



# What HR Needs To Know About Title IX



**Title IX In Focus**  
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# Disclaimers

We can't help ourselves. We're Lawyers.

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- We are not giving you legal advice.
- Consult with legal counsel regarding specific situations.
- You will receive slides for today's presentation after we've concluded.

# And another one...

## Specific to the Title IX In Focus Webinar Series

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- The 2020 Title IX regulations require training on several specific subjects
- While the Title IX In Focus webinar series will discuss some of the required subject matter, none of these one-hour webinars will cover all of the material required for Title IX training compliance
- Work with your TIXC to make sure that you are trained in accordance with Title IX, Clery, and any applicable state law

# Can We Post These Materials?

YES – Post away!

Institutions are required by §106.45(b)(10)(i)(D) to post materials used to train Title IX personnel on its website.



# Agenda

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- Rationale for this webinar
- Title VII Sexual Harassment
- Title IX Sexual Harassment
- Supreme Court showdown – coming soon
- Retaliation Prevention
- Supportive Measures
- HR: Ways to help your Title IX office
- Title IX: Ways to help your HR office

# Why are we talking about this?

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- Upcoming Supreme Court case on the interplay between Title VII and Title IX
- Anecdotal shift in Title IX case load towards more employee cases at many institutions
- “Office of last resort”?

# Poll:

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- Do you have someone at your institution who is formally assigned to both HR and the Title IX team?

# Title VII vs. Title IX

|                      | Title VII                                                             | Title IX                                                                                                            |
|----------------------|-----------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------|
| Who is protected?    | Protects employee complainants                                        | Protects students, employees, and others in relation to your education programs and activities in the United States |
| Procedures           | Grievance procedures that provide for investigation and determination | Highly specific requirements per 34 CFR 106.45                                                                      |
| Law                  | 42 USC 2000 et seq.                                                   | 20 USC 1681 et seq.                                                                                                 |
| Regulations          | 29 CFR Part 1604                                                      | 34 CFR Part 106<br>See 34 CFR 106.51 through 106.62 for employment-specific regs                                    |
| Informal Resolution? | Not specifically addressed                                            | See 34 CFR 106.45(b)(9)                                                                                             |
| Enforced by          | EEOC                                                                  | ED/OCR (DOJ?)                                                                                                       |

# Title VII - Statute

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- It shall be an unlawful employment practice for an employer—
  - To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin, or
  - To limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 USC 2000e-2

# Title VII – Sexual Harassment Regulation

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- Harassment on the basis of sex is a violation of ... Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:
  - Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment,
  - Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or
  - Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

29 CFR 1604.11(a) – Note: EEOC looks for “severe or pervasive”

# Title IX – Sexual Harassment Regulation

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- Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:
  - 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, dating violence, domestic violence, or stalking.

34 CFR 106.30 (2020 regulations)

# ***Crowther v. Bd. of Regents of the Univ. Sys. of Ga.***

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- U.S. Supreme Court, Case No. 25-183
- Certiorari granted, oral arguments not yet set
- Currently there is a circuit split as to whether employees can sue under Title IX for sex discrimination (majority), or whether they must sue under Title VII (5<sup>th</sup>, 7<sup>th</sup>, 11<sup>th</sup>)
- Question presented: Whether Title IX provides employees of federally funded educational institutions a private right of action to sue for sex discrimination in employment

# Hypo – Step #1

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- Phyllis is an office worker and Michael is her supervisor
- Phyllis tells HR that Michael:
  - Changes her assignments without notice or explanation, making it hard to finish her duties in a shift
  - Gives better assignments to his “favorites”
  - Gives her conflicting instructions and yells at her for not following them
- What happens next?

## Hypo – Step #2

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- Six months later, two more office workers come forward – Meredith and Stanley – with the same concerns
- What happens next?

## Hypo – Step #3

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- Three months later, Phyllis is back in your office:
  - The behavior hasn't stopped
  - When Phyllis expressed frustration about being pulled off a project, Michael called her a b\*\*\*\*
- What happens next?

## Hypo – Step #4

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- Two months later, Phyllis, Meredith, and now Angela are back in front of HR
  - Michael is giving the best assignments to Kevin “because he didn’t go to HR”
  - “The women in the office feel like no one is listening to their concerns”
  - Michael may be dating Kelly, who also seems to get better assignments
- What happens next?

# Consensual Relationships

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- If Michael is dating someone he supervises (Kelly), is that a Title IX concern?
  - What if Kelly says it's consensual?
  - What if Kelly says it's not consensual?
  - What if Kelly says it's consensual now, but in six months sees things differently?
- Does the relationship between Michael and Kelly affect Phyllis, Angela, Meredith, and Stanley?

## Hypo – Step #5

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- Phyllis, Meredith, Angela, and Stanley file a formal complaint alleging Title IX Sexual Harassment and Title VII Sexual Harassment

# A Note About Privacy

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- There isn't a federal law that says everything relating to an employee is confidential
  - This means HR can tell Title IX pretty much anything
- Title IX allows information to be shared when necessary to implement the process (supportive measures, retaliation protection, sanctions, etc.)
  - This means Title IX can tell HR more than zero and something less than everything
  - The more HR knows, the more they can be at risk...

# Grievance Processes

|               | Title VII                                              | Title IX – Sexual Harassment                                                           |
|---------------|--------------------------------------------------------|----------------------------------------------------------------------------------------|
| Notice        | No requirements                                        | Regulatory requirements – 34 CFR 106.45(b)(2)                                          |
| Investigation | Look at the record as a whole and make a determination | Regulatory requirements – 34 CFR 106.45(b)(5)                                          |
| Hearings      | No requirements                                        | Regulatory requirements – 34 CFR 106.45(b)(6)                                          |
| Advisor       | Only if required by Clery                              | Advisor of choice                                                                      |
| Transparency  | No requirements                                        | 10 day review of evidence<br>10 day review of report<br>Simultaneous notice of outcome |
| Outcome       | Immediate and appropriate corrective action            | Sanctions to respondent<br>Remedies to complainant                                     |

# Non-Title IX Charging

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- What if Michael has potentially violated other policies and procedures that would not typically fall under the Title IX process?
  - Include in the Notice of Allegations to resolve in the same procedure?
  - Make relevant findings of fact in the Title IX process but refer to HR for further steps?
  - Run concurrent or consecutive separate procedures?

# Protecting from Retaliation

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- Phyllis is concerned about getting removed from key projects.
- Angela is concerned about her upcoming request for a promotion within Michael's team.
- Meredith is having performance issues and may need to be placed on a Performance Improvement Plan, which would normally be done by Michael.
- Stanley's annual evaluation is coming up, and he's worried that Michael will give him low ratings due to his participation.

# Supportive Measures – Title IX

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- Title IX requires supportive measures to be offered when someone is reported to have experienced Title IX Sexual Harassment
  - Non-disciplinary, non-punitive, individualized
  - Offered as appropriate, as reasonably available, and without fee or charge
  - Available to both parties, even where no formal complaint is filed
  - Designed to restore or preserve equal access to the education program or activity
  - Cannot unreasonably burden the other party
  - Includes measures designed to protect the safety of all parties or the recipient's educational environment, or to deter sexual harassment

# Supportive Measures – HR Cooperation

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- Title IX may need to separate an employee from another person
- HR can assist with:
  - Changing schedules, work assignments, and work locations
  - Changing supervisory assignments
  - Implementing no-contact orders
  - Leaves of absence
- HR can also assist with administrative leave for employee respondents where appropriate

# HR: Ways to Help Your Title IX Office

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- Report early and often
- Help manage employee-related conflicts as soon as possible
- Encourage management to address supervisory issues
- Assist with supportive measures and providing retaliation buffers
- Accept that you may not get to know every detail about every case
- Remember – Title IX is a private process that takes time

# Title IX: Ways to Help Your HR

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- If administrative leave is a possibility, give HR a heads up as soon as possible
- If supportive measures will involve no-contact orders or job restrictions, give HR a heads up as soon as possible
- Consider whether to ask a party to involve HR in a conversation when appropriate (such as regarding supportive measures)
- Document all conversations with parties, including educational conversations when no formal complaint is pursued
- Keep HR as informed as possible under the circumstances

# After the Grievance Process

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- Does the Title IX decision implicate other policies and procedures?
- Is HR follow-up appropriate?

Remember – to discipline for Title IX Sexual Harassment, the Title IX process must be followed.

# Upcoming Title IX In Focus Webinars

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- All of these are free and held at 12:00 p.m. CT/1:00 p.m. ET
- Sign up at [www.bricker.com/events](http://www.bricker.com/events)
  - Sept. 24<sup>th</sup> – Pregnancy and Parenting
  - Oct. 29<sup>th</sup> – Peer-on-Peer Retaliation
  - Nov. 19<sup>th</sup> – Title IX Litigation Update
  - Feb. 25<sup>th</sup> – Understanding Neurodivergence in Title IX Investigations
  - March 25<sup>th</sup> – FERPA and Public Records Considerations in Title IX Cases
  - April 29<sup>th</sup> – Sexualized Hazing and Title IX
  - May 27<sup>th</sup> – Title IX Litigation Update

# Upcoming Higher Ed Webinars

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**All of these are free and held at 11:00 p.m. CT/12:00 p.m. ET**

- Sept. 16<sup>th</sup> – Red Zone Primer for Student Conduct
- Oct. 21<sup>st</sup> – Title VI Update
- Dec. 16<sup>th</sup> – End of Year Employment Update & What's to Come in 2027
- Jan. 28<sup>th</sup> – AI, Privacy, and Trust on Campus: What Higher Ed Leaders Need To Know in 2027
- Feb. 17<sup>th</sup> – Clery Compliance Best Practices
- March 17<sup>th</sup> – Accreditation: Effects on Legal Compliance
- April 21<sup>st</sup> – Athletics Hot Topics
- June 9<sup>th</sup> – Complex Accommodation Issues

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