

THE BALANCING OF PERSPECTIVES
IN A CHANGING
TITLE IX LANDSCAPE:
INVESTIGATING TITLE IX CLAIMS

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8:30 AM - 11:30 AM

PRESENTED BY KRISTEN GIBBONS FEDEN



WHO I AM?

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WHO ARE YOU?

- Title IX Coordinators?
- Teachers?
- Investigators?
- Student/Resident Life Representatives?
- Attorneys?
- Academic Advisors?
- Others?

WHO ARE YOU?

What institutions do you represent?

AGENDA

- Basics of Title IX
- Investigations
- Proposed Title IX Regulations
- Duty to Report and Other Obligations

BASICS

TITLE IX

HISTORY OF TITLE IX

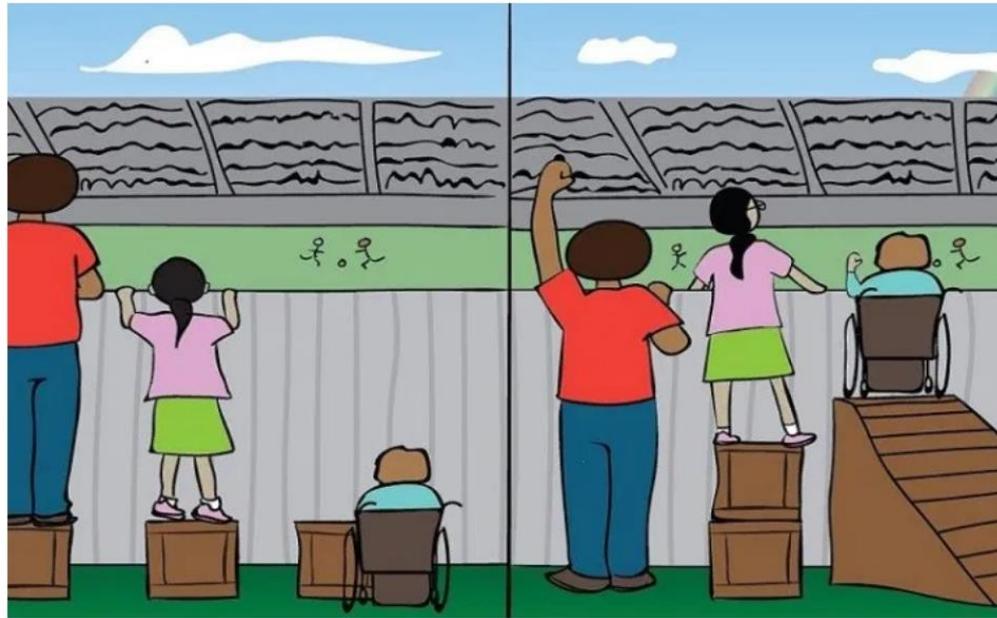
<https://www.youtube.com/watch?v=5kNG78T9N5c>

WHAT IS TITLE IX?

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

20 USCA §1981

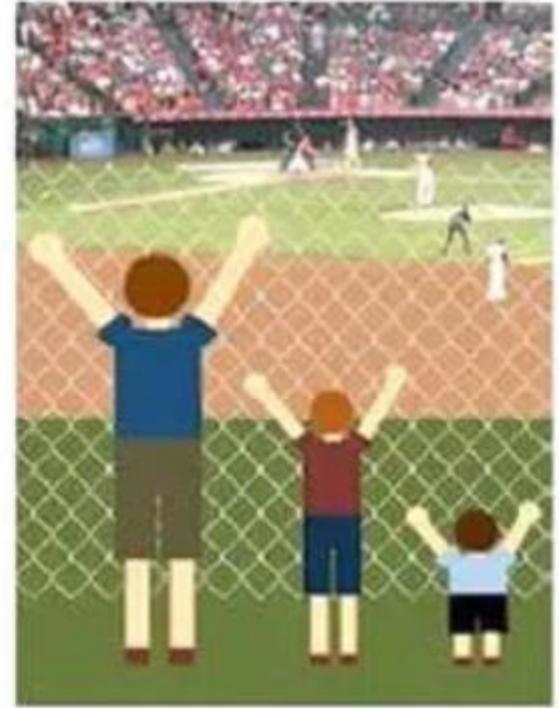
EQUALITY



EQUALITY V. EQUITY



EQUALITY V. EQUITY



WHAT IS TITLE IX?

- Federal Law intended to end discrimination in all areas of education.
- To enforce Title IX, the U.S. Department of Education maintains an Office for Civil Rights (OCR), with headquarters in Washington, DC and 12 offices across the United States.
 - Guidelines for compliance with Title IX are provided by OCR at:
<https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/index.html>

THE REGULATORY FRAMEWORK

- **The Clery Act**

- Federal law that requires colleges and universities to disclose crimes reported on or near their campuses and warn students about potential threats
- Penn State cited for 11 violations in a 239-page report following a U.S. Dept. of Education investigation following Sandusky

- **Violence Against Women Act (VAWA) & Amendments**

- **FERPA**

- **Family Educational Rights and Privacy Act**

- (20 U.S.C. § 1232g; 34 CFR Part 99) Federal law that protects the privacy of student education records. The law applies to all schools that receive funds under an applicable program of the U.S. Department of Education.

THE REGULATORY FRAMEWORK

- **Campus SaVE Act**, 20 U.S.C. §1092
 - SaVE requires colleges and universities, both public and private, participating in federal student aid programs (covering virtually every campus in the United States) to increase transparency about the scope of sexual violence on campus, guarantee victims enhanced rights, provide for standards in institutional conduct proceedings, and provide campus community wide prevention educational programming.
- **Federal and state laws**
 - Criminal statutes (including child pornography)
 - Mandatory reporting of child abuse-
 - Enhanced Requirements post-Sandusky with revisions to PA reporting statute implemented in 2015
 - Sex offender registration
 - State Megan's law

TITLE IX OCR GUIDANCE

- 2001 Revised Sexual Harassment Guidance
- 2011 Dear Colleague Letter (*withdrawn by OCR in September 2017, but provides helpful guidance that remains viable and appropriate*)
- 2014 Q&A on Title IX and Sexual Violence (*withdrawn by OCR in September 2017, but provides helpful guidance that remains viable and appropriate*)
- 2015 Dear Colleague Letter and Resource Guide
- 2017 Interim Guide: Q&A on Campus Sexual Violence
- 2018 Proposed Changes

CONDUCT COVERED UNDER TITLE IX

- All unwelcome sex/gender-based conduct
- All unwelcome conduct of a sexual nature
- All sex discrimination
- All gender discrimination
 - Including gender identity discrimination; and
 - Sexual orientation discrimination that implicates gender
- Pregnant or Parenting Student Discrimination
- **Limitation**: Actions/Conduct/Speech protected by the First Amendment and academic freedom.

PRINCIPLES OF TITLE IX

Who is Covered?

✓ Myths:

- ✓ *Title IX only protects female students*
- ✓ *Title IX only applies to athletics*

Title IX covers everyone in the educational setting. It protects ANY person: Female, Male, Gender Non-Conforming Students, Faculty and Staff from discrimination, harassment and/ or violence.

What Does It Do?

- ❑ Title IX addresses issues against gender-based discrimination, sexual harassment, and sexual violence
- ❑ Under Title IX, federally funded schools must ensure that students and employees of all ages are not denied or limited in their ability to participate in or benefit from the school's educational programs or activities on the basis of sex.

WHAT DOES TITLE IX REQUIRE?

- Requires grievance procedures for “**prompt and equitable**” resolution of student and employee complaints;
- An institution violates Title IX if it “**has notice**” of a sexually hostile environment and fails to take immediate and effective corrective action.
- An institution has notice if a **responsible employee knew or, in the exercise of reasonable care, should have known** about the harassment.
- Once an institution “**knew or should have known,**” the institution must:
 - Eliminate the harassment
 - Prevent its recurrence, and
 - Address its effects

INVESTIGATION

ESSENTIAL COMPETENCIES FOR ALL INVOLVED

- Strategic Process
- Questioning
- Evaluating Evidence
- Establishing Rapport
- Good Report Writing
- Alcohol & other drugs
- Blackouts
- Dynamics of Sexual Violence
- Technology
- Cultural Competence
- Patterns
- Predictions
- Recantation
- Rape Myths
- Consent
- Force/Incapacity
- Gender Bias
- Victim-Blaming
- Working with Responding Student

WHEN DO YOU INVESTIGATE?

Receive allegations (Complaint).

Rumors, gossip, social media, etc. can be notice.

Actual Notice or Constructive Notice

NOTICE

Actual Notice

- Complainant files a Title IX Complaint
- Complainant notifies the Title IX Coordinator or other Responsible Employee, school/campus police or security official/SRO
- Staff member witnesses harassment
- Indirect notice from sources such as flyers, media, online postings, or video

Constructive Notice

- Pervasiveness of harassment. *Simpson v. Gilmore*.
- Harassment is widespread, openly visible, or well known to students and/or staff.

NOTICE

- A school can receive notice of sexual violence in many different ways. Some examples of notice include:
 - **Direct notice:** filing a report, third party report, witness
 - **Indirect notice:** a member of the local community, social networking sites, the media.
- In some situations, if the school knows of incidents of sexual violence, **the exercise of reasonable care should trigger an investigation** that would lead to the discovery of additional incidents.
 - Pattern of conduct: several acts of sexual violence against different students
 - Pervasiveness of conduct: widespread, openly practiced, or well-known among students or employees
- ***“In those cases, OCR may conclude that the school should have known of the hostile environment. In other words, if the school would have found out about the sexual violence had it made a proper inquiry, knowledge of the sexual violence will be imputed to the school even if the school failed to make an inquiry.”***

JURISDICTION

- Jurisdiction is expected when the institution has:
 1. Control over the Harasser/Discriminator, AND
 2. Control over the context of the Harassment/Discrimination.
- Covered Programs
- Covered Individuals
- Subject Matter

CONDUCT COVERED UNDER TITLE IX

Sexual/Gender Discrimination and Harassment

- Verbal
- Physical
- Electronic
- Hostile Environment

Sexual Violence

- Rape
- Sexual Assault
- Exploitation

Stalking and Cyberstalking

Interpersonal Violence

- Intimate Partner
- Domestic
- Dating
- Relationship

Retaliation

Gender-based discrimination and harassment

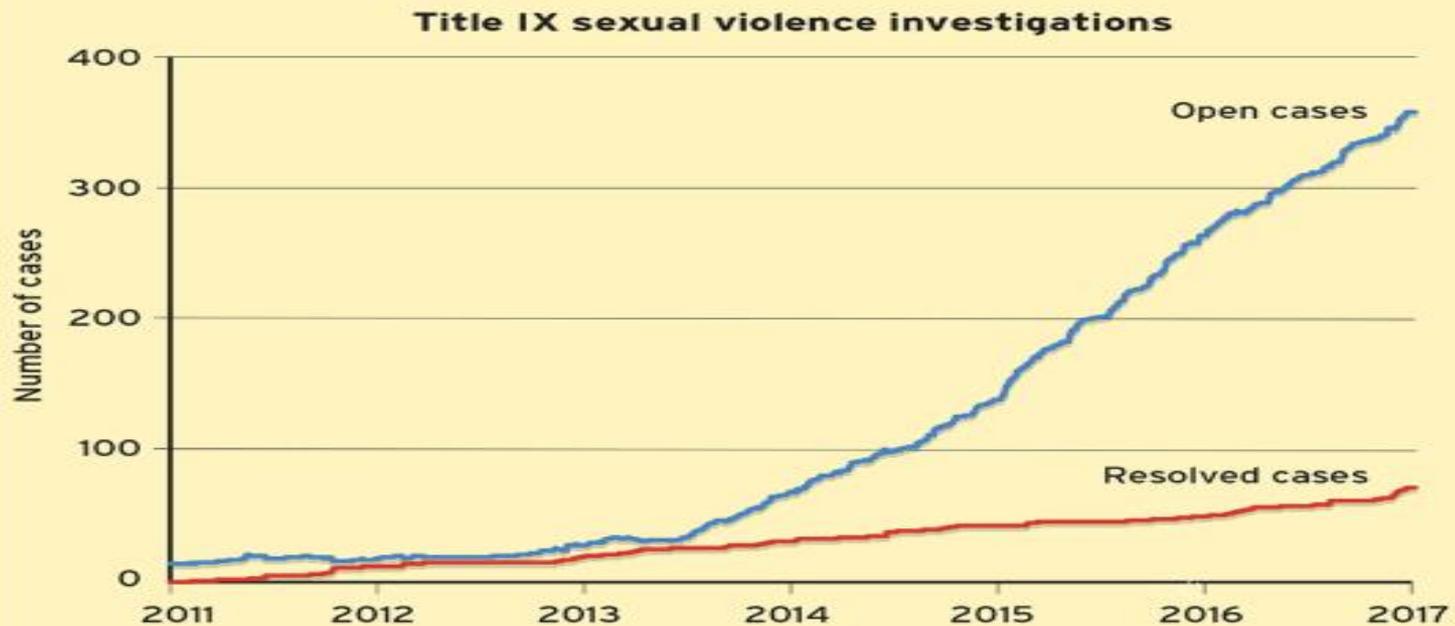
Bullying/Hazing

Quid Pro Quo

SCHOOL SEXUAL VIOLENCE COMPLAINTS

Rising Sexual Violence Investigations (Figure 1)

As of August 31, 2017, the Office for Civil Rights has conducted 430 investigations of colleges for possibly mishandling reports of sexual violence, of which 358 remain open.



SOURCE: The Chronicle of Higher Education's Title IX investigation tracker, <https://projects.chronicle.com/titleix/>

UNDERSTANDING TITLE IX

Scope of responsibilities when responding to an incident

Question: *Is this something we can and must act on/respond to?*

Answer: *Yes, but to what extent*

Determine the relationship of the parties to the University and then jurisdiction.

- School must process **all** complaints of sexual violence, regardless of where the conduct occurred, to determine whether the conduct:
 - Occurred in the context of an education program or activity; or
 - Had **continuing effects** on campus or in an off-campus education program or activity
 - Even if there are no continuing effects of the off-campus sexual violence, the school still should handle these incidents as it would handle other off-campus incidents of misconduct or violence

- School may need to gather additional information in order to make such a determination

INSTITUTIONAL OBLIGATIONS UNDER TITLE IX

Once an Institution has notice of sexual
harassment/misconduct, they MUST:

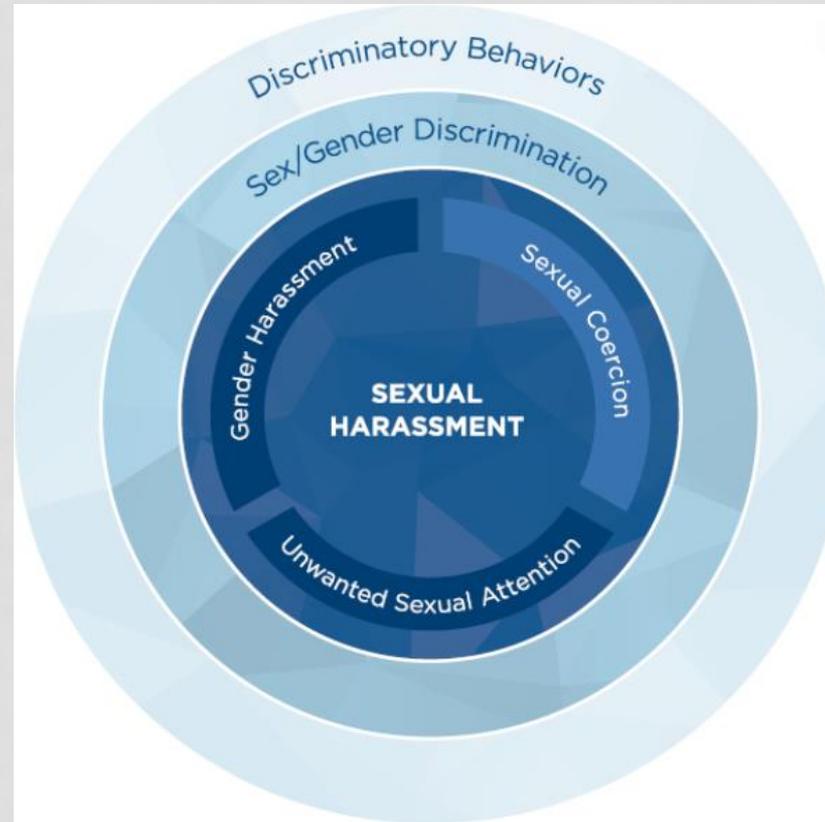
INVESTIGATE

STOP

PREVENT

REMEDY

SEXUAL/GENDER DISCRIMINATION



Legal Classifications:

- Quid pro quo sexual harassment
- Hostile environment harassment

SEXUAL HARASSMENT/UNWANTED SEXUAL ATTENTION

1. Hostile Work Environment
2. *Quid Pro Quo*
3. Retaliatory Harassment

HOSTILE WORK ENVIRONMENT

- Created when sexual harassment is...
 - Sufficiently severe, or
 - Persistent or pervasive, and objectively offensive that it unreasonably interferes with, denies, or limited someone's ability to participate in or benefit from the university's educational, social, or residential program.
- From both a subjective and an objective viewpoint
- Consideration of the Totality of the circumstances.

QUID PRO QUO

- Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature,
- By a person having power or authority over another.
- This is sexual harassment, when:
 - Submission to such sexual conduct is made either explicitly or implicitly a term or condition of rating or evaluating an individual's educational progress, development, or performance (includes when submission is a condition for access to receive the benefits of any educational program).

RETALIATION

- Retaliation –
 - Any **adverse action** taken against a person participating in a protected activity because of the person's participation in that protected activity.

SEXUAL COERCION/VIOLENCE

- Non-consensual sexual intercourse
- Non-consensual sexual contact
- Related Misconduct

CONSENT CONSTRUCT

- What is Consent?
 - Consent
 - Force
 - Incapacity
- Looking for Evidence

CONSENT CONSTRUCT : CONSENT

What is it?

- Informed
- Knowing
- Voluntary
- Freely Given
- Affirmative Action
- Mutual Understanding of Permission

Factors to Consider

- Was there: Physical Force, Threats, Intimidating Behavior, Coercion?
- Is the person mentally or physically incapacitated?
- Lack of protest or resistance is NOT consent.
- Consent should not be assumed.
- Consent must be present the entire time.

CONSENT CONSTRUCT : FORCE

- Physical Violence
- Threats
- Intimidation
- Coercion
 - Consider: Frequency, Intensity, Duration, and Isolation.

CONSENT CONSTRUCT : INCAPACITY

Types

- Drugs
- Alcohol

- Results:
 - Mental Cognitive Impairment
 - Injury
 - Loss of consciousness

Factors to Consider

- Was the complainant incapacitated at the time of sex?
 - Could he/she make rational, reasonable decisions?
 - Could he/she appreciate the situation and address it competently such that any consent was informed?
- Did the respondent know or should he/she have known of the complainant's incapacity?

CONSENT CONSTRUCT

<https://www.youtube.com/watch?v=u7Nii5w2Fal>

ELEMENTS OF AN INVESTIGATION

- Investigation
- Understanding Evidence
- Strategy
- Investigation Report
- Credibility
- Making a Finding
- Sanctioning

DUTY TO REPORT

- Responsible Employee
 - Confidential Employees v. Quasi Confidential Employees v. Responsible Employee
- The Clery Act – Campus Security Authority
- Be Aware of **Additional** Reporting Requirements

TRAINING RESPONSIBLE EMPLOYEES

- Title IX – Background, overview, and purpose
- Scope of Title IX
- Jurisdiction
- Actual & Constructive Notice
- Confidential Employees v. Responsible Employees
- What to tell the Complainant
- What to Report
- How to Report
- Resource and Support

CREATE AND IMPLEMENT APPROPRIATE POLICE

- Policies should clearly define expected/prohibited conduct.
- Policies should be regularly updated, revised, assessed.
- Procedures should clearly outline the appropriate resources available.
- Procedures should provide for equitable remedying of complaints.

QUESTIONS

