

Stop, Drop, & Title IX

RESPONDING TO REPORTS OF SEXUAL HARASSMENT IN SCHOOLS



Today's Panel

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AVOIDING TITLE IX PITFALLS

- Title IX: Where Are We Now?
- Determining if Title IX Applies
- Ignoring Off Campus Conduct
- Moving too Fast
- Ignoring the Respondent
- Investigation No Nos
- Over-Deference to Law Enforcement
- Ignoring FERPA
- Falling to Partiality Pressure

Title IX: Where Are We Now?

Same Old, Same Old

- ▶ Same law
- ▶ Same rules
- ▶ Same commentary
- ▶ Expected proposed rules May 2023

Guidance & Caselaw

- ▶ Q&A includes some troubling language regarding issues such as prevention efforts, codes of conduct, and
- ▶ Conflict between OCR approach on preemption and courts
- ▶ Challenges from *Cardona* fallout

Determining if Title IX Applies

Tricky Title IX Traps

Title IX SH Grievance Process
NOT required:

- ▶ Title IX Athletics
- ▶ Different Treatment Based on Sex
- ▶ Pregnant/Parenting
- ▶ Retaliation?



Ignoring Off-Campus Conduct

Ask Yourself

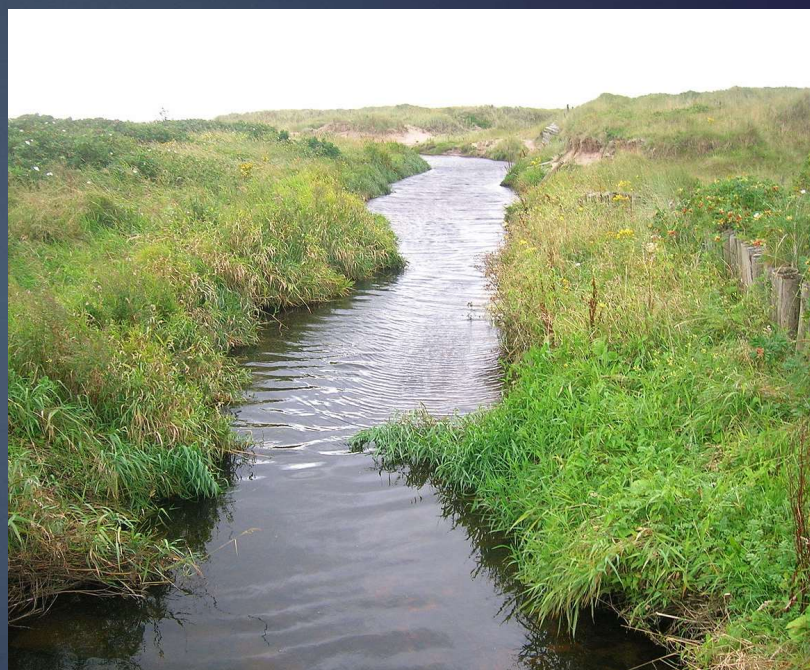
How would you handle?

- ▶ Off campus cyberbullying or non-sex based speech (compare to off campus sex-based speech)
- ▶ Off campus fight (compare to off campus sexual assault)



Downstream Effects

- ▶ Unsettled area of law – caselaw is emerging
- ▶ Though not necessarily required, offer supportive measures for off-campus conduct involving sex



Moving too Fast

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The Common Scenario

- ▶ Student reports conduct to building administrator
- ▶ Building administrator uses normal procedure for complaints
- ▶ Potential violation of due process rights, can lead to loss of evidence



Form Over Substance

- ▶ Building administrators often handle these matters well
- ▶ But they may not follow the policy requirements
- ▶ Even before the new Title IX rules, OCR found this to be a violation



What'd I Miss?

- ▶ Supportive Measures Meeting
- ▶ Confidentiality
- ▶ Notice, Prep Time, Right to Have Parents/Advisor Present
- ▶ No Discipline Before Process

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Ignoring the Respondent

Supportive Measures

Schools must “[t]reat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures, against a respondent”

Supportive Measures

But the rule also states...

“Supportive measures means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.”

Supportive Measures

Supportive measures are the only part of the process that is not required to be equitable between the parties

Respondent (like Complainant) must only receive supportive measures necessary and reasonable for them

Supportive Measures

Examples of supportive measures for Respondent:

- Counseling
- Extra time on assignments
- Leave of absence/excused absences
- Assistance with bullying/harassment

Investigation No Nos

No Gag Rules Allowed

You cannot restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence





What You Can Do....

- ▶ Remind parties of the risks of oversharing
- ▶ Encourage parties to file retaliation complaints

No Instant Interviews

Before an interview of any party, must provide:

- ▶ Notice of Allegations to both parties with sufficient details and sufficient time to prepare
- ▶ Notice of specific interview with date, time, location, purpose, and participants and sufficient time to prepare

The background features a dark, stylized landscape with mountains and clouds. In the center, there are two large, dark blue arrow-shaped signs pointing in opposite directions. The top sign points right and contains the word 'NOW' in large, light blue, sans-serif capital letters. The bottom sign points left and contains the word 'LATER' in large, light blue, sans-serif capital letters. Overlaid on these signs is the main title of the slide in a light blue, sans-serif font.

Over-Deference to Law Enforcement

Good Cause for Delay

- ▶ The Title IX sexual harassment grievance process can be delayed for good cause with written notice to the parties
- ▶ Concurrent law enforcement activity is one example of good cause in the rule

Law Enforcement Dos and Don'ts

- ▶ Do document the reason for the delay, including follow up (weekly if possible)
- ▶ Do make clear intention to move forward once evidence has been collected
- ▶ Enlist the parties in obtaining answers and information from law enforcement

Ignoring FERPA

FERPA Background

- ▶ Since at least 2001, OCR has taken the position that FERPA does not override due process
- ▶ Preamble: The Department is not “favoring” due process over FERPA; it is bound by the U.S. Constitution, including the Due Process Clause, and thus cannot administer Title IX or FERPA in a manner that deprives persons of due process of law

FERPA Basics

- ▶ Accordingly, the educational institution can provide directly related evidence, the investigative report, and other required notices without violating FERPA
- ▶ OCR has also taken the position that sharing discipline or consequences that impact the Complainant is acceptable

FERPA Flubs

- ▶ FERPA does not allow release of any information collected in an investigation; information should be directly related to be released for review and relevant to be summarized in a report
- ▶ Overbroad investigations can lead to FERPA concerns if directly related information that is not relevant is shared



Falling to Partiality Pressure

Impartial \neq Outside

- ▶ Even smaller institutions can often staff Title IX team roles without engaging outside investigators
- ▶ Rely on legal counsel for support; can be equally effective to hiring an outsider for a role

Thank You!

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