



Recent Developments in Title IX, Public Relations and Crisis Response Handling

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Ashley R. Lynam has considerable experience in the analysis, implementation and evaluation of written sexual assault and molestation policies and procedures, as well as the proactive investigation of alleged sexual assault and representation of corporate representatives, current and former employees and independent contractors, and other witnesses for deposition and trial.

She also provides wrap-around crisis management services to clients in the public, private, college and university setting, specializing in VAWA and Clery Act compliance as well as investigating, adjudicating, and advisory services under Title IX and student conduct policies. Ashley is certified by the SUNY Student Conduct Institute.

Ashley also has extensive experience in rapid-response investigations for catastrophic and high-exposure losses as well as intensive special investigations of fraudulent claims and misconduct.



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Kacie E. Kergides concentrates her practice on Title IX investigations and advising, institutional response to sex and/or gender-based harassment and misconduct and the adjudication of student, employee and management disputes, and sports injury cases including traumatic brain injury (TBI) litigation. In addition to handling investigations and litigation in both practice areas, Kacie counsels athletes, schools, and sports organizations on sports-related injuries such as concussion and TBI, provides guidance on the management of sport-related injuries and Title IX complaints, and advises these institutions on minimizing and managing risk.

Kacie has recently presented on recent federal changes to Title IX regulations and the specific role of advisor in the institutional setting. Kacie has also presented on minimizing risk exposure and compliance-related issues at various law schools and undergraduate universities including Villanova School of Law and the University of Michigan, and before various sports organizations, including the Eastern Athletic Trainers' Association.



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WHAT IS A COLLEGIATE ATHLETIC TRAINER?

- ✓ Manage injuries to athletes
- ✓ Prevent injuries to athletes
- ✓ Assist in recovery of injured athletes
- ✓ Collaborate with doctors
- ✓ Develop injury prevention plans



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WHAT IS A COLLEGIATE ATHLETIC TRAINER NOT?

- ✓ Therapist/Psychologist
- ✓ Parent
- ✓ Best Friend
- ✓ Emotional Outlet
- ✓ **TITLE IX INVESTIGATOR**



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“San Jose State swimmers tell how they blew the whistle on trainer’s alleged sexual abuse”
The Mercury News

“Syracuse women’s basketball coach Quentin Hillsman accused of abuse, unwanted contact by players”
NEW YORK POST

“LSU mishandled sexual misconduct complaints against students, including top athletes”
USA TODAY SPORTS

“Betrayed: How Ohio failed hundreds of male athletes abused by OSU’s Dr. Richard Strauss”
5 abc NEWS 5 CLEVELAND

“U.S. Department of Justice accuses Nebraska of misapplying Title IX laws”
ESPN

“Alumni call on AG to investigate how University of Michigan dealt with abuse complaints”
ESPN



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OBJECTIVES

- Update on relevant Title IX changes
- Discuss which of those changes we think will stick under new administration
- Discuss how they apply to you as a CAT
- Advice for compliance and best practices

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TITLE IX

Title IX of the Education Amendments Act of 1972

"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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THE HIERARCHY



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TITLE IX GUIDANCE A HISTORICAL PERSPECTIVE

From Dear Colleague Letters to Rules and Regulations

- 2011 Dear Colleague Letter and 2014 FAQs
 - Rescinded 2017
- November 2018: Proposed Formal Regulations
- November 2018 through January 2019: Comment Period
 - 100,000+ public comments
- May 6, 2020: New Regulations
 - Released during COVID-19 nationwide pandemic
 - 2033 page document
 - Had to be implemented by August 14, 2020
 - Includes significant resource materials: a preamble, executive summary, overview of public comments, discussion of directed questions, regulatory impact analysis and other content



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FUTURE OF TITLE IX

Review of Existing Regulations

- June 15, 2020: Bostock v. Clayton Cty. decision (140 S.Ct. 1731)
Sex discrimination under Title VII includes **sexual orientation and gender identity**; SCOTUS specifically refused to extend holding to Title IX.
- January 8, 2021: DOE's Office of General Counsel Memorandum to OCR re: Bostock decision
- January 15, 2021: Two-part OCR Q&A (www2.ed.gov/about/offices/list/ocr)
- March 11, 2021: Executive Order 14021
Sex discrimination under Title IX includes sexual orientation and gender identity.
- April 6, 2021: OCR Letter to Students, Educators, and other Stakeholders re: Executive Order 14021
OCR announced it was undertaking a comprehensive review of existing regulations, orders, guidance, policies, including the August 14, 2020, regulations.
- June 7-11, 2021: Public Hearing on Title IX

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TOP 10 PRINCIPAL CHANGES OF THE NEW REGULATIONS

- Definition of Sexual Harassment
- What Triggers an Investigation?
- Off-Campus Jurisdiction
- Investigator Model
- Opportunity to Review Report & Evidence
- Evidentiary Standard
- Live Hearing Requirement
- Cross Examination
- Role of Advisors
- Informal Resolution

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1. DEFINITION OF SEXUAL HARASSMENT

New Regulatory Definition

- Existing federal and state case law regarding sexual harassment and quid pro quo sexual harassment
- or**
- “Unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it denies a person access to the school’s education program or activity.”

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2. WHAT TRIGGERS AN INVESTIGATION?

Previous Standard

- Reporters: “Responsible employee”
- “Should have known”

New Standard

- “Actual knowledge” / Formal Complaint
- Reporters: Title IX coordinator or “an official with authority to take corrective action.”



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3. OFF-CAMPUS JURISDICTION

Previous Standard

- Included off-campus
- Included during study abroad

New Standard

- Includes off-campus if within a school’s “education program or activity”
- Excludes study abroad



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4. INVESTIGATOR MODEL

Previous Guidance

- Single-investigator OK
- Does not require school policy to provide for hearing

New Regulations

- Prohibits single-investigator
- Person who determines responsibility cannot be the same person as the Title IX Coordinator or investigator

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5. OPPORTUNITY TO REVIEW REPORT & EVIDENCE

Previous Guidance

- No requirement that parties be provided access to the evidence gathered during the investigation

New Regulations

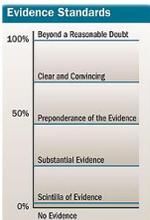
- Parties must be provided two opportunities to review and respond to the investigative report and the evidence gathered during the investigation
 - Before the investigative report is completed
 - Before the hearing



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6. EVIDENTIARY STANDARD



Previous Standard

- Mandated that institutions use "preponderance of the evidence"
- Lower standard than "clear and convincing evidence"

New Standard

- Institutions may choose between the two (PoE or C&C)
- Schools must apply the same standard of evidence to all formal complaints of sexual harassment, ie: against employees (including faculty)

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7. LIVE HEARING REQUIREMENT

New regulations provide:

- Under 106.45(b), Postsecondary schools **must** provide for live hearing during the grievance process
- Most challenging feature of the live hearing requirement is the cross-examination requirement



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8. CROSS-EXAMINATION

Previous Guidance

- No cross-examination required
- Cross-examination of one party by the other party was "strongly discouraged"



New Regulations

- Mandated right to cross-examination during live hearing, i.e., directly, orally, and in real time
- Prohibited cross-examination of one party by the other party (must be done by an advisor)
- Parties must be provided advisors who can, but are not required to be, attorneys
- Must allow for pause before witness/party gives answers
- Can be done remotely / separate rooms via technology
- Only relevant questions allowed
- Parties can refuse to submit to cross-examination

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9. ROLE OF ADVISORS

Advisor Requirement

- All parties are entitled to an advisor of their choosing
- School must provide an advisor if party wants an advisor but does not have one
- Advisor can be anyone, including an attorney
- School cannot limit party's choice of advisor
- No advisor? No problem!
 - If a party does not have an advisor at the live hearing, recipient must provide advisor to perform cross
 - May be, but is not required to be, an attorney

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10. INFORMAL RESOLUTION

Previous Guidance

- Voluntary informal mechanisms permitted for some types of complaints
- “Not appropriate” in sexual assault cases

New Standard

- Permitted, even in sexual assault cases
- Parties cannot be required to participate in an informal resolution
- Informal resolution not permitted to resolve an allegation that an employee sexually harassed a student

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SCENARIOS



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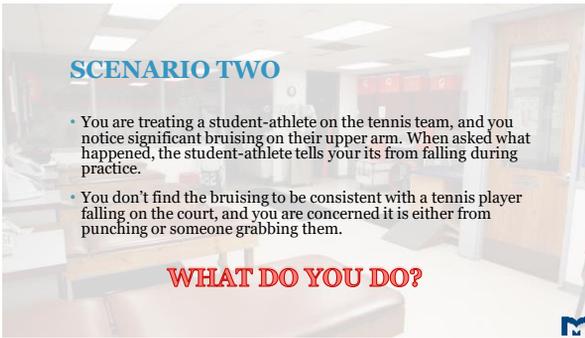
SCENARIO ONE

- While wrapping a student-athlete's ankle before practice, that student-athlete confides in you that he/she believes she was assaulted last night at a party. He/she discloses that the alleged perpetrator was a star athlete, who's team is playing in the national championship next week.

WHAT DO YOU DO?



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SCENARIO TWO

- You are treating a student-athlete on the tennis team, and you notice significant bruising on their upper arm. When asked what happened, the student-athlete tells you it's from falling during practice.
- You don't find the bruising to be consistent with a tennis player falling on the court, and you are concerned it is either from punching or someone grabbing them.

WHAT DO YOU DO?

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LESSONS LEARNED

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- Pure compliance isn't the goal – value-driven institutional response is
- Know your role – set your boundaries
- Know your limitations – don't be the highest up holding a secret
- Document!



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QUESTIONS?

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