

ES LEGAL INC. PRESENTS

Title IX

Presented to: Fresno Pacific University Administration
Presented by: Emerzian Shankar Legal Inc.
Ashley N. Emerzian, Esq.
Inna Shankar, Esq.
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WELCOME!

Quick request: No photos, videos or recordings please.

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ROAD MAP



- TITLE IX BASICS
- CLERY & VAWA BASICS
- FEDERAL AND STATE LAW OVERLAPS
- KEY ASPECTS OF A TITLE IX PROGRAM

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Part I: Title IX Basics

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Guiding Principal:

Title IX is a circus with more than three rings..

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Title IX: 20 USC § 1681 et seq. (1972)

“No person in the United States shall, [redacted], be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity [redacted].”

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Title IX: Protects In the Following Areas

1. Recruitment/admissions/counseling
2. Financial assistance
3. Athletics
4. Pregnant and parenting students
5. Discipline
6. Single-sex education
7. Employment
8. **Sex Misconduct**

Protects both students and employees from:

- ✓ Sexual harassment
- ✓ Sexual assault
- ✓ Dating violence
- ✓ Domestic violence
- ✓ Stalking
- ✓ Other conduct which implicates sex or gender

Retaliation: Threats, intimidation, reprisals, and/or adverse employment or educational actions against a person based on: (a) their report of Title IX violations; (b) assisting with a report of Title IX violations; (c) participation in an investigation; (d) participation in remedial or disciplinary processes required under the Title IX policy.

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Sexual Harassment Defined

1. Quid Pro Quo

Sexual conduct is implicitly or explicitly made the basis for an employment or educational action.

2. Hostile Environment

Such conduct is sufficiently severe or pervasive that it denies, adversely limits or interferes with the work or learning environment and creates an environment that a reasonable person would find intimidating or offensive.

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Sexual Harassment Defined

IT DOES NOT NEED TO BE MOTIVATED BY
SEXUAL DESIRE.

IT DOES NOT REQUIRE INTENT.

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Who Can be the Harasser?

Male	←→	Female
Male	←→	Male
Female	←→	Female
Employee	←→	Supervisor
Vendor	←→	Intern
Employee	←→	Student
Volunteer	←→	Intern
Independent Contractor	←→	Employee

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Sexual Assault

- Includes rape (i.e., penetration of the victim’s vagina, anus or mouth by a penis or penetration of the victim’s vagina or anus with any body part or object against someone’s will).
 - 20% of college females*
 - 6% of college males*
 - Most of the time involving alcohol.
 - Most at risk: college freshman women.
- Includes other contact: touching of an intimate body part, either clothed or unclothed, against someone’s will.

*includes rape and other forms of assault

Consent: In California yes means yes. Ed. Code § 67386.
Affirmative. Conscious. Voluntary. Revocable.


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Dating Violence and Domestic Violence

- **Dating Violence:** conduct by a person who is or has been in a romantic or intimate relationship with the complainant that intentionally or recklessly caused bodily injury or fear of same.
- **Domestic Violence:** Conduct by a current or former spouse or intimate partner of the complainant (or between two people who share a child) that intentionally or recklessly causes bodily injury or places in fear of same (applies to complainant or another).

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Stalking



- Repeated conduct directed at a Complainant of a sexual or romantic nature or motivation that would cause a reasonable person to fear for their safety or the safety of others or to suffer substantial emotional distress.
- Conduct may include following, monitoring, observing, surveilling, threatening, communicating or interfering with property.

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Other Conduct Implicating Sex/Gender

- Differential treatment of one sex as compared to the other (e.g., Professor G grades girls easier than boys)
- Sexual privacy violations (e.g., inappropriate photographs/videos, so-called “revenge porn,” depictions of someone in a sexual act posted or used for extortion purposes)
- Exposing oneself in a public place
- Underage sex (lack of consent)

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Title IX: Two Separate Notice Requirements

- ✓ **Notice of Non-Discrimination Policy**
(Usually combined with campus-wide statement on non-discrimination listing all protected classes)
- ✓ **Notice of Complaint Procedures**

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Title IX: General Obligations

- Take steps to understand what has occurred and respond appropriately once a school knows or reasonably should know of an incident of sexual discrimination.
- Provide interim measures, as appropriate.
- Take prompt and effective steps to: (1) end sexual discrimination if it occurred; (2) to eliminate its effects; and (3) prevent its recurrence
- Prevent retaliation.

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Title IX: Quick Note on Pregnant Students

- Title IX also protects pregnant students, as does the Americans with Disabilities Act.
- In practical terms, this means pregnant students experiencing temporary disabilities due to their pregnancy must be granted reasonable accommodations.

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Part II: CLERY & VAWA Basics

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Clery & VAWA

- **Clery Act:** Requires higher ed institutions to comply with certain campus safety/security requirements.
- **Violence Against Women Act (aka Campus SaVE):** Amended Clery to impose enhanced requirements for handling cases of sexual assault, dating violence, domestic violence and stalking.

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Clery Act: Key Components

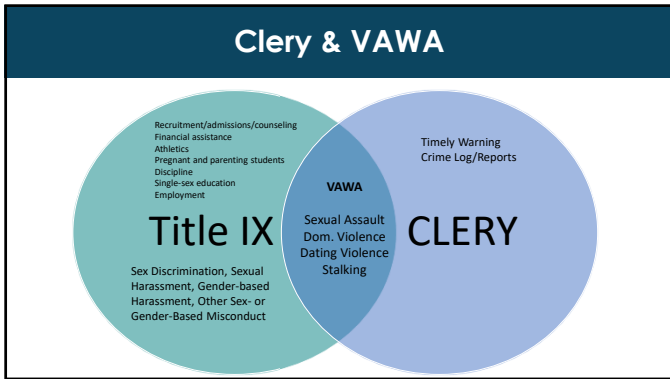
1. Disclosure of policies regarding campus safety.
2. Timely warning of certain crimes that might represent an ongoing threat.
3. Compilation and maintenance of crime information.
4. Reporting of crime information.
 - If alleged crime of sexual violence is reported to a campus security authority it must be reported and recorded. This includes not just police but others with significant responsibility for student activities. Confidential Employees exempt.
 - The report may also trigger a Title IX investigation.

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Violence Against Women Act

- ✓ Requires higher ed institutions to compile statistics for incidents of dating violence, domestic violence, sexual assault and stalking. Students and employees must be subject to discipline for any of this conduct under this Act.
- ✓ Requires that those involved in the disciplinary process be trained annually on issues related to the prohibited misconduct and how to conduct an investigation and hearing process that protects the safety of the victims and promotes accountability. Advisors must be permitted, including attorneys.
- ✓ Requires policies/procedures in their annual security reports.
- ✓ Requires that all incoming students and new employees must receive prevention/awareness programs about dating/domestic violence, sexual assault, stalking, bystander intervention training.

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Part III: FEDERAL AND CALIFORNIA STATE LAW OVERLAPS

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FEDERAL TITLE VII: 42 U.S.C. § 2000e-2 (1964)

“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) (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.**”

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California Law: Ed Code 67386

IN ORDER TO RECEIVE **STATE FUNDS FOR FINANCIAL ASSISTANCE... INCLUDING INDEPENDENT POSTSECONDARY INSTITUTIONS... FOR ALL VAWA MISCONDUCT...**

- Affirmative consent required.
- Preponderance of the evidence standard required.
- Victim-centered policies.
- Statement on protection of confidentiality.
- Policies on other matters, including stranger v. non-stranger assault, intake interviews, notices about on and off-campus resources and services and law enforcement coordination, participation of victim advocates, protections for complainants and witnesses shielding them from student conduct proceedings unless egregious conduct.
- A comprehensive, trauma-informed training program for campus officials involved in investigations and adjudications.
- MOUs with community-based partners for student referrals (rape crisis, counseling, victim advocacy, legal assistance, etc.).
- At Every Incoming Student Orientation: Comprehensive prevention and outreach program addressing VAWA misconduct, including prevention strategies, empowerment programming, awareness campaigns, affirmative consent standard education, bystander intervention and student rights/responsibilities.

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California Law: Gov Code 11135/11139.8 (AB 1887, 2016)

“No person in the State of California shall, on the basis of **sex...** be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is... **funded directly by the state, or receives any financial assistance from the state.**”

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California Law: Civil Code 51.9

“A person is liable in a cause of action for sexual harassment when ...

1. There is a business, service or **professional relationship...**
2. The defendant has made **sexual advances, solicitations...** or engaged in verbal, visual or physical conduct of a **sexual nature or of a hostile nature based on gender** that were unwelcome and pervasive or severe...
3. The plaintiff has suffered or will suffer economic loss, disadvantage or personal injury, including emotional distress...”

Professional relationship includes teachers.

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California Law: Unruh Civil Rights Act – Civil Code 51

“All persons within the jurisdiction of this state are free and equal, and no matter what their sex... are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.”

Private Non-Profit Religious Schools: Not businesses for student admissions/disciplinary purposes, but are businesses in other activities such as commercial transactions or contracts. Doe v. California Lutheran High School Association (2009, No state funding issue in that case.)

Religious Freedom/Free Speech Exemptions to Unruh: Religious freedom and free speech do not exempt from compliance with Unruh. North Coast Women’s Care Medical Group Inc v. Superior Court.

Sex includes: pregnancy, childbirth, medical conditions related thereto, gender, gender identity, gender expression (whether or not stereotypically associated with the person’s assigned sex at birth).

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Part III: KEY ASPECTS OF A CALIFORNIA TITLE IX PROGRAM

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- Coordinates all compliance with Title IX, including investigations, reports and remedies
 - Maintains records of reports of prohibited conduct, actions taken in response, investigation files, resolutions, disciplinary action
 - Identify and address patterns or systemic problems related to Title IX process/procedures
 - Assists complainants with reports to law enforcement
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- Mandatory annual training – students and all employees
 - Comprehensive trauma informed training – all employees involved in Title IX investigation or adjudication processes
 - Prevent and awareness campaigns for campus community including bystander intervention (see something say something) and risk reduction awareness
 - Educational materials provided to promote reporting
 - Posting of information on school website, including how to report

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Title IX Pre-Investigation Phase

- ✓ Process for filing a complaint must be clear
- ✓ ID Confidential and Responsible EEs
- ✓ Investigator assigned (neutral, trained, adequately resourced)
- ✓ Complaint Procedures Notice – To Both Complainant and Respondent

BEST PRACTICES FOR COMPLAINT NOTICE

- Prompt response required
- Delivered simultaneously
- Identify the investigator and purpose of investigation
- Summary of allegation
- Identification of applicable policy
- Standard of evidence statement
- Interim Measures
- Expected timeline (with wiggle room)
- Anti-retaliation statement
- List of resources available

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Mediation & Restorative Models Best Practices in Title IX Context

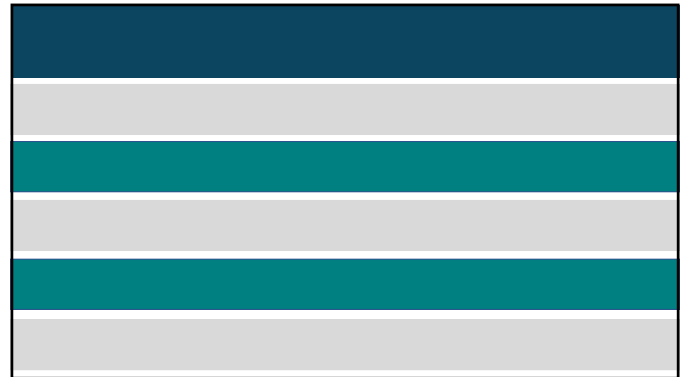
MEDIATION

- Allowed but not required under 2017 guidance from the Dept. of Ed.
- Can be subject to approval from Title IX Office
- But, some overlapping state law protections do not contemplate as alternative to investigation

RESTORATIVE JUSTICE

- Allowed post-investigation
- Not appropriate for all cases
- Generally requires:
 - ✓ Carefully Documented Process
 - ✓ Mutual agreement to participate
 - ✓ Admission of guilt
 - ✓ Acknowledgement of harm
 - ✓ Readiness to apologize

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Title IX Adjudication & Appeal Phase

STUDENTS

- Significant Ninth Circuit Case Law – Trend Towards Increased Due Process for Respondent
- Adjudication Review Panel is Best Practice
- Panel Training Required
- Investigation File Required
- Cross-Exam Required
- Best Practice to Provide Guidelines & Sanctions List
- May Allow Witnesses
- Panel Can:
 - Remand to Investigator
 - Remand to Title IX Coordinator
 - Uphold, Modify or Overturn Findings
 - Decide whether to issue sanctions
- Notice of Decision and Appeal Rights

EMPLOYEES

- Generally, less litigation in this context
- Due Process Still Required
 - Notice
 - Opportunity to Be Heard
- Must Also Comply with California HR Law, Employment Contracts Requirements, and Institutional HR Policies/Handbooks
- Training of Adjudicator Still Required
- Can Refer to Normal Employment Disciplinary Procedures of the Institution
 - Faculty Handbook
 - Staff Handbook

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Additional Best Practices

- Assessment of process
- Regular review and update to policy
- Template letters/correspondence prepared in advance, regular updates to same
- Regular review of new laws in this area, fast-changing legal landscape

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Questions?

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THANK YOU FROM ES LEGAL INC.

Mission

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Vision

Emerzian Shankar Legal Inc. provides innovative and practical strategies for resolving legal challenges faced by schools, business and non-profits. We seek to break the mold of a typical law firm. This means creating an atmosphere that encourages extraordinary work product and personal fulfillment as parallel goals. We embrace accountability within our team by directly communicating about goals and desired outcomes, resulting in high performance. Our focus is on building long-term relationships with our clients by offering a wide variety of legal services. We think dynamically, develop creative options, and empower our clients by helping them strategically evaluate what choice is best for them.

Values

Our values of community, collaboration, effectiveness and integrity guide our business decisions every day.

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