lawsuit in federal court Thursday alleging that the university’s failure to stop the hazing was ‘driven by a broken model of self-governance and outdated gender stereotypes about young men engaging in masculine rites of passage,’ which violates Title IX of the Education Amendments of 1972...” Jeremy Bauer-Wolf, Family of Dead Pledge Sues LSU, Inside Higher Ed (Aug. 17, 2018).
- * “The family alleges that the university treats hazing rituals among fraternities less seriously than it does those among sororities.”
- * Family is suing for \$25 million in damages.

Resolution Agreement Spotlight

UC Berkeley (2018)

- * 4-year investigation
- * Investigation was opened after 31 current and former students filed two complaint (one under Clery, one under Title IX)
- * Insufficient Notice of Nondiscrimination at Certain Times
- * Policy Recommendations
 - * Sexual harassment and violence training for graduate students.
- * Development of the position of “special faculty adviser to the chancellor on sexual violence/sexual harassment”
- * Prompt resolution: Faculty process
- * Reinforces off-campus provisions of 2017 guidance

Resolution Agreement Spotlight

Michigan State Univ (2019)

- * 54-page *Letter of Findings* and 10-page *Voluntary Resolution Agreement* between MSU and U.S. Dept. of Education, Office for Civil Rights
https://msu.edu/ourcommitment/_assets/documents/OCR-MSU-Agreement-2019.pdf
- * 19-page *Voluntary Resolution Agreement* between MSU, MSU Healthteam, and MSU Health Care, Inc. and U.S. Dept. of Health and Human Services, Office for Civil Rights
<https://www.hhs.gov/sites/default/files/vra-between-msu-and-ocr.pdf>
- * OCR investigation focused on Strampel (former Dean) and Larry Nasser/Sports Medicine program.
- * “MSU agreed to revise non-discrimination and sexual misconduct policies to clarify Title IX’s and Section 1557’s prohibitions on sex discrimination.”
- * “They also agreed to improve their investigative and complaint resolution processes and to designate an official to coordinate the response to those complaints.”
- * “For medical practitioners, the agreement includes a chaperone policy, which requires an authorized medical staff member to be present at sensitive medical examinations. Patients can also request chaperones according to sex.”
- * “The agreement also includes multiple measures to maximize patient privacy when a sensitive examination takes place. Practitioners also agreed to conduct all-staff training and to provide bi-annual reports to OCR during the three-year term of the agreement.”

Preparing for What Lies Ahead... Continued

- * Expect dynamism as Title IX develops. Tensions between Congress, courts, chief executive and federal regulators, and the states.
- * Training is more imperative than ever, as is continuing education.
- * Budget for disruption and dynamism: May need new staff, new training in new, additional services, including counseling and counsel.
- * Authenticity and transparency vs. FERPA.
- * The future lies with prevention, pro-vention, and science-based intervention strategies.
- * Intersectionality/Multidimensionality will rise/Social justice advocacy in many forms including men's rights issues.
- * "Edu-pocalypse"? Declining enrollments, business and legal pressures of all sorts; loss of trust in the industry; business models under stress; "referees" and loss of internal control, etc.

Corner 1 Issues

Staffing and Supervisory Issues

- * Where is the Title IX coordinator on the org chart?
- * To whom(s) does the Title IX coordinator report?
 - * 2015 guidance
- * Full support?
- * Independence?
- * Relationship with counsel (GC, others?)
- * Do deputies have a direct report, to the Title IX coordinator?
- * Large system with many campuses (SUNY)
- * Internal/External investigators—Role(s)?
- * Managing responsible employees... *Table-Top Exercise!*

Table-Top Exercise #1

Dr. Summit, a faculty member in the English department, calls you and says that a student disclosed a rape to her and Dr. Summit is looking for “the best counseling options” for the student. Dr. Summit promised the student confidentiality even though she is a responsible employee. Dr. Summit refuses to give you the student’s name and says, “Well, you never properly trained me on my reporting duties. Students have come to me for years with their personal issues and I have always been able to help them in my own way. I’ll never tell you this student’s name.”

Training and Due Diligence: Faculty, Staff and Students

- * Population-level: Specific Populations
- * Responsible Employee training
- * Investigator and Decision-Maker training
- * Trauma-informed
- * Credibility assessment
- * Forensics
- * Cross-training on other EO metrics
- * Keep training records!
- * Turnover, Burnout, (Re)Traumatization
- * Improper interference?
- * What products do you use?

See the
Title IX Primer,
pages 86 – 92.

Table Top Exercise #2

HR purchased a pricey Title IX training video package for students, staff and faculty. After watching the video for students, the president of one of the fraternities on campus emails you stating that “all the perpetrators in the video are men, all the homosexual people are men, and men are made to look like violent, sex-crazed idiots.” The fraternity members think the video itself violates Title IX.

Interfaces with Law Enforcement, MOUs and the Clery Act

- * Do you have an MOU with local law enforcement?
- * Training for campus law enforcement/security?
- * How do you coordinate Title IX and Clery Act mandates?
 - * ASR compilation?
 - * CSA vs. RE roles?
- * Can the Title IX Coordinator alone make a decision/threat assessment determination about Emergency Notifications/Timely Warnings?
 - * What if the reporting party asks for confidence?
 - * How does a Title IX Coordinator coordinate with law enforcement?
- * How do Title IX matters differ (if at all) from specific VAWA/SaVE violations?
- * **Jane and Darrian Case Study**

Managing Public and Internal Narratives

- * Court of public opinion
- * Often cannot correct rumors, falsities, etc. because of privacy/FERPA/litigation.
- * Firewalls/Wallpaper/Candor
- * Process for construction/review of narratives
- * How does spotting potential narrative challenges work on your campus?
- * Role of ERM/Risk Management/Communications