

A stack of several books with spines of various colors (black, red, white) and some with labels. The books are slightly out of focus, suggesting a library or study environment.

**TITLE IX REGULATIONS UPDATE**  
*WEEKLY ADVANCED WEBINAR SERIES*

# How the Updated Title IX Regulations have Impacted... Employment Issues

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# Agenda

1. Who is Covered – Title IX and Employees?
2. Title VII and Title IX – Both? Yes.
3. Supportive Measures/Administrative Leave
4. Determining the Standard of Evidence
5. Imposing Disciplinary Measures
6. Training
7. Miscellaneous

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# First, a Preview of the “Good” News

- Yes, there is some:
  - You can largely decide who has “actual notice” –
    - Title IX coordinator (always)
    - “Any official who has authority to institute corrective measures on behalf of the recipient.”
  - You can decide who is trained.
    - No liability for training everyone – does not affect above
  - You can decide whether to align non-Title IX processes with the prescribed process for Title IX.
  - You may not need to amend employment policies/agreements by August if you focus on difference between Title IX remedy and discipline.
  - You can decide the standard of evidence (well, maybe).
  - You can still place most respondents on administrative leave.

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# Title IX and Employment?

§ 901(a) – No **person** [] shall, on the basis of sex, be excluded from participation in, or denied the benefits of, or be subjected to discrimination under any **education program or activity** receiving Federal financial assistances[.]

- No mention of employee in the text, but Title IX's reach to employees is not new:
  - ED authority akin to Title IV regarding race discrimination in federally funded programs
  - Existing Title IX regulations already applied to employees - 34 CFR § 106, Subpart E
  - US Supreme Court upheld ED's ability to regulate employment under Title IX – *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982)
  - *Gebser / Davis*
  - All employees, regardless of function (but only in US)

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# Title IX and Employment?

Existing Regulations:

34 C.F.R. § 106.2(h)(2).

**Program or activity** and **program** means *all the operations of*

- A college, university, or other postsecondary institution, or public system of higher education
- A local educational agency [], system of vocational education, or the school system

34 C.F.R. § 106.51(a)(1).

No person shall, on the basis of sex, be excluded from participation in, be denied the full benefits of, or be subjected to **discrimination in employment**...

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# Brief Recap of Requirements

- Final Regs require recipients to respond promptly to claim of sexual harassment by:
  1. Offering supportive measures to every complainant;
  2. Refraining from imposing disciplinary sanctions on a respondent without first following prescribed grievance process;
  3. Investigating every formal complaint;
  4. Effectively implementing remedies designed to **restore** or **preserve** a complainant's equal educational access where respondent is found responsible



# Actual Notice

- No more “Responsible Employee”
- Who has “authority to institute corrective measures?”
  - Grants recipients discretion to determine (Preamble 30114.)
- ED says no conflict if training or other requirements are required by another source (NCAA, Clery, state law)

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# Conflict?

- ED says no inherent conflict between Title IX and Title VII
- Will construe to avoid actual conflict
- Must comply with BOTH
- Can choose to have a separate code of conduct for the two

# Sexual Harassment

## Title IX

- Unwelcome conduct
- Based on sex
- Recipient's program or activity
- Quid pro quo by a recipient's employee
- A VAWA sexual offense
- Other conduct that is
  - Objectively offensive, and
  - Denies equal access to a recipient's program or activity, and
  - Is severe, **and**
  - Is pervasive

• *Note: no vicarious liability; requires actual knowledge.*

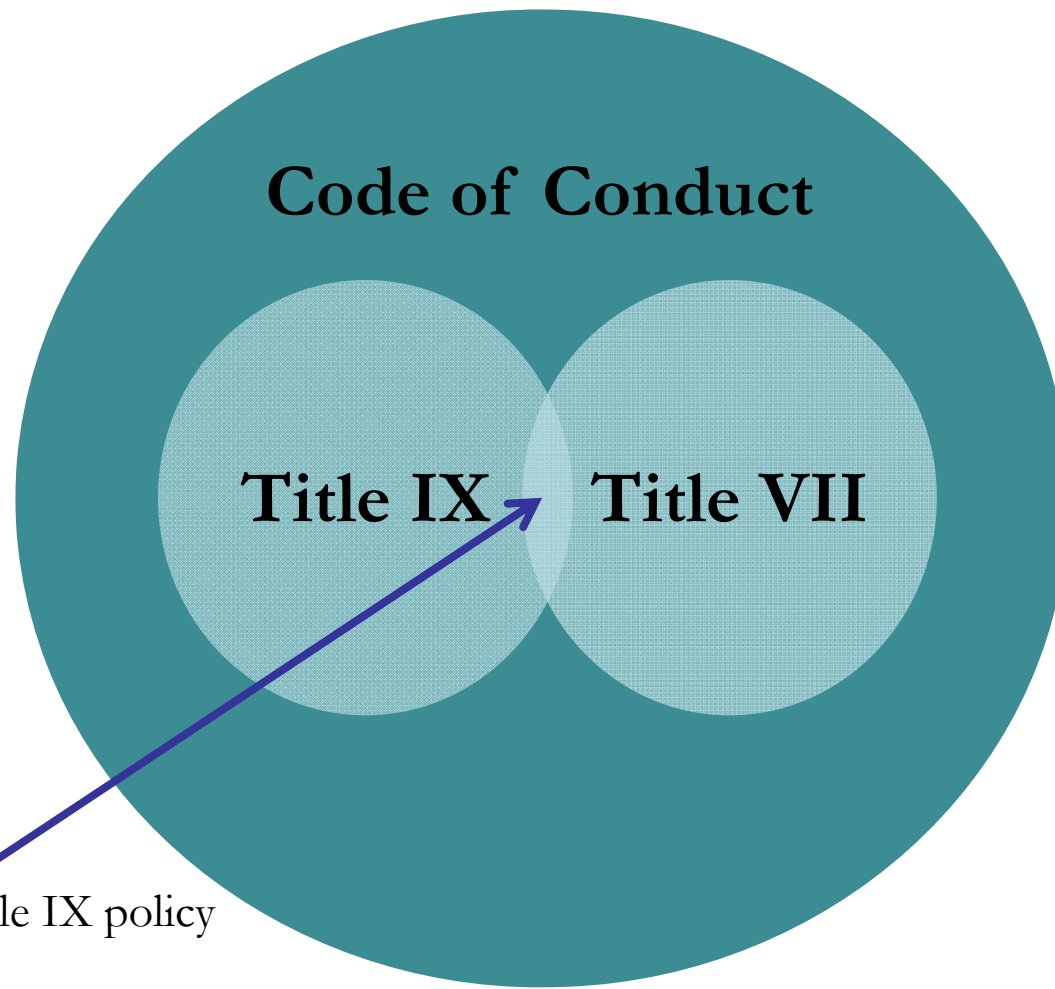
## Title VII

- Unwelcome conduct
- Based on sex
- Employment context
- Conduct that is objectively offensive and
  - Severe, **or**
  - Pervasive
- Affects term, condition, or privilege of employment

*Note: vicarious liability attaches*

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# Title IX and Title VII



Handle under Title IX policy

# The Title IX definition is broader

The regulation's definition of sexual harassment is, in some ways, **broader** than sexual harassment under Title VII. (Preamble 30151-52.)

## Example

An employee's supervisor fondles an employee's breast once. No harassment occurred before the incident or after the incident. (Preamble n. 669.)

Title IX?

**Yes.**

Title VII?

**No.**

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# The Title IX definition is narrower

The regulation's definition of sexual harassment is, in some ways, **narrower** than sexual harassment under Title VII. (Preamble 30440.)

## Example

An employee's supervisor calls the employee a derogatory term based on the employee's sex multiple times per week for a year.

Title IX?

**No.**

Title VII?

**Yes.**

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# Decision Points

- Two fundamental policy questions:
  - Do you want to align your Title IX process and your Title VII process?
  - Do you want to align your student code of conduct and your employee handbook?



# Moving Forward

- Step 1: Think practically
  - What do we realistically think we can get done by August?
  - Remember, all we need by August 14th is a policy/procedure that we can train on and follow, and that complies with the regulations
- Step 2: Dream big
  - What would your ideal policy/procedure be?
  - How can you modify what you've already put in place to get to that ideal?

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# Supportive Measures

- Available to employees too (Preamble 30442.)
- Fact Specific
  - Non disciplinary
  - Non-punitive
  - Not unreasonably burdensome
  - Consistent with 106.30 definition/requirements
- Not no burden, but cannot be unreasonable
- Mutual no contact for employees is possible

## Evaluation Considerations

When can we put non-  
student employees on  
**administrative leave?**

- ❑ Recipients can place non-student employees on administrative leave during pendency of grievance process. (§ 106.44(d).)

AND...

- ❑ Recipients must not impose any disciplinary sanctions until the grievance process is complete. (§ 106.45(b)(1)(i).)

AND...

- ❑ Placing an employee on administrative leave without pay is generally considered to be disciplinary. (Preamble 30237.)

### WHERE DOES THAT LEAVE US?

- ❑ “these final regulations do not dictate whether administrative leave during the pendency of an investigation under § 106.45 must be with pay (or benefits) or without pay (or benefits).” (Preamble 30236.)

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# Leave

- Emergency: Can remove a respondent (including employee) from all or part of a recipient's education program or activity in an emergency situation pursuant to Section 106.44(c) (with or without a grievance process pending)
- May place a non-student employee respondent on administrative leave **during a grievance process.**
  - Cannot be indefinite
  - Student-employee? (CAREFULLY)

# Informal Resolution?

- May have process for employee-on-employee sexual harassment.
- But **NOT** for allegations an employee sexually harassed a student (§ 106.45(9)(iii).)
  - “Too difficult to determine if truly voluntary” (Preamble 30400.)
- Cannot waive right to formal complaint process as condition of employment (Preamble 30406.)

**Let's pause for questions ...**

# Agenda

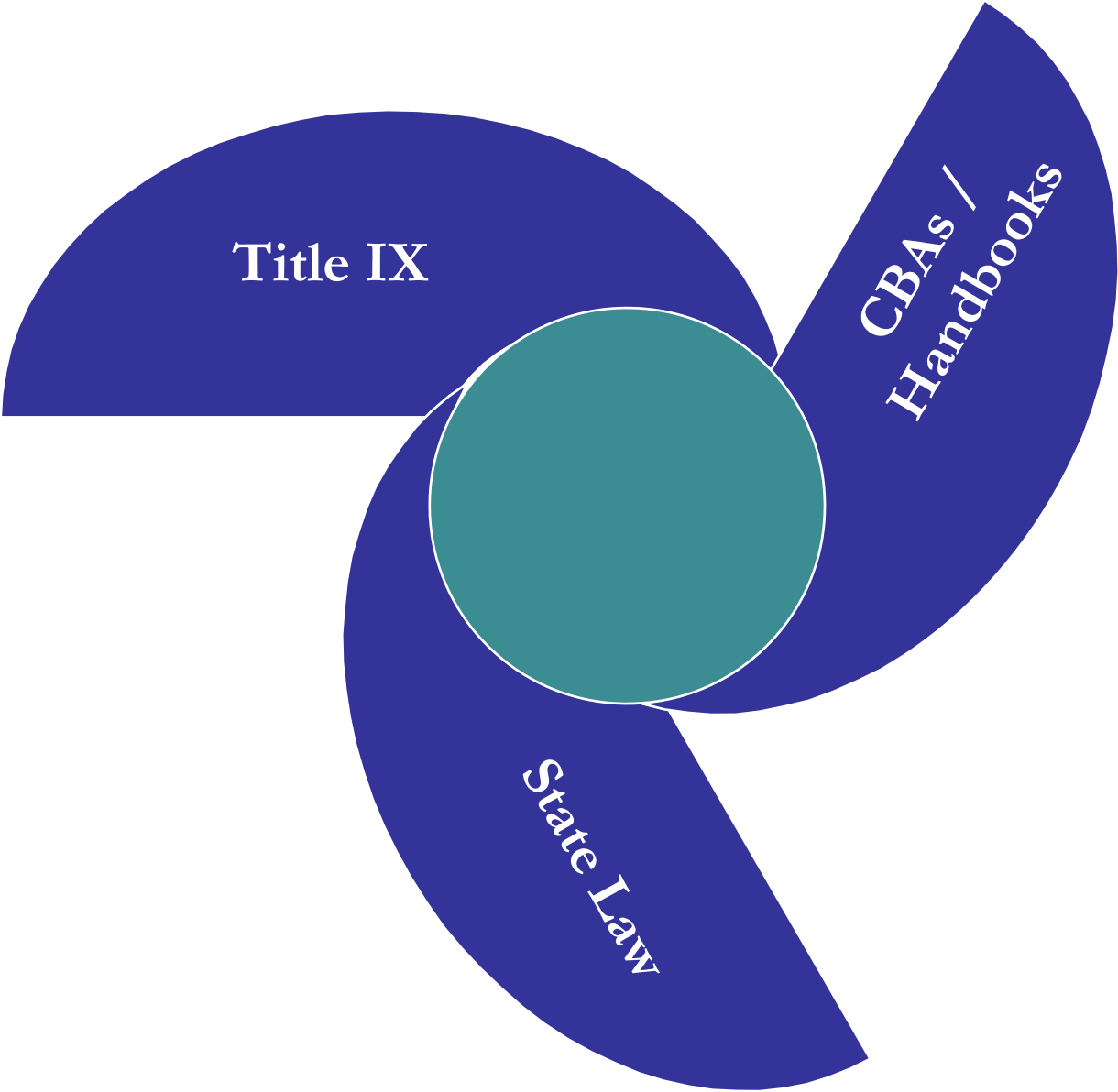
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## Evaluation Considerations

“[A]pply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standards of evidence to all formal complaints of sexual harassment”

- The standard for finding a violation of the Title IX policy and imposition of a remedy.
  - We will talk more about the standard for imposition of disciplinary measures later.
- What laws, policies, and procedures do we weigh in determining whether to adopt the preponderance or clear and convincing standard?



# State Law

## Evaluation Considerations

What if state law requires the preponderance of the evidence standard for determining whether a violation of the recipient's Title IX policy occurred?

- ❑ Scenario 1: Apply the preponderance of the evidence standard to all Title IX grievance procedures.
  - ✓ Title IX
  - ✓ State law
- ❑ Scenario 2: Apply the preponderance of the evidence standard in student respondent Title IX cases and clear and convincing standard in non-student respondent Title IX cases.
  - X Title IX
  - ✓ State law
- ❑ Scenario 3: Apply a clear and convincing standard in all Title IX grievance procedures.
  - ✓ Title IX
  - X State law

# Preemption/Conflict Issues

- Will construe to avoid conflict, but if actual conflict then ED believes regulations preempt state law (Preamble 30456.)
- Examples (Preamble 30455):
  - If law requires union rep present, no conflict because can have your own advisor.
  - NY “Enough is Enough” law –
    - If NY law requires a recipient to respond to conduct that these final regulations do not deem covered by Title IX, a recipient may do so – dismiss formal complaint and pursue under another provision.
      - But, cannot of course have different standards/processes for a covered claim

# CBA/Handbook

## Evaluation Considerations

What if a CBA or handbook requires the clear and convincing evidence standard for determining whether a violation of the recipient's Title IX policy occurred?

- ❑ Scenario 1: Apply the clear and convincing standard to all Title IX grievance procedures.
  - ✓ Title IX
  - ✓ CBA/Handbook
- ❑ Scenario 2: Apply the preponderance of the evidence standard in student respondent Title IX cases and clear and convincing standard in non-student respondent Title IX cases.
  - X Title IX
  - ✓ CBA/Handbook
- ❑ Scenario 3: Apply a preponderance of the evidence standard in all Title IX grievance procedures.
  - ✓ Title IX
  - X CBA/Handbook

## Evaluation Considerations

What if a CBA or faculty handbook requires the clear and convincing evidence standard for determining whether a violation of the recipient's Title IX policy occurred, **BUT** state law requires the preponderance of the evidence standard?

- Scenario 1: Apply the clear and convincing standard to all Title IX grievance procedures.
  - ✓ Title IX
  - X State law
  - ✓ CBA/Handbook
  
- Scenario 2: Apply the preponderance of the evidence standard in student respondent Title IX cases and clear and convincing standard in non-student respondent Title IX cases.
  - X Title IX
  - ✓ State law
  - ✓ CBA/Handbook
  
- Scenario 3: Apply a preponderance of the evidence standard in all Title IX grievance procedures.
  - ✓ Title IX
  - ✓ State law
  - X CBA/Handbook



## Evaluation Considerations

How do we get our documents to align with our decision regarding the standard of evidence?

- ❑ Look closely at your CBA/Handbook
  - Is there a savings/severability clause? What does it say?
  - Is there a clause that allows for reopener? What does it say?

# Sample Clauses

## **Severance/Savings Clause:**

If any one or more of the provisions or subjects contained in this Agreement is for any reason held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability will not affect the validity and enforceability of any other provisions or subjects of this Agreement, and it is the intention of the parties that there shall be substituted for such invalid, illegal or unenforceable provision a provision as similar to such provision as may be possible and yet be valid, legal and enforceable.

## **Reopener Clause:**

In the event that any provision of this Agreement conflicts with applicable federal, state, or local law, either party, by giving 10 days' written notice to the other party, shall have the right to reopen that provision to negotiate that provision only.

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# Shared Governance

- Regulations do not preclude faculty committee to hear claims of harassment against faculty.
  - Must, of course, comply with hearing provisions in regulations.
- Hearing officer may be a faculty member so long as:
  1. Trained
  2. Not conflicted
  3. Not biased
  4. Complies with provisions of § 106.45

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# Title IX Governs Remedy – Not Discipline

“[t]he final regulations do not require particular disciplinary sanctions”

## Evaluation Considerations

Can the standard of evidence for imposition of disciplinary measures be different than the standard of evidence for finding of a violation and remedies?

- ❑ Establish a grievance process under Title IX for “the purpose of addressing formal complaints of sexual harassment”
  - Provide remedies to complainant where a determination of responsibility for sexual harassment has been made against the respondent
  - Disciplinary sanctions may not be imposed until after conclusion of the grievance process

## Evaluation Considerations

Can the standard of evidence for imposition of disciplinary measures be different than the standard of evidence for finding of a violation and remedies?

### ☐ What are remedies?

- Must be designed to restore or preserve equal access to the recipient's education program or activity
- May include “supportive measures”
- May burden the respondent
- Need not be non-disciplinary or non-punitive

## Evaluation Considerations

Can the standard of evidence for imposition of disciplinary measures be different than the standard of evidence for finding of a violation and remedies?

- ❑ The imposition of a remedy must occur within the grievance process framework
- ❑ The imposition of a disciplinary measure need not occur within the disciplinary framework

**THEREFORE...**

To the extent a recipient seeks to impose a disciplinary measure, which can only be imposed pursuant to the process set forth in a faculty handbook/CBA, that process can be followed.



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## Evaluation Considerations

Which employees do we  
have to train on the Title IX  
policy?

- ❑ When does the recipient have “actual knowledge” of alleged sexual harassment?

~~RESPONSIBLE EMPLOYEE~~

Instead,

- The Title IX Coordinator
- Any official of the recipient who has authority to institute corrective measures on behalf of the recipient.

*UNLESS*

The recipient is an elementary or secondary school.

## Evaluation Considerations

Which employees get  
trained on the Title IX  
policy?

### Must train

- The Title IX Coordinator
- Any official of the recipient who has authority to institute corrective measures on behalf of the recipient.

### May train

- All employees – training employees who do not have “actual knowledge” does not increase liability for recipient.

### Should train? Consider some factors:

- Logistics
- Training revamp
- Optics
- Posting

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## Evaluation Considerations

How do the new Title IX regulations affect the at-will employment doctrine?

- At-will: An employer can terminate an employee's employment for a good reason, a bad reason, or no reason at all, as long as it's not discriminatory.
- No employee should "be deprived of employment as a result of allegations of sexual harassment without the protections and process that these final regulations provide." (Preamble 30445.)
- Does the recipient have a legitimate, non-Title IX related reason for terminating the employee's employment?

## Evaluation Considerations

Does a recipient's Title IX policy apply to non-employees?

- The short answer is “maybe”
  - Is the non-employee a complainant?
  - Did the recipient give the non-employee the authority to institute corrective measures on the recipient's behalf?
- Who is an employee?
  - State law
- Volunteers (30448)

# QUESTIONS?

# Questions



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*Thank you to colleague, Carolyn Pellegrini, who assisted  
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