



D. STAFFORD
& ASSOCIATES

Title IX Coordinator Training Class

Presented by DSA Associates:

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Mary Baldwin University

August 13 and 14, 2020

Agenda

Please note: We will have two 15 minutes breaks (at approximately 10:15am and 11:45am) and some stretch breaks each day. The times below are approximate.

Day 1 (Thursday, August 13th, 9am - 1pm)

- Introductions
- Overview of Title IX and the New Regulations
- Mary Baldwin's policy
- "What if" scenarios

Day 2 (Friday, August 14th, 9am - 1pm)

- Thoughts from the day before
- Title IX Personnel (responsibilities, training needs, challenges, opportunities)
 - Coordinators
 - Investigators
 - Decision-makers - Emergency removal/administrative leave, hearing panels, appeal officers for removals and hearings
- Advisors
 - Who will your institutional advisors be? How will you train them?
 - How do you interact with outside advisors?
- Tabletop exercise
- Closing comments/questions



Catherine Cocks, M.A.
Consultant, Student Affairs, Title IX, and
Equity Compliance Services



Ms. Cocks has been a higher education professional for over thirty years. Her work with D. Stafford & Associates focuses on Title IX investigations and training; assessment of student affairs policies, practices and services; and behavioral threat assessment. Cathy was the Director of Community Standards for the University of Connecticut for 14 years where she managed the student conduct process, which included managing all Title IX cases involving student respondents and chaired the University's student threat assessment team. Prior to that, she held several positions within Residential Life at the University of Connecticut and Roger Williams University.

She is a faculty member for the Association for Student Conduct Administration's (ASCA) Donald D. Gehring Academy teaching on subjects such as ethics, governance, threat assessment, media relations, and higher education trends. She was an affiliated faculty

member for many years in the University of Connecticut's Higher Education and Student Affairs Master's program teaching "The Law, Ethics, and Decision-Making in Student Affairs."

Cathy has co-authored the "Philosophy of Student Conduct" chapter in the 2nd edition of "Student Conduct Practice" (2020) and was a member of the writing team for CAS Standards' Cross-functional Framework for Identifying and Responding to Behavioral Concerns.

Cathy is a Past President of ASCA. She has also served as a Circuit representative, co-chair of the Public Policy and Legislative Issues Committee, and as a member of the ASCA Expectations of Members Task Force. Cathy has served in a variety of leadership roles in NASPA Region I.

She was the 2015 recipient of ASCA's Donald D. Gehring Award. She is a past recipient of the NASPA Region I Mid-Level Student Affairs Professional Award and the NASPA Region I Continuous Service Award.

She earned her Master's degree in Higher Education Administration from the University of Connecticut and Bachelor's degree in Communications/Media from Fitchburg State University.



TITLE IX

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Title IX Overview

1



Agenda

- History
- Case Law
- The Law & Regulations

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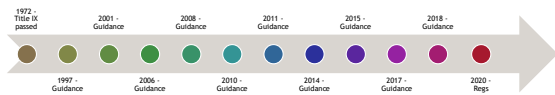
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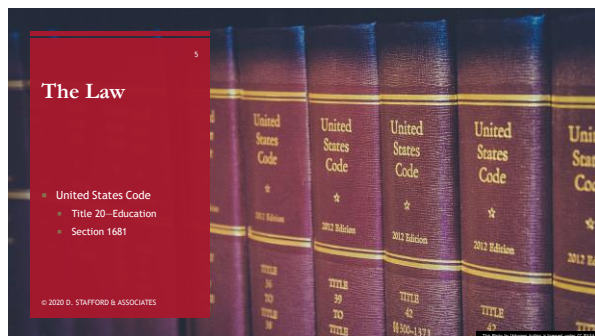
Sexual Harassment Guidance Timeline



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Law - Federal

Statute	Overview
Title IX 20 USCA § 1681	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, except that:

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Law - Federal

Statute	Overview
Title IX 20 U.S. Code § 1681	Exceptions: ...3) religious organizations; 4) military services or merchant marines; 5) traditional single-sex institutions; 6) social fraternities or sororities and voluntary youth organizations; 7) Boy or girl conference; 8) Father-son/mother-daughter activities; 9) "beauty pageants."

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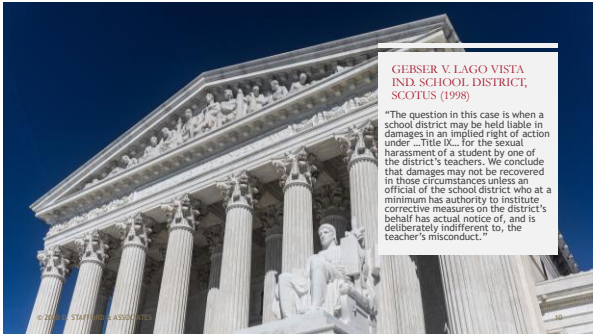


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https://www.uscourts.gov/sites/default/files/us_courts_circuit_map_1.pdf

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**GERBER V. LAGO VISTA
IND. SCHOOL DISTRICT,
SCOTUS (1998)**

"The question in this case is when a school district may be held liable in damages in an implied right of action under ...Title IX... for the sexual harassment of a student by one of the district's teachers. We conclude that damages may not be recovered in those circumstances unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct."

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**DAVIS V. MONROE COUNTY
BOARD OF EDUCATION,
SCOTUS (1999)**

"We consider here whether a private damages action may lie against the school board in cases of student-on-student harassment. We conclude that it may, but only where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities. Moreover, we conclude that such an action will lie only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."

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**JACKSON V. BIRMINGHAM
BOARD OF EDUCATION,
SCOTUS (2005)**

"We consider here whether the private right of action implied by Title IX encompasses claims of retaliation. We hold that it does where the funding recipient retaliates against an individual because he has complained about sex discrimination."

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FITZGERALD V. BARNSTABLE SCHOOL COMMITTEE, SCOTUS (2009)

"...Title IX was not meant to be an exclusive mechanism for addressing gender discrimination in schools, or a substitute for §1983 suits as a means of enforcing constitutional rights. Accordingly, we hold that §1983 suits based on the Equal Protection Clause remain available to plaintiffs alleging unconstitutional gender discrimination in schools."

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DOE V. CINCINNATI, 6TH CIRCUIT (2017)

"Here, the University's disciplinary committee necessarily made a credibility determination in finding John Doe responsible for sexually assaulting Jane Roe given the exclusively "he said/she said" nature of the case. Defendants' failure to provide any form of confrontation of the accuser made the proceeding against John Doe fundamentally unfair."

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DOE V. BAUM, 6TH CIRCUIT (2018)

"...if a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder."

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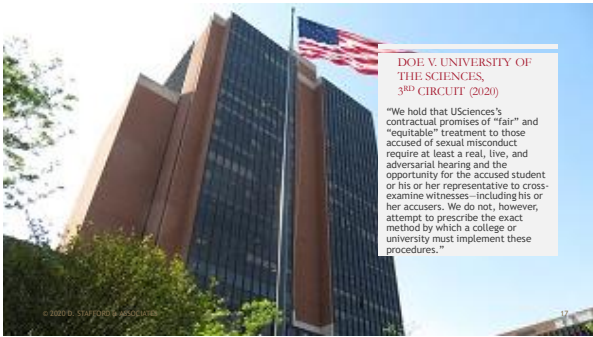


**HAIDAK V. UMASS-AMHERST,
1ST CIRCUIT (2019)**

"...we find that the university violated Haidak's federal constitutional right to due process in suspending him for five months without prior notice or a fair hearing, but that it did not thereafter violate his rights in expelling him after providing a fair expulsion hearing."

"Some opportunity for real-time cross-examination, even if only through a hearing panel."

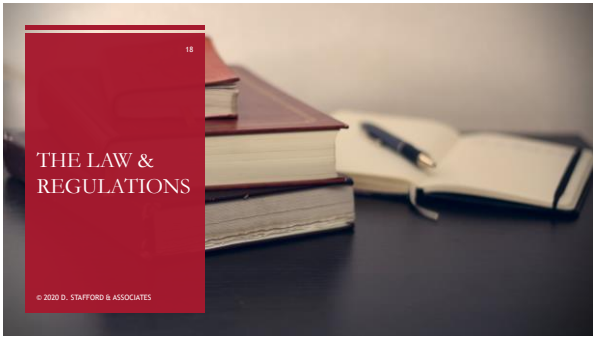
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**DOE V. UNIVERSITY OF
THE SCIENCES,
3RD CIRCUIT (2020)**

"We hold that USciences's contractual promises of "fair" and "equitable" treatment to those accused of sexual misconduct require at least a real, live, and adversarial hearing and the opportunity for the accused student or his or her representative to cross-examine witnesses—including his or her accusers. We do not, however, attempt to prescribe the exact method by which a college or university must implement these procedures."

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Interpreting Laws



Law



Regulations



Substantive guidance

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General Comments and Thoughts – 2020 Regulations



Applies to
Higher Ed and
K-12



Preamble



Technical
assistance



Implement
date of
August 14,
2020



Possible Delay

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§106.3 – Remedial Action



Fix it



No monetary damages

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§106.6 – Effect of Other Requirements and Preservation of Rights



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§106.8(a) Designation of Coordinator

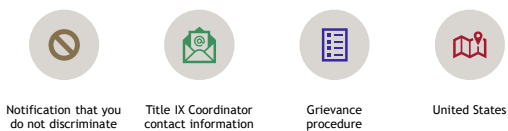


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§106.8(b) Dissemination of Policy



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§106.8(C) Adoption of Grievance Procedure

"grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part and a grievance process that complies with § 106.45 for formal complaints as defined in § 106.30."

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Only applies to US

Use other policy

No Clery conflicts

§106.8(d)
Application
Outside of the
United States

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Submit in writing

Specific tenant

Not required

Raise any time

§106.12 –
Religious
Institutions

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§106.30 Definitions – Actual Knowledge

“Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient.”

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§106.30 Definitions – Actual Knowledge


Title IX
Coordinator


Official with
authority


Different
K-12
standard


Designation


Not same as
CSAs

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§106.30 Definitions – Complainant & Respondent

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- **Complainant**
 - “an individual who is alleged to be the victim of conduct that could constitute sexual harassment”
- **Respondent**
 - “an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment”

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§106.30 Definitions – Formal Complaint

- "... a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment."
- At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed."
- "Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party."

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§106.30 Definitions – Formal Complaint



Signed formal
complaint



Title IX
Coordinator



Third parties



Anonymous
reports

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§106.30 Definitions - Sexual Harassment

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;

3. "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

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PRONG 1: Quid Pro Quo



Must be an employee (not volunteer, visitor, student)



"This for that" harassment



When favorable professional or educational treatment is conditioned on a sexual activity

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PRONG 2: Hostile Environment+ (The *Davis* Standard)



No definition of consent required



Not the same Title VII "hostile environment" or 2001 Guidance



First Amendment protections

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PRONG 3: The VAWA Crimes



Sexual Assault

Rape
Fondling
Incest
Statutory Rape



Intimate Partner Violence

Dating Violence
Domestic Violence



Stalking

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§106.30 Definitions – Supportive Measures

“Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.”

“Such measures are designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment, or deter sexual harassment.”

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§106.30 Definitions – Supportive Measures



Non-disciplinary, non-punitive



Both parties



Academic, housing, and athletic impact



“Mutual restrictions on contact”

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§106.44 Recipient's Response to Sexual Harassment; (a) General Response to Sexual Harassment

Deliberately
Indifferent

Educational
Program or
Activity

Equitable

Contact
Complainant

On-line

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§106.44 (c) Emergency Removal; (d) Administrative Leave



Emergency removal



Administrative leave

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§106.45 Grievance Process for Formal Complaints of Sexual Harassment (a) Discrimination

"A recipient's treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX."

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§106.45 Grievance Process for Formal Complaints of Sexual Harassment, (b) Grievance Process(1) Basic Requirement

Equitable

Objective
Evaluations

Impartiality
and Training

Presumption
of Not
Responsible

Prompt Time
Frames

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§106.45 Grievance Process for Formal Complaints of Sexual Harassment, (b) Grievance Process, (1) Basic Requirements



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§106.45 Grievance Process for Formal Complaints of Sexual Harassment, (b) Grievance Process, (2) Notice



Notice requirements

Additional allegations

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§106.45(b)(3) Dismissal of a Formal Complaint

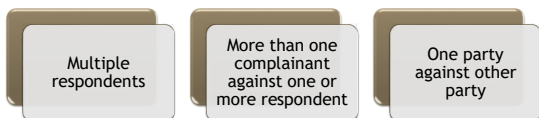
Must dismiss:	May dismiss:
<ul style="list-style-type: none">• Behavior does not constitute sexual harassment• Did not occur in educational program or activity, not in the United States	<ul style="list-style-type: none">• Complainant withdraws formal complaint• Respondent no longer enrolled/employed• Insufficient evidence

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§106.45(b)(4) Consolidation of a Formal Complaint



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§106.45(b)(6) Hearings



Live hearing



Cross-examination

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§106.45(b)(6) Hearings

Advisor

Relevancy

Participation consequences

“Physically present”

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§106.45(b)(7) Determination Regarding Responsibility

Allegations

Procedural steps

Findings of fact

Conclusion/application

Rationale

Appeal procedures

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Sanctions and Remedies



Sanctions



Remedies

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§106.45(b)(8) Appeals

MUST have

- Procedure
- New evidence
- Conflict or bias that impacted outcome

Additional grounds permitted

Decision-maker can have no other role

Reasonably prompt time frame

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§106.45(b)(8) Appeals

Notification of appeal

Equal opportunity to respond

Written outcome - rationale

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§106.45(b)(9) Informal Resolution



Notice



Voluntary



Not allowed for Employee/student

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§106.45(b)(10) Recordkeeping (seven years)



Case Materials



Training materials

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Intimidation, threats, coercions,
discrimination

May use same grievance procedure

1st Amendment

False reports

§106.71
Retaliation
Prohibited

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Title IX Personnel

1

Title IX Personnel – Title IX Coordinator

- Coordinates all Title IX efforts
- Disseminates policy
- Responsible for notice to all applicants for admission and employment, students, unions, and professional organizations holding collective bargaining or professional agreements of name or title, office address, email, and telephone number of Title IX Coordinator
- Receives reports of sex discrimination, including sexual harassment
- Accepts or signs formal complaints
- Manages dismissal of complaints
- Responsible for coordinating the effective implementation of supportive measures for both the complainant and respondent

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Title IX Personnel – Title IX Coordinator

- Responsible for assigning investigations
- Responsible for notice to parties of the allegations and investigation
- Coordinate the logistics of hearing procedures (cannot be a decision-maker nor have a role in weighing evidence and determining relevancy)
- Assigns the advisor of the institution's choice for the live hearing if a party does not have one
- Responsible for effective implementation of any remedies
- Ensure that the appeal decision-maker is not the same as the hearing decision-maker

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Title IX Personnel – Decision-maker

- Decision-makers can only serve one role within a case
- Hearing
 - Reviews the investigation report and evidence
 - Manages the hearing (Asks questions of the parties and manages cross-examination by the advisors, including determining relevancy of questions)
 - Issues notice of findings including allegations, procedural steps, findings of fact, conclusion/application, rationale for each allegation (determination, sanctions, remedies), appeal procedures
- Appeal officers

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Title IX Personnel – Investigators and Advisors

- Investigators
 - Interviews both parties and witnesses
 - Gathers evidence
 - Write the preliminary and final investigative reports
- Advisors
 - Chosen by the party; can have throughout the process but not required until live hearing
 - Receives evidence and investigation report
 - Conduct cross-examination at the hearing
 - If a party does not have an advisor at the live hearing, the institution must provide one (of the institution's choice)

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Training

- Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process
 - Definition of sexual harassment
 - Scope of the recipient's education program or activity
 - How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable
 - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.
- Decision-makers receive additional training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant
- Investigators receive additional training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section.

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