

## Prevention And Remediation of Gender Discrimination

- Equity in programs and operations.
  - Access and admissions.
  - Academic programs.
  - Recruitment, promotion, and hiring.
  - Compensation and benefits.
  - Discipline and discharge.
  - Athletics (more on this later).
    - Including, inter-collegiate, intra-mural, and sports clubs.
  - All student organizations and activities.
    - Fraternities and sororities are exempted from membership equity.



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## Prevention and Remediation of Sexual Harassment

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



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## Prevention and Remediation of Sexual Harassment

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



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## Prevention and Remediation of Stalking

- Stalking 1:
  - A course of conduct
  - Directed at a specific person,
  - On the basis of actual or perceived membership in a protected class,
  - That is unwelcome, AND
  - Would cause a reasonable person to feel fear.



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## Prevention and Remediation of Stalking

- Stalking 2
  - Repetitive and menacing.
  - Pursuing, following, harassing, and/or interfering with the peace and/or safety of another.
- May be a series of legal actions, but campus policy is not required to mirror criminal standards in most jurisdictions.



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## Prevention and Remediation of Stalking

- Gender-based stalking a form of sex discrimination.
- May involve technology (i.e., Hofstra case).
- Definition and prohibition should be reflected in policy.
- Response consistent with Title IX requirements.



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## Prevention and Remediation of Intimate Partner and Relationship Violence

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



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## Prevention and Remediation of Intimate Partner and Relationship Violence

- Assure remedies consistent with Title IX
  - Consider no-contact order implications.
  - Trespassing someone from campus.
  - Consider importance of advocacy.
  - Also utilize community/off-campus resources.
- Recognize complexities before incident.
- VAWA Sec. 304 specifically targets and highlights issues of “domestic violence” and “dating violence.”



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## CASE STUDY



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## Prevention and Remediation of Bullying and Cyberbullying

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



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## Prevention and Remediation of Bullying and Cyberbullying

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



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## Prevention and Remediation of Bullying and Cyberbullying

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



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## OVERSIGHT OF PROMPT AND EQUITABLE GRIEVANCE PROCEDURES

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



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## Oversight and Coordination of Prompt and Equitable Grievance Procedures

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



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## Oversight and Coordination of Prompt and Equitable Grievance Procedures

- How to ensure prompt procedures:
  - The investigation must be conducted according to the timelines in the institution's policy.
    - (Be very careful about wording your policy – use “reasonable delays at the discretion of the Title IX administrator,” “barring exigent circumstances”, etc.).
  - Parties/witnesses should be interviewed as soon as possible so that recollections are as fresh as possible and to secure necessary remedies as soon as possible.
  - Document all delays and reasoning therefore.
    - Unresponsive or uncooperative parties reporting party and/or responding party, criminal investigation, holidays etc.



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## Prompt & Equitable Procedures: Clear Timeframes

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



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## Equity: Preponderance Standard Required

- The only equitable standard.
- Articulate the standard throughout your policy, procedure, investigation, and hearings.
- Educate the parties and their advisors.
- Use language the community understands.
  - 50.1%.
  - “More likely than not.”
  - The “tipped scale.”
  - Try NOT to use just the term “preponderance of the evidence” – it is not common language.

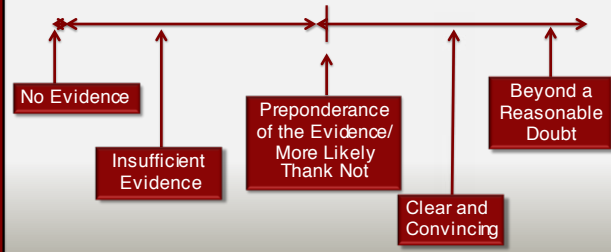


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## Understanding Evidence Thresholds

### EVIDENTIARY STANDARDS



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## Equity

- “Title IX regulation requires schools to provide equitable grievance procedures” (DCL, p. 10).
- “A grievance procedure applicable to sexual harassment complaints cannot be prompt or equitable unless students know it exists, how it works, and how to file a complaint. Thus, the procedures should be written in language appropriate to the age of the school’s students, easily understood, and widely disseminated” (2001 Guidance, p. 20).



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## Equity & Grievance Procedures

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



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## Equity: Barriers & Problems

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



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## Equity: Barriers & Problems

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



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## Equity: Barriers & Problems

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



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## Equity Requires Training

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



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## Oversight and Coordination of Prompt and Equitable Grievance Procedures

### ➤ The coordinator's role:

- A sexual harassment grievance procedure is not prompt and equitable unless students and employees know it exists, how it works, and how to file a complaint.
- Ensure that the notice of complaint procedure is published and posted widely, in the publications and information sources that are most commonly read and used – easily located.
- Procedures should be written in a manner that is easily understood.



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## Oversight and Coordination of Prompt and Equitable Grievance Procedures

### ➤ The coordinator's role (cont.):

- Clearly identify the individuals to whom discrimination complaints can be submitted.
- Periodically review and update grievance procedures to ensure they comply with Title IX requirements.
- Confirm that new or revised grievance procedures are posted and published promptly and that old procedures are removed from publications and websites.
  - Beware multiple conflicting or varying versions of published policy.



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## SUPERVISOR OF INVESTIGATIONS



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## Supervisor of Investigations

### ➤ The Title IX officer is responsible for:

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



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## Supervisor of Investigations

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



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## ELEMENTS OF AN INVESTIGATION

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



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## Who Should Investigate?

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



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## Should There Be More Than One Investigator?

- No specific requirement, but:
  - Investigation must be prompt, thorough, and impartial.
  - Investigator must collect the maximum amount of relevant information available to make a determination.
  - A pool of investigators may help to ensure that your investigation meets these requirements.
  - Who investigates may be strategic to each specific case.
  - Team = Ability to brainstorm investigation steps and lines of questioning with co-investigators and co-facilitate interviews.
  - Flexibility if there is any conflict with investigators and parties.



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## Role of Campus Law Enforcement in Civil Rights Investigations?

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



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## Elements of an Investigation

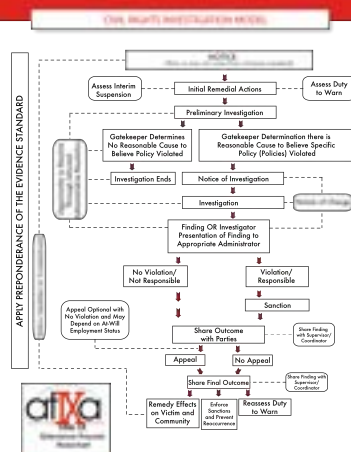
- Incident.
- Complaint or notice (actual or constructive).
- Preliminary investigation/inquiry (initial strategy).
- Gatekeeper determination (throughout process).
- Strategize investigation.
- Formal comprehensive investigation.
- Witness interviews and evidence gathering.
- Charge/allegation.
- Analysis and report writing.
- Finding.
- Appeal.



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## Civil Rights Investigation Model



## Role of a Title IX Coordinator in Investigations

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



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## Gatekeeping in Investigations


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



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## Major Gatekeeping Guideposts

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



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## Understanding Evidence

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



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## Understanding Evidence

- Formal rules of evidence do not apply. If the information is considered relevant to prove or disprove a fact at issue, it should be admitted. If credible, it should be considered.
  - Evidence is any kind of information presented with the intent to prove what took place.
  - Certain types of evidence may be relevant to the credibility of the witness, but not to the charges.
- Consider if drugs or alcohol played a role.
  - If so, do you know what you need to know about the role of alcohol on behavior? Timing? Incapacitation?
  - Look for evidence of prior planning.



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## Investigation, Interviews, Evidence Gathering, Hearing

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



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## Investigation: Strategy is Key

- The investigation team, in consultation with the deputy coordinator, and/or the Title IX coordinator strategizes the entire investigation. This includes:
  - What Policy(s) elements may have been violated?
  - What are the undisputed facts? Which ones are significant to the investigation?
  - What are the facts in dispute? Which ones are significant to the investigation?
  - Who do you need to interview?
  - What should be the order of the interviews?
  - Timeline.



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## How Important is the Creation of an Investigation Report?

- The investigation report is the one comprehensive document summarizing the investigation, including:
  - Results of interviews with parties and witnesses.
  - Results of interviews with experts.
  - Summary of other information collected, (i.e., information from police reports including pretext calls, medical exams, video surveillance and photographs, copies of text, email and social networking messages, etc.).
- Provides conclusions and findings.



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## Credibility

- “To assess credibility is to assess the extent to which you can rely on a witness’s testimony to be accurate and helpful in your understanding of the case.”
  - Credible is not synonymous with truthful.
  - Memory errors do not necessarily destroy a witness’s credibility, nor does some evasion or misleading.
  - Refrain from focusing on irrelevant inaccuracies and inconsistencies.
- Pay attention to the following factors...



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## Factors to Consider for Credibility

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



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## Making Credibility Determinations

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



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## Rendering a Finding

- Review the institutional policies that apply.
- Parse the policy.
  - Specific findings for each violation and for each responding party.
- Review the evidence and what it shows (relevance).
- Assess credibility of evidence and witness statements as factual, opinion-based, or circumstantial.
- Make a determination whether a policy violation is more likely than not.
- Cite concretely the reasons for this conclusion.
- Move to sanctioning.



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## Investigation: Sanctioning

- Coordinator should ensure that sanctions:
  - Bring an end to the discriminatory conduct
  - Take steps reasonably calculated to prevent the future reoccurrence of the discriminatory conduct
  - Restore the victim as best you can to his/her pre-deprivation status.
- Real clash with the typically educational and developmental sanctions of student conduct processes
- Sanctions for serious sexual misconduct should not be developmental as their primary purpose. They are intended to protect the victim and the community



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## COORDINATOR TRAINING AGENDA

### Day 4

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



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

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



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## Coordinator of the Interaction of Multiple Student and Employee Grievance Processes

- Potential processes:
  - Generalized sexual harassment procedures.
  - General student grievance procedures.
  - Employee grievance procedures.
  - Faculty grievance procedures.
  - Student discipline process.
  - Employee discipline process.
  - Faculty discipline process.
  - Academic appeal process.
  - Athletics department policies/processes and “team rules.”
  - Collective bargaining agreements.



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## Coordinator of the Interaction of Multiple Student and Employee Grievance Processes

- The Title IX coordinator:
  - Has oversight of deputy coordinators/investigators, including the ability to appoint “lead” investigators.
    - Institutional equity/AA/EOP officer.
    - Coordinator of campus conduct.
    - Athletics.
  - Must be able to coordinate remedies and results (sanctions) in student-to-employee and employee-to-student grievances.



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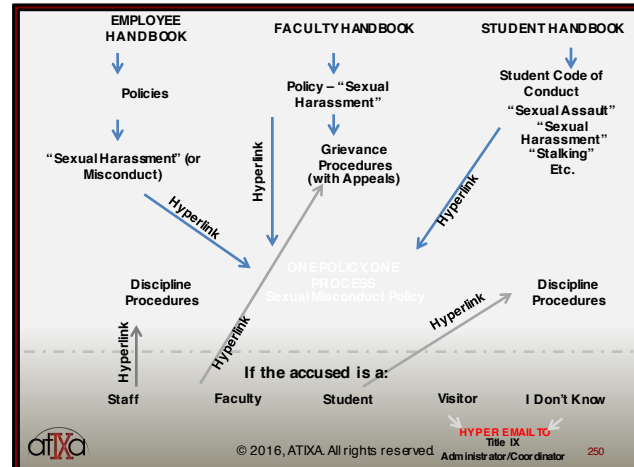
## Coordinator of the Interaction of Multiple Student and Employee Grievance Processes

- Supervisor of the interaction of Title IX and VII.
  - Must understand distinctions between Title IX and Title VII in responding and investigating.
  - Must be very familiar with all the processes.
  - Must have the ability to merge/combine/pick the investigatory and hearing processes and explain these to the parties.
    - E.g.: The difference between a student-employee and an employee-student.



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## Coordinator of the Interaction of Multiple Student and Employee Grievance Processes

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



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## One Policy-One Process

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



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## TITLE IX COMPLIANCE OVERSIGHT



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## Title IX Compliance Oversight

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



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## Title IX Compliance Oversight

- Compliance checklist.
  - Departmental self-study audit at regular intervals.
- Case/investigation debriefing.
- Active professional development on issues related to compliance; oversight of compliance plan implementation.
  - For Title IX coordinator and/or deputy coordinators.
- Climate surveys.
  - Online, in-person, focus groups, campus committee feedback etc.



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## ASSURANCE OF FIRST AMENDMENT PROTECTIONS



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## Assurance of First Amendment Protections

*“Congress shall make no law...abridging the freedom of speech...”*

- An important concern for all public institutions and any private campuses impacted by state law and constitutions (e.g., California and New Jersey).
- Impacts policy language regarding expression.
- Pay heed to vagueness & over breadth concerns.
- Avoid incorporating “intent” or “purpose” language.
- Incorporate appropriate standard for context.



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## Assurance of First Amendment Protections

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



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## PREVENTION AND REMEDIAL OF RETALIATION

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



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## Retaliation Basic Legal Principles

- The Title IX regulations prohibit recipients from engaging in any adverse action against a person because of that person's participation in a protected activity.
- Protected activity under Title IX:
  - Reporting sex discrimination, including sexual harassment and assault.
  - Filing a discrimination complaint.
  - Assisting someone in reporting discrimination or filing a complaint.
  - Participating in any manner in an investigation of discrimination, for example as a witness.
  - Protesting any form of sex discrimination (including, e.g., lack of equity in athletics).



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## Prevention and Remediation of Retaliation

- Retaliation is an increasingly common legal claim arising from charges of discrimination.
- The Title IX regulations prohibit colleges and universities from “intimidating, coercing or retaliating against” individuals because they engaged in activities protected by Title IX.



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## Prevention and Remediation of Retaliation

- Title IX coordinators should ensure that the institution effectively communicates a message about protection against retaliation and that reporting parties understand their rights.
  - Review existing discrimination policies to ensure that they contain a clear prohibition against retaliation and that resolution procedures are explicitly applicable to retaliation claims.
  - Ensure that training includes information about the prohibition on retaliation.



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## Prevention and Remediation of Retaliation

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



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## Prevention and Remediation of Retaliation

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



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## Retaliation Claim

### **Jackson v. Birmingham Bd. of Ed.**

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



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## Retaliation Claim

### **Jackson v. Birmingham Bd. of Ed.**

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



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## Investigating Retaliation Claims Keys To Understanding

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



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## Preliminary Elements of a Retaliation Claim

The following elements establish an *inference of retaliation*:

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



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## Investigating Retaliation Claims: Rebutting the Inference

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



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## Investigating Retaliation Claims: Is The Explanation Legitimate?

### *Factors to consider:*

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



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## Investigating Retaliation Claims: 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.



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## SECTION 504 DISABILITIES COMPLIANCE OVERSIGHT

- About Section 504
- Administrative Requirements



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## Section 504 Disabilities Compliance Oversight

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



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## Section 504 Administrative Requirements

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



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## OVERSIGHT OF ATHLETICS GENDER EQUITY

- Title IX Requirements
- Three-Prong Test



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## Oversight of Athletics Gender Equity

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



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## Oversight of Athletics Gender Equity

Effective Accommodation of Interests and Abilities: 1979 Test – 3  
Prongs:

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



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## ASSURANCE OF COMPLIANCE WITH REQUIREMENTS TO STOP, PREVENT, AND REMEDY

- Effective Remedies
- Common Remedies
- Preventing Recurrence



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## Assurance of Compliance with Requirements to Stop, Prevent, Remedy

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



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## Assurance of Compliance with Requirements to Stop, Prevent, Remedy

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



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## Common Remedies for Students

*\* Not an Exhaustive List*

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



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## Common Remedies for Employees

*\* Not an Exhaustive List*

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



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## Assurance of Compliance with Requirements to Stop, Prevent, Remedy

### ➤ Prevent recurrence:

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



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## ASSURANCE OF COMPLIANCE WITH FINAL SANCTIONS

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



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## Sanctioning in Sexual Misconduct Cases

- Title IX and case law requires:
  - Bringing an end to the discriminatory conduct.
  - Taking steps reasonably calculated to prevent the future reoccurrence of the discriminatory conduct.
  - Restoring the victim as best you can to his/her pre-deprivation status.
- Real clash with the typically educational and developmental sanctions of student conduct processes.
- Sanctions for serious sexual misconduct should not be developmental as their primary purpose. They are intended to protect the victim and the community.



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## Sanctioning Considerations

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



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## Sanctioning in Sexual Misconduct Cases

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



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## Sanctioning in Sexual Misconduct Cases

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



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## Common Student Sanctions

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



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## Common Employee Sanctions

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



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## Assurance of Compliance With Final Sanctions

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



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## What Sanctions?

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



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### What Sanctions?

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



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### What Sanctions?

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



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### What Sanctions?

- A severely intoxicated student who lives on the 6<sup>th</sup> floor, gets off the residence hall elevator on the 4<sup>th</sup> floor at the same time with a female student who lives on the floor. As the female student attempts to enter her room, the male student hugs and tackles her, holds her down, reaches up her skirt, moves aside her underwear, and rubs his fingers along her clitoris and penetrates her digitally. The female student is able to free herself and rushes into her room, locking the door. The panel finds him responsible.



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### What Sanctions?

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



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## APPEALS

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



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## Appeals: Key Elements

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



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## Appeals: Grounds for Appeal

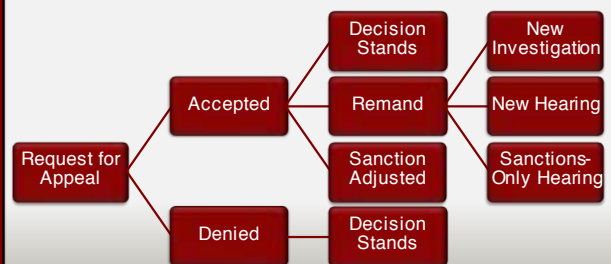
- A procedural error or omission occurred that significantly impacted the outcome of the hearing.
  - (e.g., substantiated bias, material deviation from established procedures, etc.).
- To consider new evidence, unknown or unavailable during the original hearing or investigation, that could substantially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



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## Appeals: The Process




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**Q&A AND WRAP-UP**



**QUESTIONS?**

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