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ASSOCIATION OF CHIEF HUMAN RESOURCE OFFICERS (ACHRO) FALL TRAINING INSTITUTE

Status of the Title IX Regulations

10/22/2021

PRESENTED BY:

Pilar Morin & Ryan Wilson
& Lorraine Jones

Status of the Title IX Regulations

Association of Chief Human Resource Officers (ACHRO) Fall Training Institute | October 22, 2021

Presented By: Lorraine Y. Jones, Ryan Wilson, & Pilar Morin



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Presented By:

Lorraine Y. Jones, M.S.W., District Compliance Officer and Title IX Coordinator, Riverside Community College District;

Ryan Wilson, Manager, Title IX/EEO Investigations, Mt. San Antonio College
& Pilar Morin, Partner, Liebert Cassidy Whitmore

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Agenda

- Status of Regulations
- Case Studies
- Questions



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What is Title IX?

Title IX prohibits discrimination that is:

- On the basis of sex
- In education programs or activities
- Receiving federal financial assistance
- In the United States

20 U.S.C. § 1681 *et seq.*

34 C.F.R. § 106 *et seq.*

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Title IX Protections

- Title IX protects **all** students and employees from sexual harassment committed by:
 - Students
 - District employees
 - Third-parties

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Title IX Developments

- April 2021: OCR announced comprehensive review
- June 2021: OCR
 - Conducted virtual public hearings and collected written comments
 - Notice of Interpretation re sexual orientation and gender identity.
 - Proposed Title IX regulations in May 2022
- July 2021: OCR issued Q&As on regulations
- August 24, 2021, OCR guidance re statements not subject to cross-examination are admissible

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July 2021 OCR Q&As on the Title IX Regulations

Reasonable accommodations should be provided to individuals with disabilities.

(Questions 30, 31, See also *Accommodations for Disabilities in the Title IX Grievance Process*, Janet Elie Faulkner and Phil Catanzano, National Association of College and University Attorneys September 1, 2021 | Vol. 20 No.1)

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Sexual Harassment: Three Categories

- Quid pro quo: An *employee* conditioning an aid, benefit, or service on complainant's participation in unwelcome sexual conduct
- Unwelcome conduct so severe, pervasive, ***and*** objectively offensive that it effectively denies a person equal access to education program or activity; or
- Sexual assault, dating violence, domestic violence, or stalking.

34 CFR § 106.30

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July 2021 OCR Q&As on the Title IX Regulations

Institutions are encouraged to address alleged sexual misconduct that does not meet the definition of the 2020 regulations

- Via other rules and procedures, including conduct rules
- By offering supportive measures
- Provide training to employees and students on examples of the denial of access to education and activities

(Questions 5, 7, 8.)

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July 2021 OCR Q&As on the Title IX Regulations

Provide supportive measures even if conduct falls outside of the district's education programs and activities

What would you do: Domestic violence involving student couple where incident takes place during spring break and not during a district program or activity.

(Questions 9.)



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July 2021 OCR Q&As on the Title IX Regulations

- The Title IX Coordinator may have a duty to respond even if the complainant is not participating in or attempting to participate in the school's education program or activity
- The district is required to respond even if the respondent leaves the district before a complaint is filed

(Questions 24, 25, and 26)



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Questions about other records protected by a legally recognized privilege are also not permitted unless waived by the party.

(Question 48)

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Evidence at Hearing – Privileged Information

California privileges:

- Attorney-client privilege
- Privilege not to testify against spouse
- Privilege for confidential marital communications
- Physician-patient privilege
- Psychotherapist-patient privilege
- Clergy penitent privileges
- Sexual assault counselor-victim privilege
- Domestic violence counselor-victim privilege
- Human trafficking caseworker-victim privilege
- School counselor

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Polling Question: July 2021 OCR Q&As on the Title IX Regulations

Advisors conduct cross-examination but,

- Districts may adopt rules on how cross-examination is conducted

Yes or No: Does your District have decorum and procedure rules?

(Questions 44, 46, 49.)

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Hearing Procedure

Example: May adopt rules of procedure, such as:

- Whether parties may offer opening or closing statements
- Process for making relevance objections to questions and evidence
- Whether party/advisor may discuss relevance determination with decision-maker during hearing
- Reasonable time limitations on a hearing

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Hearing Decorum

Example rules of order or decorum, for example:

- Only participants to the hearing may speak, and then only when recognized by the decision-maker
- All individuals must address remarks, arguments, or objections to the decision-maker, and not to the opposing advisor or the opposing party
- Individuals are to avoid making disparaging or acrimonious personal remarks toward any other participant at the hearing
- When a question is pending, advisors will not, through objections or otherwise, coach the person testifying, or suggest answers

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Hearing Decorum

Example rules of order or decorum, for example:

- Individuals must refer to all persons, including witnesses, other advisors, and the parties by their surnames and not by their first or given names unless directed otherwise by the decision-maker
- Advisors and parties shall be punctual and shall timely notify the decision-maker when they or their witnesses will be late

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Polling Question: July 2021 OCR Q&As on the Title IX Regulations: Yes, No, Maybe

A student files a complaint in September of 2021 alleging he was sexually assaulted in May of 2020 in the district parking lot after the “drive by” graduation ceremony. He request that the new Title IX procedures that follow the Title IX regulations be followed to process his complaint.

Can the district apply the regulations retroactively?

LCW LIEBERT CASSIDY WHITMORE

Polling Question: July 2021 OCR Q&As on the Title IX Regulations

Following the same facts, but what if the respondent is an at will classified employee, and he demands that the new procedures following the Title IX Regulation apply to him to determine responsibility for the sexual assault allegations

Should the district apply the regulations retroactively?

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Retroactivity

- RPI concluded respondent violated its Title IX Policy
- On August 11, 2020, the respondent requested a hearing and application of RPI's new Policy
- RPI refused to apply its new policy
- Court granted preliminary injunction requiring RPI to use the new policy for conduct occurring before August 14, 2020
 - *Doe v. Rensselaer Polytechnic Institute* 2020 WL 6118492 (N.D.N.Y. Oct. 16, 2020)



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Title IX Developments: Statements Not Subject to Cross-Examination

- August 24, 2021, OCR issued new guidance: will no longer enforce part of 34 C.F.R. § 106.45(b)(6)(i) that prohibits decision-makers from considering statements not subject to cross-examination
- Follows July 28, 2021 U.S. District Court for the district of Massachusetts' decision holding provision to be arbitrary and capricious
 - Court issued a second order clarifying that it had vacated and remanded the provision and that its ruling applied nationwide



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Institutions Can Rely on Statements Not Subject to Cross-Examination

CCD decision makers can now consider statements even if the parties or witnesses do not submit to cross-examination at the live hearing, including:

- Statements made by the parties and witnesses during the investigation
- Emails or text messages between the parties
- Statements in Sexual Assault Nurse Examiner (SANE) reports, police reports, medical reports and other documents



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Case Studies

- Statement by neighbor who will not testify that respondent was with him during the time of the alleged incident
- Statement in an text by a respondent who will not testify that she is sorry about hurting the complainant and not stopping even after complainant passed out from doing tequila shots



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Questions?



Thank You!

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