



Technical College System of Georgia

Title IX Update

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Title IX Statute

“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 U.S.C. 1681

Title IX Timeline

1972



1970's and 1980s:
Early focus was on
gender equity in
intercollegiate sports

1998-2001



- 1998: U.S. Supreme Court issues companion decisions in *Davis and Gebser*, recognizing private right of action under Title IX
- 2001: U.S. Department of Education under Bush Administration adopts *Davis and Gebser* standards in sub-regulatory guidance
- 2001: The Education Department issues landmark guidance connection sexual harassment, discrimination, and assault.

2011



2011: Obama administration issues "Dear Colleague" letter detailing institutional obligations with respect to sexual misconduct under Title IX; a wave of students file lawsuits alleging that their respective universities were "deliberately indifferent" to their reports of sexual harassment

Title IX Timeline (Cont'd)

- **2011 – 2017**
 - Respondents begin to file lawsuits alleging that College process is unfair (ongoing)
- **2020**
 - May: Trump Administration publishes Final Rule on Title IX Sexual Harassment
 - June: Supreme Court issues Bostock decision holding that discrimination on the basis of sexual orientation or gender identity is discrimination “because of sex”
 - August 14: Final Rule Takes Effect
 - September: All other guidance regarding Title IX withdrawn

Title IX Timeline (Cont'd)

- **2021-2022**

- January: Biden Administration directs Department of Education to review Trump Administration regulations and announces intent to publish a new notice of proposed rulemaking in Spring 2022
- March: Biden Executive Order on Guaranteeing Educational Environment Free From Discrimination on the Basis of Sex (SOGI)
- June: Department of Education issues guidance explaining it will enforce Title IX prohibition on sex discrimination to include SOGI
- December: Department of Education issues advisory that NPRM will move up to April 2022
- June 23, 2022: NPRM issued by Department of Education

Current Obligations

- **Current regulations became effective on August 14, 2022 and are not retroactive.**
 - *Apply on a mandatory basis to reports of underlying conduct that occurred on or after August 14, 2020*
 - *Institutions may choose to apply regulation-compliant policies to conduct that occurred prior to August 14, 2020*

Jurisdiction

- “A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States must respond promptly in a manner that is not deliberately indifferent.”

Jurisdiction (Cont'd)

Four Elements



Response Obligations

A recipient with:

- 1 actual knowledge of**
 - 2 sexual harassment**
 - 3 in an education program or activity of the recipient**
 - 4 against a person in the United States**
- must **respond** in a manner that is
 - not deliberately indifferent.

Jurisdictional Issues

- 1. When does the institution have “actual knowledge”?**
- 2. What is a “program or activity”?**
- 3. Who can be a complainant?**
- 4. When must a Title IX Coordinator dismiss a formal complaint (and when may they)?**

Issue 1: “Actual Knowledge”

- **If one of these people know:**
 - the Title IX Coordinator or
 - “any official...who has authority to institute corrective measures on behalf of the recipient”
- **Information can come from any source**
- **Respondents don’t give you “actual knowledge” even if they are an official with authority**

Who is an Official with Authority

- **Institutions determine for themselves**
- **Supervisors and deans**
- **Who else has authority to institute corrective measures?
(check your list of sanctions)**
- **Not required to list OWAs in your policy (only have to list Title IX Coordinator)**

Issue 2: Program or Activity

- **Locations, events, or circumstances in which an institution exercises substantial control over both the respondent and the context in which the sexual harassment occurs**
- **Locations include buildings owned or controlled by officially recognized student organizations.**
§106.44(a)

Program or Activity

- **Training Required:**
- **Title IX Coordinator, investigator, decision-maker, those who facilitate informal resolution must be trained on “the scope of the recipient’s education program or activity”**
- **That training must be posted on the institution’s website**

Issue 3: Who can be a complainant

- **Student, employee or third party (including patients)**
- **A complainant must be participating in, or attempting to participate in, the institution's education program or activity at the time of filing a formal complaint.**
- **Attempting to participate – Fact Specific**
- **On leave, but intend to re-enroll; graduated, but intend to return for another program/degree**
- **Participation in alumni activities(?)**

How about respondents

[A]ny “individual” can be a respondent, whether such individual is a student, faculty member, another employee of the recipient, or other person with or without any affiliation with the recipient.

Issue 4: Dismissal

- **Determined after formal complaint is received**
- **Sometimes dismissal is required**
- **Sometimes dismissal is permitted**
- **Dismissal can occur at any time during the investigation/hearing process prior to a determination of responsibility**

“Must Dismiss”

- **Complaint must be dismissed if conduct:**
 - **Would not constitute sexual harassment even if proved**
 - **Did not occur in institution’s program/activity**
 - **Did not occur against a person in the United States**

“May Dismiss”

- 1. If complainant requests to withdraw their complaint**
- 2. If respondent is no longer enrolled or employed**
- 3. When specific circumstances prevent gathering evidence sufficient to reach a determination**

If dismissed...

- **Parties must receive simultaneous written notice of dismissal with reason(s) to the parties**
- **Parties must have an opportunity to appeal the dismissal**
- **Dismissal does not preclude other institutional action**

Emergency Removals

- **May remove respondent from education program or activity if:**
- **Conduct an individualized safety and risk analysis,**
- **Determine that respondent poses an immediate [imminent]**
- **threat to the physical health or safety of anyone justifying removal,**
- **The threat arises from the allegations of sexual harassment, and**
- **Provide opportunity for respondent to challenge removal immediately thereafter.**

Emergency Removals (Cont'd)

- **Preamble:**
- **Not limited to instances of sexual assault.**
- **Removal cannot be based on generalized, hypothetical or speculative concerns.**
- **No specific procedures or timeframes required.**
- **Not a pretext for interim suspension or expulsion.**

Investigations

- **When investigating a formal complaint, a recipient must:**
- **Ensure burden of proof and burden of gathering evidence rests on the recipient and not the parties;**
- **Provide an equal opportunity for the parties to present and gather evidence;**
- **Not restrict the ability of either party to discuss the allegations under investigation;**
- **Provide parties with opportunity to be accompanied by the advisor of their choice to any meeting or proceeding;**

Investigations (Cont'd)

- **Provide written notice to party of all meetings and proceedings with sufficient time to prepare;**
- **Provide both parties equal opportunity to inspect and review any evidence obtained as part of the investigation; and**
- **Create an investigative report that fairly summarizes evidence, and at least 10 days prior to hearing send to each party and party's advisor the report for their review and response.**

Cross Examination/Advisors

- **Cross Examination conducted by Advisor in real time with all relevant questions allowed; Colleges must provide Advisors at no cost**
- **Questions may not be in writing.**
- **Institutions can require party to provide advance notice of advisor.**
- **Advisor provided by institution need not be an attorney.**
- **May remove disruptive advisors.**
- **Decision-maker should evaluate cross-examination responses in context, including consideration of stress.**
- **“Because decision-makers must be trained to serve impartially without prejudging the facts at issue, the final regulations protect against a party being unfairly judged due to inability to recount each specific detail of an incident in sequence”**

Live Hearing Process

- **Decision-Maker determines relevant evidence to be considered**
- **Decision-Maker enforces decorum during live hearings**
- **TCSG uses preponderance of evidence standard to consider complaints**
- **Appeals allowed for procedural irregularity, bias, or new evidence**
- **Hearings may be conducted virtually as long as all parties may participate in real time**

Informal Resolution

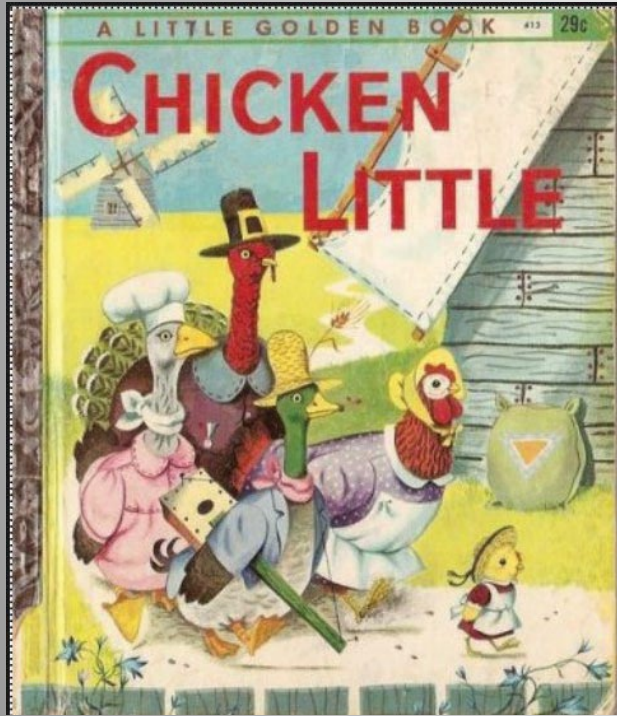
At any time prior to reaching a determination regarding responsibility, the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication.

§ 106.45(b)(9)

So what is happening with the NPRM

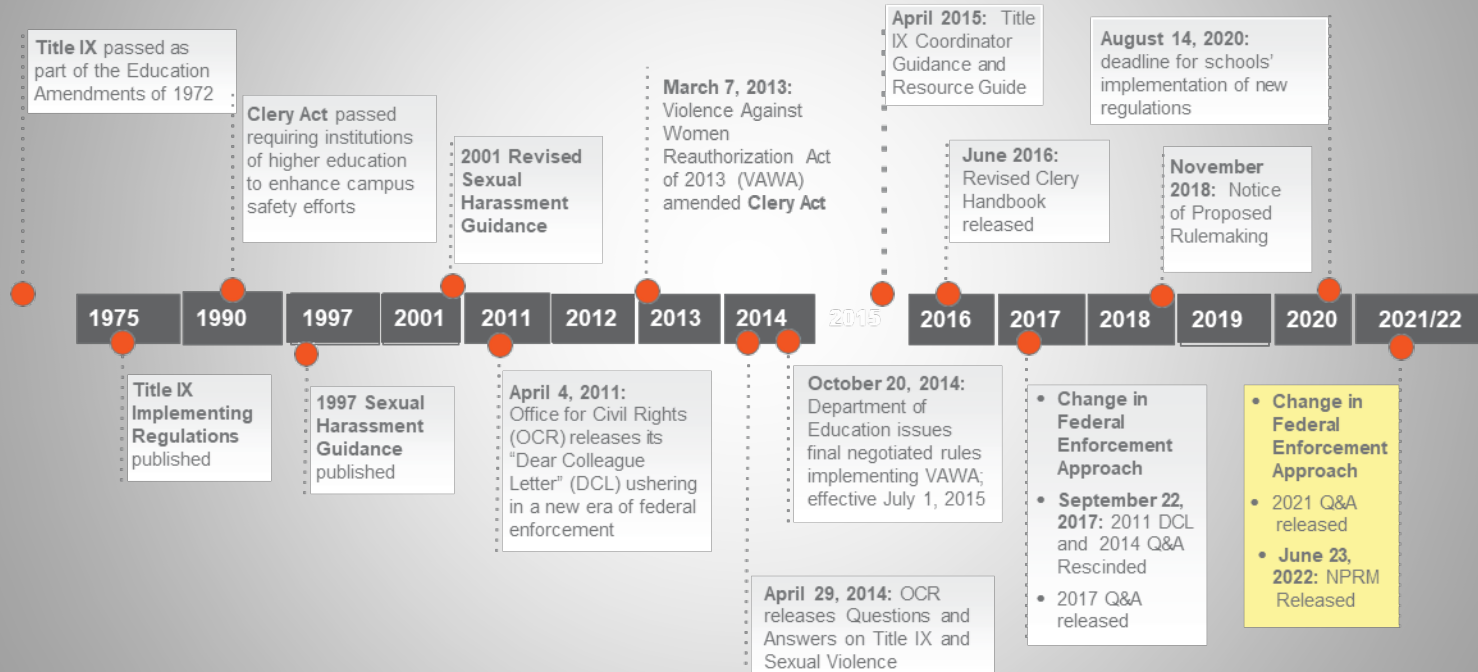
- **Released on June 23, 2022, the 50th anniversary of Title IX**
- **50 pages of proposed regulations, coupled with 650 pages of comments and discussion**
- **60-day public comment period commences when the NPRM is published in the Federal Register**
- **OCR has reflected some openness to feedback and comments**

The Sky Is Not Falling

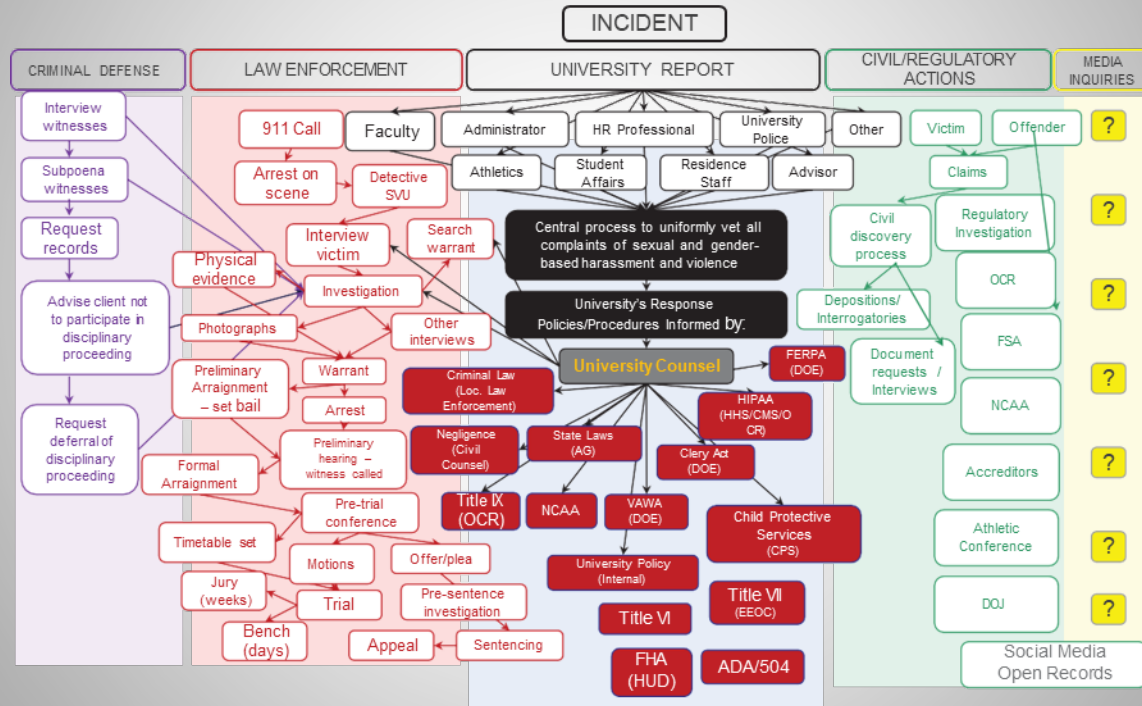


The Final Rule Will Likely Be Issued in March for Implementation later in 2024!

Title IX/Related Authority at a Glance



Reporting Structure



Expansion of Scope and Jurisdiction

- **Under §106.10, sex discrimination includes**
- **Sex stereotypes**
- **Sex characteristics**
- **Pregnancy or related conditions**
- **Sexual orientation**
- **Gender identity**

- **Current, potential, or past parental, family, or marital status [§ 106.21, § 106.40, § 106.57]**

Expansion of Scope/Jurisdiction

- **Sex-based harassment means:**
- ***Sexual harassment**
- **Harassment on the bases described in §106.10**
- **Other conduct on the basis of sex**

- **Categories include:**
 - **Quid pro quo harassment**
 - **Hostile environment harassment**
 - **Specific offenses**
 - **Sexual Assault**
 - **Dating Violence**
 - **Domestic Violence**
 - **Stalking**

Expansion of Physical Jurisdiction

- **Education program or activity**
- **Conduct that occurs under a recipient's education program or activity includes but is not limited to:**
- **Conduct that occurs in a building owned or controlled by a student organization that is officially recognized by a postsecondary institution, and**
- **Conduct that is subject to the recipient's disciplinary authority**
- **A recipient has an obligation to address a sex-based hostile environment under its education program or activity, even if sex-based harassment contributing to the hostile environment occurred outside the recipient's education program or activity or outside the U.S.**

Who Has Standing to Complain

- **Standing – who are the categories of individuals who can trigger a response obligation**
- **A student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX**
- **A person other than a student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX and who was participating or attempting to participate in the recipient's education program or activity when the alleged sex discrimination occurred.**
- **Student includes admitted students**

Intake and Outreach

- Supportive measures
- Can include involuntary changes in class, work, housing, or extracurricular or any other activity
- Can include temporary measures that burden a respondent imposed for non-punitive and non-disciplinary reasons and that are designed to protect the safety of the complainant or the recipient's educational environment, or deter the respondent from engaging in sex-based harassment
- Supportive measures that burden a respondent may be imposed only during the pendency of the grievance procedures and must be terminated at the conclusion of those grievance procedures.
- Measures must be no more restrictive of the respondent than is necessary to restore or preserve the complainant's access to the recipient's education program or activity
- No involuntary measures that burden the respondent during informal resolution
- Right to seek modification or reversal of the supportive measures

Intake and Outreach (Cont'd)

- **Emergency removal**
 - An immediate and serious threat to the health or safety of students, employees, or other persons arising from the allegations of sex discrimination that justifies removal
- **Title IX Coordinator required to monitor the recipient's education program or activity for barriers to reporting information about conduct that may constitute sex discrimination under Title IX**
- **Shift in the “formal complaint” approach**
 - Allows for oral and written complaints
 - To the recipient, not to the Title IX Coordinator
 - Title IX Coordinator must determine whether to initiate a complaint of sex discrimination . . . if necessary to address conduct that may constitute sex discrimination

Notice and Reporting

- **Responsibility to respond arises when recipient is on notice of conduct that MAY be sex discrimination**
- **Reporting obligations for employees**
 - Obligations differ based on whether the conduct involves a student or employee complainant
 - Adds obligations to all employees, including confidential employees, to provide the contact information of the Title IX Coordinator and information about how to report sex discrimination
 - Explicitly incorporates faculty as employees with the responsibility to report sex discrimination

Notice and Reporting (Cont'd)

- **Categories of employees**

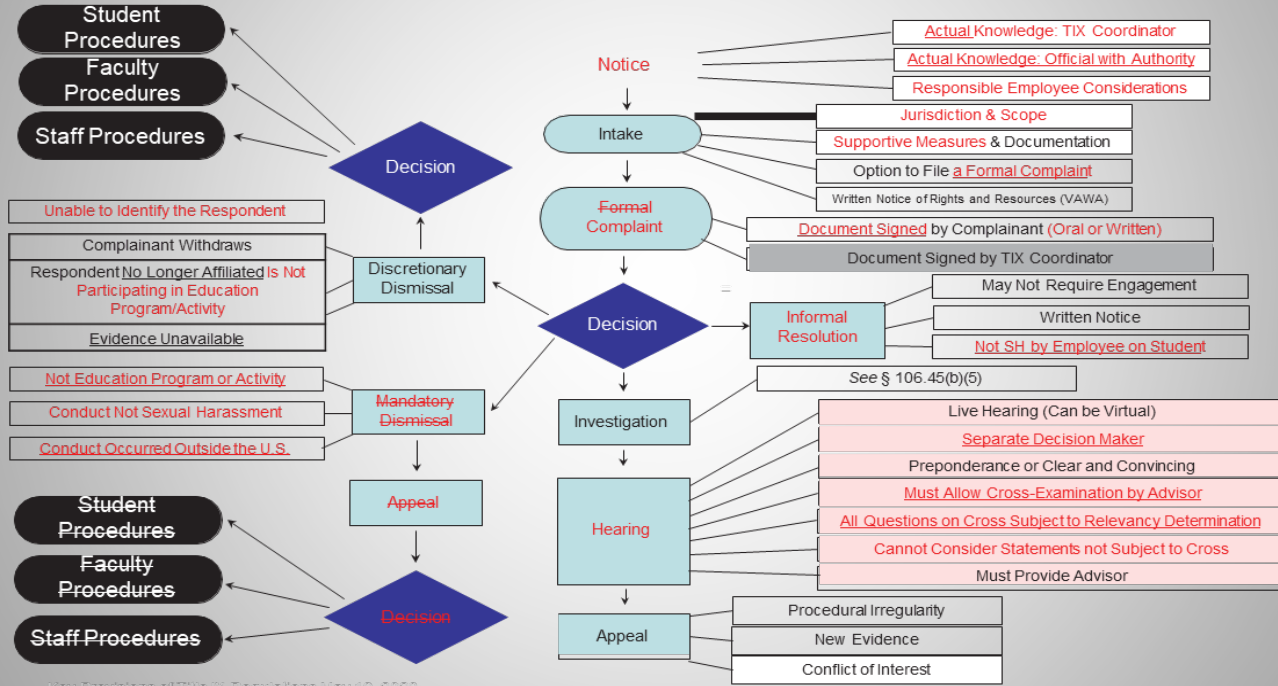
- Confidential employees
- Any employee who has authority to institute corrective measures on behalf of the recipient
- Any employee who has responsibility for administrative leadership, teaching, or advising in the recipient's education program or activity
 - Student complainant: notify the Title IX Coordinator
 - Employee complainant: notify the Title IX Coordinator OR provide the contact information of the Title IX Coordinator and information about how to report sex discrimination

- **All other employees**

Reporting Obligations

- **Provide Information to Complainant**
 - Confidential employees
 - Any employee who has responsibility for administrative leadership, teaching, or advising in the recipient's education program or activity when the complainant is an employee
 - All other employees
- **Report to Title IX Coordinator**
 - Any employee who has authority to institute corrective measures on behalf of the recipient
 - Any employee who has responsibility for administrative leadership, teaching, or advising in the recipient's education program or activity when the complainant is a student

Title IX Obligations: A Diagram



Key Provisions of Title IX Regulations May 19, 2020

§ 106.45 – Prompt and Equitable Resolution of Complaints of Sex Discrimination

- **Notice of allegations**
- **Adequate, reliable, and impartial investigation**
- **Burden on recipient to gather evidence**
- **Provide description of evidence relevant to allegations and reasonable opportunity to respond.**
- **Notify the parties of the outcome**
- **Appeal optional**
- **Complete process before imposing sanctions**
- **Presumption of not responsible**
- **Reasonably prompt timeframes for the major stages of the grievance process**
- **Reasonable steps to protect the privacy of the parties and witnesses**
- **Objective evaluation of all relevant evidence**
- **Exclude certain classes of evidence**

§ 106.46 – Resolutions of Complaints Involving a Student

- **Investigator Model**

- Equitable access to the relevant evidence or to the same written investigation report
- If report, equitable access to the relevant evidence upon request
- Reasonable opportunity to review and respond prior to determination
- Individual meetings if credibility is an issue and relevant
- Decision-maker poses questions raised by the parties

- **Live Hearing**

- If live hearing, opportunity to review the evidence and/or investigation report before the live hearing
- Opportunity to respond before or during the hearing
- Physically present in same geographic location or through technology
- Allow each party's advisor to ask questions of any party and any witnesses
- No questioning by the party personally
- Must provide advisor without charge to the party for the purpose of advisor- conducting questioning

Title IX Coordinator Responsibilities

- **Title IX Coordinator MUST**

- § 106.8 - Retain ultimate oversight over compliance responsibilities
- § 106.8(d) – Be trained
- § 106.8(f) - Maintain records
- § 106.40 – Take specified actions following notice of student's pregnancy or related condition
- § 106.44(b) - Monitor for barriers to reporting AND reasonably address
- § 106.44(f) – Take specified actions after notice of sex discrimination

- **Title IX Coordinator MAY**

- § 106.8(e) - Consult with disability support
- § 106.44(e) - Public awareness events*
- § 106.45(b)(2) - Be the decision maker in grievance process

Next Steps

- **TCSG System Office will collaborate with Title IX Coordinators to begin discussions on these changes and developing training for populations impacted by them**
- **Evaluate, prepare, and potentially submit public comment to impact the Final Rule**

Questions?

