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Title IX Overview

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1

Ahlers Cooney

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Ahlers & Cooney has represented educational institutions, municipalities, and private entities.

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Education Law Practice Area
We have the knowledge and expertise to advise clients on issues from the typical to the unusual.

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2

Webinar Agenda

1) Title IX Overview
2) Title IX Investigator Training
3) Title IX Decision-Maker Training (K12 & Higher Ed Breakout)
4) Title IX Coordinator Training
5) Training on Supportive Measures and Informal Resolution (K12 & Higher Ed Breakout)
6) Bonus: K12 All-Staff Training

Live Q&A following Morning and Afternoon Sessions

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Training Requirements

- This training will meet the regulations' requirements for designated groups
- New Title IX Regulations require retention and posting of training materials ***"on the school's website"***
- DOE: Title IX does not interfere with or affect intellectual property law
- All attendees will be receiving materials summarizing training for compliance with posting requirements prior to August 14, 2021

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Continuing Education Credits

The following credits are pending approval:

- State CLE
- SHRM
- IASBO

A notification will be emailed to all attendees following official approval.

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Disclaimer

Please note that this presentation is intended for informational and educational purposes and to provide general statements from federal law, state law, and agency guidance. Federal and state law may differ on particularized areas and this outline does not include all legal considerations. Each situation varies based on the individualized facts and the law is constantly evolving.

Please consult with your attorney for specific legal information, advice, or individualized inquiries.

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TOPIC #1

What is Title IX?
Equality in Athletics to Sexual Violence

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Law: Title IX, 20 § U.S.C. 1681

- Prohibits discrimination "on the basis of sex";
- Education programs and federally funded schools (whether or not sponsored by the educational institution);
- Protects students, employees, applicants, & all other persons

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The U.S. Department of Education's Office of Civil Rights ("OCR") interprets Title IX to prohibit sexual violence and harassment as forms of "sex discrimination".

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Title IX Implementing Regulations

1) Designation of a Title IX Coordinator to coordinate school's responsibilities
2) Disseminate Notice of Policy/Title IX Obligations
   - Title IX/Sexual Misconduct Policies
   - Anti-Bullying and Harassment Policies
3) *Grievance/Complaint Procedures

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Enforcement of Title IX

1) Agency Enforcement – OCR
   - Voluntary resolution
   - Equitable Relief
2) Private Litigation – In Courts
   - Monetary damages
   - Various additional claims: Breach of contract, constitutional claims, etc.
   - Complainant or Respondent as Plaintiff

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Enforcement of Title IX

- Standard – *Deliberate Indifference*
  - Plaintiff must prove officials had actual knowledge AND harassment was so severe, pervasive & objectively offensive that it barred the victim from access to their education
  - Can be avoided by merely responding to harassment in a manner that is not unreasonable

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New Regulations

regulations.gov
Your Voice in Federal Decision-Making

- Prior Title IX Guidance revoked in **September 2017**
- Proposed Regulations were released **November 16, 2018**
- Public Comment period was open until **January 28, 2019**
- Final Regulations released May 6, 2020 with an implementation date of **August 14, 2020**
- Note:
  - Lawsuits challenging regulations filed;
  - Letters sent to DOE requesting delayed implementation

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New Regulations – Major Changes

- Definitions and Jurisdictional Requirements – including Permissive and Mandatory Dismissals
- "Actual Knowledge" Standard on Who has to Report – Different for K12s and Postsecondary
- Investigation and Reports Timelines and Procedures
- Formal Resolution Procedures – Live Hearings and/or Cross-Examination
- Scope: Covers employee-on-employee situations
- Mandatory Appeals on Certain Criteria
- Recordkeeping and Retention Requirements
- Training Requirements

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Definitions: Sexual Harassment

1. A school employee conditioning an educational benefit or service upon a person's participation in unwelcome sexual conduct (often called quid pro quo harassment);

OR

2. 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 school's education program or activity (often called hostile work/educational environment harassment),

OR

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- **Dating Violence:** Violence by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. The existence of such a relationship is determined by:
  - The length of the relationship.
  - The type of relationship.
  - The frequency of interaction between the persons involved in the relationship.
- **Domestic Violence:** Includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner, a parent of a shared child, a former or current cohabitor as a spouse or intimate partner, or someone similarly situated to a spouse under domestic or family violence laws. . . , or by any other person against a victim who is protected under the domestic or family violence laws[.]

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15

- **Stalking:** Engaging in a course of conduct directed at a specific person that would cause a reasonable person to—a) fear for his or her safety or the safety of others; or b) suffer substantial emotional distress.
- **Sexual assault**: An offense classified as a forcible or nonforcible sex offense by the FBI's uniform crime reporting system:
  - Rape,
  - Fondling,
  - Incest, or
  - Statutory rape

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Scope of "Educational Program or Activity"

- Conduct must occur in "educational program or activity"
  - Does not mean geography – no on/off-campus bright line rule
  - Includes "locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs"
- Conduct must be against a person "in the United States"
  - Does not apply to study abroad

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Scope of "Educational Program or Activity"

- New:
  - Includes "*any building owned or controlled by a student organization that is officially recognized by a postsecondary institution*"
  - Biggest implication: Greek life and "Theme" houses

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Scope– Mandatory Dismissal

- No Title IX jurisdiction?
  - Must "dismiss" the complaint
  - Clarification in Final Rule: Dismissal means dismissed from the Title IX process; the school can still apply another conduct code or offer supportive measures
- Practical Difficulty – Knowing if a complaint implicates Title IX jurisdiction at various stages of the process

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Scope– Permissive Dismissal

New final rule allows schools to dismiss a complaint (with prompt and simultaneous written notice to the parties) if at any time:

1. A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations;
2. The respondent is no longer enrolled or employed by the recipient; or
3. "Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations."

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TOPIC #2

Implementing the New Title IX Regulations

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Major Compliance Areas

1) **Policy and Procedures Review and Update**
   - Incorporate new language on jurisdiction and sexual harassment and retaliation definitions
   - Incorporate investigation and hearing/cross-examination procedures
   - Think about: who is going to be our Title IX Coordinator, Investigator(s), Decision-Maker(s) and appeal authorities?
     - Internal or External
   - Revise existing notices and policies, or create "one-stop" policy and procedures for all constituencies – students, faculty/teachers, and staff
   - Review collective bargaining agreements

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Major Compliance Areas

2) **Record-keeping and Retention**

- Final Regulations require the following to maintained for SEVEN years:

1. Each sexual harassment investigation, including determinations, audio or visual recordings, disciplinary sanctions, and any remedies provided to the complainant;
2. Any appeal and the result therefrom;
3. Informal resolution, if any; and
4. *All materials used to train Coordinators, Investigators, those who facilitate informal resolution, and decision-makers with regard to sexual harassment*.

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Major Compliance Areas

2) **Record-keeping and Retention**

Final Rules require the following records to be created and kept for SEVEN years:

- Any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment.
- Document the basis for the conclusion that your response was not deliberately indifferent, and
- Document that you have taken measures designed to restore or preserve access to the recipient's educational program or activity.
- If no supportive measures are given to the complainant, document why it was not clearly unreasonable

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Major Compliance Areas

3) **Training**

- Schools must require training for anyone designed as a Title IX Coordinator, Investigator, Decision-Maker, or any other person designated to facilitate an informal resolution on designated topics
- Training materials:
  - Must not rely on sex stereotypes
  - Must promote impartial investigations and adjudications of formal complaints

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Thank You for attending!

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