



New Title IX Regulations and Clery Case Studies

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Overview

- **Introduction**
- **Quick Overview - UWS Code and Policy**
- **Title IX Case Studies**
- **Clery Case Studies**
- **Questions/Discussion**

Introduction

- This training will not cover all aspects of the new regulations – the focus of this training will be case studies
- The case studies were adapted from recently decided court cases and determined Clery violations that resulted in penalty payments
- The structure – Title IX Case Studies will be reviewed and then you will go into breakout groups and discuss – Clery Case Studies will be done as a large group
- We will share the court's decision – you should have received or will receive a link to all the court opinions and corresponding information regarding the Clery violations



Title IX Regulations

- Released on May 9, 2020 and effective August 14, 2020
- UW System has updated the Wisconsin Administrative Code and RPD 14-2 to align with the new Title IX Regulations
 - UWS Chapter 4:
https://docs.legis.wisconsin.gov/code/admin_code/uws/4
 - UWS Chapter 7:
https://docs.legis.wisconsin.gov/code/admin_code/uws/7
 - UWS Chapter 11:
https://docs.legis.wisconsin.gov/code/admin_code/uws/11
 - UWS Chapter 17:
https://docs.legis.wisconsin.gov/code/admin_code/uws/17
 - RPD 14-2: <https://www.wisconsin.edu/regents/policies/sexual-violence-and-sexual-harassment/>
- New Regulations can be found at:
<https://www.federalregister.gov/documents/2020/05/19/2020-10512/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>

Definition Changes

Federal definitions in use

Sexual Harassment:

- conduct on the basis of sex that satisfies any of the following:
 - Quid Pro Quo (Employee, Staff, and Faculty)
 - An employee of the institution conditions the provision of an aid, benefit, or service of the institution directly or indirectly on an individual's participation in unwelcome sexual conduct; or
 - An employee of the institution either explicitly or implicitly conditions the provision of an academic, professional, or employment-related opportunity, aid, benefit, or service on an individual's participation in unwelcome sexual conduct
 - Hostile Environment (Title IX vs. Non-Title IX)
 - Unwelcome conduct of a sexual nature directed towards a student, an employee, or a person participating in a program or activity of the university that, when using the legal "reasonable person" standard is so severe, pervasive, and objectively offensive that it effectively denies the person equal access to the institution's education program or activity; or
 - Unwelcome conduct of a sexual nature directed towards an individual that, when using the legal "reasonable person" standard is so severe or pervasive and objectively offensive that it has the purpose or effect unreasonably interfering with an individual's academic or work performance or participation in an university sponsored or supported activity.

New Sexual Misconduct Definition

Sexual Exploitation:

- means when an individual attempts, takes or threatens to take, nonconsensual sexual advantage of another person. Examples include
 - a) Engaging in the following conduct without the knowledge and consent of all participants:
 1. Observing, recording, or photographing private body parts or sexual activity of the complainant .
 2. Allowing another person to observe, record, or photograph sexual activity or private body parts of the complainant,
 3. Otherwise distributing recordings, photographs, or other images of the sexual activity or private body parts of the complainant.
 - b) Masturbating, touching one's genitals, or exposing one's genitals in the complainant's presence without the consent of the complainant, or inducing the complainant to do the same.
 - c) Dishonesty or deception regarding the use of contraceptives or condoms during the course of sexual activity.
 - d) Inducing incapacitation through deception for the purpose of making the complainant vulnerable to non-consensual sexual activity.
 - e) Coercing the complainant to engage in sexual activity for money or anything of value.
 - f) Threatening distribution of any of the following, to coerce someone into sexual activity or providing money or anything of value:
 1. Photos, videos, or recordings depicting private body parts or sexual activity of the complainant.
 2. Other information of a sexual nature involving the complainant, including sexual history or sexual orientation.

Title IX Case Study #1

Plaintiff v. Orange University

- *Plaintiff filed a legal action against Defendant Orange University under Title IX. In her Complaint, Plaintiff states that she was enrolled as a student at Orange University and is a former member of the University's women's cross-country team.*
- *Plaintiff alleges that, while she was a student and member of the women's team, she was sexually assaulted in September of 2018 by Student X who was a member of the men's cross- country team.*
- *Plaintiff asserts she told her coaches of the assault and filed an official complaint with the University. Approximately two weeks later, Plaintiff states she was contacted by the University's Title IX Coordinator. Three days later, the Title IX coordinator and the Title IX Investigator met and interviewed Plaintiff. Plaintiff claims that Title IX coordinator suggested, and Plaintiff agreed, that a No Contact Order ("NCO") be implemented to prevent Student X from contacting her. Plaintiff claims, however, that as of October 1, 2018, an NCO had not been issued. Therefore, she emailed the Title IX coordinator for an update. The following day, a Notice of Investigation was issued, but an NCO was not issued.*
- *Plaintiff emailed and requested an update from Ms. Hart again on October 10, 2018. The Title IX coordinator replied that there was a delay in issuing the NCO because the University's Athletic Department had intervened. Plaintiff emailed the Title IX coordinator a third time on October 17, 2018, requesting an update. At that point, Plaintiff told Ms. Hart she was considering dropping out of school because she was distressed over her continued contact with Student X. The NCO was issued that day.*

Title IX Case Study #1

- *Soon thereafter, Plaintiff states the women's and men's cross-country teams were at an out-of-state competition. Plaintiff claims that, despite the NCO, the coaches assigned Student X the hotel room directly across from her room. Shortly after returning from the competition, Plaintiff states she was hospitalized in a psychiatric ward related to the assault and subsequent events.*
- *At some point, a first draft of a report of the investigation (the "first draft") was issued by the University. According to Plaintiff, the first draft found Student X was responsible for the assault. Plaintiff states the first draft was sent to her on December 20, 2018. Nevertheless, following the Christmas break, Plaintiff claims that Student X was in her Chemistry class in violation of the NCO. Plaintiff asserts she emailed the Title IX coordinator about the situation on January 10, 2019, but she received no response.*
- *On February 4, 2019, the Program Coordinator at the Women's Center at Orange University, emailed the Cross-Country coach on behalf of Plaintiff asking why Student X continued to practice with Plaintiff, and the Program Coordinator requested an accommodation. The Program Coordinator received no response. However, the following day, Plaintiff was dismissed from the women's team. Thereafter, a final report was issued by the University on February 21, 2019, finding Student X was not responsible for sexual assault or any other misconduct.*
- *Orange University filed a Motion to Dismiss, arguing Plaintiff failed to state a claim under Title IX for deliberate indifference on the part of the University.*
- *How did the court rule?*

Title IX Case Study #2

Plaintiff v. State of Blue

- Respondent student was a student at Blue University's Lavender campus until spring semester 2017. Respondent applied to transfer to Blue University's Royal campus for fall semester 2017. While at Lavender Campus the university received two complaints of sexual misconduct. One complaint involved the use of electronic communication to make sexual comments. The complaining student did not want to participate in a formal investigation. However, per the complaining student's request respondent was directed not to contact them. The complaint was then closed. A few month's later the university received another complaint regarding sexual misconduct alleging the respondent engaged in unwanted touching of another student even after told to stop. The investigation took 10 months to complete. The complaint was initially closed after the complainant indicated that they did not feel that an investigation was necessary. The complaint was reopened a few months later after the student provided additional allegations of sexual misconduct against the respondent.
- A hearing was held, and the respondent pleaded "not responsible" to all charges. The hearing body found respondent responsible for violations of student conduct, specifically sexual misconduct, discrimination and discriminatory harassment, violation of policy, and abuse of others. The University suspended the respondent for nine days.
- Plaintiff alleges that respondent requested and was permitted to transfer from Lavender to Royal campus during this suspension. Plaintiff applied and was accepted to Royal campus coinciding with respondent's first semester at Royal. In the first month of the semester, Plaintiff alleges that respondent raped them at a party they attended at the respondent's off-campus apartment. Plaintiff filed suit against Blue University alleging discrimination under Title IX and negligence alleging Blue University mishandled sexual assault claims.

Title IX Case Study #2

- Blue University moved for summary judgment on all of Plaintiff's claims arguing in part that their injury occurred off-campus where the university exercised no control.
 - Was the University "deliberately indifferent"?
 - Did the University owe the student a duty of reasonable care?
 - How do you think the court decided?

****To recognize a pre-assault Title IX claim in addition to an individual title IX claim, Title IX liability is imposed "when a school's official policy is one of deliberate indifference to sexual harassment in any contact subject to the school's control" (Karasek v. Regents of Univ. of Calif., 956 F.3d 1093 (9th Cir. 2020)).**

- A plaintiff must show:
 - School maintained a policy of deliberate indifference to reports of sexual misconduct
 - Which created a heightened risk of sexual harassment that was known or obvious
 - In a context subject to the school's control, and
 - As a result, the plaintiff suffered harassment that was "so severe, pervasive, and objectively obvious that it can be said to have deprived the plaintiff of access to the educational opportunities or benefits provided by the school"

Title IX Case Study #3

Doctors v. Green University

- Five doctors employed at Green University's Teaching Hospital filed suit against Green University, Green University Teaching Hospital, and Respondent doctor alleging violations of Title IX and Title VII of the Civil Rights Act of 1964. Respondent supervises all five doctors in their work at the hospital and the residency program. The five doctors allege behavior by the respondent that, includes but is not limited to, unwanted touching and sexual advances, forcible kissing, asking on dates, commenting on their bodies, massaging shoulders, and discriminatory behavior towards maternity leave.
- Green University, Green University Teaching Hospital and Respondent argue that the five doctors claims under Title IX should be dismissed as Green University Teaching Hospital is not subject to Title IX and Title VII does not allow for a private right of action to sue in court.
 - Is a Teaching Hospital or separate program of a university covered by Title IX?
 - Does Title IX allow one to bring an action for employment discrimination based on sex?
 - Can a Title IX action be brought at the same time as a Title VII action?

Title IX Case Study #4

Doe v. Purple University

- In February 2020, John Doe and another Purple University student, Jane Roe, matched on a dating app; they exchanged messages and made plans to hang out at Doe's off-campus apartment. Roe met Doe at his apartment one night at about 9 p.m., where they spent some time talking before getting dinner; after eating, they sat together on the couch and "mutually leaned in to kiss each other." According to Doe's civil complaint, Doe made it a point to obtain Roe's verbal consent before kissing, going to his bedroom, and engaging in consensual sex. Roe left the apartment just before midnight.
- When she arrived back at her dorm, Roe told a witness that Doe had sexually assaulted her and subsequently filed a complaint alleging that Doe "engaged in non-consensual sexual penetration" at his apartment. In accordance with school policy, Purple University assigned an employee to investigate and adjudicate Roe's claims.
- The investigator interviewed Roe three times. The first interview occurred in person in early March, a few days before Purple University evacuated due to the COVID-19 pandemic. Roe told the investigator that she had met Doe on a dating app and arrived at his apartment at 7:45 p.m. She said they talked, walked to get dinner, and that after they returned to the apartment, Doe violently sexually assaulted her. Roe stated she left the apartment just before midnight; after getting back to her dorm, she went to the common area, where she saw and told another student what had happened. The investigator also interviewed the other student, who said Roe told her that she was assaulted. The other student told the investigator that Roe spoke with Campus Safety before the witness and Roe went to the hospital for 12 hours, where Roe received a Sexual Assault Nurse Examiner exam.

Title IX Case Study #4

- Shortly before the pandemic evacuation, Doe and his attorney separately emailed the University's Title IX Coordinator requesting to reschedule his interview until after the semester, when Doe could meet in person. The Title IX coordinator denied the request to postpone the interview and directed Doe to meet with investigator virtually the following week.
- The investigator conducted three remote interviews with Doe in March and April 2020. Doe maintained that the encounter with Roe was entirely consensual and that he never used force or coercion. Doe told the investigator that he and Roe had a lengthy discussion about the importance of consent because Roe had attended a student government meeting on the matter before arriving at Doe's apartment. The investigator eventually dismissed the Doe-Roe conversation about consent as "not germane." Because the interviews were remote, Doe was not permitted to be in the same room as his advisor (as Roe had been for her first interview), and there were video and audio technology challenges during the interview.
- Doe submitted more than two dozen questions for the investigator to ask Roe and the student witness, but the investigator posed only three of those questions to Roe and none to the witness. In Roe's second interview, she stated Doe never asked her for consent and said she planned to corroborate her account by submitting screenshots from an app on her phone that tracked her location. The preliminary investigation report included the location screenshots, key-swipe records, the campus safety report, police report, medical records, and Uber receipts. The investigator included this information in the preliminary report only after Doe requested it. The records revealed some inconsistencies in Roe's and the witness's timeline: Roe arrived at Doe's apartment at 9 p.m. (not 7:45 p.m.); her Uber dropped her off at 12:14 a.m., but she did not swipe into her dorm until an hour later; Roe spent five hours in the hospital, not twelve; and Roe claimed she took photos of red marks on her neck (which she submitted to the investigator) around 1 a.m. after she talked with the RA and Campus Safety, but the RA and Campus Safety did not receive calls about the incident until just before 3 a.m. The investigator failed to collect Roe's medical documentation and sexual assault examination report.

Title IX Case Study #4

- The investigator interviewed Roe a third time in May. Roe claimed that some of the geographic data from the app screenshots were inaccurate and testified about some discrepancies in her timeline regarding events before and after her time at Doe's apartment. After the third interview, Purple University issued a supplemental report. Doe responded to that report and pointed out Roe's contradictions and inconsistencies, but the investigator chose not to investigate them further.
- The investigator issued a decision finding Doe responsible for non-consensual sexual penetration. His one-sentence rationale was that evidence supporting Roe's story outweighed evidence supporting Doe's story. Two weeks later, Doe appeared for his sanctioning hearing. Doe asserted his innocence and complained of the investigation's flaws. The sanctioning hearing officer ignored the inadequacies of the investigation and informed Doe that he was suspended from Purple University for the following school year. Doe requested an extension of the five-day deadline to submit an appeal, which the hearing officer denied in an effort to rush through the appeal before a new, arguably respondent-friendly Title IX rule became effective. The appeal body upheld the discipline and sanction.
- Doe brought a Title IX discrimination claim against Purple University under an "erroneous outcome" theory. An erroneous-outcome claim requires a plaintiff to show that he "was innocent and wrongly found to have committed the offense." However, in the end, the theory turns on whether the alleged facts, if true, raise a plausible inference that the university discriminated on the basis of sex. Purple University moved to dismiss Doe's claim. How did the judge rule?



Clery Case Study #1

A Teal University student accused of multiple forcible sexual offenses wants to participate in an internship program at a satellite campus in Washington, D.C. University officials were aware that:

- 1) Four students had brought forth allegations of forcible sexual offenses;
- 2) The accused student indirectly confessed to committing the offenses;
- 3) The accused student admitted to having problems with alcohol;
- 4) The sexual assault complaints, although the investigation was still pending by Title IX Office and Campus Security, evidenced indications that serious violence did occur; and
- 5) The accused was going to relocate to another university campus in the summer

The only instruction that the accused received was that they should conduct themselves appropriately and the university administrator permitted them to attend the internship. The administrator did confirm with the DC program that all participants were aware of procedures to file complaints and that the program administrators could monitor his interactions. The administrator was also required the student to seek counseling about his behavior and substance abuse.

Should an emergency notification be issued to warn students and employees prior to this student's arrival?



Clery Case Study #2

- Gold University has a student housing complex consisting of apartments for students who are married or have dependents. Gold University received an alert about a burglary that occurred while a student was home in September. Gold University received another alert about a burglary at the same housing complex in October, two in November, and one in December. Some occurred while students were home.
- Gold University issued a crime alert notice for each burglary. Gold University did not issue a Timely Warning for these burglaries until the fifth incident was reported. The Timely Warning combined all 5 burglaries into one notice that that was sent to the campus community.
 - Is the warning timely in this case? If not, when should the timely warning been issued?

Clery Case Study #3

- Yellow University was hosting a speaker that some campus and non-campus individuals found to be offensive. Yellow University coordinated with external agencies to bring in outside law enforcement to make sure that they had the right level of presence. The speaker started at 8 p.m., but by 5:30 p.m. protesters had amassed on campus and the situation escalated to throwing rocks and bricks as well as setting off fireworks. The speaker was evacuated from campus at 6 p.m. as things deteriorated and the event was cancelled.
- Yellow University used Twitter and an Electronic Communication program to communicate with the campus. Yellow University began to notify the campus community at 6:36 p.m. of the violence, approximately 1 hour after things escalated. The first notification also went out 30 minutes after the decision to cancel the event and 20 minutes after messages were sent on twitter that the event was cancelled. The “All Clear” message went out at 10:52 p.m.
 - Was the emergency notification sent in a timely matter consistent with Clery?





Clery Case Study #4

- Gray University's Student Conduct Office issued an administrative disposition in a case on October 24, 2012 informing a respondent that they were found responsible for a violation of the student conduct code related to sexual misconduct. Gray University notified the respondent of the outcome, proposed sanctions, timetable to complete the sanctions, and consequences for failing to complete said sanction. The case was adjudicated 2 days later.
- Gray University did not provide notice of the outcome of the disciplinary action or sanctions to the complainant until December 2012 and after they inquired 3 different times.
 - Is failure to provide notice to a complainant of a disciplinary outcome a Clery violation?

Questions/Discussion

