



Please log in to your ATIXA Event Lobby each day to access the course slides, supplemental materials, and to log your attendance.

The ATIXA Event Lobby can be accessed by the QR code or visiting www.atixa.org/atixa-event-lobby in your internet browser.

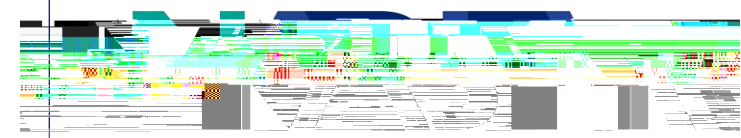
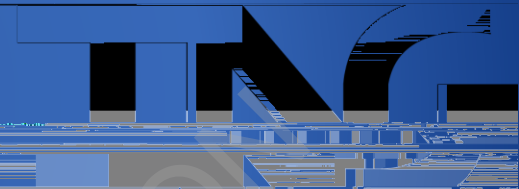
Links for any applicable course evaluations and learning assessments are also provided in the ATIXA Event Lobby. You will be asked to enter your registration email to access the Event Lobby.

If you have not registered for this course, an event



Title IX Coordinator and Administrator

Coordinator One: Foundations



Any advice or opinion provided during this training, either privately or to the entire group, is never to be construed as legal advice. Always consult with your legal counsel to ensure you are receiving advice that considers existing case law, any applicable state or local laws, and evolving federal guidance.

CONTENT ADVISORY

The content and discussion in this course will necessarily engage with sex- and gender-based harassment, discrimination, and violence and associated sensitive topics that can evoke strong emotional responses.

ATIXA faculty members may offer examples that emulate the language and vocabulary that Title IX practitioners may encounter in their roles including slang, profanity, and other graphic or offensive language.

AGENDA

1 Title IX Team Roles & Responsibilities

2 Title IX Overview & History

3 Significant Cases

4 The OCR & Title IX

5 Violence Against Women Act

6 When Does Title IX Apply?

Creating & Implementing Appropriate Policies & Procedures Oversight & Coordinating Prompt & Equitable Grievance

AGENDA

- 13 Elements of an Investigation
- 14 Coordinating the Decision-Making Stages
- 15 Ensuring Compliance with Final Sanctions
- 16 Coordinating Appeal Processes
- 17 General Title IX Compliance Oversight

NOT FOR DISTRIBUTION

TITLE IX REGULATIONS

1972: Congress passed Title IX of the Education Amendments

1980: the Department of Education's Office for Civil Rights (OCR) given primary responsibility for enforcing Title IX

November 2018: OCR proposed the most detailed and comprehensive Title IX regulations to date, which focused on sexual harassment response

August 2020: Significantly amended, due-process oriented Regulations took effect (proposed in Nov. 2018)

June 2022: OCR published a Notice of Proposed Rule Making (NPRM) outlining proposed changes to the Title IX regulations focused on sexual harassment response and pregnancy and related conditions

NPRM PROCESS TIMELINE

July 2022: NPRM published in the Federal Register and the 60-day comment period began

September 2022: Review and comment period ended

Final Rule expected to be issued in Spring 2023

Effective Date approximately Summer/Fall 2023

April 2023: OCR published a Notice of Proposed Rule

PREPARING FOR IMPLEMENTATION

Continue to fulfill obligations under the current regulations for the 2022-2023 academic year.

Anticipate OCR will expect schools to implement the new sexual harassment and pregnancy-related Title IX regulations before the start of the 2023-2024 academic year.

Steps to Take Now:

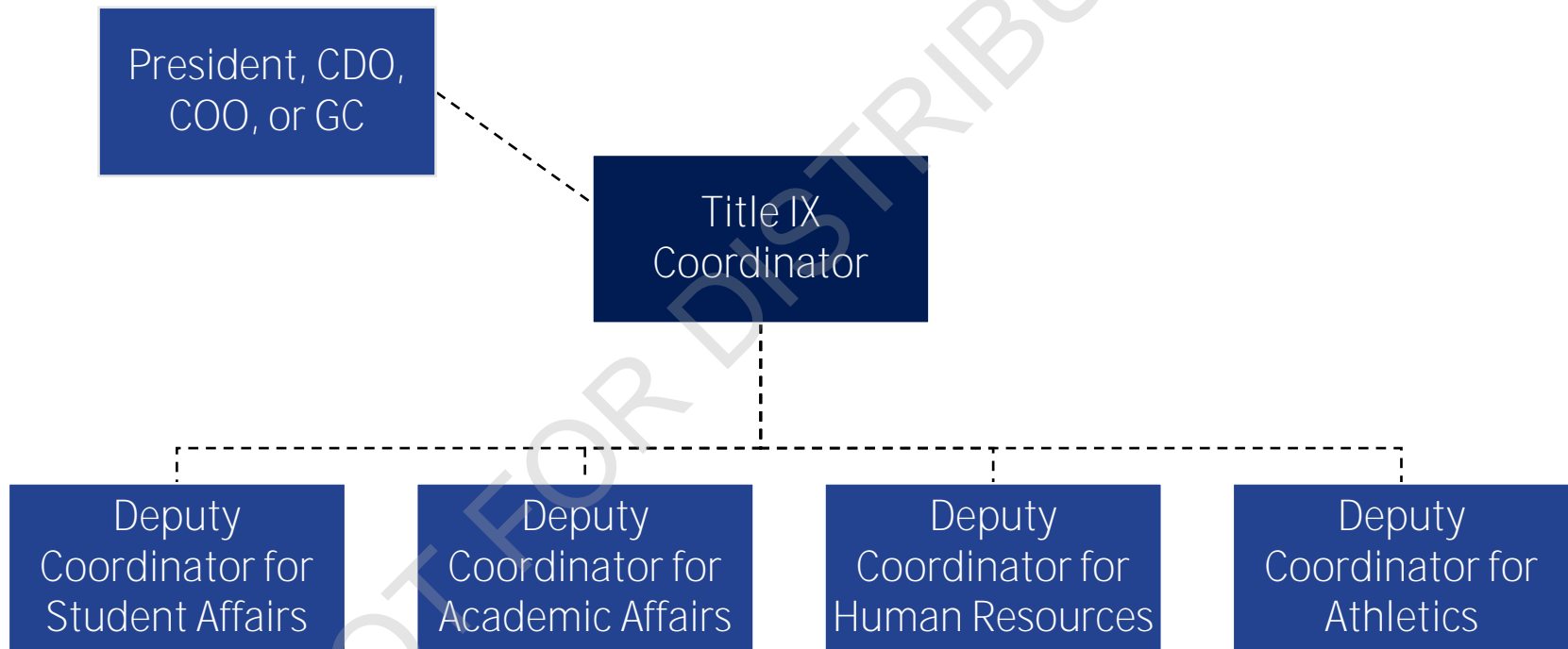
- Prepare to educate your community on the changes
- Identify stakeholders that will need to be involved in making policy decisions (e.g., whether to have hearings)
- Determine how you will manage policy changes
- Plan for the training needs for your community
- Consider state laws, court decisions, and other regulations that may affect your institutional approach



TITLE IX TEAM ROLES & RESPONSIBILITIES

Sample Team Structure
Title IX Coordinator
Investigator
Decision-Maker
Informal Resolution Facilitator
Training the Team

SAMPLE TITLE IX TEAM STRUCTURE FOR HIGHER EDUCATION



THE TITLE IX TEAM

Title IX Coordinator(s)

Deputy Coordinator(s)

Investigator(s)

Decision-Makers—can be a single Decision-maker or a panel of Decision-makers

- Policy Violation

- Appeal

Informal Resolution Facilitator(s)

Institution-appointed Advisors

TITLE IX TEAM STRUCTURE: ADDITIONAL CONSIDERATIONS

Co-Coordination?

Job responsibilities of Deputy Coordinators

Tailor scope and roles based on school/campus culture

Delegation

Multiple campuses/locations

Campuses within a larger system

Extension campuses

Online communities

District-level (e.g., community college systems)

Dual-enrollment oversight

Investigator oversight

TITLE IX COORDINATOR: ROLES AND RESPONSIBILITIES

Create and implement appropriate policy and procedures

Navigate First Amendment protections

Point person for reports and complaints

Contact for government inquiries

Oversight of prompt and equitable grievance procedures

Coordinate overlap of various student and employee grievance processes

Oversight of informal resolution processes

Supervise investigations



ROLE OF THE INVESTIGATOR

Conduct reliable, prompt, fair, and impartial investigations

Work with TIXC to develop investigation strategy

Identify and interview parties and witnesses

Identify, organize, and compile relevant information

Maintain accurate and thorough investigation records and notes

Share the evidence with the parties and their Advisors

Provide notices to the parties (may be done in conjunction with TIXC)

Create an investigation report that fairly summarizes relevant evidence

ROLE OF THE DECISION-MAKER(S)

Determine whether institution's policy has been violated based upon the applicable standard of evidence

Decisions must be based upon an independent assessment of the evidence gathered during the investigation and/or provided during a hearing, to include an assessment of the credibility of the parties and witnesses

Decisions must be based on the specific policy alleged to have been violated

Decisions must be impartial and free of substantive bias

Determine appropriate sanctions/discipline when a policy violation is found

Draft a written determination that outlines the rationale for the finding(s)

ROLE OF THE APPEAL DECISION-MAKER

Make determination on a party's request for an appeal

Review written submissions from parties

May review investigation report or other evidence gathered during investigation/hearing

ROLE OF INSTITUTION-APPOINTED ADVISORS

Parties have the right to have an Advisor of their choice to assist them throughout the process, to include attending any meetings and interviews

No mandate to provide an Advisor to the parties at the outset of the process

If party does not have an Advisor at the hearing, the institution must provide an Advisor to conduct the cross-examination on behalf of the party during the live hearing

Must be provided at no cost to the party

No mandate to train Advisors however, it is advisable to do so for all institution-appointed Advisors



REQUIRED TRAINING TOPICS

Definition of sexual harassment

Scope of the Recipient's education program or 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

Use of any technology to be used at a live hearing

REQUIRED TRAINING TOPICS (CONT.)

Issues of relevance for both questions and evidence, including when questions and evidence about the Complainant's prior sexual behavior is not relevant

Issues of relevance regarding the creation of an investigation report that fairly summarizes relevant evidence

Note: The OCR sets the minimum training requirements and institutions should conduct training that covers a broader range of topics

PUBLICATION OF TRAINING MATERIALS

Make all materials used to train Title IX Coordinators, Investigators, Decision-makers, and any person who facilitates an informal resolution process publicly available on the Recipient's website, or if the Recipient does not maintain a website, the Recipient must make these materials available upon request for inspection by members of the public

The most recent materials used to train the Title IX Team should be posted

Although seven years of materials need to be maintained, only the most recent need to be posted

This requirement is not retroactive; seven years started August 14, 2020



TITLE IX OVERVIEW & HISTORY

Text of the Law

The Road to Title IX

Where We are Today

Key Title IX-Related Issues

Essential Compliance Elements

The IX Commandments

TITLE IX

20 U.S.C. § 1681 & 34 C.F.R. Part 106 (1972)



A BRIEF HISTORY OF TITLE IX: PRE-1972

1964 - Title VI of the Civil Rights Act

Prohibits discrimination on the basis of race, color, or national origin in any program or activity receiving federal financial assistance

1964 - Title VII of the Civil Rights Act

Prohibits discrimination in the terms, conditions, or privileges of employment on the basis of an employee's race, sex, color, religion, or national origin

1965 - Executive Order 11246

Prohibits federal contractors from discriminating on the basis of race, color, religion, or national origin. "Sex" was added in 1968; renamed Exec. Order 11375.

A BRIEF HISTORY OF TITLE IX: 1972-1979

1972: Title IX passed and signed into law by President

A BRIEF HISTORY OF TITLE IX: 1980-2020

1980: U.S. Department of Education created

Title IX oversight transferred to Dept. of Ed.'s Office for Civil Rights (OCR)

1982



KEY TITLE IX-RELATED ISSUES

Sex-Based Discrimination

Program Equity	Access to Course Offerings
Recruitment, Admissions, & Access	Salaries & Benefits
Pregnancy	Financial Assistance
Athletics	Facilities
Employment, Recruitment, & Hiring	Funding
Extra-curricular activities	Sex, Sexual Orientation, & Gender Identity
Housing	

Sexual Harassment

- Quid Pro Quo
- Hostile Environment
- Sexual Assault
- Domestic Violence
- Dating Violence
- Stalking

Retaliation

TITLE IX ESSENTIAL COMPLIANCE ELEMENTS

Once an official with authority has actual notice of sexual harassment/sexual misconduct, the institution must:

Take immediate and appropriate steps to investigate what occurred

The obligation to investigate is absolute, even if just an Initial Assessment is completed (see *Davis*)

Take prompt and effective action to:

Stop the harassment

Prevent the recurrence

Remedy the effects

NOTE: This is regardless of whether the Complainant makes a formal complaint or asks the school to take action



SIGNIFICANT CASES



DAVIS V. MONROE COUNTY BD. OF ED.

526 U.S. 629 (1999)

Finding in favor of Davis, the Supreme Court expanded on the *Gebser* case:

The institution must have "actual notice"



NOT FOR DISTRIBUTION

THE OCR & TITLE IX

- OCR's Role
- Civil Lawsuits v. Administrative Actions
- OCR Guidance
- OCR Resources

ROLE OF THE OCR & TITLE IX

The Office for Civil Rights (OCR) under the U.S. Department of Education is responsible for establishing the compliance standards to be applied in investigations and enforcement of Title IX regarding sexual harassment.

Provides regulatory and sub-regulatory guidance

The OCR administratively enforces Title IX by:

Conducting investigations of complaints filed by an individual, a representative, or a group

Engaging in compliance reviews

Initiatives to combat sexual assault in K-12 public schools (compliance reviews; public awareness and support; data collection and reviews)

ROLE OF THE OCR & TITLE IX (CONT.)

Technical Assistance (The OPEN Center)

To help Recipients, students, and parents/guardians understand their rights and responsibilities

NOT FOR DISTRIBUTION

CIVIL LAWSUIT VS. ADMINISTRATIVE ACTION

Lawsuit

Filed in federal court

Monetary damages,
injunction

Requires:

Actual notice

Employee with
authority to take action

Deliberate Indifference

Administrative Action

Initiated by the OCR

Voluntary compliance or
findings

Requires:

Actual OR constructive
notice ("knew or should
have known")

Investigate

End harassment

Remedy effects

Prevent recurrence

OCR GUIDANCE

Key Regulatory and Sub-Regulatory Guidance from OCR

Rescinded:

2001 OCR Revised Sexual Harassment Guidance

2011 Dear Colleague Letter (DCL)

2014 Q&A on Title IX and Sexual Violence

OCR GUIDANCE (CONT.)

Key Regulatory and Sub-Regulatory Guidance from OCR

In effect:

2003 DCL on Title IX and Free Speech

2010 DCL on Harassment and Bullying

2013 DCL on Pregnant and Parenting Students

2020 Amendments to Title IX Regulations

2020 Q&A on Final Title IX Rule

2021 Q&A on Title IX and Single Sex Scholarships, Clubs, and other Programs

2021 Notice of Interpretation – Discrimination Based on Sexual Orientation and Gender Identity

2021 Q&A on the Title IX Regulations on Sexual Harassment (Revised 2022)

ADDITIONAL OCR RESOURCES

About OCR:

<http://www.ed.gov/about/offices/list/ocr/index.html>

In addition to the implementing regulations, compliance guidance documents are issued by OCR from time to time:

<https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/index.html>

Updated OCR Case Processing Manual (August 2020):

<http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>

OPEN Center

OPEN@ed.gov

CLERY ACT AMENDMENT: VAWA SECTION 304

VAWA Section 304 created extensive new policy, procedure, training, education, and prevention requirements for:

Sexual assault

Stalking

Dating violence

Domestic violence

The “Big 4”

Written information to victims regarding on- and off-campus resources, remedies, interim measures, and resolution mechanisms and options

Listing of policy and procedural elements required in the ASR

Listing of key training elements and requirements

Required educational programs and campaigns





VAWA REAUTHORIZATION 2022 SUMMARY (CONT.)

Expands prevention education for higher education students

Revises domestic violence and adds economic abuse and technological abuse definitions

Establishes interagency Task Force on Sexual Violence in Education

Requires the Secretary of Education to develop, design, and make available through a secure and accessible online portal, a standardized online survey tool regarding postsecondary student experiences with domestic violence, dating violence, sexual assault, sexual harassment, and stalking.



WHEN DOES TITLE IX APPLY?

- Personal Jurisdiction
- Covered Programs
- Geographic Jurisdiction
- Subject Matter Jurisdiction
- When Title IX Does Not Apply
- Group Discussion

WHEN DOES TITLE IX APPLY?

Regulations emphasize the *Davis* standard - Title IX applies, and jurisdiction is required, when the Recipient has:

Control over the harasser (Respondent) AND control over the context of the harassment

“Education program or activity” means...

- locations, events, or circumstances under substantial control
- any building owned or controlled by an officially recognized student organization

WHEN DOES TITLE IX APPLY?

Personal Jurisdiction

At the time of filing a formal complaint, a Complainant must establish personal jurisdiction over the Respondent.

WHEN DOES TITLE IX APPLY?

Personal Jurisdiction (Cont.)

If Respondent is not affiliated with the institution in any way, the institution lacks authority to take disciplinary action

E.g.: Employee of an outside company (e.g., vendor, construction worker); guest or invitee; prospective student; former student; former employee; student

WHEN DOES TITLE IX APPLY?

Covered Programs

All programs run by a federal funding Recipient

It does not matter whether the program receives federal funding, all institutional programs are covered

All programs using facilities of the funding Recipient
e.g., camps using Recipient fields/stadium

Includes hospitals, residency programs, branch or satellite campuses

What about virtual learning and employment settings?

WHEN DOES TITLE IX APPLY?

Geographic Jurisdiction

Sexual Harassment and Discrimination cases

Must be dismissed if did not occur against a person in the United States, but...

- Contrary case law

There is NO expectation that you exercise jurisdiction over off-site/off-campus incidents UNLESS

WHEN DOES TITLE IX APPLY?

WHEN DOES TITLE IX APPLY?

Subject Matter

Sexual Harassment as defined in the 2020 Title IX regulations

Sex/Gender discrimination (Equity)

OCR recently noted this includes sexual orientation and gender identity (based on biological sex) following Supreme Court's *Bostock* case

Any other policy violation that is sex/gender-based that causes a discriminatory effect (e.g., hazing, bullying, arson, vandalism, theft)

Pregnant and parenting discrimination

Retaliation

WHEN DOES TITLE IX APPLY?

Subject Matter (Cont.)

Limitations:

Actions/conduct/speech protected by academic freedom

- Pedagogically appropriate and germane to the subject matter of course that instructor hired to teach/research

Actions/conduct/speech protected by the First Amendment.

- Merely offensive conduct cannot be disciplined at a public school
- Must be severe, pervasive, and objectively offensive

IF TIX JURISDICTION IS NOT PRESENT

Behavior could still violate and be addressed under:

Institutional harassment/discrimination policies

Student Handbook/conduct policies

Technology/Acceptable Use policies

Employee Handbook/conduct policies

Professionalism standards

Institution should still take steps to:

Provide support and resources to the Complainant and campus community

- Address any “downstream effects”

Determine if there are patterns or institutional variables that contributed to the alleged incident

Take what action it can (e.g., trespass the person)

GROUP DISCUSSION QUESTIONS

Does your institution exercise jurisdiction over off-campus/non-school property incidents?

Under what circumstances?

For Students? Faculty? Staff?

When is a student officially a student under your code of conduct and/or Title IX policies?

What are you doing to address off-campus intimate partner violence?

What are you doing to address online harassment and discrimination?



CREATING & IMPLEMENTING APPROPRIATE POLICY & PROCEDURES

Required Definitions
ATIXA Definitions
Consent Construct
Navigating First Amendment Protections

CREATING AND IMPLEMENTING APPROPRIATE POLICY & PROCEDURES

Policies = The Rules

- Should clearly define expected/prohibited conduct

- Should be regularly updated, revised, and assessed

Procedures/“Process” = How alleged policy violations are addressed

- Should clearly channel the parties to appropriate resources

- Should provide for the equitable remedying of complaints

The 2020 Regulations have likely required substantial changes to existing policies and procedures.

CREATING AND IMPLEMENTING APPROPRIATE POLICY & PROCEDURES (CONT.)

CREATING AND IMPLEMENTING APPROPRIATE POLICY & PROCEDURES (CONT.)

If the institution has multiple policies and procedures (for faculty, staff, students), Recipient must ensure that these policies are not conflicting, or do not contain conflicting definitions

A strong argument for a single policy!

ATIXA's One Policy, Two Processes Model (1P2P)

NOT FOR DISTRIBUTION

CREATING AND IMPLEMENTING APPROPRIATE POLICY & PROCEDURES (CONT.)

Students and employees should know policy exists, how it works, and how to file a complaint

Ensure that policy and procedures are published and posted widely

- e.g., In the publications and information sources that are most read and used — and can be easily located

Must be included on website and all handbooks/catalogs given to applicants for admission and employment, students, employees, and unions

CREATING AND IMPLEMENTING APPROPRIATE POLICY & PROCEDURES (CONT.)

Written in a manner that is easily understood

Clearly articulate the difference between making a report v. making a formal complaint

Clearly identify the individuals to whom discrimination complaints can be submitted

NOT FOR DISTRIBUTION

DEFINITIONS OF SEXUAL HARASSMENT

Quid Pro Quo Sexual
Harassment

Hostile Environment Sexual
Harassment

Sexual Assault

Domestic Violence

Dating Violence

Stalking

REQUIRED DEFINITIONS – TIX REGULATIONS

Sexual Harassment is conduct on the basis of sex meeting one of the following conditions:

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" as defined in 20 U.S.C. 1092(f)(6)(A)(v)

"Dating violence" as defined in 34 U.S.C. 12291(a)(10)

"Domestic violence" as defined in 34 U.S.C. 12291(a)(8)

"Stalking" as defined in 34 U.S.C. 12291(a)(30)

HOSTILE ENVIRONMENT: “UNWELCOME”

Unwelcomeness is subjective and determined by the Complainant (except when the Complainant is younger than the age of consent)

NOT FOR DISTRIBUTION

HOSTILE ENVIRONMENT: “REASONABLE PERSON”

Severity, pervasiveness, and objective offensiveness are evaluated based on the totality of the circumstances from the perspective of a reasonable person in the same or similar circumstances (“in the shoes of the Complainant”), including the context in which the alleged incident occurred and any similar, previous patterns that may be evidenced

NOT FOR DISTRIBUTION



HOSTILE ENVIRONMENT: “PERVASIVE”

Widespread

Openly practiced

Well-known among students or employees – reputation of a department, person, etc.

Occurring in public spaces (more likely to be pervasive)

Frequency of the conduct is often a variable in assessing pervasiveness (look to intensity and duration)

Unreasonable interference with school or job

A “gauntlet of sexual abuse” *Meritor v. Vinson*, 477 U.S. 57 (1986)

HOSTILE ENVIRONMENT: “OBJECTIVELY OFFENSIVE”

Reasonable person
standard in context

“I know it when I see it...”

Age and relationships of
Complainant and
Respondent

Number of persons
involved

Frequency

Severity

Physically threatening

Humiliating

Intimidating

Ridiculing

Abusive

HOSTILE ENVIRONMENT: TOTALITY OF THE CIRCUMSTANCES

Hostile environment analysis requires that you evaluate the “ totality of the circumstances.”

Totality of the circumstances to consider:

- Frequency, nature, and severity of the conduct (see factors previously discussed)

- Identity of and relationship between the parties

- Age of the parties

- Size of the school, location of the incidents, and context in which they occurred

HOSTILE ENVIRONMENT: TOTALITY OF THE CIRCUMSTANCES (CONT.)

Totality of the circumstances to consider:

Whether the conduct unreasonably interfered with the Complainant's educational/work performance

Effect on the Complainant's mental or emotional state

IS THIS A HOSTILE ENVIRONMENT?

For the past three months, Taylor has been spreading rumors about Andy being gay.

About a month ago, Taylor used gay slurs directed at Andy in front of Andy and others, on multiple occasions.

Andy suspects Taylor uses slurs behind his back, as well.

This week, Taylor has started to run into Andy with his shoulder whenever they pass in hallways. The force of the contact has knocked Andy into the lockers or caused Andy to drop his books.

Today, Andy discovered that someone had etched penises into his notebooks and into his desk. Andy saw Taylor laughing with a friend and pointing at the desk.

SEXUAL ASSAULT*

Rape – Penetration, no matter how slight, of the vagina or anus, with any body part or object, or oral penetration by a sex organ of another person, without the consent of the Complainant.

Fondling – The touching of the private body parts of the Complainant (buttocks, groin, breasts) for the purpose of sexual gratification, without the consent of the Complainant, including instances where the Complainant is incapable of giving consent because of their age or because of a temporary or permanent mental incapacity.

Incest – Sexual intercourse between persons who are related to each other, within the degrees wherein marriage is prohibited by [insert state] law.

SEXUAL ASSAULT* (CONT.)

Statutory Rape – Sexual intercourse with a person who is under the statutory age of consent of [insert age in your state].

Note: Sexual Assault also includes having another person touch you sexually, forcibly, and/or without their consent.

* This definition set is not taken from the FBI Uniform Crime

DATING VIOLENCE

Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the Complainant. The existence of such a relationship shall be determined based on the Complainant's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. For the purposes of this definition —

Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.

Dating violence does not include acts covered under the definition of domestic violence.

DOMESTIC VIOLENCE

A felony or misdemeanor crime of violence committed —

By a current or former spouse or intimate partner of the Complainant;

By a person with whom the Complainant shares a child in common;

By a person who is cohabitating with, or has cohabitated with, the Complainant as a spouse or intimate partner;

By a person similarly situated to a spouse of the Complainant under the domestic or family violence laws [insert your state here];

By any other person against an adult or youth Complainant who is protected from that person's acts under the domestic or family violence laws of [insert your state here].

DOMESTIC VIOLENCE (CONT.)

To categorize an incident as Domestic Violence, the relationship between the Respondent and the Complainant must be more than just two people living



STALKING (CONT.)

Reasonable person means a reasonable person under similar circumstances and with similar identities to the Complainant.

Substantial emotional distress means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling.

The TIX regulations insist this definition not be interpreted to violate First Amendment.

OTHER POLICY DEFINITIONS

Retaliation

Sexual Exploitation

NOT FOR DISTRIBUTION

RETALIATION – REGULATION DEFINITION

§ 106.71 Retaliation

Retaliation prohibited. No Recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part...

RETALIATION – REGULATION DEFINITION

(Cont.)... Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX or this part, constitutes retaliation.

RETALIATION

§ 106.71 Retaliation.

The Recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any Complainant, any individual who has been reported to be the perpetrator of sex discrimination, any Respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder...

RETALIATION

(Cont.)... Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).

Specific circumstances.

- (1) The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under paragraph (a) of this section.
- (2) Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION

Sexual Exploitation (non-Title IX sexual harassment)

Occurs when one person takes non-consensual or abusive sexual advantage of another for their own benefit or for the benefit of anyone other than the person being exploited, and that conduct does not otherwise constitute one of other sexual harassment offenses.

Examples of sexual exploitation include, but are not limited to:

Sexual voyeurism (such as observing or allowing others to observe a person undressing or using the bathroom or engaging in sexual acts, without the consent of the person being observed)

Invasion of sexual privacy (e.g., doxxing)



ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION (CONT.)

Examples (continued):

Knowingly soliciting a minor for sexual activity

Engaging in sex trafficking

Knowingly creating, possessing, or disseminating child pornography

NOT FOR DISTRIBUTION



CONSENT

Informed, knowing, and voluntary (freely given)

Active (not passive)

Creates mutually understandable permission regarding the conditions of sexual activity

No means no, but nothing also means no. Silence and passivity do not equal consent.

Given immediately prior to or contemporaneously with the sexual or intimate activity

Consent can be withdrawn at any time, so long as it is clearly communicated verbally or non-verbally

CONSENT (CONT.)

Cannot be obtained by use of:

Physical force, threats, intimidation, or coercion

Cannot be given by someone known to be — or who should be known to be — mentally or physically incapacitated

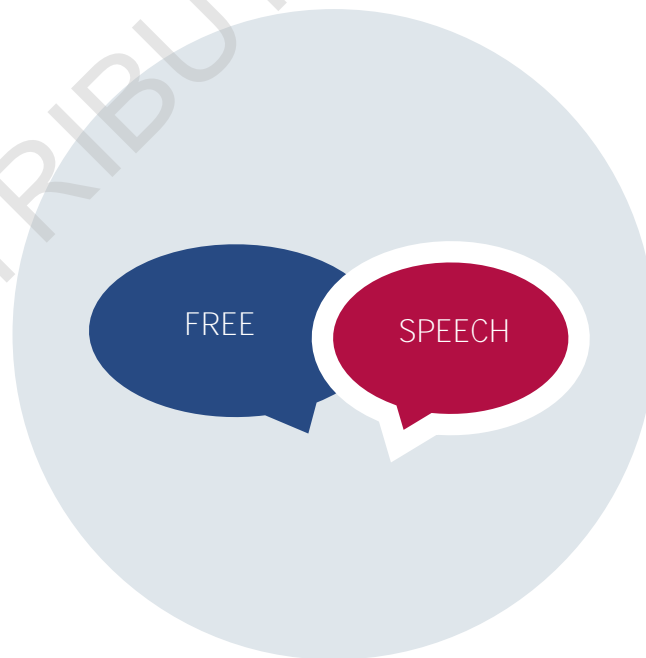
NOTE: Some states have affirmative consent laws

Does consensual sex that violates policy fall under Title IX?

OVERVIEW OF THE THREE QUESTIONS

1. Was force used by the Respondent to obtain sexual or intimate access?
2. Was the Complainant incapacitated?
 - a. If so, did the Respondent know, or
 - b. Should the Respondent have known that the Complainant was incapacitated?
- 3.

NAVIGATING FIRST AMENDMENT PROTECTIONS



NAVIGATING FIRST AMENDMENT PROTECTIONS

“Congress shall make no law...abridging the freedom of speech...”

The ED reaffirms First Amendment protections in the Title IX Regulations

An important concern for all public institutions and any private campuses impacted by state law and constitutions (e.g., California and New Jersey)

Impacts policy language regarding expression

Pay heed to vagueness and over-breadth concerns

Avoid incorporating “intent” or “purpose” language

Incorporate appropriate standard for context

NAVIGATING FIRST AMENDMENT PROTECTIONS (CONT.)

Issues to consider:

Time, place, and manner

Open forum, limited open forum, and closed forum

Confluence with academic freedom (faculty)

Unprotected speech

- Incitement of disruption and breach of peace
- Defamation
- True threat
- Obscenity

Outside speakers

Hate speech



OVERSIGHT AND COORDINATING PROMPT & EQUITABLE GRIEVANCE PROCEDURES

The Process

Promptness

Equity

Clery Act: VAWA Section 304

THE PROCESS



- Complaint or Notice to TIXC

PROMPTNESS

Reasonably prompt timeframes for the conclusion of the grievance process, including reasonably prompt timeframes for filing and resolving appeals

Concurrent law enforcement investigation does not relieve the burden of the institution to investigate

Temporary delays for “good cause” and with written notice of the delay to parties

- Complexity of the investigation

- Concurrent law enforcement investigation with time-dependent release of evidence (we recommend a one-to two-week delay)

- Delays for administrative needs are insufficient

OVERSIGHT AND COORDINATING PROMPT AND



OVERSIGHT AND COORDINATING PROMPT AND EQUITABLE GRIEVANCE PROCEDURES (CONT.)

The grievance process must be conducted according to the timelines in the Recipient's policy

Policy wording: Use "reasonable delays at the discretion of the Title IX administrator," "barring exigent circumstances," etc.

Document all delays/extension and rationale therefore e.g., unresponsive or uncooperative parties, criminal investigation, holidays, etc.

Periodically update the parties throughout the process



EQUALITY

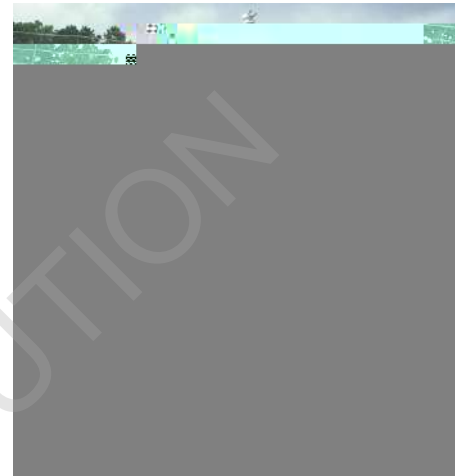
requires a level playing field that doesn't yet exist



JUSTICE

eliminates systemic barriers

The journey starts by asking those affected how they see and are impacted by the conditions, rules, and resources.



EQUITY

acknowledges systemic impediments with targeted fixes



AGENCY

individuals know that access is their right

EQUITY REQUIREMENTS

Various forms of notice — policies and procedures, investigation, hearing, outcome (finding and sanction), etc.

Notification of outcomes to parties permitted by FERPA and required by Clery (outcome and sanctions)

Title IX rules preempt FERPA

IN WRITING!

Opportunities to present witnesses and provide evidence

Ability to discuss the allegations without restriction



CLERY: VAWA SECTION 304 (2013)

Institutional disciplinary procedures shall "provide a prompt, fair, and impartial process from the initial investigation to the final result."

Accuser and accused are entitled to the same opportunities to have a support person/Advisor of their choice at any proceeding or related meeting.

NOT FOR DISTRIBUTION

CLERY: VAWA SECTION 304 (CONT.)

Accuser and accused must be simultaneously informed in writing of:

- The outcome that arises from an allegation of Dating Violence, Domestic Violence, Sexual Assault, Stalking
 - Outcome = Finding, sanction, and rationale
- The institution's procedures for appeal
- Any change to the results that occurs prior to the time that such results become final
- When such results become final

EQUITY CONCERNS

Participants/stakeholders believe "equity" = "equality"

EQUITY CONCERNS (CONT.)

Appeal processes, or other processes, where only one party is entitled to participate

Conflicts among federal regulations/guidance and state laws or education codes

NOT FOR DISTRIBUTION



COORDINATING OVERLAP OF VARIOUS STUDENT & EMPLOYEE GRIEVANCE PROCESSES

Potential Processes
Title IX And Title VII
One Policy-Two Processes

COORDINATING THE OVERLAP OF VARIOUS GRIEVANCE PROCESSES



TITLE IX AND TITLE VII

Must understand distinctions between Title IX and Title VII in responding and investigating

Must be very familiar with all the processes

Must have the ability to merge/combine/pick the investigatory and hearing processes and explain these to the parties

e.g., The difference between a student-employee and an employee-student

ONE POLICY-TWO PROCESSES (1P2P)

A community-based policy that addresses all forms of harassment, discrimination, and sexual misconduct applicable to all members of the institution community promotes equity, minimizes confusion, and supports institutional mission

- Provides easier training focus

- Allows for commonality in documentation and investigation

NOT FOR DISTRIBUTION



POINT PERSON FOR REPORTS AND COMPLAINTS

Notice, Reporting, & Confidentiality
Initial Assessment
Supportive Measures
Mandatory & Discretionary Dismissals
Emergency Removal

POINT PERSON FOR REPORTS AND COMPLAINTS

The Title IX Coordinator will be the individual designated to ensure the Title IX protocol is implemented and therefore should be the individual to whom all complaints or notice related to sex/gender harassment, misconduct, and discrimination should be directed

Contact information for Title IX Coordinator must be included on website and in all handbooks/catalogs given to applicants for admission and employment, students, employees, and unions

Recipient may designate multiple portals for receipt of information (e.g., Deputy Coordinators)

- All employees are expected to report notice and complaints to the Title IX Coordinator

COORDINATION WITH LAW ENFORCEMENT

Law enforcement information sharing:

The Title IX Coordinator should establish a reporting and information-sharing structure

POINT PERSON FOR REPORTS AND COMPLAINTS

The Title IX Coordinator must ensure the institution is promptly engaging in:

- Initiation of the initial assessment

- Implementation of response to stop the alleged harassment/discrimination

- Provision of supportive measures to the parties

- Provision of information about how to make a formal complaint

- Action to reasonably prevent the recurrence

The Title IX Coordinator must coordinate all of these steps, often across administrative processes and institutional silos

Importance of a centralized database

NOTICE,

NOTICE TO THE INSTITUTION

“Actual Knowledge” is defined as a report being received by:

- The TIX Coordinator; or

- Any official who has authority to institute corrective measures on behalf of the Recipient (Often called “Officials With Authority” or “OWA”)

This is only the standard for when OCR would deem a

MANDATORY REPORTERS

ATIXA recommends that all employees* report because this:

Enables institution to best support those who have experienced harassment or discrimination

Better enables tracking patterns

Ensures information gets to those trained to respond

Provides for simpler, uniform, and universal training and Reporting mechanisms

- Institutions must ensure that all employees are trained regarding their obligation to report harassment to appropriate administrators as mandatory reporters

*Can still have a small set of designated, trained employees who are not "mandatory reporters"

THE CLERY ACT: CAMPUS SECURITY AUTHORITY (CSA)

CSA mandatory reporting:

4-part definition of a CSA noted in the Clery Act Appendix for FSA Handbook

CSAs must share all reports of any allegations that would fall into the Clery crime categories made to them in their capacity as a CSA to their institutional chief CSA (typically campus police)

Does not include indirect notification: classroom discussions, overhearing something in the hallway, speeches (e.g., Take-Back-The-Night events), etc.



OTHER LAWS THAT DETAIL REPORTING REQUIREMENTS

Supervisors and Managers (per Title VII)

Mandated to report harassment or other misconduct of which they are aware.

Abuse or Suspected Abuse of Minors

All employees are required to report abuse or suspected abuse of minors consistent with state law. This generally includes immediately reporting to law enforcement and to the state's child welfare agency.

Additional state reporting requirements (e.g., elder abuse and felony reporting)

PRIVILEGE VS. CONFIDENTIALITY VS. PRIVACY

Privilege

Granted by laws and professional ethics

Attorneys, licensed professional counselors, medical professionals, pastoral counselors

To have privilege, these individuals must be:

- Acting in the capacity for which they are employed,
- Acting within the scope of their license, and
- Receive the disclosure during the scope of that employment

Key exception is child abuse reporting

PRIVILEGE VS. CONFIDENTIALITY VS. PRIVACY

Confidentiality

Designated by the institution

Do not have to report harassment or discrimination of which they become aware

Allows for provision of services and support without concern of reporting

Examples: Victim advocates/sexual assault-related services, gender-based resource centers, Advisors during resolution processes, ombudspersons

Must still follow state reporting laws

ATIXA recommends confidential employees report aggregate, non-identifiable data for Clery and Title IX statistical purposes

PRIVILEGE VS. CONFIDENTIALITY VS. PRIVACY

Privacy

Anyone who does not meet the institution's definition of a "Mandatory Reporter" can maintain privacy.

If using the OWA standard, then notice to those deemed "Private" does not constitute "Actual Knowledge" for OCR enforcement.

May report incidents without identifying the parties

Common Examples: Administrative Assistants, Non-supervisory employees

Must still follow state reporting laws

INITIAL ASSESSMENT

Title IX Coordinator's Role
Report vs. Formal Complaint
Requests for Confidentiality
Supportive Measures
Mandatory and Permissive
Dismissal
Emergency Removal
Timely Warning & Emergency
Notification
Notice to the Parties

INITIAL ASSESSMENT

Upon receipt of notice, the TIXC should be responsible for conducting an initial assessment to determine the following:

Has there been a formal complaint?

Does the TIXC need to sign/initiate a formal complaint?

Does the alleged conduct meet the required definitions?

Does jurisdiction exist?

Can/should Recipient remedy informally or without discipline?

Mandatory/Discretionary dismissal considerations

If dismissed, does an alternate policy/process apply?

INITIAL ASSESSMENT (CONT.)

If proceeding under Title IX:

Establish basis of investigation:

- Incident or pattern, and/or climate/culture

Establish a preliminary timeline for the investigation

If no formal action, document how Recipient's response was not deliberately indifferent

Responding to anonymous reports:

Determine if a trend or pattern may be apparent

Can you identify parties?

Duty to attempt some form of remedial response, even to an anonymous report

REPORT VS. COMPLAINT

Distinguish between a “report” and a “formal complaint”

Upon receiving a “report” (either from the would-be Complainant or a third party):

Reach out and provide support.

Provide supportive and interim measures to the person alleged to have experienced the harassment. May also offer to the would-be Respondent.

Explain process to make a formal complaint.

- Must be in writing and signed by the Complainant but can be made in any format (on paper or electronic) and made at any time
- Also explain option to report to law enforcement (VAWA requirement)

REPORT VS. COMPLAINT (CONT.)

Upon receiving a "formal complaint:"

Conduct initial assessment to determine jurisdiction

Triggers obligation to follow "grievance process"
including investigation and hearing

NOT FOR DISTRIBUTION

FORMAL COMPLAINT

REQUESTS FOR CONFIDENTIALITY

If a Complainant requests confidentiality and/or does not want the institution to investigate:

The Complainant should be notified of the following:

The process will still be available to them, regardless of how long they wait

The institution can provide resources and supportive measures to limit the effect of the behavior on the Complainant

If information is brought to the attention of the institution that may involve a threat to the community, the institution may be forced to proceed with an investigation, but that the Complainant will be notified of this process



REQUESTS FOR CONFIDENTIALITY (CONT.)

The institution should take all reasonable steps to respond consistent with the Complainant's request

Provided that doing so does not prevent the Recipient from responding effectively and preventing the harassment of other students or the Complainant

Use the PPTVWM analysis to determine whether to honor a Complainant's request for confidentiality

Proceeding without a Complainant's participation has due process implications for the Respondent

PPTVWM

Title IX Coordinator may need to file a formal complaint if any of the following are present:

PPTVWM

- Pattern
- Predation
- Threat
- Violence/Weapon
- Minors (will always be reported to proper authorities)





SUPPORTIVE MEASURES

Provided to all parties throughout the process:

Non-disciplinary, non-punitive

Individualized

Restore or preserve equal access

COMMON SUPPORTIVE MEASURES

Referral to counseling and/or medical/health services

Referral to the Employee Assistance Program

Visa and immigration assistance

Community or community subgroup education

Altering housing situation (if applicable)

Altering work arrangements for employees

Safety planning

Providing school safety escorts

Transportation assistance

Contact limitations (no contact orders) between the parties

Academic support, extensions of deadlines, or other course-related adjustments

Trespass or Be on the Lookout (BOLO) orders

Emergency notifications

Increased security and monitoring of certain areas

MANDATORY DISMISSAL – FOUR GROUNDS

The Title IX Coordinator MUST dismiss the complaint at any time during the investigation or hearing:

1. If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in the Title IX regulations even if proved, and/or
2. If the conduct did not occur in the Recipient's education program or activity, or
3. If the conduct did not occur against a person in the United States, or
4. If at the time of filing a Formal Complaint, a Complainant is not participating in or attempting to participate in the Recipient's education program or activity, and based on the available information, the Title IX Coordinator has determined that they do not need to sign a Formal Complaint on behalf of the Recipient



MANDATORY OR PERMISSIVE DISMISSAL OF A FORMAL COMPLAINT

Written notice of dismissal to parties required

Dismissal (or non-dismissal) of formal complaint may be appealed

Upon dismissal, the Recipient may institute action under another provision of the code of conduct or other policies. Due process requirements for VAWA offenses may be required in alternate processes.

EMERGENCY REMOVAL

A Recipient may remove a student Respondent from the education program or activity on an emergency basis, only after:

1. Undertaking an individualized safety and risk analysis
2. Determining if an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal
3. Providing the Respondent with notice and an opportunity to challenge the decision immediately following the removal while respecting all rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act, as applicable.



THE CLERY ACT: TIMELY WARNING & EMERGENCY NOTIFICATION

Timely Warning – notification of crimes reported to campus security authorities or local law enforcement that are serious or pose a continuing threat

Emergency Notification – notification of any significant emergency or dangerous situation that poses an immediate threat to health or safety

Includes both Clery and non-Clery incidents

- Clery-based example: campus shooting
- Non-Clery-based examples: outbreak of communicable disease, nearby gas main leak, or impending weather emergency

NOTICE REQUIREMENTS PRIOR TO INVESTIGATION (CONT.)

A statement that the Respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process

Notice that the parties may have an Advisor of their choice, who may be, but is not required to be, an attorney, and may inspect and review evidence

Parties may inspect and review evidence prior to the completion of the investigation report

Any provision from code of conduct that prohibits knowingly making false statements or knowingly submitting false information (if any)

Update notice if additional allegations will be added/investigated



COORDINATING INFORMAL RESOLUTION

Regulations Requirements
Types of Informal Resolution
Informal Resolution Considerations

INFORMAL RESOLUTION



INFORMAL RESOLUTION

ATIXA has framed a process for Informal Resolution that includes three options:

- A response based on supportive measures

- A response based on a Respondent accepting responsibility

- A response based on alternative resolution, which could include various approaches and facilitation of dialogue

Alternative resolution approaches like mediation, restorative practices, transformative justice, etc., are likely to be used more often by colleges and universities

ATIXA does not endorse these approaches as better or worse than other formal or informal approaches

INFORMAL RESOLUTION CONSIDERATIONS

The Title IX Coordinator may look to the following factors to assess whether Informal Resolution is appropriate, or which form of Informal Resolution may be most successful for the parties:

Amenability of the parties to Informal Resolution

Likelihood of potential resolution, taking into account any power dynamics between the parties

Motivation of the parties to participate

Civility of the parties

Cleared violence risk assessment/ongoing risk analysis

Whether an emergency removal is needed

Skill of the Informal Resolution facilitator with the type of complaint

INFORMAL RESOLUTION CONSIDERATIONS (CONT.)

Complexity of the complaint

Emotional investment/intelligence of the parties

Rationality of the parties

Goals of the parties



SUPERVISING INVESTIGATIONS

Title IX Coordinator's Role
When to Investigate
Who Should Investigate
Role of Law Enforcement

SUPERVISING INVESTIGATIONS (CONT.)

Reviewing the investigation report

Gatekeeping

Duty to warn

Recordkeeping of all activities

NOT FOR DISTRIBUTION

WHEN DO YOU INVESTIGATE?

Upon receipt of a formal complaint

When the Coordinator deems an investigation is warranted (and signs the formal complaint)

Rumors, gossip, social media, etc. can be notice, but not under the OCR regulations

Investigating on these bases is discretionary, particularly considering the regulations

Once a formal complaint is filed, the duty to investigate is absolute

At a minimum, an initial assessment (formerly preliminary inquiry) must be completed



SHOULD THERE BE MORE THAN ONE INVESTIGATOR?

No specific requirement, but:

Investigation must be prompt, thorough, and impartial

Investigator must collect the maximum amount of relevant information available

A pool of Investigators may help to ensure that investigations meet these requirements

Who investigates may be strategic to each specific complaint

Team = ability to brainstorm investigation steps and lines of questioning with co-Investigators and co-facilitate interviews

Flexibility if there is any conflict with Investigators and parties

ROLE OF RECIPIENT LAW ENFORCEMENT IN CIVIL RIGHTS INVESTIGATIONS



10 STEPS OF AN INVESTIGATION

1. Receive Notice/Complaint
2. Initial Assessment and Jurisdiction Determination
3. Establish basis for investigation (Incident, Pattern, and/or Culture/Climate)
4. Notice of Investigation and Allegations (NOIA) to Parties ("Charge")
5. Establish investigation strategy
6. Formal comprehensive investigation
 - Witness interviews
 - Evidence gathering

10 STEPS OF AN INVESTIGATION (CONT.)

7. Draft investigation report
8. Meet with Title IX Coordinator (or legal counsel) to review draft report and evidence
9. Provide report all evidence directly related to the allegations to parties and their Advisors for inspection and review with 10 days for response
10. Complete final investigation report
 - Synthesize and analyze relevant evidence
 - Send final report to parties for review and written response at least 10 days prior to hearing



RIGHTS OF THE PARTIES DURING THE INVESTIGATION

Complainants and Respondents have the right to:

- Present witnesses, including fact and expert witnesses

- Present inculpatory and exculpatory evidence

- Discuss the allegations under investigation without restriction

- Gather and present relevant evidence without restriction

- Be accompanied to any related meeting or proceeding by Advisor of their choice, who may be, but is not required to be, an attorney

- Written notice of the date, time, location, participants, and purpose of investigation interviews or other meetings, with sufficient time to prepare

- Inspect and review directly related evidence and investigation report

UNDERSTANDING EVIDENCE

Formal rules of evidence do not apply

All relevant and reasonably available evidence must be considered – inculpatory and exculpatory

If the information is considered relevant to prove or disprove a fact at issue, it should be admitted. If credible, it should be considered.

Evidence is any kind of information presented with the intent to prove what took place

Certain types of evidence may be relevant to the credibility of the party or witness, but not to the allegations

SPECIFIC EVIDENCE ISSUES UNDER THE TITLE IX REGULATIONS

Evidence of the Complainant's sexual predisposition is never relevant.

Evidence about the Complainant's prior sexual behavior is explicitly and categorically not relevant except for two limited exceptions:

Offered to prove that someone other than the Respondent committed the conduct alleged; or

Concerns specific incidents of the Complainant's sexual behavior with respect to the Respondent and is offered to prove consent

Even if admitted/introduced by the Complainant

Does not apply to Respondent's prior sexual behavior or predisposition

CREDIBILITY

Credibility is largely a function of corroboration and consistency

To assess credibility is to assess the extent to which an individual's testimony can be relied upon to be accurate and helpful in understanding the complaint

Credible is not synonymous with truthful

Memory errors do not necessarily destroy witness credibility, nor does some evasion or misleading

Refrain from focusing on irrelevant inaccuracies and inconsistencies

THE INVESTIGATION REPORT

Comprehensive document summarizing the investigation

Results of interviews with parties and witnesses
(including experts)

Summary of other information collected (i.e.,
information from police including pretext calls,
medical exams, video surveillance and pbs;
copies of text, email, and social networking messages)

G.A.S. Framework

Gather evidence; Assess credibility and evidence;
Synthesize areas of dispute/agreement and all
questions asked

The supplemental “bucket” to the report

EVIDENCE AND REPORT REVIEW BY PARTIES

PART 1

Prior to the completion of the Investigation Report:

Evidence directly related to allegations must:

- Be sent to each party and Advisor

- Be in an electronic format or hard copy

- Include evidence upon which the Recipient does not intend to rely

- Include exculpatory and inculpatory evidence

After sending the evidence, the Investigator must:

- Allow 10 days for written response

- Consider response prior to completion of report

Source: § 106.45(b)(5)(vi)

EVIDENCE AND REPORT REVIEW BY PARTIES

PART 2

At least 10 days prior to making a determination regarding responsibility:

The final Investigation Report summarizing relevant evidence must be sent:

To each party and Advisor

In an electronic format or hard copy

For the parties' review and written response

Best Practice: Provide the investigation report to the TIXC and/or legal counsel to review for completeness prior to being shared with the parties

Evidence directly related to the allegations must be made available at any hearing



COORDINATING THE DECISION- MAKING STAGES

Title IX Coordinator's Role
Standard of Evidence
Making a Determination

DECISION-MAKERS IN TITLE IX PROCESSES

The Title IX Coordinator cannot be the Decision-maker but may need to coordinate with Decision-makers:

- Coordinating hearings, Hearing Panel/Decision-Maker
- Facilitating the sending of notices to the parties (e.g., Notice of hearing, Notice of outcome, Notice of appeal)
- Overseeing appeal processes
- Sanctions
- Remedies
- Providing institutional memory
- Training Decision-makers (hearings and appeals)
- Recordkeeping of all activities

STANDARD OF EVIDENCE

Current industry standard is preponderance of the evidence

OCR requires Recipients to apply either the preponderance of the evidence standard or the clear and convincing evidence standard

Standard of evidence must be consistent for all formal complaints of sexual harassment, regardless of policy or underlying statutory authority

Must also apply the same standard of evidence for complaints against students as for complaints against employees, including faculty



DECISION-MAKERS: MAKING A FINDING/DETERMINATION

Review applicable institutional policies

Parse the policy

Provide specific findings for each alleged violation and for

SANCTIONING CONSIDERATIONS

SANCTIONING CONSIDERATIONS (CONT.)

Tension between educational and developmental sanctions of student conduct processes

There must be a nexus between the sanction(s) and the discriminatory conduct that led to the sanction(s)

Engage in strategic education and training requirements



DISCIPLINARY SANCTIONS: REGULATORY REQUIREMENTS (CONT.)

Disciplinary sanctions are not required under Title IX

The obligation is to remedy in a manner that is not clearly unreasonable

Sanctions can be one form

SANCTIONING CONSIDERATIONS

The sanction must be reasonable and reflect the severity of the behavior

SANCTIONING CONSIDERATIONS (CONT.)

Ensure that remedies are equitable

Ensure that remedies are not clearly unreasonable in light of the known circumstances

SANCTIONING PITFALLS

Conflating finding and sanctioning processes

Timing of impact statements

Not targeted to stop, prevent, and remedy

Unwillingness to suspend, expel, or terminate

Failure to address mitigating circumstances

Lock-step or automatic sanctioning – failure to address incident-specific circumstances

Likeability of parties: + & -

Disparate sanctions for same behavior

Others?

ASSURANCE OF COMPLIANCE WITH FINAL SANCTIONS

Take steps to confirm and document that all sanctions were enforced/completed

Did the Respondent attend mandatory training?

Is the Respondent complying with the no-contact order?

Were the necessary documents placed in the Respondent's personnel or conduct file?

Was the notation placed on the Respondent's transcript or personnel file?

Possible consequences of a Respondent's failure to comply with sanctions:

Failure to comply conduct charge

Additional sanctions imposed

COMMON STUDENT SANCTIONS

Warning

Probation

Loss of privileges

Counseling

Contact restrictions

Residence hall relocation,
suspension, or expulsion

Limited access to campus

Service hours

Online education

Parent/guardian
notification

Alcohol and drug
assessment, and counseling

Discretionary sanctions

Suspension

Expulsion

COMMON EMPLOYEE SANCTIONS

Warning – verbal or written

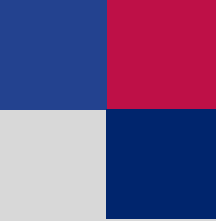
Probation

Performance improvement/
management process

Training (e.g., sensitivity
training)

Counseling

Loss of privileges



APPEALS

Appeals are mandatory under the Title IX Regulations

Must offer equitable opportunity to appeal based on determination or dismissal of any allegations

Clearly communicate to parties

- Process to appeal

- When an appeal is received and opportunity to respond

Opportunity for all parties to support or oppose outcome

Written decision with rationale delivered simultaneously to the pit

Apreon

APPEALS (CONT.)

“Reasonably prompt” timeframe for producing appeal decision

One level of appeal is best practice

Defined window of time to request appeal

Short window to request an appeal

Can always grant an extension if necessary

Three mandatory grounds for appeal; may add others

Committee versus individual determination preferred

Deference to original Decision-maker

Remand

Document-based review

NOT *de novo*

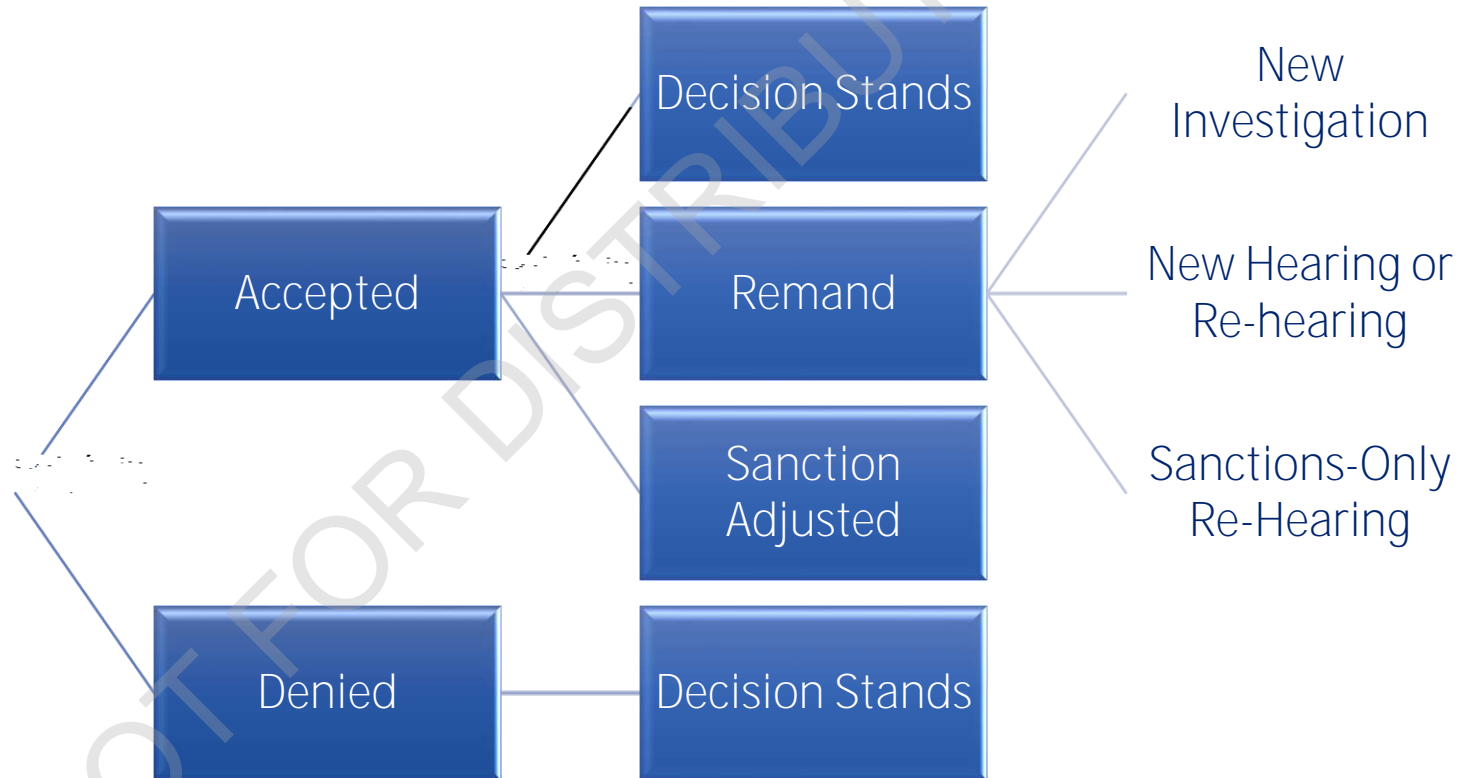
APPEAL GROUNDS

A Recipient must offer both parties an opportunity to appeal a determination regarding responsibility, and from a Recipient's dismissal of a formal complaint or any allegations therein, on the following bases:

- Procedural irregularity that affected the outcome of the matter

- New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was

APPEAL PROCESS





GENERAL TITLE IX COMPLIANCE OVERSIGHT

Stop, Prevent, & Remedy
Athletics Gender Equity
Assessing Compliance
Recordkeeping & Documentation

ENSURING COMPLIANCE WITH REQUIREMENTS TO STOP, PREVENT, REMEDY

Stop The Discriminatory Conduct:

Take timely steps to identify and implement appropriate supportive measures for the parties

Confirm and document that the appropriate supportive measures were implemented. For example:

Was the student provided alternative housing?

Was the employee provided an alternate supervisor/work assignment/workspace?

Was the student assigned to a different seat or class?

Was counseling made available?

Was a no-contact order issued?

ENSURING COMPLIANCE WITH REQUIREMENTS TO STOP, PREVENT, REMEDY

Stop The Discriminatory Conduct (Cont.):

Regularly re-evaluate the need for any continuing supportive measures (particularly when emergency removal is implemented)

Enforce any violations (e.g., no contact order)

Make sure the parties know they should report any difficulties with measures provided

ENSURING COMPLIANCE WITH REQUIREMENTS TO STOP, PREVENT, REMEDY

Prevent Recurrence:

Identify patterns and systemic problems

Issue school/campus-wide policy statements, informational campaigns, and other messages that harassment and assault will not be tolerated

Provide regular training on sex/gender-based misconduct for students and employees

Conduct periodic surveys of campus climate

Establish a system for monitoring future incidents and patterns

Provide technical assistance to school/campus law enforcement on Title IX compliance

ENSURING COMPLIANCE WITH REQUIREMENTS TO STOP, PREVENT, REMEDY

Prevent Recurrence (Cont.):

Consider the effect of educational sanctions

The potential next Complainant is potentially both a Title IX and negligence concern

NOT FOR DISTRIBUTION

ENSURING COMPLIANCE WITH REQUIREMENTS TO STOP, PREVENT, REMEDY

Remedy the Effects:

Designed to make Complainant whole and return them to the pre-deprivation status

Take timely steps to confirm and document that the appropriate remedies were implemented

Make sure the Complainant knows that they should report any difficulties obtaining the remedies and any subsequent harassment

Determine what, if any, remedies may need to be provided to the Recipient community as a whole

OVERSIGHT OF ATHLETICS GENDER EQUITY

The oversight of gender equity compliance in athletics remains the responsibility of the Title IX Coordinator

There should be a compliance officer in the athletics department already – get to know them

The two sides of athletics compliance are:

- Equity in offering and experience (also referred to as “The Prongs” and the “Laundry List”)

- Sexual Harassment and Climate and Culture

These concepts are taught in the Athletics Training in more detail!

ASSESSING COMPLIANCE

Active, internal reviews/audits/assessments

Reporting and resolution processes

Policies and procedures up-to-date and compliant
Athletics

Training content and requirements

Policy and non-discrimination notice dissemination

Materials, website, and resource guide

Compliance checklist

Departmental self-study audit at regular intervals

Case/investigation debriefing

ASSESSING COMPLIANCE (CONT.)

Active professional development on issues related to compliance; oversight of compliance plan implementation

For Title IX Coordinator and/or Deputy Coordinators

Climate surveys

Online, in-person, focus groups, institution/system committee feedback, etc.

NOT FOR DISTRIBUTION

RECORDKEEPING AND DOCUMENTATION

Certain records must be created, retained, and available to the parties for at least seven years:

Sexual harassment investigation including any responsibility determination, any disciplinary sanctions imposed, and any remedies implemented

Any appeal and related result(s)

Any informal resolution implemented

Any supportive measures implemented

For each formal complaint, must document the basis **for why the Recipient's response was not** deliberately indifferent

RECORDKEEPING AND DOCUMENTATION (CONT.)

Rationale for each determination

Measures taken to preserve/restore access to education programs/activity

NOT FOR DISTRIBUTION



NOT FOR DISTRIBUTION

Thank's for joining us today In



