



Association of
Title IX Administrators

Title IX Refresh: Navigating the Process Post-2020 Regulations

Maryland Affinity Group

November 17-18, 2021



Strategic Risk
Management Solutions



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

CONTENT ADVISORY

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

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

AGENDA

- 1 Title IX Overview
- 2 OCR Updates
- 3 When Does Title IX Apply?
- 4 Intersections Between Title IX and Clery/VAWA Section 304
- 5 Title IX Team Roles & Responsibilities
- 6 Notice to the Recipient/Complaint

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AGENDA

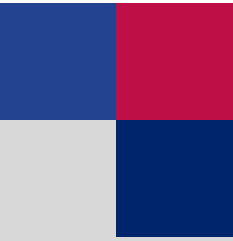
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TITLE IX OVERVIEW

- Text of the Law
- Key Title IX-Related Issues
- Essential Compliance Elements
- Due Process
- OCR Updates

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.”



KEY TITLE IX-RELATED ISSUES

Sex-Based Discrimination

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

Sexual Harassment

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

Retaliation

TITLE IX ESSENTIAL COMPLIANCE ELEMENTS

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

- Take immediate and appropriate steps to investigate what occurred
 - The obligation to investigate is absolute, even if just an Initial Assessment is completed (see *Davis*)
- Take prompt and effective action to:
 - Stop the harassment
 - Prevent the recurrence
 - Remedy the effects

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

DUE PROCESS: CURRENT ISSUES

Due Process concerns are at the heart of 2020 regulations:

- Applies to both public and private Recipients, which is a shift in legal paradigm
- Standard of Evidence
- Requirements for “Emergency Removal”
- Detailed Notice of Investigation and Allegations (NOIA) and written notice of the date, time, location, participants, and purpose of investigation interviews or other meetings, with sufficient time to prepare
- Providing investigation report and evidence for review/response

DUE PROCESS: CURRENT ISSUES (CONT.)

- Live hearing with cross-examination
- Advisor involvement (possibly including attorneys)
- Right to discuss the allegations under investigation without restriction
- Right to gather and present relevant evidence and witnesses without restriction
- Bias: TIXC, Investigators, Decision-makers, and Informal Resolution Facilitators
- Biased Training or Insufficient Training
- Requirement to publicly post training materials



OCR UPDATES

- Guidance Documents
- Other Actions

OCR UPDATES

OCR Guidance Documents

- OCR Title IX Q&A September 2020
- Questions and Answers Regarding the Title IX Regulations, Parts 1 and 2 (January 2021)
- Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation (January 2021)
- Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity (March 2021)

OCR UPDATES (CONT.)

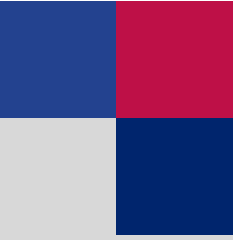
OCR Guidance Documents

- Federal Register Notice of Interpretation: Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County* (June 2021)
- Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021)
- OCR Blog: The Ruling Vacated a Provision Restricting Postsecondary Schools' Use of Statements by Parties and Witnesses (August 2021)

OCR UPDATES (CONT.)

Other OCR Actions

- Virtual Public Hearings (June 2021)
- Notice of Proposed Rulemaking indicating intent to amend Title IX Regulations (June 2021)
- Catherine Lhamon confirmation as Assistant Secretary for OCR (October 2021)



WHEN DOES TITLE IX APPLY?

- Personal Jurisdiction
- Geographic Jurisdiction
- Subject Matter Jurisdiction
- Definition of Sexual Harassment

WHEN DOES TITLE IX APPLY?

- Regulations emphasize the *Davis* standard - Title IX applies, and jurisdiction is required, when the recipient has:
 - Control over the harasser (Respondent) AND control over the context of the harassment
 - “Education program or activity” means...
 - locations, events, or circumstances under substantial control
 - any building owned or controlled by an officially recognized student organization
- At the time of filing a formal complaint, a Complainant must be participating in or attempting to participate in the Recipient’s education program or activity.

WHEN DOES TITLE IX APPLY?

Geographic Jurisdiction

- Sexual Harassment and Discrimination cases
 - Must be dismissed if did not occur against a person in the U.S., but...
 - Contrary case law
 - There is NO expectation that you exercise jurisdiction over off-site/off-campus incidents UNLESS
 - The property is owned or controlled by the school OR
 - The property is being used for a program or event sponsored by the school or an organization recognized by the school OR
 - The property is owned or controlled by an organization recognized by the school

WHEN DOES TITLE IX APPLY?

Geographic Jurisdiction (Cont.)

- The definition of sexual harassment arguably covers the in-program effects of out-of-program misconduct (though not the misconduct itself)
- Other forms of liability may still apply and the PPTVWM analysis may come into play here
- The Recipient may still be taking discretionary jurisdiction over incidents off-campus or on non-school property, but under other policies, not Title IX

WHEN DOES TITLE IX APPLY?

Subject Matter

- Sexual Harassment as defined in the 2020 Title IX regulations
- Sex/Gender discrimination (Equity)
 - The OCR recently noted this includes sexual orientation and gender identity (based on biological sex) following Supreme Court's *Bostock* case
- Any other policy violation that is sex/gender-based that causes a discriminatory effect (e.g., hazing, bullying, arson, vandalism, theft, etc.)
- Pregnant and parenting discrimination
- Retaliation

WHEN DOES TITLE IX APPLY?

Subject Matter (Cont.)

- Limitations:
 - Actions/conduct/speech protected by **academic freedom**
 - Pedagogically appropriate and germane to the subject matter of course that instructor hired to teach/research
 - Actions/conduct/speech protected by the **First Amendment**.
 - Merely offensive conduct cannot be disciplined at a public school
 - Must be **severe, pervasive, and objectively offensive**

DEFINITION OF SEXUAL HARASSMENT

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

REQUIRED DEFINITIONS – TIX REGULATIONS

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

- An employee of the Recipient conditioning the provision of an aid, benefit, or service of the Recipient on an individual's participation in unwelcome sexual conduct;
- Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the Recipient's education program or activity; or
- “Sexual assault” as defined in 20 U.S.C. 1092(f)(6)(A)(v)
“Dating violence” as defined in 34 U.S.C. 12291(a)(10)
“Domestic violence” as defined in 34 U.S.C. 12291(a)(8)
“Stalking” as defined in 34 U.S.C. 12291(a)(30)

SEXUAL ASSAULT

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

- **Rape** - Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the Complainant.
- **Sodomy** - Oral or anal sexual intercourse with another person, forcibly and/or against that person's will or not forcibly or against the person's will (non-consensually) in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

SEXUAL ASSAULT (CONT.)

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

SEXUAL ASSAULT (CONT.)

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

DATING VIOLENCE

- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the Complainant. The existence of such a relationship shall be determined based on the Complainant's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. For the purposes of this definition —
 - Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
 - Dating violence does not include acts covered under the definition of domestic violence.

DOMESTIC VIOLENCE

- A felony or misdemeanor crime of violence committed —
 - By a current or former spouse or intimate partner of the Complainant;
 - By a person with whom the Complainant shares a child in common;
 - By a person who is cohabitating with, or has cohabitated with, the Complainant as a spouse or intimate partner;
 - By a person similarly situated to a spouse of the Complainant under the domestic or family violence laws [insert your state here];
 - By any other person against an adult or youth Complainant who is protected from that person's acts under the domestic or family violence laws of [insert your state here].

DOMESTIC VIOLENCE (CONT.)

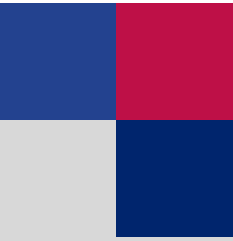
- To categorize an incident as Domestic Violence, the relationship between the Respondent and the Complainant must be more than just two people living together as roommates. The people cohabitating must be current or former spouses or have an intimate relationship.

STALKING

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

STALKING (CONT.)

- **Reasonable person** means a reasonable person under similar circumstances and with similar identities to the Complainant.
- **Substantial emotional distress** means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling.
- The TIX regulations insist this definition not be interpreted to violate First Amendment.



INTERSECTIONS OF TITLE IX AND CLERY ACT AMENDMENT: VAWA SECTION 304 (2013)

- Clery Act
- Violence Against Women Act Section 304
- Annual Security Report Requirements
- Policy, Procedures, and Training Requirements
- Timely Warnings & Emergency Notifications

THE CLERY ACT

- The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (20 U.S.C. § 1092(f))
 - Jeanne Clery was raped and murdered in her residence hall room at Lehigh University – prompted legislation
 - Originally passed in 1990 as the “Student Right-to-Know and Campus Security Act”
 - Amended in 1992, 1998, 2008 by Higher Education Act reauthorization
 - Amended in 2013 by VAWA Reauthorization
- Requires publication of Annual Security Report (ASR) by October of each year

CLERY: VAWA SECTION 304

- Violence Against Women Act (VAWA) 2013 Reauthorization included significant amendments to the Clery Act:
 - Section 304: Campus Sexual Violence Elimination Act, or “Campus SaVE”
 - Substantially amended the Clery Act
 - Codified some aspects of the April 4, 2011 Department of Education’s Dear Colleague Letter (DCL) – **DCL Now Rescinded**

CLERY: VAWA SECTION 304

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

- Sexual assault
 - Stalking
 - Dating violence
 - Domestic violence
- The “Big 4”**
- Prohibits retaliation

ANNUAL SECURITY REPORT (ASR)

- October 2020: 2016 Handbook for Campus Safety and Security Reporting was rescinded and replaced with the **Clery Act Appendix for Federal Student Aid (FSA) Handbook**
 - <https://ifap.ed.gov/electronic-announcements/100920RescissionReplace2016HandbookForCampusSafetySecurityReporting>
- Clery Geography: Three categories of locations subject to reporting: on-campus; non-campus building or property; public property
 - Note: Clery geography and Title IX jurisdiction are separate and overlapping

ANNUAL SECURITY REPORT (CONT.)

Reports of Clery Crimes:

- Criminal Homicide
- Robbery
- Burglary
- Arson
- Aggravated Assault
- Motor Vehicle Theft
- Liquor Law Violations
- Drug Law Violations
- Illegal Weapons Possession
- **Rape/Sexual Assault**
- **Domestic Violence**
- **Dating Violence**
- **Stalking**
- **Fondling**
- **Incest**
- **Statutory Rape**
- All Hate Crimes

ANNUAL SECURITY REPORT: HATE CRIME CATEGORIES

Categories of prejudice – actual or perceived:

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

ANNUAL SECURITY REPORT REQUIRED CONTENT

Policies

- Regarding alcoholic beverages and underage drinking
- Regarding illegal drugs and applicable state and federal laws
- Missing student notifications
- Procedures for reporting criminal actions or other campus emergencies
- Security of and access to campus facilities
- Enforcement authority of security personnel

Programs

- Substance abuse
- **DV/DV, SA, and stalking prevention**
- Campus security procedures and practices

Other

- **Information regarding sex offenders**
- Descriptions of emergency response and evacuation procedures
- **Campus crime statistics**
- **Procedures institutions will follow when DV/DV, SA, or stalking is reported**

POLICIES & PROCEDURES: COMPLAINANT SERVICES

- VAWA identifies requirements for institutions to provide information and services to Complainants that overlap with and add to the supportive measure requirements under Title IX

Policy statements in the ASR must include:

- Procedures Complainants should follow if domestic violence, dating violence, sexual assault or stalking occur, including information in writing regarding:
 - The importance of preserving evidence to prove a crime or obtain a protective order
 - To whom such incidents should be reported
 - That, if the Complainant wishes, campus authorities may assist the Complainant in notifying police

POLICIES & PROCEDURES: COMPLAINANT SERVICES

Policy statements in the ASR must include (Cont.):

- Victim's options to notify (may also decline to notify)*
 - Law enforcement (campus and local)
 - Campus authorities
- Written notification to students and employees about existing services for:
 - Counseling
 - Health
 - Mental health
 - Victim advocacy
 - Legal assistance
 - Other services available for victims
 - Both on campus and in the community

*Some states require law enforcement reporting if the institution is aware of an incident of sexual assault

POLICIES & PROCEDURES: COMPLAINANT SERVICES

Policy statements in the ASR must include (Cont.):

- Written notification to victims about options for, and available assistance in, changing (at victim's request):
 - Academic enrollment or class schedule
 - Living arrangements (on campus)
 - Transportation access
 - Working situations
- If reasonably available and irrespective of whether the Complainant chooses to report to campus or local law enforcement

POLICIES & PROCEDURES: COMPLAINANT SERVICES

Policy statements in the ASR must include:

- Rights of Complainants and institutional responsibilities regarding protective measures issued by a criminal or tribal court, including:
 - Orders of protection
 - No contact orders
 - Restraining orders
 - Similar lawful orders

POLICIES & PROCEDURES: STANDARD OF EVIDENCE

- ASR must include a statement of the standard of evidence that will be used during any institutional conduct proceeding arising from a report of domestic violence, dating violence, sexual assault, or stalking
 - VAWA does not require a particular standard
- Title IX regulations allow for the choice of using preponderance of the evidence or clear and convincing evidence
 - ATIXA recommends the preponderance standard as it is the most equitable standard
- Whichever standard is used for students, must be used for employees and across all sexual harassment resolution processes

POLICIES & PROCEDURES: PROMPT, FAIR, AND IMPARTIAL

- Institutional disciplinary procedures shall “provide a prompt, fair and impartial investigation and resolution.”
 - Complainant and Respondent are entitled to the same opportunities to have a support person/**Advisor of their choice** at any proceeding or related meetings.
 - The Complainant and Respondent must be **simultaneously informed in writing** of:
 - The outcome that arises from an allegation of domestic violence, dating violence, sexual assault, or stalking
 - The institution’s procedures for appeal
 - Any change to the results that occur prior to the time that such results become final
 - When such results become final

POLICIES & PROCEDURES: PROMPT, FAIR, AND IMPARTIAL (CONT.)

- If the institution addresses sexual assault, dating and domestic violence, and stalking under more than one policy or process, the Title IX formal grievance process and any other policy or process(es) must be VAWA compliant

POLICIES & PROCEDURES: CONFIDENTIALITY

Policy statements in the ASR must include:

- Information about how the Complainants' confidentiality will be protected, including how publicly available recordkeeping will be accomplished without including identifying information about the Complainant, to the extent permissible by law
 - Timely warnings must withhold the names of Complainants as confidential

POLICIES & PROCEDURES: SANCTIONS AND PROTECTIVE MEASURES

Policy statements in the ASR must include:

- Possible sanctions or protective measures that [an] institution may impose following a final determination of an institutional disciplinary procedure regarding:
 - Domestic violence
 - Dating violence
 - Sexual assault
 - Stalking

VAWA 2013: ANNUAL TRAINING REQUIREMENTS

- Annual training of officials involved in investigating and/or resolving complaints:
 - **The four types of cases:** Domestic violence, Dating violence, Sexual assault, and Stalking
 - **How to conduct an investigation** “that protects the safety of victims and promotes accountability.”
 - **How to conduct a “hearing process** that protects the safety of victims and promotes accountability.”
- Important to follow Title IX regulations with respect to training topics
- Make sure training materials are neutral

VAWA: EDUCATIONAL PROGRAMS AND CAMPAIGNS

- Programs should be tailored to each institution and its constituents and be:
 - Culturally relevant
 - Inclusive of diverse communities and identities
 - Sustainable
 - Responsive to community needs
 - Informed by research or assessed for value, effectiveness, or outcome (i.e., research conducted according to scientific standards and efficacy assessments performed by institutions and organizations)
 - Consider environmental risk and protective factors as they occur in the individual, relationship, institutional, community, and societal levels

VAWA: EDUCATIONAL PROGRAMS AND CAMPAIGNS

- Must be directed at **all incoming students** and **new employees**
 - No requirement that all take or attend, but an attendance mandate is encouraged
 - Institutions **must** make a “good-faith effort” to reach all incoming students and all new employees
 - Requires “active notification of the training’s availability and providing the training in a format and timeframe that encourages and allows for maximum participation.” (34 C.F.R. § 668.46)
 - Means of delivery (in-person, theatrical, online videos, online interactive) can vary depending “on the circumstances of your community.” (34 C.F.R. § 668.46)

VAWA: EDUCATIONAL PROGRAMS AND CAMPAIGNS

- Programming should include a statement that the institution prohibits the crimes of dating violence, domestic violence, sexual assault, and stalking as those terms are defined by the Title IX regulations.
- Institutional policies must mirror Title IX (34 C.F.R. §106.30) regulatory definitions, which include the definitions of:
 - Dating violence, domestic violence, sexual assault, and stalking
 - Consent in reference to sexual activity
 - Should also state institutional definition of consent and how it is applied

RISK REDUCTION

- Programming should include “information on risk reduction.” (34 C.F.R. § 668.46)
 - Defined as options designed to:
 - Decrease perpetrations and bystander inactions
 - Increase empowerment for victims in order to promote safety
 - Help individuals and communities address conditions that facilitate violence

Note: Information about risk reduction must not be presented in a manner that encourages victim blaming

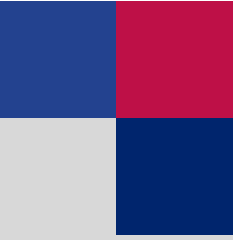
TITLE IX/VAWA SEC. 304 PREVENTION EDUCATION & TRAINING CHECKLIST

Trainee Populations:

- Title IX Team Members
 - TIX Coordinator and Deputies, Investigators, Decision-Makers, Advisors, and Informal Resolution Facilitators
- First Responders
 - RAs, health center employees, counselors, academic advisors, victim advocates, and public safety/police
- Officials With Authority (OWAs) and Responsible Employees/Mandatory Reporters
- All Faculty & Staff
- All Students

TIMELY WARNINGS AND EMERGENCY NOTIFICATIONS

	Emergency Notifications	Timely Warnings
Scope	Significant emergency or dangerous situation	Clery crimes reported to CSAs
Triggered by?	Event that is currently occurring on or imminently threatening campus	Crimes that occurred and represent an ongoing threat
Where event occurs?	Only on campus	Anywhere on Clery geography
How soon to issue?	Immediately upon confirmation of situation	As soon as information is available



TITLE IX TEAM ROLES & RESPONSIBILITIES

- Who Is On The Team
- Required Training
- Title IX Team Competencies
- Publication of Training Materials

THE TITLE IX TEAM

- Title IX Coordinator(s)
- Deputy Coordinator(s)
- Investigator(s)
- Decision-Makers—can be a single Decision-maker or a panel of Decision-makers
 - Policy Violation
 - Appeal
- Institution-appointed Advisors
- Informal Resolution Facilitator(s)

TITLE IX: REQUIRED TRAINING TOPICS

- Definition of sexual harassment
- Scope of the Recipient's education program or activity
- How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- Use of any technology to be used at a live hearing
- Issues of relevance of questions and evidence, including when questions and evidence about the Complainant's sexual predisposition or prior sexual behavior are not relevant
- How to create an investigation report that fairly summarizes relevant evidence

TITLE IX TEAM COMPETENCIES

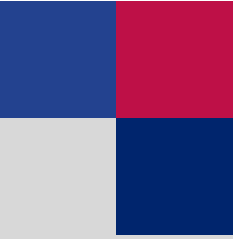
- Legal Landscape
- Resolution Process
- Understanding Investigations
- Investigation Skills
- Title IX & VAWA Requirements
- Pre-Hearing Evidence Review
- Pre-Hearing Investigation Report Review
- Critical Thinking Skills
- How to Prepare for a Hearing
- Hearing Decorum
- Questioning Skills
- Relevance
- Weighing Evidence
- Analyzing Policy
- Applying Standards of Evidence
- Technology Used at Hearing
- Controlling Evidence
- Managing Advisors
- SANE and Police Reports
- Conducting Initial Assessments
- Informal Resolution Models and Facilitation Techniques

TITLE IX TEAM COMPETENCIES (CONT.)

- Presumption of Innocence
- Due Process and Fairness
- Bias/Impartiality/Conflicts of Interest
- Stalking/Sexual Assault/Harassment
- Domestic/Dating Violence
- Discrimination
- Deliberation
- Sanctioning/Remedies
- Understanding the Appeal Process
- Cultural Competency
- Intersection with Mental Health Issues
- Concurrent Criminal Prosecutions
- Impact of Failing to Testify/Answer
- Manage Accommodations During Process
- Fixing Procedural Deviations
- Managing Impact Statements
- Writing Investigation Reports
- Writing Decisions/Rationales

PUBLICATION OF TRAINING MATERIALS

- Make all materials used to train Title IX Coordinators, Investigators, Decision-makers, and any person who facilitates an informal resolution process publicly available on the Recipient's website, or if the Recipient does not maintain a website, the Recipient must make these materials available upon request for inspection by members of the public
 - The most recent materials used to train the Title IX Team should be posted
 - Although seven year of materials need to be maintained, only most recent need to be posted
 - This requirement is not retroactive; seven years started August 14, 2020



NOTICE TO THE RECIPIENT/COMPLAINT

- Actual Knowledge/Notice
- Responsible Employees
- Report Versus Formal Complaint
- Supportive Measures
- Requests for Confidentiality

NOTICE TO THE INSTITUTION

- “Actual Knowledge” is defined as a report being received by:
 - The TIX Coordinator; or
 - Any official who has authority to institute corrective measures on behalf of the recipient
- Who is an official with authority?
- May still designate confidential employees/resources

RESPONSIBLE EMPLOYEES

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

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

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

REPORT

- Distinguish between a “report” and a “formal complaint”
- Upon receiving a “report” (either from the would-be Complainant or a third party):
 - Reach out to the Complainant.
 - Provide supportive measures to the Complainant. May also offer to would-be Respondent.
 - Explain process to make a formal complaint.
 - Also explain option to report to law enforcement (VAWA requirement)

SUPPORTIVE MEASURES

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

REQUESTS FOR CONFIDENTIALITY

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

- The Complainant should be notified of the following:
 - The process will still be available to them, regardless of how long they wait
 - The institution can provide resources and supportive measures to limit the effect of the behavior on the Complainant
 - If information is brought to the attention of the institution that may involve a threat to the community, the institution may be forced to proceed with an investigation, but that the Complainant will be notified of this process

REQUESTS FOR CONFIDENTIALITY (CONT.)

- The Complainant should be notified of the following:
 - The institution's responsive action/remedial abilities may be limited based on the level of confidentiality or privacy requested by Complainant
 - Privacy cannot be guaranteed if doing so would jeopardize the safety of the Complainant or others
 - Only those with a need to know will be informed
 - If the Respondent is an employee, the institution may need to proceed due to Title VII

REQUESTS FOR CONFIDENTIALITY (CONT.)

- The institution should take all reasonable steps to respond consistent with the Complainant's request.
 - Provided that doing so does not prevent the institution from responding effectively and preventing the harassment of other students or the Complainant.
- Use the PPTVWM analysis to determine whether you are to honor a Complainant's request for confidentiality.
- Proceeding without a Complainant's participation has due process implications for the Respondent.

FORMAL COMPLAINT

Formal Complaint

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



INITIAL ASSESSMENT

- Overview of Initial Assessment
- When Does a Coordinator File a Formal Complaint?
- Mandatory and Permissive Dismissal
- Emergency Removal
- Which Process Applies?

INITIAL ASSESSMENT

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

- Has there been a formal complaint?
- Does the TIXC need to sign/initiate a formal complaint?

Upon receipt of a formal complaint, the TIXC should determine the following:

- Does the alleged conduct meet the required definitions?
- Does jurisdiction exist?
- Can/should Recipient remedy informally or without discipline?
- Mandatory/Discretionary dismissal considerations
- If dismissed, does an alternate policy/process apply?

INITIAL ASSESSMENT (CONT.)

- If proceeding under Title IX:
 - Establish basis of investigation:
 - Incident or pattern, and/or climate/culture
 - Establish a preliminary timeline for the investigation
- If no formal action, document how Recipient's response was not deliberately indifferent.

PPTVWM

- Title IX Coordinator may need to file a formal complaint if any of the following are present:
 - **PPTVWM**
 - Pattern
 - Predation
 - Threat
 - Violence/Weapon
 - Minors (will always be reported to proper authorities)

MANDATORY DISMISSAL OF A FORMAL COMPLAINT

The TIX Coordinator MUST dismiss the complaint at any time if the alleged conduct:

- Would not constitute sexual harassment as defined (five offenses in § 106.30), even if proved
- Did not occur in the Recipient's education program or activity
- Did not occur against a person in the United States
- The Complainant is not participating or attempting to participate in Recipient's program at time of complaint

DISCRETIONARY/PERMISSIVE DISMISSAL OF A FORMAL COMPLAINT

The TIX Coordinator MAY dismiss the complaint if at any time prior to a determination:

- Complainant notifies the Title IX Coordinator in writing that the Complainant would like to withdraw the formal complaint or any allegations
- Respondent is no longer enrolled or employed by Recipient
- Specific circumstances prevent the Recipient from gathering evidence sufficient to reach a determination as to the formal complaint or any allegations

MANDATORY OR PERMISSIVE DISMISSAL OF A FORMAL COMPLAINT

- Written notice of dismissal to parties required
 - Dismissal (or non-dismissal) of formal complaint may be appealed

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

EMERGENCY REMOVAL

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

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



WHICH PROCESS APPLIES?

- Process A
- Process B

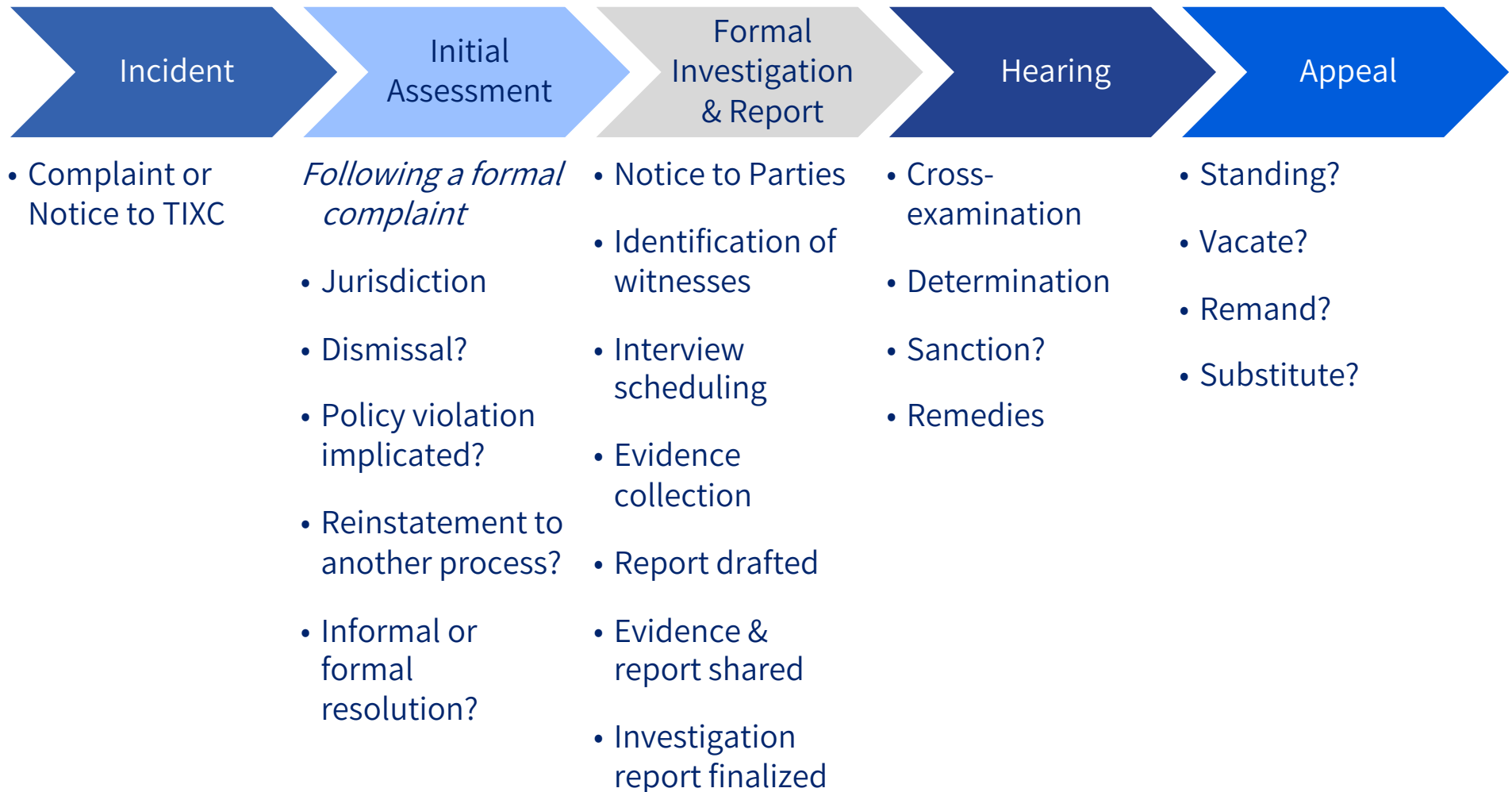
“PROCESS A” OR “PROCESS B”?

- Due Process is at the heart of OCR’s 2020 Title IX regulations. However, the Regulations effectively create two distinct processes for responding to sex-based discrimination. (see ATIXA’s 1P2P model)
 - Limiting jurisdictional language and definitions of Sexual Harassment mean that “Process A” (Compliant with Section 106.45 of the regulations) **only** applies when that language and those definitions are met.
 - If **any** of the allegations meet the definitions under Section 106.30 of the regulations, then the “Process A” must be followed.

“PROCESS A” OR “PROCESS B”? (CONT.)

- If **none** of the allegations meet the definitions or jurisdictional limitations under Section 106.30, then you would follow “Process B,” which meets the requirements of fundamental fairness or due process, but likely does not have some of the more prescriptive requirements of Section 106.45 (e.g., mandatory live hearing, cross-examination requirements, requirement for both parties to sign off on informal resolution, etc.)
- VAWA Section 304, state law, and case law in your jurisdiction will largely dictate your “Process B.”

“PROCESS A”



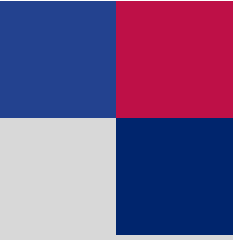
REQUIRED DEFINITIONS – “PROCESS A”

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

- An employee of the Recipient conditioning the provision of an aid, benefit, or service of the Recipient on an individual’s participation in unwelcome sexual conduct;
- Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the Recipient’s education program or activity; or
- “Sexual assault” as defined in 20 U.S.C. 1092(f)(6)(A)(v)
“Dating violence” as defined in 34 U.S.C. 12291(a)(10)
“Domestic violence” as defined in 34 U.S.C. 12291(a)(8)
“Stalking” as defined in 34 U.S.C. 12291(a)(30)

IF TIX JURISDICTION IS NOT PRESENT

- Behavior could still violate and be addressed under “Process B”
 - Institutional harassment/discrimination policies
 - Student Handbook/conduct policies
 - Technology/Acceptable Use policies
 - Employee Handbook/conduct policies
 - Professionalism standards
- Institution should still take steps to:
 - Provide support and resources to the Complainant and campus community
 - Address any “downstream effects”
 - Determine if there are patterns or institutional variables that contributed to the alleged incident
 - Take what action it can (e.g., trespass the person)



INFORMAL RESOLUTION CONSIDERATIONS

- Informal Resolution Under the Regulations
- ATIXA's Informal Resolution Process
- Informal Resolution Considerations

INFORMAL RESOLUTION PITFALLS

- Is IR appropriate?
- What type of IR will be used?
- Who will/should facilitate the process?
- Does the formal process continue if IR is occurring?
- What, if any, information will be shared (and with whom) if IR fails?
- Insufficiently trained IR facilitators
- Others?

INFORMAL RESOLUTION

- The Title IX regulations include a provision that encourages informal resolution, and it is a worthy practice, when voluntary.
 - Following formal complaint
 - Allowed at any time prior to a final determination at discretion of TIXC
 - Voluntary, written consent of the parties
 - OCR regs preclude informal resolution of allegations that an employee harassed a student
 - Must still stop, prevent, remedy, and document response

INFORMAL RESOLUTION

- ATIXA has framed a process for Informal Resolution that includes:
 - A response based on supportive measures; and/or
 - A response based on a Respondent accepting responsibility; and/or
 - A response based on alternative resolution, which could include various approaches and facilitation of dialogue.
- ATIXA does not endorse these approaches as better or worse than other formal or informal approaches.

INFORMAL RESOLUTION (CONT.)

- **Supportive Measures Only** – a type of Informal Resolution in which the Title IX Coordinator resolves the matter by providing supportive measures (only) to remedy the situation
- **Accepted Responsibility** – a type of Informal Resolution in which the Respondent accepts responsibility for violating policy and accepts the recommended sanction(s), ending the Resolution Process

INFORMAL RESOLUTION (CONT.)

- **Alternative Resolution (AR)** – a type of Informal Resolution in which the parties agree to resolve the complaint through an alternative resolution mechanism such as facilitated dialogue, mediation, or restorative practices.
 - Alternative Resolution may allow for, but does not require, the parties to communicate directly about the complaint with the assistance of a third-party facilitator.
- Alternative resolution approaches like mediation, restorative practices, transformative justice, etc., are likely to be used more often by colleges and universities.

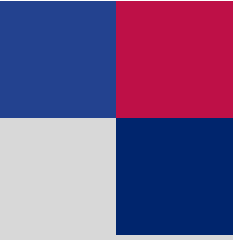
INFORMAL RESOLUTION CONSIDERATIONS

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

- Amenability of the parties to Informal Resolution
- Likelihood of potential resolution, taking into account any power dynamics between the parties
- Motivation of the parties to participate
- Civility of the parties
- Cleared violence risk assessment/ongoing risk analysis
- Whether an emergency removal is needed
- Skill of the Informal Resolution facilitator with the type of complaint

INFORMAL RESOLUTION CONSIDERATIONS (CONT.)

- Complexity of the complaint
- Emotional investment/intelligence of the parties
- Rationality of the parties
- Goals of the parties
- Adequate time to invest in Informal Resolution (resources, staff, etc.)



INVESTIGATION CONSIDERATIONS

- Investigation Pitfalls
- Evidence and Report Review and Comment Periods
- Investigation Report

INVESTIGATION PITFALLS

- Insufficient NOIA
- Understanding relevant evidence
- Organizing the “buckets” of evidence
- Managing Advisors
- Handling delays
- Poorly written investigation reports
- Failure to have TIXC and/or legal counsel review report
- Insufficiently trained Investigators
- Others?

NOTICE REQUIREMENTS PRIOR TO INVESTIGATION

After receiving a formal complaint, the Recipient must provide the following written notice to the parties who are known:

- Notice of the grievance process, including any informal resolution process
- Notice of the allegations of sexual harassment potentially constituting sexual harassment, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview, including:
 - The identities of the parties involved in the incident, if known
 - The conduct allegedly constituting sexual harassment
 - The date and location of the alleged incident, if known

NOTICE REQUIREMENTS PRIOR TO INVESTIGATION (CONT.)

- A statement that the Respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process
- Notice that the parties may have an Advisor of their choice, who may be, but is not required to be, an attorney, and may inspect and review evidence
- Parties may inspect and review evidence prior to the completion of the investigation report
- Any provision from code of conduct that prohibits knowingly making false statements or knowingly submitting false information (if any)
- Update notice if additional allegations will be added/investigated

EVIDENCE AND REPORT REVIEW BY PARTIES

PART 1

Prior to the completion of the Investigation Report:

- Evidence directly related to allegations must:
 - Be sent to each party and Advisor
 - Be in an electronic format or hard copy
 - Include evidence upon which the Recipient does not intend to rely
 - Include exculpatory and inculpatory evidence
 - Be made available at any hearing
- After sending the evidence, the Investigator must:
 - Allow 10 days for written response
 - Consider response prior to completion of report

Source: § 106.45(b)(5)(vi)

EVIDENCE AND REPORT REVIEW BY PARTIES

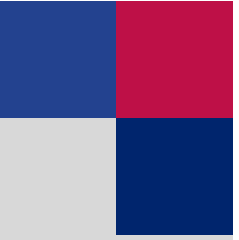
PART 2

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

- The final Investigation Report summarizing relevant evidence must be sent:
 - To each party and advisor
 - In an electronic format or hard copy
 - For the parties' review and written response
 - Best Practice: Provide the investigation report to the TIXC and/or legal counsel to review for completeness prior to being shared with the parties

THE INVESTIGATION REPORT

- Comprehensive document summarizing the investigation
 - Results of interviews with parties and witnesses (including experts)
 - Summary of other information collected (i.e., information from police reports, medical exams, video surveillance and photographs; copies of text, email and social networking messages; etc.)
- G.A.S. framework
 - **Gather** evidence; **Assess** credibility and evidence; **Synthesize** areas of dispute/agreement and all questions asked
 - Can/should the investigator make a recommendation?
- The supplemental evidence file included with the report



UNDERSTANDING EVIDENCE

- Understanding Evidence
- Relevance
- Credibility
- Types of Evidence

UNDERSTANDING EVIDENCE

- The formal federal rules of evidence do not apply in Title IX investigations or hearings
- If the information helps to prove or disprove a fact at issue, it should be admitted because it is relevant
- 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 alleged policy violation directly
- **Relevance → admissibility of the evidence**
- **Credibility → how much weight admissible evidence is given**

RELEVANCE

- Evidence is generally considered **relevant** if it has value in proving or disproving a fact at issue, and relevance means the evidence may be relied upon by the Decision-maker
 - Regarding alleged policy violation and/or
 - Regarding a party or witness's credibility
- The Investigator will have made initial relevance “decisions” by including evidence in the investigation report
- Relevance is ultimately up to the Decision-maker, **who is not bound by the Investigator's judgment**
- **All** relevant evidence must be objectively evaluated and considered – both inculpatory and exculpatory

CREDIBILITY

- Credibility is largely a function of corroboration and consistency
- To assess credibility is to assess the extent to which you can rely on an individual's 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

BUCKET 1: RELEVANT EVIDENCE



- Evidence is relevant when it tends to prove or disprove an issue in the complaint
- Parties may make case to Investigators/Decision-makers that this evidence should be shifted to Bucket 2 or 3
- Once finalized, this evidence should be provided to the parties/Advisors/Decision-makers within the investigation report via secure technology

BUCKET 2: DIRECTLY RELATED, BUT NOT RELEVANT EVIDENCE



- Evidence is directly related when it is connected to the complaint but is neither inculpatory nor exculpatory and will not be relied upon in the investigation report
- Parties may make case to Investigators/Decision-makers that this evidence should be shifted to Bucket 1 or 3
- Once finalized, this evidence should be provided to the parties/Advisors/Decision-makers in a separate file via secure technology

BUCKET 3: NEITHER RELEVANT NOR DIRECTLY-RELATED EVIDENCE



- Evidence should be maintained by the Investigator(s) but disregarded for purposes of the process
- Parties/Advisors/Decision-makers don't get to know about it



ADVISORS IN TITLE IX PROCEEDINGS

- Advisor Pitfalls
- Advisor Types, Roles, Expectations, and Limitations
- Considerations for Being an Advisor
- Advisors at the Live Hearing
- Advisor Questioning and Cross-Examination

ADVISOR PITFALLS

- “Unwilling” Advisors/Identifying institution-appointed Advisors
- Failure to set/establish Advisor expectations at outset
- Insufficient preparation
- Managing attorney-advisors
- Effectively managing questioning and cross-examination
- Responding to Advisors who “challenge” institution policy/procedures
- Lack of confidence/Over confidence in ability to serve in the role
- Insufficiently trained Advisors
- Others?

TYPES OF ADVISORS

- The Title IX process essentially systematizes two types of Advisors:
 - **Advisor of Choice**
 - May be present for every meeting, interview, hearing
 - **Institution-Appointed Advisor**
 - Requirement applies only to higher education
 - This Advisor may accompany the party throughout the entire resolution process, but the institution may limit this Advisor to only participating in the hearing and will usually only appoint this Advisor if the party has not chosen one by the time of the hearing

ADVISOR OF CHOICE

- Parties must have the same opportunities to have others present during any proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the Advisor of their choice, who may be, but is not required to be, an attorney
- May not limit the choice or presence of Advisor for either the Complainant or Respondent
 - Don't have to provide an attorney or equivalently educated/trained Advisor to one party just because the other party has one

ADVISOR OF CHOICE (CONT.)

- Can regulate the extent to which Advisors may participate in the proceedings, if restrictions apply equally to all parties
- The Title IX regulations overlap with similar provisions in VAWA Section 304*
 - VAWA applies to sexual assault, dating violence, domestic violence, and stalking
 - Title IX applies to all four of the above **PLUS** sexual harassment

*Violence Against Women Reauthorization Act of 2013

INSTITUTION-APPOINTED ADVISOR

- Must be provided free of charge
- No requirement to be an attorney or for “equitable” advisors
- Advisee isn’t the Advisor’s “client”
- Conversations unlikely to be governed by any “privilege” regardless of role
- If Advisor is also an institutionally mandated reporter, what happens if employer asks Advisor to disclose information that has been shared by an advisee?
- Advisors need an ethical code or strong personal/professional integrity to guide them
 - What if an advisee asks an Advisor to do something they consider unethical, such as mislead or conceal evidence?
 - What if an Advisor knows their advisee is knowingly providing false or misleading information?

INSTITUTION-APPOINTED ADVISOR (CONT.)

- An Advisor could be called by the other party as a witness and asked about what they know (at Recipient's discretion)
 - Unless an institutional rule prohibits this or confers “confidentiality” on the Advisor
- Advisors may not like or believe an advisee
- An advisee may not like or trust their Advisor
- Advisors are not required to be aligned with their advisee, but if not, friction can result

WHO CAN SERVE AS AN ADVISOR?

- Friends, family, roommates, faculty, college or school staff members, attorneys, etc.
- Institutional rules will determine if a party may have more than one Advisor
 - Union representation cases
 - When a party wants an Advisor and an emotional support person
- If more than one Advisor is not permitted, the advisee can rotate Advisors during the process, or the advisee can have one Advisor outside the meeting, and one inside with them

WHO CAN SERVE AS AN ADVISOR? (CONT.)

- An individual can't advise both a Complainant and Respondent in the same matter
- Must be eligible and available, meaning that institutional employees can refuse to serve as an Advisor for any reason, and should do so if it would place them in the position of a conflict of interest or commitment
- If an individual serves as both an Advisor and has a role as a witness in the matter, they may wind up limiting the efficacy of their testimony as a witness because the Decision-maker may discount their credibility based on their dual roles

ROLE OF THE ADVISOR

Depending upon institutional policy and advisee requests, and Advisor may:

- Accompany their advisee through all phases of the resolution process and explain the process
- Help their advisee decide whether to file a formal complaint and navigate other strategic issues such as whether to participate in informal resolution
- Prepare their advisee to respond to questions during the investigation, even rehearsing beforehand, and determine what evidence to share during an interview

ROLE OF THE ADVISOR (CONT.)

- Help the advisee access supportive measures, community resources, and advocacy services
- Help the advisee to review and comment on the investigation report
- Help the advisee to advocate for the inclusion or exclusion of evidence from the process
- Help the advisee prepare for the hearing (documentation, opening statements, closing statements, impact statements, etc.), and **must** conduct any cross-examination at the hearing
- Help the advisee to frame the appeal and prepare appeal documentation

INSTITUTIONAL EMPLOYEE AS ADVOCATE VS. ADVISOR

Advocate

- Confidential (**not** privileged)
 - Records belong to the institution
- Supportive and non-directive
- Connection to resources
- Assist with obtaining supportive measures
- Wait for contact from the individual to initiate follow-up
- Active listening; allow the individual to share their story in a narrative fashion based on their reality

Advisor

- Private
 - Records belong to the institution
- Supportive and directive
- Assist with navigating the process
- Initiate contact more frequently; sometimes administrative in nature
- Need to ask pertinent questions, including questions that may feel invasive or not based solely on the advisee's reality
- Responsible for cross-examination during hearing

ADVISOR EXPECTATIONS

- Get trained
- Learn the applicable policies and procedures
- Understand your role thoroughly and when you don't know something, figure out how to find the answer or who to ask
- Advise with integrity and follow any applicable professional ethics
- Get to know the Title IX Team, if you can, and establish a good rapport
- Be timely, professional, and organized

ADVISOR EXPECTATIONS (CONT.)

- Don't try to unnecessarily delay the process. The institution may delay a week or two to accommodate an Advisor's schedule, but they don't have to, and many institutions won't allow an unreasonable delay, or an attempt to run out the clock

CONSIDERATIONS FOR BEING AN ADVISOR

- Advisor and advisee may not agree on strategy
- Advisee doesn't have to listen to, and can refuse to cooperate with, their Advisor
- Advisee can request/find a different Advisor
- Advisee can raise concerns or a complaint about the Advisor's work, if an institution-appointed Advisor
 - Could the future include lawsuits that look like “ineffective assistance claims?”
 - Insurance and indemnity coverage for institution-appointed Advisors

CONSIDERATIONS FOR BEING AN ADVISOR (CONT.)

- Serving in the Advisor role may be seen as political, if an individual is also an institutional employee
 - Will an individual only work with Complainants?
 - Only with Respondents?
 - With both?
 - Potential conflicts of interest?
 - Consider the present and the future

ADVISORS AT THE LIVE HEARING

- Institutions may limit the role of Advisors during the hearing except for cross-examination and conferring with the party
- Advisors **chosen by** the party should conduct cross-examination
 - Can opt not to ask any questions
 - If they refuse to ask questions their advisee wishes them to ask, the institution will appoint an Advisor who will
- An Advisor **appointed for** the party will conduct cross-examination
- The regulations envision that the Advisor will not do more than repeat or rephrase questions framed by the party, but in many hearings, expect that the Advisor will be far more active and engaged than that

ADVISOR QUESTIONING & CROSS-EXAMINATION

- Golden Rule
- Ask direct questions. Don't try intimidation tactics. They will likely backfire.
- Don't try to trick or confuse others, either, for the same reasons.
- Remain seated while questioning. A hearing is not a courtroom.
- Respect the rules and boundaries of the process, even if you don't agree with them (unless they violate the regulations).
- Pause after asking each question to allow the Chair/Decision-maker to determine the relevance.
- Avoid multi-part or confusing questions.

ADVISOR QUESTIONING & CROSS-EXAMINATION (CONT.)

How many questions should an Advisor prepare to ask?

- Our advice is to ask witnesses (through direct examination or cross-examination) about every significant statement they have made (use the investigation report and interview transcripts as a roadmap)
- Advisors should prepare with their advisee so that they know what to ask of each witness and what their advisee wants them to ask
- Stick to what is relevant, which means the evidence would tend to prove or disprove an issue in the complaint

ADVISOR QUESTIONING & CROSS-EXAMINATION (CONT.)

- Expect that the panel or Decision-maker may ask many questions as well, and that it may do so before an Advisor has a chance. If so, the Chair or Decision-maker may disallow an Advisor's question if it duplicates a previously asked question.
- Keep track of what has been asked and be prepared to explain why a question is relevant or may produce a different answer than was already provided.

ADVISOR QUESTIONING & CROSS-EXAMINATION (CONT.)

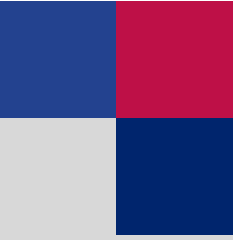
- Advisors should be supportive when their advisee is being questioned. If an advisee is uncomfortable or emotional, the Advisor can ask for a break.
- If a question is abusive, the Advisor should ask the Decision-maker to rule on it.
- If an Advisor thinks their advisee doesn't understand a question, they may ask the Decision-maker for it to be repeated or clarified, or they may repeat it for the advisee.
 - Thus, you need to pay close attention to the question being asked.
- An advisee may find it helpful to pause before answering, pose the question again to themselves in their head, make sure they understand what is being asked, compose their thoughts in response, and then answer.

ADVISOR QUESTIONING & CROSS-EXAMINATION (CONT.)

- If an advisee wants to pause to discuss a question or answer with their Advisor, they can do so, and the Advisor can also make a request to pause or confer before the advisee answers.
- There is no obligation to conduct cross-examination if the advisee determines that it is not necessary or could be counter-productive. The Advisor should respect that decision by the advisee.

ADVISOR QUESTIONING & CROSS-EXAMINATION (CONT.)

- What will happen if an Advisor refuses to conduct cross-examination?
 - The institution will replace them with an Advisor who will do so.
- What if an advisee is uncooperative?
 - Get up to speed on the complaint as best you can, and make sure you have thoroughly reviewed the investigation report.
 - An Advisor must be willing to conduct cross-examination for their advisee, even if they don't cooperate with their Advisor, unless they have directed the Advisor not to conduct cross.
- Only engage in discussion with the Chair or Decision-maker about relevance if invited to do so. This practice may or may not be permitted by institutional rules.



HEARING DECISION-MAKER CONSIDERATIONS

- Hearing Pitfalls
- Pre-Hearing Meetings
- Live Hearings
- Managing Questioning and Cross-Examination
- Deliberation Considerations
- Sanctioning Considerations
- Written Determinations

HEARING/DECISION-MAKER PITFALLS

- Insufficient preparation in advance of hearing
- Lack of a pre-hearing meeting
- “Starting from scratch”
- Understanding relevant evidence
- Effectively managing questioning and cross-examination
- Managing Advisors
- No access to TIXC and/or legal counsel during hearing
- Poorly written determination/rationale letters
- Insufficiently trained Decision-makers/Chairs
- Lack of confidence in ability to handle the process
- Others?

PRE-HEARING MEETINGS

- Although not explicitly required or even mentioned in the Title IX regulations, the Chair or Decision-maker may conduct pre-hearing meetings for each party (in writing, or in person)
 - Answer questions about the hearing and its procedures
 - Clarify expectations regarding logistics, decorum, the role of Advisors, and technology
 - Discuss witness and party participation and cross-examination
 - Discern any conflicts of interest/vet recusal requests
 - Consider any questions regarding relevance of evidence or proposed questions and may make pre-hearing rulings

LIVE HEARING

- Regulations mandate live hearing for higher education
 - Virtual hearings are permitted
- Must create audio/audiovisual recording, or transcript, of hearing and make it available to the parties for inspection and review
- Questions come from Advisors, panel (if any), and Chair

MANAGING QUESTIONING & CROSS-EXAMINATION

- The live hearing requirement for higher education allows the parties to ask (direct and) cross-examination questions of the other party and all witnesses through their respective Advisors
- Such cross-examination must be conducted directly, orally, and in real time by the party's Advisor and never by a party personally (separate rooms are allowed)
- Permit relevant questions and follow-up questions, including those challenging credibility

MANAGING QUESTIONING & CROSS-EXAMINATION (CONT.)

- If an Advisor seeks to ask a question that is potentially answered in the investigation report, that question should typically be permitted, if relevant
- If a cross-examination question has already been answered by a witness or party during the hearing, the Decision-maker or Chair may:
 - Deny the question as “irrelevant because it has already been answered,” or
 - Ask the Advisor why posing the question again is expected to lead to additional relevant evidence

MANAGING QUESTIONING & CROSS-EXAMINATION (CONT.)

- In August 2021, a federal district court vacated the part of 34 C.F.R. § 106.45(b)(6)(i) that prohibits a Decision-maker from relying on statements that are not subject to cross-examination during the hearing:
 - “If a party or witness does not submit to cross-examination at the live hearing, the [D]ecision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility....”
- If a party or witness does not appear at the hearing, the Decision-maker may now rely upon their earlier statements and assess their credibility and weight based on the totality of the information provided*

*Public institutions in the Sixth Circuit may not be able to find a policy violation if a Complainant does not attend the hearing and their credibility is at issue

MANAGING QUESTIONING & CROSS-EXAMINATION (CONT.)

- A party or witness may choose to not answer one or more questions
- The Decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.

OVERVIEW OF THE DELIBERATION PROCESS

- Only Decision-makers attend and participate in the deliberations
 - Parties, witnesses, Advisors, and others excused
 - ATIXA recommends that TIXC and legal counsel do not participate
- Do not record; recommend against taking notes (Chair may)
- Parse the policy (elements that compose each allegation)
- Assess credibility of evidence and assess statements as factual, opinion-based, or circumstantial
- Apply evidentiary standard to determine if policy has been violated

DELIBERATIONS

General Information

- Must provide detailed, written the rationale for and evidence supporting its conclusions
- With a panel, the Chair must be a voting member
- Typically, there is no specific order in which allegations must be addressed. When in doubt, start with the most serious.
- Chair should ensure that all viewpoints are heard
- Neutralize any power imbalances among panel members, particularly based upon their position at the institution
- Ensure an impartial decision that is free of substantive bias

Withhold judgment until all the evidence has been considered.

DELIBERATIONS

Findings, Impact Information, and Sanctions

- Separate the “Finding” from the “Sanction”
 - Do not use impact-based rationales for findings (e.g., intent, impact on the Complainant, impact on the Respondent, etc.)
 - Use impact-based rationales for sanctions only
- Impact statement(s) should only be considered if and after the Respondent is found in violation
- Whether Respondent violated policy should be distinct from factors that aggravate or mitigate the severity of the violation
- Be careful – do not heighten the evidentiary standard because the sanctions may be more severe

SANCTIONING CONSIDERATIONS

- Title IX Coordinator does not issue sanctions but oversees the process
- Investigation alone is not sufficient to overcome a deliberate indifference claim

Title IX and case law require resolutions which:

- **STOP:** bring an end to the discriminatory conduct
- **PREVENT:** take steps reasonably calculated to prevent the future reoccurrence of the discriminatory conduct
- **REMEDY:** restore the Complainant as best you can to their pre-deprivation status

SANCTIONING CONSIDERATIONS (CONT.)

- What is appropriate?
 - Separation/expulsion? Suspension? Lesser sanctions?
- Sanction(s) must be reasonable and reflect the severity of the behavior
 - May consider prior misconduct
 - What is the role of precedent?
 - May consider attitude
 - May also be educational (i.e., targeted to stop and prevent)
 - What best compensates for loss or injury to Recipient or individuals?
 - Compliant with laws and regulations
 - OCR asserts institutions should consider impact on the Respondent's education when determining sanction(s)

SANCTIONING PITFALLS

- Conflating finding and sanctioning processes
- Timing of impact statements
- Not targeted to stop, prevent, and remedy
- Unwillingness to suspend, expel, or terminate
- Failure to address mitigating circumstances
- Lock-step or automatic sanctioning – failure to address incident-specific circumstances
- Likeability of parties: + & -
- Disparate sanctions for same behavior
- Others?

WRITTEN DETERMINATIONS

Decision-maker/Chair issues a detailed, written determination regarding responsibility that includes the following:

- Policies alleged to have been violated
- A description of the procedural steps taken from the receipt of the formal complaint through the determination including:
 - Any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held
- Statement of and rationale for the result as to each specific allegation.
 - Should include findings of fact and conclusions

WRITTEN DETERMINATIONS (CONT.)

- Sanctions imposed on Respondent (if any) and rationale for sanctions chosen (or sanctions not chosen)
- Whether remedies designed to restore or preserve equal access to the education program or activity will be provided by the Recipient to the Complainant
- Procedures and bases for any appeal

WRITTEN DETERMINATIONS: LOGISTICS

- The written determination should be written by decision-maker
 - May use a template provided by the Title IX Coordinator
- The written determination should be provided to the parties simultaneously
- Will this letter be reviewed by the Title IX Coordinator and/or legal counsel?
 - Extent and Impact of such a review?



APPEAL DECISION-MAKER CONSIDERATIONS

- Grounds for Appeal
- Appeal Response
- Finality of Determination

GROUNDINGS FOR APPEAL

- Must offer all parties an opportunity to appeal a determination and a school's dismissal (or non-dismissal) of a formal complaint or any allegations therein, on the following grounds:
 - A procedural irregularity that affected the outcome of the matter
 - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter
 - The Title IX Coordinator, Investigator, or Decision-maker had a conflict of interest or bias that affected the outcome of the matter
- May add additional grounds if available to all parties

APPEAL RESPONSE

- When an appeal is filed, the Recipient must notify the other party and implement appeal procedures equally for all parties
- Give the parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome
- The Chair may be called upon by the Appeal Decision-maker to inform the appeal process
 - Likely a paper exchange; not in-person

FINALITY OF DETERMINATION

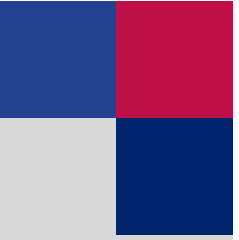
- If an appeal is filed, the determination regarding responsibility becomes final on the date that the Recipient provides the parties with the written determination of the results of the appeal.
- If an appeal is not filed, the determination regarding responsibility becomes final on the date on which an appeal would no longer be considered timely.



RECORDKEEPING AND DOCUMENTATION

RECORDKEEPING & DOCUMENTATION

- Certain records must be created, retained, and available to the parties for at least **seven** years:
 - Sexual harassment investigations including any responsibility determination, any disciplinary sanctions imposed, and any remedies implemented
 - Any appeal and related result(s)
 - Any informal resolution implemented
 - Any supportive measures implemented
 - For each conclusion, must document the rationale
 - For each formal complaint, must document the basis for why the institutional response was not deliberately indifferent
- Must document measures taken to preserve/restore access to education programs/activity
- TIXC should maintain all case records



DISABILITY-RELATED CONSIDERATIONS

- Scope of the Problem
- Intersections During the Title IX Resolution Process
- Response Considerations
- Case Study: Rebecca & Reese

SCOPE OF THE PROBLEM

- Children with disabilities are 2.9 times more likely than children without disabilities to be sexually abused.¹
- 1 out of 3 (31.6%) undergraduate female students with a disability reported nonconsensual sexual contact involving physical force or incapacitation compared to 18.4% of undergraduate females without a disability.²

Sources:

¹ Emily M. Lund and Jessica E Vaughn-Jensen, "Victimisation of Children with Disabilities," *The Lancet* 380 (July 2012), 867–869, cited in Nancy Smith and Sandra Harrell, *Vera Institute of Justice, Sexual Abuse of Children with Disabilities: A National Snapshot* (2013), 4, available at <https://www.vera.org/publications/sexual-abuse-of-children-with-disabilities-a-national-snapshot>, accessed June 17, 2021.

² David Cantor et al., at 35, 102. See also AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct Fact Sheet, available at

https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/Fact%20Sheet%20for%20AAU%20Climate%20Survey%209-21-15_0.pdf, accessed June 17, 2021.

SCOPE OF THE PROBLEM

- Men with a disability are at greater risk for experiencing sexual violence other than rape (e.g., being made to penetrate, sexual coercion, unwanted sexual contact, and noncontact unwanted sexual experiences) than men without a disability
- Women with a disability are more likely than women without a disability to report experiencing rape, sexual violence other than rape, physical violence, stalking, psychological aggression, and control of reproductive or sexual health by an intimate partner.
- Men with a disability are more likely than men without a disability to report experiencing stalking and psychological aggression by an intimate partner.

Source: CDC National Center for Injury Prevention and Control, Division of Violence Prevention

DISABILITY-RELATED INTERSECTIONS WITH TITLE IX RESOLUTION PROCESS

- Barriers to engaging the resolution process
- Accommodations for individuals as they participate in the Title IX resolution process
- Consider training for institution-appointed advisors
- Emergency Removal
- Restriction on use of medical/privileged information
- Impact on determination of a policy violation?
- Impact on sanctioning?

PREGNANCY & TITLE IX: REGULATORY LANGUAGE

Pregnancy as a Temporary Disability

- “A Recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom **in the same manner and under the same policies as any other temporary disability** with respect to any medical or hospital benefit, service, plan, or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.”
34 C.F.R. 106.40

ADDRESSING INVOLUNTARY WITHDRAWAL

Engaging in an institution-initiated removal of a student or employee with a disability is complex

- As of 2011, the law no longer applies “harm to self” as a basis for involuntary withdrawal, only “harm to others”
- OCR says **due process** is necessary to challenge assumptions that behavior is a threat that would support involuntarily removing a student or employee
- The institution must either follow appropriate disciplinary procedures for students or employees who engage in conduct that would violate the codes of conduct or engage in applying the ADA-created “Direct Threat” Test prior to removing an individual from school or work, UNLESS there is an immediacy of harm

“DIRECT THREAT” TEST

- A “Direct Threat” analysis applies to any individual who poses a “significant risk” of substantial harm or safety to others that cannot be eliminated or reduced by reasonable accommodation.
- To rise to the level of a direct threat, there must be a **high probability of substantial harm and not just a slightly increased, speculative, or remote risk**

“DIRECT THREAT” TEST

Significant risk determination in assessing a Direct Threat must be made by considering the:

- 1) duration of the risk,
 - 2) nature and severity of risk,
 - 3) likelihood that the potential harm will occur,
 - 4) proximity of the potential harm.
- OCR is, by practice, deferential to institutions’ determinations of direct threat, but they insist that institutions make one

ADDRESSING HARM TO SELF

- Similar to the way a direct threat determination can be used to involuntarily and temporarily separate a student for the safety of the campus community, a legitimate safety risk determination can permit an institution to temporarily and involuntarily separate a student who represents a serious threat of self harm.
- The process for determining a legitimate safety risk is the same as making a direct threat determination, just with a different threshold as the applicable policy.
 - Less rigorous standard
- Institutions should engage their BIT team to assess the level of risk and develop an action plan in response.

RESPONSE CONSIDERATIONS

- Involve your accessibility/disability services office/BIT Team
- Offer appropriate due process and follow your process if you plan to involuntarily remove from school or job
- Use clearly written policies and referrals based on **behaviors**, not disabilities or conditions
- Address **actual** significant disruptions to campus, not simply **risk** of disruption
- Be consistent in referrals – the same disruptive behavior should warrant a conduct process regardless of the individual. Sanctioning should also be consistent
- Do not treat students or employees with disabilities differently than other students or employees other than providing reasonable accommodations under the law

CASE STUDY: REBECCA & REESE



CASE STUDY: REBECCA & REESE

- Rebecca reported that a fellow student Reese is harassing her and that she is fearful for her safety.
- Last semester, Rebecca and Reese were in the same Chemistry class. They became acquainted with each other after spending days and evenings together in a small study group for the class.
- Rebecca stated that she and Reese began flirting with each other and it seemed like harmless banter because she had a boyfriend and was not interested in Reese. But, things have gotten out of hand. Rebecca repeatedly told Reese to stop contacting her, but he has not done so.

CASE STUDY: REBECCA & REESE

- For the past month, Reese has sent Rebecca tons of texts and e-mails. He drives past her apartment several times a day and he sits in front her apartment in his car. Sometimes, he stands outside her class. Yesterday, she saw Reese in the Chemistry Department office while she was talking with the Dean. Rebecca was so upset that she couldn't concentrate on her conversation.
- Rebecca also reported that two tires on her car were slashed last week.
- Rebecca stated she doesn't know what to do. She asked if you could just have someone talk to Reese. She stated she just wants Reese to stop harassing her and stalking her. She noted if that doesn't work, she wants him kicked out of the college.

CASE STUDY: REBECCA & REESE

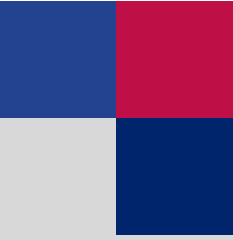
- You are the Title IX Coordinator and are familiar with Reese because you had a similar case involving him last year. While working with Reese last year, you learned that he is on the autism spectrum and works with your accessibility/disability services office.
- Consider the following:
 - Is this a Title IX matter?
 - What, if any, impact does this information have on how you will proceed?
 - What would you consider when determining whether to resolve this matter informally by talking to Reese as Rebecca requested?
 - Are there any reasons why you may consider moving forward with a formal investigation?

CASE STUDY: REBECCA & REESE

- You decide to talk to Reese. He tells you the following:
- Last semester, he took a Chemistry class and was in a study group with Becca. She struck him as different from other students because she was really cute and flirty and helped him with his work. He is not an academically strong student, but Becca assured him she would make sure he did well in the course.
- They hung out together last semester sometimes studying at Becca's house. Becca said she had a boyfriend at home, but she said it was rocky.
- Then last month, out of the blue Becca said she wanted to break it off. He couldn't believe it! She won't even tell him what's going on. He keeps trying to get her to talk to him and explain what happened, but she just avoids him. He is frustrated and has tried every way possible to get Becca to tell him what's going on. His heart is just broken.

CASE STUDY: REBECCA & REESE

- Does the information you learn from Reese change your decision about resolving this informally?
- What, if any, additional actions would you take to address Reese's conduct?
- Would you take action to remove Reese from the college?



CONSIDERATIONS FOR CASES INVOLVING EMPLOYEES

- Title IX versus Title VII
- Impact on Employees
- Title IX and Title VII Investigations

TITLE IX VS. TITLE VII

Title IX

- Applies to students and employees
- Covers sex
- Covers pregnancy
- Hostile Environment, QpQ, Retaliation
- OCR
- “Prompt”
- More directives for prompt, fair, and equitable process for parties

Title VII

- Applies only to employees
- Covers sex, race, color, national origin, religion
- Covers pregnancy
- Hostile environment, QpQ, Retaliation
- EEOC
- No timeframe set
- Fewer equity-based directives in process for parties

INTERSECTION OF TITLE VII AND TITLE IX

- Title IX was consciously modeled on Title VI of the Civil Rights Act of 1964 and borrowed heavily from Title VII.
- Courts generally apply standards established under Title VII for guidance in how to establish a Title IX violation.
- Title IX prohibits sex-based discrimination in the full range of activities related to the recruitment, evaluation, classification, payment, assignment, retention, or treatment of employees.
- Individuals can use both statutes to pursue the same violations.

IMPACT ON EMPLOYEES

- OCR's 2020 Title IX regulations create extensive due process protections for at-will employees accused of misconduct.
- Wholesale revision of employee resolution/grievance processes may be necessary
- Union employees – diminished right to an advisor because of union representation?
- Potential inequity in employee processes for Title VII-based sexual harassment

TITLE IX AND TITLE VII INVESTIGATIONS

- Consider intersections of:
 - Role of institutional equity/AA/EOP officer
 - Human resources/faculty/teachers
 - Coordinator of school/campus conduct
 - Athletics
 - Public safety/SRO/Law enforcement
- Oversight of deputy coordinators/Investigators
- Effect of Title IX regulations' sexual harassment definition
- Coordination of remedies in student/employee and employee/student grievance processes
- What happens when employee is a student or student is an employee?



Association of
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Questions?

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