



EMERZIAN SHANKAR
LEGAL INC.

Northern California Title IX Administrators Networking Meeting

**New Title IX Regulation
Case Studies & Q/A**

**August 31, 2020
1:00 PM – 2:30 PM**

Presented by:

**Elizabeth Trayner, Ed.D., Title IX Coordinator – University of the Pacific (She/Her/Hers)
Ashley Emerzian, Esq., Title IX & Education Law Attorney – ES Legal Inc. (She/Her/Hers)
Inna Shankar, Esq. Title IX & Education Law Attorney – ES Legal Inc. (She/Her/Hers)**

Presented by:

WELCOME

AGENDA

- 1 — RECENT COURT CASES
- 2 — HYPOTHETICAL CASE STUDIES
- 3 — Q/A & OPEN DISCUSSION

See Appendix – Excerpts of Regulation Language for Reference

RECENT CASES

New York et al. v. US Dept. of Ed., SDNY and
Commonwealth of Pennsylvania et al. v. DeVos et al., DDC
August 9 and 12, 2020

- Preliminary injunction to stop regulations denied in both cases.
- Not likely to prevail on the merits of the claim that Administrative Procedures Act was violated.
- No likelihood of immediate irreparable harm because of the compliance cost.

Bostock – Now Applies to Title IX

Bostock v. Clayton County

SCOTUS, June 2020

An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not otherwise have questioned in members of a different sex... exactly what Title VII forbids.

- ✓ Employers intent to harm doesn't matter.
- ✓ The name of or how the discriminatory practice is described doesn't matter.
- ✓ The employer's underlying "good" reason doesn't matter.
- ✓ Religious Orgs: See *Our Lady of Guadalupe*

Adams v. School Board of St. Johns County, 11th Cir. August 2020

Drew, a boy who was born a biological female, was prohibited from using the boy's restroom at his high school after a complaint from two girls who saw him go into the restroom. Held: Applying Bostock, the school's restroom policy as applied to Drew singled him out because of transgender status which violates Title IX and the Equal Protection Clause of the 14th Amendment.

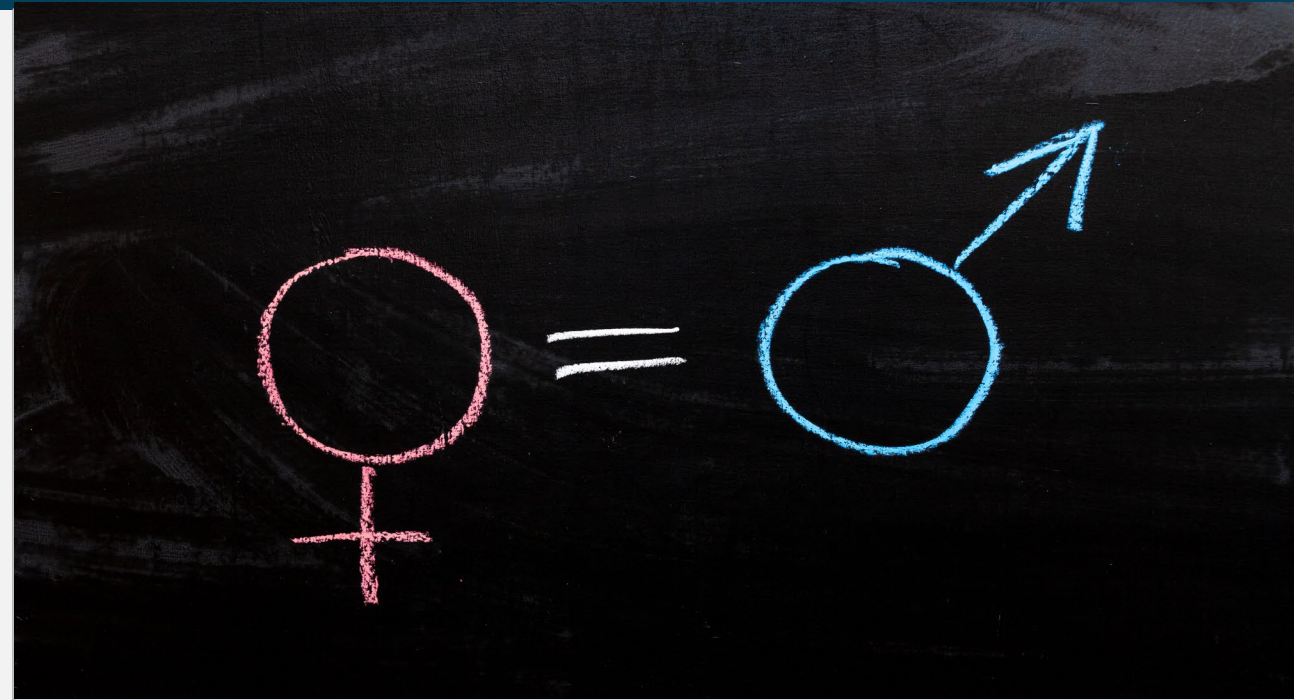


Schwake v. Arizona Board of Regents

Ninth Circuit, July 29, 1010

Key allegations:

- School was “under pressure” from DOE.
- Pattern of finding male respondents guilty without evidence; failure to pursue complaints against females.
- Procedural Irregularities: No written notice to respondent, failed to consider exculpatory evidence, did not disclose evidence against him, taking back an appeal right.
- Faculty member comments about the case during class.
- Discouraged respondent from filing a cross-complaint.



Held: For a respondent to bring a claim of gender bias in the handling of a case of sexual misconduct under Title IX the respondent-plaintiff must allege only a “plausible inference” that the University discriminated on the basis of sex. The respondent-plaintiff need not allege it was the only inference or event the most plausible inference.

“Program or Activity” Case to Watch

Doe v. University of Kentucky
6th Cir. August 19, 2020

- Deliberate indifference claim brought by a plaintiff who was not a student at UK. Doe was a student at a community college in Lexington. She lived in UK student housing and participated in student activities at UK.
- Three hearings found the respondent responsible for sexual misconduct. All overturned on appeal by UK for procedural deficiency. The fourth hearing found respondent not responsible.
- Was Doe participating in the ed program at UK when she was not a UK student? 6th Circuit said that’s a disputed fact that must be litigated because she was paying UK directly for housing and there was a close academic relationship between UK and the community college. Remanded for further proceedings.

Refresher: Doe v. Allee

30 Cal.Appl.5th 1036, January 2019

- ❑ University of Southern California case – Invalidated the single investigator model.
- ❑ When a student accused of sexual misconduct faces severe disciplinary sanctions and the credibility of the parties or witnesses is central to the adjudication of the allegation, fundamental fairness requires, at a minimum, that the university provide a mechanism by which the accused may cross-examine those witnesses, directly or indirectly, at a hearing before a neutral adjudicator who independently finds facts and makes credibility assessments.

Preliminary Checklist Considerations

- Has a formal complaint been filed?
- Does the conduct alleged meet the definition of Title IX sexual harassment?
- Did the conduct occur in the US?
- Is the alleged victim (i.e., Complainant) a student or employee?
 - If not, is the person attempting to participate in an educational program or activity in some other way?
- Did the conduct occur in the education program or activity?
- Is the Respondent a student or employee?
 - If not, what is the nature of the relationship of the respondent to the University?
- Where did the incident occur?
 - On Campus.
 - Off Campus in a place owned or controlled by the University or an officially recognized student org.
 - Off Campus without control but with in-program effect.
 - Off campus utilizing the University's technology platforms.
- Can the University gather evidence sufficient to reach a determination on the allegations?

Case Study 1



Chris, a Basketball Player, is invited over to Kelly's house after a game. Kelly lives off campus in the "Water Polo House." Kelly invites Chris to come upstairs to see the Master Bedroom. Kelly starts making moves on Chris. Chris thinks Kelly is cute and is excited that Kelly seems to be interested so they engage in some kissing which leads to them laying down on the bed.

At that point, Chris becomes uncomfortable and says that they should slow down a bit. Kelly gets offended and starts to pout. Chris feels bad but still doesn't want to go any farther. Kelly starts kissing Chris again and then starts undressing. Kelly then starts taking Chris' clothes off as well and performs oral sex on Chris. Chris asks Kelly to stop a couple of times, but Kelly continues.

Finally, Chris stands up and yells "Stop!" Two of the other Water Polo Players walked by the door to Master Bedroom about that time. Chris quickly gets dressed and runs out of the room crying.

The Water Polo House

The Water Polo House

- ❑ Is this T9 sexual harassment as defined under the new regs?
- ❑ Did this occur in a University program or activity?
- ❑ What is the T9 Coordinator's first step?
- ❑ What if one of the water polo players who passed by the Master Bedroom submits an online complaint noting that this isn't the first time Kelly has engaged in sexual activity with someone who seemed upset but without giving any more details? How should the T9 Coordinator handle that aspect of the report?

Case Study 2



Jace is a graduate teaching assistant and J.D. candidate at University. Jace supervises the Fall 2020 virtual discussion section for an undergraduate pre-law internship course. Jace's student, Sam, is completing her internship at CPS, a major law firm in that area with close ties to the University's law school, including many partners who are donors to University.

Mid-way through the semester, Sam stops attending the discussion section and Jace reaches out with a reminder that attendance is graded. Sam tells Jace that Sam is withdrawing from the course because the internship at CPS wasn't working out. Sam explains to Jace that Lenny, one of the partners at CPS, began flirting with Sam a few weeks in and last week asked Sam to come back to Lenny's place for a "private meeting," joking Sam might get a negative evaluation if Sam wasn't up for it. Sam also tells Jace that Lenny has a reputation at CPS, and that other pre-law students told Sam to avoid Lenny.

Jace immediately reports the situation to the Dean of the Law School, hoping to prevent Sam from having to withdraw from the course.

The Law Internship



Sam's withdrawal paperwork is processed. Over winter break Sam contacts the Title IX office to report Lenny. Sam also alleges that Jace could've helped her stay in the course but didn't. Sam asks for a refund of her fees for the course. Sam is clear – she wants to file a formal complaint and wants to go all the way to hearing under the University's new Sexual Misconduct policy. Sam indicated that especially in the law profession, this kind of thing shouldn't be happening. Sam's family is well off. Sam's mom works for CPS's competitor firm and Sam mentions in the report that getting a lawyer to help make sure a hearing happens won't be a problem if it comes to that.

Jace catches wind of what's going on from a friend, a first-year associate at CPS. Jace files a report with the Title IX office against the Dean for not helping Sam. Jace also files a complaint against Lenny, alleging that when Jace was an undergraduate at University 4 years ago Lenny was a faculty member for one of her pre-law courses and withheld extra credit after Jace refused to meet at Lenny's house for "help" with Jace's project.

Jace's report mentions the University has known about Lenny's reputation for years. She signs it and adds #TimesUp, then posts her written complaint on her personal Facebook account. Jace also sends her complaint to the University's student newspaper.

The Law Internship

The Law Internship

- Was the Dean an “official with authority”? How would we know?
- Is T9 sexual harassment alleged? If so, who are the parties?
- Are other forms of a Title IX violation alleged? If so, who are the parties?
- Does the University have to dismiss Sam's formal complaint(s)?
- What if Jace asks whether her report qualifies as a formal complaint?

The Law Internship

- Are all respondents subject to the Title IX grievance procedures set forth in the new regulations?
- What if Lenny is also an adjunct professor? Would that change your responses?
- Can the Title IX coordinator stop the newspaper from printing Jace's complaint?
- What if the law firm initiates an internal investigation?
- How could this situation have been prevented?

Case Study 3



The Student Government Meeting

Alex is the President of the Student Government Association. Alex has been dating Drew since they were in high school. Drew is a class representative on Student Government. Alex is very possessive and controlling of Drew and tracks where Drew goes via an app that was installed by Alex on Drew's cell phone. Alex notices that Drew has been spending a lot of time in a particular residence hall on campus and confronts Drew right before a student government meeting. Drew is confused by how Alex knows where Drew was, but states that Taylor, a classmate, has been tutoring Drew in Math.

Alex starts yelling and saying "I don't believe you!" Drew tries to calm Alex down but Alex pushes Drew and Drew almost falls to the ground. This isn't the first time that they've had a visible altercation. Last year, the Title IX Office received a report from a faculty member because Drew showed up to class with bruises. The Title IX Office reached out to Drew at that time, but Drew did not want anything done. Drew told the Title IX Coordinator that Alex didn't mean it and had apologized.

Several members of the Student Government saw the most recent incident and submitted an online report to the Title IX Office.

The Student Government Meeting

- Is T9 sexual harassment alleged? Does the Title IX grievance procedures apply?
- What if all the facts were the same except the meeting wasn't for student government but was for a self-organized student group that had not filed paperwork to be recognized by the University?
- What if Drew decides to withdraw from school to focus on being there more for Alex?
- Are Drew's medical records admissible at hearing?

Case Study 4



Tom and Rob are classmates in summer session of Calculus 1 at University. Rob would always save a seat for Tom during class and they began a friendship. In late July 2020, they went to grab lunch after class and Tom pulled out his wallet. Rob saw Tom's license picture and noticed it didn't look like Tom at all. Rob asks Tom, "Aren't you scared you'll get caught?" Confused, Tom asks Rob what that meant. Rob said, "Well identity theft is not a joke and I saw you had a woman's license." Tom became embarrassed and explained that it was his license, but that he had transitioned and hadn't updated his license – he identifies as a man and was born a biological female. Robert was shocked and said "no way, if you're a woman you'd have boobs!" and then reached out to grab Tom's chest but missed. Tom's gender identity then became the center of Robert's jokes including "you must be emotional today are you on your period?" and "oh, don't worry, Tom is actually a girl she couldn't do anything to you" and "Tom is short cause she's a woman."

Math Class



When Tom confronted Robert, Robert told him to “grow some balls, don’t be so sensitive.” Professor X assigned Tom and Robert to the same team for the mid-term project. Tom told Professor X he was uncomfortable with Robert because Robert joked about his gender. Professor X told Tom that the syllabus made clear there was no team switching allowed and they’d have to learn to get along. In a class held on August 3, 2020, Tom got the answer to a question wrong in front of the class and Rob yelled out “Don’t let that make you think all women are bad at math!” Professor X told both kids to settle down and moved on. Tom was so embarrassed; he didn’t go to lecture anymore that semester and flunked the final exam on August 14. Tom decided to appeal his grade to the Dean because of what happened in class with Rob. The Dean reports the matter to the Title IX Coordinator on August 18.

Math Class

Math Class

- Do the new regs apply?
- Is this T9 sexual harassment as defined under the new regs?
- Who are the respondents?
- What is the T9 Coordinator's first step?
- If Tom files a formal complaint, what should the T9 Coordinator do?
- Tom refuses to sign a formal complaint, but demands anonymous investigation what then?

Math Class

- ❑ If Rob discloses to the investigator that Tom makes him uncomfortable because Tom flirts with him, that one-time Tom squeezed his inner thigh during class, and explains the jokes made were just a way of trying to stop the flirting, what should the investigator do? T9 Coordinator?
- ❑ Right before the hearing, Tom asks to enter a confidential mediation instead of having to answer questions at the hearing. He tells the T9 Coordinator he can't afford a lawyer and thinks he'll lose as a result. What should the T9 Coordinator do? What paperwork should be executed for the mediation?

Informal Resolution Resources

- 1 — Community Justice Center – communityjusticecenter.com
- 2 — SEEDS – seedscrc.org
- 3 — Others?

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Thank You

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APPENDIX: EXCERPTS FROM NEW TITLE IX REGULATION

106.30 - Definitions

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) 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; or
- (3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

106.30 - Definitions

Complainant means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.

Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. 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.

Respondent means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

106.30 - Definitions

Supportive measures means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.

106.44 – Education Program or Activity

“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.

106.44 – General Response Requirements

A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent....

A recipient's response must treat complainants and respondents equitably by offering supportive measures to a complainant, and by following a grievance process that complies with [§ 106.45](#) before the imposition of any disciplinary sanctions...

The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in [§ 106.30](#), consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.

106.45 – Formal Title IX Grievance Process

For the purpose of addressing formal complaints of sexual harassment, a recipient's grievance process must comply with the requirements of this section. Any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in [§ 106.30](#), must apply equally to both parties....

Basic requirements for grievance process. A recipient's grievance process must—

- (i) Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in [§ 106.30](#), against a respondent. ...

106.45 – Formal Title IX Grievance Process

- (ii) Require an objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence—and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness...
- (iii) Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent...
- (iv) Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process...

106.45 – Formal Title IX Grievance Process

Dismissal of a formal complaint—

(i) The recipient must investigate the allegations in a formal complaint. If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in [§ 106.30](#) even if proved, did not occur in the recipient's education program or activity, or did not occur against a person in the United States, 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.

(ii) The recipient may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the recipient; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

106.45 – Formal Title IX Grievance Process

Dismissal of a formal complaint...(iii) Upon a dismissal required or permitted pursuant to paragraph (b)(3)(i) or (b)(3)(ii) of this section, the recipient must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties....

Hearings. (i) For postsecondary institutions, the recipient's grievance process must provide for a live hearing. At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally... Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant...

106.45 – Formal Title IX Grievance Process

If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney... If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions. Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other. Recipients must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review....

106.45 – Formal Title IX Grievance Process

- (9) Informal resolution.... However, at any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process...
- (i) Provides to the parties a written notice disclosing: The allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared; (ii) Obtains the parties' voluntary, written consent to the informal resolution process; and (iii) Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.