

*The National Association of College and University Attorneys*

# Certificate of Completion

THIS ACKNOWLEDGES THAT

**Thomas Moorman**

HAS COMPLETED

**Title IX Coordinator Training - Online Course**

ON

**September 5, 2023**

 **NACUA**

*Janell Johnson*

JANELL JOHNSON, ASSISTANT DIRECTOR OF  
LEGAL RESOURCES, NACUA



**Title IX Coordinator  
Training Online Course:  
Fundamentals of the August 2020  
Regulatory Requirements**

**Module 2: Formal Complaints,  
Investigations & Grievance Procedures**

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LLP  
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**THE FORMAL  
COMPLAINT PROCESS**

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## The Formal Complaint

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

§106.30(a)



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## The Formal Complaint – Consolidation

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

§106.45(b)(4)



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## Written Notice of Allegations

Written notice of the allegations to the parties must include:

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

§106.45(b)(2)

## Written Notice of Allegations (cont.)

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

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

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

§106.45(b)(2)

## Mandatory Dismissal of a Formal Complaint



If the conduct alleged:

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

§106.45(b)(3)(i)



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## Discretionary Dismissal of a Formal Complaint

If:

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

§106.45(b)(3)(ii)



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## Upon Dismissal ...

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

## Advisors

- IHE must provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice.
- Advisor may be, *but is not required to be*, an attorney.
- IHE may not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding.
- IHE may establish advisor guidelines (*e.g.*, Rules of Decorum).
- NOTE: IHE must provide an advisor at no cost for purposes of cross-examination at the hearing, if the party does not have one.

§106.45(b)(5)(v)

## Informal Resolution

- Only an option *after* the formal complaint is filed.
- IHE **may** informally resolve allegations of Title IX sexual harassment at any time prior to reaching a determination regarding responsibility, provided that:
  - Allegations do not involve an employee engaging in sexual harassment of a student;
  - Informal resolution is facilitated by trained individuals with no conflict of interest; and
  - IHE obtains parties' voluntary, written consent to the informal resolution process.

§106.45(b)(9)

## Informal Resolution (cont.)

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

§106.45(b)(9)



## INVESTIGATIONS & GRIEVANCE PROCEDURES

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### Investigation

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

§106.45(b)(5)

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## Investigation (cont.)

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

§106.45(b)(5)

## Investigative Report

- Must fairly summarize relevant evidence.
- IHE must send the investigative report to the parties (and their advisors) at least 10 days before the hearing for their review and written response.

§106.45(b)(5)(vii)

## Live Hearing

- Decision-maker cannot be the Title IX Coordinator or the investigator.  
§106.45(b)(7)
- Either party may request that the parties be in separate rooms, but IHE must provide technology allowing the decision-maker and parties to simultaneously see and hear the party or the witness providing information.
- Must record or create a transcript.  
§106.45(b)(6)

## Cross-Examination / Advisors

Cross-examination must be conducted by each party's advisor – directly, orally and in real time.

- Allow all relevant questions and follow-up questions, including those challenging credibility.
- Cross-examination **cannot** be conducted by a party – if the party does not have an advisor, the IHE must provide one at no cost.

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

§106.45(b)(6)(i)

## Relevancy Determinations

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

§106.45(b)(6)(i)



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## Relevancy Determinations (cont.)

Preamble:

- It is enough for the decision-maker to say the question is not probative of any material fact.
- The decision-maker may not require questions in writing in advance of hearing.
- IHE may have rules precluding the parties (or advisors) from challenging relevancy decisions during the hearing.
- May only exclude questions based on relevance.
  - Not because they are unduly prejudicial, concern prior bad acts or seek character evidence.
  - Questions may be deemed not relevant when they are duplicative of other evidence already in the record.
  - But, the decision-maker must exclude (a) medical, etc. records if the party has not consented in writing; and (b) statements when the party/witness is not subject to cross.



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## Excluding Statements from Consideration

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

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

§106.45(b)(6)(i)



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## Hearing Decorum

May have rules that, *e.g.*:

- Require advisors be respectful and prohibit abusive/intimidating questioning.
- Limit or prohibit objections to relevancy determinations.
- Govern the timing and length of breaks to confer, and prohibit disruption.
- Require that *parties* make openings and closings, if any, and set time limits.



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## Standard of Evidence

May use preponderance of the evidence or clear and convincing standard, but must use the same standard for formal complaints of sexual harassment against students as for formal complaints against employees, including faculty.

§106.45(b)(1)(vii)

## Hearing Outcome / Written Determination

Written determination must include:

- Identification of allegations potentially constituting sexual harassment.
- Description of the procedural steps from the filing of the formal complaint through the determination.
- Findings of fact supporting the determination.
- Conclusions regarding the application of the policy to the facts.
- Statement of and rationale for the result as to each allegation.
- Sanctions and whether remedies will be provided.
- Appeal instructions.

§106.45(b)(7)

## Hearing Outcome / Written Determination (cont.)

The determination becomes final on the date the IHE provides the parties with the written determination of the appeal, if any, or the date on which an appeal would no longer be timely, if there is no appeal.

§106.45(b)(7)

## Appeals

Must allow for appeals based on:

- Procedural irregularities that affected the outcome.
- New evidence not reasonably available at the time of determination that could affect the outcome.
- Bias or conflict of interest of the Title IX Coordinator, investigator or decision-maker that affected the outcome.
- May include other grounds, equally available to both parties.

§106.45(b)(8)

## Recordkeeping

Records regarding the following must be maintained for 7 years:

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

§106.45(b)(10)

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If you desire legal advice for a particular situation, you should consult an attorney.



# **Title IX Coordinator Training Online Course**

## **Class Six: Athletics Equity and Applying the August 2020 Regulations**

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June 6, 2023

**PLEASE NOTE: Training Course Only. Does Not Constitute Legal Advice.**

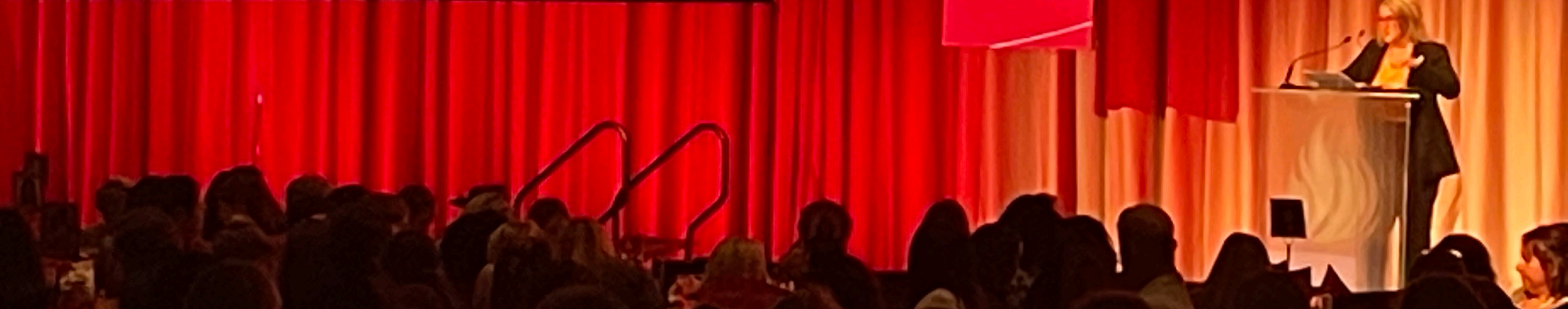
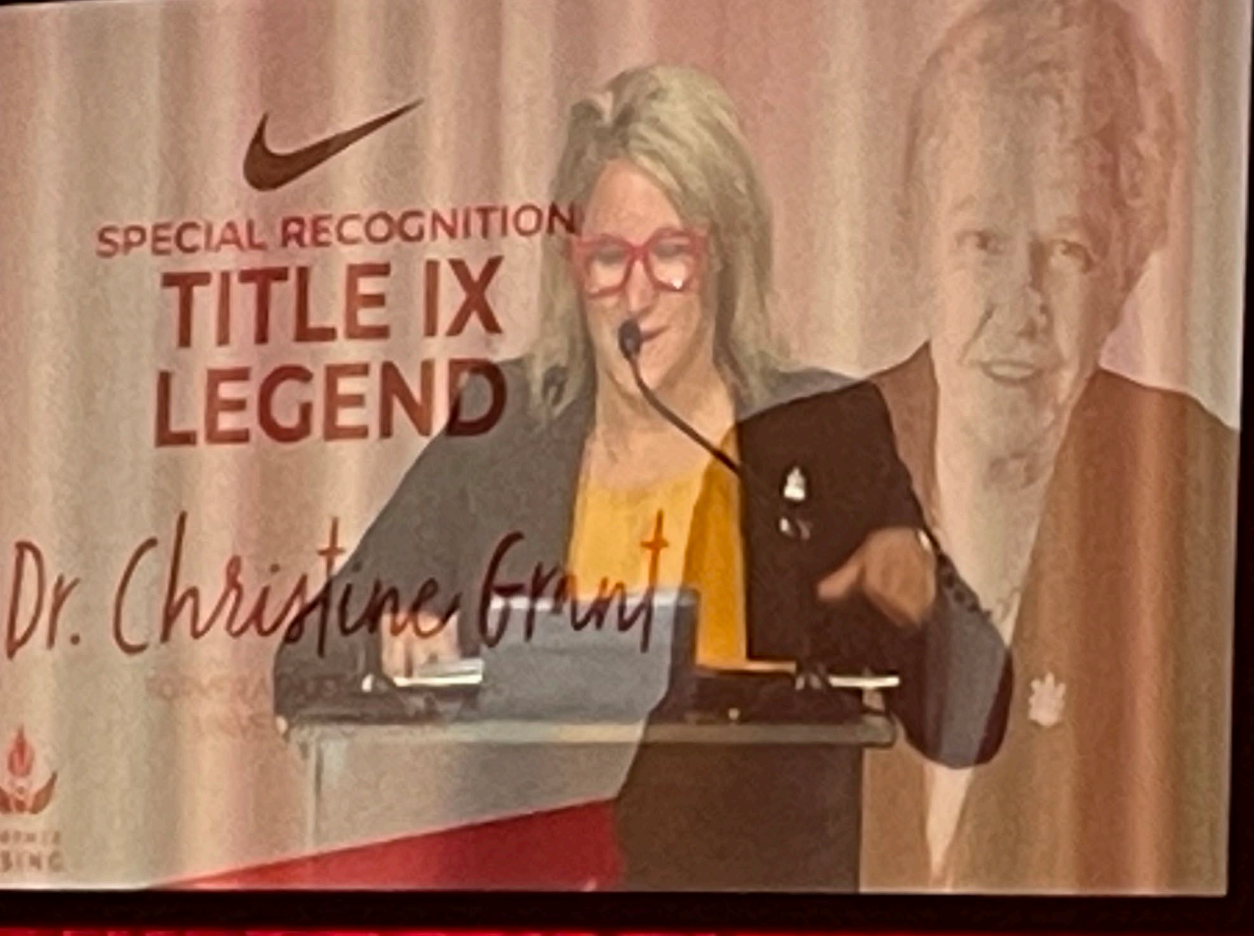




# Class Overview

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- Athletic Equity
- Pay Equity
- The Regs
- Trans Athlete Participation
- NCAA Board of Governor's Policy on Campus Sexual Violence



# Role of the NCAA

- Support the membership as established by the [NCAA Constitution](#) (2022)
- [Four membership DEI committees](#)
  - Committee to Promote Cultural Diversity and Equity
  - Committee on Women’s Athletics
  - Gender Equity Task Force
  - Minority Opportunities and Interests Committee
- [NCAA Inclusion Statement](#)
  - “The NCAA will provide or enable programming and education . . .”
  - [Annual Inclusion Forum](#): annually held in April
- Division I Legislated [DEI Review](#)—due Nov. 3, 2023.

# Overarching Principles:

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Intercollegiate athletics programs should utilize their platform to serve as leaders on campus through engagement in and collaboration on efforts to support campus-wide sexual and interpersonal violence prevention initiatives.

This includes involving student-athletes in prevention efforts in meaningful ways across the campus, including encouraging use of leadership roles on campus to support such efforts.



# The Updated Elements of the NCAA's Sexual Violence Policy and Attestation

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**The NCAA requires school's President/CEO, Director of Athletics, and TIX Coordinator to attest to the following annually:**

- All Student-Athletes and Athletics Staff have been trained around Title IX sexual misconduct annually.
- All incoming, continuing and transfer student-athletes have completed an annual disclosure related to their conduct that resulted in discipline through a Title IX proceeding or in a criminal conviction for sexual, interpersonal or other acts of violence.\*
- All transfer student-athletes have disclosed whether a Title IX proceeding was incomplete at the time of transfer.
- Institutions have taken reasonable steps to confirm whether incoming, continuing and transfer student-athletes have been disciplined through a Title IX proceeding or criminally convicted of sexual, interpersonal or other acts of violence.
- In a manner consistent with federal and state law, the school has shared relevant discipline information and incomplete Title IX proceedings as a result of transfer with other member institutions when a student-athlete attempts to enroll in a new college or university.
- The school has a written procedure that directs its staff to gather information that reasonably yields information from the former institution(s) to put the recruiting institutional leadership on notice that the student left the institution with an incomplete Title IX proceeding, was disciplined through a Title IX proceeding or has a criminal conviction for sexual, interpersonal or other acts of violence.

# NCAA Policy: Add'l Considerations

- **Covered Conduct:**
  - Discipline through a Title IX proceeding or a criminal conviction, regardless of the degree, and whether the result of a plea or court determination, of either of the following:
    - **Interpersonal Violence:** Violence that is predominantly caused due to the relationship between the victim and the perpetrator, including dating and domestic violence.
    - **Sexual Violence:** Both forcible and non forcible sex offenses, ranging from sexual battery to rape.
  - **Other Acts of Violence:** Murder, manslaughter, aggravated assault or any assault that employs the use of a deadly weapon or causes serious bodily injury.
- Schools that do not submit the required attestations will be prohibited from hosting any NCAA championship competitions for the next applicable academic year.
- International member schools and schools that do not receive federal funding, or are otherwise exempt from Title IX, must submit an annual attestation from the President, AD and Title IX coordinator or institutional staff member with comparable responsibilities.

# Attestation: Prez, AD, TIX

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- Requires annual attestations signed by the Director of Athletics, Title IX Coordinator, and President (CEO).
- BOG revisions to the Policy expanded its reach and attestation content, effective Fall 2023.
- [FAQ](#) was updated May 23, 2023
- How are schools approaching this?
  - Discussions with Title IX, General Counsel, and others on campus.
  - Explore compliance position.
  - Check state law.
  - Consider intersection with the 2020 Regs around Permissive Dismissals and Confidentiality.
  - What about the NPRM?



# The tools you need for Equity in Athletics analysis

## Get Data for One School

Search for a school to view general information and EADA statistical data for the most recent year.

## Compare Data for Multiple Schools

Select up to four schools to see a side-by-side comparison of data for the most recent year.

## Download Custom Data

Select the EADA statistical data you are interested in for one or more years and download data for a customized group of schools.

## Generate Trend Data

Select a subject area and a question that you are interested in, and then see the answer for a selected year, build a table, and see a graph that shows the trend over time. You can customize your results by various institutional characteristics such as athletic sanctioning body, public or private, and state.

## Download Data

Download the complete data file for all institutions from a single data collection. Files will include all data submitted by all institutions in the selected survey year.

# PART 1: ATHLETIC EQUITY: EADA v Title IX



# Athletic Equity Compliance: Three Separate and Independent Areas of Compliance



Participation



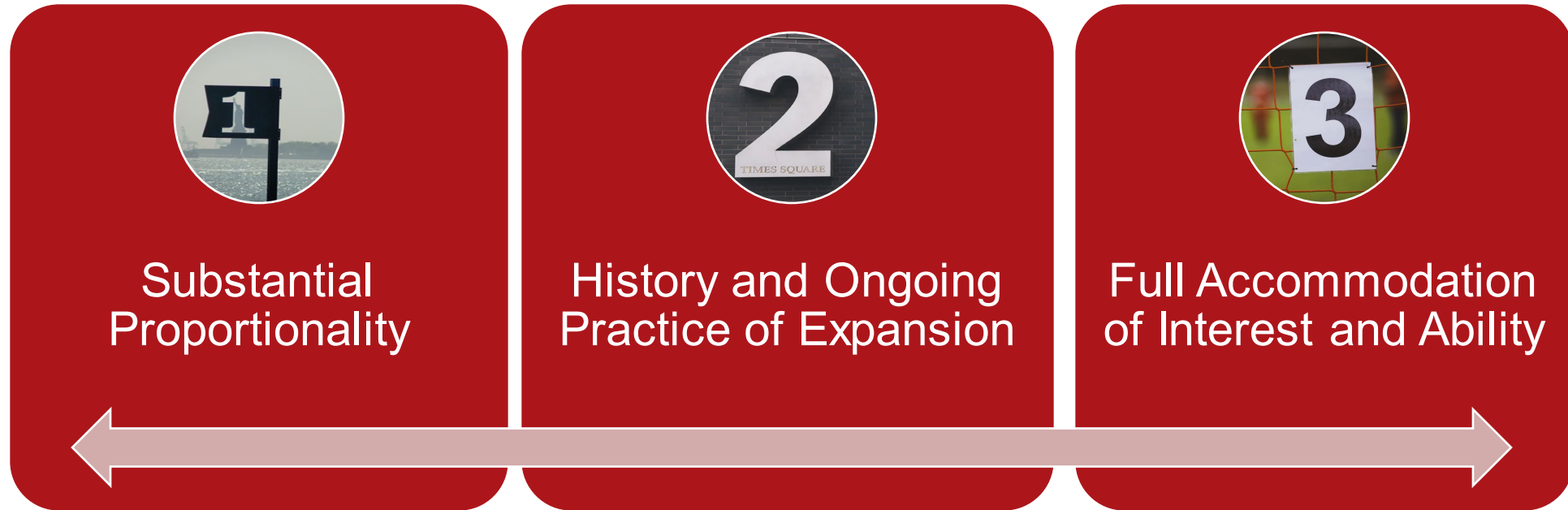
Financial Aid



Treatment



# Equitable Participation: The Three Part Test



## Prong 1.

Male and female intercollegiate participation is provided in numbers substantially proportionate to their respective full-time undergraduate enrollment, or

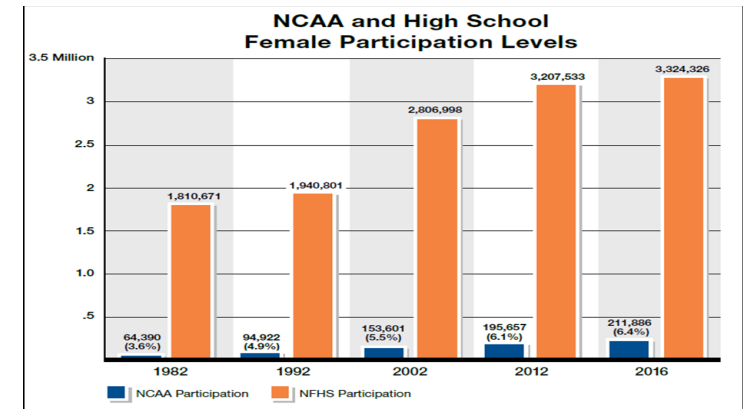
## Prong 2.

The institution has a history and continuing practice of program expansion responsive to the developing interests and abilities of the members of the underrepresented gender, or

## Prong 3.

The interests and abilities of the members of the underrepresented gender are fully and effectively accommodated by the present program.

# Sport Cuts that Involve the Underrepresented Sex: Typically Require Prong 1 Compliance Post Program Elimination



## ENFORCEMENT —

OCR: Investigation. Letter of Findings. 302 Resolution Agreement. Referral to DOJ.

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

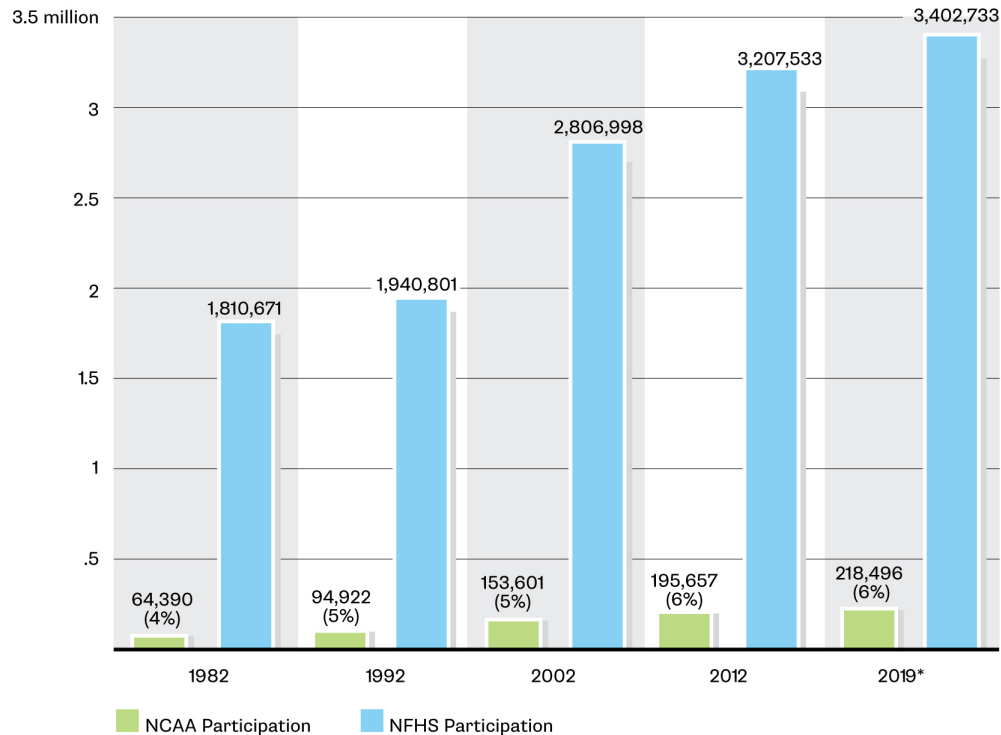
# OCR Substantial Proportionality

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- Amicus Brief (United States) in the Michigan State University (MSU) Case:
  - OCR “has not specified a magic number at which substantial proportionality is achieved.” *Equity In Athletics, Inc. v. Department of Educ.*, 639 F.3d 91, 110 (4th Cir. 2011), cert. denied 565 U.S. 1111 (2012); see also *Biediger*, 691 F.3d at 106 (explaining that the Second Circuit did not “understand the 1996 Clarification to create a statistical safe harbor at [2%] or any other percentage”).
  - What matters \*\*\* is whether the participation gap is large enough to sustain a *viable* team. As the 1996 Clarification explains, where “it is likely that a viable sport could be added,” an institution will not satisfy the first prong. (1996 Clarification).
  - Here, the district court failed to conduct the necessary fact-intensive inquiry to determine whether a participation gap of at least 15 athletes (if not more) could sustain a *viable* women’s team.
  - **If [the school] can field a viable team of eight female tennis players, for example, it will not have satisfied [the substantial proportionality standard].**

## Prong 3: Accommodating Interest & Abilities

NCAA and High School Participation Levels on Women's Teams



Do the current sport offerings for the underrepresented sex effectively accommodate their athletic interests and abilities?

All of the following must be present to require continued expansion:

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

How much interest/ability/competition is enough?


What is the relevant pool to be assessed?

## **Final Participation Question: Are there Equitable Levels of Competition?**

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

OR

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

A profile photograph of Chris Mosier, a man with short dark hair and a goatee, looking off to the right. He is wearing a green and blue patterned tank top. The background is blurred.

**I AM GOING TO PUT  
MYSELF OUT THERE  
TO BE WHO I  
NEEDED WHEN  
I WAS YOUNGER.**

CHRIS MOSIER

**TITLE IX / [TRANSATHLETE.COM](https://www.transathlete.com) / NCAA**

# NCAA Transgender Student-Athlete Participation

- **NCAA Summit on Gender Identity and Student-Athlete Participation (Oct. 2020)**
  - Improving inclusion and well-being of trans and gender nonconforming collegiate student-athletes: foundational concepts from the National Collegiate Athletic Association Summit on Gender Identity and Student-Athlete Participation | British Journal of Sports Medicine (bmj.com)
- **NCAA Policy Updated and Approved by Board of Governors in January 2022**



# 2022 Update to NCAA Policy

Alignment with Olympic Movement to balance fairness, inclusion and safety.

January 2022: NCAA Board of Governors (BOG) adopts policy as recommended by the Committee on Competitive Safeguards and Medical Aspects of Sport (CSMAS).

1. Trans student-athletes must continue to meet 2010 NCAA policy; and
2. Meet sport-specific policies that are reviewed and approved by CSMAS, in each case to be informed by national governing body policy (or international federation policy or 2015 IOC policy).

**PLEASE NOTE:** NCAA Policy to be implemented over three phases. Phase 2 in place through the 2023-2024 academic year.

# 2022 Update to NCAA Policy

CSMAS recommendation to Board of Governors

# 1

Meet 2010 policy.

Trans Men

Medical exception for testosterone.

Trans Women

Hormone suppression  $\geq$  1 year.

# 2

Meet sport-specific eligibility requirements **reviewed and approved** by CSMAS and informed by NGB policy (IF policy/2015 IOC policy).

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Includes testosterone thresholds and other elements.

# 3

Phased implementation.

1. 2022 W/S Championships

2. 2022-23 Academic Year

3. 2023-24 Academic Year

# *Delay Phase Three?*

- Phase Three considers all elements of sport-governing policies.
  - Administrative challenges.
  - Value alignment.
- Emerging info / policy trends / Title IX.
- Need for simplification?



BOG APPROVED

Extend Phase  
Two through  
2023-24  
academic year.



# Proposed Regulations

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- If a [school] adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity, such criteria must, for each sport, level of competition, and grade or education level:
  - be substantially related to the achievement of an important educational objective, and
  - minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.




# Next Steps

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- 250,000 comments sent to the government.
- Projected publication date now is 10/2023
- Summary:
  - No blanket bans, e.g., Alabama
  - Burden on school if excluding
  - Exclusions must be related to Education, Fairness, Safety
- NCAA Policy mentioned but not expressly adopted.
- Pragmatic Impact



# Athletics-Based Financial Aid/Scholarship Equity



1%

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

Dear Colleague Letter – [Bowling Green](#) (July 23, 1998)

TREATMENT AREAS	MEN	>/</=	WOMEN
Equipment and Supplies: Apparel and Sports-Specific Equipment			
Scheduling and Access to Facilities: Practice, Competition			
Travel: Mode, Housing, Food			
Academics: Personnel, Services, Tutors, Tutor Compensation			
Coaches: Quantity, Quality, Compensation*			
Facilities: Practice, Competition, Locker Room, Meeting Spaces			
Medical: Staff, Experience, Availability, Facilities			
Housing & Dining: Athletics-Specific On-Campus Support			
Publicity/Communications: Sports Information & Marketing			
Support Services: Administrative, Sport-Specific Staff, Office Space			
Recruiting: Financial & Other Support			



# Sources of Funding

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

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

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





# How Do Sport Budgets Factor In?

- Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance.
- The Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

An athletic program is gender equitable when the men's sports program would be pleased to accept for its own the overall participation, opportunities and resources currently allocated to the women's program and vice versa.



# Discrimination?

- Sex based differences in benefits or services that have a **negative impact** on athletes of one sex when compared with benefits or services available to athletes of the other sex.
- Disparity must be **so substantial** as to deny equal opportunity to athletes of one sex.
- Disparities are evaluated case-by-case.
- Non-discriminatory justifications

# Retaliation Prohibited

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- Retaliation is intentional discrimination on the basis of sex.
- Those who witness and raise concerns about discrimination are protected from adverse action they encounter because of the complaints.
- Recognition that coaches, teachers, administrators and students are in the best position to witness and alert schools

See, e.g., Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005)

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# Compensation & Pay Equity

- **Title IX Program Review Focus:**  
Coaches of women's sports as compared to coaches of men's sports, and usually only when coaching inequities are otherwise identified.
- **Title IX Employment/EPA Focus:**  
Female coaches' salaries compared to male coaches' salaries.
  - Equal Pay for Equal Work
  - Non-Discriminatory Justifications
- **OFCCP Audits/Title VII/State Law**
- **Documenting & Auditing Compensation Systems/Approaches**

# **The 2020 Title IX Regulations**

# Application (per the preamble):

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

See Title IX Regulations, 85 FR 30026 at <https://www.federalregister.gov/documents/2020/05/19/2020-10512/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>

## Notice:

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





# Athletics:

## Supportive Measures

- Cannot punish, discipline, or unreasonably burden the respondent without a finding of responsibility.
- Denials of supportive measures requests must be documented.



## Emergency Removals

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

## What are the Potential Roles of the Title IX Office Around Athletics?



- Oversight for Title IX
- Oversight for NCAA Policy
- Policy Oversight, Training, and Attestation
- Outside Title IX Speaker Review and Approval
- Evaluation of Equity and Sexual Misconduct Complaints
- Support and Emergency Removals
- EADA Report Review
- Equity Committee Membership

# Infusing Equity: Consider a Supplemental Policy

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## **Sample Language:**

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

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

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

## **No Retaliation Policy:**

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

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

**Questions?**



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# **Title IX Coordinator Training Online Course**

## **Class One: Definitions, Jurisdiction and Preliminary Matters**

### **Marjory Fisher**

Associate Vice President & Title IX Coordinator, Columbia University

### **Melinda Grier**

Melinda Grier Consulting

### **Janet P. Judge**

Education & Sports Law Group

**April 11, 2023**

Training Course Does Not Constitute Legal Advice

# Class Overview

- Title IX Updates
- Definitions
- Jurisdiction
- Formal Complaints
- Supportive Measures
- Dismissals
- Informal Resolution



**What's Next?**

**When?**



# Biden Administration Initial Steps

- April 6, 2021 – OCR letter to stakeholders announcing a comprehensive review of ED’s existing Title IX regulations, orders, guidance, policies, etc.
- May 20, 2021 – Notice of virtual public hearing June 7–11, 2021
- July 20, 2021 – Questions and Answers on the Title IX Regulations on Sexual Harassment, including policy examples
- August 24, 2021 – ED announces it will no longer enforce the requirement that “prohibits a decisionmaker from relying on statements that are not subject to cross examination.”

# What Comes Next from ED

- In December, 2021, The Department anticipated issuing the Title IX notice of proposed rulemaking by April 2022
- June 23, 2022, Title IX's 50th Anniversary, Department issued NPRM
- September, 2022, Notice and Comment period concluded
- 224,000 Comments posted, unclear how long it will take DOE to respond (Department will then have to summarize and respond to comments received and issue the resulting final regulations, which will include an effective date.)
- February 2023, OCR issues athletic resource guide, "Title IX and Athletic Opportunities in Colleges and Universities"
- April 6, 2023, OCR issues proposed rule related to eligibility standards for male and female teams.



# In the meantime,

- The existing rules control, and any college receiving federal funds must obey them.
- In addition, the NPRM is just that – proposed rulemaking.
- The administration must address all of the comments, recommendations, and concerns submitted.
- In so doing, the final regulations may be very different.



# What's In the Proposed New Rules?



April 6, 2023 “Colleges Could Keep Transgender Students Off Some Athletic Teams Under Title IX Proposal,” Chronicle of Higher Education

- **May 2020 regulations:**
  - Narrowed definition of "hostile environment sexual harassment"
  - Must respond only to severe, pervasive and objectively offensive behavior
  - Narrowed definition of "hostile environment sexual harassment" and
  - Required schools to focus their Title IX procedures on on-campus or program-related conduct that fit within that definition
- **Proposed regulations in NPR:** Restore the definition to that which was implemented by Obama Administration, which is more likely to require investigations of a broader category of unwelcome conduct of a sexual nature.
  - **April 6 2023 Proposed regulations:** Establish guidance for limiting participation on athletic teams.
    - Permits eligibility standards related to achieving an “important educational interest.”
    - Must “minimize harms” to students whose participation would be affected by their gender identity
    - Restrictions on eligibility would be permitted only after consideration of the circumstances of individual sport, level of competition and educational level.

# What's next? Procedural Changes...

- Possibility of “single investigator model” returns
- Allows for continuation of live hearings, but no longer required.
- Eliminates the requirement of cross-examination.
- Allows instead for the investigator to test credibility of parties or witnesses at “individual meetings.”
- Allows schools to provide access to evidence or investigative report, but no longer required to provide both.

Biden's Title IX reforms would roll back Trump-era rules, expand victim protections (Dustin Jones)

Updated June 23, 2022:40 PM ET



Education Secretary Miguel Cardona speaks at the White House on April 27. The Biden administration proposed a dramatic rewrite of campus sexual assault rules on Thursday, moving to expand protections for LGBTQ students, bolster the rights of victims and widen colleges' responsibilities in addressing sexual misconduct. *Susan Walsh/AP*

# Litigation Challenges

## EDUCATION

### Biden vows 'quick end' to DeVos' sexual misconduct rule

Biden disavowed Education Secretary Betsy DeVos' Title IX rule.



- **Three Challenges to Current Rule Unsuccessful**

- Know Your IX, et al. v. DeVos, filed May 14, 2020 in D. Md.
- New York v. U.S. Department of Education, filed June 4 in S.D.N.Y.
- Pennsylvania, et al. v. DeVos, filed June 4 in D.D.C.

- **One Challenge Altered Application of a Provision**

- Victim Rights Law Center, et al. v. DeVos, filed June 10 in D. Mass.
  - Court vacated the provision prohibiting use of testimony from persons who did not submit to cross-examination but upheld all other challenged provisions of the rule.
  - Dept. of Education announced it would not enforce the provision the Court vacated. August 2021

- **Challenge to DOE Guidance Upheld**

- State of Tenn., et al. v. U.S. Dep't of Educ., July 2022
  - Department of Education enjoined from enforcing the part of the Title IX Anniversary Letter that includes gender orientation and gender identity discrimination as sex discrimination against the 20 states that participated as plaintiffs in this lawsuit.

- **Challenge to State Ban on "Boys" Participation in Girls Sports**

- West Virginia v. By Jackson, April 6, 2023
  - U.S. Supreme Court let stand Appeals Court temporary injunction, against enforcing the ban.
  - As written, law defines "boys" based on "individual's form... at birth."

# Definitions

# Definition of Sexual Harassment

Sexual Harassment includes one or more of the following:

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

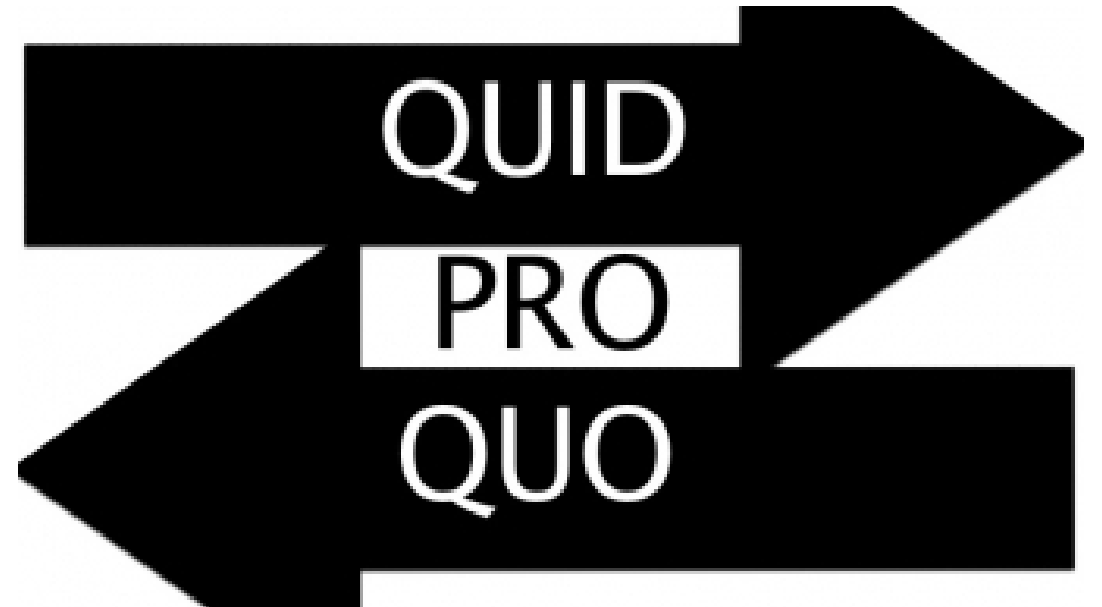
§106.30(a)





# Quid Pro Quo

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



# Hostile Environment

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



# Clery Definitions

- **Sexual Assault** – a forcible or non-forcible sex offense under the FBI UCRS (as defined by the Clery statute) including NIBRS
  - Forcible -- Any sexual act “directed against another person without the consent of the victim including if the victim is incapable of giving consent.”
  - Focus on proscribed actions rather than terms
- **Dating Violence** – violence by a person who is or has been in a romantic or intimate relationship (Clery statute)
- **Domestic Violence** – violence by a current or former spouse or intimate partner, co-parent, living partner, youth or other under state law
- **Stalking** – fear for safety or safety of others or suffer substantial emotional distress

# Complainant & Respondent

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



# Actual Knowledge

- Institution has actual notice of sexual harassment or allegations when reported to the:
  - Title IX Coordinator(s), OR
  - An Official With Authority to Take Corrective Actions (OWA)
- Not when reported to a respondent
- Not when reported to others, even if the school has decided that they may or must report
  - (But ... other causes of action may exist created by the existence of a policy or contractual provision requiring reports by certain non-OWA employees)



# **Jurisdiction**

# Education Program or Activity



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

# **Filing a Formal Compliant**



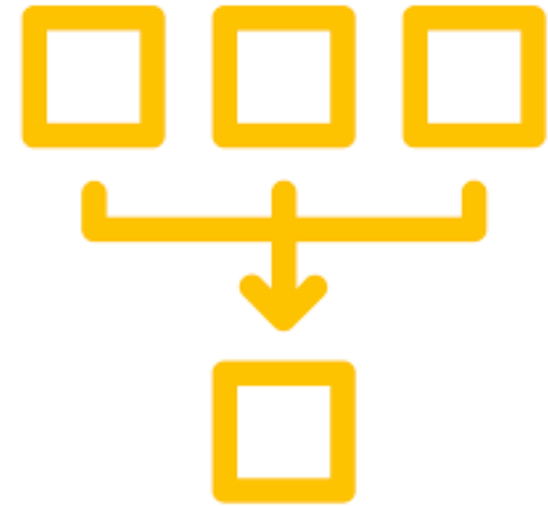
# Filing a Formal Complaint

- In person, by mail, email or approved method.
- Requests that the IHE investigate the allegations of sexual harassment.
- Filed by the Complainant participating in or attempting to participate in the IHE's education program or activity or signed by the Title IX Coordinator.
- Title IX Coordinator may file even if the Complainant is not associated in any way to protect other students.



# The Formal Complaint: More Than One Respondent

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



# Written Notice of Allegations

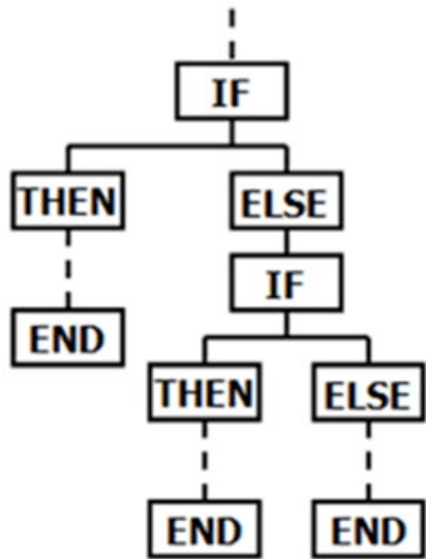
- Notice of the grievance process.
- Notice of the allegations, including sufficient details and time to prepare a response *before* the initial interview.
- Statement that the Respondent is presumed not responsible.
- Right to advisor of choice.
- Right to inspect and review evidence.
- Any prohibition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

Provide updated notice with any later discovered additional allegations.



**IMPORTANT  
NOTICE**

# Dismissals



# Mandatory/Discretionary Dismissals



## Mandatory if:

- Conduct alleged would not constitute sexual harassment even if proved;
- Conduct alleged did not occur in the IHE's education program or activity; or
- Conduct alleged did not occur in the U.S.



## Discretionary If:

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

# Dismissal Results





If a formal complaint is dismissed, school must:

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

# **Supportive Measures**

# Response to a Report

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





# Supportive Measures



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

# **Informal Resolution**

# Informal Resolution Requirements



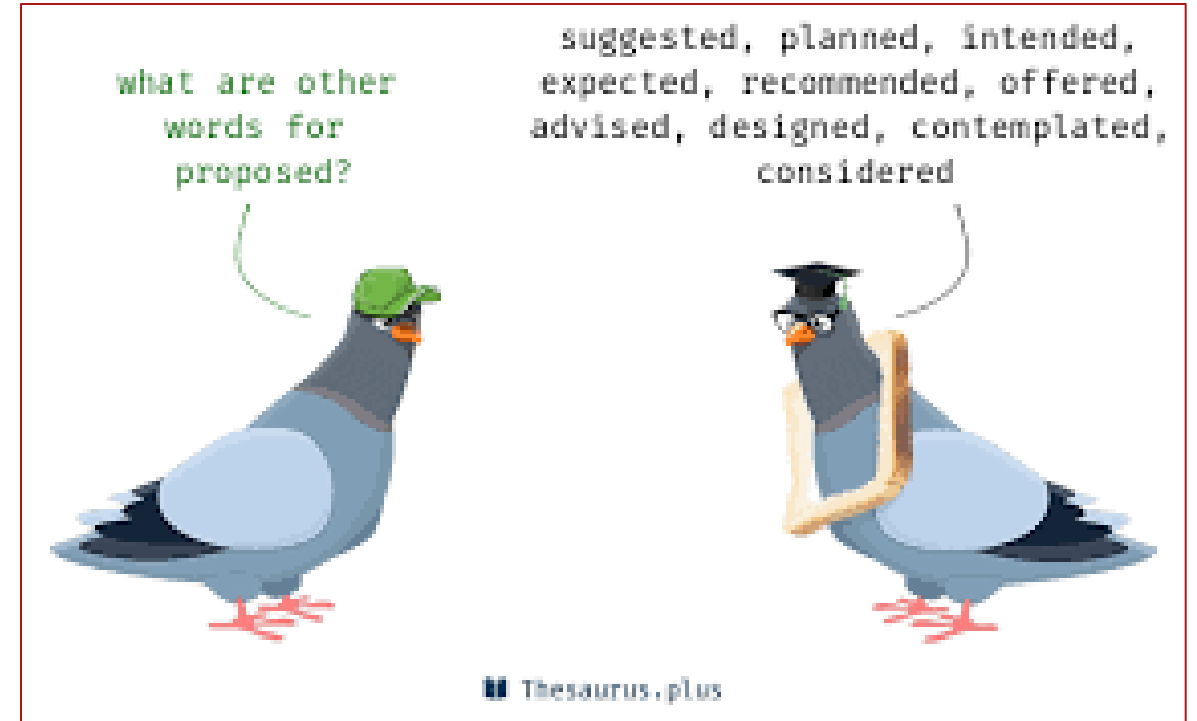
- At any point in the formal process
  - BUT only after a formal complaint is filed
  - May return to formal process if informal resolution does not resolve the matter
- May address all forms of sexual harassment:
  - *EXCEPT* – Allegations of employee against student harassment
  - *ONLY* – When the institution deems it appropriate
- Process must be facilitated by trained individuals with no conflict of interest or bias
- Written, voluntary consent by the parties, which requires ...

# Informal Resolution Process

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

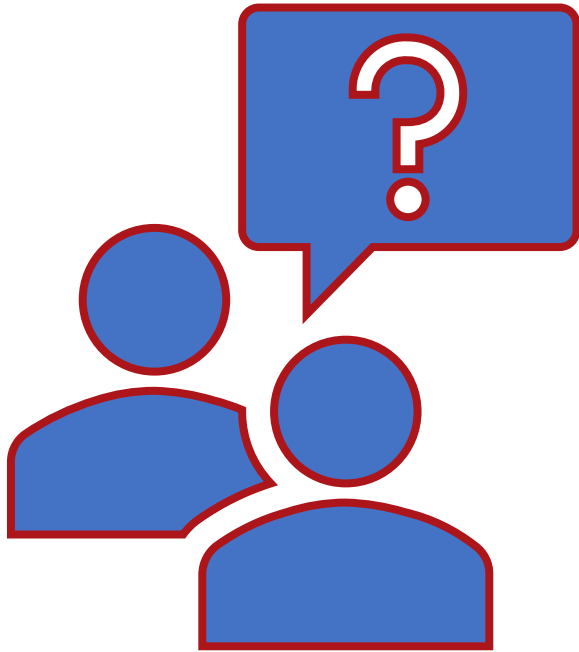


# What are some of the Proposed Changes?



# Proposed Changes

- Quid Pro Quo Harassment
    - Expanded definition
  - Hostile Environment
    - “Denies *or Limits*” access
  - Specific Offenses
    - Defines Clery Offenses
  - Complainant & Respondent
    - Applies in all sex discrimination
  - Respond to any sex discrimination
- Respond to sex discrimination in a program or activity
    - “Off campus” if disciplinary authority
    - Even if outside of US
  - Complaint
    - Any oral or written request to initiate the grievance process
  - Dismissal
    - Permissive in some circumstances
  - Supportive Measures
    - May burden R during pendency of process
    - Opportunity for C or R to request modification
    - Review by impartial party with authority to change
  - Informal Resolution
    - Available at any time with required notice



# Questions?

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**Title IX Coordinator Training  
Online Course: Fundamentals of  
the August 2020 Regulatory  
Requirements**

**Module 1: Jurisdiction and Other  
Threshold Topics**

Amy C. Foerster, Partner, Troutman Pepper Hamilton  
Sanders LLP  
Melinda Grier, Melinda Grier Consulting PC  
Janet P. Judge, Partner, Holland & Knight LLP

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**Course Overview**

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



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**Title IX Final Regulation**

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



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## PLAN & DOCUMENT YOUR EFFORTS

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

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**Jurisdiction: What,  
Who, Where, When,  
How?**

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**WHAT?**

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## DEFINITION OF SEXUAL HARASSMENT

§106.30(a): Sexual Harassment to include one or more of the following:

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

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## QUID PRO QUO

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

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## HOSTILE ENVIRONMENT

- Unwelcome sexual conduct
- “So severe, pervasive, *and* objectively offensive” (2020)
  - Pattern or practice or sustained and non-trivial (2001)
- “Effectively denies equal access”
  - Denies or limits a student’s ability to participate in or benefit from (2001)
  - Interferes with or limits a student’s ability to participate or benefit from (2011)
- “Determined by a reasonable person”
  - “[S]tanding in the shoes of the complainant.” (Preamble, p. 514)

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## CLERY DEFINITIONS

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

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## COMPARE TO

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

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## WHO?

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## IN ADDITION TO STUDENTS...APPLIES TO EMPLOYEES

### §106.51 Employment

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

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## WHAT'S NEW THEN...

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

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## OTHER CHANGES

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

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## TITLE VII – SEXUAL HARASSMENT DEFINITION

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

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## WHEN...

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

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## EMPLOYEE-EMPLOYEE HARASSMENT

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

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## SUPERVISOR LIABILITY

- Tangible Employment Action
  - Strict liability
- No tangible employment action
  - Employer takes reasonable care to prevent and correct promptly
  - and*
  - Employee unreasonably failed to use employer's preventive or corrective options

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## INSTITUTIONAL REQUIREMENTS

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



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## OTHER LEGAL REQUIREMENTS

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

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## OTHER ISSUES

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

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## WHERE?

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## JURISDICTION

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

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## BUT DON'T FORGET...

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

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## EDUCATION PROGRAM OR ACTIVITY

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

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## WHEN?

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## ACTUAL KNOWLEDGE

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

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## OFFICIAL WITH AUTHORITY

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

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## IMPLEMENTATION ISSUES

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

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## RETALIATION §106.71(a)

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

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## CONFIDENTIALITY

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

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## RETALIATION AGAINST EMPLOYEES

- Future employment decisions
- Employment references
- Licensing Boards

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**HOW?**

**NACUA**

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**THE INITIAL REPORT**

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



**NACUA**  
National Association of College and University Attorneys

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**MAKING REPORTS**

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



**NACUA**  
National Association of College and University Attorneys

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## INSTITUTION RESPONSE

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

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## SUPPORTIVE MEASURES §106.30(a)

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

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## EMERGENCY REMOVALS §106.44(c)

May remove respondent from *education program or activity* if:

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

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## BUT...



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

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## EMERGENCY REMOVALS

### Other Points to Consider:

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

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# **Title IX Coordinator Training Online Course**

## **Class Three: The Grievance Process – Hearings & Appeals**

**Marjory Fisher**

Associate Vice President & Title IX Coordinator, Columbia  
University

**Melinda Grier**

Melinda Grier Consulting

**Janet P. Judge**

Education & Sports Law Group

April 25, 2023

PLEASE NOTE: Training Course Only. Does Not Constitute Legal Advice.

# Class Overview



- Due Process / Fundamental Fairness
- Credibility Determinations
- Advisors
- The Written Determination
- Appeals



# **Due Process (Fundamental Fairness)**

# The Process That Is Due

## A Fair Process:

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

# Title IX Sexual Harassment Grievance Process: Elements of “Due Process”



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

# State the Standard of Evidence



Same standard of evidence for all.

**Either:**

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

**And Not:**

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

# **Relevance & Credibility Determinations**



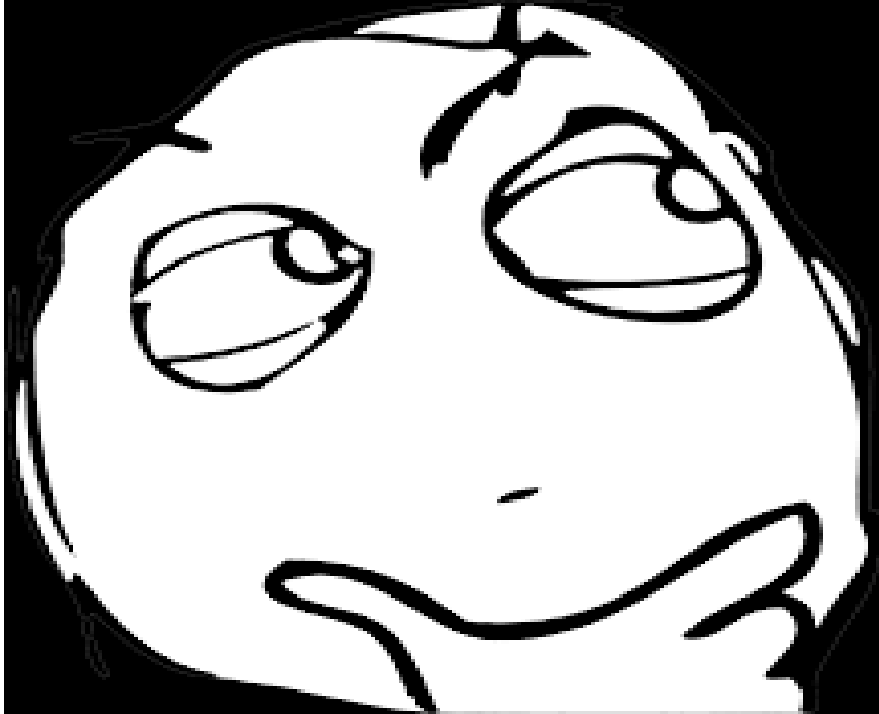
# In Hearings:

- Decision-maker must evaluate only “relevant” evidence during the hearing and when reaching the determination regarding responsibility – and must do so “objectively”
- The decision-maker must determine the relevance of each cross-examination question before a party or witness must answer.
- Make It Easy: “Not probative of any material fact.”

## Weight, Credibility, or Persuasiveness

- There is a difference between the admission of relevant evidence, and the weight, credibility, or persuasiveness of evidence.
- A school can adopt rules around weighing of evidence so long as they do not conflict with the regulations and they apply equally to both parties.
  - For example: A school may adopt a rule regarding the weight or credibility (but not the admissibility) that a decision-maker should assign to evidence of a party's prior bad acts, so long as its rule applies equally to the prior bad acts of complainants and the prior bad acts of respondents.

# Credibility Considerations



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



# Factors to Weigh

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

# Caution



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

# **The Decision- Maker (Hearing Officer)**

# Getting Ready

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

# Hearing Decorum

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

# **Advisors**

# Advisors



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

# More on the Advisor's Role



**KEEP  
CALM  
&  
FOLLOW  
THE RULES**

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



# **Working with the Parties' Attorneys**

# Advisor or Legal Representative

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



# **Written Determination**

# Written Determination

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

# **Appeals**

# Appeals

Must provide an appeal from a determination of responsibility and dismissal of a formal complaint, based on:

- Procedural irregularities that affected the outcome.
- New evidence not reasonably available at the time of determination that could affect the outcome.
- Bias or conflict of interest of the Title IX Coordinator, investigator or decision-maker that affected the outcome.
- Inappropriate or impermissible dismissal of any formal complaint or allegation.
- May include other grounds, equally available to both parties.

# Appeal Process



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

# **NPRM:**

**REMEMBER: NOT IN PLAY NOW**





# Proposed Changes



- Notice of allegations may be delayed in response to legitimate safety concerns
- Live hearing permitted, not required, for hearings involving students
  - In a live hearing, parties must be permitted to participate from separate locations
  - Must provide both parties a reasonable opportunity to review and respond to evidence before the live hearing. It may provide the same opportunity during the live hearing
  - In live hearings, allow each party's advisor, never the party, to ask all relevant and otherwise permissible questions
- Provide a process that allows decision-maker to assess the credibility of the parties and witnesses to the extent credibility is relevant and in dispute
  - Decision-maker may not rely on statements of a party if the party does not respond to questions related to the party's credibility, but also may not draw an inference about whether sex-based harassment occurred based on that refusal
- Relevance is defined (!!!)
- Take reasonable steps to address unauthorized disclosure of evidence and information
- Decision-maker must determine if each question is permissible prior to the question being posed and explain the decision to exclude any question
- Use a preponderance of the evidence as the standard of proof unless the school uses a clear and convincing standard of proof for in comparable proceedings, e.g. considering other complaints of prohibited discrimination.
- No imposition of sanctions for false statements based solely on whether sexual harassment occurred
- Requirement to describe range of supportive measures and potential disciplinary sanctions applies only in response to sex-based harassment
- Title IX Coordinator is responsible for implementing remedies on a finding that sex discrimination occurred

**Questions?**

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# **Title IX Coordinator Training Online Course**

## **Class Four: Anatomy of an OCR Investigation**

### **Phil Catanzano**

Partner, Education & Sports Law Group LLC

### **Marjory Fisher**

Associate Vice President & Title IX Coordinator, Columbia University

### **Melinda Grier**

Melinda Grier Consulting

### **Janet Judge**

Partner, Education & Sports Law Group LLC

PLEASE NOTE: Training Course Only. Does Not Constitute Legal Advice.

# Class Overview



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

# Why is this Important to You?

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

# What Complaints Does OCR Handle?

- OCR enforces several laws, including:
  - Title VI
  - Title IX
  - Section 504 of the Rehabilitation Act and Title II of the ADA
  - Age Discrimination Act
- DOJ, HUD, and EEOC may also conduct investigations that overlap into these areas, *e.g.*, DOJ reviews disability issues under Title III of the ADA, sexual misconduct issues under VAWA; HUD may take service animal/emotional support animal cases in housing
- OCR may refer complaints to DOJ for enforcement and DOJ occasionally transfers cases to OCR for investigation

# Demystifying the OCR Process

- The main phases of an OCR complaint investigation:\*
  - Notification to the Institution
  - Early Resolution Options
  - Data Requests
  - Investigation
  - Negotiation and Monitoring of Resolution Agreements (if necessary)

**\*Note that OCR can also conduct broad, agency-instituted compliance reviews, but they typically follow these same phases**



# OCR Investigations: Resources

- OCR Complaint Processing Manual (July 2022)
- Dear Colleague Letters and Enforcement Guidance by Statute
- Prior OCR/DOJ Resolution Letters by Statute
  - Understand that OCR does not publish all letters
- Case law can be helpful, but OCR does not always recognize court precedent unless it is directly on point and typically only federal cases (but see state cases in CA that require certain process)

# Phase I: Evaluating the Complaint

OCR evaluates the complaint to determine whether it can investigate:

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

# Phase I: Evaluating the Complaint

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

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

# Phase I: Strategies

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

# Phase II: Notification of Investigation

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

# Phase II: Notification of Investigation

- Notification letters are not typically detail heavy
- OCR will typically provide Case Processing Manual link and the complaint, but some offices only provide the complaint upon request and/or with heavy redactions
- **Make FOIA request**
  - Simple to do and usually costs nothing; cost only if it is overly large
  - OCR is required to respond; but may deny the request until the investigation is concluded
  - Complaint should be made available per OCR policy, but may request additional information, *e.g.*, documents submitted by complainant or prior complaints against the institution

# Phase II: Strategies

- Review regulatory provisions cited by OCR for insight into what OCR will investigate, *e.g.*, facts may cloud the fact that OCR is only focused on the publication of a policy or whether a certain notice is provided.
- OCR will remind the institution that it may not retaliate against any complainant or any person who participates in OCR investigation; make sure that is understood by relevant community members who may interact with the complainant.

# Early Resolution Options

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



# Voluntary Resolution

- Institutions may seek to affirmatively resolve complaint before conclusion of the investigation by initiating negotiations for a Resolution Agreement (a/k/a “302 Agreement,” because it’s defined under CPM Section 302)
- Appropriate when the institution agrees to forego the investigation and enter a compliance agreement on some or all issues
- OCR reserves the right to include any fact learned to date in the Resolution Letter, which may create a strategic advantage in requesting a Voluntary Resolution early if you know that is where it may be headed
- Typically, 30 days to negotiate any resolution; OCR “may” pause the investigation during this period, negotiations may continue – OCR retains significant discretion

# Phase III: Data Request

- OCR will include a Data Request with Notification letter:
  - Requests documents, policies, practices, data and explanations
  - Offers opportunity for the institution to provide additional information at its discretion
  - OCR is exempt from FERPA, but there are FOIA issues to consider
- Must respond within date on letter, usually 10-30 days
  - Brief extensions may be granted on request; not limitless
  - Keep in mind OCR has an internal clock for case processing and that clock runs from date OCR receives complaint; seek to understand pressure points and consider rolling production

# Phase III: Strategies

- Maintain updated and comprehensive records of trainings
- Maintain accessibility and consistency of policies
- Begin gathering information *promptly* upon receipt of Notification Letter; clearly communicate delays with OCR staff
- PROVIDE A NARRATIVE: This is an opportunity to educate OCR staff; can also propose relevant witnesses
- OCR does not have authority to compel production in a specific form or require the creation of materials; obligation can be satisfied by permitting OCR to come onsite and permit access

# Phase IV: Onsite Visit

## Types of Activities:

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

# Phase IV: Strategies

- Be involved: The process can take clumps of days over an extended period of time. Be judicious in choosing battles
- Identify/suggest relevant witnesses to OCR
- Prepare witnesses
  - Demystify OCR staff by explaining types of questions and reasons OCR may be interested in certain policies/issues
  - Provide witnesses with relevant policies/procedures
  - Evidentiary rules don't apply; explain this to witnesses
  - Listen carefully to questions, but do not be untruthful
  - Share OCR "Rights of Witnesses" document

# Phase IV: Strategies

- Determine appropriate role of counsel:
  - Will counsel sit in on interviews? Will counsel be able to ask limited questions? DO NOT assume that an OCR interview will be akin to a deposition or a trial proceeding
  - Certain lower level employees may have right to refuse to have anyone present during interview and to refuse to reveal interview content
- This is an opportunity to:
  - Demonstrate ongoing compliance efforts to OCR
  - Supplement data response as new information becomes apparent
  - Develop a relationship with OCR staff who will be critical in remaining phases of the case

# Phase V: Compliance Determination

If OCR determines the institution is out of compliance with a legal requirement, it will issue a Resolution Letter and a Resolution Agreement:

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

# Phase V: Compliance Determination

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



# Resolution Examples

Typical requirements in resolution agreements:

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

# Phase V: Strategies

Seek details on findings to understand how to narrow agreement terms to findings:

- Discuss proposed terms and how they align with legal/factual concerns
- Review and be prepared to discuss OCR recent resolution letters addressing the same statute and similar facts

Focus on flexibility for the institution

- What is a realistic time period for compliance?
- Have a candid conversation to try to determine OCR's internal flexibility (or inflexibility – often not driven by regional office) on certain issues, *e.g.*, timing

# In Summary ...

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

**Questions?**

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# **Title IX Coordinator Training Online Course**

## **Class Two: Conducting a Title IX Investigation**

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### **Janet P. Judge**

Education & Sports Law Group

April 18, 2023

# Class Overview:



- Case Study – Review of Class I Concepts
- Investigations
  - Impartiality/Conflicts of Interest
  - Investigations Involving Employees
  - Investigating a Formal Complaint
- Understanding Relevance
- Investigative Report
- Violations of Other Policies
- NPRM Changes

# Case Study

Part I: Reviewing Class 1 Concepts.



Anna Smith,  
the Title IX Coordinator  
at NACUA University,  
woke to the following  
email in her inbox.

To: [TitleIX@nacua.edu](mailto:TitleIX@nacua.edu)  
From: Prof. Jones, Dean, College of Arts & Sciences  
Date: Wednesday, October 21, 2022

This morning, a student named Jordan Jones told me that they were sexually assaulted over the weekend and couldn't finish a paper in time. I spoke with Jordan at length about what happened and Jordan gave me permission to share this information with you. This isn't the first time I've learned of something like this. I need to know what I'm supposed to do. Heads up – the perp is in another class of mine.



## Initial Outreach to Jordan Jones

Ms. Smith receives the following email that same day:

Is this a formal complaint, triggering an investigation under your school's Title IX policy?

To: [TitleIX@nacua.edu](mailto:TitleIX@nacua.edu)  
From: Jordan Jones  
Date: October 21, 2022

Thank you for reaching out. On the way home from a party downtown Saturday night, I went with Riley Krill to his room at the ABC Fraternity house. That's where Riley raped me. At this point, I really just want Riley to have to meet with you and me, so that we can both tell him what Riley did was wrong. If Riley apologizes, I don't want to take this any further. I can meet tomorrow, at the time you suggested.

Jordan meets with Ms. Smith and decides to file a formal complaint.

Before calling Riley in for an interview, Ms. Smith needs to send a Notice of Allegations to Riley and Jordan. This is what it contains:

Is anything missing?

# NOTICE

- Access to the Title IX-compliant policy.
- Notice of the allegations that may constitute the prohibited conduct, with sufficient detail for Riley to prepare a response before any initial interview.
- Notice of the Parties' entitlement to an Advisor of choice.
- The identity of the Investigator – Jean McDonald.
- Notice that the Parties may inspect and review evidence gathered during the investigation.
- Notice that the University's policies prohibit knowingly making false statements or knowingly submitting false information.

The day after she issues the notice of allegations, Ms. Smith receives the following email:

What should Ms. Smith do?

To: TitleIX@nacua.edu  
From: Amanda Law  
Date: October 24, 2022

I represent the Krill family. I have learned that Riley Krill is being falsely accused of rape, and I am writing to have the unfounded charges dismissed immediately. Riley's parents and I will not permit Riley's education to be disrupted by a vindictive college student with an ulterior motive. Jordan Jones is bitter because Riley didn't reciprocate Jordan's feelings after they had a fully consensual sexual encounter. If the University insists on pursuing this matter, the Krills will take all legal measures available to them.

# Investigations

# Impartiality, Bias, Prejudgment & Conflict of Interest



# **Investigations Involving Employees**



# The Basics:

- The regulations also apply to employee complainants and respondents in matters involving allegations of Title IX sexual harassment.
- Investigations of formal complaints of conduct potentially constituting Title IX sexual harassment involving employees must comply with the regulations.
- Institutions must use the same procedures and standard of proof to address employee and student allegations of Title IX sexual harassment.

# However:

- Title VII also applies.
- The Title VII and Title IX requirements are not completely aligned. For instance, Title VII may provide for broader remedies than Title IX.
- Collective bargaining and other contractual obligations may also apply.
- OCR expects institutions to comply with *all* requirements.

# Title VII



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

# Special Considerations

- Administrative leave
- Title IX
  - “Reasonably prompt timelines,” and
  - Supportive measures must be non-punitive and non-disciplinary until the process is complete
  - Administrative leave for non-student employees as well as emergency removal.
- Title VII
  - “Immediate and appropriate corrective action”



# **Investigating a Formal Complaint**

# Conducting an Investigation



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

# Interviews



Consider whether interviews will be:

- Recorded or not recorded.
- Followed with written statements or summaries.

What does your policy say?

When interviewing, the investigator must:

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

# **Evidence: Directly Related vs. Relevant**



# Investigation vs. Hearings:

- **Investigations:** Directly Related to the Allegations
- **Investigation Report:** Relevant Evidence
- **Hearings:** Relevant Evidence
- “The Department acknowledges that the evidence gathered during an investigation may be broader than what is ultimately deemed relevant and relied upon in making a determination regarding responsibility, but the procedures in § 106.45 are deliberately selected to ensure that all evidence directly related to the allegations is reviewed and inspected by the parties, that the investigative report summarizes only relevant evidence, and that the determination regarding responsibility relies on relevant evidence.”

# **Understanding Relevance**

# How is Relevance Defined?



- The Department declines to define certain terms in this provision such as “upon request,” “relevant,” or “evidence directly related to the allegations,” as these terms should be interpreted using their plain and ordinary meaning.
- The Regs do not adopt the Federal Rules of Evidence.

September 4, 2020 Guidance from OCR

# So What Is the Ordinary Meaning of the term?

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

FED. R. EVID. (401), Legal Information Institute, Cornell Law School,  
[https://www.law.cornell.edu/rules/fre/rule\\_401](https://www.law.cornell.edu/rules/fre/rule_401)

**BUT YOU JUST SAID ...**



# Should All Relevant Evidence Be Considered?

- Schools are not permitted to adopt rules that would exclude relevant evidence, e.g., that may be deemed to be unduly prejudicial, concern prior bad acts, or constitute character evidence.
- A school may not exclude relevant evidence (e.g., lie detector test results, or rape kits) unless the evidence is identified as “NOT RELEVANT” under the Regulations.

# What Evidence is “NOT RELEVANT” Under the Regulations?

- A party’s treatment records, without the party’s prior written consent [§106.45(b)(5)(i)];
- Information protected by a legally recognized privilege [§ 106.45(b)(1)(x)];
- Questions or evidence about a complainant’s sexual predisposition, and questions or evidence about a complainant’s prior sexual behavior unless offered to prove
  - that someone other than the respondent committed the conduct alleged by the complainant, or
  - if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent. [§ 106.45(b)(6)(i)-(ii)];

# AND (as we will address with hearings)...

- Although the regulations provide that a decision-maker may not rely on the statements of a party or witness who does not submit to cross-examination [§ 106.45(b)(6)(i)], this provision is **not enforced by OCR but may apply under state law or law in some federal circuits.**
- A school's investigators and decision-makers must be trained specifically with respect to "issues of relevance" and any relevance rules adopted by the school should be detailed in its Title IX training materials.





# **Weighing of Relevant Evidence**

## Weight, Credibility, or Persuasiveness

- There is a difference between the admission of relevant evidence, and the weight, credibility, or persuasiveness of evidence.
- A school may adopt rules around weighing of evidence so long as they do not conflict with the regulations and they apply equally to both parties.
  - For example: A school may adopt a rule regarding the weight or credibility (but not the admissibility) that a decision-maker should assign to evidence of a party's prior bad acts, so long as its rule applies equally to the prior bad acts of complainants and the prior bad acts of respondents.

# **Completing the Investigative Report**

# Review of Evidence

10

- Parties must have equal opportunity to inspect and review *all* evidence directly related to the allegations.
- Schools must:
  - Provide access to evidence to both parties and their advisors.
  - Allow the parties at least 10 days prior to inspect, review and respond to the evidence prior to completion of the investigative report.
  - Consider parties' written response before completing report.

# Evidence Review - What do parties get to see?

- **Any evidence that is *directly related* to the allegations raised in the Title IX formal complaint.**
- This includes evidence that is:
  - (1) relevant,  
*and/or*
  - (2) directly related.
- Only relevant evidence is included in the Investigative Report.

# Investigative Report



- Must fairly summarize the relevant evidence.
- Must provide the report to parties and their advisors for review and response at least 10 days before hearing.
- Either electronic or hard copy

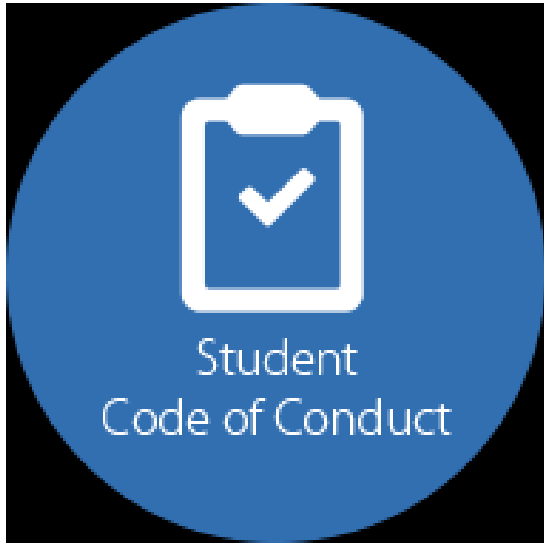
# Recommendations Regarding Responsibility

- Investigative Reports MAY include a recommendation regarding responsibility and related analysis.
- **However:** “The decision-maker is under an independent obligation to objectively evaluate relevant evidence, and thus cannot simply defer to recommendations made by the investigator in the investigative report.” [Preamble, Fed. Reg. Vol. 85, No. 97, May 19, 2020, p. 30308]
- Decision-makers must make independent decisions based on:
  - Investigative report and related evidence, and
  - Information presented at hearing, including information resulting from cross-examination.

# **Violations of Other Policies**



# Violations of Other Policies



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

*Remember to update notice with later-discovered allegations.*

# **NPRM:**

**REMEMBER: NOT IN PLAY NOW**



# Proposed Changes

## 7/22 and 4/23



- Handling complaints
  - All allegations of sex discrimination, including sexual harassment, must be handled using procedures required by the regulation.
  - The single investigator model is permitted with provisions prohibiting bias or conflicts of interest in addressing all complaints of sex discrimination.
- Title IX Coordinator
  - May investigate and/or decide Title IX grievances.
  - Must monitor for barriers to reporting and take steps to address
- **NEW** - Eligibility Criteria for Male and Female Athletic Teams
  - Sets limits on the criteria that that would limit or deny a student's eligibility to participate on a male or female athletic team consistent with their gender identity.
- Investigations
  - Burden is on the institution to gather evidence
- Relevance is defined (!!!)
- Institutions must provide parties a description of the relevant evidence
- Requirements that apply only to sexual harassment complaints involving students at post-secondary institutions
- Require all, except confidential, employees to notify the Title IX Coordinator of possible sex discrimination
- Clarify obligations to students and employees who are pregnant or experiencing pregnancy-related conditions

**Questions?**

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# **Title IX Coordinator Training Online Course**

## **Class Five: Title IX Training & Policies**

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PLEASE NOTE: Training Course Only. Does Not Constitute Legal Advice.

# Class Overview



- Audiences To Be Trained
- Elements of a Good Training Program
- Benefits and Perils of Trauma-Informed Training
- Auditing Training Materials
- Developing and Revisiting Policies
- Records Retention and Posting

# Who Do You Train?



# The Regulations (Title IX Personnel)

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



# Consider Training Others, even though not Required by the Regulations

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

# And Athletics!



- NCAA Board of Governor's Policy:  
[https://ncaaorg.s3.amazonaws.com/ssi/violence/NCAA\\_CampusSexualViolencePolicy.pdf](https://ncaaorg.s3.amazonaws.com/ssi/violence/NCAA_CampusSexualViolencePolicy.pdf)
- [NCAA Sexual Violence Prevention Tool Kit](#)
- [Task Force Recommended Timeline](#) (PDF)
- [Task Force Recommended Checklist](#) (PDF)
- [Administrator FAQ](#)
- [Student-Athlete FAQ](#)

Access Sample Policies and Procedures:

- Select the “Membership” tab on [ncaa.org](https://www.ncaa.org).
- Select “My Apps” from the dropdown menu and log in using your affiliated credentials. *Note: If you do not have access to MyApps please contact your NCAA Applications Administrator at your school or conference to gain access.*
- Select the “Membership Secure Resources” icon.
- Review the legal disclaimer and view the current sample policies and procedures documents that are available.

**Annual Attestation Process Resources**

# NCAA Policy & Principles

- 2014 NCAA Board of Governors resolution – addressing sexual violence is integral to responsible intercollegiate athletic programs
- 2017 Association Policy adopted. Multiple updates/revisions
- Overarching Policies
  - Athletic Department integrated into overall campus policies & processes addressing sexual and interpersonal violence.
  - Ongoing, comprehensive education for student-athletes, coaches and athletic administrators using the NCAA Sexual Violence Prevention Toolkit as a guide.
  - Athletic programs should serve as leaders to support campus-wide sexual and interpersonal violence prevention initiative, including involvement of student-athletes in meaningful ways.

## **Required Annual Attestation Re: Training to be signed by University Chancellor/President, AD and Title IX Coordinator**

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

# NCAA Policy Update in the Next Class – For this Year

4. All incoming, continuing, and transfer student-athletes must complete an annual disclosure related to discipline or criminal conviction for sexual, interpersonal or other acts of violence.
5. Institutions have taken reasonable steps to confirm whether incoming, continuing and transfer student-athletes have been disciplined or criminally convicted of sexual, interpersonal or other acts of violence.
6. Institutions recruiting an incoming or accepting a transfer student-athlete must have a written policy directing staff to gather information from former institution about whether student-athlete left under threat of discipline, was disciplined, or was criminally convicted for sexual, interpersonal, or other acts of violence.

# **Elements of a Good Training Program**

# Planning & Preparation

- Who must or will be trained and on what topics?
- Who will conduct training?
- What are the *most effective* and efficient methods of training?
  - In person, hybrid or virtual
  - Combination or by constituent groups
  - Timing
- What training resources are available, including internal?
- What are campus priorities with respect to training/education?
- How will you address issues of bias and avoid stereotypes?



# Required Training

A school must ensure that Title IX Personnel receive training on:

- the definition of sexual harassment;
- the scope of the institution's education program or activity;
- how to conduct an investigation and the grievance process including hearings, appeals and informal resolution processes, as applicable; and
- how to serve impartially

# Required Training

Title IX Personnel training continued:

- Avoiding prejudgment of the facts at issue, conflicts of interest and bias.
- The impact of intersections of identity: sex, race, ethnicity, sexual orientation, gender identity, disability or immigration status, financial ability, or other characteristic.
- Implicit bias.

# Required for Investigators



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

# Required for Informal Resolution Facilitators



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

# Required for Decision-makers:



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

# Other Training Topics

Investigator	Decision-maker
<ul style="list-style-type: none"><li>• Questioning</li><li>• Institutional policies</li><li>• Responsibility for proposed findings and conclusions</li><li>• Redacting privileged information</li><li>• Coordinating investigation with supportive measures</li></ul>	<ul style="list-style-type: none"><li>• Managing the process</li><li>• Hearing protocol</li><li>• Institutional policies</li><li>• Questioning</li><li>• Preparing findings and conclusions</li></ul>

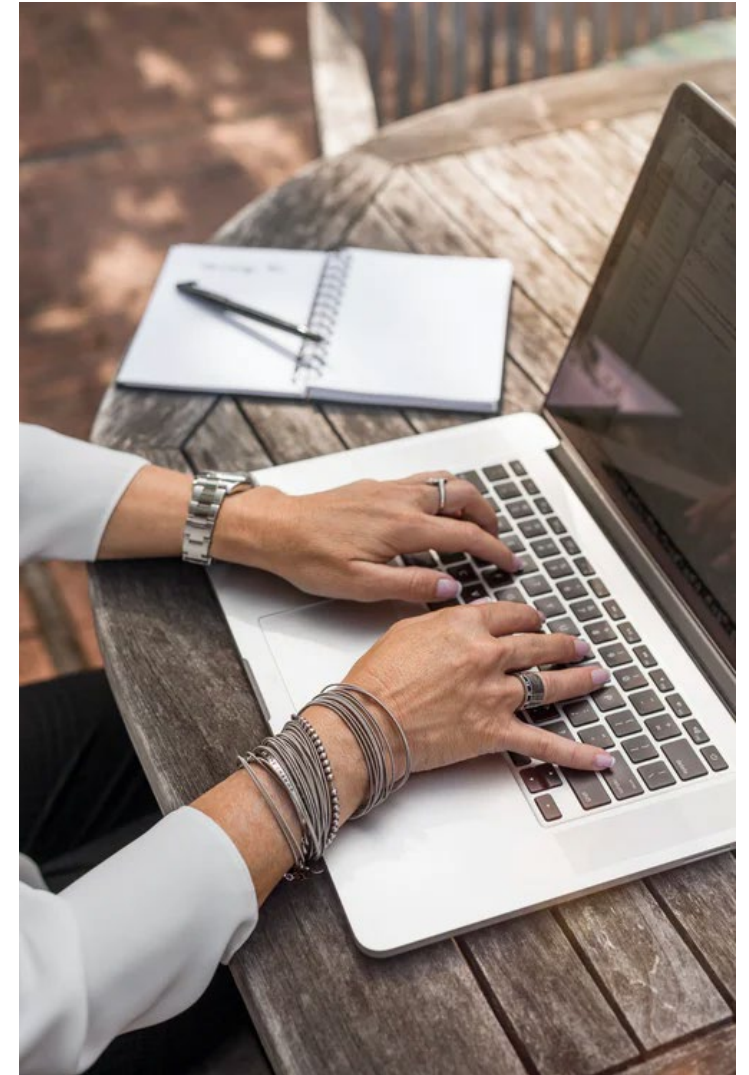
# The Investigative Report



- Defines the investigator's role
- Reports the material facts
  - Context matters
  - Facts not opinion
- Identifies any gaps
- Keep a neutral voice

# Training Transparency

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





# And Athletics!



# **Benefits and Perils of Trauma- Informed Training**

# How to Be Fair to All

Benefits	Perils
<ul style="list-style-type: none"><li>• May help those interviewed retrieve memories</li><li>• May help those interviewed stick with the process</li><li>• May prevent re-traumatizing witnesses</li></ul>	<ul style="list-style-type: none"><li>• May be perceived to favor Complainants</li><li>• May be perceived as less intense questioning or cross-examination of witnesses</li><li>• May be misused by untrained questioners</li></ul>

# **Auditing Training Materials**

# When & What to Audit

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



**Policies:  
Management,  
Notice, and  
Some  
Reminders**

# Managing the Policies

Developing policies	Monitoring policies
<ul style="list-style-type: none"><li>• Existing institutional policies</li><li>• Existing laws, agreements &amp; practices</li><li>• Identify conflicts and concurrences and harmonize or change</li><li>• <i>Include stakeholders</i></li></ul>	<ul style="list-style-type: none"><li>• Changes in law, regulations, guidance or institutional needs</li><li>• Changes in related laws or guidance, e.g. FERPA, state APA</li><li>• Effectiveness</li><li>• <i>Include stakeholders</i></li></ul>

# Notification and Dissemination

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



# Adopt & Publish

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

## Notice

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

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

# Policy Decision Point: Framework

## All-in-One Policy:

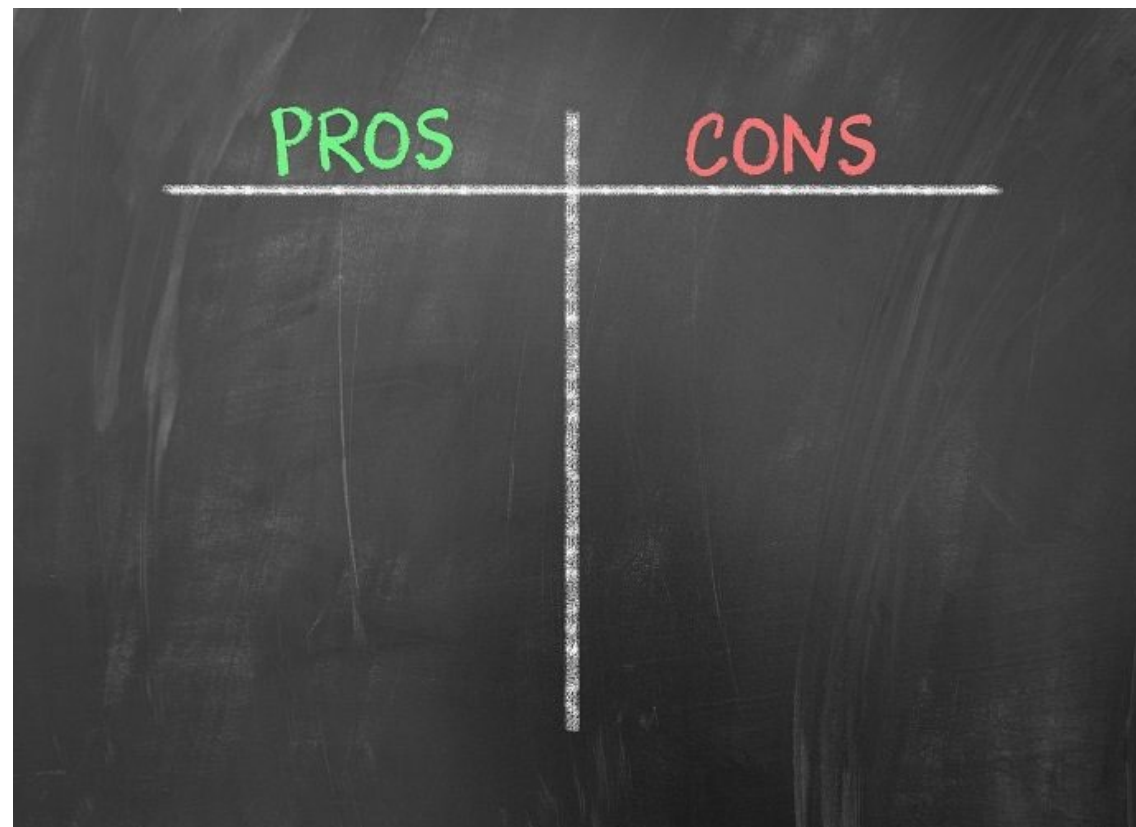
1. Treat all the Same; or
2. Decision Trees

## Two Policies: If not TIX, then ...

1. Title IX Regulation+
2. Everything Else

## Three plus:

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





# Policy Definitions (examples)

## Plus, Clery Annual Security Report Policies

- Title IX Coordinator
- Officials with Authority
- Other Reporters, if any.
- Confidential Resources
- Knowledge
- Complainant/Respondent
- Supportive Measures
- Formal Complaint
- Prohibited Conduct
  - Sexual Harassment
  - Sexual Assault
  - Dating Violence
  - Domestic Violence
  - Stalking
- Consent
- Informal Resolution
- Evidence
  - Directly Related
  - Relevant
  - Weight
- Standard of Review
  - Deliberate Indifference
  - Education Program or Activity
  - Emergency Removal

# FOCUS

## **Please Note:**

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

# Record Retention 7 Years



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

# And Athletics!



# Accommodating Pregnant & Parenting Students

- Shall not discriminate based on pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery unless the student voluntarily requests to participate in a separate program or activity.
- Consider for pregnant & parenting students
  - Individualized academic plans
  - Programs and services designed to maintain educational progress
- Proposed regulations
  - Title IX Coordinator arrange reasonable accommodation





# Proposed Changes

## Required to train all employees

- When they must notify the Title IX Coordinator about sex discrimination
- How students can report sex discrimination
- The scope of conduct that constitutes sex discrimination

Title IX Coordinator required to monitor for barriers to reporting

Title IX Coordinator responsible for accommodations for pregnant & parenting students.

Training for employees who have responsibility related to grievance procedures or supportive measures:

- Specific topics & institution obligations
- Grievance procedures
- Serving impartially
- Relevance

Training related to informal resolution for facilitators

Identify and train all confidential employees



**Questions?**

# Note

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