

**TITLE IX NOTICE OF PROPOSED  
RULEMAKING 2022**

# TITLE IX REGULATIONS

- Congress passed Title IX of the Education Amendments in 1972
- Since 1980, the Department of Education's Office for Civil Rights (OCR) has had primary responsibility for enforcing Title IX
- November 2018: OCR proposed the most detailed and comprehensive Title IX regulations to date<sup>1</sup>
- August 2020: Significantly amended, due-process oriented Regulations took effect (proposed in Nov. 2018)
- June 2022: OCR published the Notice of Proposed Rule Making (NPRM) outlining proposed changes to the Title IX regulations
- On July 12, 2022, the NPRM was published in the Federal Register and the 60-day comment period began

<sup>1</sup>U.S. Office of the Federal Register, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, <https://www.federalregister.gov/documents/2018/11/29/2018-25314/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal><sup>9</sup>

# A BRIEF HISTORY OF TITLE IX: PRE-1972

- 1964 - Title VI of the Civil Rights Act
  - ☐ Prohibits discrimination on the basis of race, color, or national origin in any program or activity receiving federal financial assistance
- 1964 - Title VII of the Civil Rights Act
  - ☐ Prohibits discrimination in the terms, conditions, or privileges of employment on the basis of an employee's race, sex, color, religion, or national origin
- 1965 - Executive Order 11246
  - ☐ Prohibits federal contractors from discriminating on the basis of race, color, religion, or national origin. "Sex" was added in 1968; renamed Exec. Order 11375

# A BRIEF HISTORY OF TITLE IX: 2021-PRESENT

- 2021: Department of Education issues “Notice of Interpretation: Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*”
- 2021: OCR announces intent to issue a Notice of Proposed
- Rulemaking (NPRM) related to Title IX by April 2022
- 2022: OCR publishes NPRM July 12, 2022

# NPRM PROCESS TIMELINE

- Official publication in the Federal Register July 12, 2022
- Review and comment period
- 60-day comment period ended September 12, 2022
- Submit comments to the Department of
- Education's Office for Civil Rights (OCR)
- Final Rule expected to be issued in Spring 2023
- Effective Date approximately Summer/Fall 2023

# PREPARING FOR IMPLEMENTATION

- Must continue to fulfill obligations under the current regulations for the 2022-2023 academic year.
- Anticipate OCR will expect schools to implement the new Title IX regulations before the start of the 2023-2024 academic year.

## Steps to Take Now:

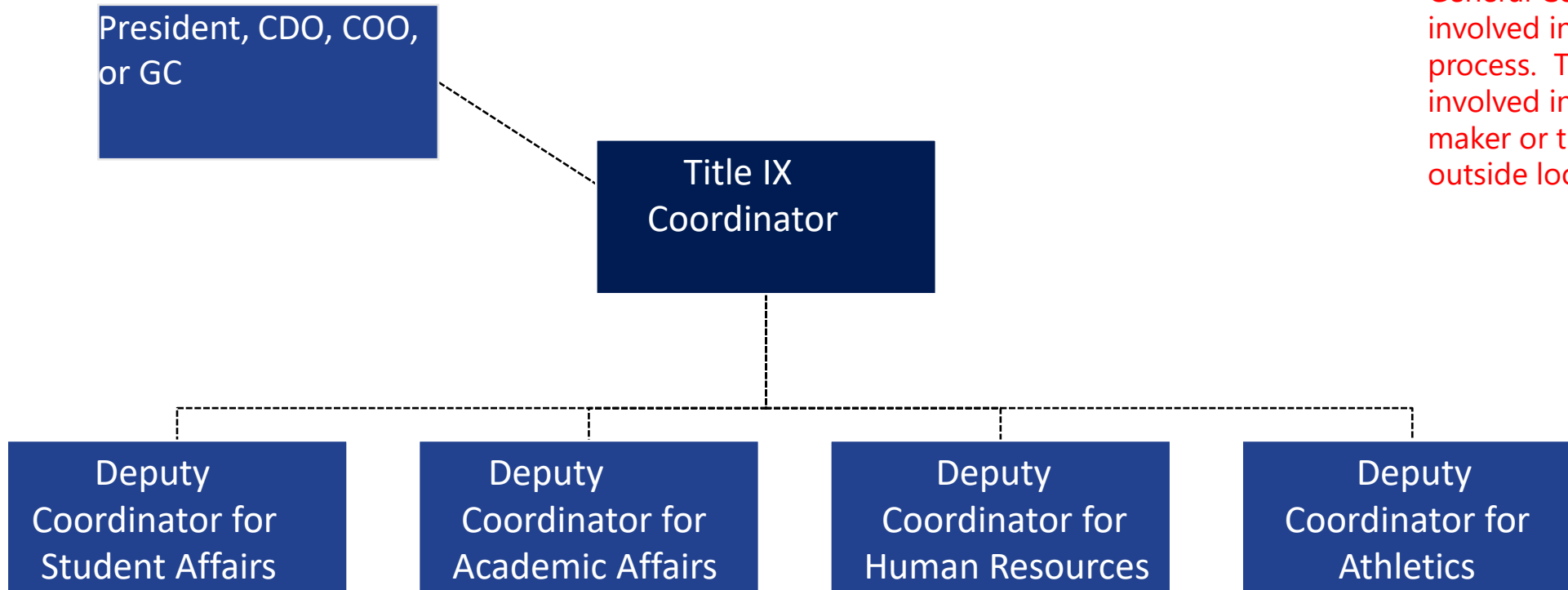
- Prepare to educate your community on the changes
- Identify stakeholders that will need to be involved in making policy decisions (e.g., whether to have hearings)
- Determine how you will manage policy changes
- Plan for the training needs for your community
- Consider state laws, court decisions, and other regulations that may affect your institutional approach

## Important note:

- *Look at your state laws court decisions and other regulations that may affect your institutions approach. very important*
- *Put in place a AD hoc advisory team possibly to look at procedures. Have these Ad hoc meetings on a regular basis.*

## SAMPLE TITLE IX TEAM STRUCTURE FOR HIGHER EDUCATION

Note:  
General Counsel should not be involved in of the Title IX process. The suggested not involved in no way as a decision maker or they should be on the outside looking.



# THE TITLE IX TEAM

- Title IX Coordinator(s)
- Deputy Coordinator(s)
- Investigator(s)
- Decision-Makers—can be a single Decision-maker or a panel of Decision-makers
  - Policy Violation
  - Appeal
- Informal Resolution Facilitator(s)
- Institution-appointed Advisors

Note:

*The Title IX and Deputy coordinator are not involved with any decision making or appeals process.*

*This could be an issue for the AD-Hoc committee to address.*



# 10 STEPS OF AN INVESTIGATION

1. Receive Notice/Complaint
2. Initial Assessment and Jurisdiction Determination
3. Establish basis for investigation (Incident, Pattern, and/or Culture/Climate)
4. Notice of Investigation and Allegations (NOIA) to Parties (“Charge”)
5. Establish investigation strategy
6. Formal comprehensive investigation
  - Witness interviews
  - Evidence gathering
7. Draft investigation report
8. Meet with Title IX Coordinator (or legal counsel) to review draft report and evidence
9. Provide report all evidence directly related to the allegations to parties and their Advisors for inspection and review with 10 days for response
10. Complete final investigation report
  - Synthesize and analyze relevant evidence
  - Send final report to parties for review and written response at least 10 days prior to hearing

# THE INVESTIGATION REPORT

- Comprehensive document summarizing the investigation
  - Results of interviews with parties and witnesses (including experts)
  - Summary of other information collected (i.e., information from police reports including pretext calls, medical exams, video surveillance and photographs; copies of text, email, and social networking messages)
- G.A.S. Framework
- **Gather** evidence; **Assess** credibility and evidence; **Synthesize** areas of dispute/agreement and all questions asked
- The supplemental “bucket” to the report

TITLE IX TEAM STRUCTURE:  
ADDITIONAL CONSIDERATIONS

Co-Coordinators?

- Job responsibilities of Deputy Coordinators
- Tailor scope and roles based on school/campus culture
- Delegation
- Multiple campuses/locations
- Campuses within a larger system
- Extension campuses
- Online communities
- District-level (e.g., community college systems)
- Dual-enrollment oversight
- Investigator oversight

## ROLE OF THE INVESTIGATOR

- Conduct reliable, prompt, fair, and impartial investigations
- Work with TIXC to develop investigation strategy
- Identify and interview parties and witnesses
- Identify, organize, and compile relevant information
- Maintain accurate and thorough investigation records and notes
- Share the evidence with the parties and their Advisors
- Provide notices to the parties (may be done in conjunction with TIXC)
- Create an investigation report that fairly summarizes relevant

## ROLE OF THE DECISION-MAKER(S)

- Determine whether institution's policy has been violated based upon the applicable standard of evidence
  - Decisions must be based upon an independent assessment of the evidence gathered during the investigation and/or provided during a hearing, to include an assessment of the credibility of the parties and witnesses
  - Decisions must be based on the specific policy alleged to have been violated
  - Decisions must be impartial and free of substantive bias
- Determine appropriate sanctions/discipline when a policy violation is found
- Draft a written determination that outlines the rationale for the

## ROLE OF THE APPEAL DECISION-MAKER

- Make determination on a party's request for an appeal
- Review written submissions from parties
- May review investigation report or other evidence gathered during investigation/hearing
- May need to speak with Investigator, Decision-maker, parties, or witnesses
- Review of case should be limited to the grounds noted in the appeal request
- Not a *de novo* review
- Draft a written determination that outlines the rationale for the outcome

## ROLE OF INSTITUTION-APPOINTED ADVISORS

- Parties have the right to have an Advisor of their choice to assist them throughout the process, to include attending any meetings and interviews
- No mandate to provide an Advisor to the parties at the outset of the process
- If party does not have an Advisor at the hearing, the institution must provide an Advisor to conduct the cross examination on behalf of the party during the live hearing
- Must be provided at no cost to the party
- No mandate to train Advisors however, it is advisable to do so for all institution-appointed Advisors

# GEBSER V. LAGO VISTA INDEP. SCHOOL

## 524 U.S. 274 (1998)

- The Supreme Court ruled individuals cannot recover
  - monetary damages against the school unless:
    - Three-part standard:
      - 1. An official of the educational institution must have had
        - “actual notice” of harassment;
        - 2. The official must have authority to “institute corrective measures” to resolve the harassment problem; AND
        - 3. The official must have “failed to adequately respond”
          - to the harassment and, in failing to respond, must
          - have acted with “deliberate indifference.
- An institution has “actual knowledge” of sexual harassment when notice is received by the Title IX Coordinator or another official who has authority to institute corrective measures on the institution’s behalf, or by any employee of an elementary and secondary school.
- Deliberate indifference is the conscious or reckless disregard of the consequences of one's acts or omissions

# VIOLENCE AGAINST WOMEN ACT

- Clery Act Amendment: VAWA Section 304 (2013)
- VAWA Reauthorization (2022)

VAWA Section 304 created extensive new policy, procedure, training, education, and prevention requirements for:

- **Sexual assault**
- **Stalking**                      The “Big 4”
- **Dating violence**
- **Domestic violence**
- Written information to victims regarding on- and off campus resources, remedies, interim measures, and resolution mechanisms and options

Listing of policy and procedural elements required in the ASR

Listing of key training elements and requirements

Required educational programs and campaigns

# THE CLERY ACT and Annual Security Reporting

## THE CLERY ACT

- The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (20 U.S.C. § 1092(f)
  - Jeanne Clery was raped and murdered in her residence hall room at Lehigh University – prompted legislation
- Originally passed in 1990 as the “Student Right-to-Know and Campus Security Act”
  - Amended in 1992, 1998, 2008 by Higher Education Act reauthorization – Amended in 2013 by VAWA Reauthorization

## CLERY ACT: ANNUAL SECURITY REPORT

- October 2020: 2016 Handbook for Campus Safety and Security Reporting was rescinded and replaced with the Clery Act Appendix for the FSA (Federal Student Aid) Handbook guidance; updated again on January 19, 2021
- Clery Geography: Three categories of locations subject to reporting: on-campus; noncampus building or property; public property
- Three categories are defined by 34 CFR 668.46(a)
- Note: Clery geography and Title IX jurisdiction are separate and overlapping

CLERY ACT AMENDMENT:  
VAWA SECTION 304 (CONT.)

Prohibits retaliation

- Clery Handbook rescinded and replaced with the Clery Act Appendix for Federal Student Aid (FSA) Handbook
- <https://ifap.ed.gov/electronicannouncements/100920RescissionReplace2016HandbookForCampusSafetySecurityReporting>

**Note:**

Retaliation: can include impeding someone's professional growth.

- Not being able to go on a conference' or any professional development
- not allowing Promotion opportunities and/or salary bonuses



## Interesting observations

- Stalking and harassment: Just because someone labels an incident harassment in their mind does not mean its that action.
- Everything that has to do with sex is not always Title IX
- Law enforcement should go through Title IX training.
- Retaliation happens often but is not reported.
- Someone's demeanor does not indicate their guilt.

# CASE STUDY PART I

- Gianna and Jeremy were both first-year students at Poe College. One night they both attended an on-campus party in a residence hall. Gianna drank two to three cups of wine, two to three shots of tequila, and a mixed drink of Sprite and vodka that contained three shots of vodka, both before the party and within an hour of arriving at the party.
- After leaving the party, Gianna and Jeremy decided to walk back to Gianna's residence hall where they engaged in vaginal sexual intercourse. Midway through the sexual encounter, the condom broke, and Jeremy ceased penetration. Jeremy informed Gianna that the condom broke, told Gianna that he would purchase the morning after pill for her the next morning, and then he left. Gianna was later found on the residence hall bathroom floor by another student and alleged that she was raped. 33 © 2023 Association of Title IX Administrators CASE STUDY PART I (CONT.

# CASE STUDY PART I (CONT.)

- Gianna framed her original complaint to Poe College as non-consensual sexual intercourse because she alleged Jeremy refused to use a condom. Although she told investigators that she had been drinking heavily and couldn't remember parts of the night, investigators focused solely on her framing of the allegations around consent and disregarded statements and evidence that suggested Gianna's incapacitation.
- First responders found a used condom in Gianna's garbage the night of the incident. When asked about the condom, Gianna stated that she guessed it was from her encounter with Jeremy.
- When the investigators submitted their draft report to the Title IX Coordinator (prior to the parties' first 10-day review period), the TIXC noted that the report did not include evidence related to Gianna's alcohol consumption on the night of the reported incident.
- The investigators believed the evidence was not relevant because Gianna alleged a violation on the basis of non-consensual sexual intercourse related to condom use.

## Questions:

What is your evaluation of the relevance of the evidence related to alcohol consumption?

As the TIXC, how would you handle this situation?

# CASE STUDY PART II

- The investigator amended the investigation report to include information about Gianna's alcohol consumption.
- The investigators recommended that Jeremy be found not responsible for a policy violation based upon the original framing of the complaint.
- The hearing panel was comprised of four College employees who had been trained by the Title IX Coordinator in Title IX and hearing procedures.
- Gianna requested that the student who found her on the bathroom floor the night of the incident and the RA she spoke to be allowed to testify to the panel. The panel declined this request. Gianna also requested an expert witness to discuss the effects of alcohol and Adderall on the body, and that too was denied.

## Questions:

- As the Title IX Coordinator, how would you respond to this situation?
- What if Gianna does not appeal the decision?
- Is there additional training to provide to the Title IX Team?

# CASE STUDY: SIRI

- Siri, a nursing student, is in her third trimester of pregnancy and her final year of nursing school. Siri is completing her clinical hours with the university-affiliated medical school when the Director of the medical school, who also oversees nursing students, phones you to inform you that Siri will need to stop participating in her clinical experience until after she gives birth.
- The Director explains that Siri will have to lift patients, stand for long hours, and oftentimes miss a meal during a shift--all of which pose risks to her and her unborn baby and put the medical school and the program at liability risk.
- **What are your recommendations?**

## Special topics

- Nursing rooms, mothers' lounges, etc.
- Residence halls
- Labs, chemicals, exposure to diseases, etc.
- Cohort programs
- Licensure requirements
- Online learning/homebound instruction
- Childcare

# NURSING ROOMS, MOTHERS' LOUNGES, ETC.

- Not required under Title IX, but an inclusive practice
- Having a dedicated space will contribute to a more inclusive campus/school environment for students, employees, and guests
- Idea: If you have a women's resource center, create a private space by placing a privacy barrier for nursing mothers
- Idea: Rotate usage of additional spaces
- Idea: Rent a lactation pod/suite and place in a heavy traffic building for easy access