From One Title IX Coordinator to Another: A Practical Approach to Navigating Beyond Compliance in a Post Regulatory World

Day 1

Martha Compton
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Meet Your Facilitator

Martha consults and trains nationally on Title IX and student conduct and has previously served as a technical trainer for Department of Justice VAWA campus grantees. Martha is a former President of the Association for Student Conduct Administration, has been a faculty member for ASCA's Gehring Academy, and was part of the core team that developed ASCA's Sexual Misconduct Institute. A student conduct professional for over 20 years, Martha is also a former dean of students and has extensive experience in residence life, behavior intervention, emergency services, orientation, leadership, and working with student organizations.

Martha Compton
She/her
Director of Strategic Partnerships and Client Relations
About Us

Vision
We exist to help create safe and equitable work and educational environments.

Mission
Bring systemic change to how school districts and institutions of higher education address their Clery Act & Title IX obligations.

Core Values
- Responsive Partnership
- Innovation
- Accountability
- Transformation
- Integrity
Let’s Take a Moment.
Title IX Coordinator to Title IX Coordinator.
The Ever-Evolving Jurisprudence of Title IX

“If nothing else, Title IX Coordinators are experts at adapting.”
"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."

Title IX Applies to All Forms of Sex Discrimination

- Sexual Harassment
- Achievement Awards
- Athletics
- Benefits
- Financial Aid
- Leaves of absence and re-entry policies
- Opportunities to join groups
- Pay rates
- Recruitment
- Retention Rates
- Safety
- Screening Exams
- Sign-on Bonuses
- Student and Employee Benefits
- Thesis Approvals
- Vocational or College Counseling
- Research opportunities
The History of Title IX

A TIMELINE

1972: Title IX is Passed
1979: Cannon v University of Chicago
1992: Franklin v Gwinnett
1998: Gebser v Lago Vista
1999: Davis v Monroe
2001: Revised Sexual Harassment Guidance
2011: Dear Colleague Letter ("DCL")
2016: DCL on Transgender Students
2018: DCL and Q&A
2017: 2011 DCL guidance & 2016 DCL on Transgender Students Rescinded
2020: Regulations
2020: Withdrawal of 2001 Guidance

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The History of Title IX - A TIMELINE
The Title IX Regulations

Sexual Harassment Only

1. Narrows the definition of sexual harassment;
2. Narrows the scope of the institution's educational program or activity;
3. Narrows eligibility to file a complaint;
4. Develops procedural requirements for the investigation and adjudication of sexual harassment complaints, only.

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

1. Conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct;

2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, OR objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity; or

3. Sexual assault is a form of sexual harassment

*Dating Violence, Domestic Violence, Stalking not included pre 2020 regulations*
Sexual Harassment: Section 106.30

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

(1) 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;

(2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity; or

Includes locations, events, or circumstances over which the recipient exercised **substantial control** over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

- On campus or in a building owned or controlled
- Off-campus incident that occurs as part of the institution's operations
- Institution exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus pursuant to § 106.44(a); or
- the incident of sexual harassment occurs at an off-campus building owned or controlled by a student organization officially recognized by a postsecondary institution
• Off campus conduct, even if it has an impact on the educational program or activity;
• Conduct that occurs outside of the United States.
Covered Individuals
Eligibility for Title IX’s Protections

“At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.” 34 C.F.R. § 106.30

Applicant
Accepted/Hired
Enrolled/Employed
Title IX Application Post May 2020 Regulations

**Type of Conduct**
- Hostile Environment Sexual Harassment
- Quid Pro Quo
- Sexual Assault
- Dating/Domestic Violence
- Stalking

**Ed Program or Activity**
- On campus
- Campus Program, Activity, Building, and
- In the United States

**Required Identity**
- Complainant is participating or attempting to participate in the Ed Program or activity

**Apply 106.45 Procedures**

Required Response:
Section 106.45 Procedures
Conduct Falling Outside the Scope of Title IX

- Apply other institutional policies and procedures
- Ensure that those policies and procedures are complaint with VAWA/Clery, other intersecting federal and state laws
**Actual Notice**

*A Narrowed Scope of Institutional Responsibility*

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<tr>
<th>Institution must respond when it has:</th>
<th>“Actual knowledge”</th>
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<td>When “an official of the recipient who has authority to institute corrective measures” has notice, e.g., Title IX Coordinator</td>
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<td>of “sexual harassment” (as newly defined)</td>
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<td>“includes locations, events, or circumstances over which the recipient exercised substantial control” over the respondent and the context in which the sexual harassment occurred</td>
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<td>that occurred within the school’s “education program or activity”</td>
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<td>Fact specific inquiry focused on control, sponsorship, applicable rules, etc.</td>
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<td>against a “person in the United States” (so, not in study abroad context)</td>
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Procedural Requirements for Investigations

- Notice to both parties
- Equal opportunity to present evidence
- An advisor of choice
- Written notification of meetings, etc., and sufficient time to prepare
- Opportunity to review all evidence, and 10 days to submit a written response to the evidence prior to completion of the report
- Report summarizing relevant evidence and 10 day review of report prior to hearing
Procedural Requirements for Hearings

- Must be live, but can be conducted remotely
- Cannot compel participation of parties or witnesses
- Standard of proof used may be preponderance of the evidence or clear and convincing; standard must be the same for student and employee matters
- Cross examination must be permitted and must be conducted by advisor of choice or provided by the institution
- Decision maker determines relevancy of questions and evidence offered
- Exclusion of Evidence if no cross examination
- Written decision must be issued that includes finding and sanction
Institutions must offer both parties an appeal from a determination regarding responsibility, and from a recipient’s dismissal of a formal complaint or any allegations therein.

Final Rule § 106.45(b)(8)
Appeals: Mandatory Grounds

(A) Procedural irregularity that affected the outcome of the matter;

(B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and/or

(C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.
Other Requirements of the Regulations

- Designation of a Title IX Coordinator
- Dissemination of policy
- Separation of Responsibilities
- Training and posting of training
- Impartiality
- Record Keeping
Building a Foundation of Success
“Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the Title IX Coordinator.”

Additionally:
• The recipient must notify [everyone] of the name or title, office address, email address, and telephone number of the coordinator(s).
• Any person may report in person, by mail/email, telephone using the contact information.
• Reports can be made at anytime.
The institution must notify applicants and all members of the community of the Title IX Coordinators:

1. Name or Title
2. Office address
3. Email address
4. Phone number

Any person may report, at any time, sex discrimination, including sexual harassment in person, by mail, by telephone, by email, or any other means using the contact information listed.
“Responsibilities Required Under Title IX and the Regulations”

- Serve as the primary pathway for receipt of reports of sex discrimination and sexual harassment;
- Upon receipt of a report, promptly contact the complainant to discuss the availability of supportive measures and to explain the process of filing a formal complaint;
- Coordinate the effective implementation of supportive measures;
- Where a report is made, but a formal complaint is not filed by the complainant, determine whether a formal complaint should be filed and sign that formal complaint;
- Effective implementation of any remedies imposed by a decision maker at the conclusion of a grievance process.
Responsibilities Often Delegated to the Title IX Coordinator

- Ensuring that the institutional policies and procedures are compliant with Title IX
- Ensuring dissemination of the policy
- Overseeing the grievance process to ensure it is compliant
- Coordinating a compliant grievance process
- Staffing various roles
- Ensuring training requirements are met
- Record keeping
- Compliance with intersecting federal and state laws
- Education and prevention efforts
The Three Essential Functions of Title IX Compliance

01 Response

02 Education & Prevention

03 Compliance
Another moment, please.
A Successful Title IX Coordinator...

**C** - Understands the Importance of Consistency

**A** - Adheres to policies and procedures

**R** - Records or documents everything

**E** - Engages meaningfully with the community

**S** - Strategically plans for success
Strategic

- Conduct your own review: Evaluate the institution’s state of compliance, strengths, and opportunities in all areas
- Develop plans for success in every area
- Prioritize the implementation and execution of those plans
Engage

- Understand the needs of the community you serve
- Build awareness
- Build trust
- When you engage, others engage
- Can assist with workload
Adhere

- Adhere to policies and procedures
- Implement training plans
- Stick to compliance plans
- Use the forms that are developed
Consistency

Development of Annual Plans for Training

Creation of Forms & Templates

Development of Annual Plans for Compliance

Comprehensive Policies & Procedures

Development of Annual Plans for Training
Record

1. Compliance
   1. Maintain old policies
   2. Keep records of all responses to reporting requirement

2. Training
   1. Dates, times, locations
   2. Attendees
   3. Training materials
   4. Reason for the training

3. Response
   1. EVERYTHING
Successful Coordinators Approach all Aspects of the Work

Utilizing Best Practices

Impartially

With Empathy
Impartiality
Avoiding Prejudgment and Bias

“The Department’s interest in ensuring impartial Title IX proceedings that avoid prejudgment of the facts at issue necessitates a broad prohibition on sex stereotypes so that decisions are made on the basis of individualized facts and not on stereotypical notions of what “men” or “women” do or do not do.” 85 Fed. Reg. 30254 (May 19, 2020).
Impartiality
Avoiding Prejudgment and Bias

- Do not rely on cultural “rape myths”
- Do not rely on cultural stereotypes about how men or women purportedly behave
- Do not rely on gender-specific research data or theories to decide or make inferences of relevance or credibility in particular cases
- Recognize that anyone, regardless of sex, gender, gender identity or sexual orientation, can be a victim or perpetrator of sexual assault or other violence
- Avoid any perception of bias in favor of or against complainants or respondents generally
- Employ interview and investigation approaches that demonstrate a commitment to impartiality
Department also rejected commenters' arguments that individuals should be disqualified from serving as investigators because of past personal or professional experience.

“Department encourages [schools] to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased” WHILE

“exercising caution not to apply generalizations that might unreasonably conclude that bias exists (for example, assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents”
## Impartiality

### Avoiding Conflicts of Interest

<table>
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<tr>
<th>Commenters argued that investigators and hearing officers employed by schools have an “inherent conflict of interest” because of their affiliation with the school, so Department should require investigations and hearings to be conducted by external contractors.</th>
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<tr>
<td>Department noted that some of those commenters argued that this resulted in bias against complainants, and some argued that this resulted in bias against respondents.</td>
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<td>Department’s response: Department’s authority is over schools, not individual investigators and other personnel, so Department will focus on holding school’s responsible for impartial end result of process, without labeling certain administrative relationships as per se involving conflicts of interest.</td>
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Impartiality

Avoiding Prejudgment, Bias, and Conflicts of Interest

Bottom line

- Follow facts of every individual case
- Investigate in manner that will not allow even a perception of prejudgment or bias for or against any party
Compliance
Sources of Compliance Obligations

- Title IX Final Regulations
- Violence Against Women Act
- Other, Intersecting Federal Laws
- State Law
- Legal Precedent
- Institutional Policies
- Resolution Agreements
Title IX Compliance Obligations

<table>
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<tr>
<th>Designate</th>
<th>Designate a Title IX Coordinator</th>
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<tr>
<td>Disseminate</td>
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<td>• Notification</td>
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<td>• Publications</td>
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<td>Respond</td>
<td>Promptly respond to instances of sexual harassment occurring within the educational program or activity of which the institution has actual knowledge in a manner that is not deliberately indifferent;</td>
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<tr>
<td>Provide</td>
<td>Provide supportive measures in accordance with the requirements of section 160.30</td>
</tr>
<tr>
<td>Utilize</td>
<td>For reports of sexual harassment utilize grievance procedures that comply with section 160.45</td>
</tr>
<tr>
<td>Require</td>
<td>Require that individuals participating in the grievance process do so impartially and that they are trained in accordance with the 160.45(b)(1)(iii).</td>
</tr>
<tr>
<td>Maintain</td>
<td>Maintain records response to sexual harassment in accordance with 160.45 (10)</td>
</tr>
<tr>
<td>Comply</td>
<td>Comply with 160.71 prohibition against retaliation</td>
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Categories of Compliance Requirements

- Staffing
- Notice
- Training
- Procedural
- Reporting
Developing a Strategy for Compliance

- **Identify Compliance Obligations**
- **How Will You Prove That You Are Compliant**
- **Record Keeping**
Implementing the Strategy for Compliance

- Partnerships
- Record Keeping Databases
- Calendar
Training & Education

Educating ourselves and our communities in a post-regulatory world
Sources of Training Requirements

- Title IX Final Regulations
- Violence Against Women Act
- State Law
- Resolution Agreements
Training and Education
Two Areas of Focus

1. Institutional Response to Sex Discrimination
2. Prevention Education
Institutional Response Training

1. Institutional Policies and Procedures
2. Prohibited Conduct
3. Options for Confidential Support
4. The Identify, Role, and Requirements of the Responsible Employee
5. Options and methods for Reporting
6. The Grievance Process
7. The Role of the Title IX Coordinator
A Really Important Moment. Listen Up. It’s Okay...

To not know the answer to every question thrown your way

To say,

“I don't know”
“I'd like to think about that”
“I'll get back to you”
“Thank you for sharing your perspective”

To decline to answer a question

To recognize and assert your expertise
Who Must Receive Training?

**Title IX Staff**
- Coordinators
- Investigators
- Decision Makers (hearings and appeals)
- Facilitators of Informal Resolution
- “Those who are charged with ensuring a prompt, fair, and impartial investigation and result.” (VAWA)

**Students**
- New Students
- Existing Students
- Specialized populations
- Student staff

**Faculty**
- New faculty
- Existing faculty
- Adjunct Faculty
- Supervising faculty

**Staff**
- Senior leadership
- Public Safety/campus law enforcement
- Health care workers
Community Partners?

- Boards of Trustees
- Law Enforcement
- Advocacy Groups
- Health Care Providers
- Attorneys
- Media
Training for Title IX Staff

- The scope of the institution’s education program or activity (i.e., its Title IX “jurisdiction”)
- How to conduct the grievance process
- How to serve impartially
- The technology to be used at a live hearing
- Issues of relevance of questions and evidence
- Rape shield protections; and,
- Issues of relevance in creating an investigative report.
Responsible Employees
## Responsible Employee Training: Additional Areas of Focus

| Take time to explain the reason for and importance of Responsible Employee reporting |
|______________________________________________________________________________|
| Provide advice on how to receive a report                                      |
| Provide suggestions on how to share their obligation to report with the reporting individual |
| Instruct on their options for reporting to the Title IX Coordinator             |
| Fully explain what happens after they report a disclosure                       |
Special Considerations for Training & Education in the Post Regulatory Landscape

- Explaining the narrowed scope of Title IX
- Explaining the institutional decision for two processes/procedures
- Responsible Employee challenges
- Burden of proof challenges
- Length of Training
- Time for questions/community processing
"The Department understands commenters' beliefs that the Department should create rules that monitor drinking, teach about interpersonal boundaries, sexuality, bystander intervention, and sexual consent communication... And while the Department does not mandate educational curricula, nothing in the final regulations impedes recipients' discretion to provide students (or employees) with educational information." 85 Fed. Reg. 30063 (May 19, 2020).
Prevention Education: Violence Against Women Act (VAWA)

A primary prevention and awareness program [which includes bystander intervention] aims to prevent dating violence, domestic violence, sexual assault, and stalking.

Ongoing prevention and awareness campaigns.
Elements of Annual Training Strategy

- Identify population to be trained
- Determine topic
- Schedule the training
- How will you deliver the training
- Partnerships
- Communications
- Community input/feedback
- Engagement as passive education
Ongoing Assessment of Trainings

PRE AND POST SURVEYS

OBSERVATION

OPPORTUNITIES FOR FEEDBACK & SUGGESTIONS

ENGAGE AND LISTEN
Communicate Training Successes

- Annual Report
- On your website
- When training
- In conversations
Questions?

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