



## LEGAL OBLIGATIONS TO ONLINE STUDENTS UNDER TITLE IX: THRESHOLD ISSUES AND PRACTICAL CONSIDERATIONS

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Innovators in online education are hardly strangers to the legal uncertainty that often accompanies efforts to interpret and apply old laws to new realities. This policy brief discusses one such area: legal obligations to online students under the federal statutory provision referred to as “Title IX,” which prohibits discrimination on the basis of sex in most educational programs and activities that receive federal funds.<sup>1</sup>

Since Title IX was adopted in 1972, federal agencies have developed regulations and policy guidance that are both copious and far-reaching. In addition, recent incidents of sexual assault at many high-profile institutions have moved Title IX compliance into the national spotlight. Institutions that fail to comply with Title IX may face federal agency compliance reviews as well as individual lawsuits from victims and alleged offenders, both of which can be costly and may result in reputational damage.

To help UPCEA members navigate this area, the following is an overview of Title IX requirements as well as threshold issues that education providers should consider in crafting policies to address sexual harassment in online offerings.

### **Does Title IX apply to the online education programs that you offer?**

Most likely, the answer is, “yes.” If your institution receives federal funds in any form, *all* of your institution’s “education programs and activities” (not just those that actually use the funds) are covered under Title IX, regardless of whether your entity is public, private, or proprietary.<sup>2</sup> Even entities that do not qualify as an institution of higher education may be subject to Title IX.

There is no exception under Title IX for online courses or programs. Furthermore, “education programs and activities” are not limited to credit-bearing courses but include activities that are extracurricular, research-oriented, or occupational in nature. They include programs and activities that are not directly operated by a recipient entity, but that the recipient entity *requires or considers equivalent to* an education program or activity, such as clinical experiences, internships, and participation in online discussion boards.<sup>3</sup>

Thus, Title IX applies equally to adult learners enrolled in one online class a week and to full-time students living on campus, and regardless of whether you provide online courses as an extension of a large research university or as a corporation that has received a federal grant for workforce training that is offered online.

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<sup>1</sup> 20 U.S.C. § 1681(a) states, “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.” This policy brief only addresses Title IX as it applies to students. Title IX’s application to employees is a topic for another day.

<sup>2</sup> 34 C.F.R. § 106.2. Although this brief discusses regulations administered by the U.S. Department of Education (“ED”), twenty-two federal agencies adopted a “common rule” in 2000 (65 Fed. Reg. 52857), which mirrored ED regulations in all significant aspects and aimed to promote consistent enforcement across all agencies that regulate providers of educational programs and activities in all their varied forms. Besides ED, the Departments of Justice and Veterans’ Affairs are key players in Title IX enforcement.

<sup>3</sup> 34 C.F.R. § 106.31.



## What does Title IX require education providers to do?

Title IX requires that recipients of federal funds provide educational programming free from discrimination on the basis of sex. The Department of Education (“ED”) interprets this to require that education providers promptly investigate and respond to incidents of sexual harassment, and take steps where necessary to remedy the effects of the harassing conduct and prevent its recurrence.

Specifically, entities subject to Title IX are required to:

- Designate at least one employee as responsible for coordinating efforts to comply with Title IX;<sup>4</sup>
- Adopt and publish grievance procedures that provide for “prompt and equitable” resolution of complaints;
- Provide training for administrators responsible for responding to and investigating harassment;
- Disseminate notices about the institution’s obligations under Title IX, what types of conduct may constitute sexual harassment, and how to report such conduct to the institution.

ED has elaborated on these baseline requirements through policy guidance and in enforcement actions, especially with respect to what it means to provide a “prompt and equitable” grievance procedure. For example, ED requires Title IX grievance procedures to use a “preponderance of the evidence” standard, implement timeframes for each major stage of the complaint process, and provide written notice to parties of the outcome of the complaint.<sup>5</sup>

## What is sexual harassment?

Broadly speaking, sexual harassment includes sexual misconduct, defined as unwelcome conduct of a sexual nature (unwelcome sexual advances, requests for sexual favors, sexual assault, etc.), as well as gender-based harassment, defined as verbal or non-verbal hostility based on gender, sexual orientation, or gender identity (for example, persistent disparagement of a person based on a perceived lack of stereotypical masculinity).

Harassing conduct rises to the level of discrimination when the conduct is so severe or persistent that it creates a hostile environment that interferes with a student’s ability to benefit from the educational program or activity.

## What are some common forms of sexual harassment in the online environment?

Sexual harassment can, and frequently does, occur in online environments. ED’s October 2010 Dear Colleague Letter identifies harassing conduct as including the following:

- Graphic and written statements, which may include use of cell phones or the internet;
- Making sexual comments or jokes;
- Stalking;
- Distributing sexually explicit drawings, pictures, or written materials;
- Calling students sexually charged names;
- Rating students on sexual activity or performance; and/or
- Circulating, showing, or creating emails or web sites of a sexual nature.

Note that each of these activities can be carried out in purely online environments and apply to both instructor-student and student-student interactions. Most do not require intent to harm or harass.

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<sup>4</sup> Actual knowledge is not required; a Title IX violation occurs even when an institution reasonably *should have known* of an incident of sexual harassment.

<sup>5</sup> 34 C.F.R. §§ 106.8-106.9; *see also* the Dear Colleague Letters and significant guidance documents issued by ED’s Office of Civil Rights on October 26, 2010; April 4, 2011; and April 29, 2014.



## **Can sexual harassment by a third party trigger obligations for the education provider?**

Yes. An education provider is required to process complaints of harassment carried out by a third party (not just students or employees), even where the conduct occurs “off-campus” and the provider lacks authority to take direct action against the harasser. ED has stated an education provider must “investigate” those types of incidents to determine if the effects of the harassment are contributing to a hostile environment within the educational program. In such cases, an appropriate response from the provider may include reasonable academic accommodations (such as postponing an examination) and referrals to sources of counseling, advocacy, and support.

## **What is the Clery Act and how does it apply to Title IX?**

The Clery Act is a separate law, distinct from Title IX, which applies to institutions participating in Title IV programs. At its core, Clery is a reporting requirement; covered institutions must record and disclose statistics for certain types of crimes (including some forms of sexual harassment) *that occur on physical property controlled by the institution*. As a practical matter, incidents of sexual harassment that occur in a purely online environment and are not perpetrated from a physical location within your institution’s control typically would not be subject to Clery’s reporting requirements.

However, the Clery Act intersects with Title IX in another important way relevant to online education. The Clery Act requires covered institutions to publish policies related to campus safety, and recent ED regulations now require institutions to distribute detailed information about their Title IX policies to victims and offer sexual harassment prevention programming to all students and employees.<sup>6</sup> The timing and content of the disclosures and the prevention programming is complex, and apply equally to students in purely online programs and in residential programs. We encourage institutions subject to the Clery Act to carefully review the new regulations, consult with legal counsel to ensure they are fully compliant with these requirements, and take steps necessary to ensure online students receive all required notices and disclosures.

## **What are the potential liabilities of non-compliance with Title IX?**

The costs associated with non-compliance can be significant. First, the issue of cyber bullying and sexual harassment in higher education has attracted national attention, and failure to comply with Title IX or mishandling a complaint will likely result in negative coverage and reputational damage to institutions and administrators alike.

Second, noncompliant schools risk Title IX investigations triggered by federal compliance reviews and student complaints to ED’s Office of Civil Rights (which increased by 50% between May and October of 2014). OCR compliance reviews typically last several years and culminate in “resolution agreements” obligating the education provider to implement a multitude of new policies and practices. As a result, resolving compliance reviews carry significant administrative costs. ED also may refer cases to the Department of Justice in situations that it identifies as requiring a more intensive legal remedy.

Finally, even in the absence of federal agency involvement, Title IX creates a private right of action for victims who can show that a school failed to adequately respond to sexual harassment it reasonably should have known was occurring. Increasingly, institutions are also facing lawsuits from students who were dismissed from an institution and claim that the institution’s investigation procedures violated their due process rights. Thus, institutions must be prepared to promptly respond to harassment and ensure that grievance procedures are equitable for all students in both on-ground and online environments.

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<sup>6</sup> See 34 C.F.R § 668.46.



## What practical considerations should weigh into your evaluation of Title IX compliance?

Putting these factors together, we encourage distance education providers to consider the following threshold issues in assessing your compliance with Title IX:

- **Review Policies.** Where relevant, ensure that students enrolled in online courses or programs receive information and policies regarding sexual harassment definitions and procedures consistent with policies that apply to on-campus conduct. Consider whether a separate policy for students in purely online programs is appropriate, and make sure that student handbook and related conduct policies clearly communicate the scope of the institution's authority to investigate and respond to harassing conduct that occurs online.<sup>7</sup>
- **Adapt Grievance Procedures.** Consult with legal counsel to develop a grievance procedure that is both fully compliant with ED's requirements, and fits the needs of your programs. In-person evidentiary hearings are not required under Title IX and likely are not practical for students who are only enrolled in distance education courses, but the grievance procedure must be equitable to the victim and the accused. Consider how the institution will investigate and weigh evidence in response to harassing conduct (e.g., written statements, video conferencing, etc.) while still affording all participants an equitable process.
- **Require Training.** Provide training to employees who are likely to come across harassing behavior online. As applied to online programs and courses, instructors are more prone to fall into this category compared to residential programs as students interact most frequently (sometimes almost exclusively) with them.
- **Monitor Your Online Environments.** Encourage instructors or others to regularly visit online message boards and other online environments to ensure discourse remains civil.
- **Review Third Party Agreements.** If your online programs require students to complete an externship or other experience provided by a third party, inform the third party of your institution's policies regarding sexual harassment. Agreements with the third party should be written to reflect a mutual understanding that the third party is prohibited by regulation from taking any action affecting your students that your institution would be prohibited from taking under Title IX.
- **Coordinate With Clery Compliance.** At covered schools participating in Title IV programs, administrators responsible for Title IX compliance should work closely with the individual's responsible for Clery compliance to ensure that all required disclosures and prevention programming related to Title IX accurately reflects the institution's policies and procedures.

There is no "one-size-fits-all" model when it comes to developing a Title IX policy for your distance education offerings. Requirements under Title IX are detailed and nuanced, and this brief is only intended to provide an initial discussion of issues—not an exhaustive list of legal obligations—that institutions should consider in keeping their online environments compliant with Title IX. If you have questions about how to strengthen Title IX compliance in your distance education courses and other online environments, do not hesitate to contact us.

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<sup>7</sup> Definitions of sexual harassment and the applicability of Title IX can be especially tricky in the online context. Providers should be especially sensitive to indicators suggesting that sexual harassment is impacting a student's ability to benefit from a program. For example, consider what steps are appropriate if a student begins limiting her engagement in an online course because another student posted a sexually charged comment about her profile picture?