



TITLE IX COORDINATOR AND ADMINISTRATOR
LEVEL ONE
TRAINING & CERTIFICATION COURSE

November 6, 13, 20, 2020

TITLE IX COORDINATOR LEVEL 1 TRAINING



- I. Title IX Coordinator's Role
- II. History & Overview of Title IX
- III. Significant Cases
- IV. OCR and Title IX
- V. Clery Act & VAWA Sec. 203
- VI. When Does Title IX Apply?
- VII. Title IX Team Roles & Responsibilities
- VIII. Creator & Implementor of Appropriate Policy
 - a. Definitions of Sexual Harassment
 - b. Other Policy Definitions
 - c. Consent Construct
 - d. First Amendment Protections
- IX. Oversight & Coordination of Prompt & Equitable Grievance Procedures
- X. Point Person for Complaints
 - a. Notice, Reporting & Confidentiality
 - b. Initial Assessment
- XI. Coordinate Informal Resolution
- XII. Coordinate Overlap in Various Grievance Processes
- XIII. Supervisor of Investigations
- XIV. Coordination of the Decision-Making Stages

TITLE IX COORDINATOR LEVEL 1 TRAINING



- XV. Assurance of Compliance with Final Sanctions
- XVI. Coordinating Appeals Process
- XVII. Compliance with Requirements to Stop, Prevent & Remedy
- XVIII. Training Oversight
- XIX. General Title IX Compliance Oversight
- XX. Oversight of Athletics Gender Equity
- XXI. Section 504 Compliance Oversight

THE TITLE IX COORDINATOR

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- Roles and Responsibilities

THE TITLE IX COORDINATOR



- Recipients are required to designate at least one person as the “Title IX Coordinator.”
- Administrator with significant authority and wide-ranging responsibilities.
- Affects change across many departments, including Human Resources, Academic Affairs, Athletics, and Student Conduct.
- Some institutions will allocate part-time responsibilities to the Coordinator. Others will dedicate a full-time position as recently recommended by OCR.
- Title IX Coordinator has become a profession within the field of civil rights compliance.
- To alleviate the burden on one administrator, institutions should consider identifying multiple deputy coordinators.

TITLE IX COORDINATOR: ROLES AND RESPONSIBILITIES



- Creator & Implementor of Appropriate Policy
- Navigating First Amendment Protections
- Point Person for Reports & Complaints
- Contact for Government Inquiries
- Oversight of Prompt & Equitable Grievance Procedures
- Coordinate Overlap of Various Student & Employee Grievance Processes
- Oversight of Informal Resolution Processes
- Supervisor of Investigations

TITLE IX COORDINATOR: ROLES AND RESPONSIBILITIES (CONT.)



- Assurance of Compliance with Final Sanctions & Remedies
- Coordinating Appeals Process
- Compliance with Requirements to Stop, Prevent, and Remedy
- Prevention and Remediation
- Training Oversight
- General Title IX Compliance Oversight
- Oversight of Athletics Gender Equity (if applicable)
- Section 504 Disabilities Compliance Oversight (if applicable)

HISTORY & OVERVIEW OF TITLE IX

- Text of the Law
- The Road to Title IX
- Where We are Today
- Key Title IX-Related Issues
- Essential Compliance Elements
- The IX Commandments

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

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

A BRIEF HISTORY OF TITLE IX PRE-1972



- Title VI of the Civil Rights Act of 1964
 - “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”
- Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e-3(a))
 - Prohibits discrimination in the terms, conditions or privileges of employment on the basis of an employee’s race, sex, color, religion, and national origin.
- 1965 - Executive Order 11246
 - Prohibited federal contractors from discriminating on the basis of race, color, religion, national origin. “Sex” was added in 1968; renamed Exec. Order 11375.

A BRIEF HISTORY OF TITLE IX 1972-PRESENT



- Title IX of the Education Amendments of 1972 passed and signed into law by President Nixon
 - Prohibits discrimination based on sex/gender in all areas of education for all recipients of federal funds, both public and private institutions
 - Applies to issues of program equity, such as in athletics, and also to sexual harassment and sexual assault
- 1975: Department of Health, Education, and Welfare (HEW) codified Title IX regulations
 - “Title IX and Intercollegiate Athletics” (1979)
 - HEW was the precursor to the current U.S. Dept. of Ed.
- 1979: Supreme Court created a private right of action under Title IX
 - *Cannon v. U. of Chicago*, 441 U.S. 677 (1979)

CANNON v. UNIVERSITY OF CHICAGO

441 U.S. 677 (1979)



- Applicant denied admission filed sex discrimination lawsuit in federal court, arguing violation of the 14th Amendment, Civil Rights Act of 1871, and Title IX
 - District and Seventh Circuit dismissed the Title IX claim, holding that Title IX had neither an express nor implied private right of action
 - Appealed to Supreme Court
- Supreme Court reversed and held that there is an implied private right of action under Title IX
 - Plain language: Individuals can bring a lawsuit under Title IX
 - Court relied on legislative history, modeling of Title IX after Title VI of the Civil Rights Act of 1964, the underlying purposes of Title IX, and federal interest in preventing discrimination in education

A BRIEF HISTORY OF TITLE IX 1972-PRESENT



- 1979: HEW promulgates three-part test for athletics to evaluate equity in athletic participation and access to resources and equitable opportunities
- 1980: U.S. Department of Education created
 - Title IX oversight transferred to Dept. of Ed.'s Office for Civil Rights (OCR)
- 1982: Supreme Court holds "Employment discrimination comes within Title IX's prohibition"
 - *North Haven Bd. of Education v. Bell*, 452 U.S. 512.

NORTH HAVEN BOARD OF EDUCATION v. BELL



- Cases consolidated on appeal and Second Circuit reversed
- Decided that HEW has authority under Title IX to address employment discrimination
 - Court did not render a decision as to whether HEW could terminate funding under Title IX for employment cases
- Appealed to the Supreme Court
- Supreme Court agreed that Title IX's "broad directive that 'no person' may be discriminated against on the basis of gender on its face, includes employees as well as students."
 - Also looked at Title IX's legislative history and post-enactment history

NEW TITLE IX REGULATIONS



- Released May 6, 2020
- Implementation Deadline was August 14, 2020
- New definitions for “Sexual Harassment”
- Many new mandatory due process procedural requirements
 - Required live hearing for higher education institutions
 - Emphasis on neutrality, presumption of innocence
 - Division of roles among Title IX team
- Allows for informal resolution processes
- Already facing litigation
- Will 2020 elections have an impact?

KEY TITLE IX-RELATED ISSUES



Sex-Based Discrimination

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

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; and
 - **Remedy** the effects.

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

THE IX COMMANDMENTS



INVESTIGATION =	Thorough	Reliable	Impartial
PROCESS =	Prompt	Effective	Equitable
REMEDIES =	Not act unreasonably to stop discrimination	Not act unreasonably to prevent recurrence	Act equitably to remedy effects

SIGNIFICANT CASES

- *Franklin v. Gwinnett County Public Schools*,
503 U.S. 60 (1992)
- *Gebser v. Lago Vista Independent School District*,
524 U.S. 274 (1998)
- *Davis v. Monroe County Bd. of Education*,
526 U.S. 629 (1999)

FRANKLIN v. GWINNETT COUNTY PUBLIC SCHOOLS



- District and Eleventh Circuit dismissed the case, indicating that Title IX does not allow for award of monetary damages.
- Supreme Court held:
 - Sexual harassment constitutes sex discrimination under Title IX
 - Private right for recovery of monetary damages under Title IX
- *Franklin* did not address issues concerning the educational institution's liability.

GEBSER v. LAGO VISTA INDEP. SCHOOL

524 U.S. 274 (1998)



The Supreme Court ruled individuals cannot recover monetary damages against the school unless:

- Three-part standard:
 1. An official of the educational school/district must have had “**actual notice**” of harassment;
 2. The official must have authority to “**institute corrective measures**” to resolve the harassment problem; **AND**
 3. The official must have “**failed to adequately respond**” to the harassment and, in failing to respond, must have acted with “**deliberate indifference.**”

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**” of the harassment; and the institution must have responded to the harassment with “**deliberate indifference.**”
 - Additionally, court held that:
 - Harassment must be “**severe, pervasive, and objectively offensive,**” and the indifference “**systemic,**” to the extent that the victim is deprived of educational opportunities or services.
 - Justice O’Conner added a framework to determine deliberate indifference – stating that deliberate indifference constitutes a response that is “**clearly unreasonable in light of the known circumstances.**”

OCR & TITLE IX

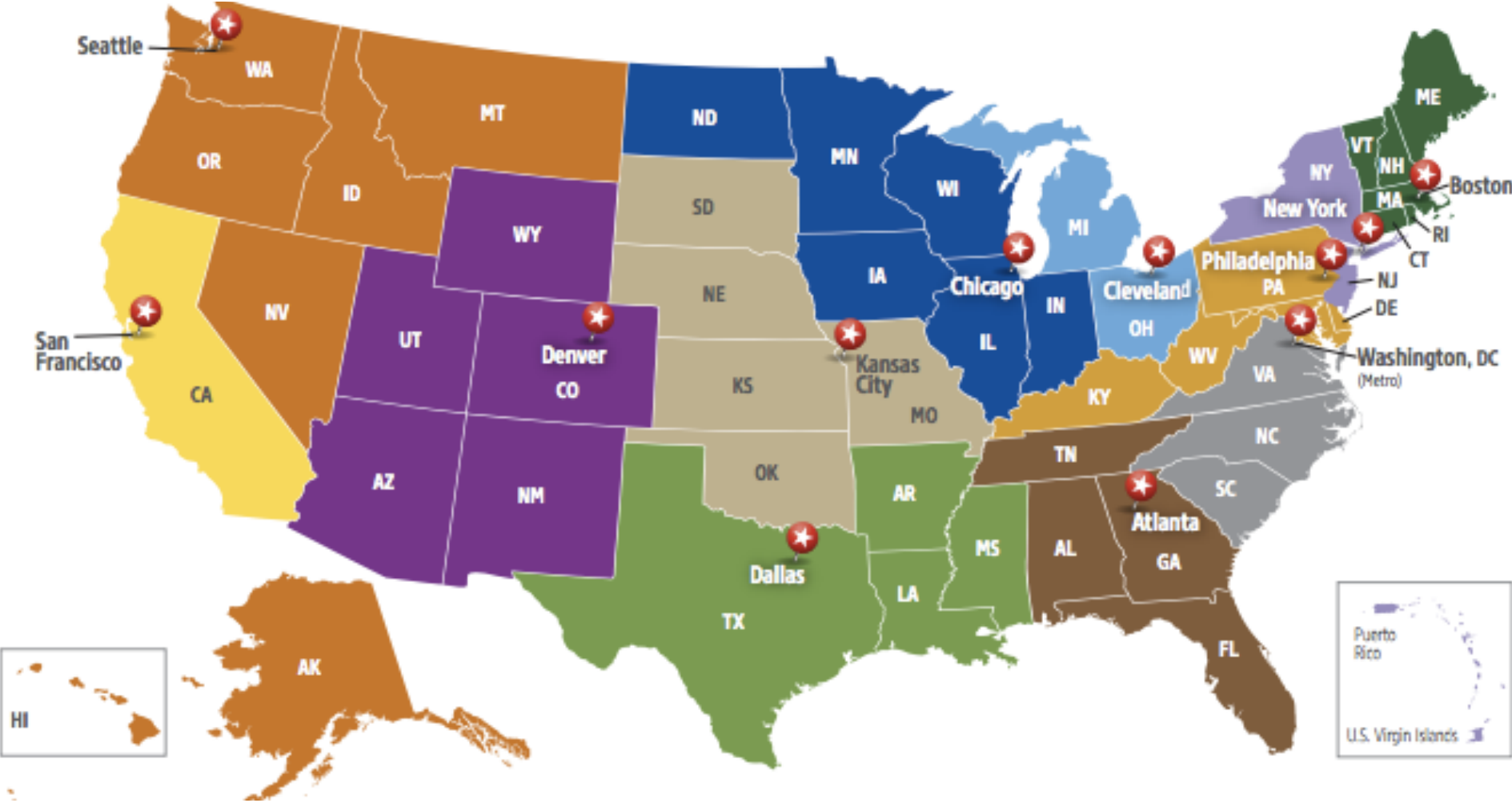
- OCR's Role
- Regional Offices
- Investigation Process
- Civil Lawsuits v. Administrative Actions
- OCR Resources

ROLE OF OCR & TITLE IX



- The Office for Civil Rights (OCR) under the 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
- 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)
- Technical Assistance (The OPEN Center)
 - To help recipients, students, and parents/guardians understand their rights and responsibilities

OCR REGIONAL OFFICES



CIVIL LAWSUITS VERSUS 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 OCR
- Voluntary compliance or findings
- Requires:
 - Actual OR constructive notice (“knew or should have known”)
 - Investigate
 - End harassment
 - Remedy impact
 - Prevent recurrence

*Based on the 2020 Regs, these standards will likely align much more moving forward.

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>
- *Chronicle of Higher Education's* Title IX Tracker
 - <http://projects.chronicle.com/titleix/>
 - Is not as up-to-date since March 2018 when OCR stopped publishing case information

KEY TITLE IX 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
 - 2015 DCL on the Role of Title IX Coordinators; TIX Resource Guide
 - 2016 DCL on Transgender Students
 - 2017 Q&A on Campus Sexual Misconduct
- Still 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

OTHER GUIDANCE REGARDING SEXUAL HARASSMENT & VIOLENCE



- OCR Resolution Agreements
- 2013 – VAWA Section 304
- 2014 – “Not Alone” – White House Task Force to Protect Students From Sexual Assault
- DOJ Title IX Legal Manual

CLERY ACT: VAWA 2013 – SECTION 304

THE CLERY ACT



Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (1990)

- Crime reporting
- Campus crime log
- Campus Sexual Assault Victims' Bill of Rights (1992)
- Primary crimes (7+3)
- Hate crimes (8 categories)
- Policy and procedure disclosures
- Timely Warnings & Emergency Notifications
- Sex offender information dissemination
- Enforcement and fines
- Violence Against Women Reauthorization Act of 2013 (VAWA) – Section 304



CLERY ACT AMENDMENT: VAWA SECTION 304



- **VAWA Section 304** significantly amended the Clery Act.
- Created **extensive** new policy, procedure, training, education, and prevention requirements for:

- Sexual assault
- Stalking
- Dating violence
- Domestic violence

The “Big 4”

- Significant focus on providing detailed written information to victims regarding on- and off-campus resources, remedies, interim measures, and resolution mechanisms and options
 - Detailed listing of policy and procedural elements required in the ASR
 - Listing of key training elements and requirements
 - Extensive description of required educational programs and campaigns targeting VAWA-based crimes
- Prohibits retaliation

THE CLERY ACT



- **Clery Handbook** - updated in June 2016 primarily to incorporate all the VAWA-based elements and additions
 - Rescinded in October 2020
- Replaced with the **Clery Act Appendix for Federal Student Aid (FSA) Handbook**
 - Does not shift procedural obligations required for the VAWA offenses
 - <https://ifap.ed.gov/electronic-announcements/100920RescissionReplace2016HandbookForCampusSafetySecurityReporting>

IS IT A IX?: WHEN DOES TITLE IX APPLY

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

WHEN DOES TITLE IX APPLY?



- Emphasizes 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?



- The definition of sexual harassment arguably covers the in-program effects of out-of-program misconduct (though not the misconduct itself).
- At the time of filing a formal complaint, a Complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.
 - OCR adopts a fairly broad definition of what could constitute “attempting to participate” in the discussion.
 - Can include the following individuals: students (on-campus & online/distance); dual enrollment students; faculty; staff; medical residents; alumni; prospective students/employees.

WHEN DOES TITLE IX APPLY?



Personal Jurisdiction

- When is a student a “student”?
 - Upon **application** to the institution?
 - Once **admitted** to the institution?
 - Once **registered**?
 - Upon **matriculation**?
 - What about winter and summer **breaks**?
- When is an employee an employee?
 - Exempt vs. Non-Exempt Employees

WHEN DOES TITLE IX APPLY?



- 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, etc.); guest or invitee; prospective student; former student; former employee; student from another institution
- Institution must still:
 - Provide support and resources to the Complainant and the community
 - Determine if there are patterns or institutional variables that contributed to the alleged incident
 - Take what action it can (e.g. trespass the person)

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 or not, **all** institutional programs are covered.
- All programs using facilities of the funding recipient.
 - (e.g., camps using your fields/stadium).
- Includes hospitals, residency programs, branch, or satellite campuses.

WHEN DOES TITLE IX APPLY?



Geographic Jurisdiction

- Sexual Harassment and Discrimination cases.
 - Must be dismissed if did not occur against a person in the U.S., but...
 - Contrary case law
 - There is NO expectation that you exercise jurisdiction over off-site/off-campus incidents UNLESS
 - The property is owned or controlled by the school OR
 - The property is being used for a program or event sponsored by the school or an organization recognized by the school OR
 - The property is owned or controlled by an organization recognized by the school
- Other forms of liability may still apply and the PPTVWM analysis may come into play here.
- This means you may still be taking discretionary jurisdiction over incidents off-campus or on non-school property, but under other policies, not Title IX.

WHEN DOES TITLE IX APPLY?



Subject Matter

- 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), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

WHEN DOES TITLE IX APPLY?



Subject Matter

- Sex/gender-based:
 - Stalking
 - Hazing
 - Bullying
 - Arson
 - Vandalism
 - Theft
 - Any other policy violation that is sex/gender-based that causes a discriminatory effect

WHEN DOES TITLE IX APPLY?



Subject Matter

- Retaliation
- Sex/Gender discrimination (Equity)
 - OCR recently noted this includes sexual orientation and gender identity (based on biological sex) following Supreme Court's *Bostock* case
- Pregnant and parenting discrimination

WHEN DOES TITLE IX APPLY?



Subject Matter

- 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**
- May still provide support and resources to the Complainant and the school community as appropriate

IF TIX JURISDICTION IS NOT PRESENT



- Behavior could still violate:
 - District/School harassment/discrimination policies
 - Student Handbook/Conduct policies
 - Technology/Acceptable Use policies
 - Employee Handbook/Policies
 - Professionalism standards
- District/School should still take steps to:
 - Provide support and resources to the complainant and school 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

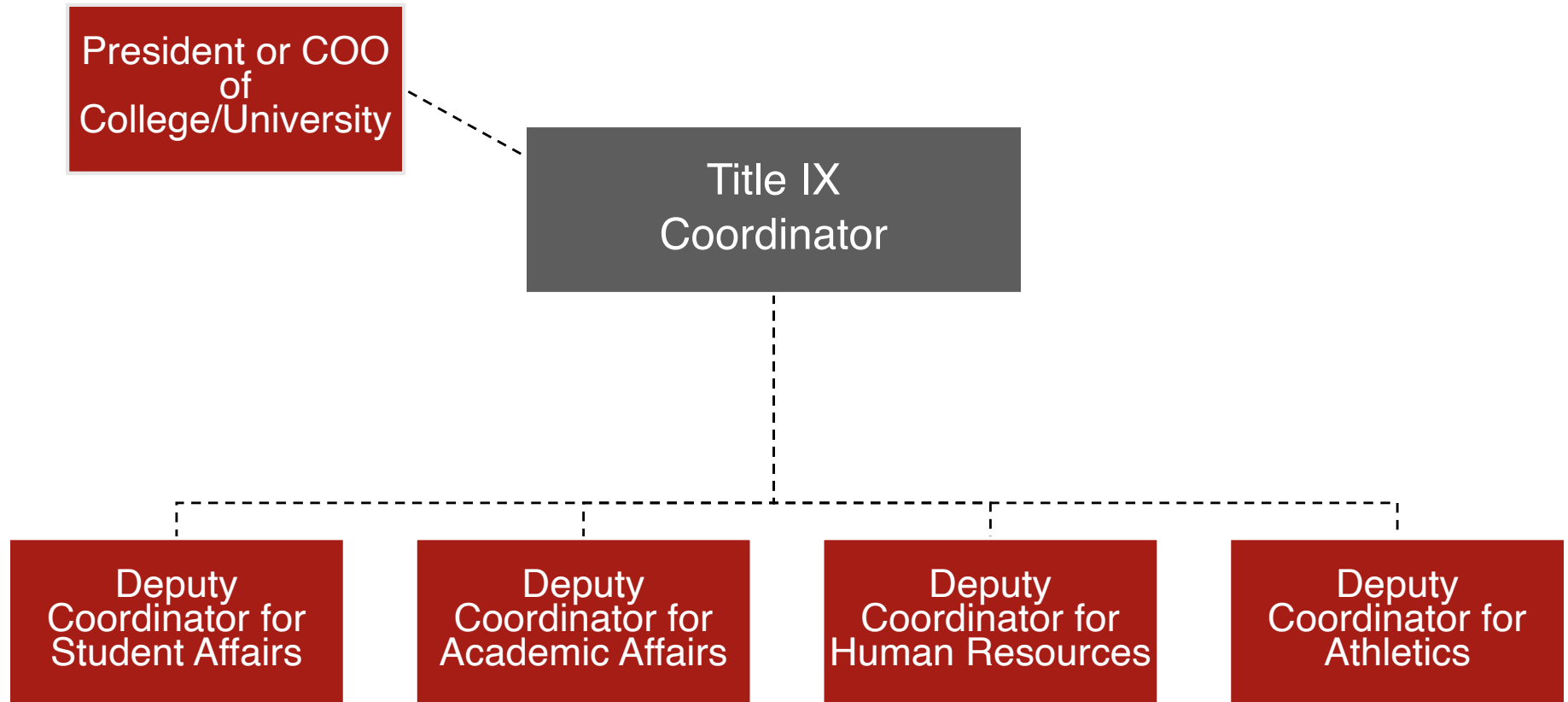


- Does your institution exercise jurisdiction over off-campus/non-school property incidents? Under what circumstances?
 - For Students? Faculty? Staff?
- When is a student officially a student under your code of conduct and/or Title IX policies?
- What are you doing to address off-campus intimate partner violence?
- What are you doing to address online harassment and discrimination?

ROLES AND RESPONSIBILITIES OF THE TITLE IX TEAM

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

SAMPLE TITLE IX TEAM STRUCTURE FOR HIGHER EDUCATION



WHO IS ON 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 ISSUES



- Co-Coordinator?
- Job responsibilities of Deputy Coordinators
 - Tailor scope and roles based on school/campus culture
 - Delegation
- Multiple campuses/locations
 - Campuses within a larger system (e.g., SUNY schools)
 - Extension campuses
 - Online communities
 - District-level (e.g. Community College systems)
- Dual-enrollment oversight
- Investigator oversight

ROLE OF THE INVESTIGATOR



- Conduct reliable, prompt, fair, and impartial investigations
 - Work with TIXC to develop strategy for investigation
 - 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-MAKERS



- 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 APPELLATE 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
- May need to speak with investigator, decision-maker, parties, or witnesses
- Review of case should be limited to the grounds noted in the appeal request
 - Not a *de novo* review
- Draft a written determination that outlines the rationale for the outcome

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 not cost to the party.
 - No mandate to train advisors however, it is advisable to do so for all institution-appointed advisors.

TITLE IX COORDINATOR:

CREATOR &
IMPLEMENTER OF
APPROPRIATE POLICY

CREATOR AND IMPLEMENTER OF APPROPRIATE POLICY



- **Policies** = The Rules
 - Policies should clearly define expected/prohibited conduct
 - Policies should be regularly updated, revised, and assessed
- **Procedures/"Process"** = How alleged violations of policy are addressed
 - Procedures should clearly channel the parties to appropriate resources
 - Procedures should provide for the equitable remedying of complaints
- **The 2020 Regs have likely required substantial changes to your existing policies and procedures.**

CREATOR AND IMPLEMENTER OF APPROPRIATE POLICY



- Must be an integral part of the policy development and review process
- Ensure all policies related to sex/gender misconduct and discrimination are legally accurate and complete
- If the institution has multiple policies (for faculty, staff, students) and procedures, must ensure that these policies are not conflicting, or contain conflicting definitions
 - A strong argument for a single policy!
 - ATIXA's One Policy, Two Processes Model (1P2P)

DEFINITIONS OF SEXUAL HARASSMENT

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

REQUIRED DEFINITIONS – 2020 REGS



- 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).

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.

HOSTILE ENVIRONMENT: "SEVERE"



- Physical conduct is more likely to be severe.
- Accompanied by threats or violence.
- Consider the circumstances (e.g., the ability for Complainant to remove themselves from the harassment.)

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
- Humiliation
- Intimidation
- Ridicule
- 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
 - Whether the conduct was physically threatening
 - Whether the conduct was humiliating
 - Identity of and relationship between the Respondent and the Complainant
 - Age and sex of the Respondent and the Complainant
 - Size of the school, location of the incidents, and context in which they occurred

HOSTILE ENVIRONMENT: TOTALITY OF THE CIRCUMSTANCES



- Totality of the circumstances to consider:
 - Effect on the Complainant's mental or emotional state
 - Whether the conduct was directed at more than one person
 - Whether the conduct unreasonably interfered with the Complainant's educational or work performance
 - Whether the statement was an utterance of an epithet which was offensive or offended by discourtesy or rudeness
 - Whether the speech or conduct deserves the protections of academic freedom or First Amendment protection
 - "Constellation of surrounding circumstances."

SEXUAL ASSAULT



Any sexual act directed against another person, without the consent of the Complainant including instances where the Complainant is incapable of giving consent.

- 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.
- Sodomy - Oral or anal sexual intercourse with another person, forcibly and/or against that person's will or not forcibly or against the person's will (non-consensually) in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

SEXUAL ASSAULT (CONT.)



- Sexual Assault With An Object - To use an object or instrument to penetrate, however slightly, the genital or anal opening of the body of another person, forcibly and/or against that person's will or not forcibly or against the person's will (non-consensually) in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.
- Fondling - The touching of the private body parts of another person (buttocks, groin, breasts) for the purpose of sexual gratification, forcibly and/or against that person's will (non-consensually) or not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

SEXUAL ASSAULT (CONT.)



- Incest - Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by [insert state] law.
- Statutory Rape - Nonforcible sexual intercourse with a person who is under the statutory age of consent of [insert age in your state].

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].
- To categorize an incident as Domestic Violence, the relationship between the Respondent and the Complainant must be more than just two people living together as roommates. The people cohabitating must be current or former spouses or have an intimate relationship.

STALKING



- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to—
 - Fear for the person’s safety or the safety of others; or
 - Suffer substantial emotional distress.
- For the purposes of this definition, *course of conduct* means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person’s property.
- 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.
- But, Regs insist this definition not be interpreted to violate First Amendment.

OTHER POLICY DEFINITIONS

-
- Retaliation
 - Sexual Exploitation
 - Other Misconduct Offenses

- § 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. 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.

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

- § 106.71 Retaliation.
- *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 (not a “Title IX policy?”)
 - Occurs when one person takes non-consensual or abusive sexual advantage of another for their own advantage or benefit, or to benefit or advantage anyone other than the one being exploited, and that behavior does not otherwise constitute one of other sexual misconduct offenses.
- Examples of sexual exploitation include, but are not limited to...
 - Invasion of sexual privacy
 - Non-consensual digital, video, or audio recording of nudity or sexual activity

ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION (CONT.)



- Examples (continued):
 - Unauthorized sharing or distribution of digital, video, or audio recording of nudity or sexual activity
 - Engaging in voyeurism
 - Going beyond the boundaries of consent (such as letting your friend hide in the closet to watch you having consensual sex)
 - Knowingly exposing someone to or transmitting an STI, STD, or HIV to another person
 - Intentionally or recklessly exposing one's genitals in non-consensual circumstances or inducing another to expose their genitals
 - Sexually-based stalking and/or bullying may also be forms of sexual exploitation

OTHER MISCONDUCT OFFENSES THAT MAY REQUIRE A RESPONSE WITH APPROPRIATE DUE PROCESS



- Bullying/Cyberbullying
- Hazing
- Threatening or causing physical harm
- Conduct which threatens or endangers the health or safety of any person
- Discrimination
- Intimidation
- Any policy violated on the basis of the Complainant's protected class, which is severe and/or pervasive/persistent enough to cause a discriminatory effect.

CONSENT CONSTRUCT

-
- Force
 - Incapacity
 - Consent

CONSENT IS...



- Informed, knowing, and voluntary (freely given),
- Active (not passive),
- Affirmative action through clear words or actions,
- That create mutually understandable permission regarding the conditions of sexual activity.
- Cannot be obtained by use of:
 - Physical force, compelling threats, intimidating behavior, or coercion
- Cannot be given by someone known to be — or who should be known to be — mentally or physically incapacitated

CONSENT



- Lack of protest or resistance \neq consent
 - “No” means “no,” but nothing also means “no.” Silence and passivity do not equal permission.
- Consent should not be assumed
- Must be present through the entire incident (ongoing or continuous)
- Consent can be withdrawn at any time, as long as that withdrawal is clearly communicated by the person withdrawing it
- To be valid, consent must be given prior to or contemporaneously with the sexual activity.
- The inability to give consent may be a result of, but not limited to, the following individuals:
 - Persons who are asleep or unconscious
 - Persons who are incapacitated due to the influence of drugs, alcohol, or medication
 - Persons who are unable to communicate consent due to a mental or physical condition
 - Minors

OVERVIEW OF THE 3 QUESTIONS



1. Was force used by the Respondent to obtain sexual or intimate access?
2. Was the Complainant incapacitated?
 - a. Did the Respondent know the Complainant was incapacitated, or
 - b. Should the Respondent have known that the Complainant was incapacitated (e.g., by alcohol, other drugs, sleep, etc.)?
3. What clear words or actions by the Complainant gave the Respondent permission for each specific sexual or intimate act that took place as it took place?

TITLE IX COORDINATOR:

NAVIGATING FIRST AMENDMENT PROTECTIONS



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

- 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
- ED reaffirms First Amendment protections in 2020 Regs

NAVIGATING FIRST AMENDMENT PROTECTIONS



- Issues to consider:
 - Time, place, and manner
 - Open forum, limited open forum, and closed forum
 - Confluence with academic freedom (faculty/teachers)
 - Unprotected speech
 - Incitement of disruption and breach of peace
 - Defamation
 - True threat
 - Obscenity
 - Outside speakers
 - Hate speech

TITLE IX COORDINATOR:

OVERSIGHT AND COORDINATION OF PROMPT & EQUITABLE GRIEVANCE PROCEDURES

-
- The Process
 - Promptness
 - Equity
 - Clery Act: VAWA Sec. 203

THE PROCESS



Complaint or
Notice to
Title IX
Coordinator
Strategy
development

Jurisdiction?
Dismissal?
Policy violation
implicated?
Reinstatement?
Informal or
formal
resolution?

Notice to parties
Identification of witnesses
Interview scheduling
Evidence collection
Report drafted
Evidence and Inv. Report
shared
Inv. report finalized

Determination
Cross-
examination
Sanction?
Remedies

Standing?
Vacate?
Remand?
Substitute?

PROMPTNESS – 2020 REGS



- 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
 - Delays for administrative needs are insufficient

OVERSIGHT AND COORDINATION OF PROMPT AND EQUITABLE GRIEVANCE PROCEDURES



- Institutions are required to make a “good faith effort” to resolve allegations promptly.
 - 60 days to resolution is a good guide; varies based on situation
 - What about breaks?
 - A forensic collection of evidence by law enforcement may warrant a reasonable, temporary delay in the institution’s investigation (we recommend 1-2 weeks)
 - Pending criminal or civil actions are not reasons for lengthy delays
 - What about delays by the Complainant?
 - Injunctions
 - Notice of extensions
 - Parties are entitled to periodic status updates throughout the process

OVERSIGHT AND COORDINATION OF PROMPT AND EQUITABLE GRIEVANCE PROCEDURES



- The investigation must be conducted according to the timelines in the institution's policy.
 - Policy wording: Use “reasonable delays at the discretion of the Title IX administrator,” “barring exigent circumstances,” etc.
- Parties/witnesses should be interviewed as soon as possible so that recollections are as fresh as possible and to swiftly secure necessary remedies.
- Document all delays and reasoning therefore.
 - E.g., unresponsive or uncooperative parties, criminal investigation, holidays, etc.
 - Communicate regularly with the parties.

OVERSIGHT AND COORDINATION OF PROMPT AND EQUITABLE GRIEVANCE PROCEDURES



- The Title IX Coordinator's role:
 - A sexual harassment grievance procedure is not prompt and equitable unless students and employees **know it exists, how it works, and how to file a complaint.**
 - Ensure that the notice of procedures is published and posted widely.
 - E.g., In the publications and information sources that are most commonly 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.
 - Procedures should be written in a manner that is easily understood.
 - Clearly articulate the difference between making a **report** v. making a **formal complaint.**

OVERSIGHT AND COORDINATION OF PROMPT AND EQUITABLE GRIEVANCE PROCEDURES



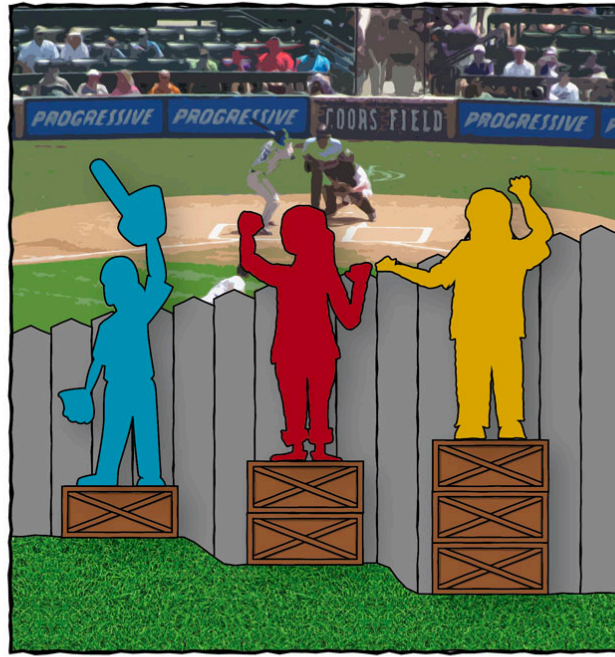
- The Title IX Coordinator's role (cont.):
 - Clearly identify the individuals to whom discrimination complaints can be submitted.
 - Periodically review and update grievance procedures to ensure they comply with Title IX requirements.
 - Confirm that new or revised grievance procedures are posted and published promptly and that old procedures are removed from publications and websites.
 - Beware multiple conflicting or varying versions of published policy.
 - Internally maintain copies of old policies and procedures for reference in the event of a lawsuit, etc.

- “Equity encompasses fairness, justice, and most precisely, fairness under the circumstances. Fairness under the circumstances is intended to make someone whole, in this context when sex or gender is the basis for some form of deprivation or discrimination” (2014 ATIXA Whitepaper, p.4, out of print).

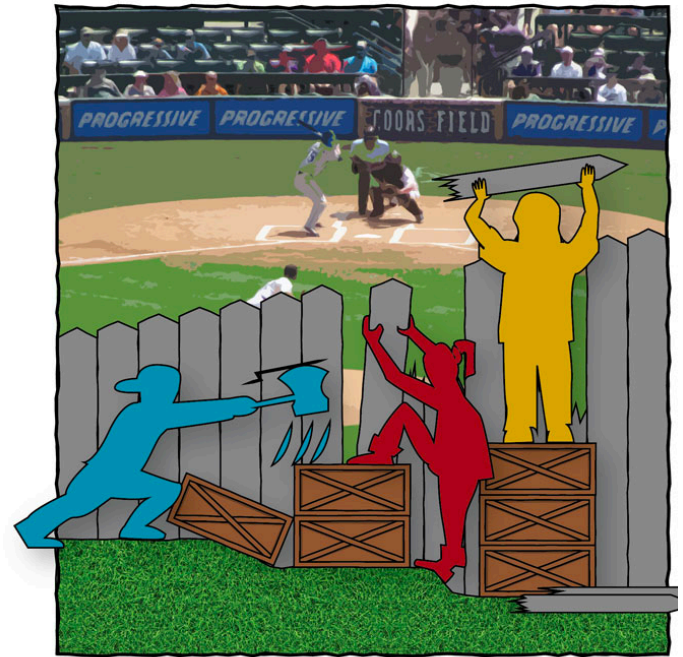
EQUITY DEFINED



EQUALITY



EQUITY



JUSTICE

EQUITY REQUIREMENTS – 2020 REGS



- Various forms of notice — policies and procedures, investigation, hearing, outcome (finding and sanction), etc.
 - Notification of outcomes to parties permitted by FERPA and also required by Clery (outcome and sanctions)
 - Title IX rules in conflict with FERPA
 - IN WRITING!
- Opportunities to present witnesses and provide evidence
- Ability to discuss the allegations without restriction
- Ability to inspect and review evidence and investigation report
- Provide the same rights for an advisor
- Impartial investigators, investigation, hearing, and decision-makers
- Remedies
- All parties entitled to appeal

CLERY: VAWA 2013 SECTION 304



- 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.
 - 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.”
- Institutional policies and procedures that are constituency-based and thereby privilege certain groups more than others (e.g., faculty, staff, or students).
- Widely disparate procedures to remedy different forms of discrimination (e.g., race, religion, disability, sex/gender).
- Ensuring that remedies are equitable (in addition to resolution processes).
- Contact restrictions on the parties that are too broad or punitive.
- Appeal processes, or other processes, where only one party is entitled to participate.
- Conflicts among federal regulations/guidance and state laws or education codes.

TITLE IX COORDINATOR:

POINT PERSON FOR
REPORTS AND
COMPLAINTS

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 all handbooks/catalogs given to applicants for admission and employment, students, employees and unions.
 - However, the institution may designate multiple portals for receipt of information (e.g., Deputy Coordinators).
 - All responsible employees are expected to report notice and complaints to the Title IX Coordinator.

POINT PERSON FOR REPORTS AND COMPLAINTS



- Institutions may also identify (in publications, policies) other individuals to whom reports can be made.
 - E.g., Deans, supervisors, athletic directors, and deputy coordinators
- Law Enforcement Information Sharing:
 - The Title IX Coordinator should establish a **reporting and information-sharing structure** with campus law enforcement.
 - All campus law enforcement officers (whether sworn or public safety/security) are considered “officials with authority” and have an obligation to report to the Title IX Coordinator.
 - Institutions with sworn law enforcement officers may need to negotiate timing and information-sharing based on the law enforcement’s role with criminal investigations and state laws.
- The Title IX Coordinator must create a **structure of documentation and reporting** by these designated individuals.

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 these steps, often across administrative processes and institutional silos
- Importance of a centralized database

NOTICE, REPORTING, & CONFIDENTIALITY

- Notice to the Institution
- Responsible Employees
- Clery: Campus Security Authorities
- Additional Reporting Requirements
- Privileged, Confidential & Private

NOTICE TO THE INSTITUTION



- “Actual Knowledge” under the Regs 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.
- This is only the standard for when OCR would deem a higher education institution to have received actual notice **AND MUST investigate; it is the bare minimum requirement.**
 - What if institution receives notice in some other way?
 - Other types of liability may still exist for failure to act with constructive notice (e.g., tort)

RESPONSIBLE EMPLOYEE



- ATIXA still recommends institutions require all employees to report harassment or discrimination and keep the “Responsible Employee” standard.
- A **Responsible Employee** is any employee who:
 1. Has the authority to take action to redress the harassment; **or**
 2. Has the duty to report harassment or other types of misconduct to appropriate officials; **or**
 3. Someone a student could reasonably believe has this authority or responsibility.

Institutions must ensure that employees are trained regarding their obligation to report harassment to appropriate administrators.

Some institutions or schools use the term “mandatory reporters.”

THE CLERY ACT: CAMPUS SECURITY AUTHORITY



- 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 with their campus 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.
- CSA vs. Responsible Employee
 - “Responsible Employee” is a broader/more encompassing designation.
 - All CSAs are Responsible Employees, but not all Responsible Employees are CSAs.

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 the law of the state. This generally includes reporting immediately to law enforcement and to the state's child welfare agency.
- Additional state reporting requirements (e.g., elder abuse and felony reporting)

PRIVILEGED VS. CONFIDENTIAL VS. PRIVATE



- “Privileged”
 - Granted by laws and professional ethics
 - Attorneys, Licensed professional counselors, Medical professionals, Pastoral counselors
 - To be confidential, 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

PRIVILEGED VS. CONFIDENTIAL VS. PRIVATE



- “Confidential”
 - 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

* ATIXA recommends schools still report aggregate, non-identifiable data for Clery and Title IX purposes.

PRIVILEGED VS. CONFIDENTIAL VS. PRIVATE



- “Private”
 - Anyone who does not meet the definition of a “Responsible Employee.”
 - This number could expand significantly under the Regs given the more restrictive “Official with Authority” definition.
 - Notice to them does not constitute “Actual Knowledge” requiring an investigation.
 - May report incidents without identifying the parties
 - Examples: Administrative Assistants, Non-supervisory employees

ATIXA'S RECOMMENDED APPROACH




- ATIXA recommends that all employees report because this:
 - Enables institution to best support those who have experienced harassment or discrimination.
 - “Private” employees may report non-identifiable information, but this may limit provision of support and resources.
 - Better enables tracking patterns.
 - Gets information to those trained to handle it.

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 IN SUMMARY

A large, stylized red letter 'I' is positioned on the left side of the slide. It consists of a solid red circle at the top, a thick red vertical bar in the middle, and a red shadowed base at the bottom. The shadow is a lighter, semi-transparent red that tapers off to the left and right.

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, should an alternate policy/process begin?

INITIAL ASSESSMENT



- 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 V. COMPLAINT – 2020 REGS



- 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 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)
- Upon receiving a “formal complaint:”
 - Conduct initial assessment to determine jurisdiction
 - Triggers obligation to follow “grievance process” including investigation and hearing

Formal Complaint

- Document or electronic submission
- Filed by Complainant or signed by TIX Coordinator
 - TIXC does not become a party to the complaint
- Alleging Sexual Harassment
- Requesting an investigation
- Complainant must be participating or attempting to participate in the recipient's education program or activity at the time of filing
- Initiates mandatory grievance process (investigation and hearing)

REQUESTS FOR CONFIDENTIALITY



- If a Complainant requests confidentiality and/or does not want the institution to investigate:
 - The Complainant should be notified of their options.
 - 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.
 - That, 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.
 - Its responsive action/remedial abilities may be limited based on the level of confidentiality or privacy requested by Complainant
 - It cannot guarantee privacy if doing so would jeopardize the safety of the Complainant or others
 - Only those with a need to know will be informed
 - If the Respondent is an employee, the institution may need to proceed due to Title VII

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 school from responding effectively and preventing the harassment of other students or the Complainant.
- Use the PPTVWM analysis to determine whether you are to honor a Complainant's request for confidentiality.
- Proceeding without a Complainant's participation has due process implications for the Respondent.

- 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)

PPTVWM (CONT.)



- Factors to consider:
 - Additional complaints of sexual violence involving the same Respondent
 - Whether the sexual violence was committed by multiple individuals
 - Whether the Respondent has a prior history of violence
 - Whether the report reveals a pattern of behavior at a given location or by a particular group
 - Whether the Respondent threatened further sexual violence or violence against the Complainant or others
 - Whether a weapon facilitated the sexual violence
 - Age of the Complainant (incidents involving minors will always be reported to proper authorities)
 - Whether the school possesses other means to obtain relevant evidence (e.g., security cameras or personnel, or physical evidence)

PPTVWM (CONT.)



- Factors to consider:
 - Whether the Respondent threatened further sexual violence or violence against the Complainant or others
 - Whether a weapon facilitated the sexual violence
 - Age of the Complainant (incidents involving minors will always be reported to proper authorities)
 - Whether the school possesses other means to obtain relevant evidence (e.g., security cameras or personnel, or physical evidence)
- If school proceeds, it should notify the Complainant and utilize appropriate supportive measures to protect them.

SUPPORTIVE MEASURES



- Provided to all parties throughout the process:
 - Non-disciplinary, non-punitive
 - Individualized
 - Restore or preserve equal access
 - Without unreasonably burdening other party
 - Protect safety of parties or environment, or deter sexual harassment
- If supportive measures not provided, document why.

COMMON SUPPORTIVE MEASURES



- Referral to counseling, medical and/or other health services
- Referral to the Employee Assistance Program
- Visa and immigration assistance
- Education to the community or community subgroup
- Altering housing situation (if applicable)
- Altering work arrangements for employees
- Safety planning
- Providing school safety escorts
- Transportation accommodations
- Implementing 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 of school
- Other tailored measures appropriate to the circumstances

MANDATORY DISMISSAL OF FORMAL COMPLAINT - 2020 REGS



- **The TIXC must dismiss the complaint if the conduct alleged in the formal complaint:**
 - Would not constitute sexual harassment as defined (in § 106.30), even if proved;
 - Did not occur in the recipient's education program or activity;
 - Did not occur against a person in the United States; or if
 - The Complainant was not participating or attempting to participate in recipient's program at time of complaint.
- Written notice of dismissal to parties required
 - 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 in alternate process

DISCRETIONARY DISMISSAL OF FORMAL COMPLAINT - 2020 REGS



- TIXC **may** dismiss a complaint or any allegations at any time during the investigation or hearing if:
 - Complainant notifies the Title IX Coordinator in writing that the Complainant would like to withdraw the formal complaint or any allegations therein;
 - The Respondent is no longer enrolled or employed by the recipient; or
 - Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein
- Written notice to parties required
- Parties may appeal a dismissal

EMERGENCY REMOVAL – 2020 REGS



- Remove a student Respondent from the recipient's education program or activity on an emergency basis, only after:
 - Undertaking an individualized safety and risk analysis, **and**
 - 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, **and**
 - Providing the Respondent with notice and an opportunity to challenge the decision immediately following the removal while respecting all rights under the IDEA, ADA, and 504, as applicable.
- May place a non-student employee Respondent on administrative leave during the pendency of grievance procedures

THE CLERY ACT: TIMELY WARNING



- In order to keep the campus community informed about safety and security issues on an ongoing basis, an institution must alert campus of certain crimes—of which it receives notice—in a manner that is timely and will aid in the prevention of similar crimes. These are crimes that are:
 - Reported to campus security authorities or local police agencies; **and**
 - Are considered by the institution to represent a **serious or continuing threat** to students and employees.

THE CLERY ACT: EMERGENCY NOTIFICATION



- Triggered by notice to the institution of a broad range of potential threats
 - Any significant emergency or dangerous situation
 - Involving an immediate threat to the health or safety of students or employees on the campus
 - Issued without delay once designated campus Clery authorities have confirmed the emergency
- 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 TO THE PARTIES - 2020 REGS



Upon receipt of a formal complaint, a recipient must provide written notice to the parties who are known:

- Notice of the grievance process, including any informal resolution process
- Notice of the allegations with sufficient time to prepare a response before any initial interview and sufficient details known at the time, including:
 - Identities of the parties involved in the incident, if known
 - Description of conduct
 - Date and location, if known

NOTICE TO THE PARTIES - 2020 REGS (CONT.)



- Respondent is presumed not responsible and a determination regarding responsibility is made at the conclusion of the grievance process
- Parties may have an advisor of their choice, who may be an attorney
- 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

TITLE IX COORDINATOR:

COORDINATE INFORMAL RESOLUTION

- Types of Informal Resolution
- Informal Resolution Considerations

INFORMAL RESOLUTION



- ATIXA has framed a process for Informal Resolution that includes:
 - A response based on supportive measures; and/or
 - A response based on a Respondent accepting responsibility; and/or
 - 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
 - Complexity of the complaint
 - Emotional investment/intelligence of the parties
 - Rationality of the parties
 - Goals of the parties
 - Adequate time to invest in Informal Resolution (resources, staff, etc.)

TITLE IX COORDINATOR:

COORDINATE OVERLAP OF VARIOUS STUDENT & EMPLOYEE GRIEVANCE PROCESSES

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

COORDINATOR OF THE OVERLAP OF MULTIPLE STUDENT AND EMPLOYEE GRIEVANCE PROCESSES



- Potential processes:
 - Generalized sexual harassment procedures
 - General student grievance procedures
 - Employee grievance procedures
 - Faculty grievance procedures
 - Student conduct/discipline process
 - Employee discipline process
 - Faculty discipline process
 - Academic appeal process
 - Athletic department policies/processes and “team rules”
 - Collective bargaining agreements

COORDINATOR OF THE OVERLAP OF MULTIPLE STUDENT AND EMPLOYEE GRIEVANCE PROCESSES



- The Title IX Coordinator:
 - Must have ability to coordinate across multiple constituency groups and procedures as necessary
 - Institutional equity/AA/EEO officer
 - Academic Affairs
 - Coordinator of student conduct
 - Student Affairs administrators
 - Athletics

COORDINATOR OF THE OVERLAP OF MULTIPLE STUDENT AND EMPLOYEE GRIEVANCE PROCESSES



- Supervisor of the interaction between 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



- 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

TITLE IX COORDINATOR: SUPERVISOR OF INVESTIGATIONS

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

SUPERVISOR OF INVESTIGATIONS



- The Title IX Coordinator is responsible for:
 - Determining extent of investigation
 - Appointment of investigators
 - Coordination/Supervision of investigators and investigations
 - Investigation strategy
 - Assurance of supportive measures
 - Timeline compliance
 - Providing institutional memory to investigators
 - Training investigators
 - Facilitating the sending of notices to the parties (e.g. Notice of investigation & allegation (NOIA); Notice of hearing, etc.)
 - Reviewing the investigation report
 - Gatekeeping
 - Duty to warn
 - Recordkeeping of all activities

- The Title IX Coordinator or designee is responsible for:
 - Notice of investigation & allegation (NOIA)
 - Gatekeeping
 - Determining extent of investigation
 - Notice of hearing
 - Notice of outcome
 - Duty to warn
 - Assurance of remedies
 - Recordkeeping of all activities

WHEN DO YOU INVESTIGATE?



- Upon receipt of a formal, written, signed complaint
- When the Coordinator deems an investigation is warranted (and signs the formal written complaint)
- Rumors, gossip, social media, etc. can be notice, but not under the OCR Regs
 - Investigating on these bases is discretionary particularly considering the Regs
- Once a formal complaint is filed, the duty to investigate is absolute
 - At a minimum, an initial assessment (formerly preliminary inquiry) must be completed

WHO SHOULD INVESTIGATE?



- Investigations of sex discrimination must be impartial, thorough, and reliable. So who should investigate?
 - Title IX Coordinator?
 - Standing panel of investigators?
 - Human resources or student services?
 - Administrators and faculty?
 - One investigator or two?
 - Outside investigator?
 - Legal counsel? (no)
 - Coordinating investigation in multiple processes

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 your investigation meets these requirements
 - Who investigates may be strategic to each specific case
 - 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 CAMPUS LAW ENFORCEMENT IN CIVIL RIGHTS INVESTIGATIONS



- Can campus law enforcement be the Title IX investigatory arm?
 - Should it be? (not a best practice)
 - Legal standards for criminal investigations are different.
 - Police investigations or reports may not be determinative of whether harassment occurred under Title IX and do not relieve the school of its duty to respond promptly and effectively.
- Establish MOUs with campus police and other local enforcement and update annually.
 - The power of the tabletop exercise

ELEMENTS OF AN INVESTIGATION

- 10 Steps
- Investigation Strategy
- Rights of the Parties
- Understanding Evidence
- Credibility
- Investigation Report
- G.A.S. Framework
- Credibility
- Evidence & Report Review

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 to Parties/Notice of Formal Allegation(s)
5. Establish investigation strategy
6. Formal comprehensive investigation
 - Witness interviews
 - Evidence gathering
7. Draft investigation report
8. Meet with Title IX Coordinator (or legal counsel) to review draft report and evidence
9. Provide 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 to make a determination of responsibility

INVESTIGATION: STRATEGY IS KEY



- The investigation team, in consultation with the Title IX Coordinator, and/or the Deputy Coordinator, strategizes the entire investigation. This includes, but is not limited to:
 - What are the undisputed facts? Which ones are significant to the investigation?
 - What are the facts in dispute? Which ones are significant to the investigation?
 - Who do you need to interview?
 - What should be the order of the interviews?
 - What evidence do you need to gather?
 - Timeline.

RIGHTS OF THE PARTIES DURING THE INVESTIGATION - 2020 REGS



- Right to present witnesses, including fact and expert witnesses
- Right to present inculpatory and exculpatory evidence
- Right to discuss the allegations under investigation without restriction
- Right to gather and present relevant evidence without restriction
- Right to be accompanied to any related meeting or proceeding by advisor of their choice, who may be, but is not required to be, an attorney
- Right to written notice of the date, time, location, participants, and purpose of investigation interviews or other meetings, with sufficient time to prepare
- Right to 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 witness, but not to the allegations.

- Credibility is largely a function of corroboration and consistency.
- To assess credibility is to assess the extent to which you can rely on a witness testimony to be accurate and helpful in your understanding of the case.
 - 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



- The investigation report is the one comprehensive document summarizing the investigation, including:
 - Results of interviews with parties and witnesses.
 - Results of interviews with experts (if any).
 - Summary of other information collected, (i.e. information from police reports including pretext calls, medical exams, video surveillance and photographs, copies of text, email and social networking messages, etc.).
- G.A.S. framework.
- The supplemental “bucket” to the report.

- To draw a clear line between investigation and decision-making functions, investigators should follow the G.A.S. Framework for investigations and reports:
 - **Gather** evidence
 - **Assess** credibility and evidence
 - **Synthesize** areas of dispute/agreement and all questions asked

- **Gather** evidence
 - Fact-gathering function

- **Assess** credibility and evidence
 - **Credibility**
 - Does not include making conclusions about whether a witness or evidence is credible
 - Point to issues of credibility without deciding them
 - Investigator highlights disputed accounts or conflicting evidence, but the decision-maker is at liberty to make their own final conclusions
 - **Evidence**
 - Assess for relevance and credibility
 - Only relevant evidence should be summarized in the investigation report

- **Synthesize** areas of dispute/agreement and all questions asked
 - **Areas of dispute/agreement**
 - Summary of all undisputed evidence
 - Summary of all evidence that remains contested
 - Hearing should focus on second list
 - **All questions**
 - Likely provided in an appendix
 - Investigator questions
 - Party/Advisor-suggested questions
 - Disposition of questions (i.e., asked, not asked, reframed, etc.) with rationales

EVIDENCE AND REPORT REVIEW BY PARTIES, PART 1 - 2020 REGS.



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
 - Be made available at any hearing
 - After sending the evidence, the investigator must:
 - Allow 10 days for written response
 - Consider response prior to completion of report
- § 106.45(b)(5)(vi)

EVIDENCE AND REPORT REVIEW BY PARTIES, PART 2 - 2020 REGS.



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 investigative report to the TIXC and/or legal counsel to review for completeness prior to being shared with the parties
- For K-12 schools, with or without a hearing, this review is followed by, or in conjunction with, the exchange of relevant written questions and responses facilitated by a decision-maker. § 106.45(b)(5)(vii) and § 106.45(b)(6)(ii)

TITLE IX COORDINATOR:

COORDINATION OF 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, etc.)
 - Overseeing appeal processes
 - Sanctions
 - Remedies
 - Providing institutional memory
 - Training decision-makers (hearings and appeals)
 - Recordkeeping of all activities

STANDARD OF EVIDENCE – 2020 REGS

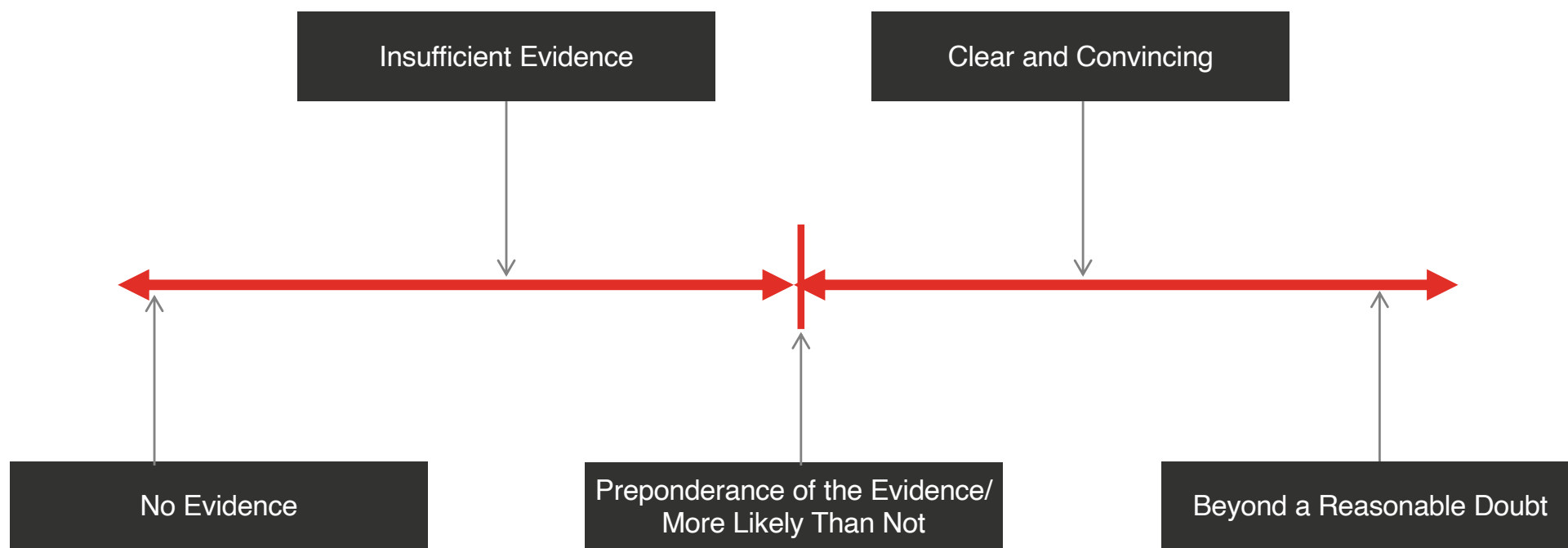


- Current industry standard is preponderance of the evidence
- OCR says recipients must now apply either the preponderance of the evidence standard or the clear and convincing evidence standard
- Standard of evidence must be consistent for all formal complaints of sexual harassment, regardless of policy or underlying statutory authority
- Must also apply the same standard of evidence for complaints against students as for complaints against employees, including faculty

UNDERSTANDING EVIDENCE THRESHOLDS



EVIDENTIARY STANDARDS



EQUITY: PREPONDERANCE STANDARD



- The only equitable standard
- ATIXA maintains that preponderance of the evidence is the appropriate standard
- Articulate the standard throughout your policy, procedures, investigation, and hearings
- Educate the parties and their advisors
- Use language the community understands
 - 50.1%.
 - “More likely than not.”
 - The “tipped scale.”
 - Try NOT to use just the term “preponderance of the evidence” – it is not common language

DECISION-MAKERS: MAKING A FINDING/DETERMINATION



- Review the institutional policies that apply
- **Parse the policy**
 - Provide specific findings for each violation and for each Respondent
- Review the evidence and what it shows (relevance)
- Assess the credibility of evidence and witness statements as factual, opinion-based, or circumstantial
- Make a determination as to whether a policy violation occurred based on standard of evidence
- Cite concretely the reasons for this conclusion
- Move to sanctioning

TITLE IX COORDINATOR:

ASSURANCE OF COMPLIANCE WITH FINAL SANCTIONS

-
- Sanctioning Considerations
 - Assuring Compliance
 - Common Sanctions

SANCTIONING CONSIDERATIONS



- Title IX Coordinator does not issue sanctions but oversees the process.
- Investigation alone is not sufficient to overcome a deliberate indifference claim.
- Title IX and case law requires:
 - **Stop:** Bringing an end to the discriminatory conduct
 - **Prevent:** Taking steps reasonably calculated to prevent the future reoccurrence of the discriminatory conduct
 - **Remedy:** Restoring the Complainant as best you can to pre-deprivation status
- The 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).

SANCTIONING CONSIDERATIONS



- What is appropriate?
 - Separation/expulsion? Suspension? Lesser sanctions?
- Sanction(s) must be reasonable and reflect the severity of the behavior
 - May consider prior misconduct
 - What is the role of precedent?
 - May consider attitude
 - May also be educational (i.e., targeted to stop and prevent)
 - What best compensates for loss or injury to college or persons?
 - Compliant with laws and regulations
- Engage in strategic education and training requirements
- Conduct a risk assessment audit and mitigation process.
- OCR says institutions should consider impact on the Respondent's education when determining a sanction.

SANCTIONING



- Ensure that remedies are equitable
- Ensure that remedies are not clearly unreasonable in light of the known circumstances
- The school may have already taken steps to protect Complainants even before the final outcome of the process (e.g., through no-contact orders, etc.) – these may be continued in the final sanctions
- Avoid undue delays
- Monitor for retaliation and respond immediately to formal complaints
- Review policies, procedures, and practices regularly to ensure they are in accordance with best practices, and state, and federal case law

ASSURANCE OF COMPLIANCE WITH FINAL SANCTIONS



- Take steps to confirm and document that all sanctions were enforced.
 - 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
- No contact
- Residence hall relocation, suspension, or expulsion
- Limited access to school/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
- Reduction in pay
- Loss of annual raise
- Discretionary sanctions
- Loss of supervisory or oversight responsibilities
- Paid or unpaid leave
- Suspension
- Termination

TITLE IX COORDINATOR:

COORDINATING THE APPEAL PROCESS

-
- Appeals
 - Grounds for Appeal
 - Key Elements
 - Process

APPEALS – 2020 REGS



- Must offer equitable opportunity to appeal based on determination or dismissal of any allegations
- All parties receive notification of any appeal
- Opportunity for all parties to support or oppose outcome
- Written decision with rationale delivered simultaneously to the parties
- Appeal decision-maker cannot have had any other role in the investigation or resolution process
- “Reasonably prompt” timeframe for producing appeal decision

APPEAL GROUNDS – 2020 REGS



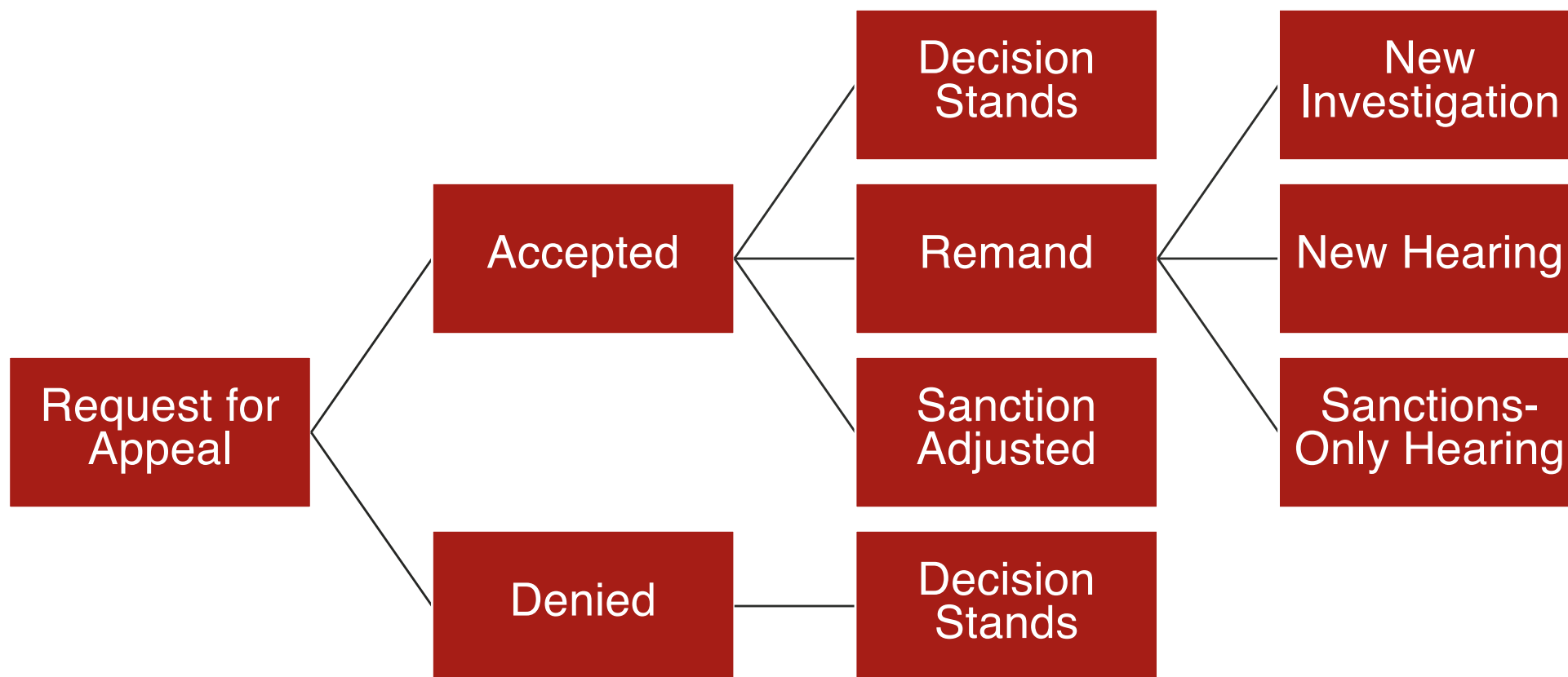
- A recipient must offer both parties an opportunity to appeal a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:
 - Procedural irregularity that affected the outcome of the matter;
 - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
 - The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.
- May add additional grounds provided they are made available on an equitable basis.

APPEALS: KEY ELEMENTS



- One level of appeal
- Limited grounds for appeal
- Deference to original hearing authority
- Short window to request an appeal
 - Can always grant an extension if necessary
- Document-based review
 - NOT *de novo*.
- Request for an appeal

APPEALS: THE PROCESS



TITLE IX COORDINATOR: COMPLIANCE WITH REQUIREMENTS TO STOP, PREVENT, REMEDY

-
- Stopping Discriminatory Conduct
 - Preventing Recurrence
 - Remedying the Effects

ASSURANCE OF 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?
- 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

ASSURANCE OF 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
- Consider the effect of educational sanctions
- The potential next Complainant is potentially both a Title IX and negligence concern

ASSURANCE OF 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 school community as a whole.

TITLE IX COORDINATOR: PREVENTION AND REMEDICATION

- Sex/Gender Discrimination
- Sexual Harassment
- Dating/Domestic Violence
- Stalking
- Retaliation
- VAWA Sec. 203
- Case Study

PREVENTION AND REMEDIATION OF SEX/GENDER DISCRIMINATION



- Prohibition of:
 - Sex/Gender discrimination
 - Sexual harassment
 - Sexual assault
 - Intimate partner/Dating/Domestic violence
 - Stalking
 - Retaliation
- May apply to other behaviors when sex/gender-based
- Obligation to recognize and respond consistent with Title IX

PREVENTION AND REMEDIATION OF SEX/GENDER DISCRIMINATION



- Equity in programs and operations
 - Access and admissions
 - Academic programs
 - Recruitment, promotion, and hiring
 - Compensation and benefits
 - Discipline and discharge
 - Athletics (more on this later)
 - Including intercollegiate, intramural, and club sports
 - All student organizations and activities
 - Fraternities and sororities are exempted from membership equity

PREVENTION AND REMEDIATION OF SEXUAL HARASSMENT



- Ensure appropriate sexual harassment language in institutional policy
- Remediation may include:
 - Mediation (likely not for physical harassment/assault)
 - Educational programs
 - Policy revision
 - Training
 - Course or work adjustments
 - In addition to remedies for other forms of sexual misconduct

PREVENTION AND REMEDIATION OF SEXUAL HARASSMENT



- Training and prevention efforts are increasingly expected and needed to prevent and remedy
- Title IX Coordinator should oversee and assure institution's prevention efforts (similar to training oversight)
 - Design of prevention strategy
 - Funding of prevention strategy
 - Implementation of prevention strategy
 - Assessment of learning outcomes
 - Assessment of behavior change

PREVENTION AND REMEDIATION OF DATING AND DOMESTIC VIOLENCE



- Ensure remedies consistent with Title IX
 - Consider no-contact order implications
 - Emergency removal available in very limited circumstances
 - Trespassing someone from campus or school
 - Consider importance of advocacy and safety planning
 - Also use community/off-site resources
- Recognize complexities of these cases
- Clery/VAWA Sec. 304 specifically targets and highlights issues of “domestic violence” and “dating violence”
- Caution regarding PPTVW analysis (see ATIXA’s 2015 Whitepaper).

PREVENTION AND REMEDIATION OF STALKING



- Can be a form of sexual harassment, too
- Gender-based stalking is a form of sex discrimination
- Increasingly involves technology
- Response consistent with Title IX requirements
- Increase in cases of students on the Autism Spectrum
- Clery/VAWA Sec. 304 does not differentiate between gender-based and non-gender-based stalking for prevention and process requirements

PREVENTION AND REMEDIATION OF RETALIATION



- Retaliation is an increasingly common legal claim
- The Title IX regulations prohibit recipients from engaging in any adverse action against a person because of that person's participation in a protected activity.
- Protected activity under Title IX:
 - Reporting sex discrimination, including sexual harassment and assault
 - Filing a formal complaint
 - Assisting someone in reporting discrimination or filing a complaint
 - Participating in any manner in an investigation of discrimination (e.g., as a party or witness)
 - Protesting any form of sex discrimination (e.g., lack of equity in athletics)
 - *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005)
 - Applies to the direct victim of the discrimination and a party who advocates on behalf of the victim.

PREVENTION AND REMEDIATION OF RETALIATION



- The Title IX Coordinator must:
 - Ensure that the institution effectively communicates a message about protection against retaliation
 - Policies clearly prohibit retaliation
 - Resolution procedures are explicitly applicable to retaliation claims
 - Training includes information about the prohibition on retaliation
 - Ensure parties and witnesses know:
 - Retaliation is prohibited
 - How to report any retaliation
 - Any retaliation will be addressed promptly and effectively
 - Additional sanctions may be imposed for such acts
 - Parties may be held responsible for retaliation by third parties (e.g. friends, colleagues, and family)
 - Act promptly to take appropriate interim and supportive measures to protect the parties/witnesses if notified of retaliation
 - Check-in periodically throughout the resolution process and afterwards to make sure no retaliation is occurring

CLERY ACT (VAWA 2013 – SEC. 304): PREVENTION PROGRAM REQUIREMENTS



- The institution's prevention programming (both for incoming students/employees and ongoing campaigns) must include:
 - The applicable jurisdiction's "**definition of consent** in reference to sexual activity"
 - "A statement that the institution...prohibits the crimes of..."
 - Dating Violence, Domestic Violence, Sexual Assault, Stalking
 - Definitions of consent, dating violence, domestic violence, sexual assault, and stalking "in the applicable jurisdiction"
 - "A description of safe and positive options for **bystander intervention**"

CASE STUDY: DATING/DOMESTIC VIOLENCE



- An employee reports to her supervisor that a colleague, Janet, is being physically abused by her partner, Robert, a full-time employee in Facilities Management.
- The employee indicates that Janet seems noticeably withdrawn lately and that Janet recently came to work late, had red puffy eyes, and looked as though she had been crying.
- The employee says Janet was walking with a limp last week and, when asked about it, told people she twisted her knee after slipping on some ice in her driveway.

CASE STUDY: DATING/DOMESTIC VIOLENCE



- Later that same day the employee said someone overheard Janet on the phone saying, “But I’m scared of what he would do if I tried to leave him.”
- According to the employee, Janet missed a few days of work last month and returned to work wearing a sling. Janet claimed that she sprained her shoulder while working in the yard.
- Yesterday, Janet showed up over an hour late to work and had some swelling around her eye and her bottom lip.

CASE STUDY: DATING/DOMESTIC VIOLENCE



- When asked, Janet said she got up to the bathroom last night in the dark and walked right into the edge of her open closet door.
- The employee says that yesterday afternoon, Robert and Janet got into a loud argument in the parking lot and that Janet was crying in the bathroom afterwards.
- The employee notes that she has hesitated to raise any concerns or suspicions, but worries that Janet's situation is escalating and that someone needs to step in.

CASE STUDY: DATING/DOMESTIC VIOLENCE



- Is this a Title IX issue?
- What are the next steps?
- What special considerations should apply in this case?
- How should you proceed?
- How do you train employees on Dating/Domestic Violence?

TITLE IX COORDINATOR: TRAINING OVERSIGHT

- Who Should Be Trained?
- Training Requirements
- Training Coordination and Operationalization
- Publication of Training Materials
- Training Topics

WHO SHOULD BE TRAINED?



- **Title IX Team**

- E.g.: Coordinator and Deputies, Investigators, decision-makers (including appeals), informal resolution facilitators, and others involved in processing, investigating, or resolving complaints.

- **First Responders**

- E.g.: RAs, health center employees, counselors, sexual assault response coordinators, academic advisors, and campus police/public safety.

- **Officials with Authority**

- **All Faculty & Staff; ATIXA Responsible Employees**

- ATIXA recommends all faculty and staff are responsible employees.

- **All Students**

- Undergraduate, graduate, professional, distance, and online, etc.

TRAINING – 2020 REGS



- Robust training mandates
- Coordinators, investigators, decision-makers, appeal decision-makers, informal resolution facilitators
- Training materials cannot include sex stereotypes; should promote impartiality
- Training materials must be maintained for seven years and posted publicly on recipient's website

TRAINING OVERSIGHT FOR EMPLOYEES, BOARDS, INVESTIGATORS, DECISION MAKERS & APPEAL DECISION MAKERS



- Each of these groups will be different
- Identify the compliance elements that constitute required knowledge for each entity
- Ensure all training materials are not biased in favor of Complainants or Respondents and do not include any sex stereotypes
- Promote impartial procedures
- Consider most effective and efficient approaches for training:
 - For example, investigators will be responsible for thoroughness, fairness, and equity in the investigation. Their training must be extensive.
 - Decision-makers (hearing and appeal) must have a comprehensive understanding of the process; should be in-person using case studies.
 - Informal Resolution facilitators are also required to be trained.
 - Employees need general resource and reporting information and may be trained by video.

TRAINING COORDINATION AND OPERATIONALIZATION



- Centralization and oversight of campus-wide efforts
- How?
 - In person? Online? Classroom?
 - Administrator-driven? Peer-driven?
- When/how often?
 - Orientation: summer orientation, orientation (student, faculty, and staff)
 - Follow-up is crucial
 - Ongoing prevention and awareness campaigns
 - Programs, conversations, speakers, parent programs, hall and floor meetings, first-year seminar, third-party online training, etc.

PUBLICATION OF TRAINING MATERIALS – 2020 REGS



- 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 year of materials need to be maintained, only most recent need to be posted
 - This requirement is not retroactive, so seven years starts August 14, 2020

REQUIRED TRAINING TOPICS – 2020 REGS



- 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
- Issues of relevance of questions and evidence, including when questions and evidence about the Complainant's sexual predisposition or prior sexual behavior are not relevant
- Issues of relevance to create an investigation report that fairly summarizes relevant evidence
- **Note:** OCR sets the minimum training requirements and institutions should conduct training that covers a broader range of topics.

CLERY ACT (VAWA 2013 – SEC. 304) REQUIRED TRAINING



- VAWA 304 contains certain training elements:
 - Annual training for those involved in disciplinary proceedings (e.g., investigators, hearing boards/decision-makers, and appeal decision-makers) on:
 - Domestic violence, dating violence, sexual assault, and stalking
 - How to conduct “an **investigation** and a **hearing process** that protects the safety of victims and promotes accountability”
 - Relevant evidence and how to analyze it
 - Questioning techniques
 - Institution’s procedures
 - Avoiding actual or perceived conflicts of interest
 - Appeals

GENERAL TRAINING TOPICS



- Additional training topics beyond minimum required under the 2020 Regs:
 - Legal Overview: Title IX, Clery, case law, and regulations
 - Institutional policy, including “§ 106.30 definition” of sexual harassment
 - Institutional procedures
 - Reporting v. making a formal complaint
 - Working with Complainants & Respondents
 - Resources, support, and remedies for Complainants
 - Resources and support for Respondents
 - Consent in sexual interactions
 - Rights of parties in complaint, investigation, hearing, and appeals
 - Sanctions/repercussions
 - Additional prevention and community education
 - How to serve in Title IX roles impartially and without conflict of interest or bias

INVESTIGATOR/HEARING BOARDS/DECISION-MAKER COMPETENCIES



- The Legal Landscape
 - Title IX & VAWA Requirements
 - The Conduct/Disciplinary Process
 - Investigation and Resolution Procedures
 - Due Process & Fairness
 - Critical Thinking Skills
 - Questioning Skills
 - Weighing Evidence & Relevance
 - Analyzing Policy
 - Standards of Evidence
 - Documentation
 - Sexual Harassment/ Discrimination
 - Dating & Domestic Violence
 - Stalking/Bullying/Harassment
 - SANE and Police Reports
 - Cultural Competence
 - Bias/Prejudice/Impartiality
 - Credibility Assessment
 - Making a Finding/Deliberation
 - Sanctioning/Remedies
 - Appeal Process
 - Support and Resources for the Parties
 - Technology for Live Hearings
 - Investigation Report Writing
- *This is not a comprehensive list

- Review institutional policies
- Discussion of consent (use case studies)
- Discussion regarding how to report
 - Where to find reporting resources
 - How to make a formal complaint
- Overview of supportive measures available
- Presentation of available for parties (including on and off-campus resources)
- Present statistics and role of drugs and alcohol and introduce “incapacitation”
- Discussion of privacy and confidentiality
- Discussion of rights of all parties
- Provision of resource/reporting guide

TRAINING RESPONSIBLE EMPLOYEES AND OFFICIALS WITH AUTHORITY

- Why Report?
- Training Topics
- What To Say
- What To Report

WHY REPORT?



- We often focus on the legal obligations and the negative consequences of not reporting.
- More effective if we focus on the real reason reports should be made - Providing support and resources.
 - Provide Complainants with school-wide assistance through a single individual (TIXC).
 - Access to the full range of support and resources.
 - Long-range view: ATIXA has seen countless cases where Complainants do not see the negative effects until months later when they are failing their classes, become ill, miss work, considering self-harm, etc.
- Also key to tracking patterns

TRAINING RESPONSIBLE EMPLOYEES/ OFFICIALS WITH AUTHORITY



- Responsible Employee/Officials with Authority
Training should include, at a minimum, the following:
 - Background, overview, and purposes of Title IX
 - Scope of Title IX: Applies to students, faculty, staff, visitors, guests, etc.
 - Responsible Employee/OWA definitions
 - Actual Notice/Knowledge
 - Privilege, Confidentiality, & Privacy
 - Jurisdiction: Geographical, Time, programs, etc.
 - What, How, and When to Report (all types of offenses)

WHAT TO SAY AS A RESPONSIBLE EMPLOYEE



- What a Responsible Employee/Official with Authority should say to a person who has shared information about sex/gender discrimination or harassment:
 - Their obligation to report the information to the Title IX Coordinator
 - Confidential reporting options
 - Counseling and other support services
 - The right to file a Title IX-based complaint and provide printed information with resolution options
 - The right to report a possible criminal act to school/campus or local law enforcement

WHAT TO REPORT AS A RESPONSIBLE EMPLOYEE/OFFICIAL WITH AUTHORITY



- **All** relevant details about the sex/gender discrimination or harassment that was reported to the Responsible Employee/Official with Authority, including:
 - The name of the Respondent (if known)
 - The name of the Complainant
 - Any other individuals involved (if known) in the situation (e.g., witnesses)
 - Relevant facts (if known), including date, time, and location of the incident(s)
- *NOTE: It is NOT the responsibility of the Responsible Employee/Official with Authority to investigate the matter, so questions to the parties should be kept to a minimum.*

GROUP DISCUSSION: TRAINING



- What are you doing that works?
 - Faculty?
 - Staff?
 - Students?
 - Responsible Employees?
- What has not worked?
- How do you reach as many as possible?
- How do you ensure impartial training?

TITLE IX COORDINATOR:

GENERAL TITLE IX COMPLIANCE DUTIES/OVERSIGHT

-
- Compliance Oversight
 - Record-Keeping & Documentation

- 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.
- 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, campus/system committee feedback, etc.

RECORD-KEEPING AND DOCUMENTATION

– 2020 REGS



- 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.**
- For each conclusion, recipient must document the rationale for its determination.
- Recipient must document measures taken to preserve/restore access to education programs/activity.

TITLE IX COORDINATOR:

OVERSIGHT OF
ATHLETICS GENDER
EQUITY

OVERSIGHT OF ATHLETICS GENDER EQUITY



- The oversight of 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 Misconduct and Climate and Culture
- These concepts are taught in the Athletics Training in more detail!

TITLE IX COORDINATOR:

SECTION 504
DISABILITIES
COMPLIANCE
OVERSIGHT

SECTION 504 DISABILITIES COMPLIANCE OVERSIGHT



- The Section 504 regulations require that institutions:
 - “Designate at least one person to coordinate its efforts to comply.”
 - Adopt a clearly defined policy and grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints of discrimination.
 - Provide oversight of disability program compliance.
 - Ensure dissemination of notice of: the institution’s non-discrimination policy; 504/ADA Coordinator contact information; 504/ADA grievance procedures; and process to obtain accommodations.
 - Have preventive measures in place to position themselves to manage reports of disability-based discrimination.

QUESTIONS?



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