

# Title IX: Brief Review and Updates

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# What is Title IX?

On June 23, 1972, the President signed **Title IX** of the **Education** Amendments of 1972, 20 U.S.C. Â§ 1681 et seq., into law. **Title IX** is a comprehensive federal law that prohibits discrimination on the basis of sex in any federally funded **education** program or activity.



## Title IX Policy:

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's main purposes are as follows:

- ▶ Its primary objective is to prohibit discrimination on the basis of sex in any federally funded education program or activity.
- ▶ With few exceptions, Title IX applies with a few specific objectives to all aspects of federally funded educational programs or activities
- ▶ Title IX also addresses the requirements of the **Campus Sexual Violence Elimination Act**, or **Campus SaVE Act (SaVE)**, a 2013 amendment to the federal **Jeanne Clery Act**. The SaVE Act addresses sexual violence in the form of sexual assault, domestic violence, dating violence and stalking. *For our purposes Title IX includes the concerns of the Campus SaVE Act.*
- ▶ At the national level Title IX is enforced by the US Department of Education's Office of Civil Rights (OCR) which is empowered to conduct compliance reviews and respond to allegations of abuse



# In effect Title IX exists for the following reasons:

- ▶ To prevent sex discrimination in any educational programs and to ensure equitable funding for all programs
- ▶ In the past the case law related to Title IX dealt primarily with parity in the funding of sports programs to ensure that female sports programs were not discriminated against in terms of funding
- ▶ In recent years Title IX has been expanded to include protection from rape, unwanted sexual advances, and hostile environments directed towards females (students, staff, and faculty)



# Examples of situations that fall under the purview of Title IX:

- ▶ Unfair funding practices in sports programs that serve to discriminate against a person based on their sex
- ▶ A person who is discriminated against in their job based on their gender (i.e., denied promotion, subject to hostile work environment, exposed to requests for *quid pro quo*)
- ▶ Students who are placed in situations where they are discriminated against in the classroom, on a job, or placed in a *quid pro quo* situation
- ▶ Men who have female supervisors or female professors could also file a Title IX grievance



# What do I do if I believe I am a victim of, or if someone reports to me that they believe they are a victim of a Title IX violation?

- ▶ Whenever someone comes to you and says they have to tell you something and you “can’t tell anyone” be very careful about agreeing to do this without hearing what it is!
- ▶ You need to report a violation of Title IX to one of the Title IX personnel either on this campus or at SAGU if you become aware of it.
- ▶ Even if a crime has been committed that falls under Title IX and the police are contacted, the incident still needs to be reported to Title IX personnel.
- ▶ Courts are not accepting “ignorance” or “deliberate indifference” as a defense, they are sometimes responding with “You should have known.” We must be proactive!



# Duties of the Title IX Investigative Team:

- ▶ Thoroughly investigate any valid allegations of Title IX incidents
- ▶ Call in and interview the complainant(s) and respondent(s) as well as witnesses (calling back people for subsequent interviews is frequently necessary in order to gain a full grasp of the available facts)
- ▶ Maintain an air of impartiality and fairness throughout the interview process
- ▶ Create and maintain a careful written report summarizing the event(s) as accurately as possible with a recommendation(s) as to whether or not the incident is more than likely to have occurred.
- ▶ Never try to bully or intimidate a complainant into not making a report because it might “stir things up” or “cause us to be sued.”
- ▶ Maintain confidentiality throughout the process and subsequent to the incident(s).





# Standard of evidence

- ▶ In a US court of law the standard is guilt must be established “beyond a reasonable doubt.”
- ▶ However, under Title IX the standard of guilt is established by “a preponderance of evidence.” In other words, the standard of guilt is basically that the person(s) is more likely than not *guilty*. (Note: this is a lower standard than our courts of law.)
- ▶ Under the new regulations more protection is offered to the respondent (accused) who previously operated virtually under a virtual presumption of guilt.



# Brief mention of new developments:

- ▶ The complete text of the new changes is 2,033 pages!
- ▶ They went into effect on August 14, 2020
- ▶ Core provisions including the requirement for live hearings and cross-examinations remain. (Note: these are quasi-judicial in tone and must be properly recorded and preserved.)
- ▶ Both complainants (plaintiffs) and respondents (defendants) are allowed to have representation in the proceedings
- ▶ A cornerstone of the final regulations is the “deliberate indifference” as explained in the *Gebser* and *Davis* cases. (See next slide.)



# “Deliberate indifference” defined

“Under the Gebser/Davis standard, an institution is liable in a civil suit under Title IX only if: (1) it has actual knowledge of sexual harassment occurring in a setting where the institution exercises substantial control over the alleged harasser and the context in which the alleged harassment occurs; (2) the institution’s response is deliberately indifferent (i.e., clearly unreasonable); and (3) as a result of the institution’s deliberate indifference, it subjects its students to sex discrimination in its education programs and activities. The standards in the regulation for triggering institutional response, assessing the adequacy of an institution’s response, the programmatic reach of Title IX and the definition of sexual harassment are all derived from the civil liability standards articulated in Gebser/Davis.” (Husch Blackwell, “Summary of Final Title IX Regulation,” May 6, 2020, p. 1)



## In other words . . .

- ▶ We are only responsible for occurrences that happen in locations or contexts under the direct purview of this institution
- ▶ However, an institution cannot be “deliberately indifferent” but it must reasonably expect to be aware of situations where discrimination or abuse took place.
- ▶ The institution must not have policies or practices in place that place students or employees at risk



# Dispute resolution matters

- Grievances can only be filed by an alleged victim or the Title IX Coordinator.
- An important caveat is as follows: “at the time of making a complaint, an alleged victim must be participating in or attempting to participate in the institution’s education program or activity. Effectively, this means an institution will have discretion not to initiate the Title IX grievance process for complaints made by former students or employees.” (Husch Blackwell, “Summary of Final Title IX Regulation,” May 6, 2020, p. 2)
- Under the new guidelines, institutions cannot require students or employees to waive the Title IX quasi-judicial process as a condition of admission or employment.
- However, if the parties wish to move towards a more informal process rather than the quasi-judicial process requiring a formal hearing, calling of witnesses, etc., they may do so but a formal complaint must be filed first.
- The new regulations require extensive documentation of all Title IX cases and training received by Title IX actors. (We don’t yet know what this fully means, but the attorneys describe the documentation as “onerous” and potentially very expensive, requiring a significant investment in training and technology.)

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<https://www.aicag.edu/consumer-information/title-ix-policy>