



# TITLE IX COORDINATOR & ADMINISTRATOR TRAINING & CERTIFICATION LEVEL ONE COURSE

## COURSE SLIDE PACKET

*This training manual is intended to provide assistance for achieving best practices with respect to campus sexual misconduct, but is not given and should not be taken as legal advice.*

*Before acting on any of the ideas, opinions or suggestions in this publication, participants should check first with a licensed attorney in their own jurisdiction.*




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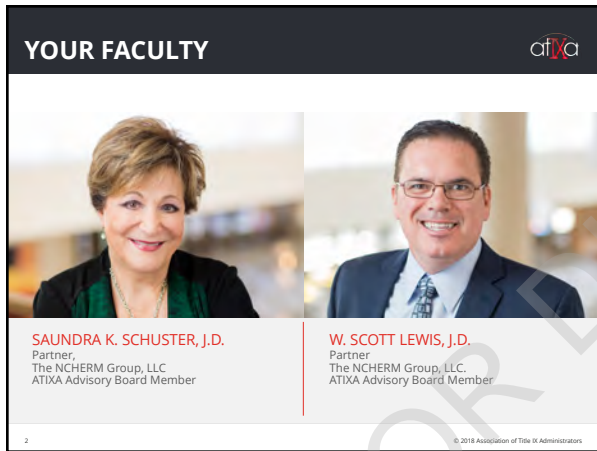
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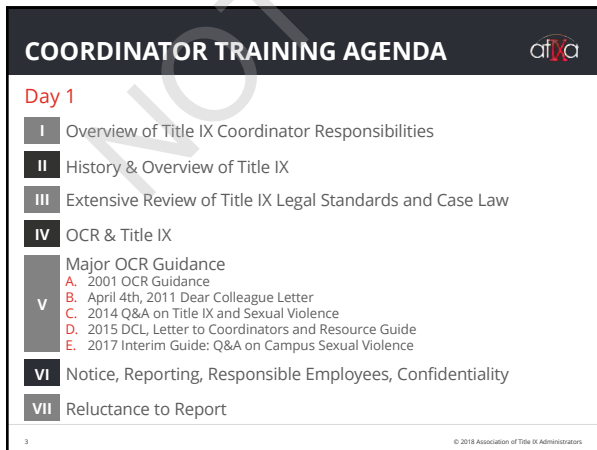
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# THE TITLE IX COORDINATOR

Overview of the Responsibilities

- Description
- Roles
- Discussion




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## THE TITLE IX COORDINATOR



- The campus Title IX coordinator is an administrator with significant authority and wide-ranging responsibilities.
- Must be able to effect change across many departments, including Human Resources, Academic Affairs, Athletics, and Student Conduct.
- Some campuses will allocate part-time responsibilities to the coordinator. Others will dedicate a full-time position as recently recommended by OCR.
- We need to see the Title IX coordinator as a profession within the field of civil rights compliance.
- To alleviate the burden on one administrator, campuses should consider identifying multiple deputy coordinators.

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## THE ROLE OF THE TITLE IX COORDINATOR



- Prevention and remediation of:
  - Gender Discrimination
  - Sexual Harassment
  - Sexual Assault
  - Stalking
  - Intimate Partner/Relationship Violence
  - Bullying and Cyberbullying
  - Retaliation
- Assurance of compliance with requirement to stop, prevent, remedy.
- Assurance of compliance with final sanctions.

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### THE ROLE OF THE TITLE IX COORDINATOR



- Contact for government inquiries.
- Point person for campus complaints.
- Oversight and coordination of prompt and equitable grievance procedures (faculty, student, and staff).
- Creator and implementer of appropriate policies.
- Compliance auditor.
- Training oversight: Faculty, staff, students, investigators, hearing officers, and appellate officers.
- Assurance of First Amendment protections.
- Section 504 disabilities compliance oversight.
- Athletics gender equity.

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### SMALL GROUP DISCUSSION



- What are the three biggest concerns you have regarding your role as a Title IX administrator (coordinator, deputy, etc.)?
- What are you hoping to take away from this training?
- Describe and discuss a recent or current Title IX case at your institution that presented a number of difficulties.

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### HISTORY & PURPOSES OF TITLE IX

- The Road to Title IX
- Text of the Law
- Where We are Today

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### 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, sex or national origin.
- 1965 - Executive Order 11246
  - Prohibited federal contractors from discriminating on basis of race, color, religion, national origin. "Sex" was added in 1968; renamed Exec. Order 11375.

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### TITLE IX



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."

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### TITLE IX



- Title IX of the Education Amendments of 1972 is a federal law intended to end sex discrimination in **all areas of education**.
  - Applies to **non-discrimination based on sex/gender** to 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**.
- In addition to the implementing regulations, the guidelines for compliance with Title IX are provided by the U.S. Department of Education, Office of Civil Rights: [www2.ed.gov/about/offices/list/ocr/docs/shguide.html](http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html)

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**A BRIEF HISTORY OF TITLE IX  
1972-PRESENT**



- Passed in 1972 and signed into law by President Nixon
- Department of Health, Education and Welfare (HEW) – Title IX regulations codified in 1975.
  - “Title IX and Intercollegiate Athletics” (1979).
- 1979 – Supreme Court created a private right of action under Title IX, **Cannon v. U. of Chicago**, 441 U.S. 677 (1979).

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**CANNON V. UNIVERSITY OF CHICAGO  
441 U.S. 677 (1979)**



- Basic Facts:
  - In 1975, Geraldine Cannon (age 39) was denied admission to Univ. of Chicago and Northwestern Univ. medical schools.
  - Schools had policy of not admitting candidates older than 30 unless they already had an advanced degree.
  - Cannon argued that the policy was more likely to discriminate against women due to interruptions related to pregnancy and raising families.
  - Filed a Title IX complaint with HEW.

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**CANNON V. UNIVERSITY OF CHICAGO  
441 U.S. 677 (1979)**



- Filed sex discrimination lawsuit in federal court, arguing violation of the 14th Amendment, Civil Rights Act of 1871, and Title IX.
  - District and Circuit Courts (7th Cir.) dismissed the Title IX claim, indicating Title IX had neither an express nor implied private right of action.
  - Appealed to Supreme Court.
- Supreme Court Finding: **There is an implied private right of action 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 discrimination in education to support its finding.

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**A BRIEF HISTORY OF TITLE IX  
1972-PRESENT**



- 1979 – Three-part test for Athletics promulgated by HEW
- 1980 – U.S. Department of Education was created.
  - Title IX oversight transferred to Dept. of Ed.’s Office for Civil Rights (OCR).
- Supreme Court holds “Employment discrimination comes within Title IX’s prohibition,” **North Haven Bd. of Education v. Bell**, 452 U.S. 512 (1982).

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**NORTH HAVEN BOARD OF EDUCATION V. BELL, 456 U.S. 512 (1982)**



- Involved two cases: North Haven Board of Education and Trumbull Board of Education (both in Connecticut).
- **North Haven Board of Education**
  - Elaine Dove, a tenured teacher in North Haven public school system took a one-year maternity leave. North Haven refused to rehire Dove. In Jan. 1978, Dove filed a complaint with HEW for violation of Title IX.
  - HEW began an investigation, but North Haven refused to cooperate, “Asserting that HEW lacked authority to regulate employment practices under Title IX.”
  - HEW notifies North Haven it is considering enforcement proceedings, which could result in loss of federal funding.
  - District Court found in favor of North Haven in summary judgment.

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**NORTH HAVEN BOARD OF EDUCATION V. BELL, 456 U.S. 512 (1982)**



- **Trumbull Board of Education**
  - Oct. 1977, Linda Potz, a former guidance counselor in Trumbull school district, filed a complaint with HEW alleging sex discrimination “with respect to job assignments, working conditions, and failure to renew her contract.”
  - HEW determined Trumbull had violated Title IX and required Trumbull to engage in a number of corrective actions, including reinstating Potz to her position.
  - Trumbull filed a lawsuit in federal court seeking to invalidate the decision and HEW’s authority to address employment under Title IX.
  - Same District Court cited its decision in North Haven and found in favor of Trumbull.

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### NORTH HAVEN BOARD OF EDUCATION V. BELL, 456 U.S. 512 (1982)



- Cases consolidated on appeal and Second Circuit reversed, thereby indicating 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.
- USSC, citing a number of factors including Title IX's legislative history, post-enactment history, and language of "no person," the Supreme Court determined 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."

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### A BRIEF HISTORY OF TITLE IX 1972-PRESENT



- OCR Guidance
  - 1997 Guidance → 2001 Revised Sexual Harassment Guidance.
  - 2011 Dear Colleague Letter (The "DCL").\*
  - Questions and Answers on Title IX and Sexual Violence (April 2014).\*
  - 2015 Dear Colleague Letter, Dear Coordinator Letter & Resource Guide.
  - 2016 Guidance on Transgender Students.\*
  - 2017 Interim Guide: Q&A on Campus Sexual Violence.
- "Not Alone" - White House Task Force to Protect Students From Sexual Assault (April 2014).
- Also: The Clery Act, VAWA 2013: Section 304.

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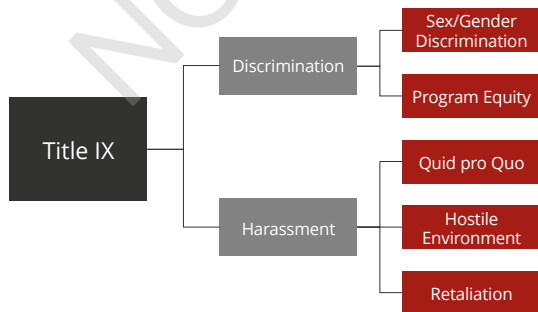
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### TITLE IX



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### TITLE IX ESSENTIAL COMPLIANCE ELEMENTS



- Once a “responsible employee” has either actual or constructive notice of sexual harassment/ sexual misconduct, the school must:
  - Take immediate and appropriate steps to **investigate** what occurred.
    - The obligation to investigate is absolute, even if just a preliminary inquiry (see **Davis**).
  - Take prompt and effective action to:
    - **Stop** the harassment;
    - **Prevent** the recurrence; and
    - **Remedy** the effects

**NOTE:** This is regardless of whether or not the victim makes a complaint or asks the school to take action.

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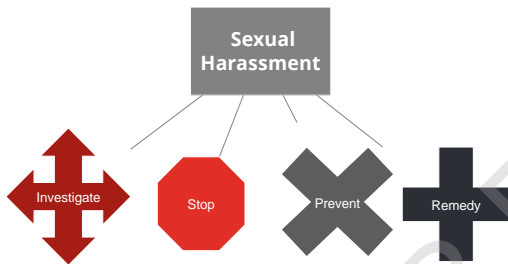
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### INSTITUTIONAL OBLIGATIONS UNDER TITLE IX



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### THE IX COMMANDMENTS



<b>Thorough</b>	<b>Reliable</b>	<b>Impartial</b>	Investigation (prompt & fair – VAWA Sec. 304)
<b>Prompt</b>	<b>Effective</b>	<b>Equitable</b>	
End the Discrimination	Prevent its Recurrence	Remedy the effects upon the victim & community	Remedies

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### EQUITY DEFINED



- "Fairness or justness in the way people are treated; justice according to natural law or right; specifically, freedom from bias or favoritism" ([www.merriam-webster.com](http://www.merriam-webster.com)).
- "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).

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### EQUITY DEFINED



#### EQUALITY VERSUS EQUITY



In the first image, it is assumed that everyone will benefit from the same supports. They are being treated equally.

In the second image, individuals are given different supports to make it possible for them to have equal access to the game. They are being treated equitably.

In the third image, all three can see the game without any supports or accommodations because the cause of the inequity was addressed. The systemic barrier has been removed.

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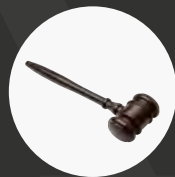
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### SIGNIFICANT CASES

- *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).




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**FRANKLIN V. GWINNETT PUBLIC SCHOOLS, 503 U.S. 60 (1992)**



- Christine Franklin alleged that during her junior year (1986), an economics teacher, Andrew Hill, engaged her in sexually explicit conversations, forced kissing, and coercive sexual intercourse on school grounds.
  - Hill allegedly pulled her out of class on three occasions and engaged in sexual intercourse with her in a private office.
- In 1988 Franklin filed suit against the school district alleging:
  - Sexual harassment under Title IX; and
  - Failure to take appropriate action upon learning of the harassment.
- Hill resigned in exchange for school district closing the investigation.

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**FRANKLIN V. GWINNETT PUBLIC SCHOOLS, 503 U.S. 60 (1992)**



- District and Circuit Court of Appeals dismissed the case, finding Title IX does not allow for award of monetary damages.
- In 1992, the U.S. Supreme Court decided *Franklin v. Gwinnett County Public Schools*, which established that sexual harassment constituted sex discrimination under Title IX.
- *Gwinnett* also provided a private right for recovery of monetary damages under Title IX.
- *Gwinnett* did not address issues concerning the educational institution's liability.
- What about a statute of limitations?

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**GEBSER V. LAGO VISTA INDEP. SCHOOL 524 U.S. 274 (1998)**



- Basic Facts – Faculty/student sexual harassment:
  - In spring of 1991, Alida Star Gebser, 8th grade student in Lago Vista Independent School District (TX), joined a book discussion group led by Frank Waldrup, a teacher. During book group, Waldrup made a number of sexually suggestive comments to the students.
  - In Fall 1991, Gebser (9th grade) was assigned to two of Waldrup's courses. Waldrup also began tutoring Gebser at her home.
  - In Spring 1992, Waldrup and Gebser began a sexual relationship that continued until spring 1993, when a police officer discovered them having sex in the woods. Gebser and Waldrup often engaged in sex during school hours, though not on school property.
  - No one at the school or in the district knew of the relationship.
  - Upon his arrest, Lago Vista fired Waldrup and Texas Education Agency revoked his teaching license.

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**GEBSER V. LAGO VISTA INDEP. SCHOOL**  
524 U.S. 274 (1998)



- Gebser and her mother sued Lago Vista and Waldrup, making a number of state and federal claims, including seeking monetary damages for violation of Title IX.
- Supreme Court created a high standard that a student must meet in order to prevail on a sexual harassment claim against the institution when an employee-student consensual relationship is the basis of the claim.
- The court said you cannot recover monetary damages against the school unless the behavior has been reported to someone with the power to alter the situation ("actual notice") and a "deliberate indifference" has been demonstrated by the school.

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**GEBSER V. LAGO VISTA INDEP. SCHOOL**  
524 U.S. 274 (1998)



- Three-part standard:
  1. An official of the educational institution 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."

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**DAVIS V. MONROE COUNTY BD. OF ED.**  
526 U.S. 629 (1999)



- Basic Facts:
  - In December 1992, a fifth-grade boy attempted to touch LaShonda Davis's breasts and genitals and made statements such as "I want to get in bed with you," and "I want to feel your boobs." Similar conduct occurred on January 4 and 20, 1993.
  - Each time Davis reported the conduct to her teacher, Davis's mother also contacted the teacher and was allegedly told the principal was aware of the situation; no disciplinary action was taken.

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**DAVIS V. MONROE COUNTY BD. OF ED.  
526 U.S. 629 (1999)**



- Basic Facts:
  - Series of incidents in February-May 1993 in P.E. and other classes, E.g.:
    - The same male student stuck a doorstop in his pants and acted in sexually suggestive manner towards Davis;
    - He rubbed up against her in suggestive manner;
    - Touched her breasts and genitals.
  - Davis repeatedly reported incidents to teachers; Davis's mother also contacted teachers multiple times; no disciplinary action was taken.
  - Davis's assigned seat was next to the male student throughout the harassing behavior; not allowed to change seats for over three months.

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**DAVIS V. MONROE COUNTY BD. OF ED.  
526 U.S. 629 (1999)**



- Facts (cont.):
  - Davis's grades declined and her father found a suicide note his daughter had written; Davis told her mother she "didn't know how much longer she could keep [the male student] off her."
  - Others in class also faced harassment; group of students tried to complain to the principal, but were allegedly prevented from doing so and told, "If [the principal] wants you, he'll call you."
  - Parents had complained to three teachers and the principal; student had also complained to three teachers.

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**DAVIS V. MONROE COUNTY BD. OF ED.  
526 U.S. 629 (1999)**



- In May 1993, principal told Davis's mother, "I guess I'll have to threaten him a little harder"; male student not disciplined.
- Davis's parents finally reported the harassment to the local sheriff; male student charged with and plead guilty to sexual battery.
- The abuse finally stopped; male student ultimately moved away.
- Davis's mother filed a Title IX action, alleged that persistent harassment and deliberate indifference resulted in her daughter's inability to attend school and participate in activities.

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**DAVIS V. MONROE COUNTY BD. OF ED.  
526 U.S. 629 (1999)**



- Finding in favor of Davis, the Supreme Court applied same standards to find the institution liable for damages as in 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:
    - 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’Connor added a framework to determine deliberate indifference – stating that **deliberate indifference constitutes a response that is “clearly unreasonable in light of the known circumstances.”**

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**WHAT'S NEXT FOR TITLE IX LITIGATION?**



- Title IX increasingly viewed as a viable cause of action.
- Increase in lawsuits by the accused.
- Hospitals and Title IX
- Negligence-based claims.
- Due process-based claims.
- Chevron/Auer Deference on OCR guidance?
- Impact of OCR’s Interim Guide
- Breach of contract.
- Good faith and fair dealing.
- Shifting view of what constitutes “notice.”
- Impact of VAWA 2013 – Section 304.
- Pending state and federal legislation.

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**RECENT KEY CASES**



- *K.T. v. Culver-Stockton College & Lambda Chi Alpha*, U.S. Ct. of Appeals, 8th Cir. (Aug. 7, 2017).
- *Sarah Weckhorst v. Kansas State University*, U.S. Dist. Ct., Kansas (March 14, 2017).
- *Jane Doe v. Mercy Catholic Medical Center*, U.S. Ct. of Appeals, 3rd Cir. (March 7, 2017).
- *Elizabeth M. Shank v. Carleton College*, U.S. Dist. Ct., Minn. (Jan 9, 2017).
- *John Doe v. University of Cincinnati*, U.S. Dist. Ct., W.D. Ohio (Nov. 30, 2016).
- *John Doe v. Lynn University*, U.S. Dist. Ct., S.D. Florida (Nov. 23, 2016).

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RECENT KEY CASES



- *Collick et al. v. William Patterson University*, U.S. Dist. Ct., New Jersey (Nov. 17, 2016).
- *John Doe v. Regents of the University of California*, San Diego, Cal. Ct. of Appeals (4th Dist.) (Nov. 11, 2016).
- *John Doe v. The Ohio State University, et al.*, U.S. Dist. Ct., S.D. Ohio (Nov. 7, 2016).
- *John Doe v. Brown University*, U.S. Dist. Ct., Rhode Island (Sept. 28, 2016).
- *John Doe v. Columbia University*, U.S. Ct. of Appeals, 2nd Cir. (July 29, 2016).
- *John Doe v. Catherine Lhamon, et al.*, U.S. Dist. Ct., Dist. of Columbia (filed June 14, 2016).

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RECENT KEY CASES



- *Deborah Moore v. Regents of the University of California*, U.S. Dist. Ct., N.D. Cal. (May 23, 2016).
- *Jane Doe I et al. v. The University of Tennessee et al.*, U.S. Dist. Ct., M.D. Tenn. (May 3, 2016).
- *Abigail Ross v. University of Tulsa*, U.S. Dist. Ct., N.D. Oklahoma (April 15, 2016).
- *G.G. v. Gloucester County School Board*, U.S. 4th Cir. (April 19, 2016).
- *John Doe v. Brandeis University*, U.S. Dist. Ct., Mass. (March 31, 2016).
- *John Doe v. University of Cincinnati*, U.S. Dist. Ct., S.D. Ohio (March 23, 2016).

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RECENT KEY CASE DECISIONS



- *Paul Nungesser v. Columbia University*, U.S. Dist. Ct., S.D. N.Y. (March 13, 2016).
- *Karasek v. Regents of the University of California*, No. U.S. Dist. Ct., N.D. Cal. (Dec. 11, 2015).
- *Sarah Butters v. James Madison University*, U.S. Dist. Ct., W.D. Va. (Nov. 6, 2015).
- *Takla v. The Regents of the University of California*, U.S. Dist. Ct., C.D. Calif. (Nov. 2, 2015).
- *John Doe v. The Rectors and Visitors of George Mason Univ.*, U.S. Dist. Ct., C.D. Calif. (Nov. 2, 2105).
- *John Doe v. Washington and Lee University*, U.S. Dist. Ct., W.D. Virginia (August 2105).

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### DISCUSSION QUESTIONS



- In small groups, please discuss the following:
  - What did you learn about Title IX's history and legal background that you did not know before?
  - How does Equity differ from Equality?
  - How do the *Gebser* and *Davis* standards fit with your institution's policies?
  - At this point in the training, what is your biggest take-away?

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### OCR & TITLE IX

- OCR's role
- Regional offices
- Enforcement mechanisms
- OCR complaints
- Investigation process
- OCR process alternatives
- Remedies under Title IX
- Civil lawsuits v. administrative actions



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### 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 standard indicates that upon receipt of **notice**, institution must immediately take immediate and appropriate steps to **investigate** what occurred and take **prompt and effective action to end the harassment, remedy the effects, and prevent the recurrence.**

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### OCR & TITLE IX



- The OCR guidelines distinguish the administrative oversight of Title IX from the standards applicable to private litigation for monetary damages.
- OCR standards require the sexual misconduct must rise to the level of **severe, pervasive or persistent**.
- OCR **administratively** enforces Title IX by:
  - Conducting investigations from complaints filed with the U.S. Dept. of Education.
  - Engaging in “voluntary compliance” investigations.

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### OCR REGIONAL OFFICES



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### OCR ENFORCEMENT MECHANISMS



- Complaints
  - Filed by an individual, a representative, or a group.
- Compliance Reviews
  - OCR targets resources on class-wide compliance problems that appear particularly acute.
- Technical Assistance
  - To help institutions, students, and parents understand their rights and responsibilities.

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**OCR COMPLAINTS**



- When received by an office, the complaint is evaluated.
- OCR will open an investigation if:
  - OCR has jurisdiction over the institution.
  - The allegation alleges a violation of one of the laws enforced by OCR.
  - The complaint is timely (180 days).
  - The allegation contains sufficient detail to raise an inference of discrimination or retaliation.

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**THE OCR INVESTIGATION PROCESS**



- OCR is a neutral fact-finder that collects and analyzes relevant information.
- Notification letters:
  - To the reporting party and recipient informing them that OCR is opening an investigation.
  - Normally will be sent to the college president or chancellor.
- Data request - written request for documents and narrative responses to questions.
- Scheduling Interviews: telephone or in-person.
- On-site visit.

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**OCR PROCESS ALTERNATIVES**



- Early Complaint Resolution (ECR)
  - A form of alternative dispute resolution facilitated by OCR.
  - Reporting party and recipient voluntarily participate in the resolution of the complaint.
- Investigation and Voluntary Resolution ("302 Letter")
  - At any point before the conclusion of an investigation, a recipient may express to OCR that it is interested in resolving the complaint through a voluntary resolution agreement.
- Investigation and Findings ("303 Letter")
  - Compliance determination; agreement if non-compliance.

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### VOLUNTARY RESOLUTION AGREEMENT THE "302 LETTER"



- At any point before the conclusion of an investigation, a recipient may express to OCR that it is interested in resolving the complaint through a voluntary resolution agreement.
- This does not indicate an admission liability or wrongdoing.
- OCR determines whether the 302 is appropriate.
- OCR ensures that agreement is aligned with the complaint allegations or the information obtained thus far in the investigation, and consistent with applicable regulations.
- Reporting party approval is not required.
- OCR monitors the voluntary resolution agreement until it is fully implemented (3+ years).

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### RESOLUTION AGREEMENT THE "303 LETTER"



- Investigative Determinations – made using a preponderance of the evidence standard.
  - Insufficient evidence to support a conclusion of noncompliance.
  - Sufficient evidence to support a conclusion of noncompliance.
    - Typically, OCR shares proposed terms of resolution with the institution and give a 90-day window to resolve voluntarily.
- OCR will monitor the agreement for compliance (typically 3+ yrs).

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### RESOLUTION AGREEMENTS



- Must be:
  - Signed by a person with authority to bind the recipient;
  - Approved by the Chief Attorney or designee;
  - Approved by the Office Director or designee; and
- Must include:
  - Specific acts or steps the recipient will take to resolve compliance issues;
  - Dates for implementing each act or step;
  - Dates for submission of reports and documentation verifying implementation; and
  - A statement indicating OCR may initiate enforcement action or judicial proceedings, but OCR will give 60 days' notice to cure the alleged breach.

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**INSUFFICIENT EVIDENCE DETERMINATION**



- If OCR determines there is insufficient evidence to support a conclusion of non-compliance:
  - Letters are issued to both parties explaining the issues, factual analysis, and conclusion.
  - Reporting parties may appeal.
  - If an appeal is filed, the recipient is typically not notified unless OCR determines that the investigation should be re-opened.

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**RECENT OCR TITLE IX RESOLUTIONS**



- Shift in OCR's approach to complaints
  - OCR is resolving cases at a much more rapid rate under the Trump administration than under the Obama administration.
  - Less all-encompassing investigations.
  - Resolving far more by early complaint resolution, administrative closure and insufficient evidence.
  - Continues to take complaints at a fairly rapid rate.

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**RECENT OCR TITLE IX RESOLUTION AGREEMENTS**



- Davis & Elkins College (Dec. 2017).
- Vincennes University (Dec. 2017).
- Buffalo State College (Nov. 2017).
- Humboldt State University (Nov. 2017).
- Cisco College (Nov. 2017).
- Butte College (July 2017).
- Wittenberg University (Mar. 2017).
- University of Alaska System (Feb. 2017).
- Palo Alto Unified School District (Mar. 2017).

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### RECENT OCR TITLE IX RESOLUTION AGREEMENTS



- Wesley College (Oct. 2016).
- Hunter College of the City University of New York (Oct. 2016).
- Hampton City Public Schools (July 2016).
- Occidental College (June 2016).
- Erie Community College (June 2016) (Athletics).
- DOJ/OCR: University of New Mexico (April 2016).
- Frostburg State University (Sept. 9, 2016).
- Minot State (July 7, 2016).

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### RECENT OCR TITLE IX RESOLUTIONS



- As of Jan. 5, 2018:
  - OCR had 340 active Title IX cases involving sexual violence at colleges and universities.
  - Some institutions have multiple investigations open at once.
  - Average length of time to resolution is 1.9 years.
  - Since April 2011, 118 cases have been resolved (60 in 2017 alone).
  - OCR remains very active, opening approximately 100 cases in 2017 and resolved 12 of those.

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### ADDITIONAL RESOURCES ABOUT OCR



- About OCR:
  - <http://www.ed.gov/about/offices/list/ocr/index.html>
- OCR Case Processing Manual:
  - <http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>
- Chronicle of Higher Education's Title IX Tracker
  - <http://projects.chronicle.com/titleix/>
- NCHERM Group database of OCR Resolution Agreements:
  - <http://www.nchem.org/resources/legal-resources/ocr-database/>

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**REMEDIES UNDER TITLE IX** 

- An individual may assert a Title IX claim against the institution by:
  - **Lawsuit:** Suing the institution in court and seeking monetary damages or injunctive or declaratory relief.

**And/Or**

- **OCR Complaint:** Filing an administrative complaint, a grievance with U.S. Dept. of Ed. Office for Civil Rights (or other applicable federal agency).

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**CIVIL LAW SUITS V. ADMINISTRATIVE ACTION & TITLE IX** 

<p><b>Lawsuit</b></p> <ul style="list-style-type: none"> <li>• File in federal court.</li> <li>• Monetary damages, injunction.</li> <li>• Requires:           <ul style="list-style-type: none"> <li>- Actual notice.</li> <li>- Employee with authority to take action.</li> <li>- Deliberate Indifference.</li> </ul> </li> </ul>	<p><b>Administrative Action</b></p> <ul style="list-style-type: none"> <li>• Initiated by OCR.</li> <li>• Voluntary compliance or findings</li> <li>• Requires:           <ul style="list-style-type: none"> <li>- Actual OR constructive notice ("knew or should have known").</li> <li>- Investigate.</li> <li>- End harassment.</li> <li>- Remedy impact.</li> <li>- Prevent recurrence.</li> </ul> </li> </ul>
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**DISCUSSION QUESTIONS** 

- In small groups, please discuss the following:
  - What questions do you have regarding OCR and its investigation and resolution processes?
  - What is the difference between a "302 Letter" Resolution Agreement and a "303 Letter" Resolution Agreement?
  - Discuss the interactions (if any) you or your institution have had with OCR.
  - Discuss the differences between a lawsuit and an OCR complaint.

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## KEY TITLE IX OCR GUIDANCE

- 2001 Revised Sexual Harassment Guidance
- 2011 Dear Colleague Letter\*
- 2014 Q&A on Title IX and Sexual Violence\*
- 2015 Dear Colleague Letter and Resource Guide
- 2017 Interim Guide: Q&A on Campus Sexual Violence (addressed in detail later)

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### 2001 REVISED SEXUAL HARASSMENT GUIDANCE



- **Is now the primary Title IX regulatory compliance document.**
- "Sexual harassment is unwelcome conduct of a sexual nature."
- "Sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature."
- "Sexual harassment of a student can deny or limit, on the basis of sex, the student's ability to participate in or to receive benefits, services, or opportunities in the school's program."
- "Sexual harassment of students is, therefore, a form of sex discrimination prohibited by Title IX under the circumstances described in this guidance."

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### 2001 REVISED SEXUAL HARASSMENT GUIDANCE



- The "education program or activity" = all of the school's operations.
- "All academic, educational, extra-curricular, athletic, and other programs of the school" regardless of location.
- Addresses sexual harassment and sex discrimination by the institution, teachers, employees, students, and third parties.
- Prompt and effective action required upon receipt of notice of the harassment/discrimination.

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**2001 REVISED SEXUAL HARASSMENT GUIDANCE**



- Publication of policies and procedures that:
  - Provide non-discrimination statement.
  - Offer effective reporting and response protocol.
  - Have appropriate grievance procedures.
  - Ensure fair and equitable investigations.
  - Include equitable remedies.
  - Prevent recurrence.
  - Incorporate preventive training.
  - Appoint a Title IX coordinator.

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**2011 DEAR COLLEAGUE LETTER**



Withdrawn by OCR in Sept. 2017, **however**, it provides helpful guideposts that remain viable and appropriate.

- Centrality of the Title IX coordinator.
- Sexual violence is a form of sexual harassment.
- Preponderance of the evidence.
- Promptness and time frames.
- Equity in process.
- Equity in appeals.
- Possible off-campus jurisdiction.

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**2011 DEAR COLLEAGUE LETTER**



- Provision of interim and long-term remedies.
- Mediation not permitted for sexual violence cases.
- Balancing reporting party requests for confidentiality.
- Training of those involved in resolution of complaints.
- Training of student population.

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**2014 Q&A ON TITLE IX AND SEXUAL VIOLENCE**



Withdrawn by OCR in Sept. 2017, **however**, it provides helpful guideposts that remain viable and appropriate.

- Clarifies who is and the role of a "Responsible Employee."
- Confidentiality and reporting.
- Title IX coordinator role and responsibilities.
- Disciplinary processes – robust investigation.
- Interim measures.
- Remedies
- Appeals.
- Training, education, and prevention.

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**2014 Q&A ON TITLE IX AND SEXUAL VIOLENCE**



- Training, Education, and Prevention
  - Responsible employees.
  - For all employees – What to report, to whom, and how.
  - Nature of sexual violence.
  - Victimology and trauma.
  - How to prevent and identify sexual violence.
  - Bystander intervention.
  - Those responsible for grievance procedures.

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**2014 Q&A ON TITLE IX AND SEXUAL VIOLENCE**



- Training for Students
  - Title IX and what constitutes sexual violence, including same-sex sexual violence, and unwelcome conduct under the school's policies.
  - The school's definition of consent applicable to sexual conduct, including examples.
  - Reporting options, including formal reporting and confidential disclosure options and any time frames set by the school for reporting.
  - The school's policies, grievance procedures, and sanctions used to process sexual violence complaints.

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NOT FOR DISTRIBUTION

**2014 Q&A ON TITLE IX AND SEXUAL VIOLENCE**



- Training for Students
  - Effects of trauma, including neurobiological changes.
  - The role alcohol and drugs often play in sexual violence incidents.
  - Bystander intervention strategies – prevention.
  - How to report sexual violence to campus or local law enforcement.
  - Ability to pursue law enforcement proceedings simultaneously with a Title IX grievance.
  - Title IX's protections against retaliation.

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**2015 LETTER TO TITLE IX COORDINATORS**



**Remains in full effect. Not impacted by Sept. 2017 action by OCR.**

- Thanks coordinators for their service and efforts.
- Stresses the centrality and import of the Title IX coordinator's work and responsibilities.
  - "you must have the full support of your institution."
- Introduces the April 2015 Dear Colleague Letter to superintendents and presidents.
- Introduces the Title IX Resource Guide.

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**APRIL 2015 DEAR COLLEAGUE LETTER: TITLE IX COORDINATORS**



**Remains in full effect. Not impacted by Sept. 2017 action by OCR.**

- Sent to all K-12 superintendents and all college presidents.
- Specifically applied the 2011 DCL on sexual violence to K-12.
- Targets the responsibilities, functions, and centrality of the Title IX coordinator role.
- Reiterates requirement to designate a Title IX coordinator.
- Must have necessary positional and actual authority to perform their role.

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**2015 DCL: KEY TITLE IX COORDINATOR CONSTRUCTS**



- Independence
  - should report to senior leadership (e.g., president or superintendent).
  - Avoid conflicts of interest.
- Full-time?
  - "It is critical that the employee has the qualifications, training, authority, and time to address all complaints throughout the institution."
- Multiple/Deputies
  - Must have "one lead Title IX coordinator who has ultimate oversight responsibility."

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**2015 DCL TITLE IX COORDINATOR**



- Responsibility and Authority
  - Notified of ALL Title IX-related reports and complaints.
  - Coordinate all responses to complaints.
  - Monitor all outcomes.
  - Identify and address patterns.
  - Assess campus climate.
  - May determine outcome or institutional response to complaint.
  - Must be protected from retaliation.

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**2015 DCL TITLE IX COORDINATOR**



- Visibility
  - Notice of non-discrimination with Title IX and coordinator information posted and included in virtually all publications, materials, and websites.
  - Encourages Title IX-specific website.
- Training
  - Institutions must ensure coordinators are well-trained and up-to-date on all responsibilities and all applicable laws, policies, guidance, regulations, institutional policies, and procedures.

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**TITLE IX RESOURCE GUIDE (2015)**



- Broad-ranging, topically-organized summary guide for coordinators.
  - Intended to help coordinators perform their jobs and receive needed support from their institutions.
- Topics addressed:
  - Scope of Title IX.
  - Coordinator’s responsibilities.
  - Administrative requirements and oversight.
    - E.g., Grievance procedure requirements and notice of nondiscrimination.

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**TITLE IX RESOURCE GUIDE (2015)**



- Topics addressed (cont.)
  - Key Title IX issues:
    - Recruitment, admissions, and counseling.
    - Financial assistance.
    - Athletics.
    - Sex-based harassment.
    - Pregnant and parenting students.
    - Discipline.
    - Single-sex education.
    - Employment.
    - Retaliation.
  - Information collection and reporting.

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**OTHER GUIDANCE REGARDING SEXUAL HARASSMENT & VIOLENCE**



- OCR Resolution Agreements.
- October 29, 2010 – Bullying.
- January 25, 2013 – Athletics & ADA.
- April 24, 2013 – Retaliation.
- June 25, 2013 – Pregnancy.
- May 13, 2016 – Title IX and Transgender Students.\*
- Not Alone – White House Task Force to Protect Students From Sexual Assault – April 2014.
- VAWA 2013 Section 304
- DOJ Title IX Legal Manual.

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**COORDINATOR TRAINING AGENDA** 

Day 2

- I Notice and Reporting
- II Is It a IX Matter? — When Does Title IX Apply?
- III VAWA 2013 — Section 304 & Clery
- IV Case Study
- V Consent Construct
- VI Job Responsibilities of the Title IX Coordinator
  - A. Training Oversight
    - i. Training Campus Constituencies
    - ii. ATIXA Training Checklist
  - B. Creator and Implementer of Appropriate Policy
    - i. Three Forms of Harassment

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**NOTICE, REPORTING, RESPONSIBLE EMPLOYEES & CONFIDENTIALITY**

- “Responsible Employee”
- When Do You Investigate?
- Examples of Actual and Constructive Notice
- Clery: Campus Security Authorities
- Additional Reporting Requirements
- Timely Warnings and Emergency Notifications

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**RESPONSIBLE EMPLOYEE** 

- A **Responsible Employee** includes any employee who:
  - Has the authority to take action to redress the harassment; or
  - Has the duty to report harassment or other types of misconduct to appropriate officials; or
  - 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.**

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**WHEN DO YOU INVESTIGATE?**



- Receive allegations (complaint).
- Actual notice or constructive notice.
- Rumors, gossip, social media, etc. can be notice.
- Once notice exists, the duty to investigate is absolute.
  - Small "i" preliminary inquiry.
  - Big "I" comprehensive investigation.

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**ACTUAL NOTICE**



- Individual files a Title IX complaint.
- Individual notifies the Title IX coordinator or other Responsible Employee.
- Individual reports to campus police or security official.
- Staff member witnesses harassment.
- Indirect notice from sources such as flyers posted on campus, media, online postings, or video.

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**EXAMPLES OF CONSTRUCTIVE NOTICE**



- Pervasiveness of the harassment may be enough to conclude that the college should have known of the hostile environment.
- Harassment is widespread, openly visible, or well known to students and/or staff.
- OCR can conclude the institution should have known of incidents of harassment from a report to an employee who had a reporting duty to a supervisor, but failed to do so.

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**THE CLERY ACT:  
CAMPUS SECURITY AUTHORITY**



- Clery identifies a Campus Security Authority (CSA) as:
  - Campus police.
  - Non-police security staff responsible for monitoring campus property.
  - Individuals and offices designated by the campus security policies as those to whom crimes should be reported.
  - Officials of the institution with significant responsibility for student and campus activities.

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**THE CLERY ACT:  
CAMPUS SECURITY AUTHORITY**



- CSA Mandatory reporting:
  - All CSAs must report all alleged Clery-designated criminal incidents (primary and hate crimes) that are reported to them in their capacity as a CSA to chief campus CSA.
  - Does not include indirect notification: classroom discussions, overhearing something in the hallway, speeches (e.g.: TBTN), 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.

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**ADDITIONAL 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).

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**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 the campus community of certain crimes 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.

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**THE CLERY ACT: EMERGENCY NOTIFICATION**



- Triggered by 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 or impending weather emergency.

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**CASE STUDY: REPORTING**



- On April 27th, Amy Craft, a student knocks on her teacher's door. Gabriela Suarez, her teacher, opens the door and can immediately see that Amy is very upset and looks exhausted. Gabriela asks if everything is ok and Amy asks if she can close the door.
- Gabriela gets up, closes the door, sits back down and Amy blurts out, I think I was raped last weekend by another student, a friend of a friend named Todd.
- Stunned and very concerned, Gabriela asks what happened. What follows is Amy's account as provided to the Gabriela.

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**CASE STUDY: REPORTING**



- On Friday, April, 23rd I went to a party at a friend's house. I was doing a lot of drinking and dancing and getting to know people. I had at least four drinks in the first few hours I was there. Then, I met Todd.
- I remember that he came up to me on the dance floor, and started to dance with me. He was really good looking, and so was the other guy he was with, Jeff, whom I had met at a different party the week before.
- We danced and had a lot of fun, and I remember drinking some more and Todd getting me some Jell-O shots, which were really strong and nasty.

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**CASE STUDY: REPORTING**



- I wasn't feeling well and went into the bathroom, feeling like I might throw up. The bathroom was really crowded, and I went outside for some fresh air instead.
- I sat on the stoop, feeling nauseated. I went over to the bushes and got sick. Todd came over and helped me out.
- I remember him requesting a Lyft car, and throwing up again at some point after that, but nothing else.
- When I woke up the next day, I was in a room I did not know, I was only wearing a long t-shirt and my panties, and Todd was lying next to me wearing only his boxers.

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**CASE STUDY: REPORTING**



- I got up to dress and Todd woke up and asked where I was going. I told him I wanted to go home and asked him to tell me what happened.
- I remembered most of what he said about the party, but when he told me that we came to his room and had sex, I started to cry. I didn't remember any of it, and was afraid I might be pregnant.
- Todd assured me he wore a condom, and asked me to come back to bed. Instead, I finished getting dressed, and called my friend Sarah to come and pick me up.
- She suggested I talk with you. Please don't tell anyone...

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### CASE STUDY: REPORTING



- What to do?
  - What are Gabriela's Title IX obligations?
  - For those at a college or university, what are Gabriela's Clery obligations?
  - What training should Gabriela receive?
- Now assume Amy told her athletic coach as well
  - What are your school's reporting protocols within athletics?
  - What training are you providing to your athletic administrators and coaches?
- What if Amy is taking a class from a school counselor and tells the counselor about it after class?
  - Does Context matter?
- Let's discuss...

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### WHO IS "CONFIDENTIAL"



- Confidential/Privileged Employees\*
  - Licensed professional counselors.
  - Pastoral counselors.
  - Licensed medical professionals (Health Service Employees).
- May Be Deemed Confidential\*\*
  - Student health staff (support staff).
  - Counseling center staff (support staff).
  - Victims advocate/sexual assault-related services and resource centers & staff.
  - Others?

\* 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.

\*\* ATIXA recommends schools still report aggregate, non-identifiable data for Clery and

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### WHO IS NOT "CONFIDENTIAL"



- Faculty/Teachers – all levels.
- Faculty advisors.
- Student organization advisors.
- Mediators & ombuds.
- Resident advisors.
- District Administrators.
- Principals, Assistant Principals
- Front Office staff (except those in health or counseling centers)
- Student affairs staff.
- Academic affairs administrators.
- Residence life staff.
- Campus police/public safety.
- Intercollegiate athletics coaches and administrators/staff.
- Everyone else...

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**ATIXA'S RECOMMENDED APPROACH** 

- All employees are Mandatory Reporters, meaning they must report **all** known information regarding incidents of sex/gender discrimination, sexual violence or crime to the Title IX Coordinator (with an exception for those employees who are confidential).

Mandated Reporters: Full Reporting	"Confidential" Reporting
Must report all known information regarding an incident to the Title IX Coordinator without delay	Report only non-identifiable, aggregate information regarding incidents disclosed to them
All employees except those who are confidential	Only professional Counselors and Medical Providers

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**ATIXA'S RECOMMENDED APPROACH** 

- Only professional counselors, pastoral counselors and health service medical staff whose official responsibilities include providing medical services or mental-health counseling to members of the school community may provide "complete" confidentiality for reported incidents.
  - Will only report information with the consent of the victim or if there is a legal "duty to warn."
  - For a professional counselors or medical providers to maintain confidentiality, they must have received the notice while working within the scope of their licensure, certification and job description.
- When unsure or in doubt, report.

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**TRAINING FOR RESPONSIBLE EMPLOYEES** 

Colleges and universities should ensure that employees are trained so that:

- Those with authority to address harassment know how to respond appropriately.
- Other responsible employees know that they are obligated to report harassment to appropriate officials.
  - Essential topics for training:
    - Knowledge of institutional and community resources.
    - Information regarding reporting.
      - Who to report to.
      - What to report.

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**RELUCTANCE TO REPORT**



- If a reporting party requests that their name not be used:
  - The institution should take all reasonable steps to respond and investigate consistent with that request,
  - So long as doing so does not prevent the school from responding effectively and preventing the harassment of other students or the reporting party.
- **PPTVW**
  - Pattern
  - Predation
  - Threat
  - Violence/Weapon.

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**ANALYZING A REPORTING PARTY REQUEST FOR CONFIDENTIALITY**



- Pattern, Predation, Threat, Violence, or Weapon
  - Additional complaints of sexual violence involving the same perpetrator.
  - Whether the sexual violence was committed by multiple perpetrators.
  - Whether the perpetrator has a history of arrests or records from a prior school indicating a history of violence.
  - Whether the student's report reveals a pattern of perpetration at a given location or by a particular group.

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**ANALYZING A REPORTING PARTY REQUEST FOR CONFIDENTIALITY**



- Pattern, Predation, Threat, Violence, or Weapon (cont.)
  - Whether the alleged perpetrator threatened further sexual violence or violence against the student or others.
  - Whether the sexual violence was perpetrated with a weapon.
  - Age of the victim.
  - Whether the school possesses other means to obtain relevant evidence (e.g., security cameras or personnel, or physical evidence).
- If institution proceeds, it should notify the reporting party and utilize appropriate interim measures to protect the reporting party.

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**RELUCTANCE TO REPORT** 

- The 2001 Revised Guidance and Sexual Harassment notes:
  - "If the school knows or reasonably should know about the harassment, the school is responsible for taking immediate effective action to eliminate the hostile environment and prevent its recurrence" (p.12).
- The SUNY Resolution Agreement (2013) provides us some direction as well:
  - Policies should include "provisions for the investigation of complaints when the complainant does not choose to proceed with an informal or formal resolution or a hearing" (p.3)

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**RELUCTANCE TO REPORT** 

- The reporting party should be notified as to their options:
  - That the process will still be available to them, regardless of how long they wait.
  - That the institution will support them in any way it can (e.g., housing, classes, no contacts, etc.). Engage in ways to limit the effect of the behavior on the reporting party.
  - That, if information is brought to the attention of the of the institution that may involve a threat to the community, the office may be forced to proceed with an investigation, but that the victim will be notified of this process.

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**RELUCTANCE TO REPORT** 

- The college or university should explain to the reporting party that:
  - Its responsive action may be limited based on the level of privacy requested by reporting party.
  - It cannot guarantee privacy if doing so would jeopardize the safety of the reporting party or others.
- Emphasize that only those with a need to know will be informed.
  - Train those who will be informed about confidentiality expectations.

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# IS IT A IX?

When does Title IX apply?

- Jurisdiction
- Covered Programs
- Covered Individuals
- Subject Matter

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## WHEN DOES TITLE IX APPLY?



### Jurisdiction

- OCR says Title IX, by its text, does not apply outside the U.S., and will not enforce extraterritorial complaints.
  - But see *King et. al. v. EMU*, which shows the courts connect Title IX to federally funded educational programs, even if they are overseas.
- The *Davis* standard is that jurisdiction is expected when the institution has:
  - Control over the harasser (discriminator); AND
  - Control over the context of the harassment (discrimination).

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## WHEN DOES TITLE IX APPLY?



### Jurisdiction

- This means we will be taking discretionary jurisdiction over incidents off-campus or on non-school property.
  - See, e.g., *Simpson v. Colorado*.
- When?
  - Whenever our policy says.
  - “Nexus.”
    - When the behavior occurs on property we own or control.
    - When the behavior occurs in programs/events we sponsor.
    - When the downstream effects of purely off-campus conduct cause a discriminatory impact on campus.

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**WHEN DOES TITLE IX APPLY?**



**Jurisdiction**

- For Sexual Misconduct/Title IX Cases.
  - There is an expectation that you have SOME jurisdiction over off-campus incidents - "Nexus"
- For all other conduct cases.
- Jurisdictional Limitations.
  - Geographic.
  - Temporal.
- When is a student a "student"?
  - Application-Admission-Registration-Attendance-Breaks?

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**WHEN DOES TITLE IX APPLY?**



**Covered Programs**

- All programs run by a federal funding recipient.
- All programs using facilities funded by federal money (e.g., camps using your fields/stadium).
- Includes hospitals, residency programs, etc.
- It does not matter whether some of your programs are explicitly federally funded or not, all institutional programs are covered, as has been decided by OCR and the courts.

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**WHEN DOES TITLE IX APPLY?**



**Covered Individuals**

- Students – On-campus & online/distance.
  - Faculty.
  - Staff.
  - Campers.
  - Medical Residents.
  - Subcontractors, vendors.
  - Guests/visitors.
- (as either reporting or responding party)

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WHEN DOES TITLE IX APPLY?



Subject Matter

- All unwelcome sex-based and gender-based conduct.
- All unwelcome conduct of a sexual nature.
- All sex discrimination.
- All gender discrimination.
  - Including gender identity discrimination; and
  - Sexual orientation discrimination that implicates gender.
- Pregnant and parenting student (employee?) discrimination.

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WHEN DOES TITLE IX APPLY?



Subject Matter

- Hostile environment sexual harassment.
- *Quid Pro Quo*.
- Retaliatory harassment.
- Sexual violence.
- Intimate Partner Violence/Relationship violence

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WHEN DOES TITLE IX APPLY?



Subject Matter

- And, any sex/gender-based:
  - Stalking.
  - Hazing.
  - Bullying.
  - Arson.
  - Vandalism.
  - Theft.
  - And any other policy violation that is sex/gender based that causes a discriminatory effect.

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### 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 (or CA) university.
      - Must be **severe, pervasive (persistent), and objectively offensive**.
      - Must still remedy for conduct that is severe or pervasive (OCR).
    - Subjectively offensive conduct cannot be disciplined at a public (or CA) university unless it is also objectively offensive.

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### SMALL GROUP DISCUSSION QUESTIONS



- Does your campus 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?

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### VAWA 2013 – SECTION 304 & CLERY

- The Clery Act
- Campus Sexual Assault Victims' Bill of Rights
- Recent Clery Amendments from VAWA Reauthorization
- Reporting – Hate Crimes
- Annual Security Report
- Sexual Assault, Dating Violence, Domestic Violence and Stalking
- Clery: VAWA 2013 Section 304

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### 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.



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### THE CLERY ACT & APPLICABILITY



- The Clery Act applies only to Post-Secondary Schools, Colleges, and Universities.
  - There is, however, increasing traction within Congress to developing a similar mechanism within K-12.
- Most of the principles of The Clery Act/VAWA Sec. 304, are universal and instructive for all educational institutions, such as:
  - Policy best practices
  - Reporting
  - Transparency
  - Equitable resolution mechanisms
  - Due Process
  - Support for victims, etc.

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### THE CLERY ACT: CAMPUS SECURITY AUTHORITY



#### Examples of CSAs

- Dean of Students.
- Campus Public Safety/Campus Police.
- Director of Athletics, all athletic coaches – including part-time and graduate assistants.
- Faculty Advisor to student groups.
- RAs.
- Greek Life personnel.
- Title IX Coordinator.
- Most District Officials.
- Director of Campus Health or Counseling Center.
- Victim Advocates or others performing advocacy-based services.
- Ombuds.
- SART members.
- Local law enforcement contracted with the institution to provide campus/school-safety related services.

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### CAMPUS SEXUAL ASSAULT VICTIMS' BILL OF RIGHTS (1992)



- Added to the Clery Act through the Higher Education Amendments of 1992.
- Provisions:
  - In a disciplinary proceeding, the victim and accused must have equal opportunity to present witnesses.
  - The victim and the accused must have equal notification of the proceeding's outcome.
  - Institution must:
    - Inform the victim of counseling services.
    - Inform the victim of option to notify law enforcement.
    - Inform victim of options to avoid the accused, such as changing residence halls or classes.

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### RECENT CLERY AMENDMENT: VAWA REAUTHORIZATION & SECTION 304



#### Section 304: "Campus SaVE"

- Section 304 significantly amended the Clery Act.
- Final Regulations released Oct. 15, 2014.
- Effective date of the law was July 2015.
- Created **extensive** new policy, procedure, training, education, and prevention requirements for:
  - Sexual assault.
  - Stalking.
  - Dating violence.
  - Domestic violence.
- Prohibits retaliation.

The "Big 4"

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### THE CLERY ACT CRIMINAL OFFENSES/"PRIMARY" CRIMES



- Criminal Homicide:
  - Murder and non-negligent manslaughter.
  - Negligent manslaughter.
- Sexual Assault/Sex Offenses:
  - Rape.
  - Fondling.
  - Incest.
  - Statutory rape.
- Robbery.
- Aggravated assault.
- Burglary.
- Motor vehicle theft.
- Arson.

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**VAWA 2013 SECTION 304 CATEGORIES OF HATE CRIMES** 

- Race.
- Gender.
- **Gender identity.\***
- Religion.
- Sexual orientation.
- **Ethnicity.\***
- **National origin.\***
- Disability.

\*Added in 2013 (prior to VAWA, the Clery Act treated Ethnicity/National Origin as one category)

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**THE CLERY ACT: HATE CRIMES** 

<p><b>All Primary Crimes</b></p> <ul style="list-style-type: none"> <li>• Criminal homicide.</li> <li>• <b>Sexual assault/sex offenses.</b></li> <li>• Robbery.</li> <li>• Aggravated assault.</li> <li>• Burglary.</li> <li>• Motor vehicle theft.</li> <li>• Arson.</li> </ul>	<p><b>Additional Crimes</b></p> <ul style="list-style-type: none"> <li>• Larceny-theft.</li> <li>• Simple assault.</li> <li>• Intimidation.</li> <li>• Destruction/damage/vandalism of property.</li> </ul>
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**VAWA 2013 SECTION 304 ANNUAL SECURITY REPORT** 

- Arrests and disciplinary actions.
  - Arrests for:
    - Liquor law violations.
    - Drug law violations.
    - Illegal weapons possession.
  - Individuals referred for campus disciplinary action for:
    - Liquor law violations.
    - Drug law violations.
    - Illegal weapons possession.

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**VAWA 2013 – SEC. 304  
UCR DEFINITIONS: SEXUAL ASSAULT**



*“Sexual Assault” means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the FBI.”*

- Forcible sex offense – is defined as “any sexual act directed against another person, forcibly and/or against that person’s will; or not forcibly or against the person’s will where the victim is incapable of giving consent.”
- Non-forcible sex offense – is defined as “unlawful, non-forcible sexual intercourse.” (Sex with a minor or incest.)

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**VAWA 2013 – SEC. 304: UCR DEFINITIONS:  
DATING VIOLENCE**



- Violence committed by a person:
  - Who is or has been in a social relationship of a romantic or intimate nature with the victim; and
  - Where the existence of such a relationship shall be determined based on a consideration of the following factors:
    - Length of the relationship.
    - Type of relationship.
    - Frequency of interaction between the persons involved in the relationship.
  - Includes sexual or physical abuse or the threat of such abuse (does not include emotional or psychological abuse).
  - Any incident meeting this definition is considered a crime for purposes of Clery Act reporting.

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**VAWA 2013 – SEC. 304: UCR DEFINITIONS:  
DOMESTIC VIOLENCE**



- Felony or misdemeanor crimes of violence committed by:
  - A current or former spouse or intimate partner of the victim.
  - A person with whom the victim shares a child in common.
  - A person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner.
  - A person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.
  - Any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction.
- Any incident meeting this definition is considered a crime for purposes of Clery Act reporting.

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**VAWA 2013 – SEC. 304  
UCR DEFINITIONS: 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.

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**CLERY: VAWA 2013 SECTION 304**



- **Clery Handbook** dramatically updated in June 2016, primarily to incorporate all the VAWA-based elements and additions.
  - <https://www2.ed.gov/admins/lead/safety/handbook.pdf>
- **Key Elements of the 2016 Updates:**
  - Designation of a Clery Coordinator.
  - **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.

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**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.

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**CLERY: VAWA 2013 SECTION 304**



- Victims should receive **written** information regarding:
  - Procedures victims of DV, DV, SA, and S should follow.
  - Interim measures (e.g., academic, living, transportation, and work).
  - Services available on and off-campus (e.g., counseling, advocacy, and health).
  - Reporting options (e.g., campus police, local police, student conduct, HR, etc.).
  - Protection options (e.g., order of protection, no-contact orders, etc.).
- Institutions should create a guide to hand to victims.

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**VAWA 2013 – SEC. 304 & PREVENTION PROGRAMS**



- 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."
    - <http://atixa.org/resources/consent-statutes-by-state/>.
  - "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**."

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**VAWA 2013 – SEC. 304 & PREVENTION PROGRAMS**



- Annual training for those involved in disciplinary proceedings (e.g., investigators, hearing officers, and appellate officers) 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.

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# CONSENT CONSTRUCT

- Force
- Incapacity
- Consent
- Case Study

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## CONSENT IS...

afva

- 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.

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## CONSENT

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- Lack of protest or resistance ≠ consent.
- Consent should not be assumed.
- Must be present through the entire incident; consent can be withdrawn at any time.
- 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, including minors.

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**OVERVIEW OF THE 3 QUESTIONS**



1. Was force used by the accused individual to obtain sexual access?
2. Was the reporting party incapacitated?
  - a. Did the accused individual know, or
  - b. Should s/he have known that the alleged victim was incapacitated (e.g., by alcohol, other drugs, sleep, etc.)?
3. What clear words or actions by the reporting party gave the accused individual permission for the specific sexual activity that took place?

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**FORCE**



- Was force used by the individual to obtain sexual access?
- Because consent must be voluntary (an act of free will), consent cannot be obtained through use of force.
- Types of force to consider:
  - Physical violence: hitting, restraint, pushing, kicking, etc.
  - Threats: anything that gets others to do something they wouldn't ordinarily have done absent the threat.

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**FORCE**



- Types of force to consider (cont.)
  - Intimidation: an implied threat that menaces and/or causes reasonable fear.
  - Coercion: the application of an unreasonable amount of pressure for sexual access.
    - Consider:
      - Frequency.
      - Intensity.
      - Duration.
      - Isolation.

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**INCAPACITY** 

- What was the form of incapacity?
  - Alcohol or other drugs.
    - Incapacity ≠ Impaired, drunk, intoxicated, or under the influence.
    - Incapacity = an extreme form of intoxication.
  - Administered voluntarily or without victim's knowledge.
  - Rape drugs.
- Mental/cognitive impairment.
- Injury.
- Asleep or unconscious.

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**INCAPACITY** 

- First, was the alleged victim incapacitated at the time of sex?
  - Could s/he make rational, reasonable decisions?
  - Could s/he appreciate the situation and address it consciously such that any consent was informed?
    - Knowing who, what, when, where, why, and how.
- Second, did the accused individual know of the incapacity (fact)?
- Or, should the accused individual have known from all the circumstances (reasonable person)?

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**EVIDENCE OF INCAPACITY** 

- Evidence of incapacity will come from context clues, such as:
  - A witness for the accused may know how much the other party consumed.
  - Slurred speech.
  - Bloodshot eyes.
  - The smell of alcohol on the breath.
  - Shaky equilibrium.
  - Vomiting.
  - Outrageous or unusual behavior.
  - Unconsciousness (including blackout).

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### INCAPACITY



- Incapacity is dependent on many or all of the following factors:
  - Body weight, height, and size.
  - Tolerance for alcohol and other drugs.
  - Amount, pace, and type of alcohol or other drugs consumed.
  - Amount of food intake prior to consumption.
  - Voluntariness of consumption.
  - Vomiting.
  - Propensity for blacking-out (mentally or physically).
  - Genetics.

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### CONSENT



- Question 3 is the consent question: What clear words or actions by the reporting party gave the accused individual permission for the specific sexual activity that took place?
- Equity demands a “pure” consent-based policy, defining what consent is rather than defining it by what it is not (e.g., force, resistance, against someone’s will, unwanted, someone unable to consent, etc.).

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### CONSENT IS...



- Informed (knowing).
- Voluntary (freely given).
- Active (not passive).
- Clear words or actions.
- Indicates permission to engage in mutually agreed-upon (sexual) activity.
- What does “affirmative consent” mean...?
- The “cup of tea” metaphor.
- Concept of Validation

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**CONSENT IS...** 



<http://rockstardinosaurpirateprincess.com/2015/03/02/consent-not-actually-that-complicated/>

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**CONSENT: RULES TO REMEMBER** 

- “No” means “no,” but nothing also means “no.” Silence and passivity do not equal permission.
- To be valid, consent must be given prior to or contemporaneously with the sexual activity.
- Ongoing or continuous.
- Consent can be withdrawn at any time, as long as that withdrawal is clearly communicated by the person withdrawing it.

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**THE TITLE IX COORDINATOR**

Detailed Review of the Responsibilities




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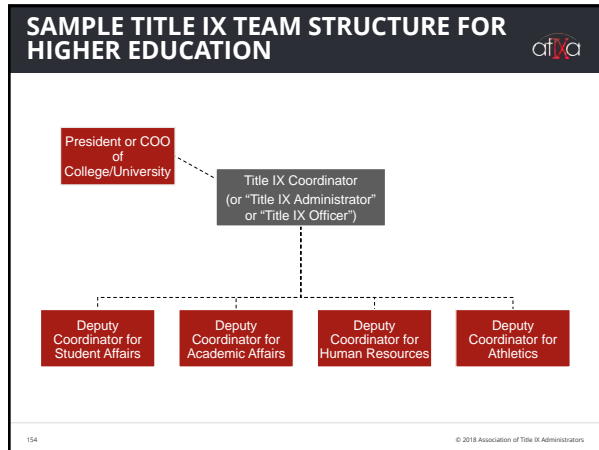
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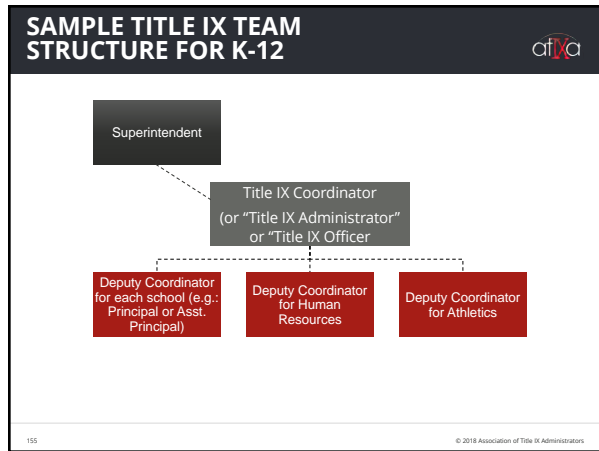
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- ### TITLE IX TEAM STRUCTURE: ADDITIONAL ISSUES
- Job responsibilities of Deputy Coordinators?
    - Tailor scope and roles based on campus culture.
    - Delegation.
  - Multiple campuses/locations.
    - Campuses within a larger system (e.g., SUNY schools).
    - Extension campuses.
    - Online communities.
    - District-level (K-12 and Community Colleges).
  - Co-Coordinator?
  - Dual-enrollment oversight?
  - Investigator oversight.
  - How is your campus/district/school structured?
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## TRAINING OVERSIGHT

- Employees
- Students
- Boards & Panels
- Investigators
- Appeals Officers

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## SUPERVISOR OF TRAINING atixa

- General training content categories:
  - Legal Overview: Title IX, Clery, Basic Caselaw and regulations.
  - Institutional policy.
  - Institutional procedures.
  - Reporting.
  - Working with reporting parties & responding parties.
  - Resources, support, and remedies for reporting parties.
  - Resources and support for responding parties
  - Consent in sexual interactions.
  - Rights of parties in complaint, investigation, hearing, and appeals.
  - Sanctions/repercussions.
  - Additional prevention and community education.

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## TITLE IX/VAWA SEC. 304 PREVENTION & TRAINING CHECKLIST atixa

- The basis of each training as required/recommended by:
  - Title IX-based guidance from OCR and/or the DOJ.
    - 2001 Revised Sexual Harassment Guidance
    - April 2011 "Dear Colleague Letter."\*
    - 2014 Q&A on Title IX and Sexual Violence.\*
    - 2015 Title IX Coordinator "Dear Colleague Letter" & "Resource Guide."
    - 2017 Interim Guide: Q&A on Campus Sexual Violence
    - Major resolution agreements and letters.
  - Implied necessary elements in various OCR resolution agreements.
  - Elements recommended by ATIXA.
  - VAWA 2013 - Sec. 304.

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### TITLE IX/VAWA SEC. 304 TRAINING CHECKLIST



- Trainee Populations:
  - Title IX Compliance Officers
    - E.g.: Coordinator and Deputies, Investigators, hearing boards (including appeals), 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 public safety.
  - All Faulty & Staff; ATIXA Mandatory Reporters
    - ATIXA recommends making all faculty and staff mandatory reporters.
  - All Students
    - Undergraduate, graduate, professional, distance, and online, etc.

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### 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 (K-12), hall and floor meetings, first-year seminar, third-party online training, etc.

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### TRAINING OVERSIGHT FOR EMPLOYEES, BOARDS, INVESTIGATORS & APPEALS OFFICERS



- Each of these will be different.
- Must identify the compliance elements that constitute required knowledge for each entity.
- Consider most effective approach for training, as well as most efficient.
  - For example, investigators will be responsible for completeness, fairness, and equity. Their training must be extensive.
  - Appeals officers must have a comprehensive understanding of the process; should be in-person using case studies.
  - Employees need general resource and reporting information and could be trained by video.

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**ESSENTIAL COMPETENCIES FOR TITLE IX COORDINATORS, DEPUTIES & INVESTIGATORS** 

- Strategic process.
- Questioning.
- Evaluating evidence.
- Establishing rapport.
- Good report writing.
- Alcohol.
- Other drugs.
- Blackouts.
- Victimology.
- Technology.
- Cultural competence.
- Patterns.
- Predation.
- Recantation.
- False complaints.
- Rape myths.
- Consent.
- Force/incapacity.
- Gender bias.
- Victim-blaming.
- Working with responding parties

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**INVESTIGATOR TRAINING** 

- The institution's policies and procedures.
- Applicable federal and state law and court decision.
- Investigative techniques, including specifically interviewing witnesses.
- Cultural sensitivity; diversity competence.
- Applicable legal standards and framework.
- How to analyze evidence in relation to the standard.
- How to synthesize evidence, write reports, and make findings.

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**TRAINING FOR "RESPONSIBLE EMPLOYEES"/MANDATORY REPORTERS** 

- Schools should ensure that employees are trained so that:
  - Those with authority to address harassment know how to respond appropriately.
  - Other Responsible Employees know that they are obligated to report harassment to appropriate officials, what to report, and to whom.
    - Who does this represent at your school? Faculty/Teachers? Coaches? Trainers? Student teachers? Graduate teaching assistants? RAs?

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**TRAINING FOR "RESPONSIBLE EMPLOYEES"/MANDATORY REPORTERS** 

- The institution's policies and procedures must also address cross-constituency complaints.
  - Faculty.
  - Staff.
  - Students.
- The departmental/college expectation for reporting incidents of sexual assault and harassment:
  - Who to tell.
  - How to tell.
  - When to tell.
  - Confidentiality.

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**BASIC TRAINING TOPICS (CONT.)** 

- The school's resources for sexual assault/harassment victims including:
  - Title IX Administrator or Deputy Administrator.
  - Law enforcement/School Resource Officer — campus and local.
  - Student conduct/student discipline.
  - EOP/EEOC officers.
  - Victims' services/advocates.
  - Counseling services.
  - Health services.
  - Remedial measures available (e.g., no-contact orders, course or work adjustments, etc.).

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**TRAINING FOR STUDENTS** 

- Review institutional policies.
- Discussion of consent (use case studies).
- Discussion regarding how to report.
  - Where to find reporting resources.
- Presentation of 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.

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**SMALL GROUP DISCUSSION: TRAINING**



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

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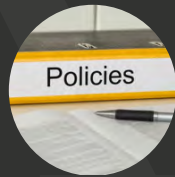
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**CREATOR & IMPLEMENTER OF APPROPRIATE POLICY**




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**CREATOR AND IMPLEMENTER OF APPROPRIATE POLICY**



- Policies should clearly define expected/prohibited conduct.
  - Policies should be regularly updated, revised, and assessed.
  - Procedures should clearly channel the grievant to appropriate resources.
  - Procedures should provide for the equitable remedying of complaints.
- NOTE:** *Policies will be discussed throughout the training.*

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**CREATOR AND IMPLEMENTER OF APPROPRIATE POLICY** 

- The Title IX Coordinator does not unilaterally create policies, but must be an integral part of the policy development and review process.
- The Title IX Coordinator must ensure all policies related to sex/gender misconduct and discrimination are legally accurate, complete and, if the institution has multiple policies (for faculty, staff, students) and procedures, must ensure that these policies are not conflicting, nor contain conflicting definitions.
  - A strong argument for a single policy! (1P1P).

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**THREE TYPES OF SEXUAL HARASSMENT** 

1. Hostile Environment	2. <i>Quid Pro Quo</i>	3. Retaliatory Harassment
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**UNDERSTANDING THE THREE FORMS OF SEXUAL HARASSMENT** 

**Sexual Harassment is:**

Unwelcome conduct of a sexual nature or that is sex or gender-based

Based on power differentials ( <i>quid pro quo</i> ),	The creation of a <i>hostile environment</i> , or	<i>Retaliation</i>
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**HOSTILE ENVIRONMENT** 

- A hostile environment is created when sexual harassment is:
  - sufficiently **severe**, or
  - **persistent or pervasive**, and
  - **objectively offensive** that it:
    - Unreasonably interferes with, denies, or limits someone's ability to participate in or benefit from the university's educational [and/or employment], social, and/or residential program.
- From both a subjective (the alleged victim's) and an objective (reasonable person's) viewpoint.

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**HOSTILE ENVIRONMENT** 

- Totality of the circumstances to consider:
  - The frequency (persistent or pervasive), nature, and severity of the conduct.
  - Whether the conduct was physically threatening.
  - Whether the conduct was humiliating.
  - The identity of and relationship between the alleged harasser and the subject or subjects of the harassment.
  - The age and sex of the alleged harasser and the subject or subjects of the harassment.
  - The size of the school, location of the incidents, and context in which they occurred.

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**HOSTILE ENVIRONMENT** 

- Totality of the circumstances to consider:
  - The effect on the alleged victim's mental or emotional state.
  - Whether the conduct was directed at more than one person.
  - Whether the conduct unreasonably interfered with the alleged victim'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 the First Amendment protection.
  - "Constellation of surrounding circumstances."

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**"SEVERE"** 

*"The more severe the conduct, the less the need to show a repetitive series of incidents; this is particularly true if the harassment is physical."*  
—(2001 Guidance)

- Physical is more likely to be severe without need for repetition: "attempts to grab a female student's breasts or attempts to grab any student's genital area or buttocks" (2001 Guidance).
  - Non-consensual sexual intercourse or contact are almost always sufficiently severe.
  - Consider the circumstances: E.g., the ability for victim to escape the harassment.
- Accompanied by threats or violence.

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**"PERVASIVE"** 

- Widespread.
- Openly practiced.
- Well-known among students or employees — reputation of a department etc.
- Occurring in public spaces (more likely to be pervasive).
- "Harassment is pervasive when incidents of harassment occur either in concert or with regularity" (2001 Guidance – Footnote 44).
- Frequency of the conduct is often a pervasiveness variable.
  - Intensity/duration.
- Unreasonable interference.
- A "gauntlet of sexual abuse" Meritor v. Vinson, 477 U.S. 57 (1986).

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**"PERSISTENT"** 

- Repeated.
  - Intensity.
  - Duration.
  - Welcomeness.
- Defined:
  - Continuing to do something or to try to do something even though other people want you to stop.
  - Continuing beyond the usual, expected, or normal time; not stopping or going away (Merriam-Webster.com).

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### “OBJECTIVELY OFFENSIVE”



- Reasonable person standard in context.
- “I know it when I see it...”
- Age and relationships of accuser and accused.
- Number of persons involved.
- Frequency.
- Severity.
- Physically threatening.
- Humiliation.
- Intimidation.
- Ridicule.
- Abusive.

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### SEVERE? PERVASIVE? PERSISTENT? OBJECTIVELY OFFENSIVE?



#### Student-Based Examples

- Female student “sexts” pictures of herself to a male classmate.
- Drawing a penis on the whiteboard at the front of the class. What about a whiteboard on the student’s residence hall door?
- E-mailed nude pictures.
- “Revenge” pictures posted online.
- A student viewing porn on a computer in the library.
- A student calling another a C-nt.

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### HOSTILE ENVIRONMENT?



Hostile Environment?

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### HOSTILE ENVIRONMENT?



Hostile Environment?

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### SEVERE? PERVASIVE? PERSISTENT? OBJECTIVELY OFFENSIVE?



#### Faculty-Based Examples

- Giving a student a back-rub.
- Post-class sex demonstration.
- Require students to read 50 Shades of Grey and give an assignment to compare their own experiences against those from the book.
- Female faculty member repeatedly referring to male students as "penises."
- Repeatedly telling "dirty" jokes in class.
- Calling a colleague a "bitch" in a meeting.

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### SEVERE? PERVASIVE? PERSISTENT? OBJECTIVELY OFFENSIVE?



#### Staff-Based Examples

- Telling dirty jokes: In common area? Staff meeting? To a single individual?
- Sending porn to a colleague.
- Rolling eyes and making masturbation motion with hand at comments during a staff meeting.
- Coming up behind a colleague and giving a brief shoulder rub.
- Repeated staring at a colleague of the opposite sex; accompanied by occasional winking.
- Colleague repeatedly mentioning how much they like a person's outfits.

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### QUID PRO QUO SEXUAL HARASSMENT



- Quid Pro Quo harassment is:
  - Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature,
  - By a person having power or authority over another constitutes sexual harassment when:
    - Submission to such sexual conduct is made either explicitly or implicitly a term or condition of rating or evaluating an individual's educational [or employment] progress, development, or performance.
  - This includes when submission to such conduct would be a condition for access to receiving the benefits of any educational [or employment] program.

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### RETLIATORY HARASSMENT



- Retaliation is defined as:
  - any adverse action taken against a person participating in a protected activity because of the person's participation in that protected activity.
- Also includes retaliation against the victim by the accused or by the accused's friends or others who are sympathetic to the accused.
- Also can include retaliation directed toward third parties because of their participation in a grievance process or for supporting a grievant.

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### RETLIATION AND ADVERSE ACTION



- Common definition of adverse action:
  - Significantly disadvantages or restricts the reporting party as to their status as a student or employee, or their ability to gain the benefits or opportunities of the program; or
  - Precluded from their discrimination claims; or
  - Reasonably acted or could act as a deterrent to further protected activity.
  - The U.S. Supreme Court and the federal courts have defined adverse action **very broadly**.

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**COORDINATOR TRAINING AGENDA** 

**Day 3**

- I** Creator and Implementer of Appropriate Policy (cont.)
- II** Contact for Government Inquiries
- III** Prevention and Remediation
  - A. Gender Discrimination
  - B. Sexual Harassment
  - C. Sexual Assault
  - D. Stalking
  - E. Intimate Partner/Relationship Violence
  - F. Bullying/Cyberbullying
- IV** Oversight of Prompt and Equitable Grievance Procedures
  - A. Supervisor of Investigations

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**MODEL POLICY FRAMEWORK**

- Non-Consensual Sexual Intercourse
- Non-Consensual Sexual Contact
- Sexual Exploitation
- Related Misconduct

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**NON-CONSENSUAL SEXUAL INTERCOURSE** 

- **Non-consensual sexual intercourse is:**
  - Any sexual intercourse,
  - However slight,
  - With any object,
  - By a person upon another person,
  - That is without consent and/or by force.

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**INTERCOURSE DEFINED**



- **Non-consensual sexual intercourse includes:**
  - Vaginal or anal penetration,
  - By a penis, object, tongue, or finger, and oral copulation (mouth to genital contact),
  - No matter how slight the penetration or contact.

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**NON-CONSENSUAL SEXUAL CONTACT**



- **Non-consensual sexual contact is:**
  - Any intentional sexual touching,
  - However slight,
  - With any object,
  - By one person upon another person,
  - That is without consent and/or by force.

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**SEXUAL CONTACT DEFINED**



- **Sexual contact includes:**
  - Intentional contact with the breasts, buttock, groin, or genitals, or touching another with any of these body parts, or making another touch you or themselves with or on any of these body parts; or
  - Any other intentional bodily contact in a sexual manner.

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**SEXUAL EXPLOITATION**



- 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...

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**SEXUAL EXPLOITATION (CONT.)**



- Invasion of sexual privacy.
- Non-consensual digital, video, or audio recording of nudity or sexual activity.
- 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).

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**SEXUAL EXPLOITATION (CONT.)**



- 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.

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**OTHER MISCONDUCT OFFENSES THAT MAY REQUIRE TITLE IX BASED RESPONSE**



- Intimate Partner Violence.
- Bullying/cyberbullying.
- Hazing.
- Stalking.
- Threatening or causing physical harm.
- Conduct which threatens or endangers the health or safety of any person.
- Discrimination.
- Intimidation.
- Any rule violated on the basis of the victim's sex/gender, which is severe and/or pervasive/persistent enough to cause a discriminatory effect.

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**CONTACT FOR GOVERNMENT INQUIRIES**




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**CONTACT FOR GOVERNMENT INQUIRIES**



- Clearly and widely identify your Title IX Coordinator in public policies and procedures (so the government knows who to contact) — have single point of contact.
- Various government inquiries:
  - Department of Education's Office for Civil Rights (OCR).
    - Title IX, Section 504 disability complaints and Title II disability complaints, and Title VI (race, color, and national origin).
    - Generally initiated by OCR's Regional Offices.
      - Voluntary review.
      - Complaint-instigated investigation.

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**CONTACT FOR GOVERNMENT INQUIRIES** 

- A person may make a complaint with OCR and file a lawsuit under Title IX, 504, and Title VI.
  - Government permission to sue is not required for OCR complaints.
- Equal Employment Opportunity Commission (EEOC) will investigate Title VII (employment) complaints.
  - EEOC does not conduct voluntary reviews.
  - A person filing a Title VII complaint must go through the administrative process (via EEOC or state Civil Rights Commission) prior to being provided a "right to sue" letter from the government.
  - OCR will typically refer employment-based complaints to EEOC.

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**CONTACT FOR GOVERNMENT INQUIRIES** 

- If a complaint is filed against the institution, or your school is selected for a voluntary compliance review, OCR will likely contact Title IX Coordinator or President.
  - Contact Legal Counsel if the complaint is filed or a voluntary compliance review is initiated.
  - Coordinator will be expected to produce all documents requested by OCR. Generally this is a substantial amount of information.
  - Don't be surprised if documents are requested going back 5-10 years. If you have them, you must produce them.
    - FERPA does not apply to such OCR requests.

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**CONTACT FOR GOVERNMENT INQUIRIES** 

- Cooperation with OCR is key.
- Institution's timely response is essential.
- Expect substantial delays on the part of OCR (don't be alarmed by this).
- Often, the OCR investigation will take 1-2 years.
- OCR will likely want to interview individuals. Sometimes this is done via conference calls, sometimes in person.
  - The Title IX Coordinator will be (should be...) the point person on all of this.

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**CONTACT FOR GOVERNMENT INQUIRIES** 

- Even if OCR is investigating based on a complaint, it will seek voluntary compliance on the part of the institution before making a finding.
- Voluntary Compliance Resolution (or Resolution Agreements) are really not voluntary on the part of the institution; they are an opportunity for the institution to come into compliance before a finding is made.
- Generally compliance agreements require between three and five years of monitoring by and documentation to OCR.

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**CONTACT FOR GOVERNMENT INQUIRIES** 

- The Title IX Coordinator is responsible for the implementation and oversight of all compliance elements in the voluntary resolution agreement.
- It's always a good idea to review recent voluntary resolution agreements sent to other institutions.
- However, recognize that while there may be similarities, each regional office will have unique priorities for compliance.

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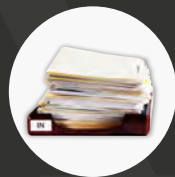
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**POINT PERSON FOR  
CAMPUS  
COMPLAINTS**




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**POINT PERSON FOR CAMPUS 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 misconduct and disability discrimination should be directed.
  - 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.

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**POINT PERSON FOR CAMPUS COMPLAINTS**



- Institutions may also identify others, such as deans, supervisors, the athletic director, and deputy coordinators, in publications and policies as individuals to whom a complaint may be made.
  - The Title IX Coordinator must create a **structure of documentation and reporting** by these designated individuals to ensure awareness of the complaint and will either designate the individual to lead the Title IX-based response protocol or will implement that process.

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**POINT PERSON FOR CAMPUS COMPLAINTS**



- The Title IX Coordinator must ensure the institution is promptly engaging in:
  - Initiation of the preliminary inquiry.
  - Prompt response to stop the harassment/discrimination.
  - Immediate remedial support for the victim.
  - 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.

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### POINT PERSON FOR CAMPUS COMPLAINTS



- Law Enforcement Information Sharing: The Title IX Coordinator must establish a **reporting and information-sharing structure** with campus law enforcement.
  - All campus law enforcement officers (whether sworn or public safety/security) are considered "responsible employees" and have an obligation to report to the Title IX Coordinator.
  - Institutions with 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.

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### PREVENTION AND REMEDIATION

- Gender Discrimination
- Sexual Harassment
- Sexual Assault
- Stalking
- Intimate Partner/Relationship Violence
- Bullying/Cyberbullying

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### PREVENTION AND REMEDIATION OF GENDER DISCRIMINATION



- Prohibition of:
  - Sexual misconduct.
  - Gender discrimination.
  - Sexual harassment.
  - Retaliation.
  - Intimate partner/relationship violence.
  - Stalking.
- Applies to other behaviors when gender-based.
- Obligation to recognize and respond consistent with Title IX.

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**PREVENTION AND REMEDIATION OF 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, inter-collegiate, intra-mural, and sports clubs.
  - All student organizations and activities.
    - Fraternities and sororities are exempted from membership equity.

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**PREVENTION AND REMEDIATION OF SEXUAL HARASSMENT**



- Sexual harassment language in institutional policy.
  - Example: Sexual harassment is unwelcome conduct of a sexual nature or that is sex or gender-based.
    - Based on power differentials (quid pro quo);
    - The creation of a hostile environment; or
    - Retaliation.
- Remediation may include:
  - Mediation (not for physical harassment/assault);
  - Policy revision; and
  - Training/education;
  - In addition to remedies for other forms of sexual misconduct.

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**PREVENTION AND REMEDIATION OF SEXUAL HARASSMENT**



- "Sexual Harassment" includes non-consensual sexual intercourse and/or contact.
- OCR's DCL has placed renewed emphasis on prevention and training; overlaps significantly with VAWA Sec. 304's requirements.
- Title IX Coordinator should oversee and assure campus prevention efforts (See also: Training).
  - Design of strategy.
  - Funding of strategy.
  - Implementation of strategy.
  - Assessment of learning outcomes.
  - Assessment of behavior change.

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**PREVENTION AND REMEDIATION OF STALKING** 

- Stalking:
  - Repetitive and menacing,
  - Pursuit, following, harassing, and/or interfering with the peace and/or safety of another.
- This definition of stalking also allows campuses to **distinguish stalking from lurking**, which is often a fixation without menacing or harmful intent, and which is often a steady state, whereas stalking often becomes more intrusive over time.
- We distinguish the ATIXA model definition of stalking (as we do with Domestic Violence/Dating Violence) from the VAWA definitions, which do not reflect best practices, and are used only for the reporting of crime statistics.

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**PREVENTION AND REMEDIATION OF STALKING** 

- May be a series of legal actions, but campus policy is not required to mirror criminal standards in most jurisdictions.
- Can be a form of sexual harassment, too.
- Gender-based stalking is a form of sex discrimination.
- Increasingly involves technology.
- Definition and prohibition should be reflected in policy.
- Response consistent with Title IX requirements.
- Increase in cases of students on the Autism Spectrum.

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**PREVENTION AND REMEDIATION OF INTIMATE PARTNER AND RELATIONSHIP VIOLENCE** 

- Intimate Partner Violence is:
  - Violence between those in an intimate relationship to each other.
- Other terms include relationship violence, interpersonal violence, domestic violence, dating violence.
- Almost always involves another code violation (e.g., physical abuse of another).
- OCR refers to "dating violence" as "gender-based violence."
- If based on gender/sex, it would fall within Title IX.

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**PREVENTION AND REMEDIATION OF INTIMATE PARTNER AND RELATIONSHIP VIOLENCE**



- Ensure remedies consistent with Title IX.
  - Consider no-contact order implications.
  - Trespassing someone from campus.
  - Consider importance of advocacy.
  - Also use community/off-campus resources.
- Recognize complexities before incident.
- VAWA Sec. 304 specifically targets and highlights issues of "domestic violence" and "dating violence."
- Caution regarding PPTVW analysis (see ATIXA's 2015 Whitepaper)

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**CASE STUDY: INTIMATE PARTNER 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.

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**CASE STUDY: INTIMATE PARTNER 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.

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**CASE STUDY:  
INTIMATE PARTNER 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.

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**PREVENTION AND REMEDIATION  
OF BULLYING AND CYBERBULLYING**



- Bullying is:
  - Repeated and/or severe
  - Aggressive behavior
  - Likely to intimidate or intentionally hurt, control, or diminish another person, physically, or mentally,
  - That is not speech or conduct otherwise protected by the First Amendment.
- It often:
  - Includes repetitive comments about race, color, national origin, **sex**, **gender**, sexual orientation, or disability.
  - Involves an imbalance of power, aggression, and a negative repeated behavior.

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**PREVENTION AND REMEDIATION  
OF BULLYING AND CYBERBULLYING**



- Cyberbullying is:
  - When an individual is bullied using the Internet, interactive and digital technologies, or mobile phones.
- Those who are electronically engaged can be cyberbullied at any time or location, making the effect of cyberbullying ubiquitous and acute.
  - Does it make the bullying more pervasive or persistent?
- Harassment, hazing, and stalking are often used to encompass cyberstalking or cyberbullying policy.

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**PREVENTION AND REMEDIATION OF BULLYING AND CYBERBULLYING** 

- Policy development.
  - Student Handbook/Code of Conduct.
  - Employee Manuals/CBAs.
  - Faculty Handbooks.
- Distribution and dissemination of policy information.
- Early intervention (using your BIT, TAT etc.).
- Training of faculty, staff, and students.

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**OVERSIGHT OF PROMPT AND EQUITABLE GRIEVANCE PROCEDURES**

- Timeframes
- Equity Defined
- Preponderance Standard
- Evidence Thresholds
- Barriers and Problems

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**OVERSIGHT AND COORDINATION OF PROMPT AND EQUITABLE GRIEVANCE PROCEDURES** 

- Prompt:
  - This is the 60-day guidance for investigation outlined in the “Dear Colleague Letter.”
    - There is not an exception for summer break, but possible for winter or spring breaks.
    - A forensic collection of evidence by law enforcement will garner a 7–10 day extension (up to two weeks in extreme circumstances).
    - Pending criminal or civil actions are not reasons for delay.
      - What about delays by the reporting party?
    - Injunctions.
    - Notice of extensions.

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**OVERSIGHT AND COORDINATION OF PROMPT AND EQUITABLE GRIEVANCE PROCEDURES**



- How to ensure prompt 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.

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**PROMPT & EQUITABLE PROCEDURES: CLEAR TIMEFRAMES**



- Timeframe for each stage of process, and process for extensions.
- Parties are entitled to periodical status updates (FERPA does not conflict with Title IX).
- 60 days to resolution is a good guide; varies based on situation.
- Notification of outcomes to parties permitted by FERPA, and required by Clery (outcome and sanctions).
  - Title IX rules in conflict with FERPA.
  - IN WRITING!
- Entitled to status updates on appeals, too, regardless of which party appeals.

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**EQUITY: PREPONDERANCE STANDARD REQUIRED**



- The only equitable 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.

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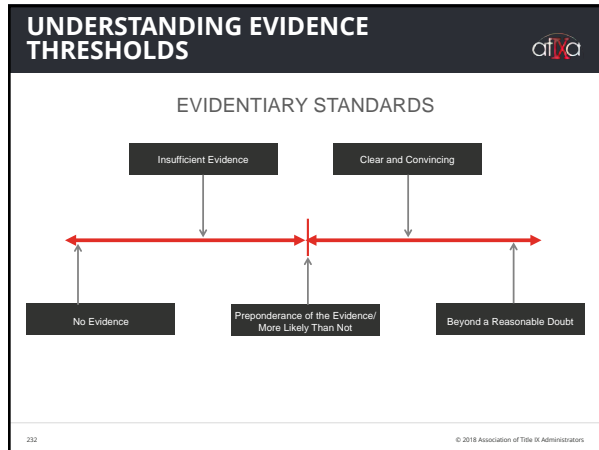
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### EQUITY

- "Schools are required by the Title IX regulations to adopt and publish grievance procedures providing for prompt and equitable resolution of sex discrimination complaints, including complaints of sexual harassment." (2001 Guidance, p. 14).
- "A grievance procedure applicable to sexual harassment complaints **cannot be prompt or equitable unless students know it exists, how it works, and how to file a complaint.** Thus, the procedures should be written in language appropriate to the age of the school's students, easily understood, and widely disseminated" (2001 Guidance, p. 20).

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### EQUITY & GRIEVANCE PROCEDURES

- Various forms of notice — policies and procedures, investigation, hearing, outcome (finding and sanction), etc.
- Meetings and opportunities to present witnesses and provide evidence.
- Access to information.
- Advisor or advocate.
- Impartial investigators, investigation, hearing, and panelists.
- Remedies.
- Appeals.

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**EQUITY: BARRIERS & PROBLEMS**



- You think equality is the same as equity.
- Investigation and resolution mechanisms are built into castles of due process.
- Institutional policies and procedures are constituency-based, thereby privileging certain constituencies (e.g., faculty, staff, and students) more than others.
- Procedures to remedy different forms of discrimination — race, religion, disability, sex, etc. — are widely disparate from each other.

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**EQUITY: BARRIERS & PROBLEMS**



- Your resolution processes are equitable, but your remedies are not.
- Your remedies are equitable, but your resolution procedures are not.
- You impose contact restrictions on victims that are too broad or punitive.
- You think equity should only apply to issues of sexual violence.
- On your campus, only the responding party is entitled to participate in an appeal, grievance, tenure revocation hearing, or arbitration of a disciplinary action.

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**EQUITY: BARRIERS & PROBLEMS**



- Victims' rights are an afterthought.
- Your inability to revoke tenure promptly (e.g.: within 60 days) perpetuates discriminatory conduct.
- Your resolution procedures don't recognize patterns and prior misconduct as evidence of present misconduct.
- State laws or education codes inhibit Title IX compliance, and haven't been updated since the April 2011 DCL.

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**EQUITY REQUIRES TRAINING**



- Title IX Coordinator(s).
- Intake staff/faculty.
- Campus law enforcement.
- Investigators.
- Hearing officers.
  - Training on and knowledge of sexual violence.
  - Confidentiality requirements.
  - Due process rights... should not “restrict or unnecessarily delay Title IX protections for complainant.”
- Appeals officers.

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**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 complaint 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.
  - Procedures should be written in a manner that is easily understood (especially for K-12).

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**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.

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**SUPERVISOR OF INVESTIGATIONS** 

- The Title IX Coordinator is responsible for:
  - The appointment of investigators.
  - Supervision of investigators and investigations.
  - Strategizing investigations.
  - Assurance of initial remedial actions.
  - Timeline compliance.
  - Communication and coordination of investigation teams.
  - Providing institutional memory to investigators.
  - Training of investigators, hearing boards, and appeals officers.

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**SUPERVISOR OF INVESTIGATIONS** 

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

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### ELEMENTS OF AN INVESTIGATION

- Who Should Investigate?
- More Than One Investigator?
- Law Enforcement Role?
- Title IX Coordinator's Role?
- Gatekeeping
- Understanding Evidence
- Strategy
- Investigation Report
- Credibility
- Making a Finding
- Sanctioning

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### WHO SHOULD INVESTIGATE?



- Investigations of sex discrimination must be impartial, thorough, and reliable. So who should it be?
  - Title IX Coordinator?
  - Standing panel of investigators?
  - Human resources or student services?
  - Administrators and faculty?
  - One investigator or two?
  - Outside investigator or legal counsel?
  - Coordinating investigation in multiple processes?

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### 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 to make a determination.
  - 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.

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### 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.
  - What about School Resource Officers in K-12?
- Establish MOUs with campus police and other local enforcement and update annually.
  - The power of the tabletop exercise.

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### 11 STEPS



1. Allegation (complaint) or notice.
2. Preliminary inquiry (initial strategy).
3. Gatekeeper determination (earliest point).
4. Notice of investigation and/or allegation (earliest point).
5. Strategize investigation.
6. Formal comprehensive investigation.
7. Witness interviews.
8. Evidence gathering.
9. Analysis.
10. Finding.
11. Appeal.

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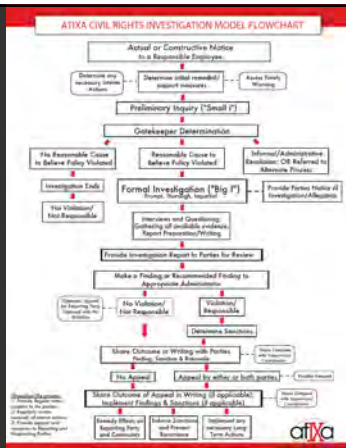
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### CIVIL RIGHTS INVESTIGATION MODEL




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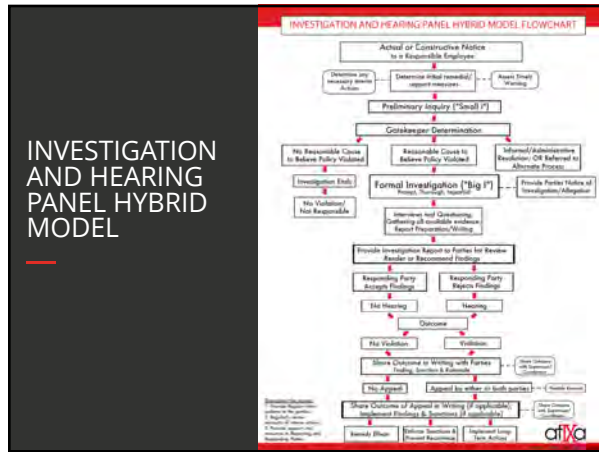
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### ROLE OF A TITLE IX COORDINATOR IN INVESTIGATIONS

- What is the proper role of the Title IX coordinator in relation to the investigation and resolution process?
  - Investigator?
  - Gatekeeper?
  - Strategizing the investigation?
  - Ensuring timeline compliance?
  - Writing the investigation report?
  - Making a finding?
  - Determining sanctions?
  - Reviewing the investigation?
  - Appellate officer?
  - Training the investigators, hearing officers, and appellate officers?

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### GATEKEEPING IN INVESTIGATIONS

- The Gatekeeper of the process determines the extent and development of the investigation, moving it from preliminary to full investigation and identifying timing for charges and strategy development.
  - Equity, due process, essential fairness, and equal dignity all demand substantiating evidence before dragging a reporting party through the entire process.
  - A charge (complaint) must be supported by reasonable cause to permit its full pursuit.

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**MAJOR GATEKEEPING GUIDEPOSTS** 



- Notice.
- Preliminary investigation.
- Comprehensive investigation.
- Charge/allegation.
- Finding.
- Sanction.
- Appeal.

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**UNDERSTANDING EVIDENCE** 

- You may assign weight to evidence based on:
  - Documentary evidence (e.g., supportive writings or documents).
  - Electronic evidence (e.g., photos, text messages, and videos).
  - Real evidence (i.e., physical object).
  - Direct or testimonial evidence (e.g., personal observation or experience).
  - Circumstantial evidence (i.e., not eyewitness, but compelling).
  - Hearsay evidence (e.g., statement made outside the hearing, but presented as important information).
  - Character evidence (generally of little value or relevance).
  - Impact statements (typically only relevant in sanctioning).

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**UNDERSTANDING EVIDENCE** 

- Formal rules of evidence do not apply. 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 charges.
- Consider if drugs or alcohol played a role.
  - If so, do you know what you need to know about the role of alcohol on behavior? Timing? Incapacitation?
  - Look for evidence of prior planning.

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### INVESTIGATION, INTERVIEWS, EVIDENCE GATHERING, HEARING



- Fair and equitable.
- Confidentiality, privacy, and FERPA.
- Interviewing.
- Advisors for the parties.
- Note-taking.
- Witness lists and flowcharts.
- Evidence is...
- Charge.
- Assessing evidence and credibility.
- Investigation report.
- Hearing (if applicable) – investigator as key witness.
- Making a finding.

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### INVESTIGATION: STRATEGY IS KEY



- The investigation team, in consultation with the Deputy Coordinator, and/or the Title IX Coordinator, strategizes the entire investigation. This includes:
  - What policy elements may have been violated?
  - 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?
  - Timeline.

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### HOW IMPORTANT IS THE CREATION OF AN 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.
  - 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.).
- Provides conclusions and findings.

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**CREDIBILITY**



- "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.
- Pay attention to the following factors...

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**FACTORS TO CONSIDER FOR CREDIBILITY**



- Demeanor.
  - Nonverbal language.
  - Demeanor issues should be your cue to ask more questions.
- Non-cooperation.
  - Look for short, abrupt answers or refusal to answer.
- Logic/consistency.
  - E.g.: "I'm struggling to develop a timeline based on your statements. Could you clarify...?"
- Corroborating evidence.

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**MAKING CREDIBILITY DETERMINATIONS**



- Look at consistency of story — substance and chronology of statements.
- Consider inherent plausibility of all the information given.
- Look for the amount of detail (facts) provided. Factual details should be assessed against general allegations, accusations, excuses, or denials that have no supporting details.
- Pay attention to non-verbal behavior, but don't read too much into it. This isn't "Lie to Me."

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### MAKING A FINDING



- Review the institutional policies that apply.
- **Parse the policy.**
  - Provide specific findings for each violation and for each responding party.
- 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 is more likely than not.
- Cite concretely the reasons for this conclusion.
- Move to sanctioning.

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### SANCTIONING IN SEXUAL MISCONDUCT CASES (CONT.)



- **Title IX and case law require:**
  - Bring an end to the discriminatory conduct (Stop).
  - Take steps reasonably calculated to prevent the future reoccurrence of the discriminatory conduct (Prevent).
  - Restore the reporting party as best you can to their pre-deprivation status (Remedy).
- Real clash with the typically educational and developmental sanctions of student conduct processes.
- Sanctions for serious sexual misconduct should not be developmental as their primary purpose; they are intended to protect the reporting party and the community.

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### COORDINATOR TRAINING AGENDA



#### Day 4

- I** Coordinator of Multiple Grievance Procedures
- II** Title IX Compliance Auditor
- III** Assurance of First Amendment Protections
- IV** Prevention and Remediation of Retaliation
- V** Section 504 Disabilities Compliance Oversight
- VI** Oversight of Athletics Gender Equity
- VII** Assurance of Compliance with Requirements to Stop, Prevent, and Remedy
- VIII** Assurance of Compliance with Final Sanctions
- IX** Appeals

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**COORDINATOR OF THE INTERACTION OF MULTIPLE STUDENT & EMPLOYEE GRIEVANCE PROCESSES**

- Potential Processes
- Interaction Of Title IX And Title VII
- One Policy-One Process

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**COORDINATOR OF THE INTERACTION 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.
  - Various Elementary, Middle and High School processes.
  - Academic appeal process.
  - Athletics department polices/processes and "team rules."
  - Collective bargaining agreements.

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**COORDINATOR OF THE INTERACTION OF MULTIPLE STUDENT AND EMPLOYEE GRIEVANCE PROCESSES** 

- The Title IX Coordinator:
  - Has oversight of Deputy Coordinators/Investigators, including the ability to appoint "Lead Investigators."
    - Institutional equity/AA/EOP officer.
    - Coordinator of campus conduct.
    - Student Affairs administrators.
    - Athletics.
  - Must be able to coordinate remedies and results (sanctions) in student-to-employee and employee-to-student grievances.

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**COORDINATOR OF THE INTERACTION OF MULTIPLE STUDENT AND EMPLOYEE GRIEVANCE PROCESSES** 

- Supervisor of the interaction between Title IX and 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.

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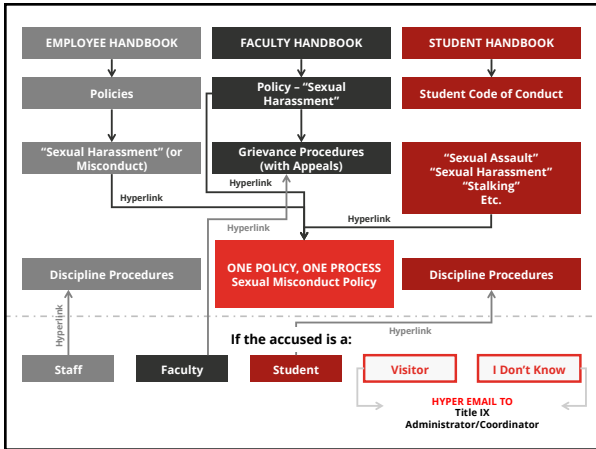
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**COORDINATOR OF THE INTERACTION OF MULTIPLE STUDENT AND EMPLOYEE GRIEVANCE PROCESSES** 

- One Policy, One Process: simplifying the multiple process conundrum.
  - ATIXA promotes the idea of using “One Policy, One Process” (1P,1P) to resolve all harassment and discrimination complaints (i.e., sex/gender, disability, age, race, gender, ethnicity, etc.).
    - One institution-wide policy.
    - One stand-alone resolution process.
    - Applied to all complaints involving faculty, students, and staff.

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### ONE POLICY-ONE PROCESS



- A community-based policy that addresses harassment, discrimination, and sexual misconduct applicable to all members of the institution community promotes equity, minimizes confusion, and supports institutional mission.
  - Recommended by the DOE and DOJ in their *Montana AND New Mexico* resolutions.
  - Provides easier training focus.
  - Allows for commonality in documentation and investigation.

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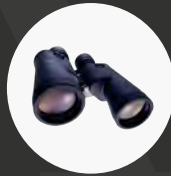
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### TITLE IX COMPLIANCE OVERSIGHT




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### TITLE IX COMPLIANCE OVERSIGHT



- Active internal review, audits, or assessments.
  - Complaint and resolution processes — investigations, findings, and sanctions.
  - Policies and procedures up-to-date and compliant.
  - Athletics.
  - Training content and requirements.
  - Policy and non-discrimination notice dissemination.
  - Materials, website, and resource guide.

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**TITLE IX COMPLIANCE OVERSIGHT**



- 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 committee feedback, etc.

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**ASSURANCE OF FIRST AMENDMENT PROTECTIONS**




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**ASSURANCE OF 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.

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### ASSURANCE OF FIRST AMENDMENT PROTECTIONS



- Issues to consider:
  - Time, place, and manner.
  - Open forum, limited open forum, and closed forum.
  - Confluence with academic freedom (faculty).
  - Unprotected speech.
    - Incitement of disruption and breach of peace; defamation; true threat; and obscenity.
  - **Outside speakers.**
  - Hate speech.

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### PREVENTION AND REMEDIATION OF RETALIATION

- Basic Legal Principles
- *Jackson v. Birmingham Bd. of Education*
- Investigating Retaliation

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### RETALIATION BASIC LEGAL PRINCIPLES



- 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 discrimination complaint.
  - Assisting someone in reporting discrimination or filing a complaint.
  - Participating in any manner in an investigation of discrimination (e.g. as a witness).
  - Protesting any form of sex discrimination (including, for instance, lack of equity in athletics).

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**PREVENTION AND REMEDIATION OF RETALIATION**



- Retaliation is an increasingly common legal claim arising from charges of discrimination.
- The Title IX regulations prohibit colleges and universities from “intimidating, coercing, or retaliating against” individuals because they engaged in activities protected by Title IX.
- Title IX Coordinators should ensure that the institution effectively communicates a message about protection against retaliation and that reporting parties understand their rights.
  - Review existing discrimination policies to ensure that they contain a clear prohibition against retaliation and that resolution procedures are explicitly applicable to retaliation claims.
  - Ensure that training includes information about the prohibition on retaliation.

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**PREVENTION AND REMEDIATION OF RETALIATION**



- The Title IX Coordinator or designee must engage in the following, for reporting parties and witnesses:
  - Take time to explain that the institution prohibits retaliation, that the reporting party or witness should immediately report any acts of retaliation, and that the institution will respond promptly to address it.
  - Check in with reporting parties and witnesses periodically during an investigation to make sure they have not been subjected to retaliation.

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**PREVENTION AND REMEDIATION OF RETALIATION**



- The Title IX Coordinator or designee must engage in the following for individuals accused of sexual assault or harassment:
  - Explain that retaliation is prohibited, that any reports of harassment will be addressed promptly and effectively, and that additional sanctions may be imposed for such acts.
  - May hold responding parties responsible for retaliation by friends, fraternity/sorority members, and family.
  - Act promptly to take appropriate interim measures to protect the reporting party if notified of retaliation.

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**RETALIATION CLAIM  
JACKSON V. BIRMINGHAM BD. OF ED.**



- *Jackson v. Birmingham Bd. of Education*, 544 U.S. 167 (2005).
  - K-12 case.
  - 1999 — Jackson, a high school P.E. teacher and girls' basketball coach, complained about inequity in sports programs' funding (gender).
  - 2000 — He began to get negative evaluations.
  - 2001 — He was dismissed as coach, but retained as teacher.
  - He sued under Title IX's private right of action.

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**RETALIATION CLAIM  
JACKSON V. BIRMINGHAM BD. OF ED.**



- Procedure:
  - District Court — School prevailed.
  - 11th Circuit — Upheld District Court finding.
  - Supreme Court — Overturned.
- Question: Does the private right of action for discrimination only apply to the direct victim of the discrimination, or does it also apply to a party who advocated on behalf of the victim?

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**INVESTIGATING RETALIATION CLAIMS  
KEYS TO UNDERSTANDING**



- Establishing retaliation, unlike establishing sexual harassment, requires proving motive — the intent to retaliate.
- Since someone's intention is rarely displayed openly, the legal framework is about whether a retaliatory motive can be inferred from the evidence.
- Gathering details of what occurred is critical.

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**PRELIMINARY ELEMENTS OF A RETALIATION CLAIM**



The following elements establish an *inference of retaliation*:

1. Did the reporting party engage in protected activity?
  - Usually straightforward.
  - Unless there is a question of reasonableness of belief or manner.
2. Was the reporting party subsequently subjected to adverse action?
3. Do the circumstances suggest a connection between the protected activity and adverse action?
  - Did the individual accused of retaliation know about the activity?
  - How soon after the protected activity did the adverse action occur?

If these three elements are not shown, the claim fails.

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**INVESTIGATING RETALIATION CLAIMS: REBUTTING THE INFERENCE**



- What is the stated non-retaliatory reason for the adverse action?
  - Is the explanation for the action legitimate on its face?
- Is there evidence that the stated legitimate reason is a pretext?
  - This is the heart of the case — is the explanation the true reason?
- The preponderance of the evidence must establish that the adverse action was motivated by retaliation.

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**INVESTIGATING RETALIATION CLAIMS: IS THE EXPLANATION LEGITIMATE?**



**Factors to Consider:**

- The explanation makes sense.
- The action was consistent with established policy or practice.
- No adverse action was taken against others who engaged in protected activity.
- The reporting party was treated the same as other individuals.

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### INVESTIGATING RETALIATION CLAIMS: EVIDENCE OF PRETEXT?



#### Factors to Consider:

- The explanation given is not credible.
- Other actions by the same individual are inconsistent with the explanation.
- The explanation is not consistent with past policy or practice.
- There is evidence of other individuals treated differently in similar situations.

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### SECTION 504 DISABILITIES COMPLIANCE OVERSIGHT

- About Section 504
- Administrative Requirements

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### SECTION 504 DISABILITIES COMPLIANCE OVERSIGHT



- The Section 504 regulations require that colleges:
  - “Designate at least one person to coordinate its efforts to comply.”
  - Adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints of discrimination.
  - Must provide oversight of disability program compliance.
  - Must ensure dissemination of notice of the institution’s non-discrimination policy.
  - Must ensure civil-rights-based grievance procedures are in place to address complaints of discrimination.

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### SECTION 504 ADMINISTRATIVE REQUIREMENTS



- Schools must have clearly defined policies and procedures and implement them consistently.
- Schools must have preventive measures in place to position themselves to manage reports of disability-based discrimination.
- Schools must provide notice of:
  - Nondiscrimination.
  - 504/ADA Coordinator.
  - 504/ADA grievance procedures.
  - How to obtain academic adjustments and auxiliary aids.

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### OVERSIGHT OF ATHLETICS GENDER EQUITY

- Title IX Requirements
- Three-Part Test



### OVERSIGHT OF ATHLETICS GENDER EQUITY



- Title IX compliance requirements:
  - Effective accommodation of interests and abilities.
  - Financial assistance proportionality.
  - Treatment of student-athletes.
- **Compliance** may be delegated to the Senior Woman Administrator (SWA) or compliance officer in athletics.
- The oversight of compliance remains the responsibility of the Title IX Coordinator.
  - Need for outside education.
- The dangers of being both.

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**OVERSIGHT OF ATHLETICS  
GENDER EQUITY**



Effective Accommodation of Interests and Abilities: 1979  
Test – 3 Part-Test:

- **Part 1:** Opportunities for males and females substantially proportionate to their respective enrollments, OR
- **Part 2:** Where one sex has been underrepresented, a history and continuing practice of program expansion responsive to the developing interests and abilities of that sex, OR
- **Part 3:** Where one sex is underrepresented and cannot show a continuing practice of program expansion, whether it can be demonstrated that the interests and abilities of that sex have been fully and effectively accommodated by that present program.

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**COMPLIANCE WITH  
REQUIREMENTS TO STOP,  
PREVENT, REMEDY**

- Effective Remedies
- Common Remedies
- Preventing Recurrence

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**ASSURANCE OF COMPLIANCE WITH  
REQUIREMENTS TO STOP, PREVENT, REMEDY**



- **Effective Remedies:**
  - Title IX requires that remedies for sexual harassment and assault be effective in:
    - Stopping the harassment.
    - Remedying its effects (often not sanction-based).
    - Preventing it from recurring.
      - Consider the effect of “educational” sanctions here.
      - Second victim is both Title IX and negligence concern.

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**ASSURANCE OF COMPLIANCE WITH REQUIREMENTS TO STOP, PREVENT, REMEDY**



- Take timely steps to confirm and document that the appropriate remedies were implemented. For example:
  - Was the student provided alternative housing?
  - Was the student assigned to a different seat or class?
  - Was counseling made available?
  - Was a no-contact order issued?
  - Was the grade removed from the student's transcript?
- Make sure the reporting party knows that s/he should report any difficulties obtaining the remedies and any subsequent harassment.

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**COMMON REMEDIES FOR STUDENTS**  
*\* NOT AN EXHAUSTIVE LIST*



- ✓ Providing an escort.
- ✓ Ensuring that the reporting party and responding party do not attend the same classes.
- ✓ Relocating to a different residence hall.
- ✓ Providing counseling services.
- ✓ Providing medical services.
- ✓ Offering academic support services, such as tutoring.
- ✓ Arranging transportation accommodations.
- ✓ Arranging for the reporting party to re-take a course/withdraw from a class without penalty.
- ✓ Reviewing any disciplinary actions taken against the reporting party to see if there is a causal connection between the harassment and the misconduct and adverse action.
- ✓ Providing campus wide training and education initiatives.

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**COMMON REMEDIES FOR EMPLOYEES**  
*\* NOT AN EXHAUSTIVE LIST*



- ✓ Providing no-contact orders/contact restrictions.
- ✓ Providing an escort.
- ✓ Arranging transportation accommodations.
- ✓ Providing referral to counseling services, medical services, and mental health services.
- ✓ Adjusting work schedules, work assignments, supervisory responsibilities, etc.
- ✓ Offering leave with pay.
- ✓ Providing suspension with pay (accused).
- ✓ Work.
- ✓ Sanctions.

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**ASSURANCE OF COMPLIANCE WITH REQUIREMENTS TO STOP, PREVENT, REMEDY** 

- **Prevent Recurrence:**
  - Identify patterns and systemic problems.
  - Issue campus wide policy statements, informational campaigns, and other messages that harassment and assault will not be tolerated.
  - Provide regular training on sexual misconduct for students and employees.
  - Conduct periodic surveys of campus climate.
  - Establish a system for monitoring future incidents and patterns.
  - Provide technical assistance to campus law enforcement on Title IX compliance.

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**ASSURANCE OF COMPLIANCE WITH FINAL SANCTIONS**

- Sanctioning In Sexual Misconduct Cases
- Considerations
- Common Sanctions
- What Sanctions?

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**SANCTIONING IN SEXUAL MISCONDUCT CASES** 

- 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 victim as best you can to pre-deprivation status.
- Real clash with the typically educational and developmental sanctions of student conduct processes .
  - Sanctions for serious sexual misconduct should not be developmental as their primary purpose. They are intended to protect the victim and the community.

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**SANCTIONING CONSIDERATIONS**



- The sanction must be reasonable and reflect the severity of the behavior.
  - May consider prior misconduct.
  - The role of precedent.
  - May consider attitude.
  - Should be educational.
  - What best compensates for loss or injury to college or persons?
  - Compliant with laws and regulations (e.g., Title IX).

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**SANCTIONING IN SEXUAL MISCONDUCT CASES**



- Investigation alone is not sufficient to overcome a deliberate indifference claim.
- There must be a nexus between the sanctions and the discriminatory conduct that led to the sanction(s).
- What is appropriate?
  - Separation/expulsion.
  - Suspension.
  - Lesser sanctions.
- Engage in strategic education and training requirements.
- Conduct a risk assessment audit and mitigation process.

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**SANCTIONING IN SEXUAL MISCONDUCT CASES**



- Ensure that remedies are not clearly unreasonable in light of the known circumstances.
- Avoid undue delays.
- Take immediate steps to protect reporting parties even before the final outcome of investigations (e.g., through no-contact orders, etc.).
- Ensure that remedies are equitable.
- Consider restorative justice as part of your remedial process.
- Monitor for retaliation and respond immediately to allegations.
- Review policies, procedures, and practices regularly to ensure they are in accordance with best practices, and state, and federal case law.

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**COMMON STUDENT SANCTIONS**



- Warning.
- Probation.
- Loss of privileges.
- Counseling.
- No contact.
- Residence hall relocation, suspension, or expulsion.
- Limited access to campus.
- Service hours.
- Online education.
- Parental notification.
- Alcohol and drug assessment, and counseling.
- Discretionary sanctions.
- College suspension.
- College expulsion.

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**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.

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**ASSURANCE OF COMPLIANCE WITH FINAL SANCTIONS**



- Take steps to confirm and document that all sanctions were enforced.
  - Did the harasser attend training?
  - Is the harasser complying with the no-contact order?
  - Were the necessary documents placed in the harasser’s personnel or conduct file?
  - Was the notation placed on the harasser’s transcript or in personnel file?
- Possible consequences of failure to ensure compliance with sanctions:
  - Persistence of the behavior/hostile environment, recurrence, retaliation, and claims of deliberate indifference.

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**WHAT SANCTIONS?**



- A female staff member continues to make overt and tacit sexual advances towards a female colleague, even though the recipient of the behavior has repeatedly told the staff member that the advances are unwelcome.
  - The advances are verbal as well as in emails and text messages.
  - Some of the more subtle advances have been in the company of others.
  - The victim complained because it is starting to impact her ability to focus at work.

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**WHAT SANCTIONS?**



- Responding student is found responsible for non-consensual intercourse involving a student-victim who the panel determines was incapacitated and whose incapacity should have been known to the accused.
  - The panel felt that part of the problem was the students' inexperience with sexual matters and poor communication.
  - The responding party is an excellent student and is well liked by the campus community.
  - The victim also indicates that she does not want him to get suspended or expelled.

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**WHAT SANCTIONS?**



- A male tenured faculty member is found responsible for non-consensual intercourse involving a female student who is not in any of the faculty member's classes.
  - The investigator determines that the student was incapacitated and the accused faculty member should have known of that incapacity.
  - The faculty member is a full professor holding a prestigious endowed chair position.
  - The student and the faculty member engaged in consensual sex five times after the non-consensual incident.
  - The student brought the allegation shortly after the faculty member began sleeping with the student's friend.

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**WHAT SANCTIONS?**



- A severely intoxicated student who lives on the sixth floor gets off the residence hall elevator on the fourth floor at the same time with a female student who lives on the floor. As the female student attempts to enter her room, the male student hugs and tackles her, holds her down, reaches up her skirt, moves aside her underwear, and rubs his fingers along her clitoris and penetrates her digitally. The female student is able to free herself and rushes into her room, locking the door. The panel finds him responsible.

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**WHAT SANCTIONS?**



- Five members of the men's soccer team (Students A, B, C, D, and E) subject the first-year students to various hazing-related rituals, including paddling and pouring hot sauce on the first-year students' genitals.
  - Four students (A, B, C, and D) engaged in the paddling.
  - Two students (A and B) poured hot sauce on the genitals of first-year students.
  - One student (E) was present throughout, but did not paddle or pour hot sauce on the first-year students.

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**APPEALS**

- Appeals Exercise
- Key Elements
- Grounds for Appeal
- Process
- Outcomes
- Flowchart

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### APPEALS: KEY ELEMENTS



- One level of appeal.
- Limited grounds for appeal (see next slide).
- Deference to original hearing authority.
- Sanctions take effect immediately.
- Short window to request an appeal.
  - Can always grant an extension if necessary.
- Document-based and recording review.
  - NOT *de novo*.
- Request for an appeal.

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### APPEALS: GROUNDS FOR APPEAL



- A procedural error or omission occurred that significantly impacted the outcome of the hearing.
  - E.g.: Insufficient evidence to warrant the finding, substantiated bias, material deviation from established procedures, etc.
- To consider new evidence, unknown or unavailable during the original hearing or investigation, that could substantially impact the original finding or sanction.
  - A summary of this new evidence and its potential impact must be included.
- The sanctions imposed are substantially disproportionate to the severity of the violation (or the sanctions fall outside the range of sanctions the university/college has designated for this offense).

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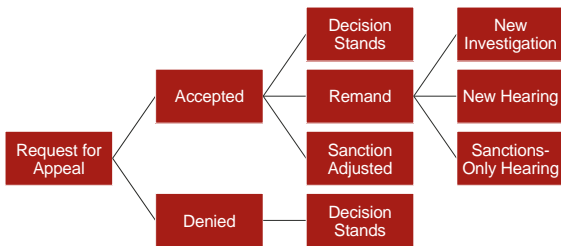
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### APPEALS: THE PROCESS



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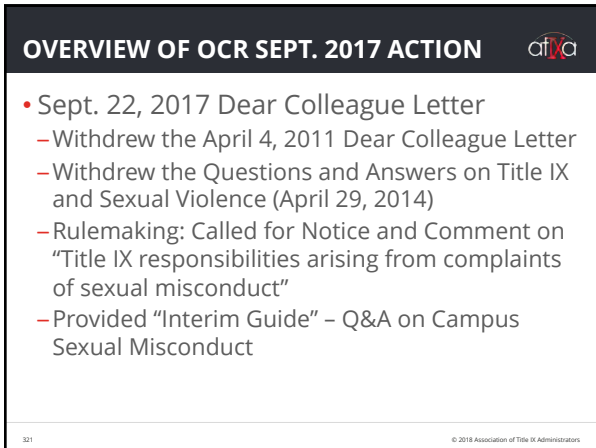
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OVERVIEW OF OCR SEPT. 2017 ACTION



- OCR's stated reasons for withdrawing 2011 DCL and 2014 Q&A
  - Released without providing for notice and comment requirements (APA)
  - "Created a system that lacked basic elements of due process"
  - "Created a system that...failed to ensure fundamental fairness"

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NOTICE & RULEMAKING



- **Administrative Procedures Act (APA)**
  - Federal agencies typically must provide public notice and an opportunity for public comment before finalizing a rule.
  - Preliminary steps are largely unstructured and typically include informal conversations with interested parties
  - Agency then provides Notice of Proposed Rulemaking with rule published in Federal Register requesting public comment (typically for 30-60 days)
  - Agency then finalizes the rule, which goes into effect within 0-30 days.

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Q&A ON CAMPUS SEXUAL MISCONDUCT

- Interim Guidance from OCR dated September 2017

Note: Items in red represent changes from previous guidance or new guidance not previously given

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**OCR "INTERIM GUIDE" SUMMARY** 

- **Actual or Constructive Notice**
  - OCR Maintains an actual or constructive notice standard ("knew or should have known") as triggering an institution's obligations under Title IX.
- **Hostile Environment**
  - Maintains definition of a hostile environment, "when sexual misconduct is so severe, persistent, or pervasive as to deny or limit a student's ability to participate in or benefit from the school's programs or activities, a hostile environment exists and the school must respond."
- **Responsible Employees**
  - OCR provides little information other than that employees may be designated as such.

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**OCR "INTERIM GUIDE" SUMMARY** 

- **Title IX Coordinator**
  - Schools "must designate at least one employee to act as a Title IX Coordinator to coordinate its responsibilities in this area."
  - 2015 DCL to Coordinators is still in place.
- **Consistent with Laws**
  - Schools "must formulate, interpret, and apply their rules" in a manner consistent with laws, court decisions and the First Amendment.
- **Clery/VAWA**
  - Schools must uphold Clery/VAWA and Title IX (if applicable) when addressing issues of dating violence, domestic violence, sexual assault and stalking.

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**OCR "INTERIM GUIDE" SUMMARY** 

- **Interim Measures**
  - "Interim measures" are "individualized services" provided to BOTH reporting party and responding party prior to resolution of an allegation.
  - Key elements regarding interim measures:
    - Institutions cannot "rely on fixed rules or operating assumptions that favor one party over another."
    - Institutions cannot make "measures available only to one party."

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**OCR "INTERIM GUIDE" SUMMARY** 

- **Interim Measures (con't)**
  - Key elements regarding interim measures:
    - May change over time.
    - Schools should make "every effort to avoid depriving any student of his or her education."
    - Coordinator should communicate regularly with the parties to ensure any interim measures are "necessary and effective."

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**OCR "INTERIM GUIDE" SUMMARY** 

- **Prompt and Equitable**
  - "A school must adopt and publish grievance procedures that provide for a prompt and equitable resolution of complaints of sex discrimination, including sexual misconduct."
- **Prompt**
  - "Prompt" is shifted from a 60-day time limit to providing "no fixed time frame."
  - OCR will examine a school's response to see if the school used a "good faith effort" to provide a prompt, fair and impartial resolution in a timely manner.

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**OCR "INTERIM GUIDE" SUMMARY** 

- **Prompt and Equitable procedures:**
  - Provide "notice of the school's grievance procedures, including how to file a complaint, to students, parents of elementary and secondary school students, and employees."
  - Apply "the grievance procedures to complaints filed by students or on their behalf alleging sexual misconduct carried out by employees, other students, or third parties."
  - Designate "and follow a reasonably prompt time frame for major stages of the complaint process."

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**OCR "INTERIM GUIDE" SUMMARY** 

- **Prompt and Equitable procedures (con't):**
  - Ensure "an adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence."
  - Notify "the parties of the outcome of the complaint."
  - Provide "assurance that the school will take steps to prevent recurrence of sexual misconduct and to remedy its discriminatory effects, as appropriate."

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**OCR "INTERIM GUIDE" SUMMARY** 

- **Equitable**
  - School has the burden of gathering evidence and information, not the parties.
  - Investigation must be led by someone who is "free of actual or reasonably perceived conflicts of interest and biases for or against any party."
  - Ensure institutional interests do not interfere with the impartiality of the investigation
  - Rights afforded to the parties should be on "equal terms."

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**OCR "INTERIM GUIDE" SUMMARY** 

- **Equitable**
  - Requires a trained investigator to:
    - Analyze and document the available evidence to support reliable decisions
    - Objectively evaluate the credibility of parties and witnesses
    - Synthesize all available evidence—including both inculpatory and exculpatory evidence; and
    - Take into account the unique and complex circumstances of each case.
  - Gag orders and similar actions restricting the parties from discussing the investigation with others are likely inequitable because they may inhibit ability of the parties to obtain and present evidence and defend their interests.

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**OCR "INTERIM GUIDE" SUMMARY** 

- **Notice of Investigation**
  - Written, detailed notice of investigation should be provided to the responding party once a school has decided to pursue an investigation.
  - The Notice of Investigation should include sufficient details, including:
    - Identity of the parties involved.
    - Specific policies allegedly violated.
    - Precise misconduct alleged.
    - Date of the alleged incident.
    - Location of the alleged incident.

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**OCR "INTERIM GUIDE" SUMMARY** 

- **Notice of Hearing**
  - Provide parties advanced, written notice of any hearing "with sufficient time to prepare for meaningful participation."
- **Investigation Report**
  - "Investigation should result in a written report summarizing the relevant exculpatory and inculpatory evidence."
- **Notice of Interview**
  - Provide parties advanced, written notice of any interview "with sufficient time to prepare for meaningful participation."

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**OCR "INTERIM GUIDE" SUMMARY** 

- **Access to information**
  - School must provide the reporting party, the responding party and appropriate officials with "timely and equal access to any information that will be used during informal or formal disciplinary meetings and hearings.
  - Decision-maker must provide the parties with "the same meaningful access to any information that will be used during informal and formal disciplinary meetings and hearings, including the investigation report."

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OCR "INTERIM GUIDE" SUMMARY



• Informal Resolution

- Defined as a process that reaches a mutually voluntary resolution that "does not involve a full investigation and adjudication...including mediation."
- Informal resolution is permissible if:
  - All parties voluntarily agree to engage in informal resolution.
  - Parties have received a full disclosure of the allegations.
  - Parties have received a full disclosure of their resolution options.
- School determines the complaint is appropriate for

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OCR "INTERIM GUIDE" SUMMARY



• Decision-Maker

- Can be an investigator or a separate decision-maker.
- Finding need not come from a formal hearing (investigation-based decision is permissible).
- Should focus on whether the conduct violated school's policies.
- Should make a decision on each of the alleged violations.
- No formal hearing is necessary.

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OCR "INTERIM GUIDE" SUMMARY



• Standard of Proof

- School may use either Preponderance of the Evidence OR Clear and Convincing.
- Whatever standard is used, the school must use the same standard for all other student misconduct cases.

• Right to Respond to the Investigation Report

- Parties should be provided the opportunity respond in writing to the investigation report before a finding is made and/or before a hearing.

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OCR "INTERIM GUIDE" SUMMARY



• Sanctioning

- The decision-maker can also determine the sanction, or sanction can be determined by someone else.
- Sanctioning should "be made for the purpose of deciding how best to enforce the school's code of conduct."
- Sanctioning should also account for the impact of "separating a student from his or her education."
- Sanctions must represent a "proportionate response to the violation"
- OCR restates the VAWA requirement that a college or university list all possible sanctions for DV, DV, S, SA in its Annual Security Report.

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OCR "INTERIM GUIDE" SUMMARY



• Notice of Outcome

- OCR recommends that written notice of outcome is provided currently to the reporting party and the responding party.
- Content of the notice of outcome may vary based on the nature of the allegations, the institution, and the age of the parties.

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OCR "INTERIM GUIDE" SUMMARY



• Notice of Outcome

- OCR restates the Clery requirement for colleges and universities to provide the parties with:
  - Simultaneous, written notification of the disciplinary proceeding.
  - Institution's procedures for appeal (if any).
  - Any change "to the result when it becomes final."
  - Must include "any initial, interim or final decision"
  - Any sanctions imposed.
  - Rationale for the results.
  - Rationale for the sanctions.

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OCR "INTERIM GUIDE" SUMMARY



• Notice of Outcome

- For non-Clery-based allegations (harassment, K-12, etc.), "the school should inform the reporting party:
  - Whether it found that the alleged conduct occurred,
  - Any individual remedies offered to the reporting party, or
  - Any sanctions imposed on the responding party that directly relate to the reporting party,
  - Other steps the school has taken to eliminate the hostile environment (if the school found one to exist)."
  - In K-12, notice should be provided to parents if the student is <18 yrs. old and to the student if <18 yrs

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OCR "INTERIM GUIDE" SUMMARY



• Appeals

- Are not required
- A school does NOT need to provide the parties the same rights to appeal.
- A "school may choose to allow appeal (i) solely by the responding party; or (ii) by both parties, in which case any appeal procedures must be equally available to both parties."

• Existing Resolution Agreements

- Remain in full effect

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Q&A AND WRAP-UP




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**CONTACT  
INFORMATION**

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