



# Title IX Takes Up Residency: Addressing Sexual Misconduct Under the New Regulations

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# Our Presenter

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# Disclaimer

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- This presentation does not constitute legal advice. Consult with competent legal counsel regarding how best to address your specific situation.

# Today's Agenda

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- Does Title IX Apply To Your Institution?
- What does Title IX require?
- Practical Implications of Complying with Title IX
- Building a Title IX Compliance Program



**Does Title IX Apply To Your Institution?**

# What is Title IX and does it apply to Health Care Institutions?

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## First, What is Title IX?

### **Title IX provides:**

“no person in the United States shall, on the basis of sex, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under ***any educational program or activity receiving federal financial assistance.***”

20 U.S.C. §1681(a) (emphasis added).

# What is Title IX and does it apply to Health Care Institutions?

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## The U.S. Supreme Court's initial decisions about the scope of Title IX's definition of "educational program or activity"

*Grove City College v. Bell*, 465 U.S. 555 (1984): held that the "receipt of federal funds by a particular program within an institution, does not trigger institution-wide coverage" under Title IX. The *Grove City College* Court stated that a student's tuition payments funded through federal financial assistance *triggered Title IX coverage for the institution's financial aid program but not the institution as a whole.*

# What is Title IX and does it apply to Health Care Institutions?



***Congress reverses Grove City College three years later by enacting the Civil Rights Restoration Act of 1987 (CRRRA).***

The CRRRA broadened the statutory scope of Title IX to include “all of the operations” of the following entities, “any part of which” is extended federal funding:

- State or local governmental instrumentalities, 20 U.S.C. § 1687(1);
- Colleges, universities, postsecondary institutions, public systems of higher education, local educational agencies, vocational education systems, and “other” school systems, id § 1687(2);
- “Entire” corporations, partnerships, “other” private organizations, and sole proprietorships if assistance is extended to them “as a whole” or if they are “principally engaged in the business of providing education, healthcare, housing, social services, or parks and recreation,” id § 1687(3)(A);
- “Entire” plants or other “comparable, geographically separate” facilities in the case of “any other” corporation, partnership, private organization, or sole proprietorship not described in subsection (3)(A), id § 1687(3)(B); and
- “Any other entity” established by “two or more” entities described in subsections (1) through (3), id § 1687(4).

# Third Circuit applies Title IX to Mercy Catholic Hospital

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*Doe v. Mercy Catholic Medical Center*, 850 F.3d 545 (3d Cir. 2017).

**Facts:** Doe, a former radiology resident, alleged that the director of her program repeatedly sexually harassed her and retaliated against her for complaining about his behavior. Doe alleged that she was terminated from her program in retaliation for bringing a complaint against her supervisor. She brought claims under Title VII and Title IX seeking damages against Mercy Catholic Medical Center (“Mercy”).

**Procedure and Appeal to Third Circuit:** Her Title IX claim was dismissed by the district court who determined that Mercy’s program was not covered by Title IX’s scope as Mercy was not an educational institution. The Third Circuit reversed. In finding that Title IX could apply to Mercy, the court first analyzed whether Mercy’s residency program could constitute an “educational program or activity” under Title IX.

# Third Circuit applies Title IX to Mercy Catholic Hospital

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Third Circuit, applying the CRRA, extended the reach of Title IX to Mercy's medical residency program.

- **“Four Feature Test” – Is this an educational program?**
  - (A) program is incrementally structured through a particular course of study or training, whether full- or part-time;
  - (B) program allows participants to earn a degree or diploma, qualify for a certification or certification examination, or pursue a specific occupation or trade beyond mere on-the-job training;
  - (C) program provides instructors, examinations, and evaluation process or grades, or accepts tuition; or
  - (D) the entities offering, accrediting, or otherwise regulating a program hold it out as educational in nature

# Third Circuit applies Title IX to Mercy Catholic Hospital

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**Third Circuit found “two plausible ways” that Mercy’s residency program could be considered an educational program or activity.**

1. Doe’s complaint alleged facts that raise a “plausible inference” that Mercy would be considered a “private organization principally engaged in the business of providing healthcare” making it subject to the CRRA broad applicability because Mercy also operates a residency program that is accredited by the Accreditation Council for Graduate Medical Education (ACGME); and
2. Mercy’s residency program makes the hospital’s “mission,” at least in part, educational under Title IX because of Mercy’s “affiliation” with Drexel Medicine, a university program plausibly covered by Title IX.

# Title IX Regulations also can create liability for medical education programs

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The Title IX Regulations define a “program or activity” as all of the operations of:

- A college, university, or other postsecondary institution, or a public system of higher education; or
- An entire corporation, partnership, other private organization, or an entire sole proprietorship—

(A) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(B) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or [\* \* \*]

***“[The Title IX Regulations] appl[y] to every recipient and to the education program or activity operated by such recipient which receives Federal financial assistance.” 34 C.F.R. § 106.11***

# Other corporate considerations...

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- If you have a multi-campus system with a parent-subsidary relationship between the campuses (each as individual corporations) does the Title IX requirements attach to only the corporation (subsidiary campus) that receives federal assistance or aid?
- Do you have medical affiliation agreements (shared staff, faculty appointments)? Clinical programs with local colleges and universities?



REGULATIONS

**What Does Title IX Require? (In Brief)**

# Does Title IX Apply?

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- Likely, yes
- Title VII still applies also – and there is a circuit split as to whether Title VII claims pre-empt Title IX claims
- Title VII and Title IX definitions of sexual harassment are now different
- If Title IX applies, the August 14, 2020 regulations also apply, requiring grievance procedures to be put in place, including robust notice of allegations, an investigation, and written questions and answers exchanged between the parties
- So, what do you have to do?

# Some Terminology

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- Complainant – the person who reportedly experienced the discrimination/harassment
- Respondent – the person who reportedly engaged in discrimination/harassment
- Report – Information about discrimination/harassment received prior to the filing of a formal complaint
- Formal Complaint – a written, signed document that reports sexual harassment and requests an investigation

# First, the Basics

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- You must “designate and authorize” at least one employee to act as a Title IX Coordinator
- You must prohibit sex discrimination and sexual harassment
- You must create a grievance policy that complies with the regulations
- You must notify virtually employees, students, unions, and applicants of the identity of the Title IX Coordinator, the prohibition against discrimination/harassment, and where to find the policy
- See 34 C.F.R. 106.8 (eff. August 14, 2020) for specifics

# Sexual Harassment Definition

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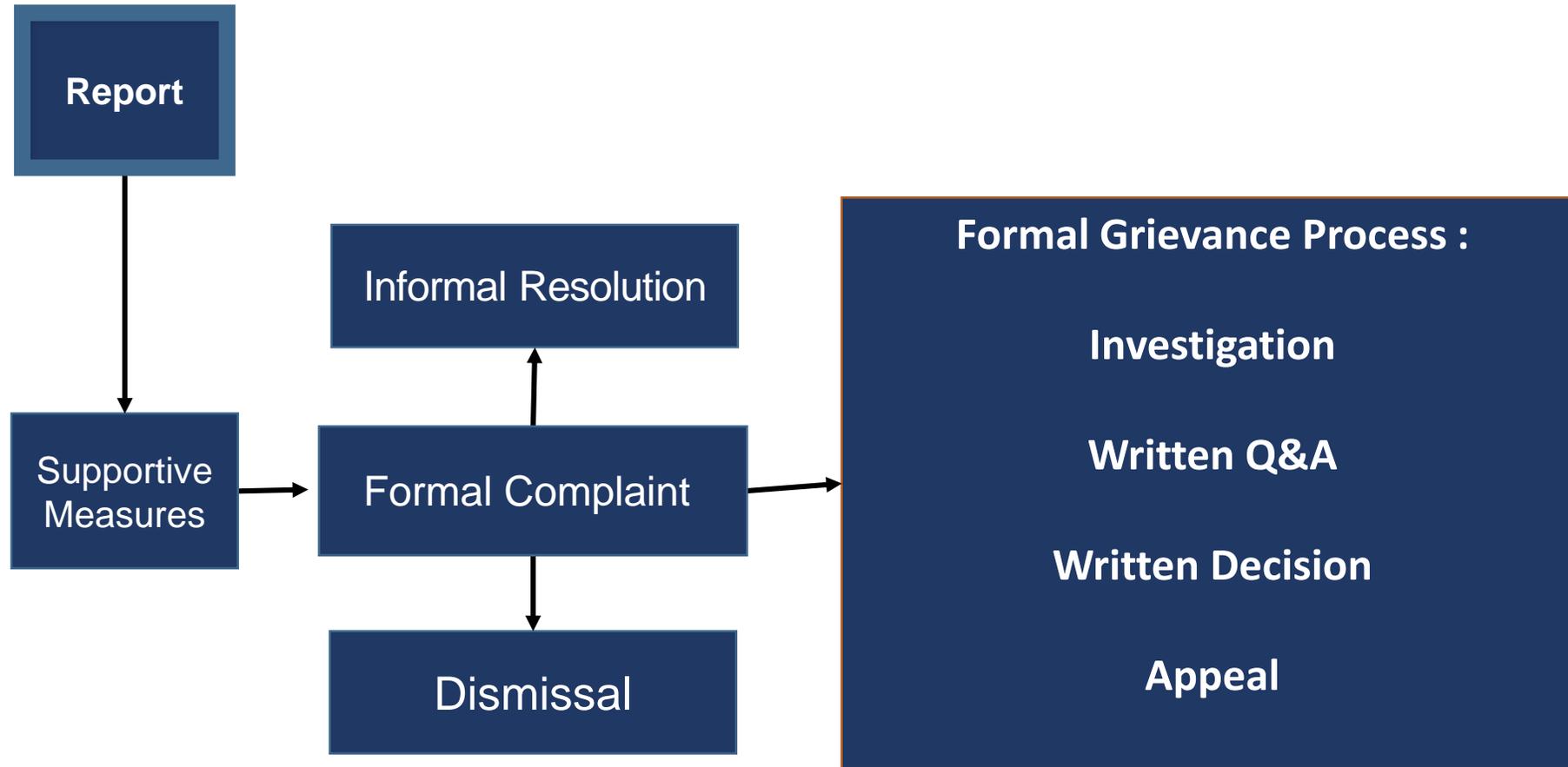
- Conduct on the basis of sex that satisfies one or more of the following:
  - An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
  - Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
  - Sexual assault, dating violence, domestic violence, or stalking

# Sexual Assault



- Note that sexual assault includes these when they are without valid consent:
  - Sexual intercourse (anal, oral, vaginal) using a body part or object
  - Fondling for the purpose of sexual gratification
- Sexual assault also includes these regardless of consent
  - Sexual intercourse with a person who is under the statutory age of consent
    - In Ohio –
      - Individuals under the age of 13 may not consent
      - Individuals 13 or older, but under the age of 16 may not consent to individuals over 18
      - Individuals may consent starting at 16
  - Sexual intercourse between individuals who are not permitted to marry
    - In Ohio – closer in kin than second cousins

# Overview of the Process



# Receiving Reports

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- You have “actual knowledge” of sexual harassment when someone reports allegations of sexual harassment to the Title IX Coordinator or to “any official of the recipient who has the authority to institute corrective measures on behalf of the recipient”
- Actual knowledge triggers a duty to:
  - Contact the complainant to offer supportive measures and discuss their options to resolve the concerns
  - Potentially, initiate an investigation even if the complainant does not wish to do so (risk analysis)

# Supportive Measures

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- Non-disciplinary, non-punitive individualized services as appropriate, as reasonably available, and without fee or charge to the individual receiving the services
- Designed to restore or preserve equal access to your program until the case is resolved
- Examples: Counseling, deadline extensions, modifications of work/class schedules, campus escort services, no-contact restrictions, changes in work locations, leaves of absence, increased security
- Note: Both parties are eligible for supportive measures.

# Options for Processing Reports

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- No resolution process, but consider whether more training would be helpful for a particular group. Provide supportive measures as needed.
- Informal resolution – facilitated agreement between the parties to govern future conduct/interactions. Agreement is enforced by the recipient.
- Formal resolution – Impartial investigation and decision-making. Appeal available.

# Threshold Issue

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- Not all formal complaints will trigger a process!
- To go forward, must meet all of the following requirements:
  - Complainant must be participating in or attempting to participate in the recipient's education program or activity of the recipient when the formal complaint is filed
  - Reported behavior must be directed at a person physically present in the United States
  - Reported behavior must potentially qualify as "sexual harassment" if it is proved
  - Reported behavior must have occurred in the recipient's education program or activity
- If formal complaint does not meet these requirements, must dismiss (but can still address conduct through another policy)

# Formal Resolution – Investigation

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- Upon receipt of formal complaint of sexual harassment, provide detailed notice of allegations to both parties. See 34 C.F.R. 106.44(b)(2).
  - Must be done before you interview the respondent!
- Investigator interviews parties and relevant witnesses.
  - Each party may bring an advisor of their choice, who may be an attorney or a union representative.
- Investigator gathers interview summaries and relevant evidence into a case file.

# Evidence Sharing

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- Parties and advisors receive 10 days to review relevant evidence directly related to the complaint (which may include a draft investigative report) and provide a written response
- Investigator prepares a written investigative report that fairly summarizes all relevant evidence, including inculpatory and exculpatory evidence
- Parties and advisors have another 10 days to review investigative report and provide a written response

# Written Q&A

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- You may have a live hearing with cross-examination, but you are not required to.
- You *must* allow each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.
  - Decision-maker can rule to exclude a question based on relevancy.

# Written Decision

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- Written Decision issued by a “decision-maker” who is neither the investigator nor the Title IX Coordinator
- Must include findings of fact, conclusions as to whether your policy was violated, and a rationale for each conclusion
- Appeal is permissible to a separate “decision-maker” in writing
- Appeal grounds are limited by regulation but you may add to them in your policy

- You must provide training for your investigators, decision-makers, Title IX Coordinator(s), and appeals officers
  - Definition of sexual harassment
  - Scope of your education program/activity
  - How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes (as applicable)
  - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
  - Issues of relevance (investigators and probably decision-makers)
- These training materials must be made publicly available on your website
  - This training does not meet these requirements, but you may include it in your posting if you choose.



# Practical Implications of Compliance

# Why Would Title IX Apply?

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- Does your hospital provide **clinical experience for students and/or residents**?
- Does your hospital provide **medical/healthcare/wellness services** to schools, colleges/universities or other educational programs?
- Does your hospital participate in **research activities** that are federally funded?
- Does your hospital receive **federal grants** or other federal sources of funds?

# Parties involved (1 of 4)

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- Employees:
  - Hospitals/employers must ensure risks are minimized for employees
  - Health care providers = Ohio law and reporting rules apply
- Contractors and vendors:
  - CMS CoP §482.12(e): Contracted Services
  - What are the contractual terms – **who's policies govern?**
  - Do they include prohibition against discrimination and harassment?
  - Do they include Title IX Coordinator (or designated official for complaints)?

# Parties involved (2 of 4)

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- **Patients: CMS CoP §482.13: Patient's Rights**
  - **§482.13(a)(2): Hospital Grievance Process**
    - "Grievance": formal or informal written or verbal complaint to hospital by patient (or patient representative) regarding patient's care and includes allegations of abuse, neglect or other unethical behavior.
    - Grievance process must:
      - Clearly explain procedure to submit grievance
      - Promptly review, investigate and resolve grievance
      - Provide written notice of decision to patient (or patient representative) that includes:
        - Name of hospital contact person
        - Steps taken on behalf of patient to investigate
        - Results of the grievance process
        - Date of completion

# Parties involved (3 of 4)

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- **Patients: CMS CoP §482.13: Patient's Rights**
  - **§482.13(c)(2): Care provided in a safe setting**
    - **Hospitals must protect patients**
      - Conduct patient risk assessments
        - Identify vulnerable patient populations
        - Provide adequate staffing levels for appropriate patient observation/monitoring
      - Assess safety risks in all patient care area
        - Provide appropriate security and systems to protect patients
        - Limit/restrict unwanted visitors

# Parties involved (4 of 4)

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- **Patients: CMS CoP §482.13: Patient's Rights**
- **§482.13(c)(3): Patient right to be free from all forms of abuse/harassment**
  - Hospital must ensure patients are free from all forms of abuse, neglect or harassment from staff, other patients and/or visitors.
  - Be proactive to prevent or identify events/occurrences that may constitute abuse.
  - Policies for investigation of abuse allegations must include:
    - Methods to protect patients from abuse during investigation of allegations.
    - Investigations of abuse or mistreatment are timely, objective and thorough.
    - Appropriate corrective action occurs and incidents of abuse or harassment are reported in accordance with applicable federal, state and local laws.

# Preventative Measures

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- **Policies: are clear and up-to-date:**
  - **HR/Compliance**
    - Discrimination/harassment policies
    - Conducting screenings/background checks/credentialing
  - **Patient Care:**
    - Grievance Process/Policy
    - Chaperone Policy
      - OAC 4731-26 – Sexual Misconduct and Impropriety
      - OAC 4731-26-01 – Definitions for:
        - “Chaperone”                      “Intimate Examinations”
        - “Sexual Misconduct”              “Sexual Impropriety”
        - “Sexual Contact”                    “Sexual Interaction”

# Case Study #1

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- Nursing student vs. Resident

Resident Fedup tells her program coordinator that she no longer wants to be scheduled for surgical cases with Dr. Hawkeye because he makes inappropriate sexual jokes and suggestive comments during every surgery.

The program coordinator responds that he is harmless and a talented surgeon that they are lucky to have on staff. The Program Coordinator also says that no other residents have complained (she is the only female surgical resident) besides she has to work with Dr. Hawkeye in order to get the right case mix to complete her training.

The next day Resident Fedup is seen rushing out of the OR very flustered.

A scrub tech tells the OR manager that when they were scrubbing out and talking about her upcoming wedding, Dr. Hawkeye interrupted “Don’t get pregnant until you have completed with your residency.”

# Case Study #2

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- Resident vs. Physician

RN student Lauren told her preceptor that she feels like Resident Creep follows her around the hospital and always shows up on whatever unit she is assigned.

Lauren is leaving a patient's room in the ICU.

When she starts to remove her PPE, Resident Creep walks over closely to her and whispers "Take it all off so I can take some pictures for later tonight."

# Case Study #3

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- Patient vs. Nurse

Patient Daisy wakes up and complains to Nurse Stephanie that she was assaulted by a man during the night.

Nurse Stephanie asks what happened.

Daisy says she doesn't know the man but he rubbed her pelvic area during the night.

Then Nurse David walks in the room to check on Daisy and Daisy becomes frightened and tells Nurse Stephanie, "It was him!" and points to Nurse David.

Nurse Stephanie calls Security and speaks with David who says he changed Daisy's catheter during the night.

# Case Study #4

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- Patient vs. Visitor

Patient Ted is in a coma and has a female visitor in his room.

A nurse walks in and sees the female visitor's hand moving under Patient Ted's blanket around his groin area.



## **Building a Compliance Program**

# Where do you start? (1 of 3)

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- Identify your Title IX Coordinator
- Train your Title IX Coordinator
- Develop a policy
  - How will it integrate with other policies (e.g. Title VII sexual harassment)?
  - How will you address sex discrimination and retaliation?
- Circulate your policy
- Train everyone on your policy
  - If it's potential sexual harassment under the Title IX definition, it must be dealt with through the policy.

# Where do you start? (2 of 3)

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- Identify investigators, decision-makers, and informal resolution facilitators – and train them
- Post all training materials for Title IX team members on your website
- Keep all information highly confidential and only share as necessary to implement the process and provide supportive measures
- Create a record-keeping system that complies with the new retention requirements in 34 C.F.R. 106.45(b)(10)

# Where do you start? (3 of 3)

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- Identify any Title IX partners – colleges and universities that may also have Title IX policies to comply with
  - How can we show that we are all compliant and cooperating as appropriate?
- Keep training current for team and all employees
  - Can this be integrated into other education programs that you provide that may be important for patient care purposes?