Title IX Coordinator Training	TNACUA
Online Course: Fundamentals of	3 7
the August 2020 Regulatory	
Requirements	
Module 1: Jurisdiction and Other Threshold Topics	
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Course Overview

- Jurisdiction and Other Threshold Topics
- Formal Complaints, Investigations, and Grievance Procedures
- Policy and Training Obligations

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Title IX Final Regulation

- Effective August 14, 2020
- Where to Begin
 - Inventory
 - Implementation Plan

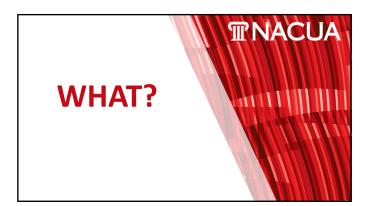


PLAN & DOCUMENT YOUR EFFORTS

- Inventory
 - Current Title IX Procedures
 - Clery Act Policies & Compliance
 - Student Conduct Code
 - HR Policies & Agreements
 - State or Local Laws or Regulations
- Implementation Plan
 - What?
 - Who?
 - When?

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DEFINITION OF SEXUAL HARASSMENT §106.30(a): Sexual Harassment to include one or more of the following: 1. Quid Pro Quo 2. Hostile Environment 3. Clery Definitions TNACUA **QUID PRO QUO** 1. Conditioning provision of an aid, benefit, or service on participation in unwelcome sexual conduct 2. Carried out by an employee TNACUA **HOSTILE ENVIRONMENT** · Unwelcome sexual conduct • "So severe, pervasive, and objectively offensive" (2020) • Pattern or practice or sustained and non-trivial (2001) · "Effectively denies equal access"

• Denies or limits a student's ability to participate in or benefit from

• "[S]tanding in the shoes of the complainant." (Preamble, p. 514)

• Interferes with or limits a student's ability to participate or benefit from

(2001)

(2011)

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• "Determined by a reasonable person"

CLERY DEFINITIONS

- \bullet Sexual Assault a forcible or non-forcible sex offense under the FBI UCRS (as defined by the Clery statute)
 - Rape, attempted rape, sodomy, fondling, statutory rape
- Dating Violence violence by a person who is or has been in a romantic or intimate relationship (Clery statute)
- Domestic Violence violence by a current or former spouse or intimate partner, co-parent, living partner, youth or other under state
- Stalking fear for safety or safety of other or suffer substantial emotional distress

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COMPARE TO

- Institution Conduct Code
- Court standards
- Title VII
- State law



IN ADDITION TO STUDENTS...APPLIES TO EMPLOYEES

§106.51 Employment

- "No person shall, on the basis of sex, be excluded from participation in, or denied benefits of, or be subjected to discrimination in employment..."
- Remains unchanged by current amendments

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WHAT'S NEW THEN...

- 2011 Guidance directed at student-on-student sexual violence
- Courts and OCR have relied on Title VII when considering employees' complaints alleging sexual harassment even under Title IX.
- OCR acknowledges differences, expects institutions of higher education (IHEs) to comply with both Title IX and Title VII requirements.
 - OCR will try to "avoid an actual conflict" regarding employer's obligations. (Preamble p. 1511.)

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OTHER CHANGES

- Requires IHEs to handle allegations by employees, including at-will employees, using the same procedures it uses for students.
- Independent contractors and volunteers are *not* considered employees who may create *quid pro quo* Title IX liability.
- Actions by non-employees may create liability for other types of sexual harassment. (Preamble p. 448)
- Volunteers who experience discrimination *may* be covered. (Preamble p. 1544)

TITLE VII – SEXUAL HARASSMENT DEFINITION

- Conduct
 - Unwelcome sexual advances
 - Requests for sexual favors
 - Other verbal or physical conduct of a sexual nature
- Viewed by a reasonable person in the Complainant's position

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WHEN...

- Submission becomes a term or condition of employment
- Rejection is used as the basis for an employment decision
- The conduct unreasonably interferes with work performance or creates a hostile, intimidating or offensive environment

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EMPLOYEE-EMPLOYEE HARASSMENT

- Employer's knowledge
 - · Knew or should have known
- Immediate and appropriate corrective action
 - Reasonably calculated to end the harassment and prevent recurrence
- Actions by third parties

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SUPERVISOR LIABILITY

- Tangible Employment Action
 - Strict liability
- No tangible employment action
 - Employer takes reasonable care to prevent and correct promptly

and

Employee unreasonably failed to use employer's preventive or corrective options

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INSTITUTIONAL REQUIREMENTS

- Contractual Obligations
 - Collective bargaining agreements
 - Employee handbooks
 - Individual employee contracts



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OTHER LEGAL REQUIREMENTS

- Conflicting state requirements
 - •State laws
 - State administrative rules and regulations
- Choice of IHE to accept federal funding

OTHER ISSUES

- Procedures
 - Serial or parallel
 - Clearly identify what applies to employees
- Student employees
- Clery obligations to employees
- Notification to all employees and applicants (§106.8)

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JURISDICTION

- No distinction between on- or off-campus
 - If in a location, at an event, or in circumstances that meet the definition
- Only in the United States
 - Harassment must occur against a person in the United States
 - Study abroad & foreign employment

BUT DON'T FORGET...

- May apply other institutional conduct standards and procedures
- Clery applies to students and employees regardless of location.
- Title VII applies to U.S. citizens working for U.S. corporations abroad.

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EDUCATION PROGRAM OR ACTIVITY

- §106.44(a): Locations, events, or circumstances over which IHE exercises substantial control over *both* the respondent and the context in which the sexual harassment occurred
- Any building owned or controlled by a recognized student organization
- Training on the scope of the institution program or activity



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ACTUAL KNOWLEDGE

- §106.30 (a): Notice to Title IX Coordinator or any official who has authority to institute corrective measures
- Sexual harassment or allegations of sexual harassment
- No vicarious liability, constructive notice or "should have known"

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OFFICIAL WITH AUTHORITY

- · Authority to institute corrective measures
- Not an official with authority (OWA)
 - An official with only the ability or obligation to report
 - An official with only the ability or obligation to inform student about how to report
 - An official having been trained to report or inform students how to report
- Respondents are not OWAs

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IMPLEMENTATION ISSUES

- Institutions determine who is OWA
 - Institutions decide who must, may or may only with a student's consent report sexual harassment.
 - Make a list of who has authority
 - Need not give notice of all OWAs only Title IX Coordinator information
- Responsible employees
 - No longer in regulations
 - $\bullet\,$ Institutions now may want to re-conceptualize if or how they will designate.
 - May require employees to inform IHE
 - Resident Assistants

RETALIATION §106.71(a)

- No retaliation by any person to interfere with any right "secured by Title IX"
- No retaliation for
 - Making a report or complaint
 - Participating or refusing to participate
- Filing charges regarding conduct that arises out of the "same facts or circumstances" but does not involve sex discrimination

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CONFIDENTIALITY

- IHEs must keep confidential the identity of any individual
 - Who has made a report or filed a complaint
 - Who has been reported as a perpetrator
 - Who has been a witness
- Exceptions
 - FERPA
 - Legal obligations
 - Carry out the purposes of these regulations

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RETALIATION AGAINST EMPLOYEES

- Future employment decisions
- Employment references
- Licensing Boards

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THE INITIAL REPORT

- Anyone may report
 - Not automatically a formal complaint
- Institution response to notice
 - Offer of supportive measures
 - Explanation of formal complaint process
 - Compare to Clery

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MAKING REPORTS

- Who
- Any individual
 - alleged to be the victim of conduct that could be sexual harassment
- Distinguish from Formal Complaint
- Against Whom
 - Any individual
 - Reported as perpetrator of conduct that could be sexual harassment
 - Distinguish from Formal Complaint

INSTITUTION RESPONSE

- Promptly contact the Complainant to discuss the availability of supportive measures
 - Consider complainant's wishes
 - Make clear available with or without formal complaint
- Explain the process for filing a formal complaint
- Treat complainants and respondents equitably
- Consider Clery obligations

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SUPPORTIVE MEASURES §106.30(a)

- Non-disciplinary, non-punitive individualized services
 Impose actions that are disciplinary sanction or not supportive measure only after a grievance process
- Appropriate, reasonably available, free to complainant or respondent
- Restore equal access without unreasonably burdening the other party
- Confidential, if possible

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EMERGENCY REMOVALS §106.44(c)

May remove respondent from education program or activity if:

- Conduct an individualized safety and risk analysis,
- Determine that respondent poses an immediate [imminent] threat to the *physical* health or safety of *anyone* justifying removal
- The threat arises from the allegations of sexual harassment, and
- Provide opportunity for respondent to challenge removal immediately thereafter.

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BUT...



- This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the American with Disabilities Act.
- Review disability policies regarding danger to self or others

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EMERGENCY REMOVALS

Other Points to Consider:

- Not limited to instances of sexual assault
- Who will conduct the assessment and make the decision?
- Beyond verbalized threats, what information will be considered?
- Institution can determine the scope of removal.
- No specific timeframes may (not required to) reassess
- What will respondent's ability to challenge it look like?
- Separate from non-student employee Administrative Leave

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Title IX Coordinator Training Online Course: Fundamentals of the August 2020 Regulatory Requirements Module 2: Formal Complaints, Investigations & Grievance Procedures Amy C. Foerster, Partner, Troutman Pepper Hamilton Sanders LLP Melinda Grier, Melinda Grier Consulting Janet P. Judge, Partner, Holland & Knight LLP outdip-halforgalist dauget: date; date;

THE FORMAL COMPLAINT PROCESS

The Formal Complaint

- Filed by the Complainant or signed by the Title IX Coordinator.
 Title IX Coordinator ≠ Complainant
- Filed in person, by mail, by email or another approved method.
- Includes allegations of Title IX sexual harassment and requests that the IHE investigate those allegations.
- Complainant must be participating in or attempting to participate in the IHE's education program or activity at the time of filing.

§106.30(a)

The Formal Complaint – Consolidation

- May consolidate formal complaints if sexual harassment allegations:
 - Are against more than one respondent, or
 - · Are by more than one complainant against one or more respondents, or
 - Are by one party against the other party (i.e., "counterclaim").
- As long as the allegations of sexual harassment arise out of the same facts or circumstances and are so intertwined that the allegations directly relate to all of the parties.

§106.45(b)(4)

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Written Notice of Allegations

Written notice of the allegations to the parties must include:

- Notice of the grievance process.
- Notice of the allegations that may constitute Title IX sexual harassment, including sufficient details and time for the respondent to prepare a response before an initial interview.
- A statement that the respondent is presumed not responsible unless and until a determination of responsibility is reached at the conclusion of the process.

§106.45(b)(2)

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Written Notice of Allegations (cont.)

Written notice of the allegations to the parties must also include:

- Notice of the parties' right to an advisor of choice at any meeting, interview or other proceeding related to the formal complaint.
- Notice of the parties' (and their advisor's) right to inspect and review evidence gathered during the investigation.
- The institution's prohibition against false statements.

NOTE: IHE must provide notice of additional allegations as they arise and are subject to investigation, if applicable.

§106.45(b)(2)

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Mandatory Dismissal of a Formal Complaint If the conduct alleged: Would not constitute Title IX sexual harassment even if proved, Did not occur in the IHE's education program or activity, or Did not occur in the United States. \$106.45(b)(3)(i) Discretionary Dismissal of a Formal Complaint If: Complainant notifies the Title IX Coordinator in writing of their wish to withdraw the complaint or any allegations in it, Respondent is no longer enrolled or employed by the IHE, or Specific circumstances prevent sufficient gathering of evidence to reach a determination.

Upon Dismissal ...

§106.45(b)(3)(ii)

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- Provide written notice of and the reasons for dismissal to both parties.
- Party may appeal dismissal.
- Dismissal does not preclude investigation and adjudication under another provision or policy.

Advisors • IHE must provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice. Advisor may be, but is not required to be, an attorney. IHE may not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding. • IHE may establish advisor guidelines (e.g., Rules of Decorum). • NOTE: IHE must provide an advisor at no cost for purposes of crossexamination at the hearing, if the party does not have one. §106.45(b)(5)(v) TNACUA **Informal Resolution** • Only an option after the formal complaint is filed. • IHE may informally resolve allegations of Title IX sexual harassment at any time prior to reaching a determination regarding responsibility, provided that: $\bullet\,$ Allegations do not involve an employee engaging in sexual harassment of a student: • Informal resolution is facilitated by trained individuals with no conflict of • IHE obtains parties' voluntary, written consent to the informal resolution

Informal Resolution (cont.)

- IHE must provide parties involved in the process with written notice of:
 - The allegations and the requirements of the informal resolution process.
 - Circumstances precluding parties from resuming formal complaint process/same allegations.
 - The right to withdraw and resume the formal complaint grievance process any time prior to agreeing to a resolution.
 - Any consequences associated with informal resolution, including records that will be maintained or could be shared.

§106.45(b)(9)

process. §106.45(b)(9)

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Investigation

- IHE cannot access, consider, disclose or otherwise use a party's records prepared by a professional in a treatment capacity without the voluntary, written consent of that party.
- Each party must have an equal opportunity to present witnesses (fact and expert), and to identify inculpatory and exculpatory evidence.
- IHE cannot restrict a party's ability to discuss allegations or gather evidence.

§106.45(b)(5)

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Investigation (cont.)

- Parties must have sufficient written notice of all hearings, interviews and other meetings to sufficiently allow them to prepare.
- IHE must provide the parties (and their advisors) all evidence directly related to the allegations at least 10 days before the investigator completes the investigative report, so that the parties may review and respond.
 - Directly Related ≠ Relevant
 - IHE must make that evidence available at the hearing

§106.45(b)(5)

Investigative Report • Must fairly summarize relevant evidence. • IHE must send the investigative report to the parties (and their advisors) at least 10 days before the hearing for their review and written response. §106.45(b)(5)(vii) TNACUA **Live Hearing** \bullet Decision-maker cannot be the Title IX Coordinator or the investigator. §106.45(b)(7) • Either party may request that the parties be in separate rooms, but IHE must provide technology allowing the decision-maker and parties to simultaneously see and hear the party or the witness providing information. • Must record or create a transcript. §106.45(b)(6) TNACUA **Cross-Examination / Advisors** Cross-examination must be conducted by each party's advisor – Allow all relevant questions and follow-up questions, including those challenging credibility. Cross-examination gannot be conducted by a party – if the party does not have an advisor, the IHE must provide one at no cost.

IHE can establish rules of decorum governing hearing, including cross-examination.

§106.45(b)(6)(i)

Relevancy Determinations

- Before a party or witness answers a question, the decision-maker must determine whether it is relevant and explain any decision to exclude the question as not relevant.
- Questions and evidence about complainant's sexual predisposition or prior sexual behavior, unless to prove that someone other than respondent committed the conduct alleged or, if concerning specific incidents of complainant's conduct with respondent, offered to prove consent, are not relevant.

§106.45(b)(6)(i)

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Relevancy Determinations (cont.)

Preamble:

- It is enough for the decision-maker to say the question is not probative of any material fact.
- The decision-maker may not require questions in writing in advance of
- Hearing.

 HE may have rules precluding the parties (or advisors) from challenging relevancy decisions during the hearing.

 May only exclude questions based on relevance.

 Not because they are unduly prejudicial, concern prior bad acts or seek character evidence.
- - character evidence.
 - Questions may be deemed not relevant when they are duplicative of other evidence already in the record.
 But, the decision-maker must exclude (a) medical, etc. records if the party has
 - not consented in writing; and (b) statements when the party/witness is not subject to cross.

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Excluding Statements from Consideration

If a party or witness is not subject to cross-examination, the decisionmaker may not rely on their statement in determining responsibility.

• But, the decision-maker may not draw any inferences as to responsibility as a result of individuals not subjecting themselves to cross-examination.

§106.45(b)(6)(i)

Hearing Decorum May have rules that, e.g.,: • Require advisors be respectful and prohibit abusive/intimidating questioning. • Limit or prohibit objections to relevancy determinations. • Govern the timing and length of breaks to confer, and prohibit • Require that parties make openings and closings, if any, and set time TNACUA **Standard of Evidence** May use preponderance of the evidence or clear and convincing standard, but must use the same standard for formal complaints of sexual harassment against students as for formal complaints against employees, including faculty. §106.45(b)(1)(vii) TNACUA **Hearing Outcome / Written Determination** Written determination must include: • Identification of allegations potentially constituting sexual harassment. • Description of the procedural steps from the filing of the formal complaint through the determination. • Findings of fact supporting the determination. \bullet Conclusions regarding the application of the policy to the facts. • Statement of and rationale for the result as to each allegation.

• Sanctions and whether remedies will be provided.

• Appeal instructions.

§106.45(b)(7)

Hearing Outcome / Written Determination (cont.) The determination becomes final on the date the IHE provides the parties with the written determination of the appeal, if any, or the date on which an appeal would no longer be timely, if there is no §106.45(b)(7) TNACUA **Appeals** Must allow for appeals based on: • Procedural irregularities that affected the outcome. • New evidence not reasonably available at the time of determination that could affect the outcome. • Bias or conflict of interest of the Title IX Coordinator, investigator or decision-maker that affected the outcome. • May include other grounds, equally available to both parties. §106.45(b)(8) TNACUA

Recordkeeping

Records regarding the following must be maintained for 7 years:

- Investigation, including the determination regarding responsibility, the hearing recording or transcript, sanctions and remedies
- Appeal and outcome
- Informal resolution and result
- Supportive measures
- Training

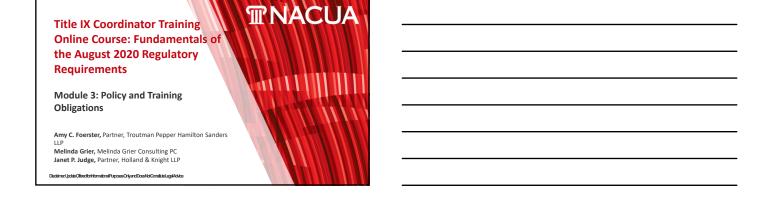
§106.45(b)(10)

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Title IX Coordinator(s) §106.8

Designation:

- Regulations refer to Title IX
 Coordinator in multiple ways,
 suggesting that it may be one or
 more persons.
 - "At least one employee "
- <u>Must</u> be referred to as the Title IX Coordinator.
- Notification provisions apply to <u>all</u> personnel with this responsibility.

Any person may report sex discrimination, including sexual harassment to the Title IX Coordinator(s) at any time, day or night, in person, by mail, by email, by phone, or by any other means that results in notice (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sexual discrimination or sexual harassment).

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Policy versus
Grievance Process
versus Grievance
Procedures

Dissemination of Policy §106.8

- Title IX Coordinator(s) contact info:
 - Name or Title, Office Address, Email, Telephone Number.
- · Website.
- Handbook or Catalog.
- School must not use or distribute a publication stating that the school treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by Title IX.

Required Notification Recipients

Applicants: Admission & Employment Students Employees Professional Orgs with CBA/PAs

Discuss: Parents/Legal Guardians*

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Dissemination of Policy §106.8

Notification of Policy: Elements

- School does not discriminate on the basis of sex in its education program or activity.
- School is required by Title IX not to discriminate.
- School's nondiscrimination policy extends to admission and employment.
- Inquiries may be directed to the Title IX Coordinator, to the Assistant Secretary, or both.
- How to file a complaint language.*



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Adoption of Grievance Procedures §106.8

- Adopt and publish:
 - grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action prohibited under Title IX.
 - <u>a grievance process</u> that complies with §106.45 for formal complaints as defined in §106.30.

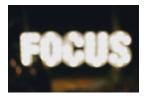
Notice

Policy Decision Point: Framework All-in-One Policy Treat all the Same; or 2. Decision Trees Two Policies: If not TIX, then ... Title IX Regulation+ 2. Everything Else Three plus: TIX Regulation Conduct 2. Other Sexual Misconduct 3. Other Prohibited Conduct TNACUA

Please Note:

"Nothing in this part may be read in derogation of any individual's rights under Title VII of the Civil Rights Act of 1964"

Where there is a conflict between State or local law and Title IX regulations, Title IX regulations win.



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Definitions (Suggestions):

- Actual Knowledge
- Complainant/Respondent
- Consent
- Formal Complaint
- Prohibited Conduct
 - Sexual Harassment
 Sexual Assault
 Dating Violence
 Domestic Violence
 Stalking

- Supportive Measures/Remedial Measures
- Disciplinary Measures
- Title IX Coordinator
- Officials with Authority/Required Reporters
- Confidential Resources
- Evidence
 Standard of Evidence
 Directly Related
 Relevant
- · Deliberate Indifference
- Education Program or Activity
- Informal Resolution
- Emergency Removal

Policy Elements:

- Non-Discrimination Policy Language
- Filing a Complaint:
 - Title IX Coordinator: Office Address, Email Address, Telephone Number
- Response:
- Supportive Measures, including Confidentiality (§106.30), as distinguished from Remedies.
- Emergency Removals: §106.44(c)



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Grievance Process: Formal Complaints

- Formal Complaint/Actual Knowledge
- Jurisdictional Issues:
 Dismissal of a Formal Complaint
 Written Notice/Appeal
 Option for Other Proceedings
 Consolidation of a Formal Comp
 Investigations of a Formal Comp
- Emergency Removals
- Notice of Allegations
- Advisor of Choice/Guidelines



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Grievance Process: Formal Complaints

- Informal Resolution Options
- No Conflict Provisions
- Range of Equitable Supportive Measures
- Investigations

 - Burden of Proof
 Evidence/Rape Shield
 - Notice





Grievance Process: Formal Complaints Hearings Venue: Same or Separate Rooms Decorum Provisions Access to Evidence Relevance Determinations Standard of Evidence Cross Examination Guidelines Expert Witnesses Recording

- Determinations of Responsibility/Notice
- Determination of Remedies/Sanctions, where





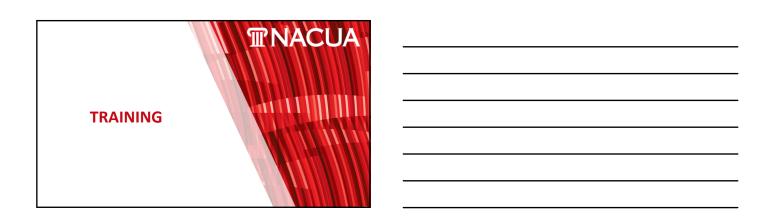


Grievance Process: Formal Complaints

- Possible Remedies/Sanctions
- Non-Retaliation
- Confidentiality/First Amendment
- Reasonably Prompt Timeframes
 - Short-Term, Good Cause Delays
- · Extensions of Time
- Materially False Statements
- Training









Training

A school must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on:

- the definition of sexual harassment,
- the 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.

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Title IX Personnel:

- · How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest and bias.
- Including: sex, race, ethnicity, sexual orientation, gender identity, disability or immigration status, financial ability, or other characteristic.
- **Implicit bias training not required.

Training



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Decision-Makers:

- Training on any technology to be used at a live hearing.
- Training on issues of relevance, including how to apply the rape shield protections provided only for complainants.
- Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.

Training



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Training Investigators: Training on issues of relevance to create an investigative report that fairly summarizes relevant evidence.

Training:

Must not rely on sex stereotypes

Must promote impartial investigations and adjudications

Must be maintained for 7 years.

Must be posted on website, if any, or Available for members of the public to inspect.

All Up-to-Date Training Materials



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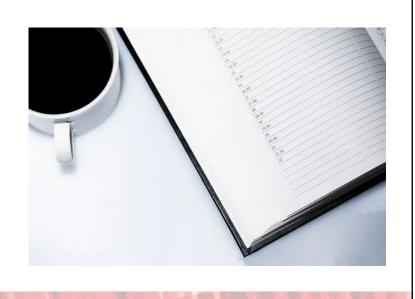
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Class Overview

- Definitions
- Jurisdiction
- Formal Complaints
- Supportive Measures
- Dismissals
- Informal Resolution



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DEFINITION OF SEXUAL HARASSMENT

Sexual Harassment includes one or more of the following:

- 1. Quid Pro Quo
- 2. Hostile Environment
- 3. Clery Definitions

§106.30(a)





QUID PRO QUO

- Conditioning provision of an aid, benefit or service on participation in unwelcome sexual conduct
- Carried out by an employee



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HOSTILE ENVIRONMENT

- Unwelcome sexual conduct
- "So severe, pervasive, and objectively offensive"
- "Effectively denies equal access"
- "Determined by a reasonable person"
 - "[S]tanding in the shoes of the complainant." (Preamble, p. 514)



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CLERY DEFINITIONS

- Sexual Assault a forcible or non-forcible sex offense under the FBI UCRS (as defined by the Clery statute)
 - FBI UCRS/SRS definitions or NIBRS Sex Offenses definitions
 - Focus on proscribed actions rather than terms
- **Dating Violence** violence by a person who is or has been in a romantic or intimate relationship (Clery statute)
- **Domestic Violence** violence by a current or former spouse or intimate partner, co-parent, living partner, youth or other under state law
- Stalking fear for safety or safety of other or suffer substantial emotional distress

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Complainant & Respondent

- Complainant an individual who is alleged to be the victim of conduct that could be sexual harassment
- Respondent an individual who has been reported to be the perpetrator of conduct that could be sexual harassment



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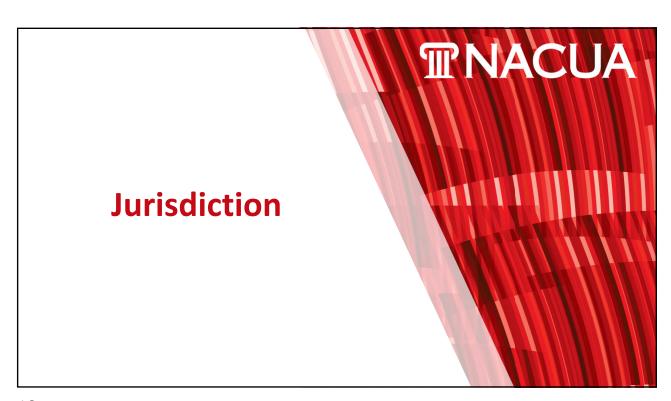
Actual Knowledge

- Institution has actual notice of sexual harassment or allegations when reported to the:
 - Title IX Coordinator(s)
 - Official With Authority to Take Corrective Actions (OWA)
- Not a respondent
- Not others who may or must report





9



Education Program or Activity



- Locations, events, or circumstances over which IHE exercises substantial control over both the respondent and the context in which the sexual harassment occurred, or
- Any building owned or controlled by a recognized student organization, and
- Against a person in the United States

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Filing a Formal Complaint

- Filed by the Complainant or signed by the Title IX Coordinator.
- Requests that the IHE investigate the allegations of sexual harassment.
- In person, by mail, email or approved method with Complainant's signature.
- Complainant must be participating in or attempting to participate in the IHE's education program or activity.



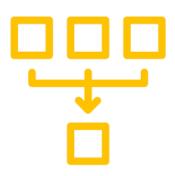


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The Formal Complaint: More Than One Respondent

- May consolidate formal complaints against more than one respondent, or by one party against the other party
 - Allegations arise out of the same facts or circumstances.
- Complaints may be filed and sanction imposed *only* against individuals, not groups



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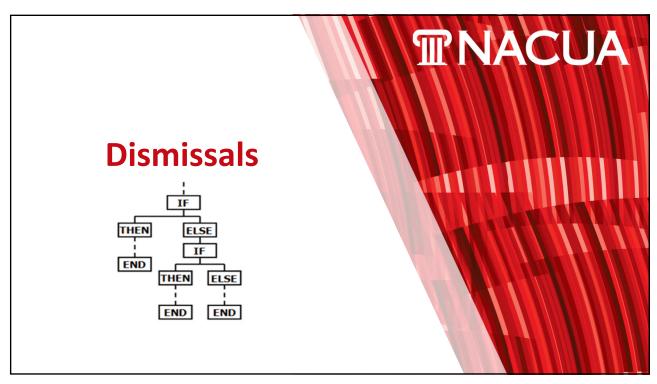
Written Notice of Allegations

- Notice of the grievance process.
- Notice of the allegations, including sufficient details and time to prepare a response before the initial interview.
- Statement that the respondent is presumed not responsible.
- Right to advisor of choice.
- Right to inspect and review evidence.
- Any prohibition of false statements or information.

Provide updated notice with any later discovered additional allegations.







Mandatory/Discretionary Dismissals



- Would not constitute sexual harassment even if proved;
- Did not occur in the IHE's education program or activity; or
- Did not occur in the United States.

Discretionary If:

- Complainant notifies the Title IX
 Coordinator in writing of a wish to
 withdraw complaint or any
 allegations in it;
- Respondent is no longer enrolled or employed; or
- Specific circumstances prevent sufficient gathering of evidence to reach a determination.

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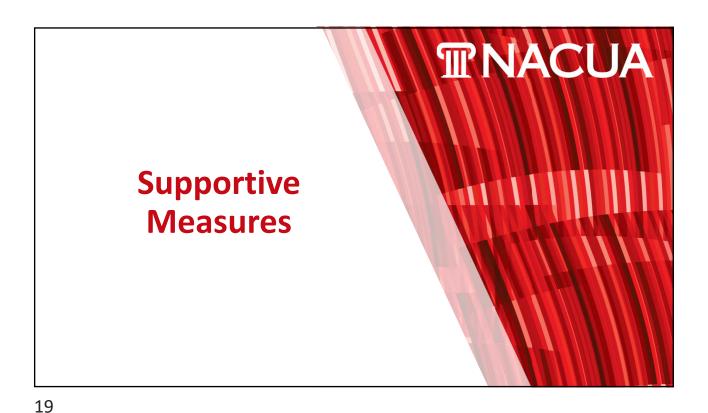
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Dismissal Results



If a formal complaint is dismissed:

- Provide written notice of dismissal and reasons to both parties.
- Provide an appeal process.
- The matter *may* proceed under another provision, policy or code.



Response to a Report

- Offer *supportive measures* promptly to the Complainant.
- Explain the process for filing a formal complaint.
- Consider the Complainant's wishes as to supportive measures.
- Follow a grievance process that complies with the regulations before imposing any disciplinary sanctions or other actions that are not supportive measures against the Respondent.





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Supportive Measures



- Non-disciplinary and non-punitive
- Treat complainant and respondent equitably
- No fee or charge to complainant or respondent
- Restore or preserve equal access without unreasonably burdening the other party
- Confidential to the extent possible

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Informal Resolution Requirements



- At any point in the process
- May return to formal process if informal resolution does not resolve the matter



- NOT Allegations of employee against student harassment
- ONLY When the institution deems it appropriate
- Process is facilitated by trained individuals with no conflict of interest or bias
- Written, voluntary consent by the parties, which requires ...





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Informal Resolution Process

- Parties must be given written notice of:
 - The allegations and the requirements of the informal resolution process;
 - The right to withdraw from the informal procedure at any time prior to agreeing to a resolution;
 - The circumstances precluding parties from resuming the formal complaint arising from the same allegations; and
 - Any consequences associated with informal resolution, including records that will be maintained or could be shared.



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Title IX Coordinator Training Online Course

Class Two: Conducting a Title IX Investigation

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Training Course Does Not Constitute Legal Advice

Class Overview:



- Investigations Involving Employees
- Investigating a Formal Complaint
- Impartiality/Conflicts of Interest

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- Relevance
- Violations of Other Policies

Investigations Involving Employees

The Basics:

- Remember that the regulations also apply to employees – both as those allegedly subject to Title IX sexual harassment and as those accused of engaging in Title IX sexual harassment.
- Investigations of formal complaints of conduct potentially constituting Title IX sexual harassment involving employees must comply with the regulations
- Institutions must use the same procedures for employee and student allegations of Title IX sexual harassment.



However:

- Title VII also applies.
- Collective bargaining and other contractual obligations might also apply.
- OCR expects institutions to comply with *all* requirements.

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Title VII Requirements



- Standards
 - Submission becomes a term or condition
 - Unreasonably interferes with work performance or creates a hostile environment
 - Employer knew or should have known
- Immediate and appropriate corrective action
 - End the harassment and prevent recurrence

Special Considerations

- Collective Bargaining Rights
- Administrative Leave
- "Reasonably prompt timelines"

VS.

"Immediate and Appropriate Corrective Action"





Conducting an Investigation



- Investigator must be free from bias and conflict of interest.
- Don't restrict the ability of either party to discuss allegations or gather evidence.
- Provide parties written notice sufficient to prepare.
- Allow parties an equal opportunity to identify witnesses, and other inculpatory and exculpatory evidence.
- · Allow parties to have advisors
- Don't access, consider, disclose or otherwise use a party's records prepared by a professional in a treatment capacity without voluntary, written consent.

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Consider in advance whether interviews will be:

- · Recorded or not recorded.
- Be followed with written statements or summaries.

In interviewing, the investigator must:

- Be prepared.
- Be objective and unbiased, free from stereotypes.
- Be free of conflict of interest.
- · Avoid any prejudging of the parties or responsibility.
- Demonstrate respect.
- Take the lead in seeking evidence (inculpatory and exculpatory) – it is not the parties' responsibility to investigate.
- Demonstrate respect.
- Be alert to non-verbal communications.

Review of Evidence

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- Parties must have equal opportunity to inspect and review all evidence directly related to the allegations.
- Provide access to evidence to both parties and their advisors.
- Ten days prior to completion of the investigative report.
- Consider parties' written response before completing report.

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Investigative Report



- Complete an Investigative Report that fairly summarizes relevant evidence.
- Provide to parties and their advisors for review and response at least 10 days before hearing,

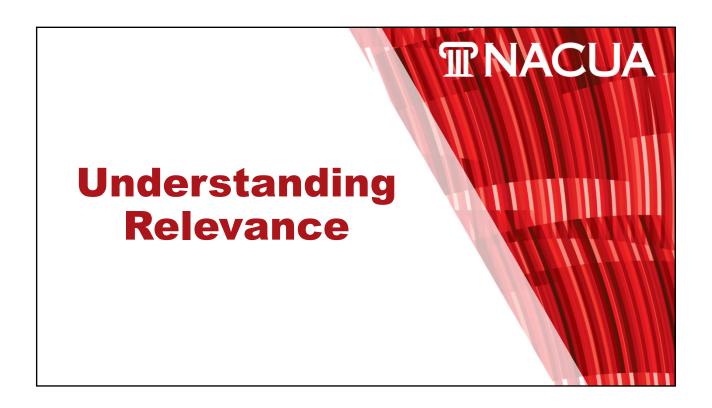




Impartiality, Bias, Prejudgment & Conflict of Interest

- Impartiality –
 basing a conclusion or decision
 on the facts rather than on a
 preference for one party over
 another; unbiased.
- Bias –

 a pre-disposition or preconceived opinion that prevents one from impartially evaluating facts
- Conflict of Interest –
 demonstrating bias or inability to
 be impartial because it will be to
 one's own personal benefit or
 other competing interest
- Prejudgment –
 reaching a conclusion before
 considering all relevant evidence



How is Relevance Defined?



- September 4, 2020 Guidance.
- Title IX Rule does not adopt the Federal Rules of Evidence for hearings conducted under Title IX.
- "The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied."
- A school may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence.
- A school may adopt rules of order or decorum to forbid badgering a witness, and may fairly deem repetition of the same question to be irrelevant.

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Relevant Evidence



- Evidence is relevant if:
 - It has any tendency to make a fact more or less probable than it would be without the evidence; and
 - The fact is of consequence in proving or disproving the allegations.
- Does the evidence tend to prove or disprove the allegations?
- A determination regarding relevancy can rely on logic, experience or science.

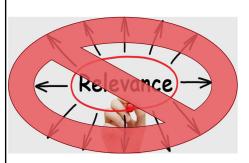
FED. R. EVID. (401), Legal Information Institute, Cornell Law School, https://www.law.cornell.edu/rules/fre/rule_401

Admission
vs.
Weight,
Credibility, or
Persuasiveness

- There is a difference between the admission of relevant evidence, and the weight, credibility, or persuasiveness of particular evidence.
- Because § 106.45 does not address how relevant evidence must be evaluated for weight or credibility by a decision-maker, an IHE can adopt and apply its own rules so long as:
 - · The rules do not conflict with § 106.45; and
 - · The rules apply equally to both parties.
- · For example:
 - An IHE may, e.g., adopt a rule regarding the weight or credibility (but not the admissibility)
 that a decision-maker should assign to evidence of a party's prior bad acts, so long as its
 rule applies equally to the prior bad acts of complainants and the prior bad acts of
 respondents.
- <u>REMEMBER</u>: An IHE's investigators and decision-makers must be trained specifically with respect to "issues of relevance" and any relevance rules adopted by the IHE should be addressed in the IHE's publicly available training materials.

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What Is NOT Relevant?



- September 4, 2020 Guidance.
- The Regs direct schools to exclude the following evidence and information:
 - a party's treatment records, without the party's prior written consent [§ 106.45(b)(5)(i)];
 - information protected by a legally recognized privilege [§ 106.45(b)(1)(x)];
 - questions or evidence about a complainant's sexual predisposition, and questions or evidence about a complainant's prior sexual behavior unless it meets one of two limited exceptions [§ 106.45(b)(6)(i)-(ii)];
 and.
 - a decision-maker is not permitted to rely on the statements of a party or witness who does not submit to cross-examination [§ 106.45(b)(6)(i)].

Defining Relevance in Policy



- September 4, 2020 Guidance.
- "An IHE may not adopt rules excluding certain types of relevant evidence (e.g., lie detector test results, or rape kits) where the type of evidence is not either deemed "not relevant" (as is, for instance, evidence concerning a complainant's prior sexual history) or otherwise barred from use under § 106.45 (as is, for instance, information protected by a legally recognized privilege)."
- Hmmm ... let's break it down.

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All Relevant Information Is Not Created Equal



- · May weigh evidence
- · Considerations:
 - Is it corroborated?
 - Is there a reason the source might not be reliable?
 - Is it logical given other established facts?
- The Regs require the decision-maker to objectively evaluate only "relevant" evidence during the hearing and when reaching the determination regarding responsibility.
- The decision-maker must determine the relevance of each crossexamination question before a party or witness must answer.
- · "Not probative of any material fact."



Violations of Other Policies

- Knowingly making false statements or submitting false information
- Sexual Harassment not covered in the regulations but violating campus policies
 - Violations occurring in programs or at locations outside the current definition
 - Violations that don't meet the standards under the regulations
- Student Conduct violations
- Employee Conduct standards

Update notice with later-discovered allegations.







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Class Three: The Grievance Process – Hearings & Appeals

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Class Overview



• Due Process / Fundamental Fairness

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- Credibility Determinations
- Advisors
- The Written Determination
- Appeals

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that follows the law, is implemented without bias, stereotypes or pre-judgment, and provides an equal opportunity for parties to be heard and present evidence, so as to allow the decision-maker(s) to reach a determination consistent with the standard of evidence.

A Fair Process:

Title IX Sexual Harassment Grievance Process: Elements of "Due Process"



- Notice to the Respondent of the allegations
 - Opportunity to respond
 - · Adequate opportunity to prepare before responding
- Notice to the Parties of the process that will be used, including appeals
- Opportunity to present evidence and witnesses
- Cross-examination, including questioning of witnesses
- Live hearing (in separate spaces upon request and as appropriate)
- Opportunity to have advisors of choice

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State the Standard of Evidence



Same standard of evidence for all.

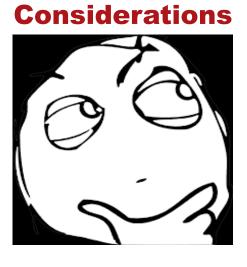
Either:

- Preponderance of the evidence, i.e., more likely than not; Or
- Clear and convincing evidence, i.e., substantially more likely to be true than not.

And Not:

 Beyond a reasonable doubt (no other reasonable explanation possible – criminal cases).





- What evidence is most believable?
- Corroborating evidence
 - Other testimony
 - Physical evidence
- Consider faulty memories
- Explore reasons for inconsistencies
- There are no "perfect" witnesses, complainants or respondents

Factors to Weigh

- Consider each material fact separately.
- Credibility as to the facts:
 - Credibility on one fact doesn't make all of that person's testimony credible, and
 - Lack of credibility on one point doesn't make all of that person's testimony non-credible.
- Does the testimony feel rehearsed or memorized?
- Is the testimony exactly the same as another witness?
- · Does the testimony make sense?
- Is the testimony detailed, specific & convincing? If not, is there a reason?
- Is it a statement against interest?
- Less credible witness isn't necessarily being dishonest.

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Caution



- Eyewitness accounts
- Bias/Assumptions about witness credibility that may not take account of cultural norms or may stereotype.
- Assumptions about memory that may not reflect witness experiences.
- Failure of decision-maker to explain credibility determinations.



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Getting Ready

- Self-identify any conflict of interest or bias.
- Prepare, prepare, prepare.
- Read the report carefully and repeatedly, but don't prejudge.
- Understand the conduct at issue and the elements of the alleged violations.
- Identify areas of agreement and disagreement.
- Determine if there are areas that require further inquiry, e.g., did the investigator explore & consider all the relevant evidence?

Hearing Decorum

Points to Consider: May have rules that:

- Require advisors be respectful and prohibit abusive/intimidating questioning.
 - Deem repetition of the same question irrelevant.
 - Allow for removal of advisors.
- Specify any objection process.
- Govern the timing and length of breaks to confer, and prohibit disruption.
- Require that parties make any openings and closings.
- Who will enforce the rules of decorum?
 - How will you train decision-makers?

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Advisors



- Parties must have the opportunity to have an advisor present during any grievance proceeding (hearing or related meeting).
- A party may choose not to have an advisor.
 - However, the institution <u>must</u> provide an advisor to question and cross-examine witnesses if the party isn't accompanied by one.
 - Institutions may require parties to provide advance notice of their advisor's attendance.
 - What if they are a no-show?
- Advisor provided by institution need not be an attorney.
 - Need not be of "equal competency."
- May establish guidelines for advisors.
 - Role of advisors in hearings and meetings.
 - Use of non-disclosure Agreements.



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More on the Advisor's Role



- Provide support and advice to the party.
- Understand the allegations and the process.
- Understand the purpose and scope of questioning and crossexamination.
- Ask questions that elicit relevant information.
- Wait for relevancy determinations after asking a question.
- Adhere to rules of decorum and encourage the party to do the same.
- NOTE: Institutions may remove disruptive advisors ... carefully.



Advisor or Legal Representative

- Clarify procedures and role in advance.
- Distinguish between advisor and legal representative.
- Emphasize the "ground rules" provide any rules of decorum.
- Establish lines of communication and points of contact.







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Written Determination

- Identification of allegations potentially constituting sexual harassment
- Description of the procedural steps
- Findings of fact supporting the determination
- Conclusions regarding the application of the code of conduct/policy to the facts
- Statement of and rationale for the result as to each allegation, including sanctions and whether remedies will be provided
- Appeal procedures and grounds





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Must provide an appeal from a determination of responsibility and dismissal of a formal complaint, based on: • Procedural irregularities that affected the outcome. • New evidence not reasonably available at the time of determination that could affect the outcome. **Appeals** • Bias or conflict of interest of the Title IX Coordinator, investigator or decision-maker that affected the outcome. • Inappropriate or impermissible dismissal of any formal complaint or allegation. • May include other grounds, equally available to both parties. TNACUA National Association of College and University Attorneys

Appeal Process



- Notify other party upon receipt of appeal.
- Appeal decision-maker can't be Title IX Coordinator, investigator or hearing decision-maker.
- Opportunity for both parties to submit written statement.
- Written decision with the result and rationale simultaneously to both parties.

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Title IX Coordinator Training Online Course

Class Four: Anatomy of an OCR Investigation

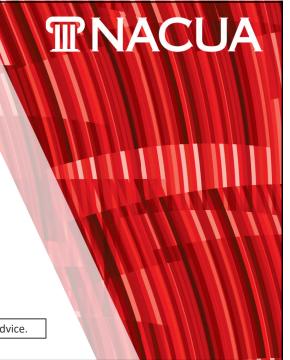
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Class Overview



- Demystifying the OCR's Multi-Phase Process
- Understanding different aspects of OCR's Case Processing Manual
- Practical Points to Consider in Working with OCR
- Summary

Why is this Important to You?

- OCR is the primary enforcement agency regarding Title IX, which may make your department more likely to interact with them
- OCR's process is its own, meaning that responding to OCR often looks different from responding to litigation or even responding to other civil rights enforcement agencies
- Most importantly, understanding OCR's perspectives and the way that it approaches its role can help you maintain policies, files, and other materials in a way that is helpful to you and eases the burden of an OCR review



3

What Complaints Does OCR Handle?

- OCR enforces several laws:
 - Title VI
 - Title IX
 - Section 504 of the Rehabilitation Act and Title II of the ADA
 - Age Discrimination Act
- DOJ/USAO and EEOC may also conduct investigations that overlap into these areas, e.g., DOJ reviews disability issues under Title III of the ADA, sexual misconduct issues under VAWA
- OCR may refer complaints to DOJ for enforcement
- NOTE: It's extremely easy for individuals to file complaints!



Demystifying the OCR Process

- The main phases of an OCR complaint investigation:*
 - Notification to the Institution
 - Early Resolution Options
 - Data Requests
 - Investigation
 - Negotiation and Monitoring of Resolution Agreements (if necessary)
- *Note that OCR can also conduct broad, agency-instituted compliance reviews, but they typically follow these same phases

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OCR Investigations: Resources

- OCR Complaint Processing Manual (Aug. 2020)
- Dear Colleague Letters and Enforcement Guidance by Statute
- Prior OCR/DOJ Resolution Agreements by Statute
- Case law can be helpful, but OCR does not always recognize court precedent unless it is directly on point

Phase I: Evaluating the Complaint

OCR evaluates the complaint to determine whether it can investigate:

- Does the complaint allege a violation of law enforced by OCR?
- Was the complaint filed within 180 days of last act which complainant alleges to be discriminatory?
- OCR may:
 - Contact complainant for clarification
 - Waive 180 day filing requirement at its discretion
 - Do all of this without the institution knowing it's happening!



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Phase I: Evaluating the Complaint

OCR may administratively close/dismiss the Complaint if, e.g.:

- Complaint does not state a violation of a law OCR enforces
- Complaint is not filed timely
- Complaint is unclear/incomplete and complainant did not provide OCR with clarifying information
- Complaint has been investigated by another federal, state, or local civil rights agency and resolution meets OCR regulatory standards
- Same allegations have been filed by same complainant against same school in state or federal court

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Phase I: Strategies

- There's not much an institution can do to advocate with OCR when it has advance notice that a complaint is headed to OCR
 - OCR uses this period to determine whether it has jurisdiction and sufficient facts to investigate
 - OCR typically does not appreciate outside opinions at this early stage of the process; any efforts to intercede should be done <u>very delicately</u>
- When should an institution intercede?
 - A fundamental premise is inaccurate that might lead to dismissal
 - The matter in question is currently being heard internally at the institution and the process is not completed, or it has been filed in court or with another agency



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Phase II: Notification of Investigation

- OCR sends "Letter of Notification" to the institution and the complainant if it determines it will open the complaint for investigation. This letter typically includes:
 - OCR's jurisdiction
 - A brief factual description and allegations to be investigated
 - A statement that OCR is a neutral party
- OCR may refuse to disclose the identity of the student/group bringing the complaint
- OCR may consolidate multiple similar complaints into a single investigation
- OCR may convert a complaint into a broader compliance review

Phase II: Notification of Investigation

- Notification letters are not typically detail heavy
- OCR will typically provide a link to the Case Processing Manual and the complaint, but some offices only provide the complaint upon request and/or with heavy redactions

Make FOIA request

- Simple to do and usually costs nothing
- OCR is required to respond; but may deny the request until the investigation is concluded
- May request additional information beyond complaint, e.g., documents submitted by complainant or even prior complaints against the institution

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Phase II: Strategies

- Review regulatory provisions cited by OCR for insight into what OCR will investigate, e.g., facts may cloud the fact that OCR is only focused on the publication of a policy
- Pay particular attention to what OCR says it is investigating,
 which may be broader or narrower than what is in the complaint
- OCR will remind the institution that it may not retaliate against any complainant or any person who participates in OCR investigation; make sure that is understood by relevant community members who may interact with the complainant

Early Resolution Options

- <u>Rapid Resolution Process</u> (RRP): Cases chosen by OCR because resolution seems more straight forward or timing is an issue. Often precedes the notification letter and could obviate a finding of any sort.
- <u>Facilitated Resolution Between the Parties</u> (FRBP): An OCRfacilitated mediation-like process:
 - Available only where OCR deems "appropriate."
 - Both parties must agree to mediate; if unsuccessful the case goes back to mediation. (Different OCR staff mediate v. investigate.)
 - Ultimate agreement not typically monitored by OCR unless a breach is alleged and, even then, OCR will typically revert to investigating the original allegations and not the breach.

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Voluntary Resolution

- Institutions may seek to affirmatively resolve complaint before conclusion of the investigation by initiating negotiations for a Resolution Agreement (a/k/a "302 Agreement," because it's defined under CPM Section 302)
- Appropriate when the institution agrees to forego the investigation and enter a compliance agreement on some or all issues
- OCR reserves the right to include any fact <u>learned to date</u> in the Resolution Letter, which may create a strategic advantage in requesting a Voluntary Resolution early if you know that is where it may be headed
- New change to Section 302 allows recipients an opportunity (5 days) to review the draft resolution letter, usually while negotiating draft resolution agreement

Phase III: Data Request

- OCR will typically include a Data Request with the notification letter:
 - Requests documents, policies, practices, data and explanations
 - Offers opportunity for the institution to provide additional information at its discretion
 - OCR is exempt from FERPA
- Must respond within date on letter, usually 10-30 days
 - Brief extensions may be granted on request
 - Keep in mind OCR has an internal clock for case processing and that clock often runs from date OCR receives complaint

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Phase III: Strategies

- Maintain updated and comprehensive records of trainings
- Review accessibility and consistency of policies
- Begin gathering information promptly upon receipt of Notification Letter; clearly communicate delays with OCR staff
- <u>PROVIDE A NARRATIVE</u>: An opportunity to educate OCR staff; can also propose witnesses
- OCR does not have authority to compel production in a specific form or create materials; obligation can be satisfied by permitting OCR to come onsite and permit access
- All data submitted to OCR is subject to a FOIA request; consider redactions, as appropriate

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Phase IV: Onsite Visit

Types of Activities:

- Interview employees, including Title IX Coordinator and Deputies; Director of Student Conduct; Dean of Students; Resident Directors; Athletics Director; coaches; etc.
- Interview students, including those trained to respond to reports of sexual misconduct; member(s) of the judiciary/hearing board; members of student organizations; students involved in the grievance process
- Focus group meetings, involving community members (including students) who wish to meet with OCR to share their perception of climate on campus regarding presence and effects of sexual harassment
- **File review**, if not already completed (May ask OCR to only review certain sensitive material on campus so it does not end up in the government file.)

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Phase IV: Strategies

- <u>Be involved</u>: The process can take clumps of days over an extended period of time. Be judicious in choosing battles
- Identify / suggest relevant witnesses to OCR
- Prepare witnesses
 - Demystify OCR/DOJ staff by explaining types of questions
 - Provide witnesses with relevant policies/procedures
 - Evidentiary rules don't apply; OCR will weigh hearsay in certain situations explain this to witnesses
 - Share OCR "Rights of Witnesses" document

Phase IV: Strategies

- Determine appropriate role of counsel:
 - Will counsel sit in on interviews? Will counsel be able to ask limited questions?
 - Certain lower level employees may have right to refuse to have anyone present during interview and to refuse to reveal interview content
- This is an opportunity to:
 - Demonstrate ongoing compliance efforts to OCR
 - Supplement data response as new information becomes apparent
 - Develop a relationship with OCR staff who will be critical in remaining phases of the case



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Phase V: Compliance Determination

- If OCR determines the institution was out of compliance with a legal requirement, it will issue a Resolution Letter and a Resolution Agreement:
 - Resolution Letters are fact-intensive summaries that apply the law to OCR's factual findings, but OCR makes clear that they are not formal statements of OCR policy
 - The Resolution Agreement then sets forth the agreed upon steps the institution will take to correct the compliance concern
 - Resolution Agreements typically include specific monitoring requirements that often involve continued oversight by OCR

Phase V: Compliance Determination

- OCR may end Resolution Agreement negotiations at any time if there is an "impasse" or if 90 day period expires. Letter provides OCR will issue findings within 10 days if resolution is not reached
- If institution and OCR are still unwilling or unable to negotiate, OCR will issue a Letter of Impending Enforcement Action
- After that, OCR will initiate administrative enforcement proceedings to suspend, terminate, or refuse to grant or continue Federal financial assistance, or refer to DOJ for litigation
- OCR may also move to defer any new or additional Federal financial assistance to school

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Phase V: Examples

Typical requirements in resolution agreements:

- Mandatory training, with OCR potentially reviewing and approving training content. Occasionally, OCR must approve trainer(s).
- Revision of policies and submission of policies to OCR for approval within a specific period.
- Conduct climate surveys or other assessments in the area of concern.

Phase V: Strategies

- Seek details on findings to understand how to narrow agreement terms to findings:
 - Discuss proposed terms and how they align with legal/factual concerns
 - Review and be prepared to discuss OCR recent resolution letters addressing the same statute and similar facts
- Focus on flexibility for the institution
 - What is a realistic time period for compliance?
 - Have a candid conversation to try to determine OCR's internal flexibility (or inflexibility – often not driven by regional office) on certain issues, e.g., timing

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In Summary ...

- An OCR investigation requires significant internal resources to address data requests and onsite visits
- Be an active participant, as appropriate, in each stage of the process
- Identify and begin taking steps to remedy possible vulnerabilities upon notice of complaint
- Organize files and processes as part of school's regular operations – not just if there is an OCR investigation



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Title IX Coordinator Training Online Course

Class Five: Title IX Training & Policies

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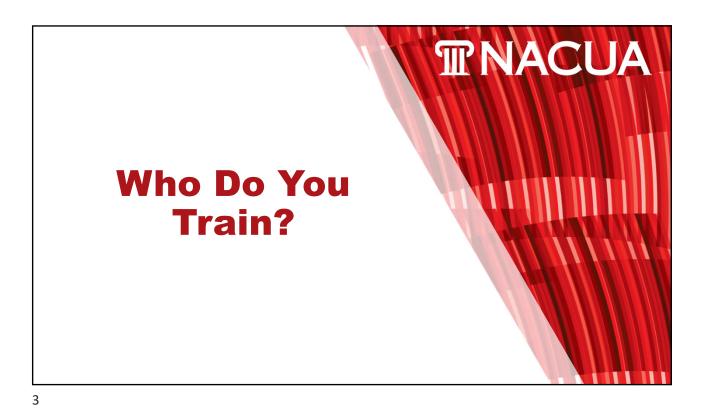
Class Overview



- Audiences To Be Trained
- Elements of a Good Training Program

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- Benefits and Perils of Trauma-Informed Training
- Auditing Training Materials
- Developing and Revisiting Policies
- Records Retention and Posting



The Regulations (Title IX Personnel)

- Title IX Coordinators
- Investigators
- Decision-makers
- Anyone who facilitates an informal resolution process



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Consider Training Others, even though not Required by the Regulations

- Title IX staff who are not identified by the regulations
- Officials With Authority to take corrective measures
- Other individuals with the responsibility to report sexual harassment – former Responsible Employees
- Campus Safety Authorities (CSAs)
- The Campus Community

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Planning & Preparation

- · Identify who must or will be trained on what topics
- · Identify who will conduct training
- Identify the method that will be most effective and efficient for those to be trained and trainers
 - · Live training v. on demand v. hybrid
 - · Should groups be combined?
 - · When should training occur?
- Consider training resources and campus culture around training
- Ensure training is without bias or stereotypes
 - · Complainants vs. Respondents
 - · Balanced without regard to gender or other classifications



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Required Training

A school must ensure that Title IX Personnel (coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process) receive training on:

- the definition of sexual harassment;
- the scope of the institution's education program or activity;
- how to conduct an investigation and grievance process including hearings, appeals and informal resolution processes, as applicable; and
- how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest and bias.

Required Training

Title IX Personnel Continued:

- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest and bias.
- Including: sex, race, ethnicity, sexual orientation, gender identity, disability or immigration status, financial ability, or other characteristic.
- **Implicit bias training not required.

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Required for Investigators



- Conducting a fair and thorough investigation.
- Determining relevance in order to prepare an investigative report that fairly summarizes relevant evidence.

Required for Informal Resolution Facilitators



- How to conduct informal resolution processes (85 FR 30405)
- Document or make public?

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Required for Decision-makers:

- Training on any technology to be used at a live hearing.
- Training on issues of relevance, including how to rule on evidence during a hearing and how to apply the rape shield protections provided only for complainants.
- Include training around the presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.



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Other Training Topics

Investigator	Decision-maker
Questioning	Managing the process
Institutional policies	Hearing protocol
 Responsibility for proposed findings and conclusions Redacting privileged information Coordinating investigation with supportive measures 	Institutional policiesQuestioningPreparing findings and conclusions

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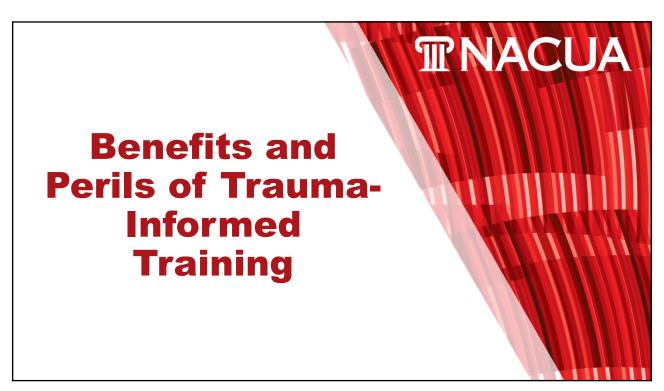
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Training Transparency

- Post all training materials for Title IX personnel on publicly available website. (If no website, then make materials available for members of the public to inspect.)
- Ensure the materials posted are up-todate, reflecting the most current training provided.



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How to Be Fair to All

Perils
May be perceived to favor Complainants
May be perceived as less intense questioning or cross- examination of witnesses
 May be misused by untrained questioners



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When & What to Audit

- · Who was trained
- Was training effective
 - Measured outcomes
 - Observed outcomes
- How often to monitor
- Documenting monitoring



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Managing the Policies

 Existing laws, agreements & practices Identify conflicts and concurrences and harmonize Changes in related laws or guidance, e.g. FERPA, state APA Effectiveness 	 Existing laws, agreements & practices Identify conflicts and concurrences and harmonize or change guidance or institutional needs Changes in related laws or guidance, e.g. FERPA, state APA Effectiveness Include stakeholders 	Developing policies	Monitoring policies		
 Existing laws, agreements & practices Identify conflicts and concurrences and harmonize Changes in related laws or guidance, e.g. FERPA, state APA Effectiveness 	 Existing laws, agreements & practices Identify conflicts and concurrences and harmonize or change Changes in related laws or guidance, e.g. FERPA, state APA Effectiveness Include stakeholders 	Existing institutional policies			
• Identify conflicts and concurrences and harmonize guidance, e.g. FERPA, state APA	 Identify conflicts and concurrences and harmonize or change Identify conflicts and concurrences and harmonize or change Include stakeholders 	• •			
concurrences and harmonize	concurrences and harmonize or change • Effectiveness • Include stakeholders	•	guidance, e.g. FERPA, state		
	Include stakeholders Include stakeholders	concurrences and harmonize	• Effectiveness		
Include stakeholders Include stakeholders		 Include stakeholders 			

Notification and Dissemination

- Title IX Coordinator contact info must be distributed and prominently displayed on the IHE website, and in each handbook or catalog made available to applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations with CBAs.
- · Nondiscrimination Policy stating:
 - that the IHE does not discriminate on the basis of sex in the education program or activity it
 operates.
 - That the IHE is required by Title IX not to discriminate.
 - · That the IHE's nondiscrimination policy extends to admission and employment.
 - That inquiries about the application of Title IX may be referred to the school's Title IX Coordinator, to OCR, or to both.



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Adopt & Publish

- · Adopt and publish:
 - grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action prohibited under Title IX.
 - a grievance process that complies with 106.45 for formal complaints as defined in 106.30.

Notice

WHAT: Notice of the school's grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the school will respond.

TO WHOM: applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the school.

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Policy Decision Point: Framework

All-in-One Policy

- 1. Treat all the Same; or
- 2. Decision Trees

Two Policies: If not TIX, then ...

- 1. Title IX Regulation+
- 2. Everything Else

Three plus:

- 1. TIX Regulation Conduct
- 2. Other Sexual Misconduct
- 3. Other Prohibited Conduct



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Policy Definitions:

- Actual Knowledge
- Complainant/Respondent
- Supportive Measures
- Formal Complaint
- Prohibited Conduct
 - · Sexual Harassment
 - Sexual Assault
 - · Dating Violence
 - Domestic Violence
 - Stalking
- Consent

- Title IX Coordinator
- Officials with Authority
- · Other Reporters, if any.
- Confidential Resources
- · Standard of Review
- Evidence
 - · Directly Related
 - Relevant
 - · Weight
- · Deliberate Indifference
- · Education Program or Activity
- Informal Resolution
- Emergency Removal





Please Note:

Where there is a conflict between State or local law and Title IX regulations, Title IX regulations win.

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Don't Forget Clery ... Annual Security Report Policies

- Description of proceedings and processes for filing and handling complaints of sexual assault, dating violence, domestic violence and stalking.
- The standard of evidence used in disciplinary actions for covered offenses.
- · List of possible sanctions for covered offenses.
- · Range of protective measures available to victims.
- Assurances that proceedings will be prompt, fair, impartial & conducted by trained officials.
- Equal opportunity for parties to have an advisor chosen by the party.
- Simultaneous notification of result, process for appeal and when final.
- Description of primary prevention and awareness programs.
- Procedures for victims to follow if a covered crime occurs.
- · Notification of services and accommodations for victims.



Record Retention 7 Years



- For formal complaints:
 - Investigation
 - · Determination of responsibility
 - · Transcripts or recordings of hearings
 - · Sanctions, if any
 - · Remedies to Complainant, if any
 - · Appeal, if any, and result
 - · Informal resolution and result, if any
- For all reports, regardless of whether there is a formal complaint:
 - Actions taken and supportive measures, if any, provided in response to a formal complaint.
 - Basis for a determination that the institution was not deliberately indifferent.
 - Measures to restore or preserve equal access or reasons why not providing support was not clearly unreasonable under the circumstances.
- · All training materials for Title IX personnel

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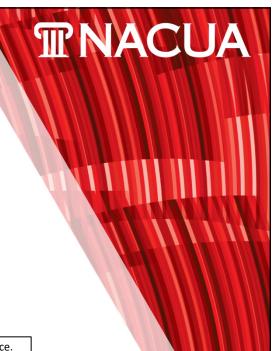
Class Six: Athletics Equity and Applying the New Regulations

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Class Overview



- Athletic Equity
- Pay Equity
- Practical Effects of the New Regulations
- Training/Related NCAA Requirements



Sources of Law, Title IX
Enforcement, and the impact of
Pandemics
(NCAA does NOT enforce Title IX)

Schoolhouse Rock:
https://www.voutube.com/watch?v=tPd98CbbMk

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Activities counted as Sports for purposes of Title IX

- NCAA Championship sports are presumed to be countable.
- For non-NCAA sports, a review may consider the following, among other factors:

PROGRAM STRUCTURE AND ADMINISTRATION —

Is the program provided a budget, support services, access to coaching, equitable eligibility for athletics scholarships and awards, and are the student-athletes recruited in a manner consistent with established varsity sports?

TEAM PREPARATION AND COMPETITION -

Does the team practice and compete in a manner consistent with established varsity sport programs? Included in this review, among other factors, are the following considerations:

- Are there standardized rules of play and competition criteria for the sport?
- · Are the support services provided based on the competitive needs of the program?
- · Is post-season play determined by regular season performance?
- Is team selection based on athletics ability?

 $Dear Colleague \ Letter: A thletic Activities Counted for Title IX Compliance (OCR 2008), \\ \underline{https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20080917.html}.$

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Title IX Countable Participation Opportunity

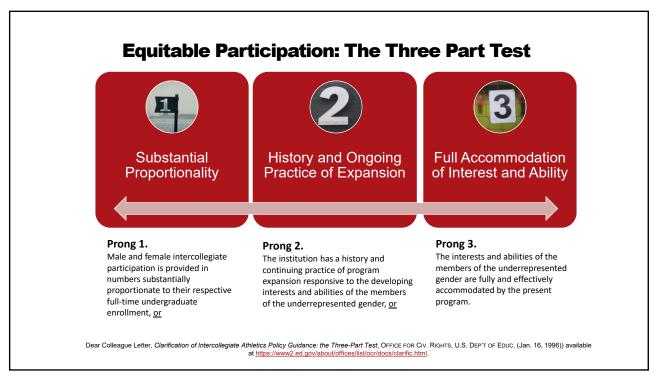
OCR defines a Title IX Participant as one:

- who is receiving the institutionally sponsored support normally provided to athletes competing at the institution involved (e.g., coaching, equipment, medical and training room services) on a regular basis during a sport's season; and
- who is participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and
- who is listed on the eligibility or squad lists maintained for each sport;
- 4. who, because of injury, cannot meet 1, 2, or 3 above but continues to receive financial aid on the basis of athletic ability.

Per guidance, "OCR considers a sport's season to commence on the date of a team's first intercollegiate competitive event and to conclude on the date of the team's final intercollegiate competitive event."

Dear Colleague Letter, Clarification of Intercollegiate Athletics Policy Guidance: the Three-Part Test, Office FOR CIV. RIGHTS, U.S. DEP'T OF EDUC. (Jan. 16, 1996)) available at https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html.

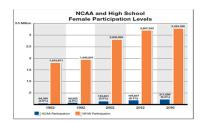




Sport Cuts that Involve the Underrepresented Sex: Typically Require Prong 1 Compliance







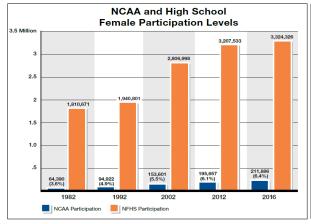
ENFORCEMENT —

 ${\tt OCR: Investigation. \ Letter\ of\ Findings.\ 302\ Resolution\ Agreement.\ Referral\ to\ DOJ.}$

Court: No Administrative Exhaustion. No Cap on Damages. Injunctive Relief. Class Actions. Attorneys Fees.

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Prong 3: Accommodating Interest & Abilities



Does the current line up of sports effectively accommodate the athletic interests and abilities of the underrepresented sex?

What is the underrepresented sex?

Is there:

- o unmet interest in a particular sport;
- o sufficient ability to sustain a team in the sport; and
- a reasonable expectation of competition in the normal competitive area?

How much interest/ability/competition is enough? What is the relevant pool to be assessed?

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Equitable Levels of Competition:

The competitive schedules for men's and women's teams, on a program-wide basis, afford proportionately similar numbers of male and female athletes equivalently advanced competitive opportunities;



There exists a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex.

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Athletics-Based Financial Aid/Scholarship Equity



"If any unexplained disparity in the scholarship budget for athletes of either gender is 1% or less for the entire budget for athletic scholarships, there will be a strong presumption that such a disparity is reasonable and based on legitimate and nondiscriminatory factors. Conversely, there will be a strong presumption that an unexplained disparity of more than 1% is in violation of the "substantially proportionate" requirement.

We would like to clarify that use of statistical tests is not appropriate in these circumstances."

Dear Colleague Letter – <u>Bowling Green</u> (July 23, 1998)



Non-Exhaustive Areas of Review	Men's Program Overall	>/ =</th <th>Women's Program Overall</th>	Women's Program Overall
Equipment and Supplies (Apparel and Equipment)			
Scheduling (Practice, Competition)			
Travel (Mode, Housing, Food)			
Tutors/Academic Services (Personnel, Services)			
Coaches (Quantity, Quality, Compensation*)			
Facilities/Spaces (Practice, Competition, Locker Room)			
Medical (Personnel, Experience, Availabity)			
Housing & Dining (Home)			
Publicity/Communications (Sports Information & Marketing)			
Support Services (Administrative, Office, Support)			
Recruiting (Financial & Other Support)			

Sources of Funding

It's not a dollar to dollar analysis. Focus on goods and services. Where differences exist, OCR may focus on funding.

Private donations are institutional dollars and goods and services provided through private funding still count. In other words, those goods and services are included in the equity analysis.

See, e.g., Chalenor v. Univ. of North Dakota, 142 F. Supp. 2d 1154 (D.N.D. 2000)



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Are the Disparities Significant? OCR v Judicial Review



Difference, on the Basis of Sex

- in benefits or services that has a . . .
- negative impact on athletes of one sex . . .
- when compared with benefits or services available to athletes of the other sex.

Disparity:

• So Substantial as to Deny Equal Opportunity to Athletes of One Sex.

Disparities that are not Substantial...

• Evidence to be Evaluated on a case by case basis.

See, e.g., Policy Interpretation, 44 Fed. Reg at 71,417 (1979).

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Compensation and Pay Equity

• Title IX Program Review:

Coaches of women's sports as compared to coaches of men's sports, and usually only when coaching inequities are otherwise identified.

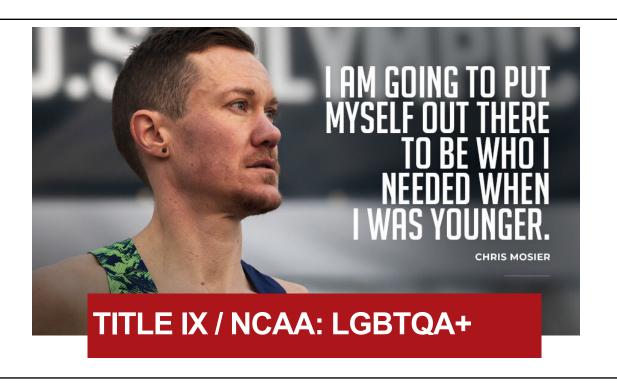
• Title IX Employment/EPA:

Female coaches' salaries compared to male coaches' salaries.

- Equal Pay for Equal Work
- Non-Discriminatory Justifications
- OFCCP Audits/Title VII/State Law
- Documenting & Auditing Compensation Systems/Approaches



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Application (per the preamble):

- "[T]he Department declines to address other topics ... such as pregnancy, parenting, or athletics under Title IX, coverage of Title IX to fraternities and sororities, whether speech codes discriminate based on sex, funding intended to protect women or young adults on campus, funding cuts to girls' programs by recipients, or forms of harassment other than sexual harassment."
- These complaints "may be referred" to the recipient's Title IX Coordinator to review under the grievance procedures required by these Regulations.
- "[T]he handling of non-sexual harassment sex discrimination complaints brought by students and employees (for instance, complaints of sex-based different treatment in athletics . . .) remains the same as under current regulations (i.e., recipients must have in place grievance procedures providing for prompt and equitable resolution of such complaints)."

See Title IX Regulations, 85 FR 30026 at <a href="https://www.federalregister.gov/documents/2020/05/19/2020-10512/nondiscrimination-on-the-basis-of-sex-in-education-programs.or-a-chivities-re-epignos-federal-programs.or-a-chivities-re-epignos-federal-programs.or-a-chivities-re-epignos-federal-programs.or-a-chivities-re-epignos-federal-programs.or-a-chivities-re-epignos-federal-programs.or-a-chivities-re-epignos-federal-programs.or-a-chivities-re-epignos-federal-programs.or-a-chivities-re-epignos-federal-programs.or-a-chivities-re-epignos-federal-programs.or-a-chivities-re-epignos-federal-programs.or-a-chivities-re-epignos-federal-programs.or-a-chivities-re-epignos-federal-programs.or-a-chivities-re-epignos-federal-programs.or-a-chivities-re-epignos-federal-programs.or-a-chivities-re-epignos-federal-programs.or-a-chivities-re-epignos-federal-programs.or-a-chivities-re-epignos-federal-programs.or-a-chivities-programs.or-a-chivitie

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Infusing Equity: Consider a Supplemental Policy

Sample Language:

This policy supplements the overall school policy prohibiting sexual harassment, [provide link] which also applies to all members of the athletics department, both staff and student-athletes.

School U. values the educational aspect of athletics and as such offers opportunities to compete in a [NAIA/NCAA] Division [I, II or III] varsity athletics program and is a member of the [name] conference[s], club level and intramural programs. School U. believes that its student-athletes should be provided gender equitable participation opportunities, receive gender equitable athletic scholarships, and be afforded gender equitable treatment overall.

To report an athletics gender equity concern or to a request for varsity status for an athletic team not currently offered at the varsity level, please contact School U's Title IX Coordinator, titleix@schoolu.edu, Office 405, University Hall, 8-4490.

No Retaliation Policy:

Employees and/or students who ask questions, seek advice or report a suspected violation of this policy are protected by School U's no retaliation policy. Retaliation will not be tolerated. If you suspect that you or another employee may be the victim of retaliation, you should contact TIX immediately. Those who violate the No Retaliation policy are subject to discipline.

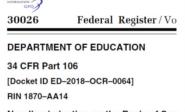
IMPORTANT: Consider how complaints would be managed and findings would be implemented.

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Discussion



Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

AGENCY: Office for Civil Rights, Department of Education. ACTION: Final rule.

- Title IX Coordinator and Deputies
- Actual Knowledge/Reporting Responsibilities*
- · Definitions of Prohibited Conduct
- Supportive Measures*
- Formal Complaints/Notice/Investigation
- Confidentiality
- Advisors
- Jurisdiction/Mandatory v. Permissive Dismissals
- Emergency Removals*
- Informal Resolution
- Findings/Sanctions/Appeals*

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• Reporting in Athletics • Title IX Coordinator in Athletics? • Officials with Authority to address Sexual Harassment? • Who else is required to report? • Confidential? By licensure? • Limited confidentiality? Why?

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Athletics:

Supportive Measures

- Can not punish, discipline, or unreasonably burden the respondent.
- · Denials must be documented.



Emergency Removals

- A school may remove an individual from one or more education programs or activities in situations where the person poses an immediate threat to the physical health and safety of any individual before an investigation into sexual harassment allegations concludes (or where no grievance process is pending).
 - The school makes an individualized assessment that "an imminent threat to the physical health or safety of any person, arising from sexual harassment allegations, justifies removal," and
 - The school provides an opportunity to challenge its determination.
- An emergency removal cannot be imposed simply because an individual has been accused of sexual harassment.
- The Regulations do not prohibit a school from addressing violations of a school's code of conduct, policies, or laws, <u>provided the conduct does not</u> <u>constitute Title IX sexual harassment or is not "arising from" Title IX</u> <u>misconduct allegations.</u>

Findings, Sanctions, & Appeals

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Training:

- · Annual Per NCAA Requirements
- All Staff
 - Administration
 - Team Doctors/ATC
 - Support Staff
 - · Coaches
 - · GAs and Paid Student Workers
- · Student-Athletes
- · Cross Campus Engagement
- · Reporting Protocols
- · Complaint Avenues

- · In Person and Safe
- · Protocols for Outside Speakers
- · Importance of Face Time
- · Retention/Time of Day/Time of Year
- · Sport Examples
 - · Consider Student Involvement/Investment
- · Culture of Sport/Supervisor
- · Confidential Resources
- · Support for Complainants and Respondents
- Spotlight/Speed/Updates/Engagement
- · Head Coach Culture of Compliance

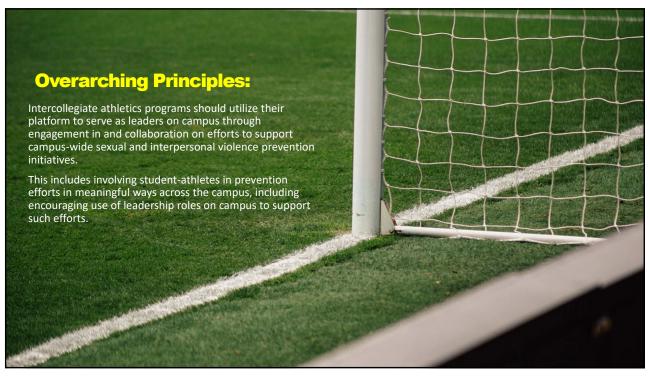


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Complying with NCAA Requirements: Policy and Attestation

- NCAA Board of Governors adopted a Policy on Campus Sexual Violence on Aug. 8, 2017.
- Requires annual attestations signed by the Director of Athletics, Title IX, and President (CEO).
- April 30, 2020 BOG revisions to the Policy expanded its reach and attestation content, effective Spring 2023.
- · Policy and FAQ are on the NCAA Website
- · Task Force
- · In the meantime:
 - Consider Discussions with Title IX, General Counsel, and others on campus.
 - Explore Compliance Position.
 - Consider Intersection with the new Regulations around Permissive Dismissals and Confidentiality.
 - Forward Comments to Regional Conference or NCAA Office.





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Attestation:



- The athletics department is informed on, integrated in, and compliant with institutional policies and processes regarding sexual violence prevention and proper adjudication and resolution of acts of sexual and interpersonal violence.
- The institutional policies and processes regarding sexual violence prevention and adjudication, and the name and contact information for the campus Title IX coordinator, are readily available within the department of athletics, and are provided to student- athletes.
- All student-athletes, coaches and staff have been educated each year on sexual violence prevention, intervention and response, to the extent allowable by state law and collective bargaining agreements.

Attestation, cont'd:

Nos. 4-6 require attestation beginning with the 2022-2023 academic year attestation:

- 4. All prospective, continuing and transfer student-athletes have completed a disclosure form annually related to their conduct that resulted in an investigation, discipline through a Title IX proceeding or in a criminal conviction for sexual, interpersonal or other acts of violence.** Failure to accurately and fully disclose investigatory activity, a disciplinary action or criminal conviction could result in penalties, including loss of eligibility to participate in athletics as determined by the member institution.
- 5. Institutions have taken reasonable steps to confirm whether prospective, continuing and transfer student-athletes have been under investigation, subject to discipline through a Title IX proceeding or criminally convicted of sexual, interpersonal or other acts of violence.** In a manner consistent with federal and state law, all NCAA member institutions must share information related to these matters with other member institutions when a student-athlete attempts to enroll in a new college or university.
- 6. An institution choosing to recruit a prospective student-athlete or accept a transfer student- athlete must have a written policy that directs its staff to gather information that reasonably yields information from the former institution(s) to put the recruiting institutional leadership on notice that the prospect has been under investigation, disciplined through a Title IX proceeding or a criminal conviction for sexual, interpersonal or other acts of violence.** Failure to have a written policy and to gather information consistent with that policy could result in penalties.

Further, the athletics department will cooperate with college or university investigations into reports and matters related to sexual and interpersonal violence involving student-athletes and athletics department staff in a manner compliant with institutional policies for all students.

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- When did the policy begin? August 2017. The most recent amendments are effective in the 2022-23 academic year. The annual
 attestation period runs from March 1 May 15 each year.
- What is the deadline for completing the annual education for coaches, student-athletes and athletics staff? For the 2020-21
 academic year, education should be completed prior to the May 15, 2021 deadline so that presidents or chancellors, athletics
 directors and campus Title IX coordinators can attest to their compliance by the May 15 deadline. The attestation form will be
 available electronically in the NCAA Learning Portal and on ncaa.org/csvpolicy beginning March 1, 2021 and must be completed by
 May 15, 2021. This is a firm deadline.
- · How do I upload my completed form? Each school's director of athletics must upload the final form in the NCAA Learning portal.

FAQs:

- What type of education meets the expectations of the policy? The policy allows member schools to determine the types and manner
 of education provided. The NCAA Sexual Violence Prevention Tool Kit can assist member schools in this effort. The tool kit provides
 checklists for campus collaboration and educational resources created specifically for student-athletes. Those resources include the
 online curriculum myPlaybook, which includes a course on sexual violence prevention.
- What happens after the deadline? A list of schools that have and have not attested to the requirements of the policy will be
 presented in a report to the Board of Governors at their August meeting each year. Once approved, the lists will be published on
 ncaa.org.
- Which athletics staff members are expected to complete the education requirement? While the policy does not provide a specific
 definition of staff for purposes of the educational prong and provides institutions the discretion to determine how far to extend their
 educational efforts (e.g. whether to include temporary workers, consultants or contractors), there is an expectation that all education
 will meet the requirements of local, state and federal law. All coaches including part-time, volunteer and assistant coaches, as well as
 athletics administrators full-time and temporary, and participating student-athletes are expected to complete the education.
- If I have additional questions about the policy where should I go? Questions may be sent to <u>questions@ncaa.org</u>. This inbox will only answer questions related to the policy and attestation process.

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