

A group of five diverse students are gathered around a table in a library, looking at books and papers. The background is filled with tall bookshelves packed with books. The students are engaged in a collaborative study session.

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# **Title IX Certification (Higher Education) for Investigators and Decisionmakers**

**Session 1: Title IX Roles and Responsibilities**

**Presented by: Richard F. Verstegen**

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# Introduction



# Introduction

- Discrimination Based on Sex
  - Sexual Harassment
- Obama Administration
  - Guidance
- Trump Administration
  - 2020 Title IX Regulations
- Biden Administration
  - 2024 Title IX Regulations



# The Basics





# History Leading to Title IX

## Road to Title IX

- Protections for women gained significant momentum from the racial movement of the 1960s.
- After the Civil Rights Act of 1964, women's rights activists sought greater protection in the law.
- In 1970, Representative Edith Green (D-Ohio) drafted legislation prohibiting sex discrimination in education.
- In 1972, Title IX was enacted.



# The Law

- **Title IX**
  - No person in the U.S. 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.
- **Title IX Regulations**
  - 34 C.F.R. 106
- **Enforced by the Office for Civil Rights**





# Application of Title IX

## Scope of Title IX

- All public and private elementary and secondary schools, school districts, colleges, and universities receiving federal funds (“recipients”) must comply with Title IX.
- Application of Title IX is institution-wide.
- All students (as well as other persons) at recipient institutions are protected by Title IX.





# Application of Title IX

## Programs or Activities

### General prohibition

- Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance. 34 C.F.R. § 106.31(a).



# Application of Title IX

## Employment and Benefits

- A recipient is also generally prohibited from discriminating on the basis of sex in employment or recruitment.
- This includes employment actions, such as hiring, promotion, compensation, grants of leave, and benefits.
- These provisions also protect against discrimination based on an applicant's or employee's pregnancy or marital or parental status.



# Application of Title IX

## Other Areas

- Athletics
- Pregnancy
- LGBTQ+
- Sex-based harassment



# Title IX Coordinator Training

- **Training – All Title IX Investigators and Decisionmakers.**
  - An institution must ensure that persons receive training related to their duties under Title IX **promptly upon hiring or change of position that alters their duties under Title IX** or this part, and **annually** thereafter.
  - The training must not rely on sex stereotypes.

34 C.F.R. § 106.8(d)



# Title IX Final Regulations

- **Training – All Title IX Investigators and Decisionmakers**
  - All employees must be trained on:
    - The institution's **obligation to address sex discrimination** in its education program or activity;
    - The **scope of conduct that constitutes sex discrimination** under Title IX and this part, including the definition of sex-based harassment; and
    - All applicable **notification and information requirements** under § 106.40(b)(2) and 106.44.


34 C.F.R. § 106.8(d)(1)

# Title IX Final Regulations

- **Training – All Title IX Investigators and Decisionmakers**
  - In addition, these individuals must be trained on the following topics to the extent related to their responsibilities.
    - The recipient's **obligations under § 106.44** (response to sex discrimination)
    - The recipient's **grievance procedures under § 106.45**, and if applicable § 106.46 (postsecondary school grievance procedures)
    - How to serve **impartially**, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias; and
    - The meaning and application of the term “**relevant**” in relation to questions and evidence, and the **types of evidence** that are impermissible regardless of relevance under § 106.45, and if applicable § 106.46.

34 C.F.R. §106.8(d)(2) and (3)





# Procedural Requirements



# Procedural Requirements

## Designation of Title IX Coordinator

- Title IX Coordinator
  - Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with responsibilities under Title IX and this part.
  - If a recipient has more than one Title IX Coordinator, it must designate one of its Title IX Coordinators to retain ultimate oversight over those responsibilities and ensure the recipient's consistent compliance with its responsibilities under Title IX and this part.
  - As appropriate, a recipient may delegate, or permit a Title IX Coordinator, to delegate specific duties to one or more designees.

# Procedural Requirements

## Notice of Nondiscrimination

- Each recipient must provide a **notice of nondiscrimination** to students; parents, guardians, or other authorized legal representatives of elementary school and secondary school students; employees; applicants for admission and employment; and all unions and professional organizations holding collective bargaining or professional agreements with the recipient.



# Procedural Requirements

## Notice of Nondiscrimination - Contents

- The notice of nondiscrimination must include the following elements:
  - A statement that the recipient **does not discriminate** on the basis of sex and prohibits sex discrimination in any education program or activity that it operates, as required by Title IX and this part, including in admission (as applicable) and employment;
  - A statement that inquires about the application of Title IX and this part may be referred to the recipient's Title IX Coordinator, the Office for Civil Rights, or both;
  - The name or title, office address, email address, and telephone number of the recipient's Title IX Coordinator;
  - How to locate the recipient's nondiscrimination policy and the recipient's grievance procedures; and
  - How to report information about conduct that may constitute sex discrimination under Title IX, and how to make a complaint of sex discrimination under this part.

# Procedural Requirements

## Notice of Nondiscrimination - Publication

- Each recipient must prominently include all elements of its notice of nondiscrimination on its website and in each handbook, catalog, announcement, bulletin, and application form that it makes available to persons entitled to notice (as described previously), or which are otherwise used in connection with the recruitment of students or employees.
- If necessary, due to the format or size of any publication, the recipient may instead include in those publications a statement that the recipient prohibits sex discrimination in any education program or activity that it operates and that individuals may report concerns or questions to the Title IX Coordinator and provide the location of the notice on the recipient's website.
- A recipient may not use or distribute a publication stating that the recipient treats applicants, students, or employees differently on the basis of sex, except as such treatment is permitted by Title IX or this part.

# Procedural Requirements

## Nondiscrimination Policy

- Each recipient must adopt, publish, and implement **a policy** stating that the recipient does not discriminate on the basis of sex and prohibits sex discrimination in any education program or activity that it operates, as required by Title IX and this part, including in admission (as applicable) and employment.



# Procedural Requirements

## Grievance Procedures

- A recipient must adopt, publish, and implement **grievance procedures** consistent with the requirements of § 106.45, and if applicable § 106.46, that provide for the prompt and equitable resolution of complaints by students, employees, or other individuals who are participating or attempting to participate in the recipient's education program or activity, or by the Title IX Coordinator, alleging any action that would be prohibited by Title IX or this part.

# Grievance Procedure

- A recipient's grievance procedures for the prompt and equitable resolution of complaints of sex discrimination must be in writing and include provisions that incorporate the requirements of this section.
- If a recipient adopts grievance procedures that apply to the resolution of some, but not all, complaints articulate consistent principles for how the recipient will determine which procedures apply.
- If a recipient adopts additional provisions as part of its grievance procedures for handling complaints of sex discrimination, including sex-based harassment, such additional provisions must apply equally to the parties.

# Grievance Procedure – Basic Requirements

- A recipient's grievance procedures must:
  - (1) Treat complainants and respondents equitably;
  - (2) Require that any person designated as a Title IX Coordinator, investigator, or decisionmaker not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. The decisionmaker may be the same person as the Title IX Coordinator or investigator;



# Grievance Procedure – Basic Requirements

- A recipient's grievance procedures must:
  - (3) Include a presumption that the respondent is not responsible for the alleged sex discrimination until a determination is made at the conclusion of the recipient's grievance procedures for complaints of sex discrimination;
  - (4) Establish reasonably prompt timeframes for the major stages of the grievance procedures, including a process that allows for the reasonable extension of timeframes on a case-by-case basis for good cause with notice to the parties that includes the reason for the delay. Major stages include, for example, evaluation (i.e., the recipient's decision whether to dismiss or investigate a complaint of sex discrimination); investigation; determination; and appeal, if any;

# Grievance Procedure – Basic Requirements

- A recipient's grievance procedures must:
  - (5) Require the recipient to take reasonable steps to protect the privacy of the parties and witnesses during the pendency of a recipient's grievance procedures, provided that the steps do not restrict the ability of the parties to obtain and present evidence, including by speaking to witnesses, subject to § 106.71; consult with their family members, confidential resources, or advisors; or otherwise prepare for or participate in the grievance procedures;
  - (6) Require an objective evaluation of all evidence that is relevant, as defined in § 106.2, and not otherwise impermissible under paragraph (b)(7) of this section—including both inculpatory and exculpatory evidence—and provide that credibility determinations must not be based on a person's status as a complainant, respondent, or witness;

# Grievance Procedure – Basic Requirements

- A recipient's grievance procedures must:
  - (7) Exclude the following types of evidence, and questions seeking that evidence, as impermissible (i.e., must not be accessed or considered, except by the recipient to determine whether an exception in paragraphs (i) through (iii) applies; must not be disclosed; and must not otherwise be used), regardless of whether they are relevant:
    - (i) Evidence that is protected under a privilege as recognized by Federal or State law or evidence provided to a confidential employee, unless the person to whom the privilege or confidentiality is owed has voluntarily waived the privilege or confidentiality;



# Grievance Procedure – Basic Requirements

- A recipient's grievance procedures must:
  - (ii) A party's or witness's records that are made or maintained by a physician, psychologist, or other recognized professional or paraprofessional in connection with the provision of treatment to the party or witness, unless the recipient obtains that party's or witness's voluntary, written consent for use in the recipient's grievance procedures; and
  - (iii) Evidence that relates to the complainant's sexual interests or prior sexual conduct, unless evidence about the complainant's prior sexual conduct is offered to prove that someone other than the respondent committed the alleged conduct or is evidence about specific incidents of the complainant's prior sexual conduct with the respondent that is offered to prove consent to the alleged sex-based harassment. The fact of prior consensual sexual conduct between the complainant and respondent does not by itself demonstrate or imply the complainant's consent to the alleged sex-based harassment or preclude a determination that sex-based harassment occurred;

# Grievance Procedure – Basic Requirements

- A recipient's grievance procedures must:
  - For complaints alleging sex-based harassment, the grievance procedures must:
    - (1) Describe the range of supportive measures available to complainants and respondents under § 106.44(g); and
    - (2) List, or describe the range of, the possible disciplinary sanctions that the recipient may impose and remedies that the recipient may provide following a determination that sex-based harassment occurred.



# Responsibilities of Title IX Coordinator

IV

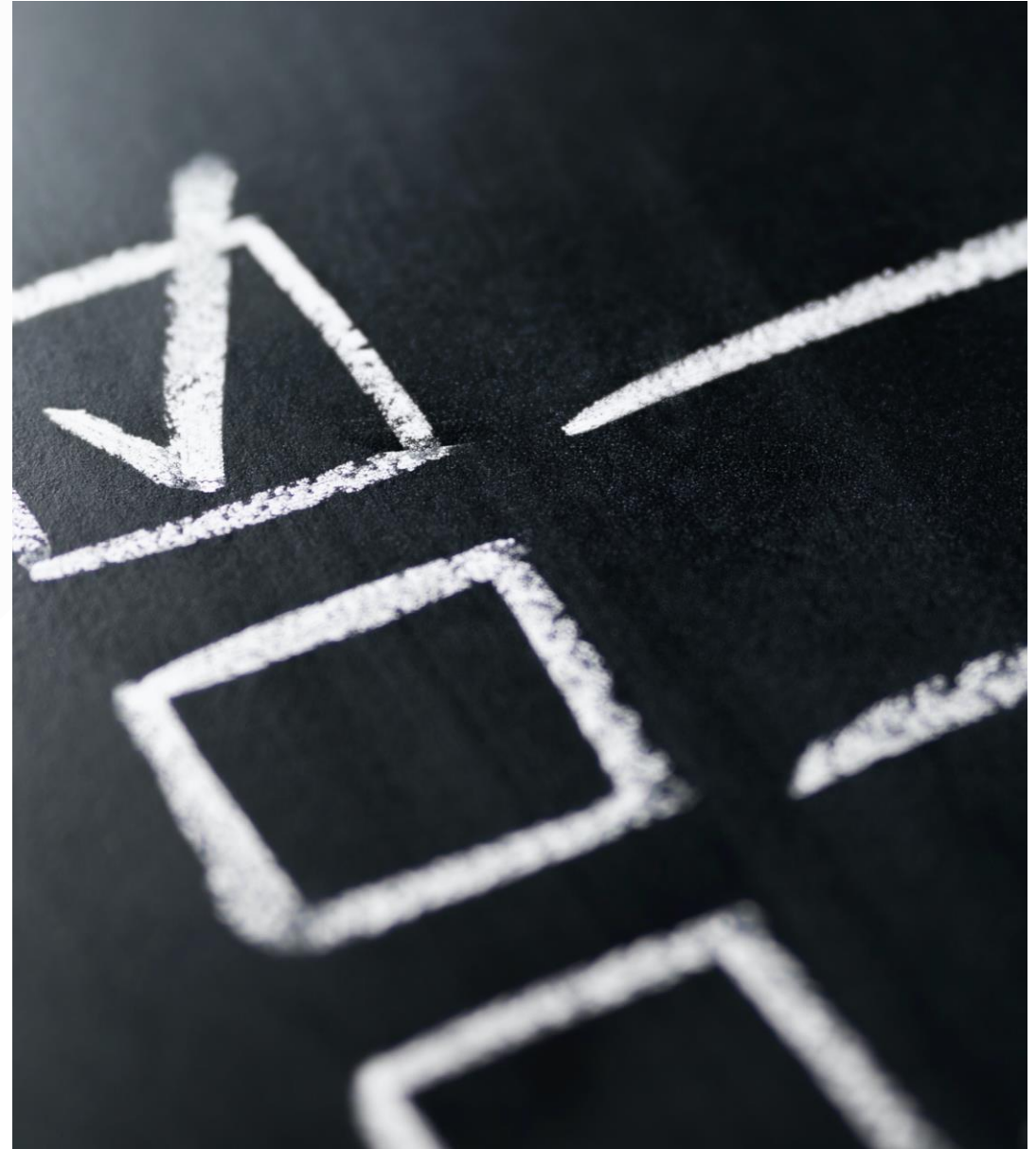
# Title IX Coordinator

- **Title IX Coordinator Requirements**
  - The Title IX Coordinator is responsible for coordinating the recipient's compliance with its obligations under Title IX and this part.
  - A recipient must require its Title IX Coordinator to:
    - **Monitor** the recipient's education program or activity **for barriers** to reporting information about conduct that reasonably may constitute sex discrimination under Title IX or this part; and
    - Take steps reasonably calculated to address such barriers.



# Obligation to Title IX Coordinators

- Institutions have specific obligations to ensure that the Title IX coordinator is visible to the institution's community.
- Provide coordinators with access to information regarding incidents of sex-based harassment and other relevant information.
- Ensure that Title IX coordinators receive appropriate training and have thorough knowledge in the areas over which they have responsibility.





# Title IX Coordinator Responsibilities

- Title IX coordinator responsibilities
- Coordinate institution's compliance with Title IX, including grievance procedures for resolving Title IX complaints.
- Coordinate the institution's response to all complaints involving sex discrimination.
- Remain knowledgeable and updated about Title IX and the institution's policies and procedures.
- Provide training and technical assistance on school policies related to sex discrimination.
- Assist with surveying the school climate and analyze the information obtained from any survey.
- Monitor participation in athletics and across academic fields to identify disproportionate enrollment based on sex.



# Sexual Harassment Complaint Form

## Obligation to Address Sex Discrimination



# Title IX Final Regulations

- **General Response Requirement for Institutions**
  - An institution with **knowledge** of conduct that reasonably may constitute **sex discrimination** in its **education program or activity** must **respond promptly and effectively** and must also comply with § 106.44 to address sex discrimination in its program or activity.

34 C.F.R. § 106.44(a)



# Title IX Final Regulations

- **In the Education Program or Activity**
  - “Except as provided in this subpart, this part applies to every recipient and to all sex discrimination occurring **under a recipient’s education program or activity in the United States.**”
  - “For purposes of this section, conduct that occurs under a recipient’s education program or activity includes but is not limited to conduct occurs in a building owned or controlled by a student organization that is officially recognized by a postsecondary institution, and **conduct that is subject to the recipient’s disciplinary authority.**”

34 C.F.R. § 106.11

# Title IX Final Regulations

- **In the Education Program or Activity**
  - “A recipient has an obligation to address a **sex-based hostile environment** under its education program or activity, even when **some** conduct alleged to be contributing to the hostile environment occurred outside the recipient’s education program or activity or outside of the United States.”

34 C.F.R. § 106.11





# Scope of the Conduct that Constitutes Sex Discrimination



# Title IX Final Regulations

- **Sex Discrimination**

- “Discrimination on the basis of sex includes discrimination on the basis of **sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.**”

34 C.F.R. § 106.10

- “Sex-based harassment prohibited by this part is a form of sex discrimination and means sexual harassment and other harassment on the basis of sex, including the bases described in § 106.10.”

34 C.F.R. § 106.2



# Title IX Regulations

- **Title IX Regulations: Education Programs or Activities**
  - “Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient that receives federal financial assistance.”

34 C.F.R. § 106.31

# Title IX Regulations

- **Title IX Regulations: Parental, Family, or Marital Status; Pregnancy or Related Conditions**
  - “A recipient must not adopt or implement any policy, practice, or procedure concerning a student’s current, potential, or past parental, family, or marital status that treats students differently on the basis of sex.”
  - “A recipient must not discriminate in its education program or activity against any student based on the student’s current, potential, or past pregnancy or related conditions.”

34 C.F.R. § 106.40

# Title IX Regulations

- **Title IX Regulations: Employment**
  - “No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which received federal financial assistance.”

34 C.F.R. § 106.51

# Title IX Final Regulations

- **Quid Pro Quo Harassment**
  - “An **employee, agent, or other person** authorized by the recipient to provide an aid, benefit, or service under the recipient’s education program or activity **explicitly or impliedly** conditioning the provision of an aid, benefit, or service on a person’s participation in **unwelcome sexual conduct**.”

34 C.F.R. § 106.2



# Title IX Final Regulations

- **Hostile Environment Harassment**
  - “Unwelcome sex-based conduct that, based on the **totality of the circumstances**, is **subjectively and objectively offensive** and is **so severe or pervasive** that it **limits or denies** a person’s ability to participate in or benefit from the recipient’s education program or activity (i.e., creates a hostile environment).”

34 C.F.R. § 106.2

# Title IX Final Regulations

- **Hostile Environment Harassment**

- “Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following:
  - The degree to which the conduct affected the complainant’s ability to access the recipient’s education program or activity;
  - The type, frequency, and duration of the conduct;
  - The parties’ ages, roles within the recipient’s education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct;
  - The location of the conduct and the context in which the conduct occurred; and
  - Other sex-based harassment in the institution’s education program or activity.

# Title IX Final Regulations

- **Specific Offenses: Sexual Assault**
  - “An offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.”

34 C.F.R. § 106.2

# Title IX Final Regulations

- **Specific Offenses: Dating Violence**
  - “Violence committed by a person:
    - Who is or has been in a social relationship of a romantic or intimate nature with the victim; and
    - Where the existence of such a relationship shall be determined based on a consideration of the following factors:
      - The length of the relationship;
      - The type of relationship; and
      - The frequency of interaction between the persons involved in the relationship.”

34 C.F.R. § 106.2



# Title IX Final Regulations

- **Specific Offenses: Domestic Violence**
  - “Felony or misdemeanor crimes committed by a person who:
    - Is a current or former spouse or intimate partner of the victim under the family or domestic violence laws of the jurisdiction of the recipient, or a person similarly situated to a spouse of the victim;
    - Is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner;
    - Shares a child in common with the victim; or
    - Commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction.”

34 C.F.R. § 106.2

# Title IX Final Regulations

- **Specific Offenses: Stalking**
  - “Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
    - Fear for the person’s safety or the safety of others, or
    - Suffer substantial emotional distress.”

34 C.F.R. § 106.2



# Applicable Notification and Information Requirements

# Title IX Final Regulations

- **Notification Requirements for All School Employees**
  - All school employees must “**notify** the Title IX Coordinator when the employee has **information** about conduct that reasonably may constitute **sex discrimination** under Title IX or this part [i.e., the Title IX regulations].”
  - This requirement does not apply to “confidential employees.”

34 C.F.R. § 106.44(c)(1)



# Title IX Final Regulations

- **Confidential Employee**
  - “An employee of a recipient whose communications are privileged or confidential under Federal or State law. The employee’s confidential status, for purposes of this part, is only with respect to information received while the employee is functioning within the scope of their duties to which privilege or confidentiality applies.”
  - “An employee of a recipient whom the recipient has designated as confidential under this part for the purpose of providing services to persons related to sex discrimination. If the employee also has a duty not associated with providing those services, the employee’s confidential status is only with respect to information received about sex discrimination in connection with providing those services.”

34 C.F.R. § 106.2

# Title IX Final Regulations

- **Confidential Employee**
  - “An employee of a postsecondary institution who is conducting an Institutional Review Board-approved human-subjects research study designed to gather information about sex discrimination – but the employee’s confidential status is only with respect to information received while conducting the study.”

34 C.F.R. § 106.2

# Title IX Final Regulations

- **Confidential Employee Requirements**

- “A recipient must notify all participants in the recipient’s education program or activity of how to contact its confidential employees, **if any**, [except any employee whose confidential status is only with respect to their conducting an IRB-approved human subjects research study].”

34 C.F.R. § 106.44(d)

# Title IX Final Regulations

- **Confidential Employee Requirements**
  - “A recipient must require a confidential employee to **explain** to any person who informs the confidential employee of conduct that reasonably may constitute sex discrimination under Title IX or this part:
    - The **employee’s status as confidential** for purposes of this part, including the circumstances in which the employee is **not** required to notify the Title IX Coordinator about conduct that reasonably may constitute sex discrimination
    - How to **contact the recipient’s Title IX Coordinator** and how to **make a complaint of sex discrimination**; and
    - That the Title IX Coordinator may be able to **offer and coordinate supportive measures**, as well as initiate an informal resolution process or an investigation under the grievance procedures.”

34 C.F.R. § 106.44(d)(2)



# Title IX Final Regulations

- **Notification Requirements Concerning Pregnant Students**
  - When a student (or a person who has a legal right to act on behalf of the student) informs any employee of the student's pregnancy or related conditions, the employee must (1) **promptly provide that person with the Title IX Coordinator's contact information** and (2) **inform that person** that the Title IX Coordinator can coordinate specific actions to prevent sex discrimination and ensure the student's equal access to the institution's education program or activity.
  - Such notification is not required if the employee reasonably believes that the Title IX Coordinator has been notified.

34 C.F.R. § 106.40(b)(2)

# Title IX Complaints

## Other Options

- File a complaint with OCR.
- Send a letter to OCR enforcement officer.
- Not required to use the school's grievance process before filing a complaint.
- File a lawsuit in court claiming a violation; there is no need to file with OCR before filing a suit in court.



# Title IX Complaints

## Policies need to consider

- Interaction when claims also involve other protected classes (race, disability, etc.).
- Interaction with other state laws.
- Interaction with overlapping federal laws (Title VII).
- Interaction with the student code of conduct.





# Conclusion

V





## Conclusion

- Need to recognize roles and responsibilities.
- Need to monitor activity on campus in all areas.
- Need to maintain records in all areas.

# What was your key takeaway?

## Please let us know in the Q&A.

We will use your response with your first name and last initial on our website so others can benefit!





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**Attorney**

# Questions?



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