

Title IX, VAWA, University of Montana Summary
Mackenzie Wilfong, Esq.
Oklahoma State University Assistant University Counsel
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Title IX an Introduction

According to the Department of Education, Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681 *et seq.*, and its implementing regulations, 34 C.F.R. Part 106, prohibit discrimination on the basis of sex in education programs or activities operated by recipients of Federal financial assistance. Sexual harassment of students, which includes acts of sexual violence, is a form of sex discrimination prohibited by Title IX.

Title IX covers state and local agencies that receive ED funds. These agencies include approximately 16,000 local school districts, 3,200 colleges and universities, and 5,000 for-profit schools as well as libraries and museums. Also included are vocational rehabilitation agencies and education agencies of 50 states, the District of Columbia, and territories and possessions of the United States.

Programs and activities, which receive ED funds must operate in a nondiscriminatory manner. These programs and activities may include, but are not limited to: admissions, recruitment, financial aid, academic programs, student treatment and services, counseling and guidance, discipline, classroom assignment, grading, vocational education, recreation, physical education, athletics, housing and employment. Also, a recipient may not retaliate against any person because he or she opposed an unlawful educational practice or policy, or made charges, testified or participated in any complaint action under Title IX. For a recipient to retaliate in any way is considered a violation of Title IX. The ED Title IX regulations (Volume 34, Code of Federal Regulations, Part 106) provide a detailed discussion of discrimination prohibited by Title IX.

The Office for Civil Rights (OCR) in ED is responsible for enforcing Title IX. OCR's responsibility to ensure that institutions, which receive ED funds comply with Title IX is carried out through compliance enforcement. The principal enforcement activity is the investigation and resolution of complaints filed by people alleging sex discrimination. Also, through agency-initiated reviews of selected recipients, OCR is able to identify and remedy sex discrimination, which

may not be addressed through complaint investigations.¹

Definition of two forms of sexual harassment

1. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when submission to or rejection of this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance or creates an intimidating, hostile or offensive work environment.
2. Two forms of sexual harassment
 - A. Quid pro quo - "Quid pro quo" is Latin phrase meaning "something for something" or "this for that". Quid pro quo sexual harassment is the exchange for some sexual favor, for a benefit or boost in the workplace or to stave off a detriment.
 1. This can affect a third-party, when the employee who is not harassed loses a job benefit or opportunity to someone who is less qualified than the individual who submitted to the sexual harassment.
 - B. Hostile environment - Subjectively and objectively offensive and sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working or educational environment.

Retaliation

All Civil Rights Statutes listed below prohibit retaliation

- Title VII of the Civil Rights Act of 1964
- The Age Discrimination in Employment Act of 1967 (ADEA)
- Title I of the Americans with Disabilities Act of 1990 (ADA)
- The Equal Pay Act of 1963 (EPA)
- Genetic Information Nondiscrimination Act (2008)
- Lilly Ledbetter Fair Pay Act (2009)

Three Parts to Every Retaliation Case:

1. The protected activity (opposition or participation) and
2. The harm that followed the protected activity and
3. The connection between the two

What is a Protected Activity?

- Reasonably and in good faith opposing a practice made unlawful by one of the employment discrimination statutes

¹ See Department of Education guidance at http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html for information regarding Title IX generally.

- Filing a Charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under the applicable statute

What is an Adverse Action?

An adverse employment action may be an official act or the limiting of an internal grievance or EEO investigation. It doesn't need to qualify as an ultimate employment action, and it can occur after the employment relationship has ended. Simply put, the key is whether the adverse action would dissuade a reasonable worker from making or supporting a complaint of discrimination.

Title IX Dear Colleague letter and supporting documentation

In April 2011 the Department of Education, Office for Civil Rights published its Title IX Dear College Letter which can be found at

<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>

Below is an outline of the letter and its requirements.

Overview

- The location of the offense doesn't necessarily matter. Title IX applies to students who experience sexual violence on or off campus.
- If a school knows or reasonably should know
 - Required to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects, whether or not the sexual violence is subject of a criminal investigation.
 - If no complaint the school must take steps to limit the effects of the alleged harassment and prevent its recurrence
- How does Title IX and OCR correspond to Title VII and the EEOC – both of which make sexual harassment illegal.

Handling Sexual Violence Cases

- Adopt grievance procedures
 - Clarify that mediation will not be used to resolve sexual assault complaints.
 - Prompt and equitable
 - Both parties allowed to present witnesses and other evidence
 - Notice to both parties of the outcome of the complaint
 - An assurance that the school will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others.
 - Within 60 days:
 - Conduct a full investigation

- Both parties receive outcome notice
 - Both parties can file an appeal
- Provide periodic status updates for both parties throughout the process
- Distribute/Publish Grievance Procedures
 - Notify students and employees of grievance procedures including where complaints may be filed
 - Post on website; send electronically to all members of the community
 - Make available on campus
 - Include in handbooks, Code of Conduct, and catalogs.
- Investigation
 - Must be prompt, thorough, and impartial
 - Should inform and obtain consent from the complainant before beginning an investigation
 - Without consent from complainant, the school still must investigate with meeting the requests of possible confidentiality of the complainant
 - A criminal investigation does not constitute an investigation for the University
 - If a police report is made, law enforcement should notify the victim how to report to the University
 - If reported to the University, the University must encourage the student to report to the appropriate law enforcement agency
- Use preponderance of evidence standard- “more likely than not”
- Protect the complainant
 - Notify complainant of the right of file a criminal complaint
 - Allow No Contact Order
 - Changes to academic schedule and living arrangements
 - Provide counseling
 - Provide medical services
 - Provide academic support services
 - Provide an escort between classes
 - Allow to re-take a course or withdraw for a class without penalty
- Same rights for complainant and accused
 - Witnesses, reviewing evidence, pre-hearing meeting, allow attorneys, appeals
 - Notify both parties of the outcome of the complaint

Training and Education Requirements

- Train Faculty and Staff

- Include practical information about how to identify and report sexual harassment and violence, provide understanding of what types of conduct constitutes sexual harassment or violence, assist in identifying warning signals that may need attention, and how to respond
- To be given to any employee who could witness harassment including law enforcement, RAs, health personnel, General Counsel, counselors, administrations, and faculty
- Train faculty and staff not only on how to respond, but also how not to perpetrate sexual harassment, which in the employment context would violate Title VII and would be open to an EEOC complaint
- Train conduct hearing panels on Title IX and sexual violence
- Educate Students and Student Groups
 - Implement Preventive Education Programs
 - Include in new student orientation (undergraduate & graduate)
 - Educate student athletes and coaches, Greek Life, Residence Life staff, student organizations
 - Include in training:
 - What constitutes sexual harassment and sexual violence
 - School's policies and disciplinary procedures
 - Consequences of violating these policies
 - Information aimed at encouraging students to report incidents of sexual violence to school and police
 - Convey that the school's primary concern is their safety and not any other policy violations
 - Create specific sexual violence materials
 - Include school's policies, rules and resources for students, faculty, coaches and administrators.
 - Include information in employee handbook and any handbooks for athletes and student organizations
 - Include what constitutes sexual harassment or violence
 - What to do if you are a victim
 - Who to contact for counseling on and off campus
 - How to file a complaint with the school
 - How to contact the Title IX Coordinator
 - How the school will respond
- Regularly assess campus community with a campus "climate check"
- Create a committee of students and school officials to identify strategies to ensure students:
 - Know the prohibition against sex discrimination

- Recognize sex discrimination
- Understand how and to whom to report any incidents
- Know the connection between alcohol and drug use and sexual violence
- Feel comfortable that school officials will respond

Notice of Nondiscrimination and Title IX Coordinator

- Publish a Notice of Nondiscrimination
 - Include name or title, office address, telephone number, and email address for Title IX Coordinator(s)
 - Think about having one for student issues (when student is the individual to be disciplined – Title IX concerns only) and one for faculty and staff issues (when faculty or staff would be disciplined – Title VII and Title IX concerns)
 - Should specifically state that prohibited sex discrimination covers sexual harassment, including sexual violence
 - Should include examples
- Distribute the Notice of Nondiscrimination
 - To all students, employees, applicants for admission and employment, and other relevant persons
 - Posted on school web sites
 - Posted around campus
 - Published in electronic and printed publications
 - Available on an ongoing basis
- Designate a Title IX Coordinator(s)
 - Determine how this person works with HR as the point of contact for all sexual harassment issues between faculty and staff
 - Regularly assess campus community with a climate check
 - Create a committee of students and school officials to identify strategies to ensure students
 - Know the prohibition against sex discrimination
 - Recognize sex discrimination
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Violence Against Women's Act "VAWA"

(which includes the Campus sAve Act and amends the Clery Act)

The Violence Against Women Act (VAWA) is federal legislation signed by the

President on March 7, 2013, which addresses issues of domestic and sexual violence. VAWA states Universities **must** have primary prevention and awareness programs for **all** incoming students and employees on the areas of rape, acquaintance rape, domestic violence, dating violence, sexual assault, and stalking. Universities must also have ongoing prevention and awareness campaigns for students and faculty in the same areas as listed above.²

University of Montana Joint Department of Justice and Department of Education letter

On May 9, 2013, the U.S. Department of Justice (“DOJ”) and the U.S. Department of Education Office for Civil Rights (“OCR”) issued a 31-page joint letter (“Montana Letter”) regarding sexual harassment and assault issues stemming from a year-long investigation at the University of Montana. This joint letter state that it is “a blueprint for colleges and universities throughout the country to protect students from sexual harassment and assault.”³ The extensive letter is succinctly summarized in a recent NACUA note dated June 14, 2013, and attached hereto.⁴ The Montana Letter, like VAWA outlined above, required Montana to implement student, faculty, and staff training. The letter clarifies that it is the expectation of OCR that to be compliant with Title IX “all University staff and faculty” receive training on sexual harassment and assault, and that all must report sexual violence and harassment to the Title IX coordinator.

² The VAWA 2013 reauthorization contains numerous significant changes to the original legislation. Please see <http://4vawa.org/blog/> for a summary of the changes.

³ See <http://www.justice.gov/opa/documents/um-ltr-findings.pdf>

⁴ <http://ogc.byu.edu//NACUANotes/NACUANote-Montana.pdf>