


Fall Forum 2021  
Stimulus Funds and UGG, and You and Me, So Happy (Back) Together



# Title IX: Court Cases, Interpretations, and Regulatory Updates

Julia Martin  
jmartin@bruman.com  
[www.bruman.com](http://www.bruman.com)

**BRUSTEIN & MANASEVIT, PLLC**  
ATTORNEYS AT LAW

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## Title IX

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### Where does it come from?

- Title IX of the Education Amendments of 1972
- Enacted as follow-up to Civil Rights Act of 1964
- Originally just applied to those receiving direct aid
- The Civil Rights Restoration Act (1988) extended Title IX coverage to all programs of any educational institution that receives *any federal assistance, both direct and indirect*.
  - Public and private
  - At all levels of education (elementary, secondary, postsecondary)
  - Includes any school district of which any part receives federal funds
- Known as "recipients"

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*"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."*

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## What does it do?

- Protects against discrimination in:
  - *Recruitment, admissions, and counseling*
  - *Financial assistance*
  - *Athletics*
  - *Sex-based harassment*
  - *Treatment of pregnant and parenting students*
  - *Discipline*
  - *Single-sex education*
  - *Employment* (from ED guidance)

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## Enforcement

- Enforced primarily by U.S. Department of Education Office for Civil Rights
  - With investigations prompted by:
    - Individual complaints
    - Civil Rights Data Collection (CRDC)



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## Recipient-Level: Title IX Coordinators

- Each recipient needs a Title IX coordinator
- Responsible for helping to ensure the recipient's compliance with Title IX's administrative requirements:
  - *Must have knowledge of recipient's policies and procedures on sex discrimination*
  - *Should be involved in drafting and revision of policies and procedures*
  - *Should be involved in Title IX-involved disciplinary and other proceedings, monitor outcomes*
  - *Monitor athletic participation*
  - *Provide training and professional development*
  - *...among other responsibilities*

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## Are you a "recipient?"

## Do you have a Title IX Coordinator?

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## Sexual Harassment and Assault

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## Sexual Harassment Guidance at ED

- Has never issued final regulations on sexual harassment and assault
- Has issued several guidance documents on the topic, primarily:
  - *Dear Colleague Letter on Sexual Violence (April 4, 2011)*
  - *Questions and Answers on Title IX Sexual Violence (April 29, 2014)*
- Rescinded 2011 and 2014 Dear Colleague letters in September 2017
  - *"Lacked basic elements of fairness" for accused students*
  - *Overly prescriptive? ("the era of rule by letter is over")*
  - *Released interim guidance*
- Draft regulations issued November 2018
- Final regulations issued May 2020, applicable in August

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## Why Draft New Regulations?

- Previous guidance documents "do not provide appropriate standards" for responding to incidents
- Draft regulations allow "greater control over the process"
- Would reduce the number of complaints that are formally adjudicated
  - *Reducing burden → deregulatory action per 2017 Executive Order*

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## Applicability

- In draft rule, ED asked whether it should apply to K-12 schools, employees.
  - *Final is broadest possible application*
- Apply to all schools receiving federal funds
  - *K-12 and postsecondary*
  - *Highlight "contractual nature" of Title IX*
- Apply to conduct of employees and students, to employees and students

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## Title IX as a "Contractual Obligation"

- "...because Congress enacted Title IX under its Spending Clause authority, the obligations it imposes on recipients are in the nature of a contract."
- Consequences for noncompliance:
  - *Loss of eligibility for federal funds directly tied to program to which access was denied*
  - *Equitable remedies where considered appropriate/necessary*
  - **NO MONETARY / PUNITIVE DAMAGES**
- **ONLY** recipient institution conduct subjects it to liability
  - *Not conduct of faculty, staff, teachers, or students*
  - *Focused on institutional response*

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## New Standard for Institutions

- Conduct of recipient institution is what matters
  - *How does institution react?*
- New standard: must respond to allegations in a manner that:
  - *Complies with any formal proceeding requirements*
  - **Does not appear to constitute "deliberate indifference"**
    - *i.e. not "clearly unreasonable in light of the known circumstances"*



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## Definition Changes

- "Sexual harassment"
  - *Previous: "unwelcome conduct of a sexual nature"*
  - *Final regulations: conduct on the basis of sex involving*
    - "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;" or
    - "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 recipient's program or activity;" or
    - "Sexual Assault" as defined in the Clery Act, or "domestic violence" or "stalking" as defined by the Violence Against Women Act

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## Definition Changes

- Educational program or activity
  - Action must happen "within recipient's educational program or activity" to trigger response under proposal
  - Complainant must be participating or attempting to participate in educational programs or activities
  - May close case if respondent is "permanently separated" from entity
  - Must take place "against an individual in the United States"
  - Could include:
    - university libraries            campus tours
    - computer labs                    vocational resources
    - public lectures                    sporting events

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## Definition Changes

- Educational program or activity: how to determine responsibility?
  - Locations, events, or circumstances over which the school exercised substantial control
    - On-campus or off-campus
  - Any building owned or controlled by a student organization that is officially recognized by a postsecondary institution (such as a fraternity or sorority house).
  - Should not be conflated with Clery Act requirement that incidents take place "on campus" to trigger reporting
    - Two tests may reach same conclusion

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## When is a Response Triggered?

- Recipient must respond to each known report of sexual harassment
  - Standard of "actual knowledge"
    - "constructive knowledge" not enough!
  - "Known" = reported to
    - Title IX coordinator or official with authority to institute corrective actions, at an IHE
    - At K-12 level, any employee
      - Serve in loco parentis
      - BUT! Not the same as a mandated reporter standard or Title IX coordinator

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## Grievance Procedures

- Most extensive section
- Must:
  - *"treat complainants and respondents equitably"*
  - *not act in such a way as to deprive an individual of due process rights under 5<sup>th</sup> or 14<sup>th</sup> amendment*
    - Viewed as civil rights rule by ED
  - *"include a presumption that the respondent is not responsible for the alleged conduct" until a determination is made otherwise*

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## Grievance Procedures

- Process is triggered when:
  - *A formal complaint is filed; or*
  - *A recipient has "actual knowledge regarding reports by multiple complainants of conduct by the same respondent that could constitute sexual harassment"*
    - Title IX Coordinator must file a formal complaint to trigger proceedings
- Formal investigation must be conducted by recipient
- Must appoint:
  - *"advisors" for both parties*
  - *neutral decision-maker*



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## Grievance Procedures

- Adjudicatory Hearings
  - *In K-12 context:*
    - Investigation and questioning may be done entirely in writing
    - Option for live hearing
  - *In higher education context:*
    - Must conduct a live hearing with opportunity to question both parties
      - *May be conducted in separate rooms through use of video conferencing or other technology*

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## Grievance Procedures

- Adjudicatory Hearings
  - *Cross-examination would have to comply with federal "rape-shield law"*
    - Complainant's sexual history could not be used to escape responsibility
  - *Would allow a line of questioning:*
    - "to prove that someone other than the respondent committed the conduct alleged by the complainant;" or
    - "when evidence about specific incidents of the complainant's sexual behavior with respect to the respondent is offered to prove consent"

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## Grievance Procedures

- Standard of Evidence
  - *Recipients can choose:*
    - Preponderance of the evidence; OR
    - Clear and convincing evidence
  - *BUT!*
    - Same standard must be applied to students and employees
- Notice of Determination
  - *Must be in writing*



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## Remedies

- Required to be provided to a complainant when a respondent is found responsible
- Must be designed to maintain the complainant's equal access to education and
- May include supportive measures for complainant (e.g. changes to class schedule or housing, campus escort)
- Do not need to be non-disciplinary or non-punitive and
- Do not need to avoid burdening the respondent.

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# What Now?

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## Executive Order

- [Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity](#)
  - Directs ED to review all policies related to sex discrimination but specifically names Title IX rule
    - Within 100 days of EO issuance (March 8<sup>th</sup>)

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## Title IX and Gender Identity/Sexual Orientation

- [January 20<sup>th</sup>: ED issued making Bostock SCOTUS decision precedent governmentwide](#)
  - Says that Civil Rights Act of 1964 protects employees from discrimination based on gender identity or sexual orientation
  - *Bostock v. Clayton County* already being applied by federal judges
- [March 26<sup>th</sup>: DOJ memo to federal agencies](#)
  - Concludes that Title IX protects from discrimination based on gender identity or sexual orientation

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## Title IX Rule

- April letter Announces review mandated in March EO
- Plans for a comprehensive re-write
  - Oral testimony collected in June
  - Will publish draft rule, solicit public comment
    - Previous rule drew more than 100,000 comments
    - ED: current rule will remain in effect until new one is written
  - Will apply to K-12 and higher ED
  - 1-2 year timeline



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## Title IX Rule

- Potential areas of change
  - Applicability to K-12 (in whole or in part)
  - Standard of Evidence
  - Religious Exemptions
  - Cross-examination rules
  - Definition of Sexual Harassment
    - Return to Obama-era standard ("any unwelcome conduct of a sexual nature")
  - Definition of Sex



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## Notice of Interpretation

- June 2021: ED publishes a "Notice of Interpretation" in Federal Register
  - "Consistent with the Supreme Court's ruling and analysis in *Bostock*, the Department interprets Title IX's prohibition on discrimination "on the basis of sex" to encompass discrimination on the basis of sexual orientation and gender identity"
  - "OCR will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities that receive Federal financial assistance from the Department."

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# Do you know what your current policy/ definition is?

## Is it compliant with the NOI?

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## Attorneys General Letter and Litigation

- August/ September 2021: 20 Attorneys General write to ED contesting NOI, file lawsuit arguing that:
  - States face a "credible threat" of losing federal funding due to existing laws and policies which are not in compliance
  - Bostock is "inapplicable to Title IX's materially different language"
  - ED violated APA in issuing this opinion in a Notice of Interpretation rather than through formal rulemaking.
  - Requiring schools and teachers to use the preferred pronouns of students is illegal compelled speech under the First Amendment
  - ED has violated the Tenth Amendment, which delegates to States all powers not explicitly given to Congress

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## Resources

- ED's Title IX Resource Guide: <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf> (use with "caution" after implementation date of final rule)
- Draft Regulations: <https://www.federalregister.gov/documents/2018/11/29/2018-25314/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>
- Final Rule: <https://www.regulations.gov/document?D=ED-2018-OCR-0064-124169>
- ED summary of final rule: <https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf>

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