

2020
Regs
Rapid
Response

R³

2020 Title IX Regs Overview:

Commitment Beyond Compliance for
Colleges and Universities

2020
Regs
Rapid
Response



Your Faculty



Brett A. Sokolow, J.D.

President, ATIXA
Chair of the Board of Directors, TNG



W. Scott Lewis, J.D.

Partner, TNG
Advisory Board, ATIXA

Your Faculty



Kim Pacelli, M.Ed., J.D.

Partner, TNG
Advisory Board, ATIXA



Sandra K. Schuster, J.D.

Partner, TNG
Advisory Board, ATIXA



Daniel C. Swinton, J.D., Ed.D.

President, TNG
Vice President, ATIXA

Current State

- **Withdrawn:**
 - 2011 Dear Colleague Letter (DCL)
 - 2014 Q&A on Title IX and Sexual Violence
 - 2016 DCL on Transgender Students
- **Still in effect:**
 - 1975 Regs, as amended
 - 2001 OCR Revised Sexual Harassment Guidance (has force and effect of law; conflicts with 2020 Regs)
 - 2003 DCL on Title IX and Free Speech
 - 2010 DCL on Harassment and Bullying
 - 2013 DCL on Pregnant and Parenting Students
 - 2015 DCL on the role of Title IX Coordinators
 - 2017 Q&A on Campus Sexual Misconduct issued as interim guidance, still apparently in place

Trumping Title IX

- 2020 Title IX Regulations
- Issued May 6th, 2020 (Publication date May 19th, 2020)
- Effective and enforceable August 14th, 2020, which is 85 days from today
 - Amend the Code of Federal Regs. and have force and effect of law
 - Some provisions already mandated by due process case law in some jurisdictions
 - Intervening variables (litigation and election) may impact enforcement in the shorter or longer term
 - Lawsuits against Regs anticipated from:
 - SSAIS, ACLU, NWLC, etc.
- Regulations are significant, legalistic, surprisingly prescriptive, very due-process heavy, and go well beyond what any court has required under 5th/14th Amendment case law.

Regulations have the Force and Effect of Law

- **Laws** passed by Congress (e.g.: Title IX) – Enforceable by courts/OCR
- **Federal regulations** promulgated under Title IX have **force and effect of law**, meaning they are enforceable by OCR
- What effect will these regulations have on courts?
 - Controlling weight (substantive/legislative)?
 - Persuasive weight (procedural/interpretive)?
 - Could form the basis of Section 1983 actions (personal liability)
 - Could constitute deliberate indifference (?) or disparate treatment
- OCR “regulatory guidance” or “sub-regulatory guidance”
 - Influential but not strictly enforceable (e.g., 2011 and 2015 DCLs)
- State and local pre-emption issues – 2020 regs pre-empt state law

Commitment Beyond Compliance

- Industry standards = the floor. Best practices = the ceiling.
- Statutes, case law, and federal regulations set the floor.
- Some states have laws that exceed federal requirements and do not conflict with 2020 Regs. Where they do conflict, Regs control.
- Aiming for the floor = doing the bare minimum
 - Will continue the cycle of inequity and unfairness; Activists won't stand for it
- Civil rights issues demand more than the bare minimum
- Effect of new “not deliberately indifferent” OCR standard is to institutionalize deference, rather than encourage excellence.
 - OCR: Congrats, you didn't completely ignore invidious discrimination.

Regulatory Changes

- Grievance Procedures
- Jurisdiction
- Notice to Institution / Notice to Parties
- Definition of Sexual Harassment
- Supportive Measures
- Formal Investigation and Hearing
- Due Process Elements

Shifting Terminology

ATIXA IS SHIFTING ITS TERMINOLOGY TO MATCH THE NEW REGS

- You = Recipient
- Various titles = Title IX Coordinator
- Reporting Party = Complainant
- Responding Party = Respondent
- Resolution = Grievance Process
- ATIXA model policy offenses NCSC/NCSI = sexual assault
- Intimate Partner Violence = Dating and domestic violence

AND OCR DEFINITIONS OF THESE OFFENSES MUST BE ADOPTED:

- Including OCR definition of Sexual Harassment, Clery Act definition of sexual assault, and VAWA definitions of DV/DV and stalking.
- How will recipients exceed the floor OCR is setting with these terms/definitions?

Grievance Procedures

- Must include:
 - Presumption that responding party is not responsible until determination is reached
 - “Reasonably prompt” timeframes
 - Requirement to set specific timelines for major stages of the grievance process now gone
 - Range of possible sanctions and remedies (mirrors Clery Act mandate)
 - Description of standard of evidence
 - Bases and procedures for appeal
 - Appeal now required, equitably, on three grounds
 - Range of supportive measures available to all parties
 - Note shift from “interim measures” terminology

Promptness

- Reasonably prompt timeframes for the conclusion of the grievance process, including reasonably prompt timeframes for filing and resolving appeals
- Concurrent law enforcement investigation does **not** relieve the burden of the school to investigate
- Temporary delays for “good cause” and with written notice of the delay to parties
 - Complexity of the investigation
 - Concurrent law enforcement investigation with time-dependent release of evidence
 - Delays for administrative needs are insufficient

Jurisdictional Issues

- Emphasizes the *Davis* standard
 - Control over the harasser and the context of the harassment
 - “education program or activity” means...
 - locations, events, or circumstances under substantial control
 - any building owned or controlled by an officially recognized student organization
- Regulations specify “harassment...against a person in the United States”
 - Off-campus conduct, study abroad programs, or school-sponsored international trips – “nothing in these final regulations would prevent...”

Jurisdictional Issues

- The definition of sexual harassment arguably covers the in-program effects of out-of-program misconduct (though not the misconduct itself)
- At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed
 - OCR adopts in the discussion a fairly broad definition of what could constitute attempting to participate

“Deliberate Indifference” Standard

- A recipient with **actual knowledge** of sexual harassment in an education program or activity of a recipient in the United States must respond in a manner that is **not deliberately indifferent**
- Mandatory dismissal
 - Does not constitute sexual harassment (§ 106.30)
 - Does not fall within jurisdiction
 - Program or activity inside the United States
 - Complainant participating in or attempting to participate in ed program
- Does not preclude action under another policy (General Non-Discrimination Policy, conduct code, etc.)

- Distinct procedural steps - **actual knowledge** and **formal complaint**
 - Actual knowledge = notice of sexual harassment [or allegations] to TIXC
 - Formal complaint = document filed by a complainant or signed by TIXC alleging sexual harassment against a respondent and requesting investigation
 - TIXC is not party when signing formal complaint
- Constructive notice/respondent superior – insufficient under TIX, but can be acted upon discretionarily by a recipient
- **Actual knowledge** triggers the obligation to offer supportive measures, explain grievance process
- **Formal complaint** triggers the obligation to investigate
- Multiple reports mandate for TIXC to file complaint – provision removed from final regs

“Appropriate School Officials”

- Shift in “Responsible Employee” designations
- Previous definition
 - Who has the authority to take action to redress the harassment; or
 - Who has the duty to report harassment or other types of misconduct to appropriate officials; or
 - A student could reasonably believe has this authority or responsibility
- New definition
 - Title IX Coordinator
 - Any official of the recipient who has authority to institute corrective measures on behalf of the recipient
 - Any employee of an elementary and secondary school

“Appropriate School Officials”

- Change tracks the *Davis* standard for actual notice
- Therefore, a report must go to Title IX Coordinator or any official who has the authority to institute corrective measures
 - Most faculty in higher education **do not** have sufficient authority
 - Knowledge by employee who is harasser does not constitute actual knowledge by employer/recipient
- Broad implications for K-12 employees
- Restricts OCR enforcement mandate for responsible employees, but IHEs have discretion to keep current policies or define a broader mandated reporter requirement

Definition of Sexual Harassment

- Sexual Harassment is conduct on the basis of sex meeting one of the following conditions:
 - 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 determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
 - "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

Neutrality, Conflict of Interest, Objectivity

- Grievance process must treat parties “equitably”
 - Must be designed to restore or preserve access to education programs
 - Must include enhanced due process protections before disciplinary sanctions are imposed
- Prohibits conflict-of-interest or bias with coordinators, investigators, and decision-makers against parties generally or against an individual party
- All relevant evidence obtained must be **objectively** evaluated
- Mandates training on appropriate investigation, hearing, evidence, credibility, bias, conflict of interest

Supportive Measures

- Previously referred to by OCR as “interim measures”
- Non-disciplinary, non-punitive individualized services for all parties
- Must not unreasonably burden parties, protect the safety of parties and educational environment, and deter harassment
- Must be offered to complainant upon notice of harassment
- Must be available before, after, or in lieu of formal complaint
- 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 campus, etc.

Emergency Removal

- May remove a respondent from a recipient's education program or activity on an emergency basis, provided that the school:
 - Undertakes an individualized safety and risk analysis,
 - Determines that an immediate threat to the *physical* health or safety of students or employees justifies removal, and
 - Provides the responding party with notice and an opportunity to challenge the decision immediately following the removal
- May place a non-student employee respondent on administrative leave during the pendency of an investigation under current procedures for doing so

Notice to Parties

- Upon receipt of formal complaint, must provide written notice to the parties:
 - Relevant grievance procedures
 - Allegations with sufficient details: identity of parties, implicated policies, date, location if known
 - Statement that the respondent is presumed not responsible
 - Parties may request to inspect and review relevant evidence
 - Sufficient time to prepare a response
- Ongoing notice
 - Any reasonable delay for good cause
 - Any additional allegations
 - All hearings, interviews, and meetings requiring attendance with sufficient time to prepare

Advisor of Choice

- Advisor can be anyone – no restrictions in proposed regulations (though the advisor has a choice in the matter)
- Must allow advisor to be present at all meetings, interviews, hearings
 - May not restrict who may serve as advisor
 - May restrict advisor participation as long as applied equally to all parties
- If a party does not have an advisor to conduct cross-examination at hearing, the IHE must provide one
 - No fee or charge
 - Advisor of recipient's choice
 - May be an attorney
 - Can't be "fired" by party, but can be nullified by non-cooperation

Burden of Proof on School to Gather Evidence

- Procedures should clearly articulate that the burden of proof and burden of gathering evidence rests with the school, not the parties
 - So it's not required that a respondent prove welcomeness or consent, the recipient must prove unwelcomeness or non-consent
- “Sufficient to reach a determination”
- Equal opportunity to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence
- Evidence collected by law enforcement *or any other source*
- Contracted/outsourced investigators do not absolve the school of responsibility for this provision

Party Access to Evidence/Report

- Regulations mandate creation of an investigation report
 - Report fairly summarizes all relevant evidence
 - What should go into a report? See our recent blog on this topic.
- Prior to the completion of the report, all evidence directly related to allegations must be provided to parties
 - Parties must have at least 10 days to review and submit written responses prior to finalizing investigation report
 - Parties must receive finalized report to review and submit written responses 10 days prior to hearing
 - Essential to develop a clear protocol and workflow for these steps

Live Hearing/Questioning

- Mandated live hearing for higher education
- Parties and witnesses must attend hearing and submit to live, advisor-led cross-examination
 - Otherwise **all statements** submitted by absent party must be excluded
- Hearing administrator may not be Title IX Coordinator, the investigator, or the appeals officer
- Provisions for separate rooms, video-based hearing
 - Must be able to clearly hear and see other parties

Live Hearing/Questioning

- **Must allow live cross-examination** to be conducted exclusively by each party's advisor
 - Verbal, direct, in real time
- Each party must be permitted to ask the other party and all witnesses all relevant questions and follow-up questions
 - Including questions challenging credibility
- Each question must be cleared by hearing administrator after being posed
- Questions deemed irrelevant may be excluded with rationale provided (other bases for exclusion allowed? options other than exclusion?)
- Must exclude complainant's sexual disposition or prior sexual behavior unless specifically relevant

Due Process: Evidence

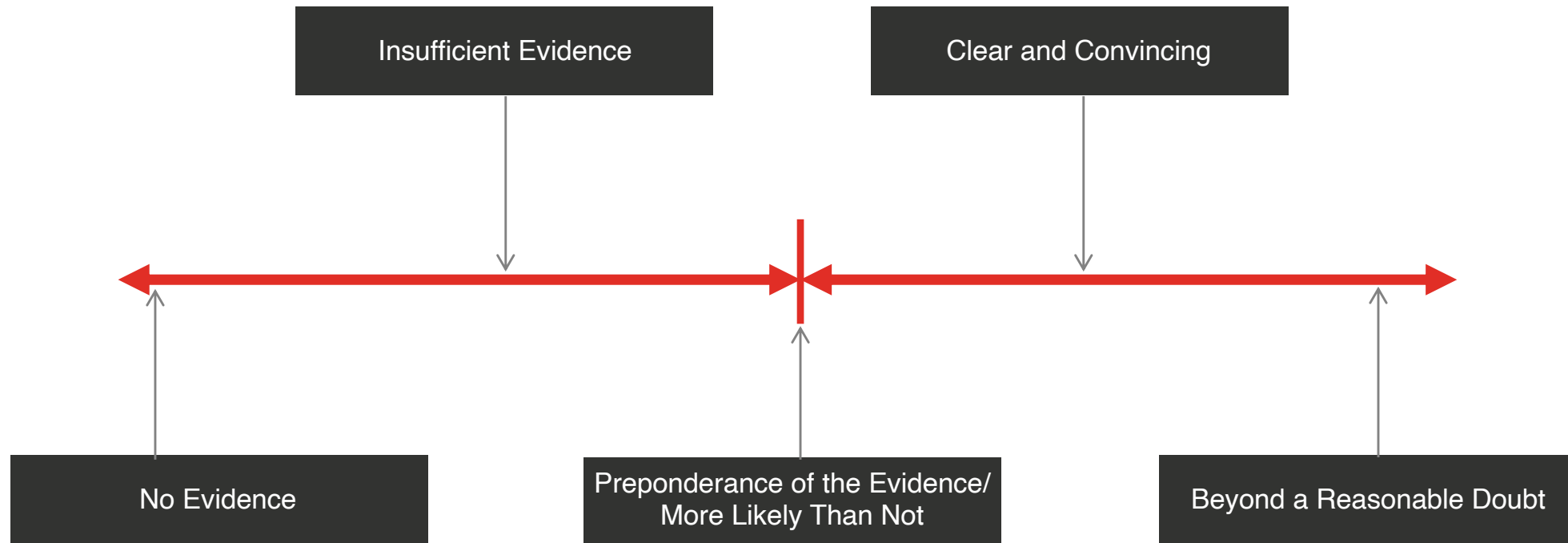
- All relevant and reasonably available evidence must be considered – inculpatory and exculpatory
- No restrictions on discussing case or gathering evidence
- Equal opportunity to:
 - Present witnesses
 - Present evidence
 - Inspect all evidence, including evidence not used to support determination
- No limits on types/amount of evidence that may be offered, except must be relevant and respect “rape shield” provision
- Includes all evidence directly related to the investigation, even evidence that determination does not, or will not, rely upon

Standard of Proof

- Current industry standard is preponderance of the evidence
- OCR says recipients must now apply either the preponderance of the evidence standard or the clear and convincing evidence standard
- Standard of evidence must be consistent for all formal complaints of sexual harassment, regardless of policy or underlying statutory authority
- Must also apply the same standard of evidence for complaints against students as for complaints against employees, including faculty

Understanding Evidence Thresholds

EVIDENTIARY STANDARDS



Written Determinations

- Required elements for written determinations:
 - Allegations potentially constituting sexual harassment (§ 106.30)
 - All procedural steps taken
 - Findings of fact supporting the determination
 - A determination on each allegation regarding responsibility, any disciplinary sanctions, remedies
 - The recipient's procedures and permissible bases for the complainant and respondent to appeal.
 - Document how recipient's response was not deliberately indifferent

Appeals

- Must offer equitable appeal based on determination or dismissal of any allegations
- All parties receive notification of any appeal
- Opportunity for all parties to support or oppose outcome
- Written decision with rationale delivered simultaneously to the parties
- Appeal decision-maker cannot have had any other role in the investigation or resolution process
- “Reasonably prompt” timeframe for producing appeal decision

OCR Enforcement

- OCR will continue to administratively enforce by:
 - Conducting investigations based on complaints filed with the U.S. Dept. of Education.
 - Narrower in scope than previous Obama-era practice
 - Engaging in “voluntary compliance” reviews and investigations
- Compensatory requirements (counseling, tuition, etc.) can be imposed.
- May include equitable and injunctive actions as well as financial compensation to victims of discrimination or regulatory violations
- OCR still retains authority to withhold federal funding; however, this power has never been used.

“Not Deliberately Indifferent”

- Mandatory steps upon notice (§ 106.44)
 - Promptly contact the complainant to discuss the availability of supportive measures
 - With or without filing formal complaint, inform complainant of supportive measures and respect complainant’s wishes
 - Explain to the complainant the process for filing a formal complaint
- Mandatory steps upon formal complaint (§ 106.45)
 - Follow detailed grievance process requirements
 - Offer informal resolution options
 - Dismiss complaint if no jurisdiction or no *prima facie* sexual harassment allegation

Informal Resolution

- Considerations
- Requirements

Informal Resolution Options

- School and parties will determine when informal resolution is appropriate
 - “[I]n responding to sexual harassment, it is important to take into account the needs of the parties involved in each individual case, some of whom may prefer not to go through a formal complaint process.”
- Does not preclude certain offenses from informal resolution
- DOES preclude informal resolution for allegations that an employee harassed a student, so presumably, employee-on-employee informal resolution is permissible.

Requirements of Informal Resolution Options

- Informal resolution allowed at any time prior to a final determination at discretion of TIXC
 - Formal complaint is required
- Must provide detailed notice to the parties:
 - Allegations
 - Requirements of the process
 - Circumstances which would preclude formal resolution
 - Consequences of participation
- Must obtain voluntary, written consent

Additional Issues

- Training
- Impact on Employees
- Record-Keeping

- Robust training mandates
- Investigators, coordinators, decision-makers, appeal officers, informal resolution facilitators
 - Conflicts of interest and bias
 - Definition of sexual harassment
 - Investigation, credibility, evidence
 - Report and rationale-writing
 - Hearings, appeals, informal resolution
 - No sex stereotypes, promote impartiality
 - Training materials must be maintained for seven years and posted publicly on recipient's website

Impact on Employees

- Regulations often refer exclusively to “students,” but employees are also protected
- Wholesale revision of faculty resolution/employee grievance processes may be necessary
- Union employees – diminished right to an advisor because of union representation?
- Extends significant due process protections for at-will employees accused of misconduct – not at will anymore under Title IX?
- Potential inequity in employee processes for Title VII-based sexual harassment
 - More due process for sex discrimination than other forms of discrimination

Record-Keeping

- Certain records must be created, retained, and available to the parties for at least seven years:
 - Sexual harassment investigation including any responsibility determination, any disciplinary sanctions imposed, and any remedies implemented
 - Any appeal and related result(s)
 - Any informal resolution implemented
 - Any supportive measures implemented
- For each conclusion, school must document the rationale for its determination
- School must document measures taken to preserve/restore access to education programs/activity

Questions?



Contact Information

Brett A. Sokolow, J.D.

Brett.Sokolow@atixa.org

W. Scott Lewis, J.D.

Scott.Lewis@tngconsulting.com

Kim Pacelli, J.D., M.Ed.

Kim.Pacelli@tngconsulting.com

Saundra K. Schuster, J.D.

Saundra.Schuster@tngconsulting.com

Daniel C. Swinton, J.D., Ed.D.

Daniel.Swinton@atixa.org