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Title IX and HB 3415:

What Community Colleges Need To Do Now

Questions and Follow Up

- You can send questions in throughout the webinar using the question box in the GoToWebinar app.

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Overview

- Comparison of new Title IX rules with Oregon's new sexual harassment laws.
- Required “to-dos” before the 2020-21 school year.
- FAQs for implementation.

What must we do before August 14?

Short Answer:

- ✓ Revise sexual harassment policies
- ✓ Engage in interim bargaining re: policy changes
- ✓ Identify key employees to implement Title IX
- ✓ Schedule (if cannot implement) training for key employees
- ✓ Work with student body group on HB 3415 definitions

New Title IX Regulations

- New Title IX regulations take effect August 14, 2020.
- OCR issued a 2,007 page “Preamble,” which addresses many of the 124,000+ comments received on the proposed regulations.
- Regulations impose complex, resource-heavy requirements for responding to Title IX issues.

Oregon Law- HB 3415 (2019)

- In 2019, the Oregon Legislature passed HB 3415 (now ORS 350.253), which established requirements for sexual harassment policies at all Oregon colleges and universities.
- The new policy must be in effect at the start of the 2020-21 academic year.

When do **Title IX** Regulations Apply?

Institutions must follow Title IX procedures for alleged conduct that:

- meets Title IX’s definition of sexual harassment;
- occurred in an education program or activity of the recipient;
- against a person in the United States; and
- of which the recipient has “actual knowledge.”

Schools Must Dismiss “**Title IX**” Complaints When **Title IX** Does Not Apply.

If the conduct would not fall within Title IX’s purview “even if proved,” then the “**recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; such a dismissal does not preclude action under another provision of the recipient’s code of conduct.**” 34 CFR 106.45(b)(3)(i)

Can/Should Colleges Still Address the Complaint?

- The regs recognize that state laws may address “misconduct that negatively impacts students’ equal educational access.”
- **“Nothing in these final regulations precludes a State, or an individual recipient, from continuing to address such matters while also complying with these final regulations.”**
- **“In the event of an actual conflict between State or local law and the provisions in §§ 106.30, 106.44, and 106.45, which address sexual harassment, the latter [federal law] would have preemptive effect.”** Preamble at 1568; *see also* 34 CFR 106.6(h).

So How Do Colleges Navigate This?

- Conduct that clearly falls within the Title IX definition must be addressed under Title IX, including the resource-heavy (and very confusing) grievance process.
- Conduct that falls outside the Title IX definition can be addressed under an institution's code of conduct (and state law) potentially without the required process of the Title IX.

Does **Title IX** Govern the Complaint?

- Is it sexual harassment as defined by Title IX?
- Does institution have a duty to act?
- Does the College have jurisdiction?

Title IX “Sexual Harassment” Includes . . .

- Quid pro quo harassment.
- Unwelcome conduct determined by a reasonable person to be **so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity.**
- Sexual assault, dating violence, domestic violence, or stalking, as defined in federal laws.

34 CFR 106.30(a).

Oregon “Sexual Harassment” Includes . . .

- Unwelcome conduct of a sexual nature.
- Includes verbal, nonverbal or physical conduct of a sexual nature where **such conduct is sufficiently severe or pervasive** that it has the effect, **intended or unintended**, of **unreasonably** interfering with an individual’s work or academic performance **or** it has created an intimidating, hostile or offensive environment **and** **would have such an effect on a reasonable person.”**

ORS 350.253(2)(a).

Title IX

- so severe, pervasive, and objectively offensive
- that it effectively denies a person **equal access to the recipient's education program or activity**
- As determined by **reasonable person**

Oregon Law

- severe or pervasive
- has the effect . . . of **unreasonably interfering** with an individual's work or academic performance or creates an **intimidating, offensive or hostile environment**
- And would have this effect on a **reasonable person**

Title IX: Institution Must Act When . . .

- Institution must "respond promptly in a manner that is not deliberately indifferent," when the institution has "actual knowledge" of sexual harassment. 34 CFR 106.44(a).
- "Actual knowledge" means "notice to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient." 34 CFR 106.30(a).

Oregon: Institution Must Act When . . .

Institution is required to conduct an initial inquiry, or to make contact with named parties, whenever a **designated responsible employee has actual knowledge, or in the exercise of reasonable care should know**, that possible sexual harassment, sexual assault, domestic violence, dating violence or stalking has occurred.

ORS 350.253(2)(c).

Requirement to Act: Key Differences

Title IX

- “Actual knowledge”
- By Title IX coordinator
- By “any official who has authority to institute corrective measures.”

Oregon Law

- “Actual knowledge” OR “in the exercise of reasonable care should know”
- By “designated responsible employee” (includes Title IX coordinator)

Title IX: Jurisdiction

- At the time of filing a formal complaint, a complainant **must be participating in or attempting to participate in the education program or activity** of the recipient with which the formal complaint is filed. 34 CFR 106.30(a).
- Alleged conduct must occur **against a person in the United States**. 34 CFR 106.44(a).

Title IX: Jurisdiction (cont.)

“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. 34 CFR 106.44(a).

Oregon Law: Jurisdiction

The institution must “analyze and may have an obligation to respond to any complaint received by the institution, **regardless of whether the incident occurred on the campus of the institution or elsewhere *****” ORS 350.253(2)(d).

Jurisdiction: Key Differences

Title IX

- Against a person in the United States.
- Locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs.
- Includes student orgs.

Oregon Law

- Application to students and staff is conduct-focused and not geographically limited.
- Also applies to third parties, without geographic restrictions.

What Law Applies?

- Evaluate initially if conduct falls under Title IX.
- Much more clear for assault or quid pro quo harassment.
- Much less clear for hostile environment.
- Checklist may help Title IX coordinator in this determination.
- May have to switch mid-process; continue to evaluate as case develops.



Action Item #1: Revise sexual harassment policies

Options for Policy Compliance

- Adopt Title IX process for all sexual misconduct allegations, regardless of whether allegations meet Title IX requirements.
- Adopt Title IX process for all sexual misconduct allegations, except that non-Title IX allegations will not receive a live hearing
- Begin with Title IX process and set procedural points to reevaluate and switch tracks.
- Evaluate continually to determine if applying appropriate law and process.

Policy Options

- ***OCCA Board Policy and Procedure Program***
 - A Comprehensive Collection of Board Policies & Administrative Procedures to Facilitate Compliance with Oregon and Federal Statutes/Regulations & NWCCU Standards
 - Reflect community college governance model
 - Templates provide customizable sample language that can be revised to reflect local practice
 - Annual legal updates ensure policies reflect current law and accreditation requirements

Policy Options

OCCA Special Summer Update to Address Title IX Requirements

- Expect a mid-July release of sample policies and procedures to address new Title IX Rules
- Title IX-specific as stand-alone
- Existing harassment policies and procedures will retain Oregon-specific definitions

What must be revised in policy?

- Title IX and Oregon law definitions of sexual harassment.
- Jurisdiction
- Formal complaint versus report
- Description of grievance process
- Timelines
- Evidentiary Standard
- Appeal of determination

What are the **Title IX** Policy Requirements?

- Updated definition
- Description of grievance process, including “reasonably prompt” timeframes, presumption of innocence, objective investigation
- List of supportive measures
- Range of sanctions
- Evidentiary standard used
- Appeal process

What are the **Oregon law** Policy Requirements?

- Must include ORS 350.253 definition of sexual harassment
- Procedure to address sexual harassment.
- When required to conduct an initial inquiry, or to make contact with named parties.
- Jurisdictional statement.

What are the **Oregon law** Policy Requirements?

- Must use plain language and be easy to read.
- Must be provided to students when:
 - Sexual harassment/covered conduct is reported.
 - During student orientation
 - On website



Action Item #2: Engage in Interim Bargaining

Collective Bargaining Impact

- Standard of proof
 - Clear & Convincing versus Preponderance of Evidence
- Live hearing requirement
- Other contract terms that conflict with Title IX or Oregon law

Action Item #3:

**Work with ASB group on HB 3415
definitions**

Oregon Law: Definitions

- College must define the following terms in consultation with recognized student government:
 - “Anti-oppression”
 - “culturally responsive”
 - “gender-responsive” and
 - “trauma-informed”

Action Item #4: **Assign Title IX Responsibilities**

Identify College Personnel

- Can no longer have “single investigator model,” of one official who investigates, adjudicates and issues disciplinary sanctions.
- New Title IX regulations requires involvement of 3 different employees:
 - Title IX coordinator: receives reports
 - Investigator: gathers information and conducts interviews
 - Decision maker: determines sanctions and remedies.

Action Item #5: Implement or Schedule Training

What are **Title IX** training requirements?

- Title IX coordinators and others responsible for implementation:
 - Definition of sexual harassment
 - Scope of the application of Title IX to college programs and activities
 - How to conduct a formal or informal process
 - How to serve “impartially,” including avoidance of “prejudgment of the facts at issue, conflicts of interest, and bias.”

What are Oregon law training requirements?

- Annual training for:
 - Title IX coordinators
 - Hearing officers
 - Process advisors
 - Institution investigators
 - Third-party contracted investigators
 - Campus security officers

What are Oregon law training requirements?

The training must cover:

- Policy definitions
- The prevalence of sexual harassment, sexual assault, domestic violence, dating violence and stalking both overall and, to the extent relevant data exists, within the educational and employment contexts;
- Trauma-informed best practices for how to serve reporting and responding students, including utilizing trauma-informed principles of support or student-centered frameworks;

What are **Oregon law** training requirements?

- Best practices for addressing bias and increasing accessibility for students through the use of an anti-oppression framework; and
- For investigators, how to conduct effective interviews, including best practices for interviewing sexual assault survivors.

What are **Oregon law** training requirements?

- Principles related to providing trauma-informed and culturally responsive processes, procedures and victim services
- The training materials must be gender-responsive, but not reliant on gender stereotypes; and
- The training materials must recognize and account for the unique needs of individuals who identify as lesbian, gay, bisexual, transgender, gender nonconforming or gender nonbinary.

Training Documentation

- Maintain records and materials of **Title IX** training received by employees for seven years.
 - Required to post on website, but what about copyright?

How Do We Actually Implement This?

I received a *report* of sexual harassment, now what?

- Meet with potential complainant.
- Describe complaint process.
- Complete intake form.
- Offer supports available on and off campus.

Who Can File a Formal Complaint?

Title IX

- Only complainant.
- Institution can proceed in limited circumstances:
 - Pattern of conduct by perpetrator in position of authority.
 - Employee sexual misconduct.
 - Multiple reports against same respondent.

Oregon law

- Complainant or third party.

If formal complaint is filed:

- Determine if/what interim measures are appropriate for complainant and respondent.
- Determine if conduct alleges rises to the level of a Title IX violation– if so, proceed under the Title IX grievance procedure.
- Determine if conduct alleges rises to a level of a general sexual harassment complaint- if so, proceed under the College’s sexual harassment policy.

Initial Response

Title IX

- Implement interim measures, but treat complainant and respondent equitably.
- Interim measures cannot be disciplinary or punitive prior to utilizing grievance process.

Oregon law

- Implement interim measures.

Title IX Interim Measures

- Schedule change
- Increased supervision
- Counseling
- Extension of time for assignments
- Modification of schedule
- Campus escort
- No contact order
- Paid administrative leave if employee is respondent
- NO complete removal from campus unless immediate threat to physical (not mental) health.

Send Notice to Parties (Title IX)

- Must provide both parties with written notice of:
 - Grievance process
 - Allegations (sufficiently detailed)
 - Statement that respondent is presumed not responsible until conclusion of grievance process
 - Inform parties can have advisor of choice and review evidence
 - Inform re: student code of conduct that prohibits making false statements

Conduct Investigation (Title IX)

- Colleges must provide evidence related to allegations to parties and advisors at least 10 days prior to requiring a response or holding live hearing.
- Parties will not be prohibited from speaking about the allegations.

Title IX Live Hearing Requirement

- Must allow cross-examination of the complaining and responding parties, as well as any witnesses, during a live hearing led by College officials.
- Cross-examination conducted by advisors for parties, but not the parties themselves.
- College must provide advisor upon request at College's expense.

Determine Appropriate Corrective Action (Title IX)

- Written determination of responsibility must include:
 - Identification of allegations
 - Description of procedural steps
 - Findings of fact
 - Conclusions regarding application of code of conduct
 - Disciplinary sanctions
 - Appeal option

Recordkeeping (Title IX)

- Must maintain records for 7 years:
 - Investigation Records
 - Disciplinary Sanctions
 - Remedies
 - Appeals
 - Records of any Action Taken

Is This Really Going to Happen?

- Department of Education firm on the August 14 implementation date
- ACLU & State Attorney General legal challenges, but standard for national injunction is high
- Discussions of congressional action, but other priorities at the moment
- Biden indicated intends to overturn regs, if...

Next Steps

- Review and update policies.
- Carefully review collective bargaining agreements (interim bargaining?).
- Develop training that meets Title IX and Oregon law requirements.
- Communicate with students, staff, and faculty as required under Title IX and Oregon law.

Other Pitfalls

- First Amendment rights
- Due Process concerns (it's not just statutory)
- Increased focus on employees; intersection between Title VII and Title IX
- Strange paradoxes: will respondents argue allegations are worse to get increased procedures?

Questions?

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