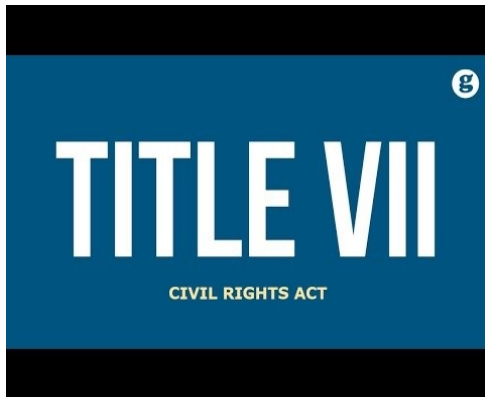


# WHEN TITLE IX AND TITLE VII COLLIDE



Melissa Flores, Associate General Counsel, Sr.

Samantha Blevins, Associate General Counsel, Sr.

*Office of the General Counsel*



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# WHICH STATUTE GOVERNS?

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Interestingly, the Civil Rights Act as passed in 1964 contained a carve-out for educational institutions; Congress eventually extended Title VII to educational institutions, local and state governments, and the federal government in the Equal Employment Act of 1972.

The Department of Justice takes the position that Title IX and Title VII are **separate enforcement mechanisms** that can both be used to attack the same violations.

There is a split in the courts, particularly with respect to Title IX claims made by employees.



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# So, the bottom line is that neither statute trumps the other.

## Case Law

The U.S. Supreme Court specifically held that “employment discrimination comes within the prohibition of Title IX.” (*N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 530 (1982)).

## Department of Education

In the last two decades, the Department of Education has engaged in robust definition and redefinition of its enforcement standard for sexual harassment on college campuses. Title IX’s protections clearly extend to students complaining about employee sexual misconduct, but it is not clear, whether and how Title IX’s provisions apply to employee-on-employee sexual misconduct.



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# What Remains Clear:

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1. The District must have a reporting requirement and must designate mandatory reporters.
2. The District must outline how those individuals are trained, and
3. The District must outline what a mandatory reporter's role is in the process.

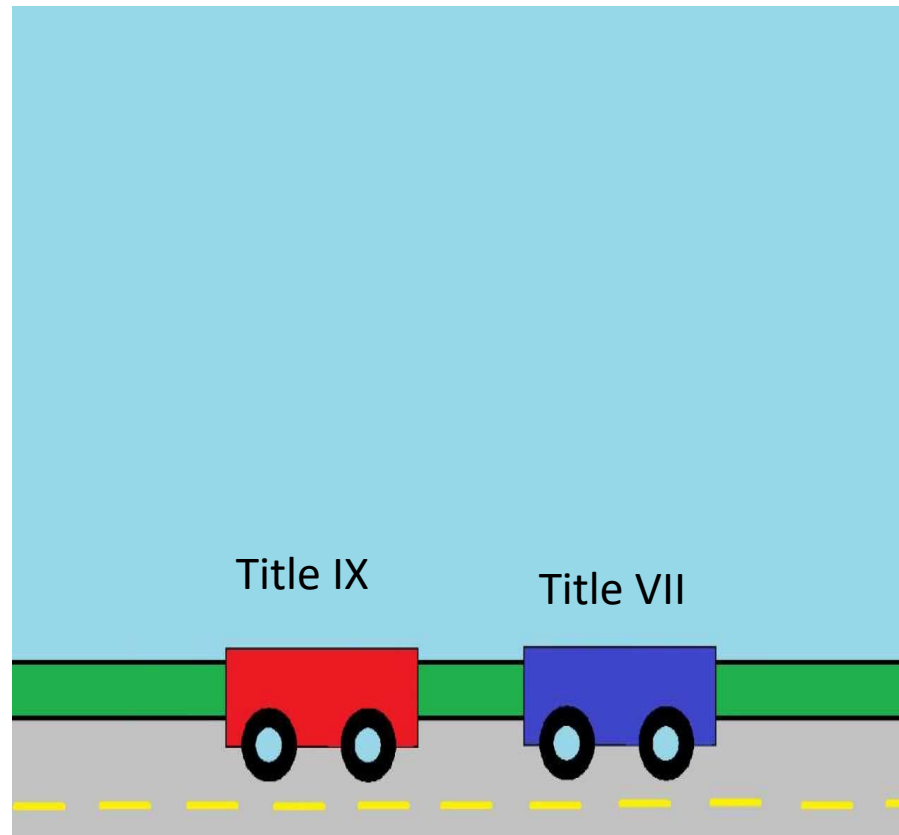


# What is a Mandatory Reporter?

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- All employees—including adjunct faculty—are expected to report any incidents of sexual harassment, assault, domestic violence, dating violence, and stalking of which they may be aware.
- MCCCDCD policy states: “**All members of the college community** are expected to adhere to this Policy, to cooperate with the procedures for responding to complaints of Discrimination and Harassment, and to report conduct or behavior they believe to be in violation of this Policy to the Title IX Coordinator. A duty to report conduct or behavior that violates this Policy is imposed on all administrators, supervisors, faculty members, and persons in positions of authority. Such employees perform their duty to report by reporting the conduct or behavior to the Title IX Coordinator.” (Administrative Regulation 2.4.4)

# Now, let's talk about when Title IX and Title VII Collide





# Title VII of the Civil Rights Act of 1964

Title VII prohibits employment discrimination on the basis of sex and other protected characteristics, as follows:

“It shall be an unlawful employment practice for an employer –

- (1) *to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or*
- (2) *to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e–2(a) and establishes the standard of causation for such claims, stating, “[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”*

42 U.S.C. § 2000e–2(m).





# Retaliation:

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Title VII also prohibits retaliation against an employee or applicant for engaging in protected activity, stating, “It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment ... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.” 42 U.S.C. § 2000e-3(a).



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# Administrative Prerequisites under Title VII

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- a. Employee must file a charge of discrimination with the U.S. Equal Employment Opportunity Commission (“EEOC”) or similar state agency.
- b. Time Limitations:
  - i. 180 days from date of discrimination
  - ii. Extended to 300 days where state or local law exists
- c. EEOC investigates.
- d. If no violation is found, it issues a Notice-of-Right-to-Sue.
- e. If a violation is found, the EEOC itself may file suit or it may issue a Notice-of-Right-to-Sue and seek conciliation of the charge.
- f. Exhaustion Requirement: Timely filing of a complaint with the EEOC is a prerequisite to filing suit in federal court; however, like a statute of limitations, it is subject to waiver, estoppel, and equitable tolling.

# Title IX of the Education Amendments

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1. Title IX provides that “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance...” 20 U.S.C. § 1681
2. Title IX itself does not specifically address retaliation, but the U.S. Supreme Court has interpreted the statute to encompass a private right of action for retaliation. See *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005)
3. There is no administrative prerequisite to filing suit under Title IX.
4. Time limitations. Title IX does not contain a statute of limitations.



# Practical Guidance



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# What happens when both sexual misconduct and other workplace misconduct are at issue?

Are there two investigations (Title IX office and a human resources office)?

- No. There should be one HR and one Title IX investigator.

How do investigations shared by two offices operate?

- Credibility determinations, analysis, and conclusions should be done together and considering BOTH policies.
- Discipline matters must be addressed through both policies.



- How, when, why, and to what extent will information be shared between offices (e.g., the Title IX office and human resources for purposes of employee files and discipline)?
- Where allegations concern employees who work together, how will interim measures like no-contact orders be enforced?
- Who is authorized to impose discipline and non-disciplinary measures?



Unless notification would jeopardize the investigation, if a Title IX or Title VII complaint involves Residential Faculty, remember to notify the Faculty Senate President at the college. Notification should:

1. Be in writing (email ok)
2. Be specific—identify that it is a Title IX/VII complaint
3. Identify the investigators on the case

## FEC Local Senate Presidents

- Adrianna Coronel, PC
- Carlos Caire, SMCC
- Dale Heuser, PVCC
- Donna Thompson, CGCC
- Douglas Deiss, GCC
- Erik Huntsinger, EMCC
- Joseph Swaba, GWCC
- Kathy Miller, SCC
- Patrice Nango, MCC
- Wanda Tucker, Rio



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# Faculty Rights in Investigations under the RFP

The RFP requires the faculty member receives the following:

- a written copy of the complaint prior to responding or being interviewed. RFP 6.8.1.1 and 6.8.3.
- a written copy of the investigator's final determination or recommendations at the conclusion of the investigation. RFP 6.8.1.2
- the right to submit a written response to the allegations at any time during the investigation, as well as a written rebuttal after the investigator's final determination or recommendations have been issued. RFP 6.8.2
- A Faculty member who is required to appear or respond to an internal investigation has a right to representation and counsel. RFP 6.8.3.
- When any faculty member is required by the College President to appear before the Chancellor, Governing Board, or any committee concerning any matters that could adversely affect employment, they may bring legal counsel. RFP 6.2





# OCR Guidance

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“The extent of a recipient’s responsibilities if an employee sexually harasses a student is determined by whether or not the harassment occurred in the context of the employee’s provision of aid, benefits, or services to students.”

**The college should determine if the conduct occurred in course of employee responsibilities and:**

- Type and degree of responsibility of the employee’s authority over student;
- Degree of influence over the student;
- Where and when the harassment occurred; and
- The age and educational level of the student.

Even if the conduct occurred outside of the context of employment, the college is still obligated to investigate and take prompt remedial action upon notice of the conduct or face the possibility of responsibility for an ongoing hostile environment.

# SCENARIOS



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# Scenario #1

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An 18 year-old freshman is a member of a student chess club. As a team, they went to a state competition and won, which got them an invitation to a national competition. The national competition occurs during the summer and most of the team members are not taking classes.

On the last day of the national competition, the faculty club advisor (an employee of the college) asked the student to come to her room to discuss the competition. At her room, the faculty member tried to kiss the student. The student screams and runs from the room. The next day the faculty member apologized. 5 days later, the student reported the conduct to the Title IX Coordinator.



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# Issues to Consider:

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Title IX protects the student from the faculty member's conduct.

Title VII addresses the faculty conduct (as an employee of the institution).

Notice of Investigation (under Title IX)

Joint Investigation



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# Scenario #2

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Student X, who is enrolled in a course taught by Residential Professor A, schedules a meeting with the Dean of Professor A's department in order to report that Professor A is apparently engaged in a consensual relationship with another student (Student B) in the class. During the interview, Student X tells the Dean they overheard Professor A tell Student B that Professor A would give Student B an "A" grade for the course if Student B agreed to have sexual relations with Professor A.

Next steps?



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# Issues to Consider:

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- The Dean must report the situation to the Title IX Coordinator and to the HR department.
- The Title IX Coordinator and HR should conduct the investigation together.
- The Faculty Senate representative needs to be notified that an investigation will take place.



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# Scenario #3

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Student A is a student in a Biology class. After failing the first assignment, Student A approaches the teaching assistant (TA), who happens to be a student employed in the TA capacity, to ask about how he can improve. Student A says he is willing to swap naked photos of himself in exchange for an “A” grade. The TA declines the offer, but Student A begins sending racy snapchats. The TA tells the faculty member and asks for help.



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# Issues to Consider:

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- Faculty should report the incident to the Title IX Coordinator.
- The TA is a student and is protected under Title IX against this type of behavior.
- The TA is also an employee of the college while acting in her TA capacity.
- Joint investigation



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# WHAT QUESTIONS DO YOU HAVE?



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