
ATIXA
Association of
Title IX Administrators
Title IX Coordinator and Administrator
Coordinator One: Foundations
Training & Certification Course
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Strategic Risk Management Solutions

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Any advice or opinion provided during this training, either privately or to the entire group, is never to be construed as legal advice. Always consult with your legal counsel to ensure you are receiving advice that considers existing case law, any applicable state or local laws, and evolving federal guidance.

CONTENT ADVISORY

The content and discussion in this course will necessarily engage with sex- and gender-based harassment, discrimination, and violence and associated sensitive topics that can evoke strong emotional responses.

ATIXA faculty members may offer examples that emulate the language and vocabulary that Title IX practitioners may encounter in their roles including slang, profanity, and other graphic or offensive language.

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AGENDA

1. Title IX Team Roles & Responsibilities
2. Title IX Overview & History
3. Significant Cases
4. The OCR & Title IX
5. Violence Against Women Act
6. When Does Title IX Apply?

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AGENDA

7 Creating & Implementing Appropriate Policies & Procedures

8 Oversight & Coordinating Prompt & Equitable Grievance Procedures

9 Coordinating Overlap in Various Grievance Processes

10 Point Person for Complaints

11 Coordinating Informal Resolution

12 Supervising Investigations

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AGENDA

13 Elements of an Investigation

14 Coordinating the Decision-Making Stages

15 Ensuring Compliance with Final Sanctions

16 Coordinating Appeal Processes

17 General Title IX Compliance Oversight

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TITLE IX NOTICE OF PROPOSED RULEMAKING 2022

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TITLE IX REGULATIONS

- Congress passed Title IX of the Education Amendments in 1972
- Since 1980, the Department of Education's Office for Civil Rights (OCR) has had primary responsibility for enforcing Title IX
- November 2018: OCR proposed the most detailed and comprehensive Title IX regulations to date[1]
- August 2020: Significantly amended, due-process oriented Regulations took effect (proposed in Nov. 2018)
- June 2022: OCR published the Notice of Proposed Rule Making (NPRM) outlining proposed changes to the Title IX regulations
- On July 12, 2022, the NPRM was published in the Federal Register and the 60-day comment period began

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[1] U.S. Office of the Federal Register, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,* https://www.federalregister.gov/documents/2018/11/29/2018-25314/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal

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NPRM PROCESS TIMELINE

- Official publication in the Federal Register July 12, 2022
- Review and comment period
  - 60-day comment period ended September 12, 2022
  - Submit comments to the Department of Education's Office for Civil Rights (OCR)
- Final Rule expected to be issued in Spring 2023
- Effective Date approximately Summer/Fall 2023
- Watch for ATIXA webinars and other opportunities ☺
- There will be a separate NPRM for Athletics

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PREPARING FOR IMPLEMENTATION

- Must continue to fulfill obligations under the current regulations for the 2022-2023 academic year.
- Anticipate OCR will expect schools to implement the new Title IX regulations before the start of the 2023-2024 academic year.

Steps to Take Now:

- Prepare to educate your community on the changes
- Identify stakeholders that will need to be involved in making policy decisions (e.g., whether to have hearings)
- Determine how you will manage policy changes
- Plan for the training needs for your community
- Consider state laws, court decisions, and other regulations that may affect your institutional approach

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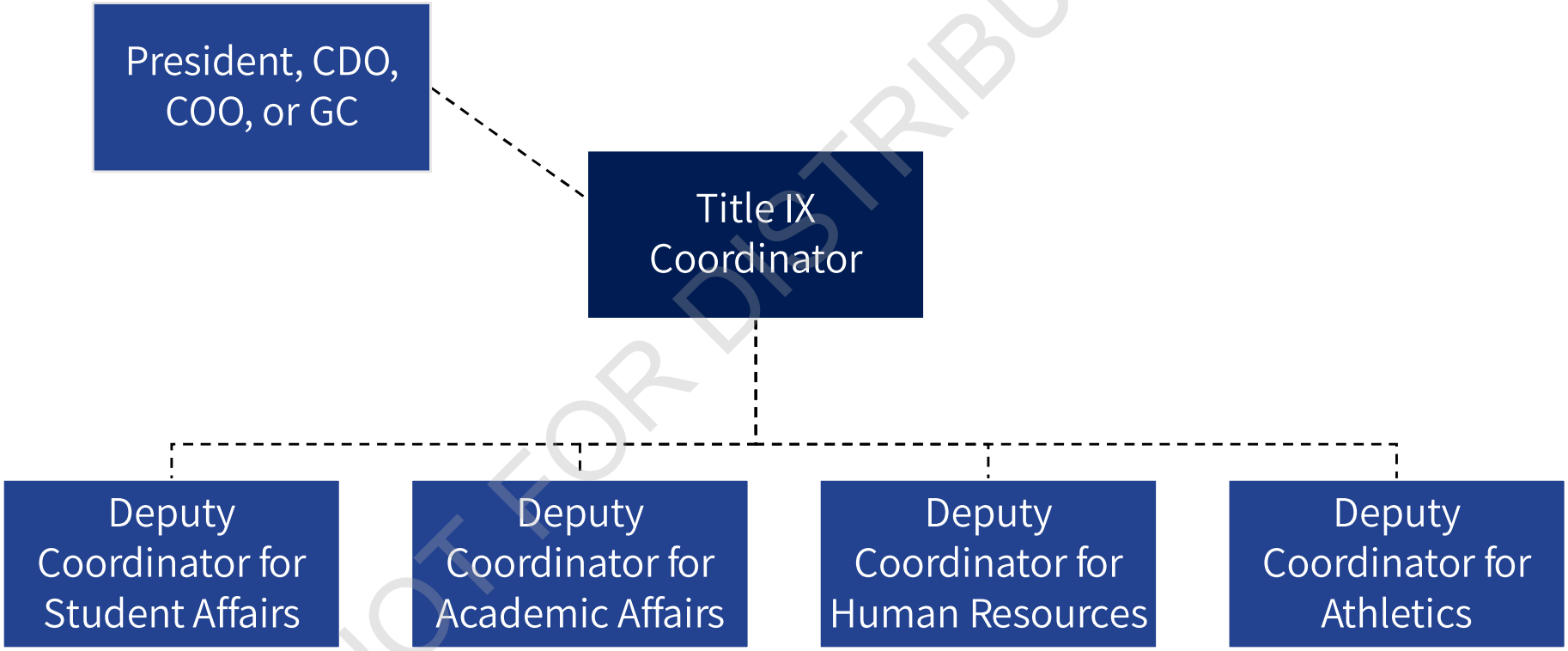
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TITLE IX TEAM ROLES & RESPONSIBILITIES

- Sample Team Structure
- Title IX Coordinator
- Investigator
- Decision-Maker
- Informal Resolution Facilitator
- Training the Team

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SAMPLE TITLE IX TEAM STRUCTURE FOR HIGHER EDUCATION



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THE TITLE IX TEAM

- Title IX Coordinator(s)
- Deputy Coordinator(s)
- Investigator(s)
- Decision-Makers—can be a single Decision-maker or a panel of Decision-makers
  - Policy Violation
  - Appeal
- Informal Resolution Facilitator(s)
- Institution-appointed Advisors

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TITLE IX TEAM STRUCTURE: ADDITIONAL CONSIDERATIONS

- Co-Coordinators?
- Job responsibilities of Deputy Coordinators
  - Tailor scope and roles based on school/campus culture
  - Delegation
- Multiple campuses/locations
  - Campuses within a larger system
  - Extension campuses
  - Online communities
  - District-level (e.g., community college systems)
- Dual-enrollment oversight
- Investigator oversight

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THE TITLE IX COORDINATOR

- Recipients are required to designate at least one employee as the "Title IX Coordinator"
- Administrator with significant authority and wide-ranging responsibilities
- Affects change across many departments, including human resources, academic affairs, athletics, and student conduct
- Some institutions will allocate part-time responsibilities to the Coordinator while others will dedicate a full-time position
- Title IX Coordinator has become a profession within the field of civil rights compliance

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TITLE IX COORDINATOR: ROLES AND RESPONSIBILITIES

- Create and implement appropriate policy and procedures
- Navigate First Amendment protections
- Point person for reports and complaints
- Contact for government inquiries
- Oversight of prompt and equitable grievance procedures
- Coordinate overlap of various student and employee grievance processes
- Oversight of informal resolution processes
- Supervise investigations

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TITLE IX COORDINATOR: ROLES AND RESPONSIBILITIES (CONT.)

- Ensure compliance with final sanctions & remedies
- Coordinate appeal process
- General Title IX compliance oversight
- Compliance with requirements to stop, prevent, and remedy
- Training oversight
- Oversight of athletics gender equity (if applicable)
- Section 504 disability compliance oversight (if applicable)

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ROLE OF THE INVESTIGATOR

- Conduct reliable, prompt, fair, and impartial investigations
  - Work with TIXC to develop investigation strategy
  - Identify and interview parties and witnesses
  - Identify, organize, and compile relevant information
  - Maintain accurate and thorough investigation records and notes
  - Share the evidence with the parties and their Advisors
  - Provide notices to the parties (may be done in conjunction with TIXC)
- Create an investigation report that fairly summarizes relevant evidence

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ROLE OF THE DECISION-MAKER(S)

- Determine whether institution's policy has been violated based upon the applicable standard of evidence
  - Decisions must be based upon an independent assessment of the evidence gathered during the investigation and/or provided during a hearing, to include an assessment of the credibility of the parties and witnesses
  - Decisions must be based on the specific policy alleged to have been violated
  - Decisions must be impartial and free of substantive bias
- Determine appropriate sanctions/discipline when a policy violation is found
- Draft a written determination that outlines the rationale for the finding(s)

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ROLE OF THE APPEAL DECISION-MAKER

- Make determination on a party's request for an appeal
- Review written submissions from parties
- May review investigation report or other evidence gathered during investigation/hearing
- May need to speak with Investigator, Decision-maker, parties, or witnesses
- Review of case should be limited to the grounds noted in the appeal request
  - Not a *de novo* review
- Draft a written determination that outlines the rationale for the outcome

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ROLE OF INSTITUTION-APPOINTED ADVISORS

- Parties have the right to have an Advisor of their choice to assist them throughout the process, to include attending any meetings and interviews
- No mandate to provide an Advisor to the parties at the outset of the process
- If party does not have an Advisor at the hearing, the institution must provide an Advisor to conduct the cross-examination on behalf of the party during the live hearing
- Must be provided at no cost to the party
- No mandate to train Advisors however, it is advisable to do so for all institution-appointed Advisors

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TIX TEAM TRAINING REQUIREMENTS

- Robust training mandates
- Coordinators, Investigators, Decision-makers, Appeal Decision-makers, Informal Resolution Facilitators
- Training materials cannot include sex stereotypes; should promote impartiality
- Training materials must be maintained for seven years and posted publicly on Recipient's website

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REQUIRED TRAINING TOPICS

- Definition of sexual harassment
- Scope of the Recipient's education program or activity
- How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- Use of any technology to be used at a live hearing

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REQUIRED TRAINING TOPICS (CONT.)

- Issues of relevance for both questions and evidence, including when questions and evidence about the Complainant's prior sexual behavior is not relevant
- Issues of relevance regarding the creation of an investigation report that fairly summarizes relevant evidence
- **Note**: The OCR sets the minimum training requirements and institutions should conduct training that covers a broader range of topics

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PUBLICATION OF TRAINING MATERIALS

- Make all materials used to train Title IX Coordinators, Investigators, Decision-makers, and any person who facilitates an informal resolution process publicly available on the Recipient's website, or if the Recipient does not maintain a website, the Recipient must make these materials available upon request for inspection by members of the public
  - The most recent materials used to train the Title IX Team should be posted
  - Although seven years of materials need to be maintained, only the most recent need to be posted
  - This requirement is not retroactive; seven years started August 14, 2020

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TITLE IX OVERVIEW & HISTORY

- Text of the Law
- The Road to Title IX
- Where We are Today
- Key Title IX-Related Issues
- Essential Compliance Elements
- The IX Commandments

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TITLE IX

20 U.S.C. § 1681 & 34 C.F.R. Part 106 (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 educational program or activity receiving federal financial assistance."



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A BRIEF HISTORY OF TITLE IX: PRE-1972

1964 - Title VI of the Civil Rights Act

- Prohibits discrimination on the basis of race, color, or national origin in any program or activity receiving federal financial assistance

1964 - Title VII of the Civil Rights Act

- Prohibits discrimination in the terms, conditions, or privileges of employment on the basis of an employee's race, sex, color, religion, or national origin

1965 - Executive Order 11246

- Prohibits federal contractors from discriminating on the basis of race, color, religion, or national origin. "Sex" was added in 1968; renamed Exec. Order 11375.

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A BRIEF HISTORY OF TITLE IX: 1972-1979

- **1972**: Title IX passed and signed into law by President Nixon
- **1975**: Department of Health, Education, and Welfare (HEW) codified Title IX regulations
  - HEW was the precursor to the current U.S. Dept. of Ed.
- **1979**: Supreme Court created a private right of action under Title IX
  - *Cannon v. U. of Chicago*, 441 U.S. 677 (1979)
- **1979**: HEW promulgated three-part test for athletics to evaluate equity in athletic participation and access to resources and equitable opportunities

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A BRIEF HISTORY OF TITLE IX: 1980-2020

- **1980**: U.S. Department of Education created
  - Title IX oversight transferred to Dept. of Ed.'s Office for Civil Rights (OCR)
- **1982**: Supreme Court holds "Employment discrimination comes within Title IX's prohibition"
  - *North Haven Bd. of Education v. Bell*, 452 U.S. 512.
- **2020**: Title IX sexual harassment regulations issued
- **2020:** Supreme Court holds that discrimination based on sexual orientation and discrimination based on gender identity inherently involve treating individuals differently because of their sex under Title VII
  - *Bostock v. Clayton County*, 590 U.S. ___ (2020)

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A BRIEF HISTORY OF TITLE IX: 2021-PRESENT

- **2021:** Department of Education issues "Notice of Interpretation: Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*"
- **2021:** OCR announces intent to issue a Notice of Proposed Rulemaking (NPRM) related to Title IX by April 2022
- **2022:** OCR publishes NPRM July 12, 2022

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KEY TITLE IX-RELATED ISSUES

Sex-Based Discrimination

- Program Equity
- Recruitment, Admissions, & Access
- Pregnancy
- Athletics
- Employment, Recruitment, & Hiring
- Extra-curricular activities
- Housing
- Access to Course Offerings
- Salaries & Benefits
- Financial Assistance
- Facilities
- Funding
- Sex, Sexual Orientation, & Gender Identity

Sexual Harassment

- Quid Pro Quo
- Hostile Environment
- Sexual Assault
- Domestic Violence
- Dating Violence
- Stalking

Retaliation

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TITLE IX ESSENTIAL COMPLIANCE ELEMENTS

Once an official with authority has actual notice of sexual harassment/sexual misconduct, the institution must:

- Take immediate and appropriate steps to **investigate** what occurred
  - The obligation to investigate is absolute, even if just an Initial Assessment is completed (see *Davis*)
- Take prompt and effective action to:
  - **Stop** the harassment
  - **Prevent** the recurrence
  - **Remedy** the effects

NOTE: This is regardless of whether the Complainant makes a formal complaint or asks the school to take action

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THE IX COMMANDMENTS

INVESTIGATION (plus **prompt** & **fair** per VAWA Sec. 304)	**Thorough**	**Reliable**	**Impartial**
PROCESS	**Prompt**	**Effective**	**Equitable**
REMEDIES	Act reasonably to stop discrimination	Act reasonably to prevent recurrence	Act equitably to remedy effects

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SIGNIFICANT CASES

- *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992)
- *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998)
- *Davis v. Monroe County Bd. of Education*, 526 U.S. 629 (1999)

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FRANKLIN V. GWINNETT PUBLIC SCHOOLS

503 U.S. 60 (1992)

- District and Eleventh Circuit dismissed the case, indicating that Title IX does not allow for award of monetary damages
- Supreme Court held:
  - Sexual harassment constitutes sex discrimination under Title IX
  - Private right for recovery of monetary damages under Title IX
- *Franklin* did not address issues concerning the educational institution's liability

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GEBSER V. LAGO VISTA INDEP. SCHOOL

524 U.S. 274 (1998)

The Supreme Court ruled individuals cannot recover monetary damages against the school unless:

- Three-part standard:
  1. An official of the educational institution must have had "**actual notice**" of harassment;
  2. The official must have authority to "**institute corrective measures**" to resolve the harassment problem; **AND**
  3. The official must have "**failed to adequately respond**" to the harassment and, in failing to respond, must have acted with "**deliberate indifference**."

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DAVIS V. MONROE COUNTY BD. OF ED.

526 U.S. 629 (1999)

Finding in favor of Davis, the Supreme Court expanded on the *Gebser* case:

- The institution must have "**actual notice**" of the harassment; and the institution must have responded to the harassment with "**deliberate indifference**."

Additionally, court held:

- Harassment must be "**severe, pervasive, and objectively offensive**," and the indifference "**systemic**," to the extent that the victim is deprived of educational opportunities or services.
- Justice O'Connor added a framework to determine deliberate indifference – stating that deliberate indifference constitutes a response that is "**clearly unreasonable in light of the known circumstances**."

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THE OCR & TITLE IX

- OCR's Role
- Civil Lawsuits v. Administrative Actions
- OCR Guidance
- OCR Resources

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ROLE OF THE OCR & TITLE IX

- The Office for Civil Rights (OCR) under the U.S. Department of Education is responsible for establishing the **compliance standards to be applied in investigations and enforcement** of Title IX regarding sexual harassment.
  - Provides regulatory and sub-regulatory guidance
- The OCR administratively enforces Title IX by:
  - Conducting investigations of complaints filed by an individual, a representative, or a group
  - Engaging in compliance reviews
  - Initiatives to combat sexual assault in K-12 public schools (compliance reviews; public awareness and support; data collection and reviews)

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ROLE OF THE OCR & TITLE IX (CONT.)

- Technical Assistance (The OPEN Center)
  - To help Recipients, students, and parents/guardians understand their rights and responsibilities

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CIVIL LAWSUIT VS. ADMINISTRATIVE ACTION

Lawsuit

- Filed in federal court
- Monetary damages, injunction
- Requires:
  - Actual notice
  - Employee with authority to take action
  - Deliberate Indifference

Administrative Action

- Initiated by the OCR
- Voluntary compliance or findings
- Requires:
  - Actual OR constructive notice ("knew or should have known")
  - Investigate
  - End harassment
  - Remedy effects
  - Prevent recurrence

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OCR GUIDANCE

Key Regulatory and Sub-Regulatory Guidance from OCR

- Rescinded:
  - 2001 OCR Revised Sexual Harassment Guidance
  - 2011 Dear Colleague Letter (DCL)
  - 2014 Q&A on Title IX and Sexual Violence
  - 2015 DCL on the Role of Title IX Coordinators; TIX Resource Guide
  - 2016 DCL on Transgender Students
  - 2017 Q&A on Campus Sexual Misconduct

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OCR GUIDANCE (CONT.)

Key Regulatory and Sub-Regulatory Guidance from OCR

- In effect:
  - 2003 DCL on Title IX and Free Speech
  - 2010 DCL on Harassment and Bullying
  - 2013 DCL on Pregnant and Parenting Students
  - 2020 Amendments to Title IX Regulations
  - 2020 Q&A on Final Title IX Rule
  - 2021 Q&A on Title IX and Single Sex Scholarships, Clubs, and other Programs
  - 2021 Notice of Interpretation – Discrimination Based on Sexual Orientation and Gender Identity
  - 2021 Q&A on the Title IX Regulations on Sexual Harassment

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ADDITIONAL OCR RESOURCES

- About OCR:
  - http://www.ed.gov/about/offices/list/ocr/index.html
- In addition to the implementing regulations, compliance guidance documents are issued by OCR from time to time:
  - https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/index.html
- Updated OCR Case Processing Manual (August 2020):
  - http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf
- OPEN Center
  - OPEN@ed.gov

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VIOLENCE AGAINST WOMEN ACT

- Clery Act Amendment: VAWA Section 304 (2013)
- VAWA Reauthorization (2022)

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CLERY ACT AMENDMENT: VAWA SECTION 304

VAWA Section 304 created extensive new policy, procedure, training, education, and prevention requirements for:

- Sexual assault
- Stalking
- Dating violence
- Domestic violence

The "Big 4"

  - Written information to victims regarding on- and off-campus resources, remedies, interim measures, and resolution mechanisms and options
  - Listing of policy and procedural elements required in the ASR
  - Listing of key training elements and requirements
  - Required educational programs and campaigns

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CLERY ACT AMENDMENT: VAWA SECTION 304 (CONT.)

- Prohibits retaliation
- Clery Handbook rescinded and replaced with the **Clery Act Appendix for Federal Student Aid (FSA) Handbook**
  - https://ifap.ed.gov/electronic-announcements/100920RescissionReplace2016HandbookForCampusSafetySecurityReporting

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VAWA REAUTHORIZATION 2022 SUMMARY

- Signed into law by President Biden as part of the Omnibus appropriations package in March 2022
- **Effective October 1, 2022** unless other deadlines are specified in the Act
- Reauthorizes all current VAWA grant programs until 2027
- Increases services and support for survivors from underserved and marginalized communities, including LGBTQIA+ survivors
- Supports State, Tribal, and local government efforts to prevent and prosecute cybercrimes, including cyberstalking and the nonconsensual distribution of intimate images

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