Questions from K-12 Panel

Can you compare the old definition of sexual harassment to the new definition?

> "Previously, schools were required to investigate all complaints of sexual harassment, which was defined as "unwelcome conduct of a sexual nature." Under the new rule, schools will be required to dismiss all complaints that do not meet one of DeVos's three stringent definitions of "sexual harassment": (i) unwelcome "quid pro quo" sexual harassment by a school employee (e.g., "I'll give you an A if you have sex with me"); (ii) an incident that meets the definition of "sexual assault," "dating violence," "domestic violence," or "stalking" under the Clery Act; or (iii) "unwelcome conduct" on the basis of sex that is "determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access" to a school program or activity" (National Women's Law Center, https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2020/05/Title-IX-Final-Rule-Factsheet-5.28.20-v3.pdf).

Does Title IX extend and protect transgender students?

> Clery specifies that hate crimes can include gender identity and sexual orientation, as well as actual or perceived gender. With some of the language that TIX uses (for example, they state "both," limiting to a binary, however does expand to "gender harassment."
>
> Considering this narrow view, harassment on the basis of LGBTQIA+ status is not explicitly covered by the rule unless perpetrated by the institution. "Sexual harassment" as defined by the rule that occurs against an LGBTQIA+ person is covered (NWLC, 2020b).
>
> Based on the most recent application of Title VII definition of sex extending to sexual orientation and gender identity, we hold that Title IX protections include individuals who identify as LGBTQIA+, and transgender, non-binary, and gender non-conforming individuals, especially when such discrimination is perpetrated by the institution.
>
> As an alternative, any harassment that occurs on the basis of sex that may not fall under the New Rule could be covered in newly created non-Title IX sexual misconduct policy to ensure that LGBTQIA+ students are are protected on campuses.

Are TIX Coordinators (in K-12) required to move forward with a formal complaint even if the complainant doesn't want to?

> "The Final Rule affirms that a complainant's wishes with respect to whether the school investigates should be respected unless the Title IX Coordinator determines that signing a formal complaint to initiate an investigation over the wishes of the complainant is not clearly unreasonable in light of the known circumstances" (U.S. DOE, 2020a, p. 3).

The TIX Coordinator must also "promptly contact the complainant...[and] consider the complainant's wishes with respect to supportive measures" (U.S. DOE, 2020a, p. 3). (https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf)

Do stadiums not owned by the school but used by schools count as off-campus?

Even though this technically is “off-campus,” if it occurred in an education program or activity then a school should respond. If a school has substantial control over the stadium (i.e has a contract or is a regularly used facility that is an extension of the school), it is considered off-campus but your school still has jurisdiction and is required to respond to incidents occurring involving your student.

Title IX "includes locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurred” (U.S. DOE, 2020a, p. 2). (https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf)

Since single investigator is not allowed under the new rule, do districts need to designate Deputy Title IX investigators at each school? Or have multiple investigators in the district elsewhere?

“Institutions must have a separate Title IX Coordinator, investigator, advisors (optimally training at least 3), decision-makers (optimally training at least 5), staff of informal resolutions if offered, and appellate adjudicators. These staffing requirements create a situation where Institutions, regardless of size, would need to have Title IX departments with no less than four separate employees to provide the bare minimum process required. To provide optimum compliance, Institutions would need more than 10 (and some commentators say close to 15-20) separate employees to take on various roles requiring training and accounting for the possibility of conflicts of interest. For small Institutions, whose Title IX departments have historically consisted of one, or two employees, the new regulations” creates a burden to increase Title IX personnel size” (SMAC, 2020, p. 23).

"A group of smaller schools in the southern half of the state have begun discussions around entering a cooperative consortium of Title IX professionals to ensure that there are enough appropriately trained professionals to provide for an appropriate grievance procedure" (SMAC, 2020, p. 24).

(SMAC Report, https://highered.colorado.gov/sites/highered/files/SMAC%20Report%208.4.20%20FINAL.pdf).

In small rural districts do you have a recommendation on how to distribute roles within the school so that the administrators do not wear mulitple hats?

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appropriately trained professionals to provide for an appropriate grievance procedure" (SMAC, 2020, p. 24).

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Is there any better direction on whose classes should be changed (complainant or respondent)? This has been an ongoing issue even prior to the new changes.

"A supportive measure must not be punitive or disciplinary, but may burden a respondent as long as the burden is not unreasonable" (U.S. DOE, 2020b, p. 750).

"The unreasonableness of a burden on a party must take into account the nature of the educational programs, activities, opportunities, and benefits in which the party is participating, not solely those educational programs that are 'academic' in nature" (U.S. DOE, 2020b, p. 569).

"Whether a supportive measure meets the...definition also includes analyzing whether a respondent's access to the array of educational opportunities and benefits offered by the recipient is unreasonably burdened. Changing a class schedule, for example, may more often be deemed an acceptable, reasonable burden than restricting a respondent from participating on a sports team, holding a student government position, participating in an extracurricular activity, and so forth" (U.S. DOE, 2020b, p. 570).
(https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf and https://www2.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf)

We recommend that institutions do not, by default, require housing or schedule changes, or otherwise require a complainant to adjust their behavior because of the impression that they may not burden the respondent without a finding of responsibility; the TIX New Rule clearly states that one may reasonably burden the respondent, even without a finding.

We recommend that students and TIX staff are trained in the definition of what "unreasonably burdensome" and "reasonably burdensome" measures are so that there is an understanding that switching respondents classes does not necessarily constitute an unreasonable burden.

So if not found responsible, how much explanation is required regarding that decision?

Institutions must include "findings of fact, conclusions about whether the alleged conduct occurred, rationale for the result as to each allegation, any disciplinary sanctions imposed on the respondent, and whether remedies" (U.S. DOE, 2020a, p. 8) "designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant" (U.S. DOE, 2020b, p. 227).

"The written determination must also include: Identification of the allegations potentially constituting sexual harassment as defined [by the Title IX New Rules]...A description of the

procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;...Conclusions regarding the application of the recipient's code of conduct to the facts; ... [and] The recipient's procedures and permissible bases for the complainant and respondent to appeal" (U.S. DOE, 2020b, p. 2027). (https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf and https://www2.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf)

Is type of Appeal dictated? Does it have to be school administration or someone outside of the school (such as an ombudsman type role)?

This is not dictated by the ruling. It just states that "a school must offer both parties an appeal from a determination regarding responsibility, and from a school's dismissal of a formal complaint or any allegations therein" (U.S. DOE, 2020a, p. 8). You must also "ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator [and] ensure that the decision-maker(s) for the appeal complies with the standards set forth" for Title IX personnel (U.S. DOE, 2020b, p. 2028). (https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf and https://www2.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf)

Do we have suggestions of changes to code of conduct to best address the gaps in the new Title IX rules that we can suggest to our local schools?

"The Advisory Committee recommends that Institutions create a new 'non-Title IX sexual misconduct policy (or as part of a Title IX policy) to address 'non-Title IX sexual harassment.' Specifically, Institutions should continue to cover non-Title IX hostile environment (severe or pervasive as required for Title VII and other protected classes), non-Title IX quid pro quo (which may be perpetuated by a student), sexual exploitation (not currently covered under Title IX unless it qualifies as Title IX hostile environment as severe, pervasive and objectively offensive) and non-Title IX stalking (as required by VAWA)" (SMAC, 2020, p. 12).

This would look like any previous codes of conduct your school had in place that no longer falls strictly under Title IX. You can still look to old Dear Colleague Letters to determine these best practices for policies.

(https://highered.colorado.gov/sites/highered/files/SMAC%20Report%208.4.20%20FINAL.pdf)

Can a K-12 school write within their policies that they will not do hearings to avoid the "may" issues?

Because this response mandate is a floor and not a ceiling of what folks can do and the Title IX rule states that your institution "may" offer a hearing, if your school and administration

determines you will *not* offer this for anyone, you absolutely can include that in your policies. In effect, we highly recommend for schools to do so.

Does "Title IX" even really mean anything to students or parents? Should it be called something like ""sexual misconduct"" so that more know how to find what they need?

Your institution must address it in terms of “Title IX” to comply, but you can add any other key search terms for your website and address it in different ways when you discuss it with your constituents.

Do we know if/when injunctive relief will be been granted?

Injunctive relief has been filed in several cases. You can learn more here: https://system.suny.edu/sci/tix2020/pending-litigation/. We should be hearing soon, but we don’t have the exact date.