Association of
Title IX Administrators

Title IX Coordinator for Healthcare Educators & Providers

Training & Certification Course

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

CONTENT ADVISORY

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

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

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AGENDA

1. Title IX Team Roles & Responsibilities
2. Title IX Overview & History
3. Significant Cases
4. The OCR & Title IX
5. Clery Act & VAWA Section 304
6. When Does Title IX Apply?

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AGENDA

7 Creating & Implementing Appropriate Policies & Procedures

8 Oversight & Coordinating Prompt & Equitable Grievance Procedures

9 Coordinating Overlaps

10 Pregnancy and Title IX

11 Point Person for Complaints

12 Coordinating Informal Resolution

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AGENDA

13 Supervising Investigations

14 Elements of an Investigation

15 Coordinating the Decision-Making Stages

16 Ensuring Compliance with Final Sanctions

17 Coordinating Appeal Processes

18 General Title IX Compliance Oversight

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TITLE IX NOTICE OF PROPOSED RULEMAKING 2022

TITLE IX REGULATIONS

- Congress passed Title IX of the Education Amendments in 1972
- Since 1980, the Department of Education's Office for Civil Rights (OCR) has had primary responsibility for enforcing Title IX
- November 2018: OCR proposed the most detailed and comprehensive Title IX regulations to date[1]
- August 2020: Significantly amended, due-process oriented Regulations took effect (proposed in Nov. 2018)
- June 2022: OCR published the Notice of Proposed Rule Making (NPRM) outlining proposed changes to the Title IX regulations
- On July 12, 2022, the NPRM was published in the Federal Register and the 60-day comment period began

[1] U.S. Office of the Federal Register, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,* https://www.federalregister.gov/documents/2018/11/29/2018-25314/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal

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NPRM PROCESS TIMELINE

- Official publication in the Federal Register July 12, 2022
- Review and comment period
  - 60-day comment period ends September 12, 2022
  - Submit comments to the Department of Education's Office for Civil Rights (OCR)
- Final Rule expected to be issued in Spring 2023
- Effective Date approximately Summer/Fall 2023
- Watch for ATIXA webinars and other opportunities ☺
- There will be a separate NPRM for Athletics

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PREPARING FOR IMPLEMENTATION

- Must continue to fulfill obligations under the current regulations for the 2022-2023 academic year.
- Anticipate OCR will expect schools to implement the new Title IX regulations before the start of the 2023-2024 academic year.

Steps to Take Now:

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

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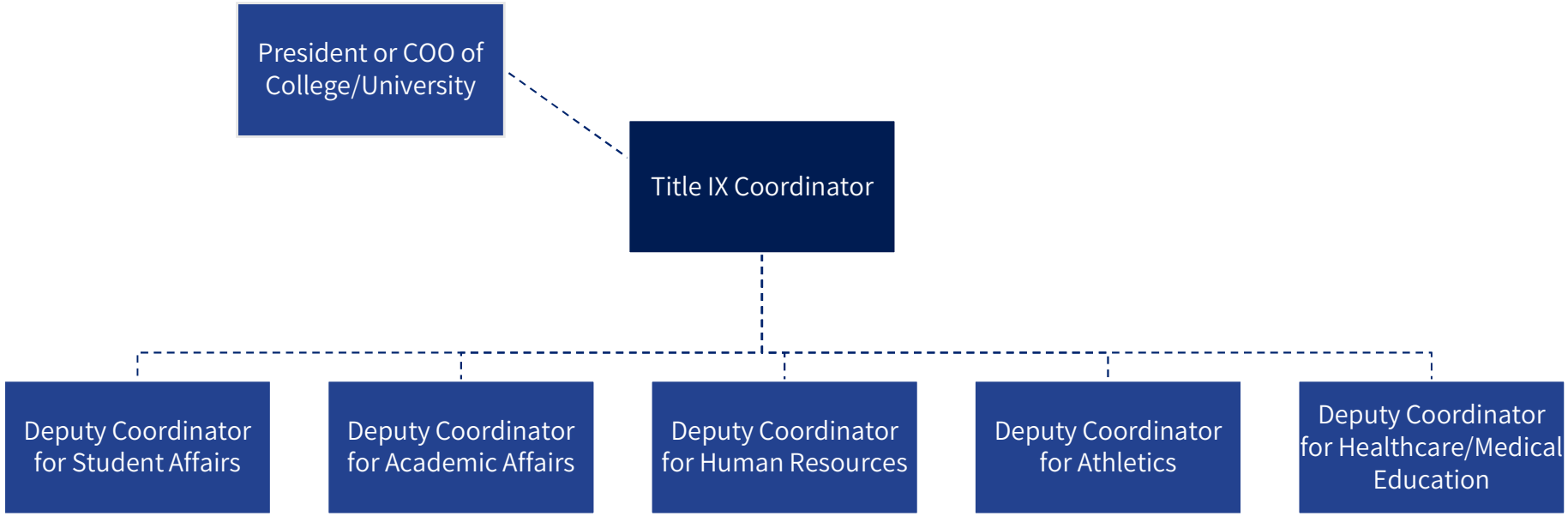
TITLE IX TEAM ROLES & RESPONSIBILITIES

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

SAMPLE TITLE IX TEAM STRUCTURE FOR HIGHER EDUCATION



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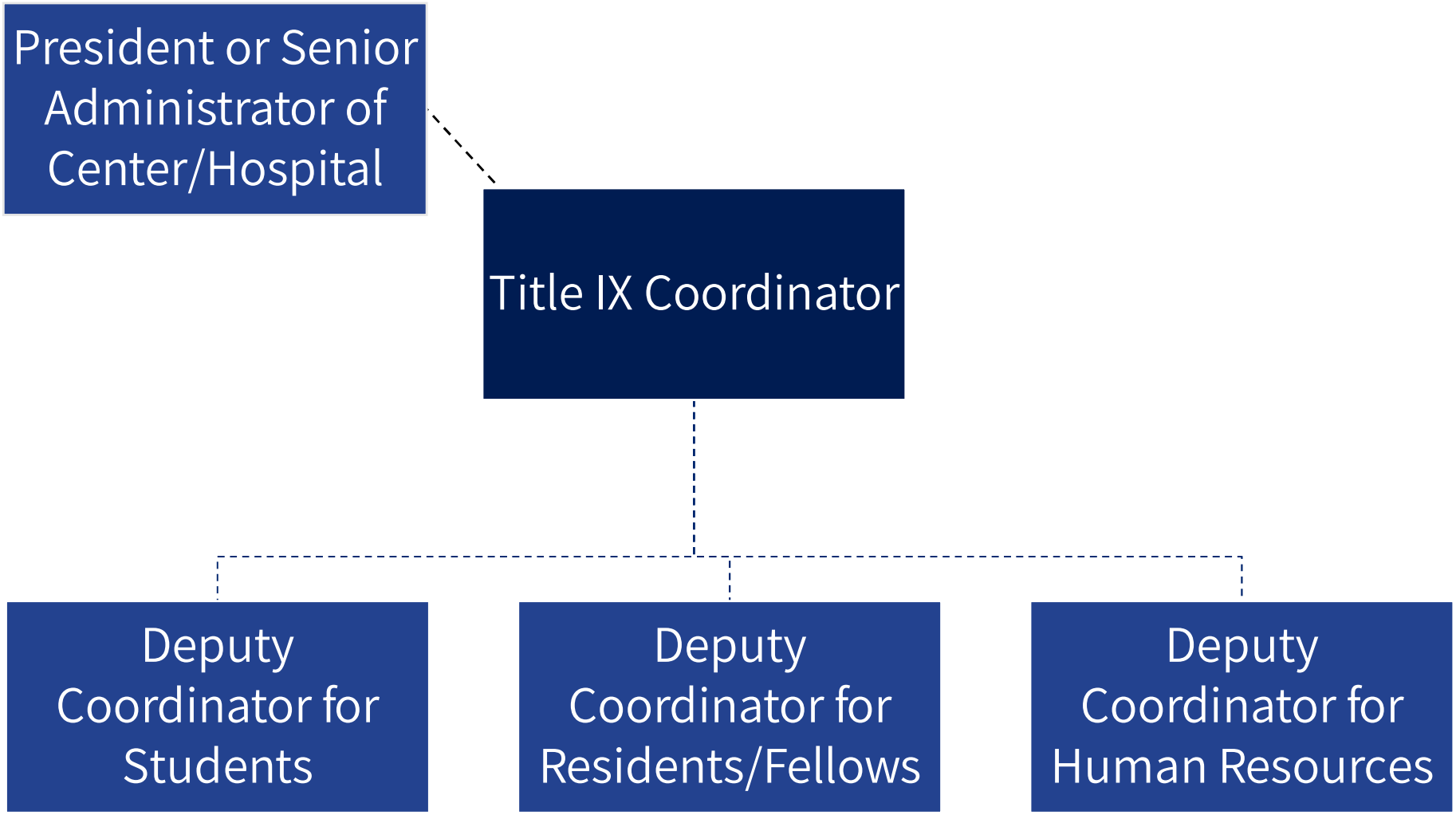
SAMPLE TITLE IX TEAM STRUCTURE FOR STANDALONE MEDICAL SCHOOL/CENTER



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THE TITLE IX TEAM

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

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TITLE IX TEAM STRUCTURE: ADDITIONAL CONSIDERATIONS

- Co-Coordinators?
- Job responsibilities of Deputy Coordinators
  - Tailor scope and roles based on institutional/organizational culture
  - Delegation
- Multiple campuses/locations
  - Campuses within a larger system (e.g., SUNY schools)
  - Extension campuses
  - Online communities
  - District-level (e.g., community college systems)
  - International placements
- Dual-enrollment oversight
- Investigator oversight

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THE TITLE IX COORDINATOR

- Recipients are required to designate at least one employee as the "Title IX Coordinator"
- Administrator with significant authority and wide-ranging responsibilities
- Affects change across many departments, including human resources, academic affairs, athletics, and student conduct
- Some institutions will allocate part-time responsibilities to the Coordinator while others will dedicate a full-time position
- Title IX Coordinator has become a profession within the field of civil rights compliance

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TITLE IX COORDINATOR: ROLES AND RESPONSIBILITIES

- Create and implement appropriate policy and procedures
- Navigate First Amendment protections
- Point person for reports and complaints
- Contact for government inquiries
- Oversight of prompt and equitable grievance procedures
- Coordinate overlap of various student and employee grievance processes
- Oversight of informal resolution processes
- Supervise investigations

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TITLE IX COORDINATOR: ROLES AND RESPONSIBILITIES (CONT.)

- Ensure compliance with final sanctions & remedies
- Coordinate appeal process
- General Title IX compliance oversight
- Compliance with requirements to stop, prevent, and remedy
- Training oversight
- Oversight of athletics gender equity (if applicable)
- Section 504 disability compliance oversight (if applicable)

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ROLE OF THE INVESTIGATOR

- Conduct reliable, prompt, fair, and impartial investigations
  - Work with TIXC to develop investigation strategy
  - Identify and interview parties and witnesses
  - Identify, organize, and compile relevant information
  - Maintain accurate and thorough investigation records and notes
  - Share the evidence with the parties and their Advisors
  - Provide notices to the parties (may be done in conjunction with TIXC)
- Create an investigation report that fairly summarizes relevant evidence

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ROLE OF THE DECISION-MAKER(S)

- Determine whether institution's policy has been violated based upon the applicable standard of evidence
  - Decisions must be based upon an independent assessment of the evidence gathered during the investigation and/or provided during a hearing, to include an assessment of the credibility of the parties and witnesses
  - Decisions must be based on the specific policy alleged to have been violated
  - Decisions must be impartial and free of substantive bias
- Determine appropriate sanctions/discipline for policy violations
- Draft a written determination that outlines the rationale for the finding(s)

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ROLE OF THE APPEAL DECISION-MAKER

- Make determination on a party's request for an appeal
- Review written submissions from parties
- May review investigation report or other evidence gathered during investigation/hearing
- May need to speak with Investigator, Decision-maker, parties, or witnesses
- Review of complaint should be limited to the grounds noted in the appeal request
  - Not a *de novo* review
- Draft a written determination that outlines the outcome rationale

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ROLE OF INSTITUTION-APPOINTED ADVISORS

- Parties have the right to have an Advisor of their choice to assist them throughout the process, to include attending any meetings and interviews
- No mandate to provide an Advisor to the parties at the outset of the process
- If party does not have an Advisor at the hearing, the institution must provide an Advisor to conduct the cross-examination on behalf of the party during the live hearing
- Must be provided at no cost to the party
- No mandate to train Advisors, however, it is advisable to do so for all institution-appointed Advisors

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TIX TEAM TRAINING REQUIREMENTS

- Robust training mandates
- Coordinators, Investigators, Decision-makers, Appeal Decision-makers, Informal Resolution Facilitators
- Training materials cannot include sex stereotypes; should promote impartiality
- Training materials must be maintained for seven years and posted publicly on Recipient's website

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REQUIRED TRAINING TOPICS

- Definition of sexual harassment
- Scope of the Recipient's education program or activity
- How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- Use of any technology to be used at a live hearing

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REQUIRED TRAINING TOPICS (CONT.)

- Issues of relevance for both questions and evidence, including when questions and evidence about the Complainant's prior sexual behavior is not relevant
- Issues of relevance regarding the creation of an investigation report that fairly summarizes relevant evidence
- **Note**: The OCR sets the minimum training requirements and institutions should conduct training that covers a broader range of topics
- **Note**: VAWA Section 304 requires annual training for sexual assault, dating and domestic violence, and stalking

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PUBLICATION OF TRAINING MATERIALS

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

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TITLE IX OVERVIEW & HISTORY

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

TITLE IX

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

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

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A BRIEF HISTORY OF TITLE IX: PRE-1972

1964 - Title VI of the Civil Rights Act

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

1964 - Title VII of the Civil Rights Act

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

1965 - Executive Order 11246

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

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A BRIEF HISTORY OF TITLE IX: 1972-1979

- **1972**: Title IX passed and signed into law by President Nixon
- **1975**: Department of Health, Education, and Welfare (HEW) codified Title IX regulations
  - HEW was the precursor to the current U.S. Dept. of Ed.
- **1979**: Supreme Court created a private right of action under Title IX
  - *Cannon v. U. of Chicago*, 441 U.S. 677 (1979)
- **1979**: HEW promulgated three-part test for athletics to evaluate equity in athletic participation and access to resources and equitable opportunities

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A BRIEF HISTORY OF TITLE IX: 1980-2020

- **1980**: U.S. Department of Education created
  - Title IX oversight transferred to Dept. of Ed.'s Office for Civil Rights (OCR)
- **1982**: Supreme Court holds "Employment discrimination comes within Title IX's prohibition"
  - *North Haven Bd. of Education v. Bell*, 452 U.S. 512.
- **2020**: Title IX sexual harassment regulations issued
- **2020:** Supreme Court holds that discrimination based on sexual orientation and discrimination based on gender identity inherently involve treating individuals differently because of their sex under Title VII
  - *Bostock v. Clayton County*, 590 U.S. ___ (2020)

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A BRIEF HISTORY OF TITLE IX: 2021-PRESENT

- **2021:** Department of Education issues "Notice of Interpretation: Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*"
- **2021:** OCR announces intent to issue a Notice of Proposed Rulemaking (NPRM) related to Title IX by April 2022

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KEY TITLE IX-RELATED ISSUES

Sex-Based Discrimination

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

Sexual Harassment

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

Retaliation

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TITLE IX ESSENTIAL COMPLIANCE ELEMENTS

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

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

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

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THE IX COMMANDMENTS

INVESTIGATION (plus **prompt** & **fair** per VAWA Sec. 304)	**Thorough**	**Reliable**	**Impartial**
PROCESS	**Prompt**	**Effective**	**Equitable**
REMEDIES	Act reasonably to stop discrimination	Act reasonably to prevent recurrence	Act equitably to remedy effects

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SIGNIFICANT CASES

- *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992)
- *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998)
- *Davis v. Monroe County Bd. of Education*, 526 U.S. 629 (1999)
- *Doe v. Mercy Catholic Medical Center,* No. 16-1247 (3d Cir. 2017)

FRANKLIN V. GWINNETT PUBLIC SCHOOLS

503 U.S. 60 (1992)

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

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GEBSER V. LAGO VISTA INDEP. SCHOOL

524 U.S. 274 (1998)

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

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

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DAVIS V. MONROE COUNTY BD. OF ED.

526 U.S. 629 (1999)

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

- The institution must have "**actual notice**" of the harassment; and the institution must have responded to the harassment with "**deliberate indifference**."

Additionally, court held:

- Harassment must be "**severe, pervasive, and objectively offensive**," and the indifference "**systemic**," to the extent that the victim is deprived of educational opportunities or services.
- Justice O'Connor added a framework to determine deliberate indifference – stating that deliberate indifference constitutes a response that is "**clearly unreasonable in light of the known circumstances**."

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DOE V. MERCY CATHOLIC MEDICAL CENTER

850 F. 3D 545 (2017)

Residency included as an "education program or activity" under Title IX.

- The court highlighted several features that support deeming "a program or activity" an "**educational** program or activity" covered under Title IX:
  - Whether the program is incrementally structured through a particular course of study or training, whether full- or part-time;
  - Whether the program allows participants to earn a degree or diploma, qualify for a certification or certification examination, or pursue a specific occupation or trade beyond mere on-the-job training;

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DOE V. MERCY CATHOLIC MEDICAL CENTER (CONT.)

850 F. 3D 545 (2017)

- Whether the program provides instructors, examinations, an evaluation process or grades, or accepts tuition; or
- Whether the entities offering, accrediting, or otherwise regulating a program hold it out as educational in nature.

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THE OCR & TITLE IX

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

ROLE OF THE OCR & TITLE IX

- The Office for Civil Rights (OCR) under the U.S. Department of Education is responsible for establishing the **compliance standards to be applied in investigations and enforcement** of Title IX regarding sexual harassment.
  - Provides regulatory and sub-regulatory guidance
- The OCR administratively enforces Title IX by:
  - Conducting investigations of complaints filed by an individual, a representative, or a group
  - Engaging in compliance reviews
  - Initiatives to combat sexual assault in K-12 public schools (compliance reviews; public awareness and support; data collection and reviews)

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ROLE OF THE OCR & TITLE IX (CONT.)

- Technical Assistance (The OPEN Center)
  - To help Recipients, students, and parents/guardians understand their rights and responsibilities

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CIVIL LAWSUIT VS. ADMINISTRATIVE ACTION

Lawsuit

- Filed in federal court
- Monetary damages, injunction
- Requires:
  - Actual notice
  - Employee with authority to take action
  - Deliberate Indifference

Administrative Action

- Initiated by the OCR
- Voluntary compliance or findings
- Requires:
  - Actual OR constructive notice ("knew or should have known")
  - Investigate
  - End harassment
  - Remedy effects
  - Prevent recurrence

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OCR GUIDANCE

Key Regulatory and Sub-Regulatory Guidance from OCR

- Rescinded:
  - 2001 OCR Revised Sexual Harassment Guidance
  - 2011 Dear Colleague Letter (DCL)
  - 2014 Q&A on Title IX and Sexual Violence
  - 2015 DCL on the Role of Title IX Coordinators; TIX Resource Guide
  - 2016 DCL on Transgender Students
  - 2017 Q&A on Campus Sexual Misconduct

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OCR GUIDANCE (CONT.)

Key Regulatory and Sub-Regulatory Guidance from OCR

- In effect:
  - 2003 DCL on Title IX and Free Speech
  - 2010 DCL on Harassment and Bullying
  - 2013 DCL on Pregnant and Parenting Students
  - 2020 Amendments to Title IX Regulations
  - 2020 Q&A on Final Title IX Rule
  - 2021 Q&A on Title IX and Single Sex Scholarships, Clubs, and other Programs
  - 2021 Notice of Interpretation – Discrimination Based on Sexual Orientation and Gender Identity
  - 2021 Q&A on the Title IX Regulations on Sexual Harassment

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ADDITIONAL OCR RESOURCES

- About OCR:
  - http://www.ed.gov/about/offices/list/ocr/index.html
- In addition to the implementing regulations, compliance guidance documents are issued by OCR from time to time:
  - https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/index.html
- Updated OCR Case Processing Manual (August 2020):
  - http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf
- OPEN Center
  - OPEN@ed.gov

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CLERY ACT AMENDMENT: VAWA SECTION 304 (2013)

CLERY ACT AMENDMENT: VAWA SECTION 304

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

- Sexual assault
- Stalking
- Dating violence
- Domestic violence

The "Big 4"

  - Written information to victims regarding on- and off-campus resources, remedies, interim measures, and resolution mechanisms and options
  - Listing of policy and procedural elements required in the ASR
  - Listing of key training elements and requirements
  - Required educational programs and campaigns

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CLERY ACT AMENDMENT: VAWA SECTION 304 (CONT.)

- Prohibits retaliation
- Clery Handbook rescinded and replaced with the **Clery Act Appendix for Federal Student Aid (FSA) Handbook**
  - https://ifap.ed.gov/electronic-announcements/100920RescissionReplace2016HandbookForCampusSafetySecurityReporting

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WHEN DOES TITLE IX APPLY?

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

WHEN DOES TITLE IX APPLY?

- Regulations emphasize the *Davis* standard - Title IX applies, and jurisdiction is required, when the Recipient has:
  - Control over the harasser (Respondent) AND control over the context of the harassment
  - "Education program or activity" means…
    - locations, events, or circumstances under substantial control
    - any building owned or controlled by an officially recognized student organization

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WHEN DOES TITLE IX APPLY?

Personal Jurisdiction

- At the time of filing a formal complaint, a Complainant must be participating in or attempting to participate in the Recipient's education program or activity.
  - The OCR adopts a fairly broad definition of what could constitute "attempting to participate"
  - Can include dual enrollment students, alumni, prospective students/employees, medical residents, etc.

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WHEN DOES TITLE IX APPLY?

Personal Jurisdiction (Cont.)

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

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WHEN DOES TITLE IX APPLY?

Personal Jurisdiction (Cont.)

- If Respondent is **not** affiliated with the institution in any way, the institution **lacks authority** to take disciplinary action
  - e.g.: employee of an outside company (e.g., vendor, construction worker); guest or invitee; prospective student; former student; former employee; student from another institution

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WHEN DOES TITLE IX APPLY?

Covered Programs

- All programs run by a federal funding Recipient
- It does not matter whether the program receives federal funding, all institutional programs are covered
- All programs using facilities of the funding Recipient
  - e.g., summer interns using lab facilities, medical/healthcare education camps
- Includes hospitals, residency programs, branch or satellite campuses
- What about virtual learning and employment settings?

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WHEN DOES TITLE IX APPLY?

Geographic Jurisdiction

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

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WHEN DOES TITLE IX APPLY?

Geographic Jurisdiction (Cont.)

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

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WHEN DOES TITLE IX APPLY?

Subject Matter

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

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WHEN DOES TITLE IX APPLY?

Subject Matter (Cont.)

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

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IF TIX JURISDICTION IS NOT PRESENT

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

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GROUP DISCUSSION QUESTIONS

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

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CREATING & IMPLEMENTING APPROPRIATE POLICY & PROCEDURES

- Required Definitions
- ATIXA Definitions
- Consent Construct
- Navigating First Amendment Protections

CREATING AND IMPLEMENTING APPROPRIATE POLICY & PROCEDURES

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

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CREATING AND IMPLEMENTING APPROPRIATE POLICY & PROCEDURES (CONT.)

- TIXC must be an integral part of the policy/procedure development and review process
  - Ensure all policies/procedures related to sex/gender misconduct and discrimination are legally accurate and complete
  - Confirm that new or revised grievance procedures are posted and published promptly and that old procedures are removed from publications and websites
    - Beware of multiple conflicting or varying versions of published policy
    - Internally maintain copies of old policies and procedures for reference in the event of a lawsuit, etc.

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CREATING AND IMPLEMENTING APPROPRIATE POLICY & PROCEDURES (CONT.)

- If the institution has multiple policies and procedures (for faculty, staff, students), Recipient must ensure that these policies are not conflicting, or do not contain conflicting definitions
  - A strong argument for a single policy!
  - ATIXA's One Policy, Two Processes Model (1P2P)

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CREATING AND IMPLEMENTING APPROPRIATE POLICY & PROCEDURES (CONT.)

- Students and employees should **know policy exists, how it works, and how to file a complaint**
  - Ensure that policy and procedures are published and posted widely
    - e.g., In the publications and information sources that are most read and used — and can be easily located
  - Must be included on website and all handbooks/catalogs given to applicants for admission and employment, students, employees, and unions

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CREATING AND IMPLEMENTING APPROPRIATE POLICY & PROCEDURES (CONT.)

- Written in a manner that is easily understood
- Clearly articulate the difference between making a **report** vs. making a **formal complaint**
- Clearly identify the individuals to whom discrimination complaints can be submitted

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DEFINITIONS OF SEXUAL HARASSMENT

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

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REQUIRED DEFINITIONS – TIX REGULATIONS

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

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

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HOSTILE ENVIRONMENT: "UNWELCOME"

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

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HOSTILE ENVIRONMENT: "REASONABLE PERSON"

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

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HOSTILE ENVIRONMENT: "SEVERE"

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

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HOSTILE ENVIRONMENT: "PERVASIVE"

- Widespread
- Openly practiced
- Well-known among students or employees – reputation of a department, person, etc.
- Occurring in public spaces (more likely to be pervasive)
- Frequency of the conduct is often a variable in assessing pervasiveness (look to intensity and duration)
- Unreasonable interference with school or job
- A "gauntlet of sexual abuse" *Meritor v. Vinson*, 477 U.S. 57 (1986)

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HOSTILE ENVIRONMENT: "OBJECTIVELY OFFENSIVE"

- Reasonable person standard in context
- "I know it when I see it…"
- Age and relationships of Complainant and Respondent
- Number of persons involved
- Frequency
- Severity

- Physically threatening
- Humiliating
- Intimidating
- Ridiculing
- Abusive

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HOSTILE ENVIRONMENT: TOTALITY OF THE CIRCUMSTANCES

- Hostile environment analysis requires that you evaluate the "totality of the circumstances."
- Totality of the circumstances to consider:
  - Frequency, nature, and severity of the conduct (see factors previously discussed)
  - Identity of and relationship between the parties
  - Age of the parties
  - Size of the school, location of the incidents, and context in which they occurred

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HOSTILE ENVIRONMENT: TOTALITY OF THE CIRCUMSTANCES (CONT.)

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

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SEXUAL ASSAULT

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

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

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SEXUAL ASSAULT (CONT.)

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

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SEXUAL ASSAULT (CONT.)

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

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DATING VIOLENCE

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

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DOMESTIC VIOLENCE

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

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DOMESTIC VIOLENCE (CONT.)

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

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STALKING

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

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STALKING (CONT.)

- **Reasonable person** means a reasonable person under similar circumstances and with similar identities to the Complainant.
- **Substantial emotional distress** means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling.

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

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OTHER POLICY DEFINITIONS

- Retaliation
- Sexual Exploitation

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RETALIATION – REGULATION DEFINITION

ň 106.71 Retaliation

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

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RETALIATION – REGULATION DEFINITION

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

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RETALIATION

ň 106.71 Retaliation.

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

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RETALIATION

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

- *Specific circumstances*.

  (1) The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under paragraph (a) of this section.

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

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ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION

Sexual Exploitation (non-Title IX sexual harassment)

- Occurs when one person takes non-consensual or abusive sexual advantage of another for their own benefit or for the benefit of anyone other than the person being exploited, and that conduct does not otherwise constitute one of other sexual harassment offenses.
- Examples of sexual exploitation include, but are not limited to:
  - Sexual voyeurism (such as observing or allowing others to observe a person undressing or using the bathroom or engaging in sexual acts, without the consent of the person being observed)
  - Invasion of sexual privacy (e.g., doxxing)

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ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION (CONT.)

- Examples (continued):
  - Knowingly making an unwelcome disclosure of (or threatening to disclose) an individual's sexual orientation, gender identity, or gender expression
  - Taking pictures, video, or audio recording of another in a sexual act, or in any other sexually related activity when there is a reasonable expectation of privacy during the activity, without the consent of all involved in the activity; or exceeding the boundaries of consent (such as allowing another person to hide in a closet and observe sexual activity; or disseminating sexual pictures without the photographed person's consent), including the making or posting of non-consensual pornography
  - Prostituting another person

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ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION (CONT.)

- Examples (continued):
  - Engaging in sexual activity with another person while knowingly infected with human immunodeficiency virus (HIV) or a sexually transmitted disease (STD) or infection (STI), without informing the other person of the virus, disease, or infection
  - Misappropriation of another person's identity on apps, websites, or other venues designed for dating or sexual connections (e.g., spoofing)
  - Forcing a person to take an action against that person's will by threatening to show, post, or share information, video, audio, or an image that depicts the person's nudity or sexual activity

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ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION (CONT.)

- Examples (continued):
  - Knowingly soliciting a minor for sexual activity
  - Engaging in sex trafficking
  - Knowingly creating, possessing, or disseminating child pornography

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CONSENT CONSTRUCT

- Force
- Incapacity
- Consent

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CONSENT

- Informed, knowing, and voluntary (freely given)
- Active (not passive)
- Creates mutually understandable permission regarding the conditions of sexual activity
- No means no, but nothing also means no. Silence and passivity do not equal consent.
- Given immediately prior to or contemporaneously with the sexual or intimate activity
- Consent can be withdrawn at any time, so long as it is clearly communicated verbally or non-verbally

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CONSENT (CONT.)

- Cannot be obtained by use of:
  - Physical force, threats, intimidation, or coercion
- Cannot be given by someone known to be — or who should be known to be — mentally or physically incapacitated

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OVERVIEW OF THE THREE QUESTIONS

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

Note: The intoxication of the Respondent can not be used as a reason they did not know of the Complainant's incapacity.

3. What clear words or actions by the Complainant gave the Respondent permission for each specific sexual or intimate act that took place as it took place?

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NAVIGATING FIRST AMENDMENT PROTECTIONS

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NAVIGATING FIRST AMENDMENT PROTECTIONS

"Congress shall make no law…abridging the freedom of speech…"

- The ED reaffirms First Amendment protections in the Title IX Regulations
- An important concern for all public institutions and any private campuses impacted by state law and constitutions (e.g., California and New Jersey)
- Impacts policy language regarding expression
  - Pay heed to vagueness and over-breadth concerns
  - Avoid incorporating "intent" or "purpose" language
  - Incorporate appropriate standard for context

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NAVIGATING FIRST AMENDMENT PROTECTIONS (CONT.)

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

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OVERSIGHT AND COORDINATING PROMPT & EQUITABLE GRIEVANCE PROCEDURES

- The Process
- Promptness
- Equity
- Clery Act: VAWA Section 304

THE PROCESS

Incident	Initial Assessment	Formal Investigation & Report	Hearing	Appeal
• Complaint or Notice to TIXC	*Following a formal complaint* • Jurisdiction • Dismissal? • Policy violation implicated? • Emergency removal? • Reinstatement to another process? • Informal or formal resolution?	• Notice to Parties • Identification of witnesses • Interview scheduling • Evidence collection • Report drafted • Evidence & report shared • Investigation report finalized	• Determination • Cross-examination • Sanction? • Remedies	• Standing? • Vacate? • Remand? • Substitute?

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PROMPTNESS

- Reasonably prompt timeframes for the conclusion of the grievance process, including reasonably prompt timeframes for filing and resolving appeals
- Concurrent law enforcement investigation does not relieve the burden of the institution to investigate
- Temporary delays for "good cause" and with written notice of the delay to parties
  - Complexity of the investigation
  - Concurrent law enforcement investigation with time-dependent release of evidence (we recommend a one-to two-week delay)
  - Delays for administrative needs are insufficient

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OVERSIGHT AND COORDINATING PROMPT AND EQUITABLE GRIEVANCE PROCEDURES

- Institutions are required to make a “good faith effort” to resolve allegations promptly
  - 60 days to resolution is a good guide; varies based on situation
  - What about breaks?
  - Pending criminal or civil actions are not reasons for lengthy delays
    - Injunctions?
  - What about delays by the Complainant?

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

- The grievance process must be conducted according to the timelines in the Recipient's policy
  - Policy wording: Use "reasonable delays at the discretion of the Title IX administrator," "barring exigent circumstances," etc.
- Document all delays/extension and rationale therefore
  - e.g., unresponsive or uncooperative parties, criminal investigation, holidays, etc.
- Periodically update the parties throughout the process

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EQUALITY
requires a level playing field that doesn't yet exist

JUSTICE
eliminates systemic barriers

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

EQUITY
acknowledges systemic impediments with targeted fixes

AGENCY
individuals know that access is their right

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Adapted from Pittman, Karen (2018). *Changing the Odds Together.*

EQUITY REQUIREMENTS

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

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EQUITY REQUIREMENTS (CONT.)

- Impartial Investigators, investigation, hearing, and Decision-makers
- Remedies
- All parties entitled to appeal

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CLERY: VAWA SECTION 304 (2013)

- Institutional disciplinary procedures shall "provide a prompt, fair, and impartial process from the initial investigation to the final result."
  - Accuser and accused are entitled to the **same opportunities** to have a support person/Advisor **of their choice** at any proceeding or related meeting.

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CLERY: VAWA SECTION 304 (CONT.)

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

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EQUITY CONCERNS

- Participants/stakeholders believe “equity” = “equality”
- Institutional policies and procedures that are constituency-based and thereby privilege certain groups more than others (e.g., faculty, staff, or students)
- Widely disparate procedures to remedy different forms of discrimination (e.g., race, religion, disability, sex/gender)
- Ensuring that remedies are equitable (in addition to resolution processes)
- Contact restrictions on the parties that are too broad or punitive

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EQUITY CONCERNS (CONT.)

- Appeal processes, or other processes, where only one party is entitled to participate
- Conflicts among federal regulations/guidance and state laws or education codes

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COORDINATING OVERLAPS

- Potential Processes
- Title IX And Title VII
- One Policy,Two Processes
- Internships, Externships, Rotations, and Residencies

COORDINATING THE OVERLAP OF VARIOUS GRIEVANCE PROCESSES

- The Title IX Coordinator must coordinate across multiple constituency groups and procedures as necessary
- Potential processes:
  - Generalized sexual harassment procedures
  - General student grievance procedures
  - Faculty and Employee grievance procedures
  - Student conduct/discipline process
  - Faculty and Employee discipline processes
  - Academic appeal process
  - Athletic department polices/processes and “team rules”
  - Collective bargaining agreements

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TITLE IX AND TITLE VII

- Must understand distinctions between Title IX and Title VII in responding and investigating
- Must be familiar with all potential processes
  - Employee Grievance
  - Faculty Grievance
  - Student Conduct
  - Code of Ethics, Behavioral Standards, etc.
- Must have the ability to merge/combine/pick the investigatory and hearing processes and explain these to the parties
  - e.g., the difference between a student-employee and an employee-student

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ONE POLICY, TWO PROCESSES (1P2P)

- A community-based policy that addresses all forms of harassment, discrimination, and sexual misconduct applicable to all members of the institution community promotes equity, minimizes confusion, and supports institutional mission
  - Provides easier training focus
  - Allows for commonality in documentation and investigation

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JURISDICTION ANALYSIS

- Who is the Complainant?
  - Student/Employee/Non-Affiliate
- Who is the Respondent?
  - Student/Employee/Non-Affiliate
- "Where" did the conduct occur?
  - Consider:
    - Campus
    - Program
    - Context
    - In-program effect
    - In or outside the U.S.

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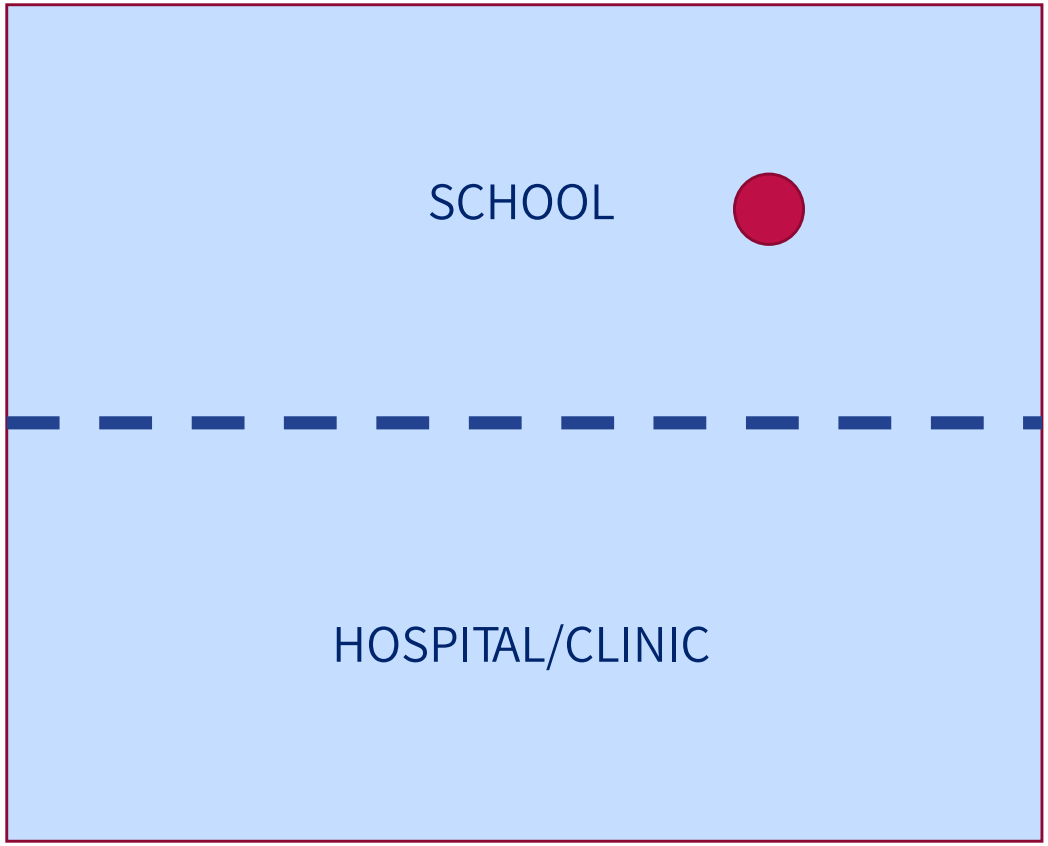
MULTI-JURISDICTIONAL SETTINGS

- Common settings within healthcare and medical education programs that have overlapping jurisdiction.



PRIVATE/INDEPENDENT EMPLOYER

- Student taking a required class led by a school employee.

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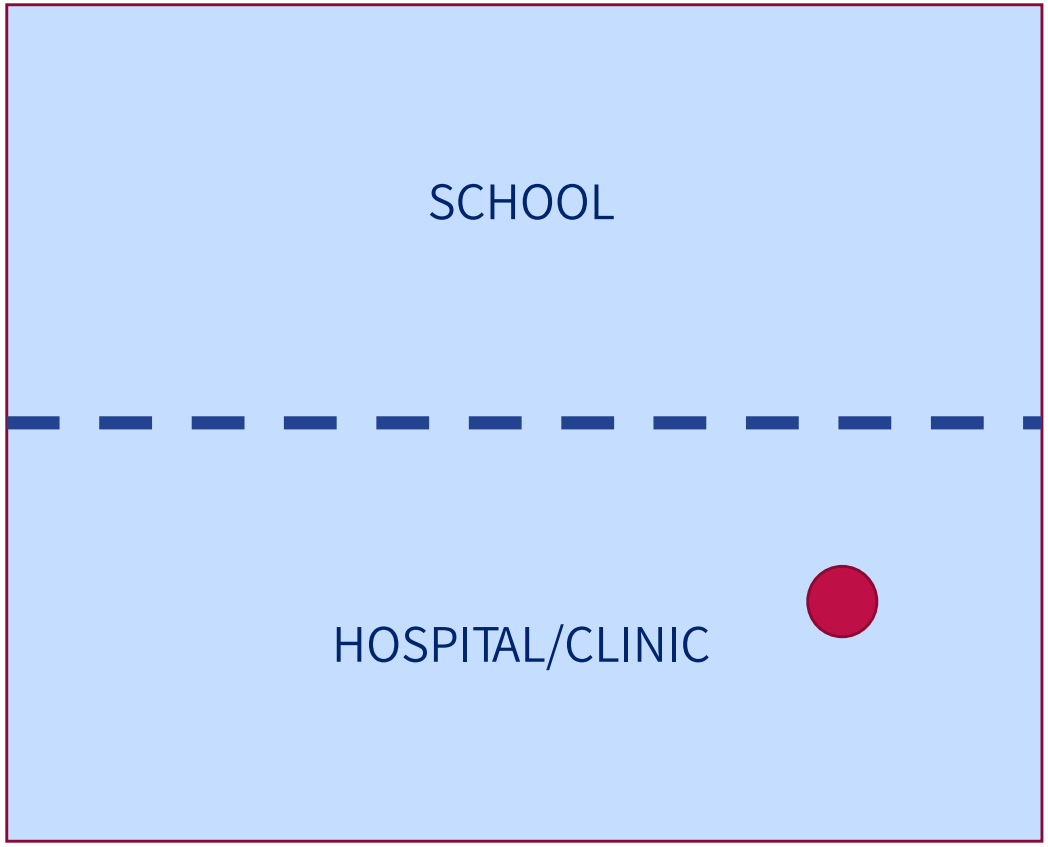
MULTI-JURISDICTIONAL SETTINGS

- Common settings within healthcare and medical education programs that have overlapping jurisdiction.



PRIVATE/INDEPENDENT EMPLOYER

- Student fulfilling clinical component of a class led by a clinician employed by the hospital/clinic.

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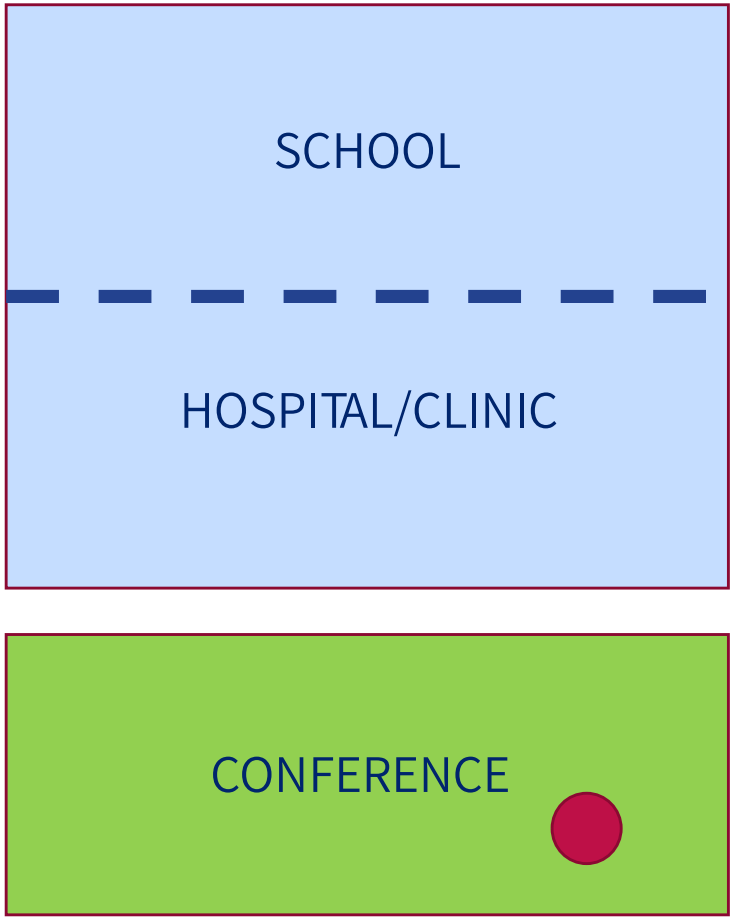
MULTI-JURISDICTIONAL SETTINGS

- Common settings within healthcare and medical education programs that have overlapping jurisdiction.



PRIVATE/INDEPENDENT EMPLOYER

- Student at a conference with other students from other medical schools.

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MULTI-JURISDICTIONAL SETTINGS

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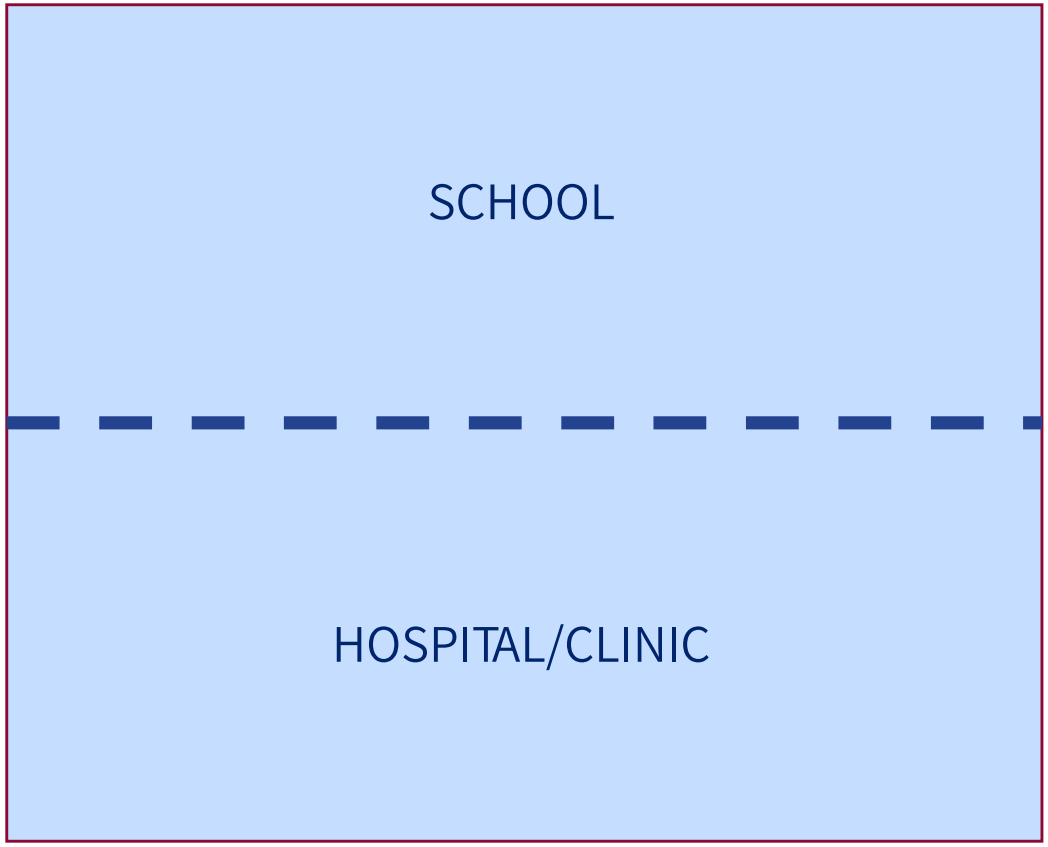

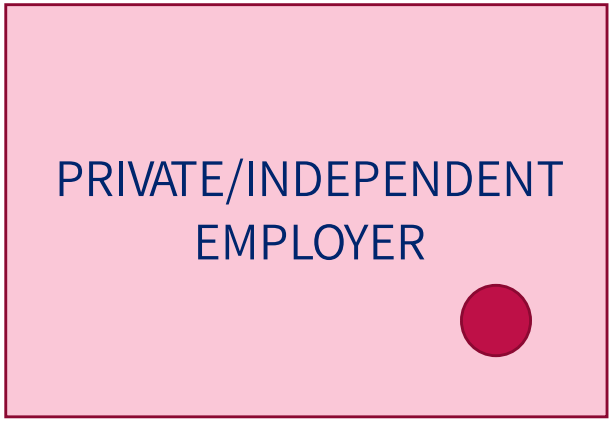

- Student in an externship experience with a private practitioner over summer break.

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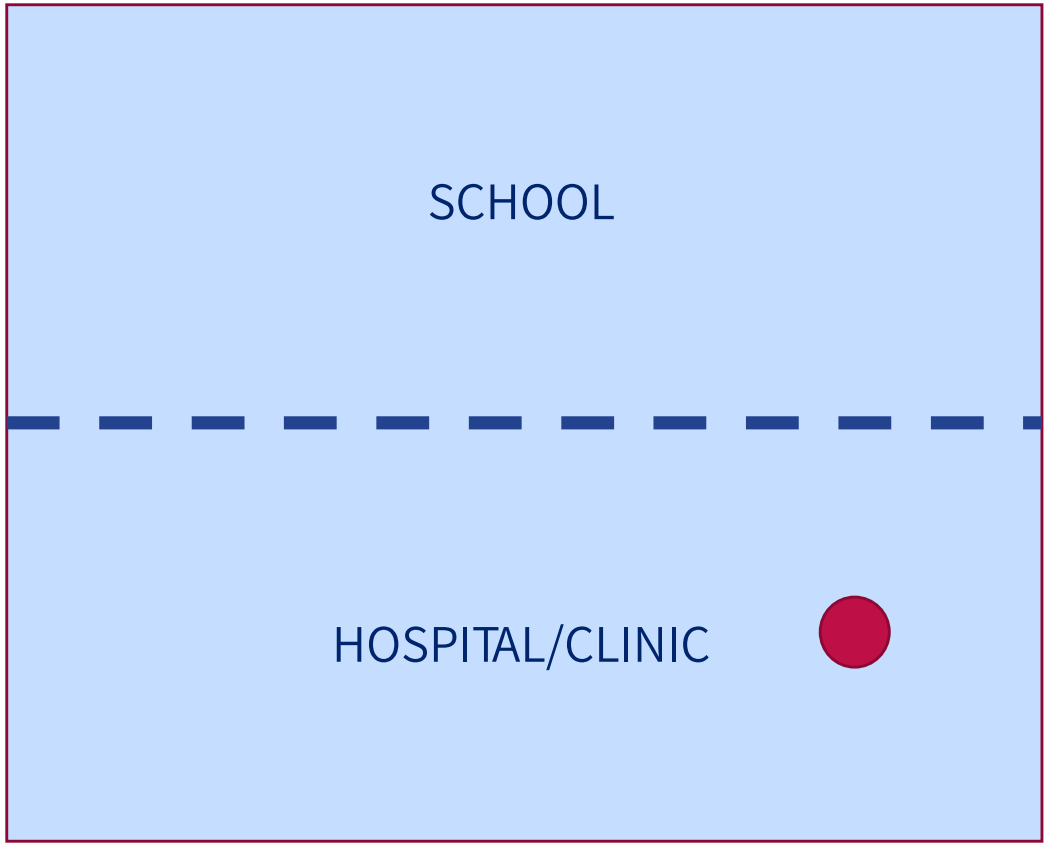
MULTI-JURISDICTIONAL SETTINGS

- Common settings within healthcare and medical education programs that have overlapping jurisdiction.



PRIVATE/INDEPENDENT EMPLOYER

- Student in a rotation with a hospital department.

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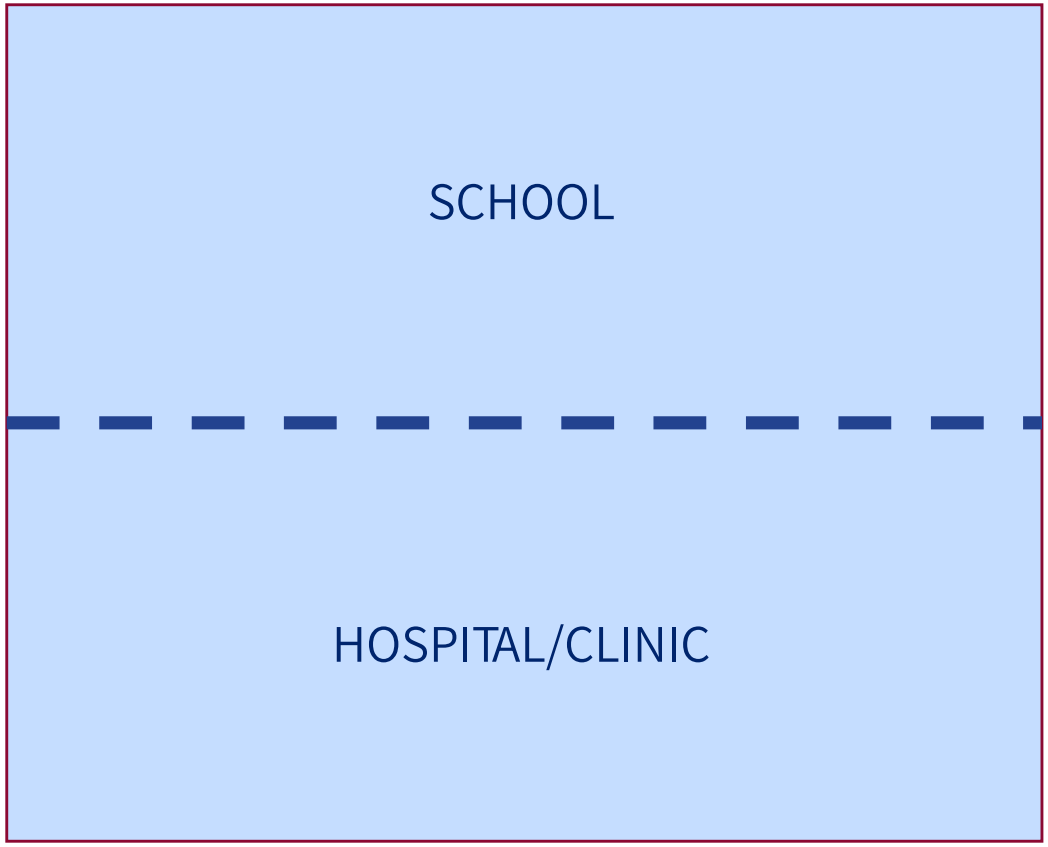
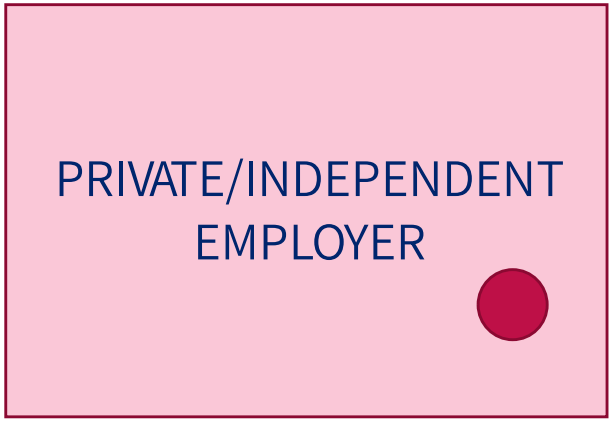
MULTI-JURISDICTIONAL SETTINGS

- Common settings within healthcare and medical education programs that have overlapping jurisdiction.





- Student in an internship with a volunteer school preceptor.

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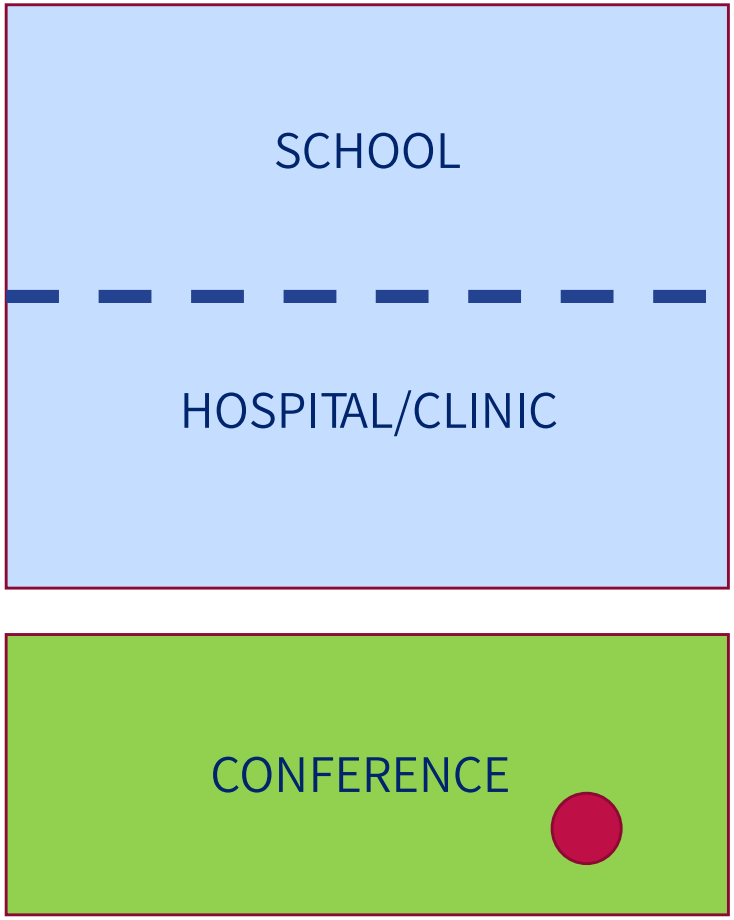
MULTI-JURISDICTIONAL SETTINGS

- Common settings within healthcare and medical education programs that have overlapping jurisdiction.



PRIVATE/INDEPENDENT EMPLOYER

- Student at a conference as a member of a Registered Student Organization.

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JURISDICTION ANALYSIS (CONT.)

- Are they in a program or activity?
  - Participating in/attempting to participate in educational program or not
  - Including the employment elements of an educational program
- Does Part 106.30 apply?
  - i.e., the definitions of offenses covered by the 2020 Title IX regulations

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PREGNANCY & TITLE IX

- June 2007 “Dear Colleague Letter”
- June 2013 DCL on Pregnant and Parenting Students
- Regulatory Language
- Case Discussion

THE OCR, TITLE IX, AND PREGNANCY

- Admissions
- On-campus residential facilities
- Extracurricular activities
- Health insurance

- Academics
  - Registration
  - Coursework accommodation and completion
- Employment
  - Hiring
  - Benefits and bonuses
  - Leave and job protection upon return from leave

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THE OCR, TITLE IX, AND PREGNANCY (CONT.)

June 25, 2007 "Dear Colleague Letter"

- Affirms the application of the pregnancy-related portions of the regulations to athletic departments and summarized a school's obligations to pregnant student-athletes
- The June 25, 2007 DCL also includes:
  - Information on how to develop programs to support these students
  - An overview of students' rights under Title IX
  - Guidance on how to submit a complaint if an individual feels their rights are not being met

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THE OCR, TITLE IX, AND PREGNANCY (CONT.)

June 25, 2007 "Dear Colleague Letter"

- Although the pamphlet is focused on secondary education, the DCL states that "legal principles apply to all recipients of federal financial assistance, including postsecondary education."

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PREGNANCY & TITLE IX

June 25, 2013 "Dear Colleague Letter"

Guidance on Supporting the Academic Success of Pregnant and Parenting Students

- Educators must ensure pregnant and parenting students are **not discriminated against**
- Educators must ensure that pregnant and parenting students are **fully supported in preparation for graduation and careers**
- Secondary school administrators, teachers, counselors, and parents must be well-educated on the rights of pregnant and parenting students as provided under Title IX

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PREGNANCY & TITLE IX: REGULATORY LANGUAGE

Pregnancy and related conditions:

- "A Recipient shall not discriminate against any student or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's **pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom**, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient." (34 C.F.R. ň 106.40)

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PREGNANCY & TITLE IX: REGULATORY LANGUAGE

Physician Certification

- "A Recipient **may require** such a student to **obtain the certification of a physician** that the student is physically and emotionally able to continue participation in the normal education program or activity **so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician."** (34 C.F.R. ň 106.40)
  - " Thus, for example, a student who has been hospitalized for childbirth must not be required to submit a medical certificate to return to school if a certificate is not required of students who have been hospitalized for other conditions."

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PREGNANCY & TITLE IX: REGULATORY LANGUAGE

Pregnancy as a Temporary Disability

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

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PREGNANCY & TITLE IX: REGULATORY LANGUAGE

Leave Policies

- "In the case of a Recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom as **a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began**." (34 C.F.R. ň 106.40)

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PREGNANCY & TITLE IX: OCR GUIDANCE

Doctor's Note to Participate

- "**Schools cannot require a pregnant student to produce a doctor's note in order to stay in school or participate in activities**, including interscholastic sports, unless the same requirement to obtain a doctor's note applies to all students being treated by a doctor." (34 C.F.R. ň 106.40)
- "That is, schools cannot treat a pregnant student differently from other students being cared for by a doctor, even when a student is in the later stages of pregnancy; **schools should not presume that a pregnant student is unable to attend school or participate in school activities**."

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PREGNANCY & TITLE IX: OCR GUIDANCE

Doctor's Note to Participate (Cont.)

- "When the student returns to school, she must be reinstated to the status she held when the leave began, which should include giving her the opportunity to make up any work missed."
- "A school may offer the student alternatives to making up missed work, such as:
  - Retaking a semester
  - Taking part in an online course credit recovery program
  - Allowing the student additional time in a program to continue at the same pace and finish at a later date, especially after longer periods of leave
- The student should be allowed to choose how to make up the work."

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PREGNANCY & TITLE IX: EXCUSED ABSENCES AND MEDICAL LEAVES

- Teachers and faculty must understand that they are required to excuse absences/medical leaves as determined by the Title IX Coordinator
  - May not refuse to allow work to be submitted after deadline if missed due to pregnancy or childbirth
- If grading is based in part on class participation or attendance, student must be given an opportunity to make those points up, if missed, due to pregnancy or childbirth

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PREGNANCY & TITLE IX: HARASSMENT PROTECTIONS

- Recipients must protect pregnant students from harassment based on sex
  - This includes harassment because of pregnancy or pregnancy-related conditions
- Conduct that is sufficiently severe, pervasive, and objectively offensive is prohibited and must be addressed under the Recipient's sexual harassment adjudication process. Conduct can include:
  - Sexual comments or jokes about student's pregnancy
  - Sexually-charged named calling
  - Spreading rumors about sexual activity
  - Sexual propositions or gestures

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PREGNANCY & TITLE IX: POLICY AND PROCEDURE REQUIREMENTS

- Develop and annually distribute a policy prohibiting sex discrimination that includes prohibited discrimination against pregnant and parenting students
- Adopt and publish grievance procedures for students to file a complaint of sex discrimination that includes discrimination related to pregnancy or parental status
- Students and employees should be aware that the Title IX Coordinator also holds the responsibility of overseeing complaints of discrimination against pregnant and parenting students

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ADDITIONAL SPECIAL ISSUES TO ADDRESS

- Nursing rooms, mothers' lounges, etc.
- Labs, chemicals, exposure to diseases, etc.
  - Reasonable restrictions for health and safety (as deemed by a physician) are permitted
- Standing, lifting, walking, shift-length requirements
- Cohort programs
- Licensure requirements

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PREGNANCY CASE DISCUSSION

PREGNANCY CASE DISCUSSION: HEALTHCARE EDUCATION

Janet is seven months pregnant and has had an easy pregnancy. She's in the Allied Health Program for EMT. In this cohort program, clinical/experiential placements only occur during the spring term. Janet is scheduled to graduate next December. The paramedic program to which she's been assigned won't allow her to participate on their ambulance runs because of her pregnancy. She needs to complete this program this term.

What will you suggest?

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POINT PERSON FOR REPORTS AND COMPLAINTS

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

POINT PERSON FOR REPORTS AND COMPLAINTS

- The Title IX Coordinator will be the individual designated to ensure the Title IX protocol is implemented and therefore should be the individual to whom all complaints or notice related to sex/gender harassment, misconduct, and discrimination should be directed
  - Contact information for Title IX Coordinator must be included on website and in all handbooks/catalogs given to applicants for admission and employment, students, employees, and unions
  - Recipient may designate multiple portals for receipt of information (e.g., Deputy Coordinators)
    - All employees are expected to report notice and complaints to the Title IX Coordinator

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COORDINATION WITH LAW ENFORCEMENT

- Law enforcement information sharing:
  - The Title IX Coordinator should establish a **reporting and information-sharing structure** with Recipient law enforcement.
    - May wish to have a formal Memorandum of Understanding (MOU)
  - All Recipient law enforcement officers (whether sworn or public safety/security) are considered "officials with authority" and have an obligation to report to the Title IX Coordinator
  - Institutions with sworn law enforcement officers may need to negotiate timing and information-sharing based on the law enforcement's role with criminal investigations and state laws

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POINT PERSON FOR REPORTS AND COMPLAINTS

- The Title IX Coordinator must ensure the institution is promptly engaging in:
  - Initiation of the initial assessment
  - Implementation of response to stop the alleged harassment/discrimination
  - Provision of supportive measures to the parties
  - Provision of information about how to make a formal complaint
  - Action to reasonably prevent the recurrence
- The Title IX Coordinator must **coordinate** all of these steps, often across administrative processes and institutional silos
- Importance of a centralized database

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NOTICE, REPORTING, & CONFIDENTIALITY

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

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NOTICE TO THE INSTITUTION

- "**Actual Knowledge**" is defined as a report being received by:
  - The TIX Coordinator; or
  - Any official who has authority to institute corrective measures on behalf of the Recipient (Often called "Officials With Authority" or "OWA")
- This is only the standard for when OCR would deem a higher education institution to have received actual notice AND MUST investigate; it is the bare minimum requirement
  - What if Recipient receives notice in some other way?
  - Other types of liability may still exist for failure to act with constructive notice (e.g., tort)

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MANDATORY REPORTERS

- ATIXA recommends that all employees* report because this:
  - Enables institution to best support those who have experienced harassment or discrimination
  - Better enables tracking patterns
  - Ensures information gets to those trained to respond
  - Provides for simpler, uniform, and universal training and Reporting mechanisms
    - Institutions must ensure that all employees are trained regarding their obligation to report harassment to appropriate administrators as mandatory reporters

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

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THE CLERY ACT: CAMPUS SECURITY AUTHORITY (CSA)

CSA mandatory reporting:

- Four-part definition of a CSA noted in the Clery Act Appendix for FSA Handbook
- CSAs must share all reports of any allegations that would fall into the Clery crime categories, made to them in their capacity as a CSA, to their institutional chief CSA (typically campus police)
- Does not include indirect notification: classroom discussions, overhearing something in the hallway, speeches (e.g., Take-Back-The-Night events), etc.

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CSA VS. MANDATORY REPORTER

- Mandatory Reporter under Title IX is a broader/more encompassing designation.
- All CSAs are Mandatory Reporters, but not all Mandatory Reporters are CSAs.

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OTHER LAWS THAT DETAIL REPORTING REQUIREMENTS

- Supervisors and Managers (per Title VII)
  - Mandated to report harassment or other misconduct of which they are aware.
- Abuse or Suspected Abuse of Minors
  - All employees are required to report abuse or suspected abuse of minors consistent with state law. This generally includes immediately reporting to law enforcement and to the state's child welfare agency.
- Additional state reporting requirements (e.g., elder abuse and felony reporting)

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PRIVILEGE VS. CONFIDENTIALITY VS. PRIVACY

Privilege

- Granted by laws and professional ethics
- Attorneys, licensed professional counselors, medical professionals, pastoral counselors
  - To have privilege, these individuals must be:
    - Acting in the capacity for which they are employed,
    - Acting within the scope of their license, and
    - Receive the disclosure during the scope of that employment
  - Key exception is child abuse reporting

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PRIVILEGE VS. CONFIDENTIALITY VS. PRIVACY

Confidentiality

- Designated by the institution
- Do not have to report harassment or discrimination of which they become aware
- Allows for provision of services and support without concern of reporting
- Examples: Victim advocates/sexual assault-related services, gender-based resource centers, Advisors during resolution processes, ombudspersons
- Must still follow state reporting laws

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

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PRIVILEGE VS. CONFIDENTIALITY VS. PRIVACY

Privacy

- Anyone who does not meet the institution's definition of a "Mandatory Reporter" can maintain privacy.
  - If using the OWA standard, then notice to those deemed "Private" does not constitute "Actual Knowledge" for OCR enforcement.
- May report incidents without identifying the parties
- Common Examples: Administrative Assistants, Non-supervisory employees
- Must still follow state reporting laws

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INITIAL ASSESSMENT

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

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INITIAL ASSESSMENT

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

- Has there been a formal complaint?
- Does the TIXC need to sign/initiate a formal complaint?
- Does the alleged conduct meet the required definitions?
- Does jurisdiction exist?
- Can/should Recipient remedy informally or without discipline?
- Mandatory/Discretionary dismissal considerations
- If dismissed, does an alternate policy/process apply?

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INITIAL ASSESSMENT (CONT.)

- If proceeding under Title IX:
  - Establish basis of investigation:
    - Incident or pattern, and/or climate/culture
  - Establish a preliminary timeline for the investigation
- If no formal action, document how Recipient's response was not deliberately indifferent
- Responding to anonymous reports:
  - Determine if a trend or pattern may be apparent
  - Can you identify parties?
  - Duty to attempt some form of remedial response, even to an anonymous report

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REPORT VS. COMPLAINT

- Distinguish between a “report” and a “formal complaint”
- Upon receiving a “report” (either from the would-be Complainant or a third party):
  - Reach out and provide support.
  - Provide supportive and interim measures to the person alleged to have experienced the harassment. May also offer to the would-be Respondent.
  - Explain process to make a formal complaint.
    - Must be in writing and signed by the Complainant but can be made in any format (on paper or electronic) and made at any time
    - Also explain option to report to law enforcement (VAWA requirement)

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REPORT VS. COMPLAINT (CONT.)

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

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FORMAL COMPLAINT

Formal Complaint

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

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REQUESTS FOR CONFIDENTIALITY

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

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

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REQUESTS FOR CONFIDENTIALITY (CONT.)

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

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REQUESTS FOR CONFIDENTIALITY (CONT.)

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

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PPTVWM

- Title IX Coordinator may need to file a formal complaint if any of the following are present:
  - **PPTVWM**
    - **P**attern
    - **P**redation
    - **T**hreat
    - **V**iolence/**W**eapon
    - **M**inors (will always be reported to proper authorities)

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PPTVWM (CONT.)

- Factors to consider:
  - Additional complaints of sexual harassment involving the same Respondent
  - Whether the sexual harassment was committed by multiple individuals
  - Whether the Respondent has a prior history of violence
  - Whether the report reveals a pattern of behavior at a given location or by a particular group
  - Whether the Respondent threatened further sexual harassment or violence against the Complainant or others
  - Whether a weapon facilitated the sexual harassment
  - Age of the Complainant (incidents involving minors will always be reported to proper authorities)

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PPTVWM (CONT.)

- Factors to consider:
  - Whether the Recipient possesses other means to obtain relevant evidence (e.g., security cameras or personnel, or physical evidence)
- If the Recipient proceeds, it should notify the Complainant and utilize appropriate supportive measures to protect them

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SUPPORTIVE MEASURES

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

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COMMON SUPPORTIVE MEASURES

- Referral to counseling and/or medical/health services
- Referral to the Employee Assistance Program
- Visa and immigration assistance
- Community or community subgroup education
- Altering housing situation (if applicable)
- Altering work arrangements for employees
- Safety planning
- Providing school safety escorts
- Transportation assistance
- Contact limitations (no contact orders) between the parties
- Academic support, extensions of deadlines, or other course-related adjustments
- Trespass or Be on the Lookout (BOLO) orders
- Emergency notifications
- Increased security and monitoring of certain areas

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MANDATORY DISMISSAL – FOUR GROUNDS

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

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

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DISCRETIONARY OR PERMISSIVE DISMISSAL OF A FORMAL COMPLAINT

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

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

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MANDATORY OR PERMISSIVE DISMISSAL OF A FORMAL COMPLAINT

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

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

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EMERGENCY REMOVAL

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

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

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EMPLOYEE ADMINISTRATIVE LEAVE

- A Recipient may place a non-student employee Respondent on administrative leave during the pendency of a grievance process under existing procedures, without modifying any rights provided under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act

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THE CLERY ACT: TIMELY WARNING & EMERGENCY NOTIFICATION

- **Timely Warning** – notification of crimes reported to campus security authorities or local law enforcement that are serious or pose a continuing threat
- **Emergency Notification** – notification of any significant emergency or dangerous situation that poses an immediate threat to health or safety
  - Includes both Clery and non-Clery incidents
    - Clery-based example: campus shooting
    - Non-Clery-based examples: outbreak of communicable disease, nearby gas main leak, or impending weather emergency

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NOTICE REQUIREMENTS PRIOR TO INVESTIGATION

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

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

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NOTICE REQUIREMENTS PRIOR TO INVESTIGATION (CONT.)

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

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COORDINATING INFORMAL RESOLUTION

- Regulations Requirements
- Types of Informal Resolution
- Informal Resolution Considerations

INFORMAL RESOLUTION – TITLE IX REGULATIONS

- The Title IX regulations include a provision that encourages informal resolution, and it is a worthy practice, when voluntary
- **Informal resolution** is not defined
- Regulations specify:
  - Formal complaint required
  - Allowed at any time prior to a final determination at discretion of TIXC
  - Voluntary, written consent of the parties
  - Not available for allegations of employee on student harassment
  - Must still stop, prevent, remedy, and document response

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INFORMAL RESOLUTION

- ATIXA has framed a process for Informal Resolution that includes three options:
  - A response based on supportive measures
  - A response based on a Respondent accepting responsibility
  - A response based on alternative resolution, which could include various approaches and facilitation of dialogue
- Alternative resolution approaches like mediation, restorative practices, transformative justice, etc., are likely to be used more often by colleges and universities
- ATIXA does not endorse these approaches as better or worse than other formal or informal approaches

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INFORMAL RESOLUTION CONSIDERATIONS

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

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

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INFORMAL RESOLUTION CONSIDERATIONS (CONT.)

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

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SUPERVISING INVESTIGATIONS

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

SUPERVISING INVESTIGATIONS

The Title IX Coordinator is responsible for:

- Determining extent of investigation
- Appointment of Investigators
- Coordination/supervision of Investigators and investigations
- Investigation strategy
- Assurance of supportive measures
- Timeline compliance
- Providing institutional memory to Investigators
- Training Investigators
- Facilitating the sending of notices to the parties (e.g., Notice of Investigation & Allegations (NOIA), Notice of Hearing)

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SUPERVISING INVESTIGATIONS (CONT.)

- Reviewing the investigation report
- Gatekeeping
- Duty to warn
- Recordkeeping of all activities

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WHEN DO YOU INVESTIGATE?

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

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WHO SHOULD INVESTIGATE?

- Investigations of sexual harassment must be impartial, thorough, and reliable. Investigators must be **well-trained**.

  - Title IX Coordinator?
  - Standing panel of Investigators?
  - Human Resources?
  - Student Services?
  - Administrators/Staff?
  - Faculty?
  - Coaches?
  - Outside/External Investigator?
  - NOT Legal Counsel

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SHOULD THERE BE MORE THAN ONE INVESTIGATOR?

No specific requirement, but:

- Investigation must be prompt, thorough, and impartial
- Investigator must collect the maximum amount of relevant information available
- A pool of Investigators may help to ensure that investigations meet these requirements
- Who investigates may be strategic to each specific complaint
- Team = ability to brainstorm investigation steps and lines of questioning with co-Investigators and co-facilitate interviews
- Flexibility if there is any conflict with Investigators and parties

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ROLE OF RECIPIENT LAW ENFORCEMENT IN CIVIL RIGHTS INVESTIGATIONS

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

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ELEMENTS OF AN INVESTIGATION

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

10 STEPS OF AN INVESTIGATION

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

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10 STEPS OF AN INVESTIGATION (CONT.)

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

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INVESTIGATION: STRATEGY IS KEY

The investigation team, in consultation with the Title IX Coordinator, and/or the Deputy Coordinator, strategizes the entire investigation. Begin with:

- What are the undisputed facts? Which ones are significant to the investigation?
- What are the facts in dispute? Which ones are significant to the investigation?
- Who needs to be interviewed?
- What should be the order of the interviews?
- What evidence needs to be gathered?
- Timeline

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RIGHTS OF THE PARTIES DURING THE INVESTIGATION

Complainants and Respondents have the right to:

- Present witnesses, including fact and expert witnesses
- Present inculpatory and exculpatory evidence
- Discuss the allegations under investigation without restriction
- Gather and present relevant evidence without restriction
- Be accompanied to any related meeting or proceeding by Advisor of their choice, who may be, but is not required to be, an attorney

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RIGHTS OF THE PARTIES DURING THE INVESTIGATION (CONT.)

- Written notice of the date, time, location, participants, and purpose of investigation interviews or other meetings, with sufficient time to prepare
- Inspect and review directly related evidence and investigation report

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UNDERSTANDING EVIDENCE

- Formal rules of evidence do not apply
- **All** relevant and reasonably available evidence must be considered – inculpatory and exculpatory
- If the information is considered relevant to prove or disprove a fact at issue, it should be admitted. If credible, it should be considered.
  - Evidence is any kind of information presented with the intent to prove what took place
  - Certain types of evidence may be relevant to the credibility of the party or witness, but not to the allegations

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SPECIFIC EVIDENCE ISSUES UNDER THE TITLE IX REGULATIONS

- Evidence of the Complainant's **sexual predisposition** is never relevant.
- Evidence about the Complainant's **prior sexual behavior** is explicitly and categorically **not relevant** except for two limited exceptions:
  - Offered to prove that someone other than the Respondent committed the conduct alleged; or
  - Concerns specific incidents of the Complainant's sexual behavior with respect to the Respondent and is offered to prove consent
- Even if admitted/introduced by the Complainant
- Does not apply to Respondent's prior sexual behavior or predisposition

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CREDIBILITY

- Credibility is largely a function of corroboration and consistency
- To assess credibility is to assess the extent to which an individual's testimony can be relied upon to be accurate and helpful in understanding the complaint
  - Credible is not synonymous with truthful
  - Memory errors do not necessarily destroy witness credibility, nor does some evasion or misleading
  - Refrain from focusing on irrelevant inaccuracies and inconsistencies

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THE INVESTIGATION REPORT

- Comprehensive document summarizing the investigation
  - Results of interviews with parties and witnesses (including experts)
  - Summary of other information collected (i.e., information from police reports including pretext calls, medical exams, video surveillance and photographs; copies of text, email, and social networking messages)
- G.A.S. Framework
  - **Gather** evidence; **Assess** credibility and evidence; **Synthesize** areas of dispute/agreement and all questions asked
- The supplemental "bucket" to the report

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EVIDENCE AND REPORT REVIEW BY PARTIES PART 1

Prior to the completion of the Investigation Report:

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

Source: 34 C.F.R. § 106.45(b)(5)(vi)

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EVIDENCE AND REPORT REVIEW BY PARTIES PART 2

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

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

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COORDINATING THE DECISION-MAKING STAGES

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

DECISION-MAKERS IN TITLE IX PROCESSES

- The Title IX Coordinator **cannot** be the Decision-maker but may need to coordinate with Decision-makers:
  - Coordinating hearings, Hearing Panel/Decision-Maker
  - Facilitating the sending of notices to the parties (e.g., Notice of hearing, Notice of outcome, Notice of appeal)
  - Overseeing appeal processes
  - Sanctions
  - Remedies
  - Providing institutional memory
  - Training Decision-makers (hearings and appeals)
  - Recordkeeping of all activities

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STANDARD OF EVIDENCE

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

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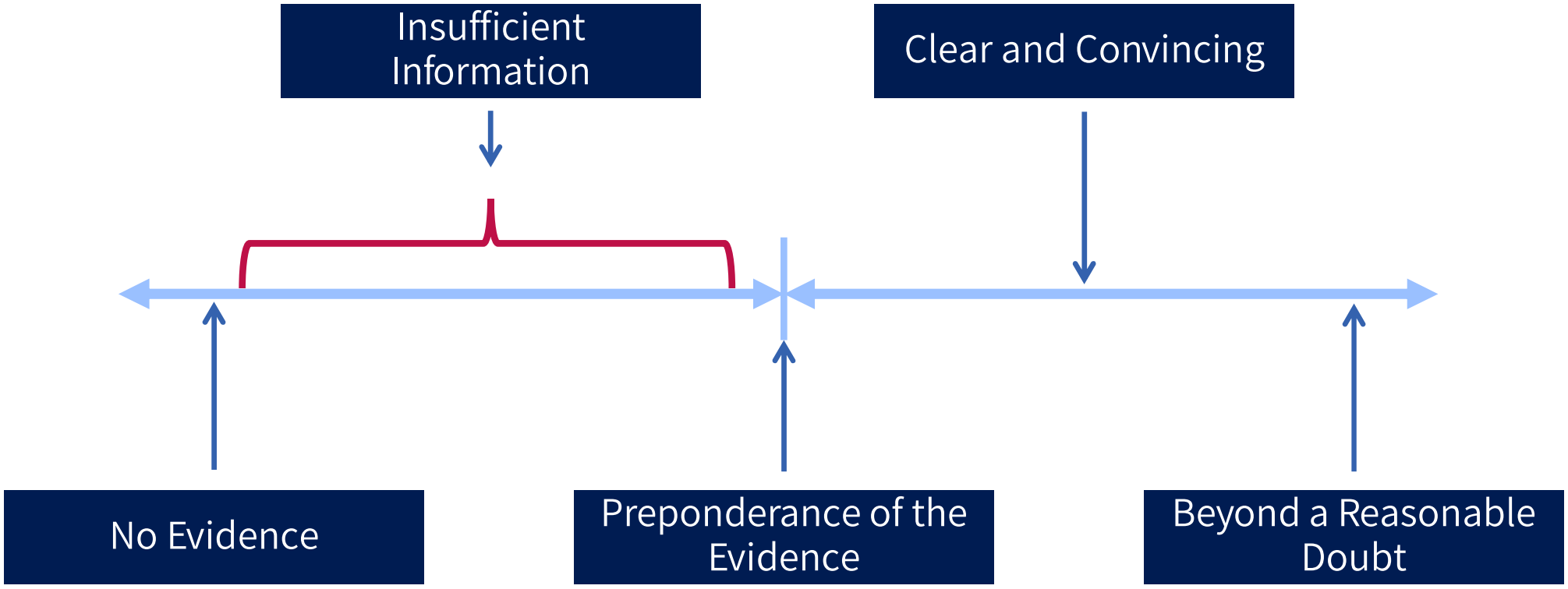
EVIDENTIARY STANDARDS



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EQUITY: PREPONDERANCE STANDARD

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

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DECISION-MAKERS: MAKING A FINDING/DETERMINATION

- Review applicable institutional policies
- Parse the policy
  - Provide specific findings for each alleged violation and for each Respondent
- Review the evidence and what it shows (relevance)
- Assess the credibility of evidence and witness statements as factual, opinion-based, or circumstantial
- Determination whether a policy violation occurred based on standard of evidence
- Concretely cite the reasons for this conclusion
- Move to sanctioning (if applicable)

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ENSURING COMPLIANCE WITH FINAL SANCTIONS

- Sanctioning Considerations
- Assuring Compliance
- Common Sanctions

SANCTIONING CONSIDERATIONS

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

Title IX and case law require resolutions which:

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

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SANCTIONING CONSIDERATIONS (CONT.)

- Tension between educational and developmental sanctions of student conduct processes
- There must be a nexus between the sanction(s) and the discriminatory conduct that led to the sanction(s)
- Engage in strategic education and training requirements
- Conduct a risk assessment audit and mitigation process
- The OCR asserts institutions should consider impact on the Respondent's education when determining sanction(s)

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SANCTIONING CONSIDERATIONS (CONT.)

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

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SANCTIONING CONSIDERATIONS (CONT.)

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

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ASSURANCE OF COMPLIANCE WITH FINAL SANCTIONS

- Take steps to confirm and document that all sanctions were enforced/completed
  - Did the Respondent attend mandatory training?
  - Is the Respondent complying with the no-contact order?
  - Were the necessary documents placed in the Respondent's personnel or conduct file?
  - Was the notation placed on the Respondent's transcript or personnel file?
- Possible consequences of a Respondent's failure to comply with sanctions:
  - Failure to comply conduct charge
  - Additional sanctions imposed

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COMMON STUDENT SANCTIONS

- Warning
- Probation
- Loss of privileges
- Counseling
- Contact restrictions
- Residence hall relocation, suspension, or expulsion
- Limited access to campus
- Service hours
- Online education
- Parent/guardian notification
- Alcohol and drug assessment, and counseling
- Discretionary sanctions
- Suspension
- Expulsion

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COMMON EMPLOYEE SANCTIONS

- Warning – verbal or written
- Probation
- Performance improvement/ management process
- Training (e.g., sensitivity training)
- Counseling
- Loss of privileges
- Reduction in pay
- Loss of annual raise
- Discretionary sanctions
- Loss of supervisory or oversight responsibilities
- Paid or unpaid leave
- Suspension
- Termination

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COORDINATING THE APPEAL PROCESS

- Appeals
- Appeal Grounds
- Appeal Process

APPEALS

- Appeals are mandatory under the Title IX Regulations
- Must offer equitable opportunity to appeal based on determination or dismissal of any allegations
- Clearly communicate to parties
  - Process to appeal
  - When an appeal is received and opportunity to respond
- Opportunity for all parties to support or oppose outcome
- Written decision with rationale delivered simultaneously to the parties
- Appeal Decision-maker cannot have had any other role in the investigation or resolution process

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APPEALS (CONT.)

- "Reasonably prompt" timeframe for producing appeal decision
- One level of appeal is best practice
- Defined window of time to request appeal
- Short window to request an appeal
  - Can always grant an extension if necessary
- Three mandatory grounds for appeal; may add others
- Committee versus individual determination preferred
- Deference to original Decision-maker
- Remand
- Document-based review
  - NOT *de novo*

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APPEAL GROUNDS

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

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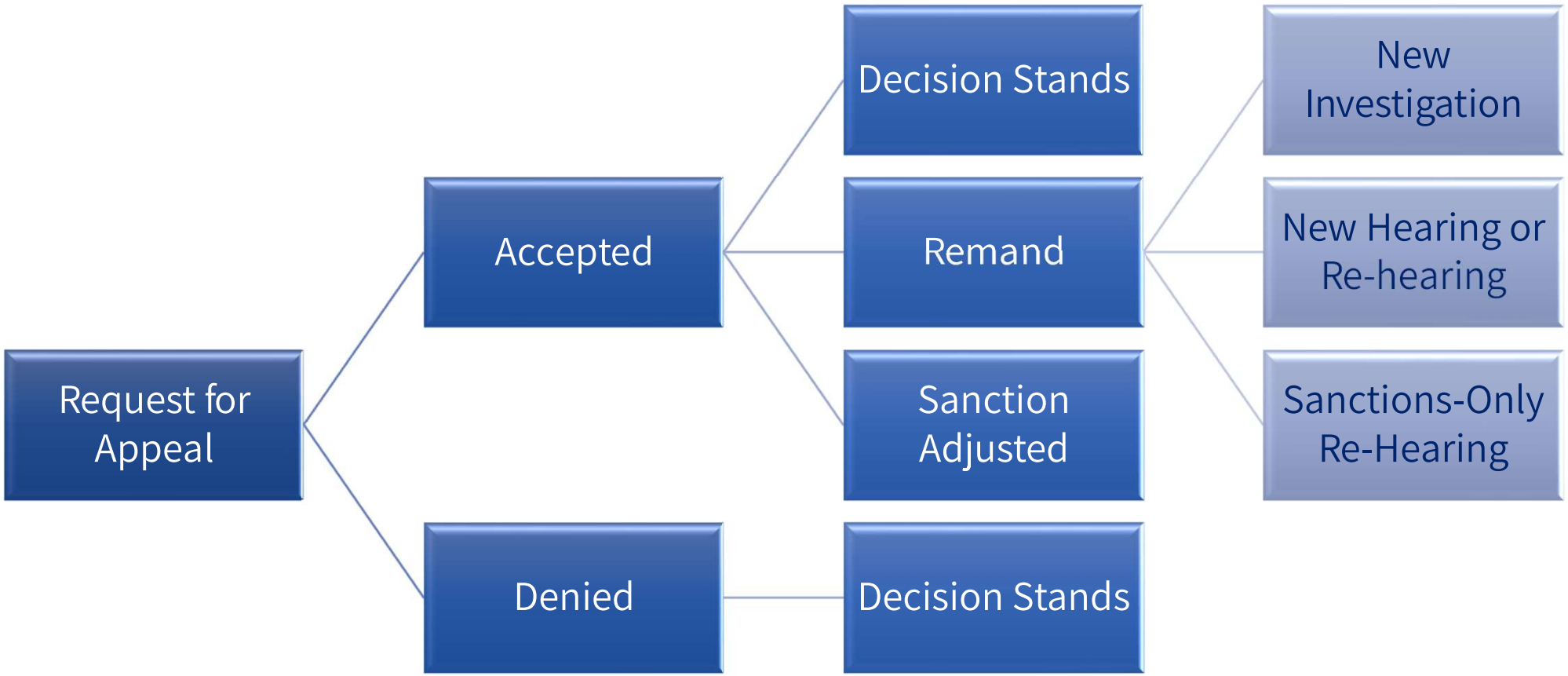
APPEAL PROCESS



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GENERAL TITLE IX COMPLIANCE OVERSIGHT

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

ENSURING COMPLIANCE WITH REQUIREMENTS TO STOP, PREVENT, REMEDY

Stop The Discriminatory Conduct:

- Take timely steps to identify and implement appropriate supportive measures for the parties
- Confirm and document that the appropriate supportive measures were implemented. For example:
  - Was the student provided alternative housing?
  - Was the employee provided an alternate supervisor/work assignment/workspace?
  - Was the student assigned to a different seat or class?
  - Was counseling made available?
  - Was a no-contact order issued?

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ENSURING COMPLIANCE WITH REQUIREMENTS TO STOP, PREVENT, REMEDY

Stop The Discriminatory Conduct (Cont.):

- Regularly re-evaluate the need for any continuing supportive measures (particularly when emergency removal is implemented)
- Enforce any violations (e.g., no contact order)
- Make sure the parties know they should report any difficulties with measures provided

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ENSURING COMPLIANCE WITH REQUIREMENTS TO STOP, PREVENT, REMEDY

Prevent Recurrence:

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

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ENSURING COMPLIANCE WITH REQUIREMENTS TO STOP, PREVENT, REMEDY

Prevent Recurrence (Cont.):

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

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ENSURING COMPLIANCE WITH REQUIREMENTS TO STOP, PREVENT, REMEDY

Remedy the Effects:

- Designed to make Complainant whole and return them to the pre-deprivation status
- Take timely steps to confirm and document that the appropriate remedies were implemented
- Make sure the Complainant knows that they should report any difficulties obtaining the remedies and any subsequent harassment
- Determine what, if any, remedies may need to be provided to the Recipient community as a whole

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ASSESSING COMPLIANCE

- Active, internal reviews/audits/assessments
  - Reporting and resolution processes
  - Policies and procedures up-to-date and compliant
  - Athletics
  - Training content and requirements
  - Policy and non-discrimination notice dissemination
  - Materials, website, and resource guide
- Compliance checklist
  - Departmental self-study audit at regular intervals
- Case/investigation debriefing

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ASSESSING COMPLIANCE (CONT.)

- Active professional development on issues related to compliance; oversight of compliance plan implementation
  - For Title IX Coordinator and/or Deputy Coordinators
- Climate surveys
  - Online, in-person, focus groups, institution/system committee feedback, etc.

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RECORDKEEPING AND DOCUMENTATION

- Certain records must be created, retained, and available to the parties for at least **seven** years:
  - Sexual harassment investigation including any responsibility determination, any disciplinary sanctions imposed, and any remedies implemented
  - Any appeal and related result(s)
  - Any informal resolution implemented
  - Any supportive measures implemented
  - **For each formal complaint, must document the basis for why the Recipient's response was not deliberately indifferent**

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RECORDKEEPING AND DOCUMENTATION (CONT.)

- Rationale for each determination
- Measures taken to preserve/restore access to education programs/activity

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Questions?

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