

Title IX and the FAR: Sexual Assault and Violence Prevention

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Holland & Knight, LLC

**EDUCATION.
INFORMATION.
ONLY.
NOT LEGAL ADVICE.**



WHAT IS TITLE IX?
No sex discrimination. No sexual assault. *Period.*

It's federal law.

It's not just about sports.

The law says no sex-based discrimination.

Not just rape — it's harassment, stalking, threats, too.

People of any sex, gender, identity or expression are protected.

Because equal rights are for all.

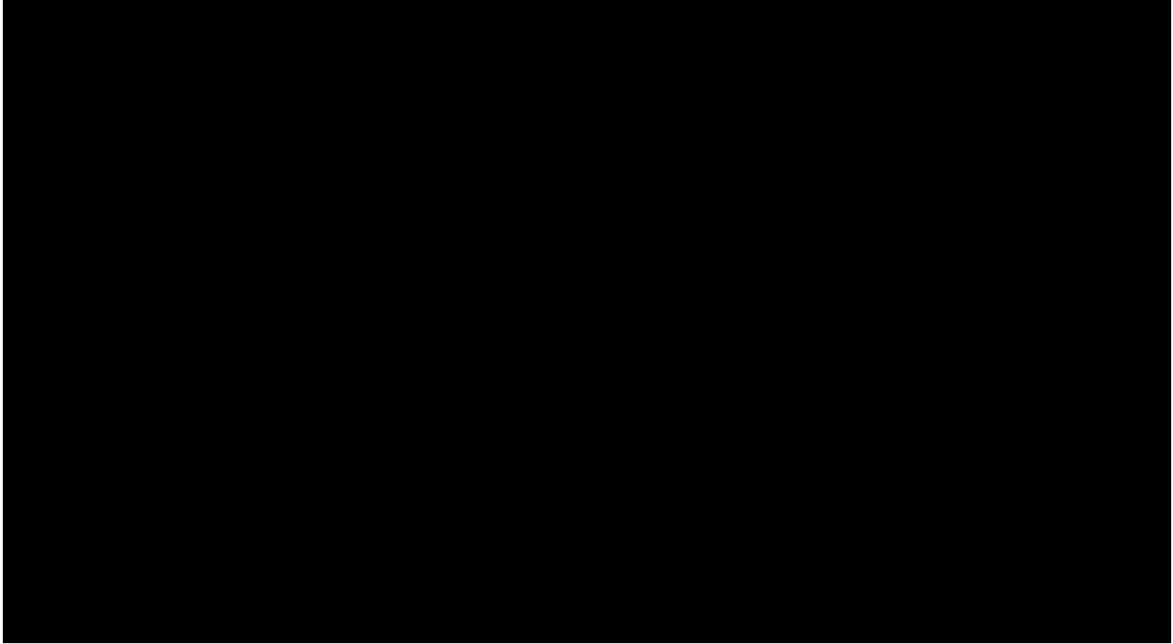
IF YOU SEE SOMETHING SAY SOMETHING DO SOMETHING

www.uaf.edu/titleix/ or 474-7300

UAF
UNIVERSITY OF ALASKA
FAIRBANKS

- Sexual Harassment
- Sexual Violence
- Sexual Misconduct
- So Severe, Persistent, or Pervasive as to deny or limit a student's ability to participate in or benefit from the school's programs or activities.
- Sex/Gender Discrimination
- Stalking
- Dating/Domestic Violence
- Attempts/Assists/Willful Encouragement/Retaliation

Harvard Soccer



Consent

My Work

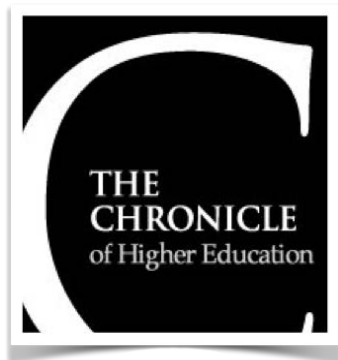


Me

Friday, September 21, 2017

OCR Withdraws:
Dear Colleague Letter on Sexual Violence (2011)
Questions and Answers on Title IX and Sexual Violence (2014)

Sexual Violence



- May 2014, OCR had 55 active sexual-violence investigations
- September 2017, OCR has 359 active sexual-violence investigations at 255 colleges and universities.
- As of the close of 2016, 17% of TIX sexual violence cases had been resolved, many under Voluntary Resolution Agreements.

Judicial Review

- 61 Published Court Opinions Since January
- Complainants/Respondents
 - Title IX Claims
 - Deliberate Indifference
 - Discrimination
 - Denial of Due Process Claims
 - Breach of Contract
 - Right v. Privilege



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Due Process



Notice



Meaningful Opportunity
to be Heard



Fairness

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Sexual Misconduct



Student tells the FAR that the student was sexually assaulted. Student tells the FAR they don't want to file a complaint with the school or the police. The student asks the FAR to keep the discussion confidential, and especially not to tell the coach. The student promises to keep in touch.

What should the FAR do, if anything?

DISCUSSION

- Do you know
 - The Process
 - Your Responsibilities
 - Your TIX Coordinator/Deputy
 - Confidential Resources
- Do you trust the process?
- Do your coaches?
- Do your students?

That Horrifying Moment
when you're looking around
for a Responsible Employee
and you realize that YOU
are the Responsible
Employee.

So You Look Around for
Someone More Responsible
than you - Someone who is
better at Responsible
Employee-ing than you are.

Sample Language Preseason

School prohibits sexual harassment, including sexual violence. To help ensure that we provide a safe environment for everybody and to make sure we help people who have been subjected to sexual misconduct, I am required to pass on to the school's Title IX coordinator any instances of sexual misconduct that I see or hear about, including things that you may tell me.

(Discuss who the Title IX Coordinator is and what he/she does.)

I am a resource for you. If you tell me about something you saw, something that happened to you or someone that happened to someone else, I will help and I will keep the information private. I can't keep it confidential. The school's Title IX Coordinator will be able to answer any questions you may have about the school process, resources, interim measures, and confidentiality.

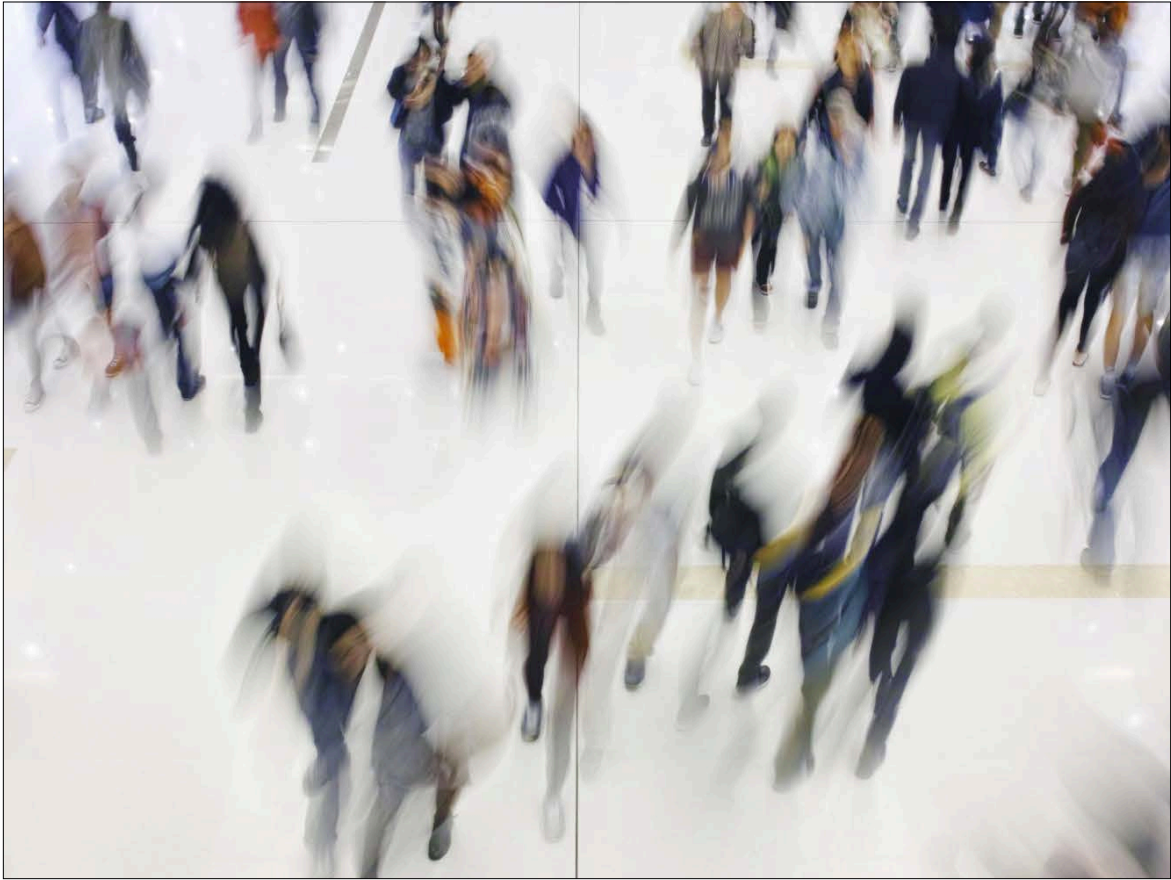
If you decide that you would rather talk with someone who can keep your information confidential, these are the people you can contact:

[List names and contact information for Confidential Reports]

- IMPORTANT: This is sample language only. Please consult with your TIX Coordinator.
- Consider Posting this notice & school's policy in locker rooms, training rooms, weight rooms.

Title IX





Role of the FAR

Understand the Issues and Your School's
Policies

Help Build Trust During the Interim
Rulemaking Process



Friday's Rationale

- The DCL and 2014 Q&A interpreted Title IX to impose new mandates related to the procedures by which educational institutions investigate, adjudicate, and resolve allegations of student-on-student sexual misconduct.
- The DCL required schools to adopt a minimal standard of proof— the preponderance-of-the-evidence standard — in administering student discipline, even though many schools had traditionally employed a higher clear-and-convincing-evidence standard.
- The DCL insisted that schools with an appeals process allow complainants to appeal not-guilty findings, even though many schools had previously followed procedures reserving appeal for accused students only.
- The Letter discouraged cross examination by the parties, suggesting that to recognize a right to such cross examination might violate Title IX.
- The Letter forbade schools from relying on investigation of criminal conduct by law-enforcement authorities to resolve Title IX complaints forcing schools to establish policing and judicial systems while at the same time directing schools to resolve complaints on an expedited basis.
- The Letter provided that any due process protections afforded to accused students should not “unnecessarily delay” resolving the charges against them.”
- Cited Penn and Harvard Law Faculty - DCL led to procedures do not afford Fundamental Fairness.

2017 Q & A

- School Responsibility to Address Sexual Misconduct
- The Clery Act and Title IX
- Interim Measures
- Grievance Procedures and Investigations
- Informal Resolutions of Complaints
- Decision-Making as to Responsibility - Standard of Proof
- Decision-Making as to Disciplinary Sanctions
- Notice of Outcome and Appeals
- Existing Resolution Agreements

Interim Measures



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A student-athlete is accused of sexual assault at the beginning of the season. It may take 60 days or more for the school to resolve the case. The Title IX Coordinator has determined that school suspension is not necessary. There are calls for the student-athlete to be suspended from the team prior to resolution of the complaint.

- What is your process?
- Automatic rules?
- Who makes the decision?
- What if the complainant and respondent are on the same team?

Interim Measures

OCR has concerns that the College may not be affording accused students their basic procedural protections by imposing immediate suspensions [from school] without conducting a sufficient assessment of the risk to the community, while also considering the rights of the parties, including the accused student.

The equitable principle in Title IX requires the College to consider a variety of factors in weighing whether an interim suspension is an appropriate interim remedy, given the potential educational impact of an interim suspension on the accused student.

- Risk to greater college community
- Risk accused will repeat offend
- Other complaints against the same individual
- Whether accused threatened further misconduct
- Whether it is alleged that more than one perpetrator

(OCR Letter, Wesley College, 2016)

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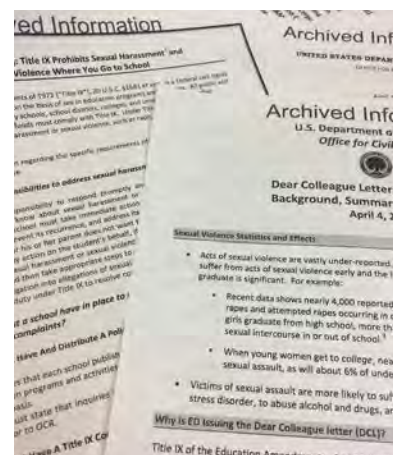
Of Particular Import

- Interim Measures
- 60 Day Standard
- Responsible Employee
- Due Process Protections
- Written Charges
- Grievance Procedures
- Equity of Support
- First Amendment
- Training



- The Department intends to implement a rule making process “in the coming months.”
- Agencies have general authority to regulate certain activities within society. An interpretive rule and a final legislative or substantive rule. Interpretive rules must not impose new standards.
- Must follow an open public process when issuing regulations, according to the APA.
- Notice of Proposed Rulemaking announces and explains the agency’s plan of action.
- Typically 30 and 60 day comment period.
- Agency must base action on the Rulemaking record, including comments, scientific data, expert opinions and facts collected during the pre-rule and proposed time periods, and must consider alternatives and cost.
- Final rule published with effective date, 30 days or more from date of publication absent good cause.
- House and Senate may pass a resolution of disapproval for Presidential approval or subject to override of a Presidential Veto.

Rulemaking Process



LGBTQ

- 60 Minutes Piece
- Overall Inclusion
- No Dating Policies
- Sexual Stereotyping
- Pending Legislation
- OCR/Pending Cases
- NCAA Policy
 - Inclusion
 - Eligibility



Role of the FAR

Understand the Issue
Help Build Trust During the
Interim

Know the NCAA Position



2014 NCAA executive committee sexual violence prevention and compliance resolution

- “Cooperate with, but not manage, direct, control or interfere with, college or university investigations into allegations of sexual violence, ensuring that investigations involving student-athletes and athletics department staff are managed in the same manner as all other students and staff on campus.”
- Collaboration
- Compliance & Accountability
- Education
- Student-Athlete Engagement



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NCAA Board of Governors Policy Related to Campus Sexual Violence

- Goals
 - 3 Overarching Principles
 - All student-athletes, coaches and staff to be educated on sexual violence prevention, intervention, and response.
 - Sexual Violence Prevention Tool Kit
 - Annual Certification, starting in the Spring of 2018 by Presidents/Chancellors, Athletics Directors and Title IX Coordinators
 - List of Compliant Schools will be published on ncaa.org.



 
SEXUAL VIOLENCE PREVENTION
An Athletics Tool Kit for a Healthy and Safe Culture

What Would You Do?

You walk by a bar and see a person pushing another person up against the side of the building in a sexual way. You can tell that they are drunk and that the person against the wall is not into it and is trying to get away.

- What would you do?
- What do you think your coach would want your SAs to do?



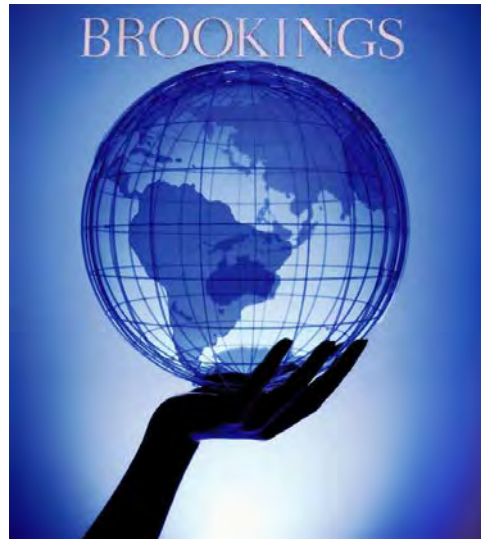
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First Amendment Free Speech



DCL 1st Amendment

- OCR has received inquiries regarding whether OCR's regulations are intended to restrict speech activities that are protected under the First Amendment.
- Not so (public and private institutions). Intended to protect students from invidious discriminate, not to regulate the content of speech.
- Offensive expression, standing alone, is not a legally sufficient basis to establish a hostile environment under the statuettes enforced by OCR.
- Expression must be sufficiently serious (i.e., severe, persistent or pervasive) as to limit or deny a student's ability to participate in or benefit from an educational program.
- To be evaluated from the perspective of a reasonable person in the alleged victim's position.



"Students don't shed Constitutional Rights at the schoolhouse gate"

"A student's rights ... do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field..., he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others. "

Burnside v. Byars, supra, at 749, (as quoted in Tinker).

TINKER

13-YEAR-OLD MARY BETH TINKER AND 4 OTHER STUDENTS WORE A BLACK ARMBAND TO SCHOOL IN PROTEST OF THE VIETNAM WAR AND WERE SUSPENDED. THE RESULTING 1969 SUPREME COURT OPINION IS FIRST AMENDMENT LEGEND.

Buckle Up

And Consider Brushing
Up on Your First
Amendment Knowledge



SOCIAL MEDIA/NCAA

NCAA officials said the infractions panel had discussed -- and ultimately rejected -- the idea that college officials should be regularly monitoring athletes' Facebook and other sites on a regular basis, as a matter of course.

- ▶ "We talked about where to strike [a] balance, given issues regarding privacy" said the chairman of the infractions panel.
- ▶ "If there was information that was available or that came to the attention of a university, that's one thing. But to expect the university to monitor social networking sites of all their student athletes is too much."

Hazing/Empathy



Discussion



Have you been hazed?

Is it hazing if you give a person the opportunity to opt out?

How does your team integrate new members?

Hidden Harms: Previous Experiences

- What we don't know about another individual can be the ultimate harm of hazing.
- Someone who just joined an organization or team could have experienced something in their lives that makes them highly susceptible to serious repercussions if they're asked to participate in certain activities, even where they are given the right to say no.
- Hazing can be physically and/or psychologically harmful to even perfectly healthy individuals, but mix hazing with any one of thousands of previous experiences and the damage can increase exponentially.

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Hidden Harms:

- Consider what students may have brought to college;
 - Depression or other mental health issues.
 - Sexual assault.
 - Eating disorders and body image issues.
 - Alcohol or other addiction.
 - Has seriously considered or attempted suicide
 - Is on medication.
 - Has been abused physically or emotionally
 - Prior experiences with hazing or bullying.
- Any of these, and more we can't imagine, could put someone at a higher risk of being re-traumatized by hazing.

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LANGUAGE/DISCIPLINE

- Investigation and Trends
- Inter-Association Task Force for Prevention Sudden Death in Collegiate Conditioning Sessions: Best Practices Recommendations.
- **Do Not Use Exercise and Conditioning Activities as Punishment**
 - Physical activity should not be used as retribution, for coercion, or as discipline for unsatisfactory athletic or academic performance or unacceptable behavior.
 - No additional physical burden that would increase the risk of injury or sudden death should be placed on the athlete under any circumstance.



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Equity of Discipline

Questions?



HAVE A GREAT YEAR . . .