



Putting (2020) Title IX into Play

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Objectives of Training

**Standard for Legal Liability
for Harassment under Title IX**

Definitions

**Overview of Grievance
Process**

Standards of Liability

Title IX: The Law

- ▶ No person in the United States
- ▶ On the basis of sex
- ▶ Shall 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

Judicial Standard of Liability: Employee-on-Student Harassment

- ▶ Educational institution liability for damages under Title IX for **employee-on-student sexual harassment** if:
 1. A school district employee with **authority to correct** on behalf of the district
 2. Has **actual notice** of the employee's misconduct; and
 3. Is **deliberately indifferent** to the employee's misconduct

Gebser v. Lago Vista Indep. Sch. Dist.,
524 U.S. 274 (1998)

Judicial Standard of Liability: Peer-on-Peer Harassment

- ▶ Educational institution liability for damages under Title IX for **student-on-student sexual harassment** if:
 1. The Gebser standards of notice and deliberate indifference are satisfied
 2. The school has substantial control over (a) the context in which the harassment occurred and (b) the harasser; and
 3. The conduct is “**sexual harassment**,” which is conduct (a) “so severe, pervasive, and objectively offensive” (b) that it “effectively denies equal access to an institution’s resources or opportunities.” [Hostile Educational Environment standard]

Davis v. Monroe County Bd. of Educ.,
526 U.S. 629 (1999)

U.S. Department of Education Title IX Regulations

- ▶ Adopted May 6, 2020
- ▶ Explicit recognition for the first time in *regulations* that sexual harassment, including sexual assault, is sex discrimination
 - ▶ Case law has long recognized this interpretation, and enforced Title IX accordingly
- ▶ Prescribed procedures that are pretty uniform among recipients
 - ▶ RCC Policy: Appendix 1 to Section 6.0

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Title IX Policy

Rappahannock Community College is committed to providing an environment that is free from harassment and discrimination based on any status protected by law. Accordingly, this Policy prohibits sex discrimination, which includes sexual harassment, sexual assault, sexual exploitation, domestic violence, dating violence, and stalking. This Policy also prohibits retaliation. This Policy supplements the following general policy statement set forth by the Virginia Community College System: This College promotes and maintains educational opportunities without regard to race, color, national origin, religion, disability, sex, sexual orientation, gender identity,

View the full Title IX Policy

U.S. Department of Civil Rights Training Videos

- [Title IX Regulations Addressing Sexual Harassment](#)
- [Conducting and Adjudicating Title IX Hearings](#)
- [New Title IX Protections Against Sexual Assault](#)
- [Due Process Protections under the New Title IX Regulations](#)
- [The First Amendment and Title IX](#)

First Approved by the State Board for Community Colleges

September 17, 2015

Last Revised and Approved by the State Board for Community Colleges

September 23, 2021

Definitions of Sexual Harassment

Hostile Environment

- ▶ unwelcome conduct
- ▶ on the basis of sex
- ▶ 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
 - ▶ including a student's educational experience
 - ▶ including an employee's work performance

Definitions of Sexual Harassment

Quid Pro Quo

- ▶ conduct on the basis of sex
- ▶ the submission or rejection of which
- ▶ is used as a basis for educational or employment decisions
- ▶ affecting the student or employee either explicitly or implicitly

Definitions of Sexual Harassment

Sexual Assault

- ▶ any sex act
- ▶ directed against another person
- ▶ without consent (or where the person is incapable of giving consent)

- ▶ Includes:
 - ▶ Intentionally touching of clothed or unclothed genitals, breasts, groin, buttocks of other body parts for the purpose of sexual degradation, gratification, or humiliation
 - ▶ Forcing someone to touch or fondle another
 - ▶ Sexual violence (physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent; includes rape and sexual assault)
20 U.S.C. 1092(f)(6)(A)(v)
CC Policy sections(E)(32)(c), (30), (33)

Definition

Consent

- ▶ Knowing
 - ▶ voluntary, and
 - ▶ clear permission
 - ▶ by word or action
 - ▶ to engage in mutually agreed upon sexual activity
-
- ▶ Fact-based, totality of circumstances determination
 - ▶ Not necessarily consent:
 - ▶ Silence
 - ▶ Past consent to previous activity
 - ▶ Current or previous dating relationship
 - ▶ Consent to certain level of physical activity (not consent to greater level)

Definitions of Sexual Harassment

Dating Violence

- ▶ violence, force, or threat
- ▶ that results in bodily injury or places one in reasonable apprehension of death, sexual assault or bodily injury
- ▶ committed by a person who is or has been in a close relationship of a romantic or intimate nature with the other person

- ▶ Existence of romantic/intimate relationship based on:
 - ▶ Length of relationship
 - ▶ Type of relationship
 - ▶ Frequency of interactions between the persons in the relationship

34 U.S.C. 12291 (a)(10)
CC Policy section (E)(9)

Definitions of Sexual Harassment

Domestic Violence

- ▶ violence, force, or threat
- ▶ that results in bodily injury or places one in reasonable apprehension of death, sexual assault or bodily injury
- ▶ committed by a person against such person's family or household member

- ▶ Family/household member includes:
 - ▶ Current or former spouse
 - ▶ Person with whom the victim shares a child in common
 - ▶ Person who is cohabitating or has cohabitated with the person as a spouse or intimate partner

34 U.S.C. 12291(a)(8)
CC Policy section (E)(12)

Definitions of Sexual Harassment

Stalking

- ▶ engaging in a course of conduct
- ▶ directed at a specific person
- ▶ that would cause a reasonable person to fear for his/her safety or the safety of others or suffer substantial emotional distress

- ▶ Stalking may occur
 - ▶ In person
 - ▶ Online
 - ▶ Must involve an education program or activity of recipient

Definitions of Sexual Harassment

Sexual Exploitation

- ▶ Taking non-consensual or abusive sexual advantage of complainant
- ▶ For respondent's own advantage or benefit, or to benefit/advantage anyone other than complainant
- ▶ If behavior/incident does not otherwise fall within another definition of sexual harassment

- ▶ Examples:
 - ▶ Prostituting another person
 - ▶ Non-consensual video or audio-taping of otherwise consensual sexual activity
 - ▶ Going beyond boundaries of consent (e.g., letting friends hide in closet to watch you having consensual sex)
 - ▶ Knowingly transmitting HIV or STD to another

Definitions: Sex Discrimination

- ▶ Unlawful treatment of another
- ▶ Based on the individual's sex
- ▶ That excludes an individual from participation in, separates or denies the individual the benefits of, or otherwise adversely affects a term or condition of
- ▶ an individual's employment, education, or participation in an education program or activity

Pregnancy

- ▶ Not “sexual harassment,” but handled under TIX office
 - ▶ Prohibition on discrimination includes nondiscrimination on the basis of pregnancy, childbirth, and related medical conditions including lactation
- ▶ Report of pregnancy should be made to TIXC for centralized consideration and implementation of accommodations

Scope of recipient's “educational program or activity”

34 C.F.R. 106.44(a)
CC Policy section (D)

ANY LOCATION, EVENT,
CIRCUMSTANCE OVER
WHICH RECIPIENT EXHIBITS
SUBSTANTIAL CONTROL
OVER BOTH ALLEGED
HARASSER(S) AND
CONTEXT IN WHICH
HARASSMENT OCCURRED

- CAN INCLUDE OFF-CAMPUS,
“NON-SCHOOL” CONDUCT ◦
- INCLUDES BUILDINGS OWNED
OR CONTROLLED BY OFFICIALLY
RECOGNIZED STUDENT
ORGANIZATION ◦

Deliberate Indifference: Difficult to Prove

- ▶ Davis standard: A recipient is deliberately indifferent only “where its response to the harassment or lack thereof is **clearly unreasonable in light of the known circumstances**”
- ▶ Courts will focus on issues: (1) Did the recipient investigate properly? (2) If so, did the recipient implement measures to remediate the harassment? (3) If so, was the remediation reasonably designed to restore equal access to programs/activities and prevent recurrence of harassment?
- ▶ It is not necessary to conduct flawless investigations or perfect solutions. *Fitzgerald v. Barnstable Sch. Committee*, 504 F.3d 165 (1st Cir. 2007).

Title IX Process

TIXC Steps

Intake (CC Policy section (T))

- ▶ Report of alleged sexual harassment (**on or off campus**)
- ▶ Discussion with complainant(s)
- ▶ Emergency removal/admin leave? (Section K)
- ▶ Formal Complaint?
- ▶ Supportive Measures
- ▶ External Reporting (CPS, felony sexual violence)

Formal Complaint (CC Policy sections (U) and (V))

- ▶ Notice of Formal Complaint
- ▶ Initial Meetings with parties
- ▶ Dismissal (section V(5) vs. Informal Resolution (section Z) vs. Investigate (section V)

Duty to Report?

- ▶ Responsible employees have an obligation to report suspected sexual misconduct/harassment to the TIXC
 - ▶ Responsible employees are all who have been given the duty to report sexual harassment, and all who a student could reasonably believes has such duty
 - ▶ Responsible employee does NOT include employee whose position at the College is providing services to campus community as licensed HCP (or admin staff of HCP); professional counselor, victim support personnel, clergy, or attorney

Confidentiality?

- ✓ “must keep identify of reporter, complainant, respondent, witnesses confidential” except
 - ✓ As permitted by FERPA
 - ✓ As otherwise required by law (may have an obligation to report to law enforcement)
 - ✓ As required to carry out TIX policy/regulations (e.g., evidence, hearing, etc)
 - ✓ Which may require sharing of significant information between the parties

Reports of Sexual Violence

1. Convene Review Committee within 72 hours
 - TIXC, campus police, student affairs
2. Report/assist with report to LEO? (if necessary to protect health/safety of any person)
 - Notify alleged victim
3. Report to Commonwealth's Attorney (if felony)
 - Notify alleged victim

Va. Code 23.1-806
CC Policy sections (E)(28), (S)

... Supportive Measures ...

- ✓ Counseling
- ✓ Course modifications
 - ✓ Extension of deadlines
- ✓ Schedule changes
- ✓ Alternative class/work/parking arrangements
- ✓ Increased monitoring/supervision
 - ✓ Mutual restrictions on contact between parties – Mutual No-Contact Order
- ⚠ Transfer out of class
- ⚠ Removal from activity
 - ⚠ Complete vs. temporary

INFORMAL RESOLUTION

34 C.F.R. 106.45(b)(9)
CC Policy section (Z)

1. For student-on-student or employee-on-employee cases *only*
2. Obtain voluntary consent
3. Only available after
 - ▶ Formal Complaint;
 - ▶ TIXC has provided notice to parties and had initial meetings with parties; and
 - ▶ Parties voluntarily request in writing
4. Provide notice of allegations, informal process “rules,” and ability to resume formal process
5. Complete promptly
6. If resolved, document complaint and resolution, parties sign, retain copies

Investigation & Decision-Making

Investigation (V)(6)

Interviews

Evidence (shared with parties)

Written report (shared with parties)

Determination (W) and (X)

Record (including parties' responses to report) forwarded to hearing officer/committee)

Hearing (advisors)

Written determination

Discipline?

Remedies?

Appeal (Y)

Timely?

Proper ground(s)

Record to appeal decision-maker

Overall Concepts

- ▶ Responsible employees have an obligation to report suspected sexual misconduct/harassment
 - ▶ Responsible employees are all who have been given the duty to report sexual harassment, and all who a student could reasonably believe has such duty = all CC staff
- ▶ College has an obligation to respond in a way that is
 - ▶ Not deliberately indifferent = prompt and reasonable under the circumstances
- ▶ Student has possible OCR complaint/process private right of action for failure to respond appropriately
 - ▶ Private right of action: Can recover monetary damages if the harassment/misconduct falls within definition of sexual harassment and College's response was deliberately indifferent

No Retaliation

“No person may intimidate, threaten, coerce, harass, discriminate, or take any other adverse action against any other person for the purpose of interfering with any right or privilege provided in policy, or because the person has made a report or filed a formal complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, live hearing, or other process described in policy.”

CC Policy section (F)

Questions?

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