

Overview of Regulations & Addressing Conflicts Between State & Federal Law



Presented by Paula Barran
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BARRAN LIEBMAN LLP
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Major Changes & Clarifications



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Title IX Jurisdictional Standards

- Title IX is not extra-territorial
 - The statute applies to **persons in the United States**
- Title IX covers **education programs or activities**
 - Education programs or activities are probably locations, events, or circumstances over which the school exercised substantial control over **the respondent** and **the context in which the harassment occurred**
- Title IX applies to any building owned or controlled by a student organization that is officially recognized by a post-secondary institution
 - Includes recognized fraternity or sorority house

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Adoption of the Supreme Court Framework as Modified & Expanded

- The definition of sexual harassment for Title IX purposes is conduct on the basis of sex that is **severe, pervasive, and objectively offensive** that effectively denies a person equal educational access
 - This part of the Department's definition comes from *Davis v. Monroe County Board of Education*
 - This part of the definition is informed by First Amendment concerns
- The definition also includes *quid pro quo* harassment and Clery Act/VAWA sex offenses
 - These offenses are **not** evaluated on the “severe, pervasive, and objectively offensive” standard
 - 85 FR 30032-33
 - 34 CFR § 106.30(a)

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New Definitions (34 CFR § 106.24)

- “Actual Knowledge”

- The Title IX Coordinator or official with authority to take corrective measures has notice

- “Complainant”

- An individual who is alleged to be a victim

- “Consent”

- There is no required definition of consent

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New Definitions (Continued)

- “Formal Complaint”

- A document filed by a complainant (document or electronic submission) or signed by Title IX Coordinator against respondent
 - Requesting investigation
 - Complainant must be participating in or attempting to participate in education program or activity

- “Respondent”

- Person who has been reported to be the perpetrator of conduct that could constitute sexual harassment

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Reporters: Mandatory & Permissive

- Actual knowledge is triggered when there is notice to:
 - The Title IX Coordinator
 - An official with authority to institute corrective measures on the institution's behalf
 - Where to find it: 34 CFR § 106.30 (definition of actual knowledge)
- Institutions are permitted to choose whether to have all employees be mandatory reporters, or designate some to be confidential

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LGBTQ

- The Department's use of the acronym LGBTQ is inclusive of asexual, intersex, non-binary, and other orientation or identity communities
- Every person is entitled to the same protections against sexual harassment under the final regulations (85 FR 30031)

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New Notice Requirements

- The institution must provide broad notice of contact information for the Title IX Coordinator
 - Notice must be provided to students, employees, applicants for admission, applicants for employment, unions
 - Notice must include name or title, office address, email address, telephone number
 - Arrange for after-hours contact for reporting purposes
- Contact information must be prominently displayed on the institution's website
 - 85 FR 30573
 - 34 CFR § 106.8

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Religious Institutions

- Exemption for institutions controlled by religious organizations (from Education Amendments of 1972) remains in place (former 34 CFR § 106.12)
- Exemption is for requirements that are “not consistent with” the organization’s religious tenets
- Additional provision: May obtain assurances of the religious exemption, but
 - May also assert the exemption without obtaining assurances in advance
- 34 CFR § 106.12(b)
- 85 FR 30573

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Higher Education is Not a Regular Workplace

“The Department does not wish to apply the same definition of actionable sexual harassment under Title VII to Title IX because such an application would equate workplaces with educational environments, whereas both the Supreme Court and Congress have noted the unique differences of educational environments from workplaces and the importance of respecting the unique nature and purpose of educational environments.”

- 85 FR 30037
- 85 FR 30438-30446

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Reporting

- New regulations clarify the circumstances under which an institution must investigate and adjudicate harassment allegations
 - Mandatory when a complainant files or a Title IX Coordinator signs a formal complaint
 - An institution may craft and apply its own policy to identify which employees must or may (with or without complainant’s consent) report to the Title IX Coordinator
- 85 FR 30041-43
 - 34 CFR § 106.8

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Clarification of What Constitutes Title IX Notice (“Actual Knowledge”)

- Actual Title IX notice occurs when there is:
 - Notice to the Title IX Coordinator
 - Notice to an official with authority to institute corrective measures on the institution’s behalf
- When actual Title IX notice occurs, the institution’s response obligations are triggered
- 85 FR 30038
- 34 CFR § 106.30(a) (definition of “actual knowledge”)

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Supportive Measures

- The final regulations require institutions to offer supportive measures to every complainant irrespective of whether the complainant files a formal complaint
- Supportive measures are not merely “interim”
- 85 FR 30030
- 34 CFR § 106.30(a)

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Treatment of Respondent

- Institutions may not treat a respondent as responsible for sexual harassment without providing due process protections (85 FR 30030)
- When the DOE uses the term “victim” or “survivor” or “perpetrator,” it is with the assumption that a reliable process has resulted in a determination of responsibility
 - 85 FR 30031
 - 34 CFR § 106.30, 45

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Avoiding Deliberate Indifference

- An institution must respond in a manner that is not clearly unreasonable in light of the known circumstances
- Revisions to 34 CFR § 106.44(a) (Recipient's response to sexual harassment)
 - Respond promptly and explain process
 - Treat complainants and respondents equitably
 - Offer supportive measures
 - No disciplinary sanctions without following a grievance procedure
 - Emergency removal of respondent based on **physical** threat provided there is opportunity for immediate challenge
 - Institution may place non-student employee on administrative leave during pendency of grievance procedure
- 85 FR 30044, 30574-75
- 34 CFR § 106.44

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New Requirements for Investigations

- The institution has the burden to gather evidence
- NO gag orders
- No restriction on the ability of parties to discuss allegations or gather evidence
- Parties may select an advisor of the party's choice who may be an attorney
- Institutions must provide written notice of investigative events and provide evidence at least ten days in advance of any required response
- No access to or use of medical, psychological, and similar treatment records
- 85 FR 30576-77
- 34 CFR § 106.45

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Grievance Procedure

- An institution's grievance procedure **must** comply with 34 CFR § 106.45 when it addresses Title IX sexual harassment under the new regulations including:
 - Procedures apply equitably to both parties
 - All relevant evidence must be objectively evaluated
 - Credibility may **not** be based on status (complainant, respondent, witness)
 - Persons implementing or facilitating the process must be unbiased, trained, impartial, without conflict of interest
 - Must presume respondent not responsible until proven to be
- 85 FR 30575-77
- 34 CFR § 106.45

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Significant Procedural Changes

- No single investigator model
- Presumption of innocence
- Live hearings with cross examination
- Advisors who may be lawyers
- 85 FR 30575-77
- 34 CFR § 106.45

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Standard of Evidence/Burden of Proof

- Institution may choose clear and convincing evidence or preponderance of evidence standard
- As long as the same standard is used for all complaints (including employees and faculty)
- Might interfere with collective bargaining agreements
- 85 FR 30575
- 34 CFR § 106.45(b)(1)(vii)

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Informal Resolution

- Processes such as mediation and restorative justice are permissible
 - A formal complaint must have been filed
 - Both parties must consent
 - The facilitator must be well-trained
- No informal resolution to resolve allegations that **an employee** sexually harassed a student
- 85 FR 30054-55, 30086, 30578
- 34 CFR § 106.45(b)(9)

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Addressing What Title IX Does Not Cover: Institutional Choice and/or State Law

- The adaptations of the Supreme Court framework provide institutions “with flexibility, **subject to the legal requirements in these final regulations**, to respond to a greater range of misconduct, operate on a condition of constructive notice, or respond under a strict liability standard, if the recipient chooses to adopt those guidance-based standards for itself, or if the recipient is required under State or other laws to adopt those standards.”
- 85 FR 30035-36

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Title IX: Jurisdictional Standards Affect Whether Formal Complaints Proceed

- Institutions “must investigate” the allegations in a formal complaint...
- If the conduct would not constitute sexual harassment **as defined in the regulations** even if proved, **or did not occur in the educational program or activity**, or against a person **in the United States**
 - The institution must dismiss the formal complaint for purposes of Title IX, but
 - The institution is not precluded from action under its code of conduct
 - 34 CFR § 106.45(b)(3)(i); 85 FR 30576

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Jurisdictional Dismissal of a Title IX Formal Complaint Need Not End the Matter

- “Recipients may continue to address harassing conduct that does not meet the 34 CFR § 106.30 definition of sexual harassment...”
- The Department’s change to 34 CFR § 106.45(b)(3)(i) clarifies that a dismissal because the allegations do not meet the Title IX definition “does not preclude a recipient from addressing the alleged misconduct under other provisions of the recipient’s own code of conduct” (85 FR 30037-38)
- The same is true for misconduct occurring outside an education program or activity, or occurring against a person who is not located in the United States (85 FR 30038)

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Title IX Processes for Title IX Misconduct & Non-Title IX Processes for Non-Title IX Misconduct

- “A school may address sexual harassment affecting its students or employees that falls outside Title IX’s jurisdiction in any manner the school chooses, including providing supportive measures or pursuing discipline.”

-Department of Education, Title IX Summary

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Federal Preemption

- State or local laws cannot affect an institution’s requirement to comply with:
 - 34 CFR § 106.30
 - 34 CFR § 106.44
 - 34 CFR § 106.45

34 CFR § 106.6(b), 85 FR 30573: to the extent of a conflict between State or local law and Title IX as implemented by 34 CFR § 106.30, 34 CFR § 106.44, and 34 CFR § 106.45, the obligation to comply with 34 CFR § 106.30, 34 CFR § 106.44, and 34 CFR § 106.45 is not obviated or alleviated by any State or local law.

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Preemptive Provisions

- 34 CFR § 106.30: includes definitions of actual knowledge, complainant, consent, formal complaint, respondent, sexual harassment, and supportive measures
- 34 CFR § 106.44: addresses the institution’s “response to sexual harassment” and deliberate indifference standard
- 34 CFR § 106.45: addresses the grievance process for formal complaints of sexual harassment
- 85 FR 30574-30578

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Commentary on Preemptive Effect

- 85 FR 30455
- “By adding 34 CFR § 106.6(h), the Department clearly and unequivocally states its intention that these final regulations concerning sexual harassment **preempt State and local law to the extent of a conflict**” (85 FR 30455)

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Complying with HB 3415 (ORS 350.253): Inconsistent Definitions of Sexual Harassment

- Federal law requirement is set out at 34 CFR § 106.30(a) (85 FR 30574)
- State law requirement is HB 3415 S. 1(2)(a)
- Possible compliance solution
 - Prepare policies that address federal requirements (the Title IX policy) and add a Conduct Code provision that uses the state law definition
 - Reserve Title IX procedures for the Title IX definition (required by federal law)

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Complying With HB 3415: Inconsistent Requirements for Initial Inquiry Based on Constructive Knowledge

- Federal law bases responsibilities upon “Actual Knowledge” (34 CFR § 106.30(a))
- State law requires “an initial inquiry” or “contact” when a designated responsible employee knows or should have known of the possible conduct (S. 1(2)(c))
- Possible compliance solution:
 - Conduct a Title IX inquiry anyway
 - Use Title IX processes if it meets the definition

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Complying With HB 3415 (ORS 350.253): Inconsistent Geographical Jurisdiction

- Federal law requires Title IX procedures if the conduct and the location meet Title IX standards
 - Applying the federal law definition of sexual harassment
 - Considering locations, events, or circumstances over which the institution exercised substantial control
 - In the United States
- If federal law is met, apply federal standards
- If federal law is not met, dismiss the **federal report**
- If state law jurisdiction is met (HB 3415 1(2)(2)), move to conduct code

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ORS Chapter 350 Geographical/Program Requirements

- ...the institution will analyze and may have an obligation to respond to any complaint received by the institution, **regardless of whether the incident occurred on the campus of the institution or elsewhere**, that relates to:
 - (A) Sexual harassment;
 - (B) Sexual assault;
 - (C) Domestic violence;
 - (D) Dating violence; or
 - (E) Stalking
- ORS 350.253

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ORS 350.255 Written Protocol

- “The alleged victim of the sexual assault is a student at the university or college and the alleged sexual assault occurred on the grounds or at the facilities of the university or college” [does not require facilities being in United States]
- “The alleged perpetrator of the sexual assault is a student at the university or college, or a member of the faculty or staff of the university or college, regardless of where the alleged sexual assault occurred” [requires only that the perpetrator be affiliated with the institution as student, faculty, or staff]

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Annual Training Requirements: State Law

- ORS 350.253(4)
 - Train **all persons** involved in Title IX proceedings
- Required content
 - Definitions and dynamics
 - Prevalence
 - Trauma informed best practices
 - Best practices to address bias, anti-oppression framework
 - Gender responsiveness
 - Effective interviewing
- Consult with recognized student government

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Compare Title IX Regulations

- Directed Question No. 4 (85 FR 30249; 85 FR 30559); 34 CFR § 106.45 (b)(1)(iii): training requirements
 - **Who:** Coordinators, investigators, decision-makers, information resolution facilitators
 - **Content:** The federal definition of sexual harassment, scope of the education program or activity, how to conduct an investigation and grievance process (including hearings, appeals, and informal resolution); how to serve impartially
 - **Who:** Investigators
 - **Content:** Issues of relevance
 - **Who:** Decision-makers
 - **Content:** Technology for live hearings, issues of relevance for questions and evidence
- Must not rely on sex stereotypes and must promote impartiality

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Federal Transparency

- The institution must post materials used to train Title IX personnel on their websites or make them available to members of the public to inspect
 - Address this requirement with proprietary providers

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Federal: Examples of Information To Be Provided at Time of Complaint

- Availability of supportive measures with or without formal complaint
- Consideration of complainant's wishes
- Explanation of process for filing formal complaint
- Grievance procedure must include a presumption that respondent is not responsible for the alleged conduct until determination is made
- Right to inspect
- Notice of conduct code provisions that prohibit knowingly making false statements
- Description of range of possible disciplinary sanctions and remedies
- Standard of evidence
- 34 CFR § 106.44-45
- 85 FR 30574-75

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State Law Written Protocol

- ORS 350.255 requires a written sexual assault protocol, made available upon report, during orientation and on website
- Content:
 - Victim's rights
 - Legal options available
 - Campus-based disciplinary processes and available services
 - Privacy rights
 - Contact information for services and resources

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Retaliation Provisions

- 34 CFR § 106.71 (85 FR 30578): "...charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purposes of interfering with any right or privilege secured by title IX or this part, constitute retaliation."
- Compare ORS 350.257 (no threat to influence decision regarding reporting or participation in investigation)

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Materially False Statements

- 34 CFR § 106.71 (85 FR 30578): It is not retaliation to charge an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding
 - A determination of responsibility is not alone sufficient to conclude there was a materially false statement in bad faith

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Confidentiality

- 34 CFR § 106.71 (85 FR 305.78)
- Institutions must keep confidential:
 - The identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or files a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness...
 - Except as may be permitted by FERPA or as required by law, **or to carry out the purposes of the regulations**

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First Amendment Protections

- The exercise of First Amendment freedoms is not retaliation (85 FR 30578, 34 CFR § 106.71)

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COVID-19 & Title IX

“The Department understands that, during this national emergency, postsecondary institutions may not be able to provide services in the same manner as they typically would. Institutions may not, however, adopt a blanket policy putting all investigations or proceedings on hold until campuses resume normal operations, or a policy of refusing to accept and respond to new complaints. Instead, institutions should make a good-faith effort (and document the steps the institution took) to respond promptly and effectively to reports of discriminatory harassment (for instance, on the basis of race, sex, or disability), and to conduct fair, impartial investigations of student and employee complaints of such harassment in a reasonably timely manner, while also taking into consideration the health, safety, and well-being of all their students and staff.”

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Reminders

- Title IX is a non-discrimination mandate
- The 2020 regulations “impose, for the first time, legally binding rules on recipients”
- Title IX Regulations
 - Must be implemented
 - August 14, 2020 is a real deadline
 - What might change
 - Lawsuits?
 - Congress?
- HB 3415 (ORS 350.253)
 - Effective date
 - Applicable to 2020-21 academic year
 - Effective date January 1, 2020

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A Note on Navigation

- Clarifying amendments to existing regulations (85 FR 30413)
- Directed questions (85 FR 30482)
- Commentary on interaction with Clery Act (85 FR 30511)
- Commentary on retaliation (85 FR 30535)
- Commentary on “lying shouldn’t be protected”(85 FR 30537)
- Regulatory Impact Analysis(85 FR 30538)
- Commentary on training (85 FR 30559)
- Text of Regulations (85 FR 30572)

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Where to Find Key Official Documents

- Oregon’s 2019 Revised Statutes
 - https://www.oregonlegislature.gov/bills_laws/Pages/ORS.aspx
- Federal Register
 - <https://www.federalregister.gov/>
- Official Filing of Regulations
 - <https://www.federalregister.gov/documents/2020/05/19/2020-10512/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>
- OCR Blog
 - <https://www2.ed.gov/about/offices/list/ocr/blog/index.html>

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Thank You!



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