Overview of the Title IX Regulations, Intersections with the Clery Act, Texas State Law and Practical Implications
Texas Tech University System-Senior Leadership Session
Presented by Adrienne Murray
February 23, 2022
“Sexual Misconduct”

- Fondling
- Dating Violence
- Rape
- Statutory Rape
- Domestic Violence
- Stalking
- Sexual Harassment
- Incest

© 2022 D. STAFFORD & ASSOCIATES
Agenda

- Title IX of the Education Amendments of 1972 codified at 20 U.S.C. §§ 1681–1688
- Texas Education Code § 51.251 (3)
- Texas Education Code § 51.253
- Administrative Regulations 19 Texas Admin. Code, Chapter 3
- Texas SB 212
Intersectional Implications

**TITLE IX**
- Quid Pro Quo
- Hostile Environment
- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking
- Gender-based Hate Crimes

**CLERY**
- Non-VAWA Clery Crimes
- (Assault etc.)
- Hate Crimes
- Arrests and Referrals: Drug, Liquor, Weapons

- Texas SB 212
- Texas Education Code
- Title VII of Civil Rights Act of 1964
Two Federal Laws - Two Sets of Requirements

Title IX is an anti-discrimination law

The Clery Act is a consumer reporting law

© 2022 D. STAFFORD & ASSOCIATES
Key Requirements of the Clery Act

- Collect, Classify, and Count Crime Reports/Statistics
- Public Disclosures-Timely Warning Notices and Emergency Notifications
- Publish Annual Security Report
- Submit Crime Statistics to the Department
Provide Educational Programs and Campaigns on Dating/Domestic Violence, Sexual Assault, & Stalking

Have Procedures for Institutional Disciplinary Action for DV/DV/SA/S

If you have a campus police or security department: Publish Daily Crime Log

If you have residential facilities: Fire Log, Fire Safety Report, Missing Persons Procedures
Clery Act-Three Part Test

1. Was the crime reported to a Campus Security Authority?

2. Is the crime a Clery Act crime?

3. Did the crime occur on or within the institution’s reportable Clery geography?
Clery Act:
Employee Reporting Considerations

Clery Act--CSAs

- Campus police department
- Those responsible for security
- Individuals to whom crimes should be reported
- “Officials with significant responsibility for student and campus activities”
- Local law enforcement

© 2022 D. STAFFORD & ASSOCIATES

Do you advise a student org?

Are we CSAs?

Are we CSAs too?

This Photo by Unknown Author is licensed under CC BY-SA
Clery Reportable Crime Categories

- Murder/Non-negligent Manslaughter*
- Negligent Manslaughter*
- Sex Assault*
  - Rape
  - Fondling
  - Incest
  - Statutory Rape)
- Robbery*
- Aggravated Assault*
- Burglary*
- Motor Vehicle Theft*
- Arson*

- Arrests and Disciplinary Referrals for:
  - Liquor
  - Drugs
  - Weapons
- Domestic Violence
- Dating Violence
- Stalking
- Hate Crimes for *, plus
  - Larceny-Theft
  - Simple Assault
  - Intimidation
  - Destruction/Damage/Vandalism of Property
### TWN vs. EN

<table>
<thead>
<tr>
<th></th>
<th>Timely Warning Notices (TWN)</th>
<th>Emergency Notification (EN)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Legal Standard:</strong></td>
<td>Potential ongoing or serious threat</td>
<td>Immediate threat to health and safety</td>
</tr>
<tr>
<td><strong>Circumstances:</strong></td>
<td>Clery-reportable crimes that have been reported (occurred in past)</td>
<td>Clery-reportable crimes as well as other types of emergencies (happening right now or about to happen)</td>
</tr>
<tr>
<td><strong>Audience:</strong></td>
<td>Community-wide</td>
<td>Can send to a segment of the community, if appropriate</td>
</tr>
<tr>
<td><strong>When Issued:</strong></td>
<td>As soon as pertinent information is available</td>
<td>Upon confirmation of emergency (when possible)</td>
</tr>
<tr>
<td><strong>Follow-Up:</strong></td>
<td>Not Required</td>
<td>Required</td>
</tr>
</tbody>
</table>
Title IX of the Education Amendment of 1972

“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 educational program or activity receiving federal financial assistance.”
Title IX Regs Give Flexibility for Employee Reporting

- Title IX Coordinator
- Officials with Authority to Institute Corrective Measures on Behalf of the Recipient
- *Other Employees as Designated by the Institution (pulls in requirements of Texas State law)
Who is an Employee?

Tex. Educ. Code § 51.251(3): Employee does not include a student enrolled at the institution.

Administrative Regulations 19 Tex. Adm. Code, Chapter 3

- Rule §3.3 (b): Course and Scope of Employment – means an employee performing duties in the furtherance of the institution’s interests.
- Rule §3.5 (a)(2): The employee is required to report an incident regardless of when or where the incident occurred.
Sec. 51.252. REPORTING REQUIRED FOR CERTAIN INCIDENTS. (a) An employee of a postsecondary educational institution who, in the course and scope of employment, witnesses or receives information regarding the occurrence of an incident that the employee reasonably believes constitutes sexual harassment, sexual assault, dating violence, or stalking and is alleged to have been committed by or against a person who was a student enrolled at or an employee of the institution at the time of the incident shall promptly report the incident to the institution’s Title IX coordinator or deputy Title IX coordinator.

(b) Except as provided by Subsection (c), the report must include all information concerning the incident known to the reporting person that is relevant to the investigation and, if applicable, redress of the incident, including whether an alleged victim has expressed a desire for confidentiality in reporting the incident.

(c) An employee of a postsecondary educational institution designated by the institution as a person with whom students may speak confidentially concerning sexual harassment, sexual assault, dating violence, or stalking or who receives information regarding such an incident under circumstances that render the employee's communications confidential or privileged under other law shall, in making a report under this section, state only the type of incident reported and may not include any information that would violate a student's expectation of privacy. This subsection does not affect the employee's duty to report an incident under any other law.
State Reporting Requirements
Texas Education Code SB 212

What should be reported?
Anything reported to you on or after 1-1-2020, regardless of when or where it occurred and falls under:
- Sexual harassment
- Sexual assault
- Dating violence
- Stalking
Committed by or against a student enrolled or an individual employed by the institution at the time of the incident

Who is required to report?
ALL System employees who become aware of an incident
- Exclusions include the victim themselves, public awareness events, duplicate reports previously received by the institution
During the course or scope of an employee's job
Employees must provide their name when reporting (no anonymous reporting)

Who to report incidents to?
Reports should be made to the Title IX Coordinator promptly after becoming aware. Institutions should make all options on how to report available to employees.

© 2022 D. STAFFORD & ASSOCIATES
Administrative Reporting Requirements

Reporting Requirements in the Tex. Edu. Code §51.253

1. Title IX Coordinator Report Requirement
2. President Report Requirement to the Board of Trustees
3. President reports annually to the TX Higher Education Coordinating Board

- The institution must designate confidential resources for students
- Employees must inform Title IX if the victim requests confidentiality

<table>
<thead>
<tr>
<th>Report Number</th>
<th>Date Received</th>
<th>Alleged Conduct Reported by Employees Under § 51.252</th>
<th>Investigation Status</th>
<th>Disciplinary Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>2019XXXXX</td>
<td>01.18.2020</td>
<td>Sexual Assault</td>
<td>Administrative closure; resource referral</td>
<td>No disciplinary action; Not applicable.</td>
</tr>
<tr>
<td>2019XXXXX</td>
<td>01.22.2020</td>
<td>Dating Violence</td>
<td>Formal Investigation, protective measures; resource referral</td>
<td>Final Result: Student Disciplinary Suspension</td>
</tr>
<tr>
<td>2019XXXXX</td>
<td>02.15.2020</td>
<td>Sexual Harassment; Stalking</td>
<td>Informal resolution completed; protective measures.</td>
<td>No disciplinary action; Not applicable.</td>
</tr>
<tr>
<td>2019XXXXX</td>
<td>02.21.2020</td>
<td>Stalking</td>
<td>Insufficient complaint information.</td>
<td>No disciplinary action; Not applicable.</td>
</tr>
<tr>
<td>2019XXXXX</td>
<td>03.12.2020</td>
<td>Sexual Harassment</td>
<td>Administrative closure</td>
<td>No disciplinary action; Not applicable.</td>
</tr>
<tr>
<td>2019XXXXX</td>
<td>03.22.2020</td>
<td>Stalking</td>
<td>Administrative closure; resource referral</td>
<td>Alleged not College-affiliated</td>
</tr>
<tr>
<td>2020-CRXXX</td>
<td>08.30.2020</td>
<td>Stalking</td>
<td>Confidential employee reporting</td>
<td>No disciplinary action; Not applicable.</td>
</tr>
</tbody>
</table>

Above report submitted on 4-1-2020 reflected 79 reports
Failure to Report or False Reporting

**Required consequences**

- Conduct an investigation through the school’s faculty/staff disciplinary process to determine whether the employee committed the offense of failure to report.
- If it is determined that the employee did in fact commit this offense, **termination is required**.

**Possible additional consequences under State law**

- **Class B misdemeanor** if a person who “is required to make a report under Section 51.252 and knowingly fails to make the report” or “with the intent to harm or deceive, knowingly makes a report . . . that is false.”
  - Punishable by a maximum of 180 days in jail and/or a maximum fine of $2,000
- **Class A misdemeanor** if the offense is escalated “if it is shown on the trial of the offense that the actor intended to conceal the incident.”
  - Punishable by up to one year in jail and/or a maximum fine of $4,000

© 2022 D. STAFFORD & ASSOCIATES
The goal of the Title IX Regulations is to require Title IV funded institutions to “promptly respond to individuals who are alleged to be victims of sexual harassment by offering supportive measures; follow a fair grievance process to resolve sexual harassment allegations when a complainant requests an investigation, or a Title IX Coordinator decides on the recipient’s behalf that an investigation is necessary; and provide remedies to victims of sexual harassment.” (Summary of the Major Provisions of This Regulatory Action; Federal Register)

*On February 17, 2022, ED sent their draft of the proposed amendments to OIRA. Next step-NPRM (which at this stage, is internal only.) It will then be published and the public will be able to comment. (See OCR blog post, February 18, 2022 entitled “An Update on the Rulemaking Process for Title IX”)*
Major Changes Under Federal Regulations

- Jurisdiction
- Definitions
- Responsible employees
- Duty to respond
- Report vs signed formal complaints
- Role of advisor of choice
- Supportive measures
- Separation of duties
- Live hearings
- Notice requirements
Title IX Case Flowchart

- Title IX Coordinator Informed (Actual Knowledge)
- Outreach and Supportive Measures
- Complainant Decision

From Complainant Decision:
- Formal Complaint Signed:
  - Informal Process
  - Investigation > Hearing > Appeal

From No Formal Complaint:
- Case closed (except for supportive measures)
- Title IX Coordinator may sign complaint

© 2022 D. STAFFORD & ASSOCIATES
“Report” versus “Signed Formal Complaint”

What is the difference between a report and a signed formal complaint?
Title IX Case Flowchart

1. Title IX Coordinator Informed (Actual Knowledge)

2. Outreach (Intake) and Supportive Measures

3. Complainant Decision
   - Formal Complaint Signed
   - No Formal Complaint
     - Title IX Coordinator may sign complaint
Supportive Measures

- Change in class
- Change in housing
- Increased security
- Dual no contact directives
- Academic accommodations
- Withdrawal without penalty
- Modified activities or campus access (as long as not punitive to respondent)
(b)(11)(vii) “When a student or employee reports to the institution that the student or employee has been a victim of dating violence, domestic violence, sexual assault, or stalking, whether the offense occurred on or off campus, the institution will provide the student or employee a written explanation of the student's or employee's rights and options, as described in paragraphs (b)(11)(ii) through (vi) of this section. . . .”
1. The importance of preserving evidence that may assist in proving that the alleged criminal offense occurred or may be helpful in obtaining a protection order
   - Not required but recommended: Where to obtain forensic exams, contact info, does not require police report and can have exam now, decide later

2. How and to whom the alleged offense should be reported
   - List any person or organization that can assist the victim
   - Recommended: Also include community organizations
3. **Notification of the victim’s option to**
   - Notify proper law enforcement authorities, including on-campus and local police;
   - Be assisted by campus authorities in notifying law enforcement authorities if the victim so chooses; and
   - Decline to notify such authorities

4. **The rights of victims and the institution’s responsibilities for**
   - Orders of protection;
   - “No contact” orders;
   - Restraining orders; or
   - Similar lawful orders issued by a criminal, civil, tribal, or institutional
5. To students AND employees about existing:
   - Counseling
   - Health
   - Mental Health
   - Victim Advocacy
   - Legal Assistance
   - Visa and Immigration Assistance
   - Student Financial Aid
   - Other services available for victims

6. Options for, available assistance in, and how to request changes to (if requested and reasonably available)
   - Academic, Living, Transportation, Working
7. Confidentiality

- Publicly available recordkeeping has no personally identifying information about the victim. (not required for respondent but best practice in most cases)
- Accommodations and protective measures are confidential (to the extent they can be without impairing the ability to provide them)

8. Disciplinary Procedures

- An explanation of the procedures for institutional disciplinary action in cases of alleged dating violence, domestic violence, sexual assault, or stalking, as required by paragraph (k)
Determining Jurisdiction to Proceed

1. Offense Meets Definition
2. Jurisdiction of Persons
3. Jurisdiction of Program of Activity
### 1. Definition of Offense-Sexual Harassment under Title IX

**Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:**

1. **An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct;**

2. **Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity;**

2-3. Definition of Persons and Programs/Activities

Complainant must be our student or employee or attempting to access our programs or activities

Respondent must be our student or employee or attempting to access our programs or activities

Sexual harassment MUST occur in the context of our educational program or activity AND in the United States
Employees must have same process

- Not just for students anymore
- Expectation that recipients handle any formal complaint that occurs through education program or activity in the United States through the Title IX compliant grievance process
Dismissal of Formal Complaints

**Must Dismiss**
- Behavior does not constitute sexual harassment
- Did not occur in educational program or activity, not in the United States

**May Dismiss**
- Complainant withdraws formal complaint
- Respondent no longer enrolled/employed
- Insufficient evidence

**Notification and appeal**
Dismissed-You Cannot Policy Shop

- If dismissed because the complainant doesn’t want to proceed, it is STILL a Title IX complaint and cannot be remanded to a different policy or procedure.
- If dismissed because it did not rise to the level of a sexual harassment as defined by Title IX, the complaint may be referred to another policy/procedure.
  - Student Conduct
  - HR-Title VII
  - Other school specific?

© 2022 D. STAFFORD & ASSOCIATES
Individualized safety and risk analysis

Immediate threat to physical harm

Notice and opportunity to challenge
Proceeding with “Multiples” - Consolidation of Complaints

- **Multiple Respondents**

- **More than one complaint against one or more respondents**

- **One party against another party**
Title IX Case Flowchart

Formal Complaint Signed

Informal Process

Investigation > Hearing > Appeal

Title IX Coordinator may sign complaint
Informal Resolution

1. School must determine that informal resolution is the appropriate means to resolve
2. Both parties must agree
3. Cannot resolve employee on student complaints in this way (must go formal)
4. Either party can stop at any time prior to written agreement
5. Parties who have proceeded to formal process can change their minds and shift back to informal any time prior to conclusion of hearing
Notice Requirements

- Grievance process
- Sufficient details and sufficient time to prepare
- Identities of the parties, alleged conduct
- Date and location of incident
- Presumed not responsible
- Advisor of choice
- False statements
- Updates as needed
- Other: Accommodations, Retaliation, Police too!
Investigations and Evidence Gathering

- Burden of proof
- Witnesses and facts
- “Gag orders”
- Advisor
- Notice
- Inspect evidence
- Investigative report
Evidentiary Standard

Clear and Convincing

- Substantially more likely than not to have occurred
- High probability that a particular fact is true
- Higher than preponderance, but not as high as “beyond a reasonable doubt”

Preponderance of the Evidence

- More likely than not
- 50% and a feather
Hearings

Live hearing

Cross-examination
Live Hearing

- Required element for all post-secondary grievance procedures
- “Single investigator” now prohibited
- In person or virtual
- Must be recorded or transcribed, with recording or transcript available to parties for inspection and review
Cross-Examination

Advisor

Relevancy

Participation
Decision-Maker’s Written Determination

- Decision-maker(s) must issue written determination that
  - Identifies allegations
  - Describes procedural steps
  - Includes findings of fact
  - Includes conclusions applying facts to code of conduct
  - Includes rationale for conclusion regarding each allegation
  - Describes appeal procedures
MUST have
- Procedure...
- New evidence...
- Conflict or bias... that impacted outcome

Additional grounds permitted

Appeal decision-maker must have had no other role

Must be done in a reasonably prompt time frame
Other Challenges/Considerations...

- Privacy versus Confidentiality;
- Retaliation;
- #METOO complaints;
- Safety (Including Open Carry);
- Intersection of BIT and Title IX;
- Employee wellness with Accepting Disclosures;
- Self-Care for Title IX Personnel (and Police);
  and
- Spirit of the law versus letter of the law....
Are you fulfilling your Employee Reporting Requirements under State Law?
Are you fulfilling all Federal training requirements for students and employees?

Are you conducting required training for Title IX Personnel?

Are you fulfilling all Federal training requirements for students and employees?

Are you conducting required training for Title IX Personnel?

Is your Clery compliance function staffed and funded properly?

Are all VAWA (Clery) requirements being met in your Title IX process and all Title IX pieces met in your ASR?

Is your Title IX function staffed and funded appropriately?

Is there collaboration between the Clery compliance function and the Title IX function to ensure requirements of both laws are being met?