Title IX Update: Clear as Mud

HR Liaison Meeting

October 2019
United Educators (UE), one of the largest insurance providers for postsecondary institutions, reported that sexual assault was the top liability for colleges and universities in 2018.

Payouts resulting from Title IX procedural challenges, which went primarily to victims of sexual assault, surpassed the legal costs of large risks such as wrongful death, negligence, athletic injury, and wrongful termination.

Since 2011:
- Settling complaints from alleged victims averages $350,000 per case (primarily loss of educational access and PTSD)
- Settling complaints from students accused of sexual misconduct averages $20,000 to $30,000 (primarily loss of tuition and housing dollars while suspended/expelled)
1st thing to know about Title IX

CREI
Department of Civil Rights and Equity Investigations (CREI)

- Investigation and resolution of ALL Civil Rights complaints, including Title IX

- Includes all reports of discrimination, harassment and/or retaliation based on a protected class.

- Protected classes: race, color, sex, gender identity or sexual orientation, age, religion, disability, national origin, Veteran status
Reports of **Inappropriate Conduct** which do not rise to the level of a civil rights violation are usually referred to the entity below for a response:

**Reports against Faculty:** Department Head  
**Reports against Staff:** HR or Supervisor  
**Reports against Students:** Student Conduct
The Same Rules Apply to Faculty, Staff, and Students

**System Regulation 08.01.01**
Civil Rights Compliance

**University Rule 08.01.01.M1**
*Prohibited Conduct:* Discrimination, Harassment, Complicity, and Related Retaliation based on a Protected Characteristic

**SAP 08.01.01.M1.01**
*Investigation and Resolution* of Allegations of Prohibited Conduct Against Students, Employees, and Third Parties
Other CREI Activities

• Provide training for faculty, staff, and student groups

• Participate in events on campus (orientation, resource fairs, Sexual Assault Awareness Month, etc.)

• Partner with and train community partners (Brazos Valley Sexual Assault Resource Center)

• Provide consultation and policy review for related processes

• Chair or participate with various committees (SASS, Step In Stand Up)
CREI by the Numbers
January – September 2019

• Total Reports Received: 570 (3.0 per business day)
  • 134 Civil Rights Reports (other than TIX)
  • 355 Title IX Reports
  • 12 Retaliation Reports
  • 69 Other

• Total Investigations Opened (1/1/19 to 9/30/19): 90
  • 46 against Faculty/Staff
  • 41 against Students
  • 3 against Third Party

• Total Reports Received (since 8/19/19 (Students Return)): 151 (5.2 per business day)
CREI Staff

1 Hearing Administrator
2 Case Managers
4 Investigators
1 Deputy Title IX Officer
1 Assistant Vice President and Title IX Officer

1 Hearing Officer (OREC)
What is Prohibited Conduct under 08.01.01?
Four Kinds of Prohibited Conduct

- Discrimination
- Harassment
- Retaliation
- Complicity
Sexual Harassment

- Unwelcome conduct of a sexual nature
- that is so severe, persistent, or pervasive
- that it unreasonably interferes with, limits, or deprives
- an individual of participation in the University’s programs, activities, or benefits.

Requires conduct to be both objectively and subjectively offensive
New SB 212

Sexual Harassment is unwelcome, sex-based physical or verbal conduct that:

A. in the employment context, *unreasonably* interferes with a person’s work performance or creates an intimidating, hostile, or offensive work environment; or,

B. in the education context, is sufficiently *severe, persistent, or pervasive* that the conduct interferes with a student’s ability to participate in or benefit from educational programs or activities

Proposed Regulations:

*In order to be actionable, sexual harassment has to be severe, persistent, AND pervasive.*
Stalking

- 2 or more unwelcome acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person’s property

- that put a person in fear for their own safety or the safety of others

- OR causes substantial emotional distress
Dating Violence

- Violence (including sexual or physical abuse or threat of such abuse)
- committed by a person
- who is or has been involved in a social relationship of a romantic or intimate nature with the victim
Domestic Violence

A crime of violence committed by:

(a) a current or former spouse/intimate partner
(b) a person with whom the Complainant shares a child in common;
(c) a person who is cohabitating with, or has cohabitated with, the Complainant like a spouse
(d) a person similarly situated to a spouse under the domestic violence rules of the jurisdiction
Sexual Exploitation

• Taking sexual advantage of another person
• For your own (or someone else’s) benefit
• Without consent

Examples: hiding in the closet and watching others have sex without their consent, posting an intimate picture of someone on social media without their consent, indecent exposure
New Criminal Violation:

HB 2789

It is a criminal offense to knowingly transmit pictures (without consent) of:

- any person engaging in sexual conduct; OR
- exposed intimate parts; OR
- the covered genitals of a male person that are in a discernibly turgid state

Class C Misdemeanor
Sexual Assault

• Rape (penetration of genitals, anus, or mouth without consent)

• Fondling (touching breast, groin, genitals, butt) without consent

• Incest

• Statutory Rape
Reporting Civil Rights/Title IX Violations
TAMU’s Mandatory Reporting Rule – All Civil Rights

- When alleged or suspected discrimination is experienced by, observed by, or made known to an employee, the employee is responsible for promptly reporting the incident.
  - No limit on time that incident occurred
  - No limit on how you found out
  - Failure to report may result in disciplinary action, including dismissal.
  - Report can be made to supervisor or CREI
  - Victim must report
  - Licensed mental health professionals (Counseling and Psychological Services) don’t report at all and licensed health care providers (Student Health Services) provide de-identified statistics
SB212 – TIX ONLY

An employee who witnesses or receives information regarding an incident that the employee *reasonably believes* to be sexual harassment, sexual assault, stalking, or dating violence, shall promptly report all known information about the incident:

- Victims expressly exempted from reporting
- Limited to acts committed by or against an enrolled student or employee at the time of the incident
- Only required to report information received in course and scope of employment
- Only acceptable place to report is Title IX Coordinator or Deputy Title IX Coordinator
- Licensed mental health professionals (Counseling and Psychological Services) and licensed health care providers (Student Health Services) report de-identified statistics.
- Mandatory termination for failure to report
- Can be prosecuted as a class A or B misdemeanor: fines and up to 1 year in jail (effective Jan. 1)
Are Students Mandatory Reporters?

SB 212 exempts students from reporting.

08.01.01 exempts students from reporting unless they are also employees and receive a disclosure of discrimination or harassment while they are acting in their employee role at the time of the disclosure.
What should you do with the student who discloses?

Ideally, you **interrupt** before they spill the secret and advise them:

- You are a mandatory reporter and must pass on a discrimination or harassment report to the Civil Rights Office
- You are concerned about them and will listen if they still want to talk
- You can help refer them to the right people on campus to get help
- They have options on campus to discuss their issue confidentially
- If they have safety concerns, call the police
Reporting to Law Enforcement

- An anonymous “Jane/John Doe” report can be filed with the police by the complainant while deciding whether to pursue criminal charges.

- **SB212** seems to require Police Officers (Employees) to report all known information to the TIX Coordinator. Class A or B misdemeanor for failure to report.

- **Code of Criminal Procedure 57.03** states that a public servant commits an offense if the public servant knowingly discloses the name of a victim who has chosen a pseudonym.
When in doubt, report!
What happens after a report is made?

• Case Managers at CREI will reach out via email and/or telephone with an invitation to talk about filing a complaint, options for resolving a complaint, and supportive measures/academic adjustments

• No obligation to respond
Options for Resolution

The Complainant’s Case Manager will request input for resolving the complaint from the Complainant. CREI makes the final decision about which resolution to pursue.

- **Formal resolution** (investigation, adjudication, and, if appropriate, the imposition of sanctions)

- **Informal resolution** (a restorative option for resolving complaints that does not involve disciplinary action against a Party; e.g., requiring the respondent to attend training)

- **No resolution at this time** (complaint may be revived at a later date)
Does Title IX apply to employee cases? Is Title VII the sole remedy for an employee?

Must we have a Live Hearings in every case or just student cases involving separation?

Must the victim be subject to cross examination? In every case or only when credibility is at issue? 6th Circuit and 1st Circuit split

Jurisdictional limits to Title IX enforcement -- Does Title IX apply when a student sexually assaults a student in an on campus dorm versus an off campus apartment? When they are out of the country?

Requirement to provide an advisor to someone who does not have one. Does the advisor have to be a JD? Is the university liable for ineffective assistance of advisor?

Waiting on Devos Regulations …
Sanctions
Employee Sanctions for Title IX Violations

When an employee is found to have sexually harassed another member of the university or agency community, the sanction will be termination of employment.

*TAMUS Regulation 08.01.01, Section 4.5.7*

Sexual harassment includes non-consensual sexual contact, sexual assault, sexual exploitation, stalking, dating violence, and domestic violence when based on sex.

*TAMUS Regulation 08.01.01, Definitions Section*
Employee Sanctions
for other Civil Rights Violations

- Written Reprimand
- Performance Improvement Plan
- Leave with or without pay
- Suspension
- Training or Counseling
- Termination
- Demotion
<table>
<thead>
<tr>
<th>Incident</th>
<th>Stage 1</th>
<th>Stage 2</th>
<th>Stage 3</th>
<th>Stage 4</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pressuring another person for dates or sexual favors</td>
<td>![Yellow]</td>
<td>![Orange]</td>
<td>![Red]</td>
<td>![Red]</td>
</tr>
<tr>
<td>Destruction of property</td>
<td></td>
<td>![Orange]</td>
<td>![Red]</td>
<td>![Purple]</td>
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<td>Engaging in sexual activity while knowingly infected with an STD without the other person’s knowledge</td>
<td>![Red]</td>
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<td>Assuming another’s identity in order to make contact with complainant</td>
<td>![Red]</td>
<td>![Purple]</td>
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<tr>
<td>Collecting, creating, and/or distributing child pornography/sexual images of those under 18</td>
<td>![Purple]</td>
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1 Year Suspension

Students found responsible for committing acts of sex-based violence and/or non-consensual sexual penetration of another person who are allowed to return to campus after a 1 year suspension will be ineligible

- to hold a leadership position in a student organization
- to represent the university (in athletics, academic, or other competitions) and
- to receive an institutional scholarship
What if someone files a false report?
Abuse of the investigation and resolution process as set forth in this rule is subject to disciplinary action up to and including dismissal from the University. Examples of abuse of process include, but are not limited to:

- Falsification, distortion, or misrepresentation of evidence or information
- Intentionally initiating or causing to be initiated a false report

*TAMU Standard Operating Procedure 08.01.01.M1.01*
Where do I get more information?
Title IX at Texas A&M University

Title IX is a federal law that prohibits sexual harassment, sexual violence, and discrimination on the basis of sex.
TitleIX.tamu.edu
Questions?