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Association of
Title IX Administrators

Civil Rights Investigator Two

Training & Certification Course



Strategic Risk
Management Solutions



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

CONTENT ADVISORY

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

ATIXA faculty 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.

AGENDA

1 Title IX and Investigations Overview

2 Due Process

3 Effective Investigations

4 Statutory and Regulatory Status

5 34 C.F.R. § 106.30 Sexual Harassment Definitions

6 Investigating Retaliation Claims

7 Other Civil Rights Offenses

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Creating Timelines

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Notetaking and Recordkeeping

AGENDA

15 Meeting Considerations

16 Questioning Skills and Guidelines

17 Hit the G.A.S.

18 The Investigation Report

19 Bias and Prejudice

20 Inclusive Investigations



TITLE IX NOTICES OF PROPOSED RULEMAKING 2022 & 2023

TITLE IX REGULATIONS

- **1972:** Congress passed Title IX of the Education Amendments
- **1980:** the Department of Education's Office for Civil Rights (OCR) given primary responsibility for enforcing Title IX
- **November 2018:** OCR proposed the most detailed and comprehensive Title IX regulations to date, which focused on sexual harassment response
- **August 2020:** Significantly amended, due-process oriented Regulations took effect (proposed in Nov. 2018)
- **June 2022:** OCR published a Notice of Proposed Rule Making (NPRM) outlining proposed changes to the Title IX regulations focused on sexual harassment response and pregnancy and related conditions

NPRM PROCESS TIMELINE

- **July 2022:** NPRM published in the Federal Register and the 60-day comment period began
- **September 2022:** Review and comment period ended
- Final Rule expected to be issued in Spring 2023
- Effective Date approximately Summer/Fall 2023
- **April 2023:** OCR published a Notice of Proposed Rule Making (NPRM) outlining proposed changes to the Title IX regulations focused on gender identity and athletic participation; notice of a 30-day comment period
- Athletics Final Rule anticipated Spring 2024
- Athletics Effective Date anticipated Summer/Fall 2024

PREPARING FOR IMPLEMENTATION

- Continue to fulfill obligations under the current regulations for the 2022-2023 academic year.
- Anticipate OCR will expect schools to implement the new sexual harassment and pregnancy-related 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



Remember: As an Investigator, you have no “side” other than the integrity of the process!

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.”



THE IX COMMANDMENTS

INVESTIGATION

(plus prompt & fair per VAWA Sec. 304)



Thorough

Reliable

Impartial

PROCESS



Prompt

Effective

Equitable

REMEDIES

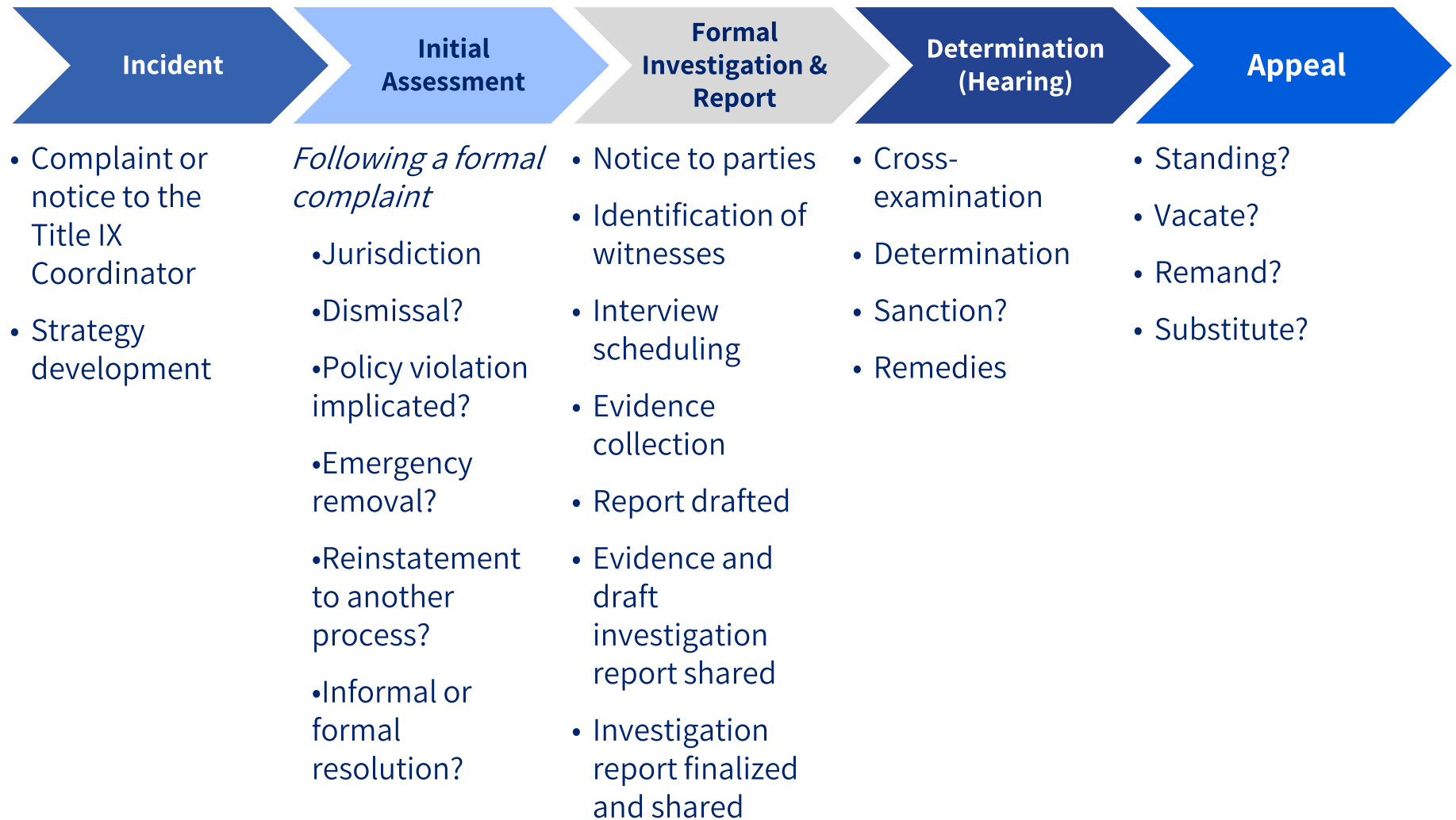


Act reasonably to stop discrimination

Act reasonably to prevent recurrence

Act equitably to remedy effects

THE PROCESS



10 STEPS OF AN INVESTIGATION

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

10 STEPS OF AN INVESTIGATION

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

*The 2020 Regulations permit, but ATIXA does **not** recommend, that Investigators make recommended findings or conclusions

THE GOAL FOR INVESTIGATORS

Impartial

Trained



Competent

Focused

STAYING IN YOUR LANE





DUE PROCESS

- What is Due Process?
- Due Process in Procedure
- Due Process in Decision

WHAT IS DUE PROCESS?

- The set of rights-based protections that accompany disciplinary action by a school, college, or university.
- Dictated by law & regulations, courts, system, district, school, or college policies and procedures.
- Private schools refer to this as “Fundamental Fairness”
 - Though courts and the OCR are increasingly using the term Due Process

EVOLUTION OF DUE PROCESS

Evolution of Due Process in education

- Dean Wormer; Principal Strickland (1950's)
- *Dixon v. Alabama* (1961) & *Goss v. Lopez* (1975)
- Constituency-based policies and procedures
- Due Process and Student Conduct Administration
- Title VII and Human Resource Models
- Civil Rights Investigation Model and Hearings
- Current case law and 2020 Title IX Regulations

DUE PROCESS IN PROCEDURE

- A school's process should include (at a minimum):
 - Detailed and specific Notice of Allegation and/or Investigation
 - Notice of Hearing
 - Right to present witnesses
 - Right to present evidence
 - Right to an Advisor of their choice
 - Opportunity to be heard and address the allegations and evidence
 - Right to review all relevant evidence AND the investigation report prior to a hearing
 - Right to cross-examination
 - Right to appeal

DUE PROCESS IN DECISION

- A decision must:
 - Be based on a fundamentally fair rule or policy
 - Be made in good faith (i.e., without malice, ill-will)
 - Be unbiased
 - Have a rational relationship to (be substantially based upon, and a reasonable conclusion from) the evidence
 - Not be arbitrary or capricious
- Sanctions must be reasonable, constitutionally permissible, and should relate to the violations

EFFECTIVE INVESTIGATIONS

- Civil Rights Investigation Hallmarks
- Terminology
- Title IX Regulatory Framework
- Promptness



CIVIL RIGHTS INVESTIGATION MODEL HALLMARKS

Investigation is a critical part of the Title IX grievance process

- Active identification and strategic gathering of evidence
- Emphasized transparency, communication, and fairness
- Grounded in the concepts of neutrality and equity
- Enhanced Due Process protections for parties
- 2020 Title IX Regulations made substantial changes and additions to grievance resolution processes

A NOTE ABOUT TERMINOLOGY

- Formal complaint
- Grievance process
- Recipient
- Complainant
 - Individual(s) affected by alleged conduct or circumstances
- Respondent
 - Individual(s) alleged to be responsible for alleged conduct or circumstances

A NOTE ABOUT TERMINOLOGY (CONT.)

- Sexual harassment
 - Quid pro quo
 - “Hostile environment”
 - VAWA offenses (sexual assault, domestic and dating violence, stalking)

TITLE IX REGULATORY FRAMEWORK

- Procedures for notice and formal complaint
- Separation between investigation, hearing, and appeal
- Distinct roles for
 - Title IX Coordinator
 - Investigator
 - Decision-Maker
 - Appeal Decision-Maker
- Evidentiary review periods
- Investigation report requirements

PROMPTNESS

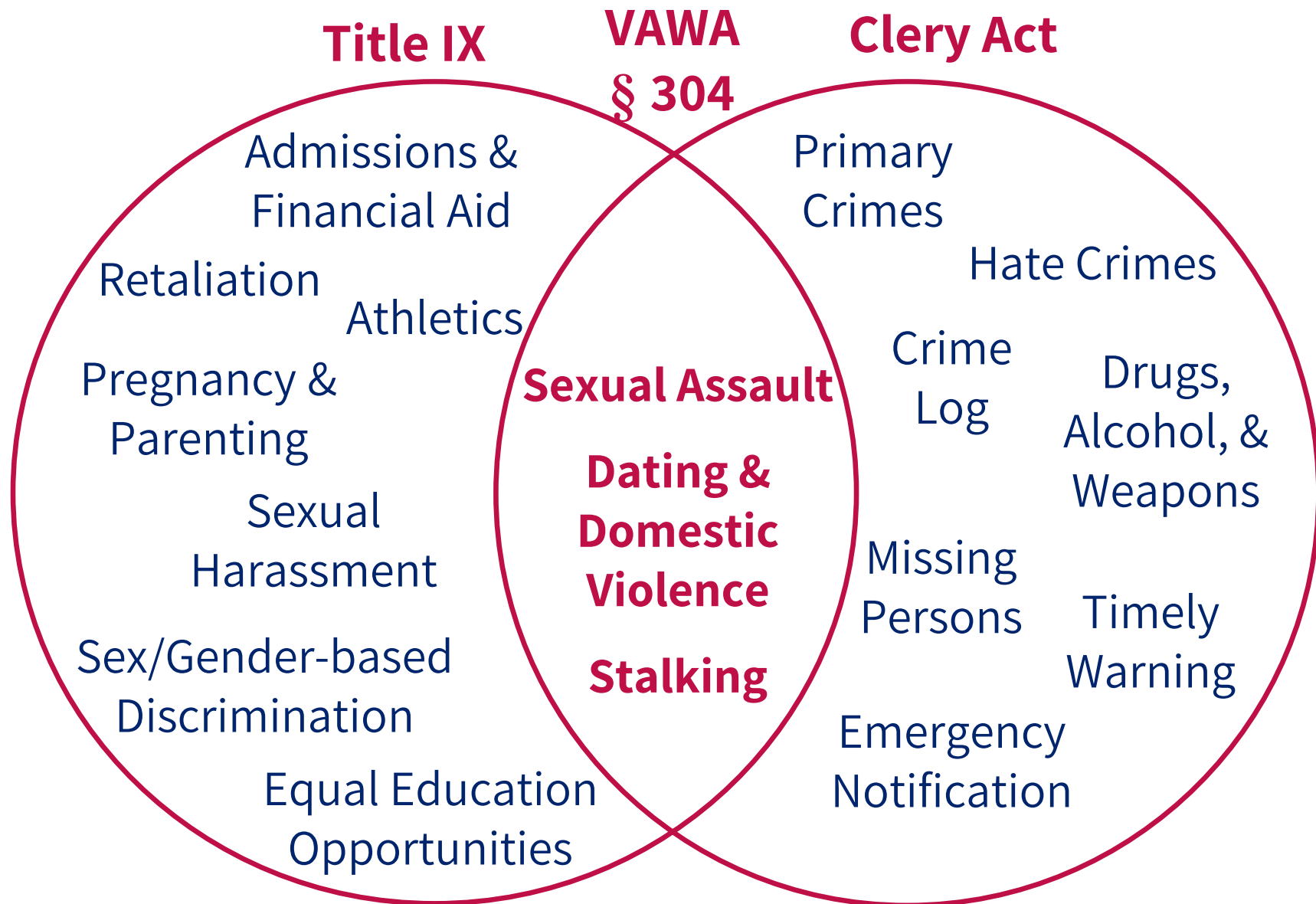
- Reasonably prompt timeframes for the conclusion of the grievance process, including reasonably prompt timeframes for filing and resolving appeals
- Concurrent law enforcement investigation does not relieve the burden of the school to investigate
- Temporary delays for “good cause” and with written notice of the delay to parties
 - Complexity of the investigation
 - Concurrent law enforcement investigation with time-dependent release of evidence
 - Delays for administrative needs are insufficient



STATUTORY AND REGULATORY STATUS

- Intersection of Title IX, the Clery Act, and VAWA Section 304
- OCR Guidance

TITLE IX, CLERY ACT, VAWA SECTION 304



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”**
- Prohibits retaliation
 - The 2020 Title IX regulations also include new procedural and training requirements for Investigators for all forms of sexual harassment

OCR GUIDANCE

Withdrawn:

- 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
- 2016 DCL on Transgender Students
- 2017 Q&A on Campus Sexual Misconduct

OCR GUIDANCE

Still in effect:

- 1975 Regulations, as amended
- 2003 DCL on Title IX and Free Speech
- 2010 DCL on Harassment and Bullying
- 2013 DCL on Pregnant and Parenting Students
- 2020 Q&A on Final Rule
- 2021 Q&A on Title IX and Single Sex Scholarships, Clubs, and other Programs
- 2021 Notice of Interpretation and Enforcement of Title IX
- 2021 Q&A on the Title IX Regulations on Sexual Harassment (Revised July 2022)

TITLE IX REGULATIONS

- 2020 Title IX regulations
 - Effective and enforceable August 14th, 2020
 - Amend the Code of Federal Regulations and have force and effect of law
 - Some provisions already mandated by due process case law in some jurisdictions
 - Intervening variables (litigation and legislation) may impact enforcement in the short or long term
- The regulations are significant, legalistic, surprisingly prescriptive, very due process heavy, and go well beyond what any court has required under 5th/14th Amendment case law

TITLE IX REGULATIONS (CONT.)

- Preamble explains thought process for regulations
- OPEN Center responses provide clarification for enforcement

GRIEVANCE PROCEDURES

Must include:

- Presumption that the Respondent is not responsible until determination is reached
- “Reasonably prompt” timeframes
 - Requirement to set specific timelines for major stages of the grievance process now gone
- Range of possible sanctions and remedies (mirrors Clery Act mandate)
- Description of standard of evidence
- Bases and procedures for appeal
 - Appeal now required, equitably, on three grounds
- Range of supportive measures available to all parties
 - Note shift from “interim measures” terminology

JURISDICTIONAL ISSUES

- Emphasizes the *Davis* standard
 - Control over the harasser and 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
- Regulations specify “harassment...against a person in the United States”
 - Off-campus conduct, study abroad programs, or school-sponsored international trips – “nothing in these final regulations would prevent...”

JURISDICTIONAL ISSUES (CONT.)

- The definition of sexual harassment covers the in-program effects of out-of-program misconduct (though not the misconduct itself)
- At the time of filing a formal complaint, a Complainant must be participating in or attempting to participate in the education program or activity of the Recipient with which the formal complaint is filed
 - OCR adopts a fairly broad definition of what could constitute attempting to participate

TITLE IX REGULATORY REQUIREMENTS

- A Recipient with **actual knowledge** of sexual harassment in an education program or activity of a Recipient in the United States must respond in a manner that is **not deliberately indifferent**
- Mandatory dismissal
 - Would not constitute sexual harassment as defined, even if proven (34 C.F.R. § 106.30)
 - Does not fall within jurisdiction
 - Program or activity inside the United States
 - Complainant participating in or attempting to participate in education program
- Does not preclude action under another policy (e.g., General Non-Discrimination Policy, conduct code)

TITLE IX REGULATORY REQUIREMENTS (CONT.)

- Discretionary dismissal
 - Complainant withdraws complaint or allegation
 - Respondent is no longer enrolled or employed
 - “specific circumstances prevent the Recipient from gathering evidence sufficient to reach a determination”
- Simultaneous notice to the parties
- Articulated rationale
- Action under another policy
 - Due process requirements for VAWA offenses in alternate process

TITLE IX REGULATORY REQUIREMENTS (CONT.)

- Mandatory steps upon notice (34 C.F.R. § 106.44)
- Promptly contact the Complainant to discuss the availability of supportive measures
- With or without filing formal complaint, inform complainant of supportive measures and respect complainant's wishes
- Explain to the Complainant the process for filing a formal complaint
- Mandatory steps upon formal complaint (34 C.F.R. § 106.45)
 - Follow detailed grievance process requirements
 - Offer informal resolution options
 - Dismiss complaint if no jurisdiction or no prima facie sexual harassment allegation



§ 106.30 DEFINITIONS – SEXUAL HARASSMENT

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

SEXUAL HARASSMENT

Title IX regulations require each Recipient to define **sexual harassment** as conduct on the basis of sex that satisfies one or more of the following:

- **Quid Pro Quo:** 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.
- **Hostile Environment:** Unwelcome conduct determined by a reasonable person to be so severe and pervasive, and objectively offensive (SPOO) that it effectively denies a person equal access to the Recipient's education program or activity
 - Education program or activity means employment, too!
- “Sexual assault” as defined in 20 U.S.C. 1092(f)(6)(A)(v)
“Dating violence” as defined in 34 U.S.C. 12291(a)(10)
“Domestic violence” as defined in 34 U.S.C. 12291(a)(8)
“Stalking” as defined in 34 U.S.C. 12291(a)(30)

HOSTILE ENVIRONMENT: “UNWELCOME”

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

HOSTILE ENVIRONMENT: “REASONABLE PERSON”

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

HOSTILE ENVIRONMENT: “SEVERE”

- Physical conduct is more likely to be severe without need for repetition
 - Sexual assault and many dating/domestic violence incidents are almost always sufficiently severe
 - Other physical conduct that does not meet the 34 C.F.R. § 106.30 definitions for sexual assault or dating/domestic violence may also rise to the level of “severe”
- Consider the circumstances (e.g., ability for Complainant to escape the harassment)
- Assess whether accompanied by threats or violence
- Assess whether there was a degree of embarrassment or humiliation

HOSTILE ENVIRONMENT: “PERVASIVE”

- Widespread
- Openly practiced; occurring in public spaces
- Well-known among students or employees – reputation of a department, person, etc.
- Frequency, intensity, and duration of the conduct
- Unreasonable interference with school or job
- A “gauntlet of sexual abuse” *Meritor v. Vinson*, 477 U.S. 57 (1986)
- Incidents occurring in concert or with regularity are more likely to be considered pervasive
- Consider the specific circumstances and facts

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

HOSTILE ENVIRONMENT: TOTALITY OF THE CIRCUMSTANCES

- Hostile environment analysis requires that you evaluate the “totality of the circumstances.”
- In evaluating the totality of the circumstances, consider:
 - Frequency, nature, and severity of the conduct
 - Whether the conduct was physically threatening
 - Whether the conduct was humiliating
 - Identity of and relationship between the Respondent and the Complainant
 - Age and sex of the Respondent and the Complainant
 - Size of the school, location of the incidents, and context in which they occurred

HOSTILE ENVIRONMENT: TOTALITY OF THE CIRCUMSTANCES (CONT.)

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

SEXUAL ASSAULT*

- **Rape** – Penetration, no matter how slight, of the vagina or anus, with any body part or object, or oral penetration by a sex organ of another person, without the consent of the Complainant.
- **Fondling** – The touching of the private body parts of the Complainant (buttocks, groin, breasts) **for the purpose of sexual gratification**, without the consent of the Complainant, including instances where the Complainant is incapable of giving consent because of their age or because of a temporary or permanent mental incapacity.
- **Incest** – Sexual intercourse between persons who are related to each other, within the degrees wherein marriage is prohibited by [insert state] law.

SEXUAL ASSAULT* (CONT.)

- **Statutory Rape** – Sexual intercourse with a person who is under the statutory age of consent of [insert age in your state].

Note: Sexual Assault also includes having another person touch you sexually, forcibly, and/or without their consent.

* This definition set is not taken from the FBI Uniform Crime Reporting (UCR) system verbatim. ATIXA has substituted Complainant for “victim,” has removed references to his/her throughout, and has defined “private body parts.” These are liberties ATIXA thinks are important to take with respect to the federal definitions, but practitioners should consult legal counsel before adopting them.

DATING VIOLENCE

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

DOMESTIC VIOLENCE

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

DOMESTIC VIOLENCE (CONT.)

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

STALKING

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

STALKING (CONT.)

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

Please, please, please, don't interpret this to violate anyone's First Amendment rights.



INVESTIGATING RETALIATION CLAIMS

- Basic Legal Principles
- Investigating Retaliation Claims

RETALIATION: BASIC LEGAL PRINCIPLES

Title IX regulations prohibit recipients from intimidating, coercing, or retaliating against individuals because they engage in activities protected by Title IX.

- Protected activity under Title IX:
 - Reporting sex discrimination, including sexual harassment
 - Filing a discrimination complaint
 - Assisting someone in reporting discrimination or filing a complaint
 - Participating in any manner in an investigation of discrimination, for example as a witness
 - Protesting any form of sex discrimination (e.g., lack of equity in athletics)

INVESTIGATING RETALIATION CLAIMS: KEYS TO UNDERSTANDING

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

PRELIMINARY ELEMENTS OF A RETALIATION CLAIM

- The following elements establish an **inference of retaliation**:
 - Did the individual engage in protected activity?
 - Usually straightforward,
 - Unless there is a question of reasonableness of belief or manner.
 - Was the individual subsequently subjected to adverse action?
 - Do the circumstances suggest a connection between the protected activity and adverse action?
 - Did individual accused of retaliation know about activity?
 - How soon after the protected activity did the adverse action occur?
 - If these three elements are not shown, the claim fails.

RETALIATION AND ADVERSE ACTION

Common definition of adverse action:

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

INVESTIGATING RETALIATION CLAIMS: REBUTTING THE INFERENCE

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

INVESTIGATING RETALIATION CLAIMS: IS THE EXPLANATION LEGITIMATE?

Factors to consider:

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

INVESTIGATING RETALIATION CLAIMS IS THERE EVIDENCE OF PRETEXT?

Factors to consider:

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



OTHER CIVIL RIGHTS OFFENSES

- Sexual Exploitation
- Discrimination
- Threats/Intimidation
- Hazing
- Bullying

OTHER ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION

Though not part of the Title IX “Sexual Harassment” definition, other conduct could be prohibited under an institutional sexual misconduct policy, including:

Sexual Exploitation: an individual taking 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 behavior does not otherwise constitute sexual harassment.

Examples include, but are not limited to:

- Sexual voyeurism
- Invasion of sexual privacy (e.g., doxxing)
- Knowingly making an unwelcome disclosure of (or threatening to disclose) an individual's sexual orientation, gender identity, or gender expression

ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION (CONT.)

- 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
- 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

ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION (CONT.)

- Causing or attempting to cause the incapacitation of another person (through alcohol, drugs, or any other means) for the purpose of compromising that person's ability to give consent to sexual activity, or for the purpose of making that person vulnerable to non-consensual sexual activity
- 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

ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION (CONT.)

- Knowingly soliciting a minor for sexual activity
- Engaging in sex trafficking
- Knowingly creating, possessing, or disseminating child pornography

OTHER CIVIL RIGHTS OFFENSES

- Threatening or causing physical harm, extreme verbal, emotional, or psychological abuse, or other conduct which threatens or endangers the health or safety of any person
- Intimidation, defined as implied threats or acts that cause an unreasonable fear of harm in another
- Discrimination, defined as actions that deprive, limit, or deny other members of the community of educational or employment access, benefits, or opportunities
- Bullying/Cyberbullying, defined as repeated and/or severe aggressive behavior Likely to intimidate or intentionally hurt, control, or diminish another person, physically and/or mentally

OTHER CIVIL RIGHTS OFFENSES (CONT.)

- Hazing, defined as acts likely to cause physical or psychological harm or social ostracism to any person within the institutional community, when related to the admission, initiation, pledging, joining, or any other group-affiliation
- Any policy violated on the basis of the Complainant's protected characteristic, which is severe and/or pervasive/persistent enough to cause a discriminatory effect
- May not fall under Title IX jurisdiction, but requires a response with appropriate due process



ISSUE SPOTTING

Using a case study, attendees should evaluate the available facts, identify issues and related evidence (available and still needed)

CONSIDERATIONS IN ISSUE SPOTTING

- Engaging in issue spotting based on the Complainant's statement is an important first step in development of your investigation strategy
- You will continue to identify issues as you interview others and gather evidence
- Continuing to revisit the facts gathered and identifying issues is critical to a comprehensive civil rights investigation
- Identifying the issues posed will help to identify the framework of policies in play

TRAVIS AND JUSTIN



TRAVIS AND JUSTIN

Travis was on the lacrosse team for three weeks. Travis reported that he was being sexually harassed by Justin, the lacrosse team captain. In the span of two weeks, Justin has asked Travis out three times. The first time Justin asked Travis out was in the locker room when they both were naked, and Justin put his hand on Travis' back. The second time Justin asked, he was pretty drunk and got in Travis's personal space at a bar. The third time, Justin walked up next to Travis in the shower and tried to grab Travis's buttocks. Travis also kissed Justin at a party the weekend before the shower interaction.

DEB



DEB

Deb is a faculty member working with a small team of seven student research assistants who meet each morning to check-in with each other and the status of their grant projects in the university lab. May is a student team-member who has recently announced that she is pregnant.

One morning, May texted Deb that she was going to miss the morning meeting. Deb announced to the group that they should get started because May wouldn't be joining the meeting that day. A third student researcher, Paulie, responded with a snort, and said, "I bet she has morning sickness. Too bad, her breasts are getting to be GINORMOUS and I was looking forward to having a peek this morning." Several team members laughed hard at this joke, while a couple of others chuckled uncomfortably.

DEB

Deb was livid, and immediately began to wonder how she could work with a team of people who objectify women like this. After the meeting she stormed into the Title IX office to complain about Paulie's conduct. She explained how uncomfortable she felt by the incident, how she no longer could work with Paulie, stating that he should be terminated from the grant-funded position and that the other students who laughed should be put on probation.



CONSENT CONSTRUCT

- Force
- Incapacity
- Consent

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.
- To be valid, consent must be 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

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?

FORCE

- 1. Was force used by the Respondent to obtain sexual or intimate access?**
 - Because consent must be voluntary (an act of free will), consent cannot be obtained through use of force
 - Consider the impact of power dynamics

FORCE (CONT.)

Types of force to consider:

- **Physical violence:** hitting, restraint, pushing, kicking, etc.
 - This may also involve alleged violations of other policies (e.g., harms to persons, violation of law)
- **Threats:** anything that gets someone to do something they wouldn't ordinarily have done absent the threat
 - This requires an analysis as to the viability of the threat and whether a reasonable person would believe the Respondent could or would carry out the threat

FORCE (CONT.)

Types of force to consider:

- **Intimidation:** an implied threat that menaces and/or causes reasonable fear.
 - This requires the same threat analysis as above
- **Coercion:** the application of an unreasonable amount of pressure for sexual access
 - Consider isolation, frequency, intensity, and duration

INCAPACITY

2. Was the Complainant incapacitated?

- Incapacity ≠ impaired, drunk, intoxicated, or under the influence.
- What was the status of the Complainant in terms of:
 - Situational awareness
 - Consequential awareness
- What was the reason for incapacity?
 - Alcohol or other drugs (prescription or non-prescription)
 - Mental/cognitive impairment
 - Injury
 - Asleep or unconscious

INCAPACITY (CONT.)

- Incapacitation is a state where individuals cannot make rational, reasonable decisions because they **lack the capacity** to give knowing consent
 - unable to understand who, what, when, where, why, or how
- Incapacitation is a determination that will be made after the incident **in light of all the facts available**
- Assessing incapacitation is very fact-dependent
- Blackouts are frequent issues
 - Blackout ≠ incapacitation (automatically)
 - Blackout = working memory functional; short-term memory not retained, not stored long-term; long-term memory from before blackout can be accessed
 - Partial blackout must be assessed as well

BEHAVIORAL CUES

Evidence of incapacity context clues:

- Slurred speech
- The smell of alcohol on the breath in combination with other factors
- Shaky equilibrium; stumbling
- Passing out
- Throwing up
- Appearing Disoriented
- Unconsciousness

BEHAVIORAL CUES (CONT.)

Evidence of incapacity context clues:

- Known blackout
- Although memory is absent in a blackout, verbal and motor skills are still functioning
- Outrageous or unusual behavior (requires prior knowledge)

PRIOR KNOWLEDGE CONSTRUCT

- These answers should be in the investigation report if the primary consideration is the out of norm behaviors of the Complainant as a determination of incapacity:
 - Did the Respondent know the Complainant previously?
 - If so, was Complainant acting very differently from previous similar situations?
 - Evaluate what the Respondent observed the Complainant consuming (via the timeline)
 - Determine if Respondent provided any of the alcohol for the Complainant
 - Other relevant behavioral cues

SOME FACTS ABOUT ALCOHOL

- Most abused drug on college campuses
- Most commonly used date rape drug
- Time – the only sobering tool
- One “drink” per hour
- “Myth of puking”
- Pace of consumption
- Food in the stomach
- Carbonation and alcohol
- Medications and alcohol

COMMON FACTORS

- Rate of consumption
- Strength of drink
- Food in the stomach
- Body weight
- Body type – body fat percentage
- Gender
 - E.g., enzymes, hormones, body fat, and water in body
- Functional tolerance
- Medications
- Illness and dehydration
- Fatigue
- Caffeine
- Genetics
- Ethnicity

