

JacksonLewis

# Key Title IX Sexual Harassment Information for Campus Leadership

Providing Steady Direction in an Uncertain Time



# Agenda

1. Understanding the Context
2. Ensuring Effective Compliance
3. Avoiding Dangerous Mistakes

## TITLE IX

No person in the United States shall, **on the basis of sex**, be excluded from participation in, be denied the benefits of, or be **subjected to discrimination** under any education program or activity receiving Federal financial assistance.

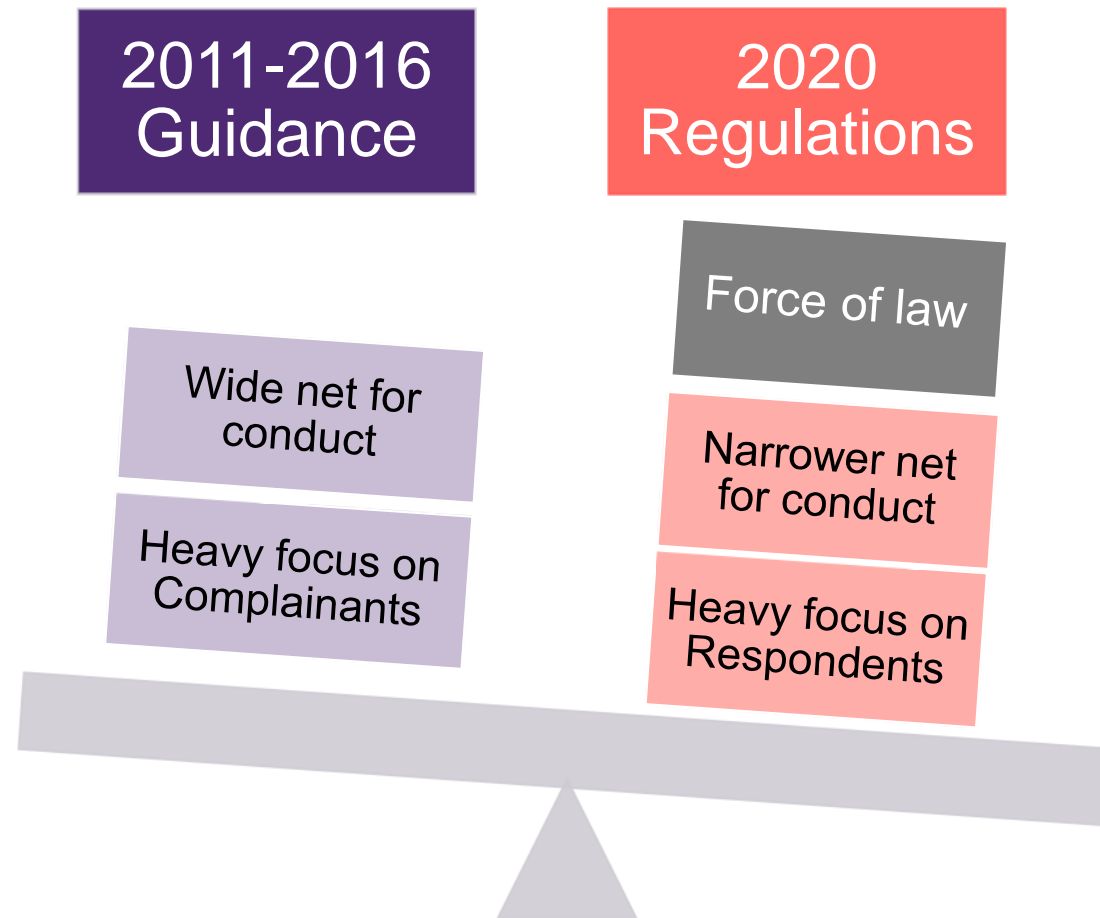


## Title IX's purpose is to remove barriers.

- Prohibitions on participation based on sex
- Inequitable support for men's and women's athletics
- Pregnancy Discrimination
- Sexual Harassment
  - Sexual Assault
  - Stalking
  - Domestic/Dating Violence
  - Verbal/expressive



# Shifting Emphasis from the Top



# The 2020 Regulations Created Two Categories

## Title IX Sexual Harassment (TIXSH)

Stalking in EPA

Dating/domestic violence in EPA

Sexual assault in EPA

Quid pro quo harassment in EPA

“Level 4” expressive harassment in EPA

**EPA = Education Program or Activity**

## Other Sexual Harassment (OSH)

Stalking not in EPA

Dating/domestic violence not in EPA

Sexual assault not in EPA

Quid pro quo harassment not in EPA

“Level 4” expressive harassment in EPA

Lesser expressive harassment in EPA

Anything outside of the country

## Two Categories



## Two Sets of Procedures?



**Title IX**

Sexual Harassment



**Other**

Sexual Harassment

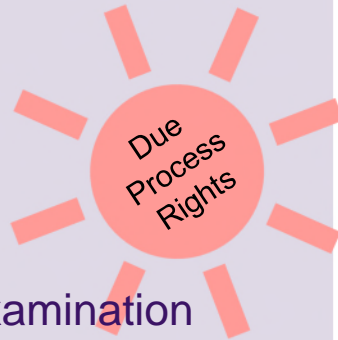
### Title IX Formal Grievance Process

Required documents:

- Complaint
- Notice
- Investigative Report
- Determination
- Appeal

Official hearing with cross examination

Advisors/Lawyers



### No Title IX Requirements

**BUT:**

- Campus SaVE Act
- Title VII
- State laws
- School Policies

# Protections for Respondents in Title IX Cases

Presumption of non-responsibility. No discipline prior to conclusion of adjudication process

Written notice of allegations and time to prepare for interview

**Due  
Process**

Opportunity to review all relevant evidence prior to hearing

Right to cross examine Complainant and other witnesses in real time at “live” hearing



# Late-Breaking DOE Guidance for the 2021-22 School Year

Q & A: 37 pages

Appendix: 18  
pages of sample  
policy provisions

## Q & A on the Title IX Regulations on Sexual Harassment

Released: July 20, 2021

Comprehensive  
review of Title IX  
regulations ongoing  
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New regulations  
expected  
May 2022

<https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>

Guided by:

- *Executive Order on Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*
- *Executive Order on Preventing and Combatting Discrimination on the Basis of Gender Identity or Sexual Orientation*

**Hey, if you want to, you can do this...**

**The Department of Education's Q & A encourages schools to exercise discretion in the following areas\*:**

Undertake prevention methods that best serve the needs and values of your educational community  
(Q & A #3)

Develop and enforce codes of conduct as an additional tool for ensuring safe and supportive educational environments  
(Q & A #7)

May provide supportive measures to Complainants whose allegations do not fall within Title IX  
(Q & A #7, 9)

Implement rules of decorum for conducting the live hearing (rules must apply equally to all parties)  
(Q & A #43, 44, 49)

May require additional individuals to report knowledge of sexual harassment to the TIX Coordinator  
(Q & A #19)

*\* The discretionary actions must not conflict with the 2020 Title IX regulations*

# Ensuring Effective Compliance

# What does it take to resolve cases successfully?

## 1 Title IX Coordinator who is unbiased and has excellent judgment

- Coordinates with HR and student conduct
- Treats both Complainants and Respondents with fairness and respect
- Responds in a matter that is not deliberately indifferent and not unreasonable under the circumstances

- Dept of Education regs and other applicable laws
- Risk mitigation principles
- Institutional values

## 2 Clear procedures for handling all sexual harassment cases (Title IX and OSH)

3

Carefully selected Title IX team with adequate training and resources to carry out the formal grievance process mandated by the 2020 rules

- **Serve impartially**, including by avoiding prejudgment of the facts at issue, conflicts of interest, sexual stereotyping, and bias
- **Investigation:** Conduct witness interviews, collect evidence of all types, determine which evidence is “directly related” to the allegations, and write an investigative report
- **Adjudication:** Hold hearings, make on-the-spot judgments about which questions will be allowed, weigh evidence against the evidentiary standard, write a determination

## **Legal Assistance May Be Especially Helpful When...**



**The Respondent is an employee and the Complainant is a student**

**The case is populated by litigious parties and/or contentious lawyers**

**A matter could become high profile**

## Three Key Basics

Reporting

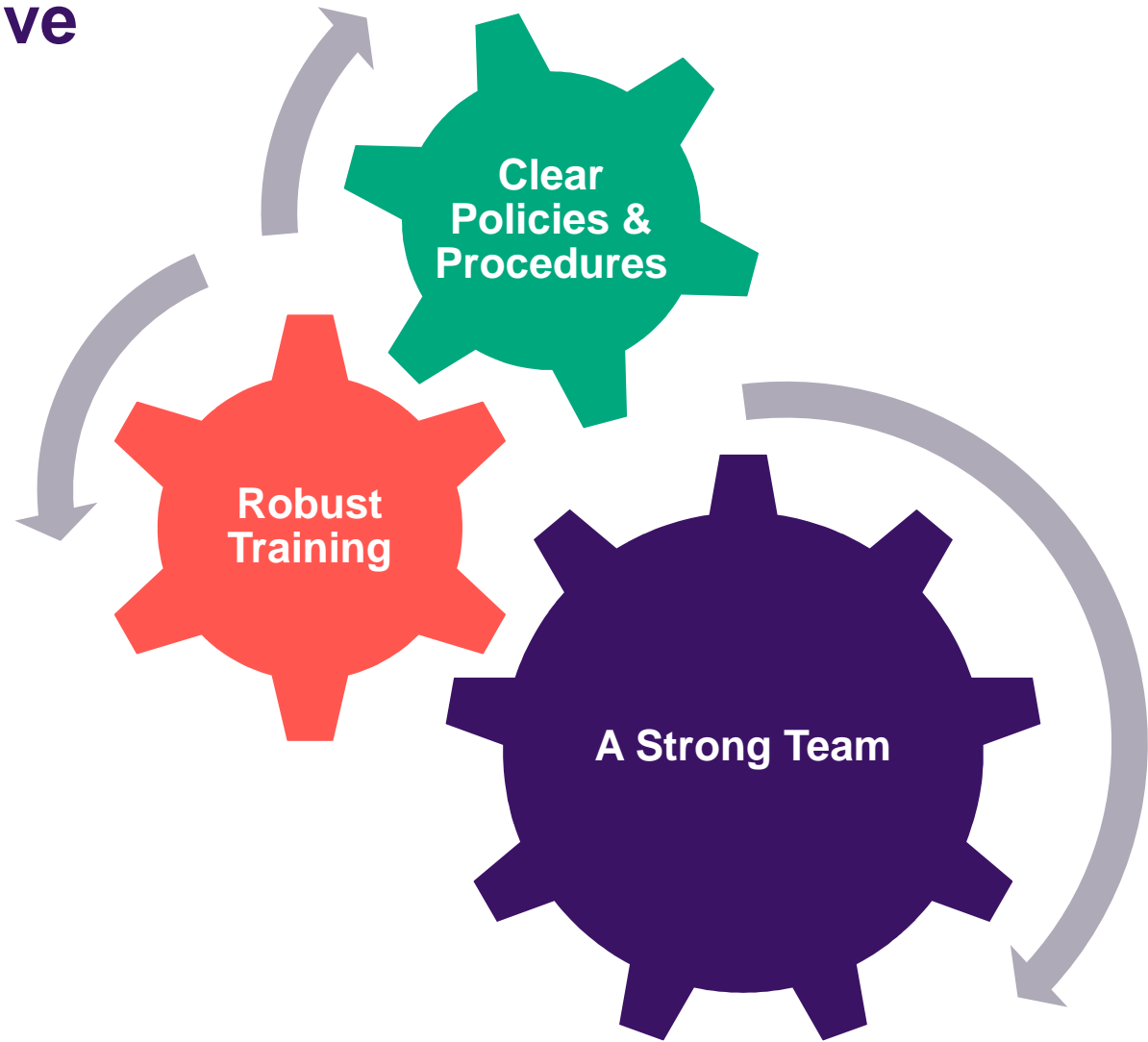
Supportive Measures

Prevention/Education

# Avoiding Dangerous Mistakes



# Ensuring Effective Compliance



## An Ounce of Prevention for Common Problems

1. Failure to put systems in place to make sure staff followed school policies and procedures, including data maintenance;
2. Failure to understand the scope of the school's program and activities;
3. Failure of high-level officials to register that they must report Title IX matters to the Title IX office and not attempt to handle them within their departments or schools.

The New York Times

## Calls Grow for University President to Resign Over [Sexual Assault] Case

By Stephanie Saul

The board of r-  
ignored r-  
can-

ed an official state invest-  
be universit-

LEADERSHIP

# President Resigns Amid Criticism of Past Handling of Sexual Misconduct

By Jack Stripling and Andy Thomason

Public Interest

New President pledges to restore trust in  
preventing campus sexual assault

New MSU president pledges to restore trust in se...



...quiry: ...ent or, worse, that it might be involved  
lay morning, also announced its  
'e Legislature as well

## The Mistake



**Untouchable  
Respondent**

## The Fix

### **Long term**

Build a culture of respect for your values and an ethic that no one is above the rules.

### **Immediate**

Communicate to your Title IX Coordinator (and all staff) that you will support the fair and impartial enforcement of sexual misconduct rules across the board.

## The Mistake

Untouchable  
Respondent

Over-  
Reliance on  
Victims to  
Pursue

## The Fix

Develop clear standards for when Coordinators should pursue cases in the absence of Complainant action, paying close attention to patterns of misconduct and situations involving abuse of authority.

## The Mistake

Untouchable  
Respondent

Over-  
Reliance on  
Victims to  
Pursue

Employee  
Awareness  
without  
Action

## The Fix

Continue to mandate that all employees (except confidential resources) report knowledge of sexual harassment **directly** to the Title IX Coordinator.

## The Mistake



## The Fix

Centralize information.

Develop procedures to allow investigators and adjudicators to review evidence of other alleged incidents of sexual misconduct.

Provide guidance as to how to appropriately weigh such evidence.

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Thank **you.**



# Your Jackson Lewis Title IX Team



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