



# **Title IX: The Past, Present, and Future**

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# Overview

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**Past – Historical Perspective on Title IX**

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**Present – Title IX Regulations and UWS Code and Policy**

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**Process Issues – Tips and Tools**

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**Title IX Case Update**

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**Future – New Rules**

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**Questions/Discussion**

# Past - Historical Perspective Title IX

- It was about athletics - right? No, it was a follow-up to the Civil Rights Act of 1964
- No protection based on sex in education – had Title VII employment that protected sex – Title VI (1964) education only protected based on race, color, and national origin
- Why athletics then? Congressman John tower proposed an amendment to Title IX that would have exempted athletic departments – REJECTED
- Misperception it was about athletics – however it is best known for its impact on high school and collegiate athletics

**TITLE IX'S  
DRAMATIC RISE**

Fewer than 300,000 females competed in athletics prior to Title IX in 1971-72. Today, more than 3.5 million females compete in 25-plus sports nationwide.

**TITLE IX<sup>at</sup> 50**

*Celebrating and Growing Opportunities*

Image Credit: nfhs.org

# Past – Historical Perspective Title IX

## History of Title IX Guidance

- Clinton Administration
  - 1997 – U.S. Department Education guidance on sexual harassment
- Obama Administration
  - 2011 – First Dear Colleague Letter
  - 2014 – Q&A Document issued
- Trump Administration
  - 2017 – Dear Colleague Letters rescinded
  - 2018 – Notice of Proposed Rule-making
  - 2020 – Final Rule issued

## Present - Title IX Regulations and UWS Code and Policy

- Released on May 9, 2020 and effective August 14, 2020
- UW System has updated the Wisconsin Administrative Code and RPD 14-2 to align with the new Title IX Regulations
  - UWS Chapter 4:  
[https://docs.legis.wisconsin.gov/code/admin\\_code/uws/4](https://docs.legis.wisconsin.gov/code/admin_code/uws/4)
  - UWS Chapter 7:  
[https://docs.legis.wisconsin.gov/code/admin\\_code/uws/7](https://docs.legis.wisconsin.gov/code/admin_code/uws/7)
  - UWS Chapter 11:  
[https://docs.legis.wisconsin.gov/code/admin\\_code/uws/11](https://docs.legis.wisconsin.gov/code/admin_code/uws/11)
  - UWS Chapter 17:  
[https://docs.legis.wisconsin.gov/code/admin\\_code/uws/17](https://docs.legis.wisconsin.gov/code/admin_code/uws/17)
  - RPD 14-2:  
<https://www.wisconsin.edu/regents/policies/sexual-violence-and-sexual-harassment/>
- New Regulations can be found at:  
<https://www.federalregister.gov/documents/2020/05/19/2020-10512/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>



# Present – Title IX Regulations and UWS Code and Policy

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- January 15, 2021 – OCR New Resource to Help Education Institutions Implement the Title IX Final Regulations
  - Part 1:  
<https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-part1-20210115.pdf>
  - Part 2:  
<https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-part2-20210115.pdf>
- June 22, 2021 – Notice of Interpretation – Enforcement of Title IX with Respect to Discrimination Based on Sexual Orientation and Gender Identity in light of Bostock v. Clayton County
  - <https://www.govinfo.gov/content/pkg/FR-2021-06-22/pdf/2021-13058.pdf>
- July 26, 2021 – Questions and Answers on the Title IX Regulations on Sexual Harassment (2021)
  - <https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>
- August 24, 2021 – OCR Enforcement of Title IX Regulation Limiting Use of Statements by Parties & Witnesses Not Subject to Cross-Examination at Live Hearing
  - <https://www2.ed.gov/about/offices/list/ocr/docs/202108-titleix-VRLC.pdf>

# Process Issues – Tips and Tools

## \*New Definitions\*

### Sexual Exploitation:

- means when an individual attempts, takes or threatens to take, nonconsensual sexual advantage of another person. Examples include
  - a) Engaging in the following conduct without the knowledge and consent of all participants:
    1. Observing, recording, or photographing private body parts or sexual activity of the complainant .
    2. Allowing another person to observe, record, or photograph sexual activity or private body parts of the complainant,
    3. Otherwise distributing recordings, photographs, or other images of the sexual activity or private body parts of the complainant.
  - b) Masturbating, touching one's genitals, or exposing one's genitals in the complainant's presence without the consent of the complainant, or inducing the complainant to do the same.
  - c) Dishonesty or deception regarding the use of contraceptives or condoms during the course of sexual activity.
  - d) Inducing incapacitation through deception for the purpose of making the complainant vulnerable to non-consensual sexual activity.
  - e) Coercing the complainant to engage in sexual activity for money or anything of value.
  - f) Threatening distribution of any of the following, to coerce someone into sexual activity or providing money or anything of value:
    1. Photos, videos, or recordings depicting private body parts or sexual activity of the complainant.
    2. Other information of a sexual nature involving the complainant, including sexual history or sexual orientation.

# Process Issues – Tips and Tools

## Sexual Harassment:

- conduct on the basis of sex that satisfies any of the following:
  - Quid Pro Quo (Employee, Staff, and Faculty)
    - An employee of the institution conditions the provision of an aid, benefit, or service of the institution directly or indirectly on an individual's participation in unwelcome sexual conduct; or
    - An employee of the institution either explicitly or implicitly conditions the provision of an academic, professional, or employment-related opportunity, aid, benefit, or service on an individual's participation in unwelcome sexual conduct
  - Hostile Environment (Title IX vs. Non-Title IX)
    - Unwelcome conduct of a sexual nature directed towards a student, an employee, or a person participating in a program or activity of the university that, when using the legal "reasonable person" standard is so severe, pervasive, and objectively offensive that it effectively denies the person equal access to the institution's education program or activity; or
    - Unwelcome conduct of a sexual nature directed towards an individual that, when using the legal "reasonable person" standard is so severe or pervasive and objectively offensive that it has the purpose or effect unreasonably interfering with an individual's academic or work performance or participation in an university sponsored or supported activity.

# Process Issues – Tips and Tools

Title IX	Non-Title IX
Formal Complaint + 4 Elements: <ol style="list-style-type: none"> <li>1. Alleged conduct on the basis of sex and meets definitions</li> <li>2. Occurred with a university education program or activity</li> <li>3. Occurred in the US</li> <li>4. Complainant was attempting to participate in the university’s education program or activity at filing</li> </ol>	Complaint of sexual misconduct
Dismissal with appeal rights <ul style="list-style-type: none"> <li>• May dismiss:               <ul style="list-style-type: none"> <li>• Complainant withdraws in writing</li> <li>• Respondent no longer enrolled</li> <li>• Circumstances prevent gathering specific evidence</li> </ul> </li> </ul>	N/A
Process is the essentially the same for faculty/staff/students until decisionmaker/discipline/appeal	Process is the same as Title IX for students – different for faculty/staff

## Tips:

1. Complainants are not required to be students
2. Dismissal requires reasoning and notice to both parties and explanation of appeal rights – make sure to have a process in place
3. Notice – additional complainants/charges require an amended notice

# Process Issues – Tips and Tools

## Advisors

- UW System will provide complainants and respondents an advisor who is an attorney at no cost to the campus
- Requests should be made to Office of Compliance and Integrity – we issue an engagement letter and handle all billing
- Campuses may have their own trained advisor pool
- A free attorney advisor should always be provided to the Complainant or Respondent if the other rejects a free non-attorney advisor and hires their own attorney

# Process Issues – Tips and Tools

## • Investigation

- Investigators are not to make findings – if you have them in the report suggest removing prior to hearing
- Both parties have the chance to review and comment
- Must contain all evidence gathered – relevant or not

## • Hearing Officers/Committees

- UW System will provide ALJs complainants and respondents an advisor who is an attorney at no cost to the campus
- Requests should be made using a form developed for student cases – other cases and complex matters contact the Office of Compliance and Integrity to coordinate with DHA
- Campuses may use their own committees – make sure to review shared governance documents to understand use of ALJs
  - ALJ as hearing officer and decisionmaker
  - ALJ as hearing officer and committee input
- ALJs will schedule a pre-hearing conference with parties, counsel, and university representatives
  - Shortly after the pre-hearing conference a hearing will be scheduled

# Process Issues – Tips and Tools

## Role of OCI

- Assist with regulatory, code, policy compliance
- Case consultation
- Investigations
- Advisor Assignment
- ALJ Assistance

## Role of UW System OGC

- Case consultation - if your campus has an OGC please consult with them
- Please contact UW System OGC or your OGC whenever the campus considers suspension or expulsion as a sanction
- OGC will review investigation reports as requested
- If the Respondent has an attorney, OGC will present the case to the ALJ
- If the campus does not use an ALJ, OGC will advise the decisionmaker, with another attorney if necessary

# Case Updates



## Hall v. Millersville University (1/11/2022)

- 3<sup>rd</sup> Circuit -  
<https://www.jdsupra.com/legalnews/third-circuit-rules-universities-may-1942932/>
- Held – Colleges and universities may be liable for damages under Title IX for deliberate indifference to known sexual harassment by nonstudent guests
- Facts – Freshman murdered in her dorm room by high school boyfriend who was not a student. Multiple incidents of interpersonal violence occurred on campus, and it was not reported to the Title IX Coordinator. In addition, a police officer failed to file a report.
- Ruled – Millersville had sufficient notice and was deliberately indifferent.





# Case Updates

## Brown v. State of Arizona et.al (1/25/22)

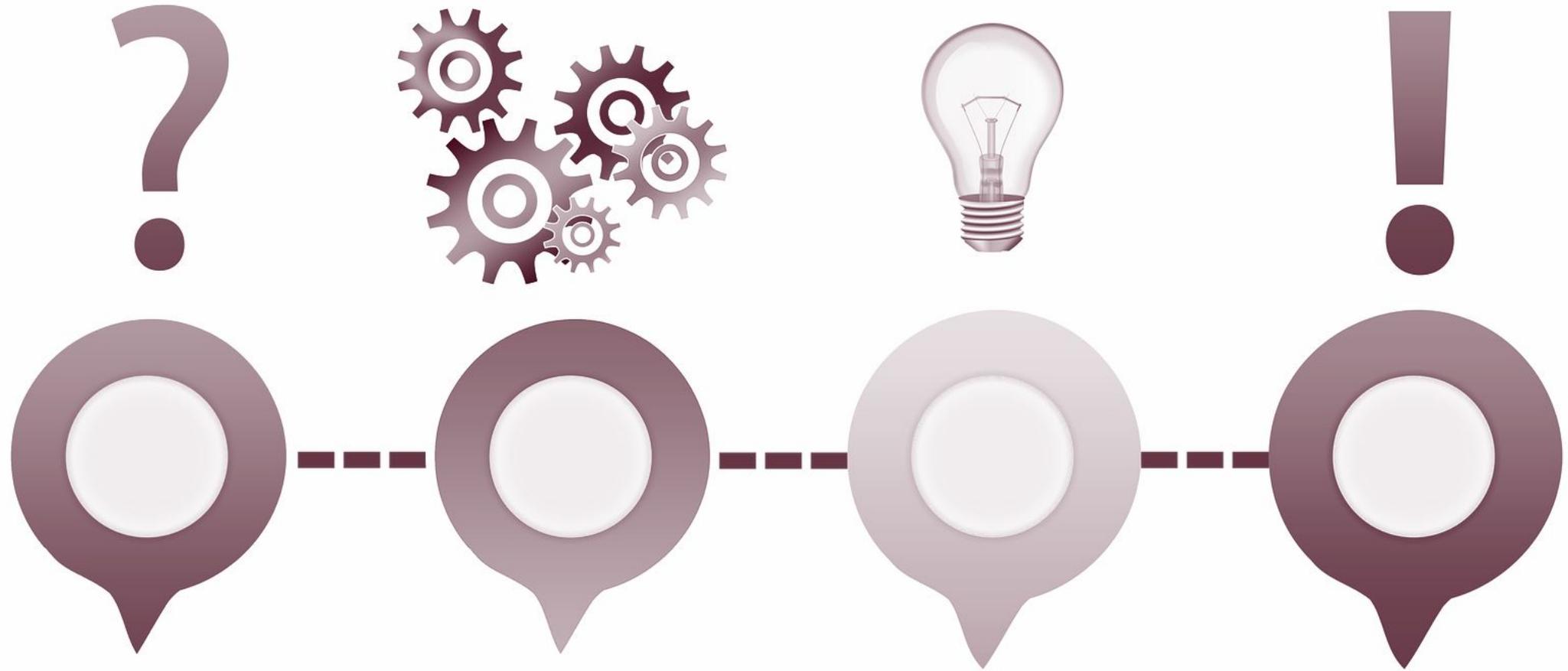
- 9<sup>th</sup> Cir. - <https://www.jdsupra.com/legalnews/ninth-circuit-rules-university-not-2567567/>
- Held – University is not liable for an assault that occurred off campus even though the university allegedly had notice of two prior allegations of misconduct against two other women.
- Facts – Assault occurred off-campus in an apartment that was paid for by football scholarship money. The two prior reports of assault – the Complainants did not want to move forward in the Title IX process. Brown alleged the university had substantial control as he was an athlete and the university failed to act on the prior assaults (Davis Test: control over conduct AND context)
- Ruled – University did not have substantial control over the Respondent at the off-campus apartment.



# Future – New Rules

- April 6, 2021 – Secretary of Education Cardona announced a review of Title IX rules and issuance of new rules in 2022
- December 10, 2021 – Office of Civil Rights announced that a Notice of Proposed Rulemaking will be forthcoming by April 2022
- March 30, 2022 – Washington Post Article – Draft text included “discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex-related characteristics (including intersex traits), pregnancy or related conditions, sexual orientation, and gender identity -  
<https://www.washingtonpost.com/education/2022/03/30/transgender-discrimination-title-ix-rule-students/>
- April 2022 – Waiting....





**Questions/Discussion**