



Stuck at a Crossroads:

Sexual Misconduct Concerns Involving Patient Care at Academic Medical Centers, Healthcare-Related Schools, Student Health Centers, and Athletic Training Services

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2020 Title IX Regulations



“Congress did not exempt academic medical centers that receive Federal financial assistance from Title IX.”

85 Fed. Reg. 30,026, 30,446 (May 19, 2020).

2020 Title IX Regulations

Title IX applies to academic medical centers

- part of the postsecondary institution,
- affiliated with the postsecondary institution, or
- “education program or activity” includes locations, events, or circumstances over which the recipient exercised substantial control over both the context of the harassment and the respondent, 34 C.F.R. 106.44(a).

2020 Title IX Regulations



Supportive Measures



Informal resolution,
Optional Live Hearing with Cross-Examination, or
Submission of Written Questions



Investigations, Experts, and Evidence

FERPA CONSIDERATIONS

The term "education record" does not include --

records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice. 20 U.S.C. § 1232g(a)(4)(B)(iv).

Directed Investigations

SECTION 402 DIRECTED INVESTIGATIONS

In appropriate circumstances, OCR may conduct a directed investigation when information indicates a possible failure to comply with the laws and regulations enforced by OCR; the matter warrants attention; and the compliance concern is not otherwise being addressed through OCR's complaint, compliance review, or technical assistance activities. See Title VI, 34 C.F.R. § 100.7(c). This regulatory provision is incorporated by reference in the regulations implementing the other statutes enforced by OCR. See Title IX (34 C.F.R. § 106.71), Section 504 (34 C.F.R. § 104.61), the Boy Scouts Act (34 C.F.R. § 108.9); the Age Discrimination Act (34 C.F.R. § 110.30), and Title II (28 C.F.R. § 35.172).

Section 302 Resolution

- *a resolution letter may be better than a letter of findings*

SECTION 302 RESOLUTION AGREEMENT REACHED DURING AN INVESTIGATION

Allegations under investigation may be resolved at any time when, prior to the point when OCR issues a draft letter of findings under CPM Section 303(b), the recipient expresses an interest in resolving the allegations *and* OCR determines that it is appropriate to resolve them because OCR's investigation has identified concerns that can be addressed through a resolution agreement. The provisions of the resolution agreement must be tied to the allegations, and the evidence obtained during the investigation and will be consistent with applicable regulations.

Key Takeways: Michigan State University Resolution Agreement (ED-OCR)

• STRUCTURE

- Independent authority of Title IX office
- But also, direct reporting line to MSU President to ensure authority "free from undue influence or pressure"
- Monitoring by outside consultant: three academic years

• NOTICE

- Ensure physical posting of Notice of Non-Discrimination and Anti-Harassment Statement where "Student Affairs and Athletics" regularly post notices
- Community-wide (students, employees, and youth program participants) email with Notice and Resolution Agreement
- End-of-semester reports to President + Board of Trustees re: all open and recently resolved Title IX investigations involving employees (report + determination)

More MSU Takeways

- **INDEPENDENT EXPERTS**

- Ensure conflict of interest policy applies to medical and other scientific experts
- Equal opportunity for parties to provide expert witnesses
- Identify as experts in reports and assure no conflict of interest

- **PERSONNEL FILES**

- Note all final Title IX reports/determinations in respondent's file
- Notation shall "provide a summary of the nature of the allegations in sufficient detail for a reasonable reviewer to identify potential patterns of behavior," including any violation finding + sanction
- Identify consequence for employee's failure to comply with documentation requirements violation findings/sanctions imposed

More MSU Takeways

- **EMPLOYEE SANCTIONS**

- Review actions of all current/former employees who had notice or were reported to have received notice of complaints/concerns of sex discrimination by identified employees
- Assess whether failed to adequately respond
- If so, identify what additional responsive actions are required, including disciplinary proceedings, revocation of tenure, revocation of honorary and other titles, demotion, etc.

- **CLIMATE AND TRAINING**

- Assess impact of conduct of identified employees on the equal access of students/employees to MSU education programs and activities
- Revise training to ensure student athletes can identify sexual harassment and assault covered by Title IX and "that occurs in the context of medical treatment, which may be more difficult to identify"
- Comprehensive Title IX training for Board of Trustees and President, select staff from Title IX Office and OGC, and other select administrators

Key MSU Takeway: Youth Programs

- **"YOUTH PROGRAM"**

- "Any class, camp, program, or other learning activity that includes participation by minors"

- **NOTICE**

- Notify youth program participants of Title IX grievance procedure and its applicability to youth programs and youth program participants and all forms of sex discrimination—as well as how to file a report
- Ensure notice is "easily understood, easily located and widely distributed"
- Include name, title, and contact information for the University's Title IX Coordinator, with explanation of role and duties

Goal: ensure the university exercises "adequate Title IX oversight over its youth programs"

Final MSU Takeway: Individual Remedies

- **NOTICE**

- Notice on website homepage for 180 days inviting current/former students/employees who were subjected to sexual harassment/assault by Employee X to contact the Title IX Office

- **RESPONSE**

- Take reasonable steps to verify the need for remedial action
- Range of possible measures to restore access: counseling services, grade adjustments, tuition reimbursement, the opportunity to retake classes without penalty or additional costs, academic assistance, performance evaluation adjustments, or other services to affected students/employees
- Not required to duplicate any accommodation previously provided or where a person has signed a release or waiver of liability

Goal: "fully assess and remedy" any sex discrimination caused by identified employees that denied a student the ability to participate in or benefit from university programs or that unreasonably interfered with an individual's work performance or opportunities

Key Takeways: University of Southern California Resolution Agreement (ED-OCR)

• STRUCTURE

- Independent authority ("free from undue influence and pressure") of Title IX office
- No reporting line to OGC
- Oversight of all Title IX investigations
- Deputy Title IX Coordinator for Keck Medical Enterprise + Healthcare Title IX Investigators, *with* office visible/accessible to main Student Health Center

• NOTICE

- Prominent posting of Notice of Non-Discrimination, including Keck School of Medicine webpage, the Keck Medical Enterprises internal web page, and in visible locations throughout the main and health science campuses, including Student Health Center—distributed to all employees and students at the beginning of each academic year
- Notify community (students, faculty, staff, and alumni) of OCR findings and agreement See <https://change.usc.edu/transformation/ocr-2020/>

More USC Takeways

• PERSONNEL FILES

- Performance evaluation to include: information about employee's compliance with Title IX policies; any reports or complaints about compliance with the policy; an attestation that the employee identified, reported, and/or took steps to prevent sex discrimination; that employee complied with training requirements
- Ensure all supervisors, including faculty supervisors, "promptly forwarded all complaints and reports of possible sex discrimination to the Title IX Office"
- Ensure all final Title IX findings and sanctions are included in the employee's personnel file and Title IX data system

• CENTRALIZED REPORTING DIRECTIVE

- Notify all employees who are Designated/Responsible Employees to report all Title IX reports (defined as sexual harassment/misconduct) to the Title IX Office

More USC Takeways

- **DATABASE SYSTEM**

- Maintain a data system that has the capacity to search for prior or concurrent reports involving the same complainants/respondents
- Upon receipt of a report, run a query for any prior reports, as well as contact the employee's supervisor, manager, or head of department, school, or unit to identify any prior reports; as needed, gather performance evaluations, personnel records, etc.
- Assess and document in Title IX Office records

- **EMPLOYEE REVIEW**

- Conduct Title IX self-assessment of current and former employees with supervisory responsibilities to ensure took action with respect to reports of sex discrimination about Employee 1 consistent with their role and authority

Key USC Takeway: Training

- **TRAINING: STUDENT HEALTH CARE EMPLOYEES**

- For employees whose primary job responsibilities are in the University's Student Health Centers, the training will be annual and conducted in-person
- Minimum of two of hours per year
- Specific to "potential Title IX issues that can arise in the context of medical provider-patient relationship, the role and responsibility of the medical chaperones, and identification of those qualified and charged with determining medical standard of care when such issues arise in the context of a possible Title IX matter"
- For supervisory employees, will also cover duty to promptly report to Title IX Office and consequences for failure to do so

Final USC Takeway: Repair

• FOCUS ON UNIVERSITY AND STUDENT HEALTH CARE CLIMATE

- Creation of an independent Women's Health Advocate position
- Additional patient survey questions
- Creation and dissemination of Sensitive Health Exams booklet
- Hiring new physicians to ensure physician preference based on gender
- Enhanced background screening and training
- Expanded information in consent for treatment forms
- Adoption of a sensitive exam chaperone policy
- Inclusion of student representation on Trauma Informed Care Committee and as Community Health Organizers
- Provision of an online opportunity for anonymous feedback, questions, concerns, complaints

HHS-OCR Resolution Agreement with MSU

U.S. DEPARTMENT OF
HEALTH AND HUMAN SERVICES

**OFFICE FOR
CIVIL RIGHTS**

- Revise non-discrimination notices and sexual misconduct policies
- Improve Title IX and Section 1557 investigation and resolution processes
- Institute new chaperone policy
- Maximize patient privacy during sensitive exams

HHS-OCR Regulatory Landscape

- Title IX and 45 C.F.R. Part 86
 - HHS Guidance *Effective Practices for Preventing Sexual Harassment* (issued September 2020)
- Patient Protection and Affordable Care Act section 1557
 - 45 C.F.R. Part 92
 - Section 1557 of the ACA extends the protections of Title IX and other civil rights statutes to, *inter alia*, “any health program or activity, any part of which is receiving Federal financial assistance” from HHS.

ED-OCR and HHS-OCR: Practical Considerations

- Cooperation and Communication
 - Timelines
 - Rolling Productions
- Clarifying Scope
 - Time Frame
 - Type of Conduct
 - Identity of Parties
 - Transparency
- Data Requests
 - Narrative Responses
 - Spreadsheets
- Witness Interviews
- Resolution
 - Letters of Finding
 - Resolution Agreements
- Monitoring

PRIMARY INSTITUTIONAL REQUIREMENTS

COLLECT, CLASSIFY & COUNT CRIME

Clery act crimes in Clery reportable geography

Publicize in Annual Security Report

Submit to Dept of ED annually

Procedure for collecting crimes

ISSUE CAMPUS ALERTS

Notice to the university community of serious or ongoing dangers

Timely warnings

Emergency notifications

University discretionary alerts

Annual exercise is required

ANNUAL SECURITY & FIRE SAFETY REPORT

Compilation of crime statistics (3 years) and security policies and procedures

Distribute to all students, faculty, and staff by Oct 1 of each year

Provide notice of availability to prospective students and employees

Elements required to be met for each Clery "campus"



Questions

Litigation – Practical Considerations



Broad Litigation Holds



Retention Policies For Both the Academic Medical Center and School of Medicine



Protective Orders & Applicable Privileges, i.e., Patient-Physician Privilege

Litigation

- Causes of Action
 - Title IX
 - 42 U.S.C. § 1983 (public colleges & universities)
 - Gross Negligence
 - Negligent Supervision
 - Negligent Retention
 - Civil Battery
 - Intentional infliction of emotional distress

Litigation

- Statute of Limitations
- Class Certification
- Settlement & Consideration of Equitable Relief

Title IX Litigation

Factors to determine the educational nature of the program or activity:

- structure of the program, including involvement of instructors and inclusion of examinations or formal evaluations;
- whether tuition is required;
- benefits conferred through the program, such as degrees, diplomas, or other certifications;
- “primary purpose” of the program; and
- whether regulators accrediting the institution hold it out as educational in nature (i.e., ACGME-accredited residency program).

Title VII v. Title IX

A Circuit Split

- Circuit split as to whether an implied private right of action exists for damages under Title IX for redressing **employment discrimination** by employers.
 - First, Third, Fourth, Sixth, and Tenth Circuits recognize employees' private Title IX claims.
 - Fifth and Seventh Circuits have held categorically that Title VII provides the exclusive remedy for individuals alleging employment discrimination on the basis of sex with respect to employers that receive federal funds.



Promising Practices

PRACTICAL TAKEAWAYS

Preventative Measures Related to Clinical Visits

- Establish Minimum Standards for Chaperone Policies at All Clinical Locations
- Supplemental Credentialing Application Questions
- Due Diligence in Health Acquisitions, Affiliations, and Joint Ventures
- Boundaries Training, Procedural Guidelines, and Patient Education
- Ensuring Title IX's Independence and Responsiveness

Reporting

- Ensure Reports Are Properly Made and Directed
- Make Certain That Reports Have Impact
- Do Not Forget Health Privacy



Investigations

- Interdisciplinary Case Management Team Model
- Interim Measures
- Experts and Conflicts of Interest
- External Reporting Obligations
- Attorney-Client Privilege

Adjudication and Discipline

- Coordination of Policies (i.e., Title IX Policy, LCME Technical Standards, Threat Assessment Team)
- Reporting Obligations (i.e., state medical boards, Child Protective Services)
- Identifying Decisionmakers (A decisionmaker regarding responsibility may be different than a decisionmaker regarding sanctions.)

Adjudication and Discipline A Multitude of Decisionmakers

- Part 1: Questions and Answers Regarding the Department's Title IX Regulations (January 15, 2021) – Q & A No. 8

- “The regulations do not preclude a recipient from using one decision-maker to reach the determination regarding responsibility, and having different decision-maker(s) (e.g., a tenure committee) determine appropriate disciplinary sanctions (including making such a decision during a separate process, such as another hearing), so long as the end result is that the single written determination includes any disciplinary sanctions imposed by the recipient against the respondent, pursuant to 34 C.F.R. § 106.45(b)(7). The issuance of a written determination cannot be a piecemeal process that is broken down into chronologically occurring sub-parts.”

YOUTH PROTECTION AND PROGRAMMING | USC EXAMPLE



- Develop and promote compliance with relevant, effective safety policies and practices that help safeguard minors engaging with USC;
- Provide support and guidance to youth programs so that they can operate safe, compliant activities and meet their responsibility of protecting participants;
- Communicate requirements for reporting child abuse or neglect, as well as other serious incidents or violations relating to minors;
- Offer the USC community resources, education, and training on child abuse prevention and awareness; and
- Continuously identify and improve mechanisms for preventing child abuse and protecting minors across the university.

From Policy to Practice: What Works

- Multidisciplinary assessment/triage teams
- Comprehensive database
- Targeted training tailored to healthcare audiences
- Information sharing agreement
- Infographics/written protocols, especially for when to report, interplay between requirements (i.e., TIX, accreditation, 1557), etc.
- Dedicated personnel with knowledge of healthcare settings
- Coordination/collaboration/communication...early and often

Due Diligence Checklist Following Receipt of a Report Indicating Potential Widespread Abuse

- | | |
|--|--|
| ✓ Complainant Reporting Options | ✓ Enforcement Implications |
| ✓ Supportive Resources For Complainants | ✓ Concurrent Civil and/or Criminal Proceedings |
| ✓ Interim Measures | ✓ Stakeholder Engagement |
| ✓ Preliminary Fact Gathering | ✓ Crisis Communication |
| ✓ Reporting Obligations Under IHE Policies | ✓ Health Privacy |
| ✓ External Reporting Obligations | ✓ Settlements |
| ✓ Expert Witness and Conflict of Interest | ✓ Public Records Act Requests |

Checklist Cont.

**Complainant
Reporting
Options**

**Supportive
Resources**

**Interim
Measures**

Checklist Cont.

**Preliminary
Fact
Gathering**

**Reporting
Under IHE
Policies**

**External
Reporting**

Checklist Cont.

**Enforcement
Implications**

**Concurrent Civil
and/or Criminal
Proceedings**

**Stakeholder
Engagement**

**Crisis
Communication**

Checklist Cont.

**Expert Witness
and Conflict of
Interest**

Health Privacy

**Public Records
Act Requests**



Questions?

 NACUA

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