



# Title IX: The Past, Present, and Future of Campus Investigations, Adjudications, and Litigation

Ashley R. Lynam and Kacie E. Kergides  
Montgomery McCracken Walker & Rhoads LLP

1



## Ashley R. Lynam

Co-Chair, Higher Education, Institutional Response and Sexual Misconduct Liability Practice Groups

**(T):** 215-772-7410

**(E):** alynam@mmwr.com

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.



2



### Kacie E. Kergides

Associate, Higher Education, Institutional Response and Sexual Misconduct Liability Practice Groups

**(T):** 215-772-7320

**(E):** [kkergides@mmwr.com](mailto:kkergides@mmwr.com)

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.



3

## OBJECTIVES

- Update on most significant Title IX changes under current regulations
- Discuss predictions for anticipated changes
- Advice for compliance and best practices

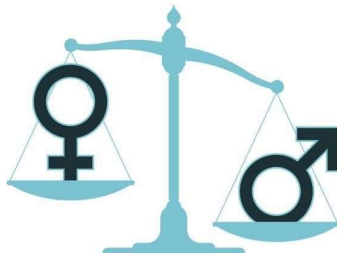


4

# TITLE IX

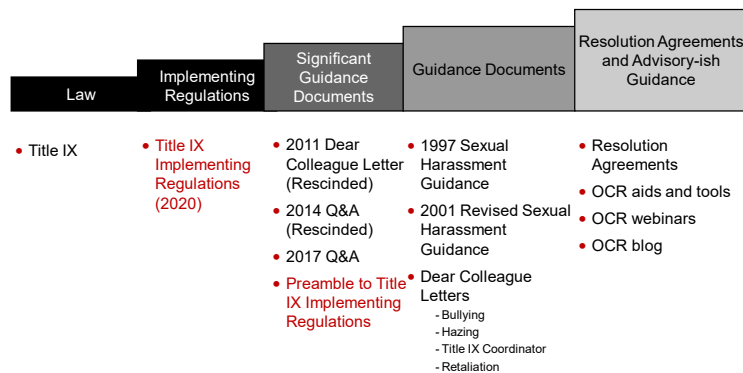
## Title IX of the Education Amendments Act of 1972

*“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.”*



5

# THE HIERARCHY



6

## TITLE IX GUIDANCE A HISTORICAL PERSPECTIVE

- **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



7

7

## FUTURE OF TITLE IX

- **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](http://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
- **APRIL 2022**: Proposed New Title Regulations

8

8

## TOP 10 PRINCIPAL CHANGES OF THE NEW REGULATIONS

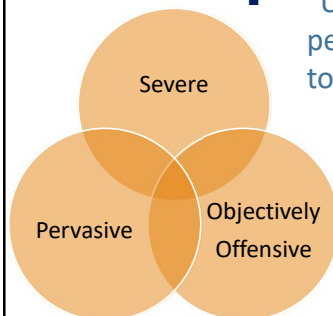
1. Definition of Sexual Harassment
2. What Triggers an Investigation?
3. Off-Campus Jurisdiction
4. Investigator Model
5. Opportunity to Review Report & Evidence
6. Evidentiary Standard
7. Live Hearing Requirement
8. Cross Examination
9. Role of Advisors
10. Informal Resolution

9

9

## 1. DEFINITION OF SEXUAL HARASSMENT

- Existing federal and state case law regarding sexual harassment and quid pro quo sexual harassment
- “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.”



10

10

## 1. DEFINITION OF SEXUAL HARASSMENT



Prediction: Likely to revert to previous standard



Compliance & Risk Impact: LOW

11

11

## 2. WHAT TRIGGERS AN INVESTIGATION?

- **Reporters:** “Responsible employee”
- “Should have known”
- “Actual knowledge” /Formal Complaint
- **Reporters:** Title IX coordinator or “an official with authority to take corrective action.”



12

12

## 2. WHAT TRIGGERS AN INVESTIGATION?



Prediction: Likely to revert to previous standard



Compliance & Risk Impact: MEDIUM-HIGH

13

13

## 3. OFF-CAMPUS JURISDICTION

- Included off-campus
- Includes off-campus **if** within a school's "education program or activity"
- Included during study abroad
- Excludes study abroad

## 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

14

14

## 3 & 4 – JURISDICTION & INVESTIGATION MODEL



Prediction: Likely to revert to previous standard



Compliance & Risk Impact: MEDIUM-HIGH

15

15

## 5. OPPORTUNITY TO REVIEW REPORT & EVIDENCE

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



16

16



## 5. OPPORTUNITY TO REVIEW REPORT & EVIDENCE



Prediction: Hybrid.



Compliance & Risk Impact: LOW

17

17

## 6. EVIDENTIARY STANDARD

- Mandated that institutions use “preponderance of the evidence”
- Lower standard than “clear and convincing evidence”
- 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)

## 7. LIVE HEARING REQUIREMENT

- Most Under 106.45(b), Postsecondary schools **must** provide for live hearing during the grievance process

18

18

## 6 & 7 - STANDARD & LIVE HEARING



Prediction: Possible revert to previous standard.



Compliance & Risk Impact: LOW

19

19

## 8. CROSS-EXAMINATION

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



20

20

## 8. CROSS-EXAMINATION



Prediction: Unclear



Compliance & Risk Impact: HIGH

21

21

## 9. ROLE OF ADVISORS

- 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

22

22

## 9. ROLE OF ADVISORS



Prediction: Unclear



Compliance & Risk Impact: HIGH

23

23

## 10. INFORMAL RESOLUTION

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

24

24

## 10. INFORMAL RESOLUTION



Prediction: New Standard remains.



Compliance & Risk Impact: LOW

25

25

## OTHER UPDATES & EXPECTED CHANGES IN NEW REGULATIONS



26

# BOSTOCK v. CLAYTON COUNTY

590 U.S. \_\_\_\_ (2020)

✓ Landmark Title VII case

✓ U.S. Supreme Court held that gender identity and sexual orientation discrimination are prohibited forms of sex-based employment discrimination

27

## DOJ Applies Bostock To Title IX

- January 25, 2021 – Biden releases Executive Order *Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation* (E.O. 13988)
- April 5, 2021 - DOJ released a memorandum confirming that ***Title IX prohibits discrimination on the basis of sexual orientation and gender identity in educational settings***, adopting the Supreme Court’s reasoning from the landmark Title VII case, Bostock v. Clayton County
  - Operative Title IX language prohibiting discrimination “on the basis of sex” is substantially similar to the Title VII language prohibiting discrimination “because of sex”
  - SCOTUS used phrases interchangeably in Bostock
- Institutional Expectations:
  - articulating prohibition on discrimination against individuals on the basis of sexual orientation and gender identity
  - Guidance on athletics, locker rooms, bathrooms, and related facilities to ensure a safe space is created for the LGBTQ+ community



28

## SUPPRESSION RULE

- *Victim Rights Law Center et al. v. Cardona*, No. 1:20-cv-11104, 2021 WL 3185743 (D. Mass. July 28, 2021)
  - Court vacated the part of 34 C.F.R. § 106.45(b)(6)(i) that prohibits decision-makers in Title IX proceedings at postsecondary institutions from considering any “statement” from a person who did not submit to cross-examination at the live hearing.
- DOE released statement that it will no longer enforce that provision, meaning:
  - A decision-maker at a postsecondary institution may now consider statements made by parties or witnesses that are otherwise permitted under the regulations, even if those parties or witnesses do not participate in cross-examination at the live hearing, in reaching a determination regarding responsibility in a Title IX grievance process.
- Police reports, SANE documents, and medical reports may now be considered without participation of witness



29

## CUMMINGS V. PREMIER REHAB KELLER, P.L.L.C.

- U.S. Supreme Court ruled that emotional distress damages are not recoverable in private actions to enforce statutes authorized by the Spending Clause of the U.S. Constitution
- Statutes authorized by Spending Clause:
  - *Rehabilitation Act*
  - **Title IX**
  - *Title VI of the Civil Rights Act of 1964*
  - *Patient Protection and Affordable Care Act*
- Focus on the contractual nature of the Spending Clause antidiscrimination statutes
  - “conditioning federal funding on a promise by the recipient not to discriminate”
- Emotional distress damages are not traditionally available in suits for breach of contract → therefore not recoverable under the spending clause anti-discrimination statutes



30

# QUESTIONS?

Ashley Lynam

- **(T):** 215-772-7410
- **(E):** alynam@mmwr.com

Kacie Kergides

- **(T):** 215-772-7320
- **(E):** kkergides@mmwr.com

