

Off-Campus Locations

Question: If a University student is attending a University sponsored study abroad program outside of the United States and experiences sexual harassment would this be within the jurisdiction of Title IX, as it is a University sponsored activity, despite occurring outside of the United States?

Answer: With respect to your question about conduct outside of the United States, the Title IX Rule recognizes the statutory jurisdiction of Title IX's language and applies only to persons in the United States. 20 U.S.C. § 1681(a) begins with the words, "No person in the United States . . ." A university's study abroad program may be part of the university's "education program or activity," yet Title IX does not extend to conduct that occurs outside the United States.

Question: If a University student experiences an act of sexual harassment perpetrated by another University student, but the act occurs at an off campus location which is not under the control of the University, would this be within the jurisdiction of Title IX? Or would this be addressed as a possible student code of conduct violation?

Answer: With respect to your question about conduct that occurs at an off-campus location, the Title IX Rule requires a university to respond to actual knowledge of sexual harassment in the university's education program or activity against a person in the United States. § 106.44(a). The Rule states in § 106.44(a): "Education program or activity" includes "locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution."

The preamble to the Rule contains extensive discussion of the "education program or activity" jurisdictional condition, at pages 615-77, including, for example, the following statement from the Department at pages 623-25 (footnotes omitted here):

For purposes of § 106.30, § 106.44, and § 106.45, the phrase "education program or activity" includes "locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs" and also includes "any building owned or controlled by a student organization that is officially recognized by a postsecondary institution." The Title IX statute and existing Title IX regulations, already contain

detailed definitions of “program or activity” that, among other aspects of such definitions, include “all of the operations of” a postsecondary institution or local education agency. The Department will interpret “program or activity” in these final regulations in accordance with the Title IX statutory (20 U.S.C. 1687) and regulatory definitions (34 CFR 106.2(h)), guided by the Supreme Court’s language applied specifically for use in sexual harassment situations under Title IX regarding circumstances over which a recipient has control and (for postsecondary institutions) buildings owned or controlled by student organizations if the student organization is officially recognized by the postsecondary institution.

While “all of the operations of” a recipient (per existing statutory and regulatory provisions), and the additional “substantial control” language in these final regulations, clearly include all incidents of sexual harassment occurring on a recipient’s campus, the statutory and regulatory definitions of program or activity along with the revised language in § 106.44(a) clarify that a recipient’s Title IX obligations extend to sexual harassment incidents that occur off campus if any of three conditions are met: if the off-campus incident occurs as part of the recipient’s “operations” pursuant to 20 U.S.C. 1687 and 34 CFR 106.2(h); if the recipient exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus pursuant to § 106.44(a); or if a sexual harassment incident occurs at an off-campus building owned or controlled by a student organization officially recognized by a postsecondary institution pursuant to §106.44(a).

With respect to your reference to code of conduct violations, at page 633 of the preamble to the Rule, the Department notes:

“[N]othing in the final regulations prevents recipients from initiating a student conduct proceeding or offering supportive measures to students affected by sexual harassment that occurs outside the recipient’s education program or activity. Title IX is not the exclusive remedy for sexual misconduct or traumatic events that affect students. As to misconduct that falls outside the ambit of Title IX, nothing in the final regulations precludes recipients from vigorously addressing misconduct (sexual or otherwise) that occurs outside the scope of Title IX or from offering supportive measures to students and individuals impacted by misconduct or trauma even when Title IX and its implementing regulations do not require such actions.”

Question: First, we are wondering about the implications of the new definition of sexual harassment, including the new jurisdiction restriction which appears to exclude incidences that might occur in a study abroad scenario. We know the guidance allows schools to continue to address sexual harassment that falls outside of Title IX via the school's code of conduct. However, we're struggling with how to operationalize this. For instance, would we develop a separate policy and procedures and train a different group of people? For some context, our university currently bifurcates investigations and adjudications whereby my office conducts the fact-finding and the student conduct office conducts the hearings for TIX incidences involving students. However, if my office has to dismiss a student-on-student rape allegation because it did not occur in the U.S., would it fall on student conduct to investigate? On the other hand, would the new rule allow the use of the same policies/procedures as those used for Title IX incidences to process such complaints?

Answer: The Title IX Rule does not preclude a recipient from using the same Title IX personnel—whether that be employees of the recipient or the employees of a third-party, such as a consortium of schools—to investigate allegations of misconduct that fall outside the scope of Title IX. Similarly, the Rule does not preclude a recipient from using a grievance process that complies with § 106.45 with respect to allegations that fall outside the scope of Title IX. In the Preamble of the Rule at pp. 481-82, for example, the Department notes:

In response to commenters' concerns, the final regulations revise § 106.45(b)(3)(i) to clearly state that dismissal for Title IX purposes does not preclude action under another provision of the recipient's code of conduct. Thus, if a recipient is required under State law or the recipient's own policies to investigate sexual or other misconduct that does not meet the § 106.30 definition, the final regulations clarify that a recipient may do so. Similarly, if a recipient wishes to use a grievance process that complies with § 106.45 to resolve allegations of misconduct that do not constitute sexual harassment under § 106.30, nothing in the final regulations precludes a recipient from doing so. Alternatively, a recipient may respond to non-Title IX misconduct under disciplinary procedures that do not comply with § 106.45. The final regulations leave recipients flexibility in this regard, and prescribe a particular grievance process only where allegations concern sexual harassment covered by Title IX.