



## It's time to assess your “education program or activity” subject to the new Title IX rules

By Steven M. Richard

This spring in response to the COVID-19 pandemic, colleges and universities quickly pivoted to remote instruction and suspended on-campus activities. As the new academic year approaches, institutions face challenging strategic choices concerning their educational and operational plans for the fall 2020 semester and beyond—when and how to return their community members to their campuses, the extent to which virtual student instruction and reliance upon remote workforces will continue, or the implementation of new hybrid models (with scheduling differing from the traditional academic calendar). Through consultation with key, cross-functional stakeholders, colleges and universities must factor these decisions into their ongoing review of their Title IX policies as they ensure their compliance with the Department of Education’s rules on sexual harassment effective August 14, 2020. Particularly, the Title IX jurisdictional analysis does not create or apply a geographic test, does not draw a line between “on campus” and “off campus,” and does not create a distinction between sexual harassment occurring in person versus online.

### “Education program or activity”

Title IX provides that: “[n]o 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[.]” 20 U.S.C. § 1681(a) (emphasis added). At § 1687 of Title IX and 34 CFR 106.2(h) of the Department’s existing Title IX regulations, the term “program or activity” means “all of the operations” of a postsecondary institution or local education agency. This regulatory scope is very broad in its application and focus, including employment matters where it can impact collective bargaining with faculty and other non-faculty unionized employees and employees generally (including at-will employment).<sup>1</sup>

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<sup>1</sup> Subpart E of the current regulations prohibits discrimination on the basis of sex in employment in education programs or activities. See 34 CFR § 106.51(a) (“No person shall, on the basis of sex, be excluded from participation in, denied the benefits of, or be subjected to discrimination in employment . . .”). See also *New Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982) (upholding Subpart E).

Expanding further, newly added § 106.44(a) states: “For purposes of this section, §§ 106.30 and 106.45, ‘education program or activity’ includes *locations, events or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.*” (emphasis added).<sup>2</sup> The Department recognizes that “recipients are obligated to think through the scope of each recipient’s own education program or activity in light of the statutory and regulatory definitions of ‘program or activity’ (20 U.S.C. 1687 and 34 CFR 106.2(h)) and [§ 106.44(a)] . . .” See 85 Fed. Reg. 30198 (May 19, 2020).

The “substantial control” test adopts the United States Supreme Court’s “program or activity” analysis in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), which addressed the conditions under which a federal funding recipient may be held liable for peer-on-peer sexual harassment in the recipient’s program or activity. The Department states, that while factors “such as whether the recipient funded, promoted, or sponsored the event or circumstance where the alleged harassment occurred . . . may be helpful or useful for recipients to consider . . . to determine the scope of a recipient’s program or activity, no single factor is determinative.” *Id.* at 30197.

## **Off-campus conduct**

Under Title IX’s existing statutory and regulatory definition of “program or activity” and the language added under § 106.44(a) of the new rules, a recipient’s Title IX obligations will clearly apply to all incidents of “sexual harassment” of which the recipient has “actual knowledge” (as both quoted terms are defined in § 106.30) occurring on its campus. Responding to expressed concerns about ambiguities over what constitutes an “education program or activity” pertaining to off-campus conduct, the Department has confirmed that a recipient’s Title IX obligations extend to off-campus sexual harassment incidents if any of three conditions are met:

- the off-campus incident occurs as part of the recipient’s “operations” pursuant to 20 U.S.C. § 1687 and 34 CFR 106.2(h);
- the recipient exercised substantial control over the respondent and the context of the alleged sexual harassment that occurred off-campus; or
- the incident of sexual harassment occurs at an off-campus building owned or controlled by a student organization recognized by a postsecondary institution.

*Id.* at 30196-97. With remote education and employee staffing likely occurring for the foreseeable future in varying degrees, a diligent analysis of each of these three conditions and the likely scenarios envisioned under them is paramount in Title IX compliance implementation and policy revisions.

## **Online sexual harassment**

The Department indicates that “the statutory and regulatory definitions of ‘education program or activity’ encompass ‘all of the operations of’ such recipients, and such ‘operations’ may certainly include computer and internet networks, digital platforms, and computer hardware or software

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<sup>2</sup> Section 106.30 provides definitions to terms including “actual knowledge,” “formal complaint,” “sexual harassment,” “sexual assault,” and “supportive measures.” Section 106.45 states the grievance process to investigate and adjudicate a formal complaint of sexual harassment.

owned or operated by or used in the operations of the recipient.” *Id.* at 30202. The new rules address “electronic, digital, or online harassment by not making sexually harassing conduct contingent on the method by which the conduct is perpetrated.” *Id.* Title IX obligations apply to sexual harassment perpetrated through use of cell phones or the internet if the sexual harassment occurred in an education program or activity. *Id.*<sup>3</sup>

Furthermore, the rules specify that an education program or activity includes online conduct where the recipient exercised substantial control over both the respondent and the context in which harassment occurred. *Id.* This fact-specific analysis will present challenging determinations, especially with students or employees predominantly studying, working, and interacting online for several months. On campus as well, questions will arise over control and context, as the Department provides as an example: a student using a personal device to perpetuate online sexual harassment during class time may constitute a circumstance over which a school exercises substantial control. *Id.*

### **Buildings owned or controlled by recognized student organizations**

An education program or activity includes on-campus and off-campus buildings *owned and controlled* by a student organization officially recognized by a postsecondary institution, which includes fraternities, sororities, or sports team houses. Although postsecondary institutions may not always control what occurs in a building owned or controlled by a recognized student organization, such student organizations and events are an integral part of campus and student life and fall within Title IX under a bright-line requirement imposed under § 106.44(a). In its official recognition process, an institution should require a student organization that owns or controls a building to acknowledge and agree expressly to abide by the Title IX policy.

Further, the Department indicates:

Where a postsecondary institution has officially recognized a student organization, and sexual harassment occurs in an off campus location *not* owned or controlled by the student organization, yet involving members of the officially recognized student organization, the recipient’s Title IX obligations will depend on whether the recipient exercised substantial control over the respondent and the context of the harassment, or whether the circumstances may otherwise be determined to have been a part of “the operations of” the recipient.

*Id.* at 30197.

### **Comparison with the Clery Act geography**

Clery Act geography is not co-extensive with the scope of a recipient’s education program or activity under Title IX. *Id.* Section 106.44(a)’s reference to “a building owned or controlled by a student organization that is officially recognized by a postsecondary institution” is not the same as,

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<sup>3</sup> Issues of online harassment have also been the subject of Title IX lawsuits. As a recent high-profile example, the Fourth Circuit held in a split 2–1 ruling that students who sued a university for failing to protect them from anonymous online harassment were entitled to pursue their Title IX claims. The majority and dissenting opinions differed on the *Davis*’ questions of context and control. *Feminist Majority Foundation v. Hurley*, 911 F.3d 674 (4th Cir. 2018).

and should not be confused with, the Clery Act's use of the term 'noncampus building or property,' even though that phrase is defined under the Clery Act in part by reference to student organizations officially recognized by an institution." *Id.* Colleges and universities must identify and evaluate the extent to which its Title IX and Clery Act obligations may differ in geographic scope. The Title IX and Clery Act regulations overlap while also imposing different requirements in some circumstances; institutions must ensure their compliance with both sets of requirements.

## **Study abroad programs**

At § 1681(a), Title IX states that "[n]o 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 [.]” Consistent with the statutory language, the Title IX rules do not have extraterritorial application with respect to study abroad programs. *Id.* at 30205-06. Nothing in the Title IX rules prevents an institution from initiating student conduct proceedings or offering supportive measures to address sexual misconduct against a person outside of the United States. *Id.* at 30206.

## **Conduct that continues into an education program or activity**

Situations will arise where reported allegations about conduct that initiated outside of an education program or activity and continued with alleged subsequent and related conduct that occurred within a Title IX education program or activity. *Id.* at 30198. For example, if a student is sexually assaulted or harassed outside of an education program or activity, but subsequently suffers Title IX sexual harassment in an education program or activity, the Title IX rules (particularly its grievance process relating to a formal complaint) apply to the latter act of sexual harassment, but the school may choose to address the prior assault or harassment through its code of conduct. Reported allegations could increasingly present such scenarios, especially with students and employees having been away from campus due to the pandemic and returning this fall or thereafter. Colleges and universities should determine how to most efficiently resolve such streams of alleged related conduct, i.e., whether to consolidate the Title IX and student conduct process and, if not, how to manage them concurrently with available resources and community needs. Separate proceedings may be theoretically possible, but not functionally practicable.

## **Takeaways**

With the August 14<sup>th</sup> effective date of the new Title IX rules less than two months away and as colleges and universities face unprecedented challenges resulting from and moving forward during the pandemic, institutional strategic choices must be integrated into its Title IX compliance process. How institutions redefine and implement their mission going forward will directly impact what falls within the scope of a Title IX “education program or activity.” Ongoing Title IX policy revisions and planning must involve strategic decision-makers beyond the Title IX office to recognize precisely where Title IX obligations will arise on or off campus, or in person or online.

Title IX coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must receive training on the scope of the institution's education program or activity. § 106.45(b)(1)(iii). The Title IX “education program or activity” jurisdictional analysis will arise at key decision points during an institution's response to reported allegations. Upon the filing of a formal complaint, the complainant must be participating in or attempting to participate in the education program or activity of the institution with which the formal complaint is filed. § 106.30 (definition of “formal complaint”). What constitutes an “attempt” to participate will pose fact-

specific considerations depending upon the nature of the specific program or activity at issue. Also, an institution must dismiss a formal complaint if the alleged conduct did not occur in its education program or activity, but such dismissal does not preclude action under another code of conduct provision. § 106.45(b)(3)(i). Going forward, an institution's Title IX process will require a holistic understanding of what constitutes an education program or activity subject to the new regulatory requirements.

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