



**SafeColleges**

Questions and Answers from the SafeColleges “New Title IX Regulations: Nine Key Takeaways for Fall Planning” Webinar



*Practitioner Guidance  
from a Title IX and Clery  
Act Expert*

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## Question and Answers from the SafeColleges “New Title IX Regulations: Nine Key Takeaways for Fall Planning” Webinar with Alison Kiss Dougherty

**Please Note:** Below are questions and answers from the “New Title IX Regulations: Nine Key Takeaways for Fall Planning” webinar with Alison Kiss Dougherty. This webinar was hosted on June 24, 2020 and the answers have been provided by Alison Kiss Dougherty. The answers provided do not serve as legal advice, rather guidance from a practitioner.

### 1. Are you saying we can or cannot use the “potted plant” rule for advisors?

The regulations require that anyone who does not have an advisor is appointed one from the hearing and cross examination. While your policy may require that the advisor not participate in the process (“potted plant” rule), the advisor must participate in the hearing and cross examination. In fact, the regulations state that only party’s advisors can ask the questions, not the parties. This is a significant departure from the role of the advisor in the past and the discretion afforded to institutions. The new rule significantly expands the role of the advisor.

### 2. Are you aware of any other existing cohorts for collaboration in other states/area?

There are some groups that an institution can join at a cost. I encourage institutions to connect with other local institutions and build collaboration organically. It is incredibly helpful to see how you can work with other states.

### 3. Can you please explain how the new regulations affect pregnancy?

There is no significant change in how the law affects pregnancy. Past guidance still holds true and the original statutory language. The following document from OCR details the rights of a pregnancy student and choices available to that student:

<https://www2.ed.gov/about/offices/list/ocr/docs/dcl-know-rights-201306-title-ix.html>.

### 4. How often is training required? Annual?

There was no hard timeline on training beyond requiring that institutions train those involved in the process and make the training available on the website. A best practice is to have annual training, and this aligns with the requirements of the VAWA amendments to the Clery Act requiring annual training for students, employees, and hearing officers. Many states have also implemented training requirements that overlap with these regulations, so it is important to review the guidance in your state.

**5. Where can I find training resources for the required areas?**

There are resources online provided by SafeColleges. There are a number of vendors that have training as well as associations. The Department of Justice, Office on Violence Against Women has a website that provides resources: <http://changingourcampus.org/>. There is also tremendous value in exploring partnerships with your local sexual violence and domestic violence prevention organization.

**6. Can you speak to the interpretation of the new regulations on live questioning and if a student does not answer one question -- can the rest of the testimony and statement still be used?**

The answer is that it depends. In terms of the requirements around evidence, I believe this will depend on the content of the question. If a student does not answer a question because they believe that it is not relevant and should not be asked, it truly will depend on the discretion of the hearing panel or adjudicator.

**7. Raising these questions is fine, but more helpful to describe actual responses So, regarding study abroad, what is your response [Alison] going to be?**

I believe that institutions should explore processes that will address conduct that falls outside the scope or jurisdiction of the regulations. For study abroad, I will include options through student and employee conduct process.

**8. Can you share training materials, or strategy for training hearing panels? We know we need to train folks, but can you offer any helpful resources for doing so?**

In terms of training hearing panels, I intent to collaborate with local institutions. There are also a number of free webinars available through law firms for this training. I have not made a decision but will likely invest in a consultant to training our hearing panel.

**9. You stated that if parties do not appear at the Hearing, their advisors can still cross-examine on their behalf. Could you please expand on this point and how it works with the new rule that if a party does not appear at the Hearing, their statements cannot be used in the final report?**

Yes, the cross examination will be a part of the record. It is my understanding that if the party doesn't participate in answering questions that evidence that was presented in the investigation cannot be used in the final decision.

**10. There is little guidance in the regs on informal resolution processes (outside of the need to inform students of the informal resolution process). Given the nature of the formal resolution process, I anticipate that many students will sign on and opt into an informal resolution process over the formal resolution process. Any best practices or thoughts on what institutions will likely do for informal resolution processes?**

I believe that restorative justice is a best practice as an alternative. The Center for Restorative Justice has affordable resources for training that will be helpful. It is also helpful to explore what institutions use restorative justice through their processes.

**11. We introduce and offer the advisor at the beginning of a formal complaint and not wait until the hearing process, correct? It sounds like we are only required to provide an advisor for the cross examination.**

If your process is the same process that you use for VAWA, then you have to and should introduce the advisor at the start of the process. It will be important to fully detail the role of the advisor (e.g. advisor must run cross examination not the party).

**12. Under the new regulations, can the coordinator also be the investigator?**

The key element that I see throughout the new regulations is that the Coordinator should be free from a conflict of interest. There was nothing specific to the role of the Coordinator as the investigator. I prefer to see the roles separated but know that this is not always possible.

**13. If there is a sexual assault involving two students, which occurs at an off-campus apartment, what can the university do? Must they find a policy outside of Title IX to investigate the complaint? If so, what would that look like?**

The regulations explicitly define the scope of an institution's responsibility to respond to complaints of sexual misconduct. Institutions must act upon complaints of misconduct that occur within an education program, such as in off-campus housing for recognized Greek life organizations or at events that are part of a university program. But an institution "may address sexual harassment affecting its students or employees that falls outside Title IX's jurisdiction in any manner the school chooses." This provided institutions with flexibility to decide.

**14. As a Deputy TIX, who is not a lawyer, knowing schools will need to rewrite policies, what piece of advice would you give to offer support to my TIXC?**

A good step is to determine what role the Deputy Title IX Coordinator will play in the process. Is there an option to serve as the advisor or maybe in arranging options for informal resolution? It is a heavy lift to rewrite these so simply asking to help is a good step.

**15. If a party selects their own advisor instead of using one from the University, does the University have to provide training to that advisor?**

The institution has to train the advisor that the institution provides. There is no requirement to train the advisor if the party selects the advisor.

**16. What are your thoughts on athletic department ability to prohibit play or practice for athlete involved in grievance process but before final resolution?**

I believe in a balanced process and until there is a finding, I am not in support of any punitive interim measures unless there is a serious threat to the community as defined by OCR. A temporary suspension from the team should be considered if there is a threat or if both parties will interact on that team and it is requested as an interim measure.

**17. You mentioned trying to think about ways to simplify the hearing process for participants, particularly witnesses. Do you have any thoughts on ways this might be simplified?**

In terms of simplifying, I mean in explaining the process. Our policies are often full of legal jargon, because they have to be. So, explaining things like privacy, who it means to participate, retaliation. These are simple concepts for those in the field but often for students and employees they are not.

**18. Can the advisor be designated in the "potted plant" role for any meetings except the live hearing?**

My interpretation of the regulations is yes. However, I suspect we may receive more guidance from OCR.

**19. Can you clarify the point of "the party's advisor may appear and conduct cross-examination even when the party whom they are advising does not appear"? Does this mean if a respondent does not appear, but they chose an attorney as their advisor, that attorney could still cross examine the complainant?**

Yes.

*Note: These answers do not serve as legal advice, rather guidance from a practitioner.*



**20. In our area of Ohio, we have 6 private institutions. So, I think collaboration can be key moving forward. I wanted to get your thoughts on partnering with local law schools to create a clinic, in which law students would serve as advisors of choice.**

This is something that I have spoken to some law faculty about and many have advised against using law students. If this is something that is done moving forward, it will be important to consider legal liability for the students who are a part of it.

**21. Will fraternity chapter house they rent/lease, that are not owned by the university or by the national organization, be considered? We recognize fraternities but they own their own properties outside of university oversight.**

It comes down to whether you recognize the property and acknowledge it as a part of the organization.

**22. Can you repeat how Title IX applies to study abroad?**

The regulations specify behavior in the “United States” so the interpretation is that it does not apply.

**23. To confirm, students abroad (school sponsored) is not covered by Title IX? Only employee discipline and/or code of conduct for students, correct?**

That is the approach most institutions are taking based on interpretation of how the regulations are written- stating “in the United States.”

**24. Are the live hearings only required at the formal stage?**

The live hearings are required as part of a formal complaint and following an investigation when a resolution will be reached.

**25. Will you please repeat your thoughts around advisor training?**

I am collaborating with local institutions to create advisor training. I do not believe they should be training as mini attorneys. This is a civil process, so it is important to train based on the regulations. The advisor should ask questions that the party would like them to.

**26. The recording and transcript of the hearing. The Recording is required. Is the transcript required or just preferable?**

The regulations state that live hearings be recorded, by transcript or audio visually, and made available to parties and maintained in college records for at least seven years. The recording can be either a transcript or audiovisual, or both.

**27. The standard of evidence chosen has to be used with both students and staff. Is it for all Title IX Cases or for all Sexual Harassment? I am thinking of cases of sexual harassment that do not fall into the Title IX window.**

It is for Title IX. Some institutions are considering separate policies. I take the approach of handling all forms of discrimination under the same policy.

**28. Does the Title IX Coordinator title have to be reflected in the HR Job title or is the role title adequate?"**

The Title IX Coordinator should be identified. If the person is in a dual role, that should be clear in their title.

**29. Do you have free resources/low cost available so we can help provide this information to students and our staff? Or know of any.**

I always point institutions to the Department of Justice website (mentioned earlier), ATIXA offers some free resources to the field, Clery Center offers some resources that cover the intersection of Clery and Title IX. In addition, SafeColleges offers Title IX training for employees and students.

**30. In regard to the advisor being present without their respective party being present, can the University mandate that the principle party (Complainant/Respondent) be present at the hearing? If that's not the case (University can't mandate it) what does that look like, then?**

This points to language in the regulation where it mentions the advisor questioning even if their party is not present. I believe this will depend on your institution as you think about the policy.

**31. Could the investigator(s) on the case be subject to cross-examination at the hearing?**

Yes, I believe the investigator can be questioned at the hearing. I believe this will depend on the institution and policy.

**32. Some folks are recommending not diving into changes prior to August 14 implementation because things may change as a result of potential/pending lawsuits. What are your thoughts?**

I agree and plan to make changes to comply, but that will not reflect my formal policy. I think waiting means you are rolling the dice. If there is no stay granted, we will be obligated to be in compliance for cases after 8/14.

**33. What if state and federal definitions differ? Which would you default to?**

I default to whatever policy I am doing. The Clery Act defers you to state definitions for some things. In this case, Title IX points to definitions that should be used in our policy. The policy then should contain these federal definitions.

**34. What about training for folks that are part of the Title IX Team such as Educators that do not get involved in the hearing process, but might meet with students to do their first intake? Would they be required to receive the same training as the Coordinators?**

There is no formal requirement, but it is an excellent practice.

**35. Do you intend to utilize Title IX complaint procedures for all allegations of sexual misconduct, or will you defer to your general conduct procedures for matters that do not merit a formal complaint under the regulatory definitions?**

I plan to use the Title IX process for everything that it would cover. If something falls outside the scope of the policy, I would consider that process. You want to be careful not to circumvent what is required by federal law.

**36. Are there regulations about how the recipient supplied advisor is trained? Is the advisor truly "advising" the student or simply serving as a party's representative for the cross-examination process?**



There is nothing about the content of the training, only that it needs to be available on the website.

**37. With the recent Supreme Court Ruling on LGBTQ+ Discrimination, how do you see that affecting colleges and universities with the Title IX regulations?**

It certainly may have an impact, but I believe this is yet to be seen.