



Privacy Implications of Department of Education's Proposed Title IX Regulations

National Sexual Assault Conference

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Poll

Who is in the room?

- SA (primarily) services organization
- DV (primarily) services organization
- Dual SA and DV services organization
- Multi-service organization
- Campus advocate/administrator
- State coalition
- Prosecutor or other law enforcement office, etc.
- Other

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Poll

Can a Title IX Coordinator provide confidential services?

- Yes
- No
- I don't know


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What is the Notice of Proposed Rulemaking (NPRM)?

- Difference between guidance and regulations
- Likely to lose 2001 guidance
- 2011, 2014 rescinded in September
- 2017 – new guidance issued


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What to Do?

- There's still a lot to be determined
 - Federal lawsuits are likely
 - Conflict with state laws
 - Potential of more guidance from the Department of Education

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Changes to Reporting and Support

- Single Title IX Coordinator
- Title IX Coordinator responsible for issuing “supportive measures”
- Formal complaint
- Multiple complaints trigger mandatory investigation

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Scenario


A survivor was assaulted on campus. They have not made up their mind about what they want to do, but they would like to know their options. They come to you (advocate) for information.



Single Title IX Coordinator

Allowing for a narrower classification of Responsible Employees

- “. . . defines ‘actual knowledge’ as notice of sexual harassment . . . 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 . . .” (pg. 23 NPRM)
- “Constructive knowledge is insufficient to constitute actual knowledge” (pg. 19 NPRM)
 - Constructive Knowledge: By application of reasonable care or diligence if a person should have known a fact, he or she is deemed to have constructive knowledge of that fact.



Privacy Pros and Cons


Pros

- Less likely to have an investigation begin without survivor consent
- Can talk to other supportive people on campus without triggering investigation

Cons

- Campus can claim they haven't heard about the issues
- Campus might stop training others on responses to SA
- Doesn't prevent disclosure by others

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Scenario

Survivor wants to talk to their favorite professor.

- Under former guidelines
- Does this change under NPRM?
- What do you do now?


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Supportive Measures Changes

- Title IX Coordinator responsible for coordinating effective implementation of supportive measures
 - Title IX Coordinator “must serve as the point of contact for the affected students”
 - “Must be confidential . . . to the extent that maintaining such confidentiality would not impair the ability of the institution to provide supportive measures”
 - “Such measures are designed to restore or preserve access to the recipients education program or activity . . .” (Pg. 37 NPRM)

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Privacy Pros and Cons

Pros

- Clear who survivor must talk to

Cons

- Lack of privilege—lack of acknowledgement that the institution now possesses more information than the survivor may have intended
- Pressure to begin investigation

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Scenario

An LGBTQ survivor attends a very conservative institution.

The survivor is not out to parents, friends, or professors.

The survivor does not wish to have an investigation and is asking for confidentiality.

- Does this change under NPRM?
- What do you do now?



Formal Complaint

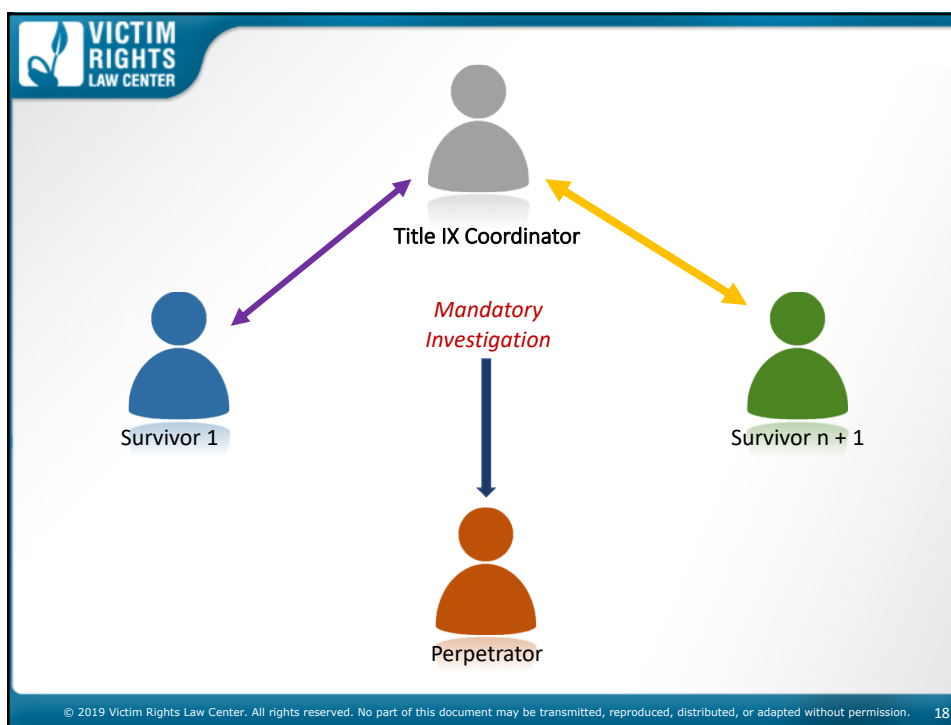
- “. . . a document signed by a complainant or the Title IX coordinator . . . requesting initiation of the recipients grievance procedures . . .” (pg 31 NPRM)
- “The recipient must first inform the complainant in writing of his or her right to pursue a formal complaint, including the right to later file a formal complaint . . .” (pg 35 NPRM)


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Multiple Complaints/ Same Respondent

“ . . . when a recipient has actual knowledge of reports by multiple complainants by the same respondent . . . the Title IX Coordinator must file a formal complaint. . .” (pg 31 NPRM)

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Privacy Pros and Cons


Pros

- Cannot start investigation without survivor expressly consenting EXCEPT in the case of multiple reports

Cons

- Impact of filing without either survivors' knowledge or cooperation, especially for dating, domestic violence, and stalking cases
- The first survivor is not given notice of the filing

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Scenario

Survivor goes to the Title IX coordinator for supportive measures, and does not want an investigation.

Six months later, a second complainant comes in for supportive measures and names the same respondent.

- Currently
- Under NPRM

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Scenario

Survivor 1 says they do not want an investigation.
What record, if any, does the Title IX office create?
What about Survivor 2?

- Under former guidelines
- Does this change under NPRM?
- What do you do now?

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Discuss Action Items

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Your name _____
 Organization _____ Phone _____
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 Your response enabling with consent of accessible partner record name? _____

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