



Spring 2025 CLE Workshop · March 26 – 28, 2025

Higher Education Discrimination Law

Title IX: Advising with Compassion

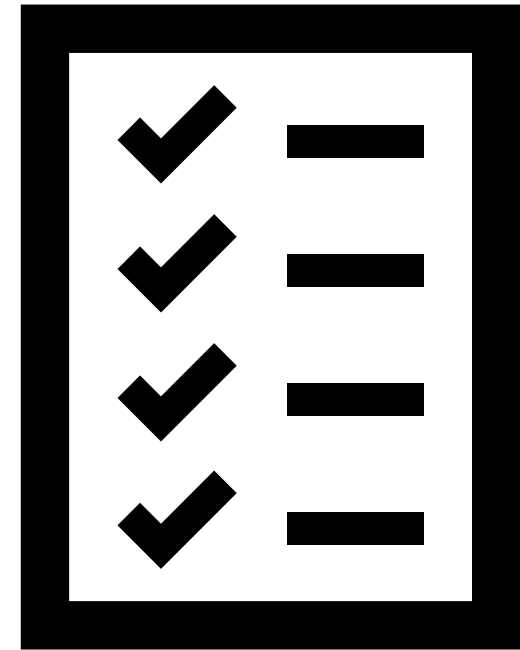
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Our Time Together Today

- The intent of Title IX
- Current state of the law
- Practical tools to meet the original intent of Title IX in a compliant and compassionate way



The background of the slide features a collection of stylized, semi-transparent silhouettes of people's heads and shoulders in various colors including green, orange, red, and brown, set against a light beige background. The silhouettes are arranged in a way that suggests a diverse group of individuals.

Re-finding the Forest Through the Trees:

Title IX's Origin and Intent

How is Title IX Different?

- Legislative History and Relationship with the Civil Rights Act
- Distinctions from Other Grievance Processes
 - Criminal Justice System
 - Student Conduct Processes
- Focus on Victim Autonomy and Redress
 - *Gesber v. Lago Vista Independent School District*
 - *Davis v. Monroe County Board of Education*

Gesber v. Lago Vista Independent School District

"[W]hereas Title VII aims centrally to compensate victims of discrimination, Title IX focuses more on 'protecting' individuals from discriminatory practices carried out by recipients of federal funds....

That might explain why, when the Court first recognized the implied right [to a private cause of action] under Title IX... the opinion referred to injunctive or equitable relief in a private action but not to a damages remedy."

Davis v. Monroe County Board of Education



- The failure to remedy harassment that interferes with access to a school resource "would fly in the face of Title IX's core principles."
- Requires the school's response to sexual harassment to focus on the impacted student(s):
 - A school must not be deliberately indifferent to sexual harassment
 - Institutions have an obligation to prevent recurrence of harassment that might impact the educational access

Questions to Consider

- How can IHEs address discrimination and harassment in their educational programs and activities in a manner that meets that original intent?
- How can they achieve compliance with the current state of the law while also meeting the deeply sensitive and personal nature of the matters that come before their Title IX offices for review?
- Can Title IX offices approach the matters before them with the objectivity required *and* compassion for the complainants, respondents, and witnesses facing the circumstances that brought them there?

Part II: The Current State of the Law

- Regulatory Changes
- Current Regulations
- Supportive Measures

Title IX Regulatory Changes

- Steady evolution since 2011 Dear Colleague Letter
- 2020 Title IX Regulations put in place by President Trump's first term are in effect nationwide
- January 9, 2025 ruling vacating Biden administration's 2024 Title IX regulations
- February 4, 2025 Dear Colleague Letter (replaced January 31, 2025 Dear Colleague Letter)
 - “open investigations initiated under the 2024 Title IX Rule should be immediately reevaluated to ensure consistency with the requirements of the 2020 Title IX Rule and the preexisting regulations at 34 C.F.R. 106 et seq.”

Supportive Measures

- Sexual misconduct remains a widespread issue
 - Students in particular are coming in unprepared
 - Lack of meaningful training, education K-12
- Wide gulf between ideal behavior and conduct that rises to the level of harassment (true in the workplace as well!)
- Title IX coordinators regularly encounter complainants whose experience may not rise to the level of policy violation/do not fall under the Title IX Regulations (not on-campus; not severe/pervasive, etc.)
 - But these parties still require support

Intake Scenario

A student, Alex, comes to the Title IX office. Alex says that since the beginning of the semester (which started last week), they share a lab with several other students in their program of study. One of the other students, Taylor, regularly makes sexual jokes and suggestive remarks in the lab. Alex says while the jokes are not targeted to any particular individual, they find the jokes annoying and have started avoiding the lab. Alex is wondering what support might be available.

How can the Coordinator respond?

Part III: Language and Communication During Intake, Interviews, and Hearings

- Compassionate Language
- Intake and Investigation Process
- Early Process and Initial Meetings
- Trauma-Informed Approach
- Hearing Process
- Supportive Measures

Trauma-Informed v. Neutral v. Compassionate: What AI Tells Us

- AI Prompts:
 - What _____ language should a college administrator use to address sexual assault?
- Themes:
 - Acknowledging the Report
 - Support
 - Transparency
 - Trauma
- No examples for Respondents

Compassionate Language

- Use language that reflects compassion
- Recognize how the person may be feeling relative to their role in the process
 - Individuals who *report*
 - Individuals who have been *reported*

Language Considerations During Intake and Investigation Process

- Required to "respond promptly" to actual knowledge of SH
 - Not deliberately indifferent
 - "Prompt" outreach to complainant to discuss supportive measures
- Initial meetings
 - Support
 - Transparency
 - Rapport
- Language
 - "Driver's Seat"
 - "Can you help me understand..."
 - "The reason I need to ask about this..."

Early Process and Initial Meetings

- Use of Neutral, Supportive Language
 - Both consistent between parties, and consistent with institution policies and support resources
- Face-to-face meetings
 - Relying solely on written notices, policy definitions, or pre-recorded materials miss an important opportunity
 - Live exchanges allow participants to ask question when they arise

Early Complaint Process Scenario

Hanna has a meeting to discuss the formal Title IX complaint process. Her first meeting with the Title IX office was two weeks ago to receive supportive measures, but now she feels ready to explore the complaint process. She shares more about the facts. She is in a sorority and her complaint involves a brother from the sorority's closest fraternity. Although her friends have been "pretty supportive," some have expressed concern about what "getting him in trouble" might do to the relationship between the two groups. Others have taken a very different approach, suggesting that the students themselves should take matters in their own hands, investigate, and get him thrown out, right away. Neither of these feels supportive to Hanna.

How can the Coordinator respond?

Trauma-Informed Approach

- Preamble discussion (85 Fed. Reg. 30,069, fn. 3 and 30,527)
 - Must not rely on sex stereotypes
 - Must not permit general information about the neurobiology of trauma to lead Title IX personnel to apply generalizations to allegations in specific cases
- Pitfalls
- Generally
 - Chronology
 - Reaction
 - Reporting

Distinction Between Support & Investigation?

- Should be a campus-specific approach
- Consider the typical support needs for your community
- Potential for confusion
- Appearance of advocacy

Language Considerations During the Hearing Process

- 2020 Title IX regulations require opportunities for cross-examination.
- Title IX decision-makers can infuse compassion into a hearing the hearing process by:
 - Use language that conveys **Approachability, Support, Transparency,** and protection for parties and witnesses
- Suggestions
 - Use of first names
 - Self-deprecation
 - Answering procedural questions using plain language

Hearing Scenario

Clara, a University employee, has filed a Formal Complaint of sexual harassment against her supervisor, Robert. Clara initially reported concerns to University police after an alleged incident in which Robert physically blocked Clara from leaving the office. When the case goes to a Title IX hearing, the file includes Clara's statement to University police, her initial report to the Title IX office, summaries of 2 interviews with the Title IX investigator, statements from 3 outcry witnesses, and medical records with references to her interactions from Robert. The details in these various statements vary in terms of the dates, Robert's statements and actions, and the impact experienced by Clara. What role does the decision-maker have, if any, in addressing inconsistencies? Is there a compassionate way to address them?

So How Can In-House Counsel Help?

- Soft Legal Advising
 - Understand what motivates your Title IX administrators
 - Help your Title IX office communicate compassionately
- Advocate for Title IX Resources
 - Help educate other administrators on what the office does
 - Make the "business case" for a well-funded office
- Be a Check for your Title IX Office on Secondary Trauma
 - Recognize that this work takes an emotional toll
 - Be cognizant of compassion fatigue

Resources Needed to Accomplish a Compassionate Approach

- Staffing: Advocating for sufficient resources and professional development
- Support for Title IX Staff: Acknowledging pressure and providing a supportive environment



Another Way Forward: Informal Resolution

Alternative/Informal Resolution

2020 Title IX Regulations explicitly allow for the use of informal resolution

- Can help bridge the gap between receipt of supportive measures only and a full investigation process
- 2020 Regulations require:
 - Exception for cases involving SH by faculty/staff of student
 - Written notice*, voluntary decision to engage, right to withdraw from the informal process and resume the formal grievance process

More on Informal Resolution

"Informal" can be a misnomer

- For cases falling under the Title IX regulations, assure specific process protections.
- Developed programs include staff with rigorous, ongoing training, specific written procedures for parties
- There is no single model, more resources and models being developed on an ongoing basis
- Process itself can take time – weeks or months.
 - Still, generally less time consuming than a full formal complaint investigation and hearing process under the Regulations

Testimonials from Participants in Informal Resolution Processes

By placing our needs and requests at the center of the process, this ensures that our voices are heard. And while we are not responsible for respondent's behaviors or willingness to change, we can ensure accountability and prevent future harm through this process. We give ourselves the power to change the narrative and write the story of our own healing and empowerment. By tailoring a process that meets our specific needs, we have the tools to reclaim our space and safety at U-M ...

-- PhD student Complainant (complaint of grooming by classmate) in informal resolution process, University of Michigan

Participant Testimonials (cont.)

“What I do know is that restorative justice brought me peace. Two years later, I’ve moved on. I don’t linger on what he did to me in the same way that I do my other previous, harmful sexual encounters. I still live with posttraumatic stress disorder, but I have been able to identify my triggers and manage my episodes. I also have been able to use this experience as a foundation to redefine and practice healthy sexuality and healthy relationships. There is still so much of my story left to write. But restorative justice allowed me to keep writing.”

-- Elizabeth Larky-Savin in “Observations and Reflections from an RJ Participant” in *Applying Restorative Justice to Campus Sexual Misconduct 2023*

Participant Testimonials (cont.)

I am immensely grateful that I had the opportunity to take part in the [informal] resolution process — not just in place of a more punitive process, but also in place of simply not confronting my problems at all. Thanks to my experience, I feel that I have a better relationship with women, more fully consider my effect on those around me, and live a healthier lifestyle than I would have had I not had the opportunity to participate. I sincerely hope that the process was equally valuable to my classmate.”

-- Graduate student Respondent (accused of groping) in an informal resolution process, University of Michigan

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Questions?

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