

NACUA Online Course
Title IX Coordinator Training

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MODULE 1

Slide 1

NACUA Online Course Title IX Coordinator Training

Module 1: Title IX Overview and Application

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Melissa Carleton, Partner and Higher Ed Co-Chair, Bricker Graydon LLP

Slide 2

A Venn diagram with 3 circles overlapping each other, one circle is labelled legislative, one is labelled judicial, and the final one is labelled executive

Slide 3

Legislation: Title IX

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

Slide 4

Administrative: Title IX Regulations

- 1975 regulations
- 1980 OCR tasked with implementing the regulations
- 1997 OCR policy guidance
- 2001 OCR reaffirmed obligations of schools to protect against sexual harassment
- 2003-2010 OCR offers additional and more targeted guidance related to sexual assault.
- 2011 DCL emphasized schools' obligations to address sexual harassment and sexual violence against students
- 2014 OCR Q & A further clarified schools' obligations & DOE issued final regulations on implementation of Campus SAVE Act, amending the Clery Act regulations.
- 2017 OCR withdrew 2011 DCL and 2014 Q&A
- 2018 NPRM
- 2020 Regulations
- 2022 NPRM
- 2024 Regulations

Slide 5

Judicial: Injunctions

Tenn., et. al. v. US Dept. of Educ. (July 15, 2022) – Enjoined DOE and EEOC from implementation of guidance providing disparate treatment protections for individuals based on gender identity and sexual orientation. (Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, and West Virginia)

Texas v. Cardona (June 11, 2024) – Enjoined DOE 2021 guidance on TIX protections on basis of sexual orientation and gender identity. (Texas)

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Judicial: Full Injunctions

State of Louisiana, et.al., v. US Dept. of Educ. (U.S. Dist. Ct. WD Louisiana, June 13, 2024)

Plaintiff States: Louisiana, Mississippi, Montana, Idaho

Tennessee, et. al., v. Cardona (U.S. Dist. Ct. E. Dist. Kentucky Northern Div., June 17, 2024)

Plaintiff states: Tennessee, Kentucky, Ohio, Indiana, Virginia, West Virginia

Kansas, et. al. v. U.S. Dept. of Educ. (U.S. Dist. Ct. Kansas, July 2, 2024)

Plaintiff states: Kansas, Alaska, Utah, Wyoming

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Title IX in 2024

Slide 8

When Does Title IX Apply?

- Program or Activity Receiving Federal Financial Assistance
 - § 106.2 Definitions: *Federal Financial Assistance*
 - Grants, loans, scholarships, provision of services of Federal personnel, use of Federal property, contract for provision of assistance by Federal government
 - Applies across institution if any part of the institution receives Federal funds
 - Exemptions
 - Religious
 - Applies even if other laws also apply
 - Title VII
 - State Laws

Slide 9

What is the scope of the application of Title IX?

“ . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity”

Slide 10

What is the scope of our education program and activities?

- In the United States
- Off Campus
- Student Organizations
- On Campus

Slide 11

Factors for whether conduct is within scope of school's program or activities

- Disparate Treatment Exemptions
 - Membership practices of social fraternities, sororities, or voluntary youth organizations
 - Maintenance of single sex living facilities
- TIX Sex-Based Harassment
 - § 106.11 expressly requires schools to address a hostile environment under its education program or activity, even when some conduct alleged to be contributing to the hostile environment occurred outside the school's education program or activity or outside the United States.

Slide 12

Factors for whether conduct is within scope of school's program or activities

- 2020 Regs
 - Building owned or controlled by recognized student organization
 - A teacher's sexual harassment of a student is likely to constitute sexual harassment.
 - Substantial control over both respondent and context
- 2024 Regs
 - Building owned or controlled by a recognized student organization
 - Conduct subject to school's disciplinary authority
 - Even when some conduct contributing to hostile environment is alleged to have occurred outside school's education program or activity or outside U.S.

Slide 13

Factors for whether conduct is within scope of the school's program or activities

Conduct occurring in a building owned or controlled by a student organization that is officially recognized by a post-secondary institution

- School exerts oversight over the student organization
- School has authority to discipline the student organization
- Does not prohibit single sex clubs and activities, social fraternities/sororities, single-sex affinity groups, or single sex dormitories that are otherwise permissible under TIX

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Factors for whether conduct is within scope of the school's program or activities

Conduct subject to a school's disciplinary authority

- Look at Student Conduct Codes
 - If other off campus interactions are covered, must apply to sexual harassment

- Look at employment policies and precedents

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Factors for whether conduct is within scope of the school's program or activities

*Does school have **substantial control** over the context*

- Perpetrator's status as a teacher is relevant
 - A teacher's sexual harassment of a student is likely to constitute sexual harassment in the program even if the harassment occurs off campus and outside a school activity
- Nexus between out-of-school conduct and the school
 - Possible future encounters between survivor and alleged perpetrators

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Factors for whether conduct is within scope of school's program or activities

Hostile Environment Factors

When evaluating the totality of the circumstances to determine whether a sex-based hostile environment exists under a recipient's education program or activity, consider § 106.2 *Hostile Environment Sex-Based Harassment – Factors to be Considered*.

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Conduct Outside United States

- No change from 2020 regulations that TIX does not have extraterritorial application. TIX does not apply to sex discrimination that occurs outside of the U.S.
- A recipient is not independently obligated to respond to an incident of sex discrimination that occurs in another country.
- Must still address sex-based hostile environment in program or activity in U.S., even when some conduct alleged to be contributing to the hostile environment occurred outside the U.S.
- Other policies, such as codes of conduct might apply.
 - Clery Act applies even outside of U.S.
 - Title VII applies to U.S. citizens working for a U.S. corporation abroad.

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On the basis of sex

- 2020 Regs
 - Deliberately omitted definition of "sex" or "on the basis of sex."
 - 2020 commentary to regs acknowledged that sexual harassment impacted many demographic groups "based on sex, race and the intersection of sex and race (as well as other characteristics such as disability status, sexual orientation, and gender identity).
 - Sexual harassment not tolerated against LGBTQ students.
 - Decline to address discrimination on the basis of gender identity.
- 2024 Regs

- § 106.10: Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy and related conditions, sexual orientation, and gender identity.
- § 106.31: In the limited circumstances in which TIX permits different treatment or separation on the basis of sex, recipient must not carry it out in a manner that discriminates on the basis of sex by subjecting a person to more than *de minimis* harm.
- A policy or practice that prevents a person from participating in a program or activity consistent with the person's gender identity subjects a person to more than *de minimis* harm on the basis of sex.

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Bostock v. Clayton County (2020)

"...in Title VII, Congress outlawed discrimination in the workplace on the basis of race, color, religion, sex, or national origin. Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questions in members of a different sex. Sex plays a necessary and undistinguishable role in the decision, exactly what Title VII forbids."

Slide 20

What are procedural definitions that apply to Title IX?

- Complainant
- Respondent
- Student
- Student with a disability
- Relevant
- Consent
- Remedies & Disciplinary Sanctions

Slide 21

Definition: Complainant

- 2020 Regs
 - An individual who is alleged to be the victim of conduct that could constitute sexual harassment.
- 2024 Regs
 - (1) A student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX or this part; or
 - (2) A person other than a student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX or this part and who was participating or attempting to participate in the recipient's education program or activity at the time of the alleged sex discrimination.

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Definition: Respondent

- 2020 Regs
 - An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.
- 2024 Regs
 - A person who is alleged to have violated the recipient's prohibition on sex discrimination.

Slide 23

Definition: Student with a Disability

- 2020 Regs
 - No definition
- 2024 Regs
 - § 106.2 A student who is an individual with a disability as defined in the Rehabilitation Act of 1973, as amended.
 - § 106.8(e) TIX Coordinator may as appropriate with the individual or office that recipient has designated to provide support to students with disabilities to determine how to comply with Section 504 of the Rehabilitation Act.

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Definition: Relevant

- 2020 Regs
 - No definition
 - Questions and evidence about complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence are offered to prove that someone other than the respondent committed the conduct alleged 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.
- 2024 Regs
 - §106.2-Related to the allegations of sex discrimination under investigation as part of the grievance procedures under §106.45, and if applicable §106.46.
 - Questions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred, and
 - Evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred.
 - §106.45(b)(7) excludes evidence, even if relevant (confidential employee, medical records, prior sexual conduct)

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Definition: Consent

- 2020 Regs
 - Not required to adopt a particular definition of consent with respect to sexual assault.
- 2024 Regs

- Not required to adopt a particular definition of consent with respect to sex-based harassment.

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Definition: Remedies

- 2020 Regs
 - No Definitions
- 2024 Regs
 - Remedies: Measures provided, as appropriate to a complainant or any other person the recipient identifies as having had their equal access to the recipient's education program or activity limited or denied by sex discrimination. These are provided to restore or preserve access to the recipient's education program or activity after a recipient has determined that sex discrimination has occurred.
 - Disciplinary Sanctions: Consequences imposed on a respondent following a determination that respondent violated TIX prohibition on sex discrimination.

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Definitions: Supportive Measures

- 2020 Regs
 - Non-disciplinary, non-punitive
 - Individualized
 - Without fee or charge
 - No unreasonable burden to other party
 - Restore or preserve equal access to program or activity
 - Provide at any point during process
- 2024 Regs
 - Non-disciplinary, non-punitive
 - Individualized
 - Without fee or charge
 - No unreasonable burden to other party
 - Restore or preserve equal access to program or activity
 - Provide at any point during process

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Role of the Title IX Coordinator

- Designate at least one employee with ultimate oversight to coordinate efforts to comply with TIX requirements
- Adopt, disseminate, provide notice, implement non-discrimination policy and procedures
- Easy-to-Find contact information for reporting
- Prominent, wide-spread, effective and comprehensive
- Coordinate training requirements
- Record keeping

Slide 29

Policy Revisions

- Include what applicable regulations require.
- Are they serving the purpose intended?
 - For students, employees, other participants
 - For investigators, hearing panels
- What might be better communicated outside the policy?
- Find the right balance between consistency and discretion.

Slide 30

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MODULE 2

Slide 1

NACUA Online Course Title IX Coordinator Training

Module 2: Prohibited Conduct

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Submodule 1

Title IX Sex-Based Discrimination

Slide 3

Legislation: Title IX

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

Slide 4

Sex-Based Discrimination

Disparate Treatment

Sexual Harassment

Slide 5

Disparate Treatment

Examples

- Excluding from a program
- Paying less
- Grading more harshly
- Not promoting
- Not hiring
- Firing

Proving Disparate Treatment

- Direct Evidence
 - Emails
 - Witness Statements
- Circumstantial Evidence

- Creates an inference of a discriminatory motive
- Comparative evidence

Slide 6

Disparate Treatment in Admissions; 2024 Regulations

- § 106.21 expressly prohibits discrimination in admissions based on sex.
- § 106.2 defines admission: “selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at any education program or activity...”
- Expressly includes “parental, family, or marital status; pregnancy and related conditions”
- Prohibits: inquiry about marital status (“Miss or Mrs.”)
- May ask applicant to self-identify their sex, but only if asked of all applicants and if response is not used as a basis for prohibited discrimination.

Slide 7

Direct Evidence

- Evidence that if believed would prove the existence of the fact without inferences or presumptions
- Example: Evidence that hiring manager told someone in the context of hiring that he “did not want a woman for the job.”
 - This is direct evidence that employee was not hired for job because she was a woman
 - Fact finder does not need to draw any inferences regarding the motive for not hiring the female employee
 - The statement is direct evidence that establishes that the female was disfavored when compared to a man.

Slide 8

Circumstantial Evidence

- Unlike direct evidence, circumstantial evidence does not directly prove that the motive for the disparate treatment was protected class discrimination.
 - Comparative evidence
 - Statistical evidence
- The circumstantial evidence creates only an inference or presumption of unlawful motive.
- The inference or presumption of unlawful motive may be rebutted.

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Circumstantial Evidence

Example:

1. Female applies for a job;
2. Female is qualified for the job;
3. Despite qualifications, female was rejected;
4. After rejection, male hired for the job who had fewer qualifications

* Still need to dig in to determine if there was a legitimate, non-discriminatory reason for hiring the male

Slide 10

On The Basis of Sex

2020 Regulations

- Silent on definition of “on the basis of sex.”

2024 Regulations

- § 106.10: “Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.
- § 106.31: In the limited circumstances in which TIX permits different treatment or separation on the basis of sex, recipient must not carry it out in a manner that discriminates on the basis of sex by subjecting a person to more than *de minimis* harm.
- A policy or practice that prevents a person from participating in a program or activity consistent with the person’s gender identity subjects a person to more than *de minimis* harm on the basis of sex.

Slide 11

Disparate Treatment in Employment

“...in Title VII, Congress outlawed discrimination in the workplace on the basis of race, color, religion, sex, or national origin. Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questions in members of a different sex. Sex plays a necessary and undistinguishable role in the decision, exactly what Title VII forbids.”
Bostock v. Clayton County (US. S. Ct. 2020)

Slide 12

Disparate Treatment of Students

- Check with your legal counsel
 - Pending injunctions
 - State Laws

Slide 13

Sex-Based Harassment

- 2020 commentary to regs acknowledged that sexual harassment impacted many demographic groups “based on sex, race and the intersection of sex and race (as well as other characteristics such as disability status, sexual orientation, and gender identity).”
- Sexual harassment not tolerated against LGBTQ students.

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Sex-Based Harassment

Quid Pro Quo

Hostile Environment

Slide 15

Quid Pro Quo Harassment

2020 Regs

- §106.3 An employee conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct.

2024 Regs

- §106.2 An employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient's education program or activity explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct.

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Hostile Environment Harassment

2020 Regs

- Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity.

2024 Regs

- Unwelcome sex-based conduct that based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity.

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Analysis of Hostile Environment Harassment under 2024 Regs

- The degree to which the conduct affected the complainant's ability to access the program or activity;
- The type, frequency, and duration of the conduct;
- The parties' ages, roles within the education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct;
- The location of the conduct and the context in which the conduct occurred; and
- Other sex-based harassment in the recipient's education program or activity.

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Hostile Environment: Subjective & Objective Analysis

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Hostile Environment; Sexual Harassment

- Not Harassment
 - One stray remark
 - One offensive particular expression, perceived by some persons, standing alone
 - Statement of one's point of view on an issue of debate, even if other person disagrees strongly
- Possible Harassment

- Sex-based conduct, occurring on multiple occasions & so persistent that it limits another student's ability to complete assigned coursework at the student's typical level of performance
- Look at Title VII court cases and EEOC guidance
- Harassment can be pervasive if it is widespread, openly practices or well-known to students and staff
- Look for patterns or practice of harassment, non-trivial, continuous series of events

Slide 20

Specific Offenses Prohibited

2020 Regs

- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking

2024 Regs

- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking

Slide 21

Sexual Assault

2020 Regs

- Clery Definition

2024 Regs

- An offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the FBI

Slide 22

Dating Violence

2020 Regs

- Clery Definition

2024 Regs

- Violence committed by a person:
 - Who is or has been in a social relationship of a romantic or intimate nature with the victim; and
 - Where the existence of such a relationship shall be determined based on a consideration of the following factors:
 - Length of the relationship;
 - Type of relationship;
 - Frequency of interaction between the persons involved in the relationship.

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Domestic Violence

2020 Regs

- Clery Definition

2024 Regs

- Felony or misdemeanor crimes committed by a person who:
 - Is a current or former spouse or intimate partner of the victim under the family or domestic violence laws of the jurisdiction of the recipient, or a person similarly situated to a spouse of the victim;
 - Is cohabitating, or has cohabitated with the victim as a spouse or intimate partner;
 - Shares a child in common with the victim; or
 - Commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction.

Slide 24

Stalking

2020 Regs

- Clery Definition

2024 Regs

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
 - Fear for the person's safety or the safety of others; or
 - Suffer substantial emotional distress.

Slide 25

Retaliation

2020 Regs

- Recipient or other person
- Intimidations, threats, coercion, or discrimination
- Against any individual
- For the purpose of interfering with any right or privilege secured by TIX, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing.
- May not discipline an individual for conduct that does not involve sex discrimination or sexual harassment for the purpose of interfering with any right or privilege secured by TIX or these regulations.

2024 Regs

- Recipient, a student, or an employee or other person authorized by the recipient to provide aid, benefit, or service under the recipient's education program or activity
- Intimidations, threats, coercion, or discrimination
- Against any person
- For the purpose of interfering with any right or privilege secured by TIX, or because the person has reported information, made a complaint, testified,

assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing, including an informal resolution...

- May not discipline for making a false statement or for engaging in consensual sexual conduct based solely on determination of whether sex discrimination occurred.
- Institution may still require employees and other authorized persons to participate as a witness in, or otherwise assist with an investigation, proceeding, or hearing.

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Submodule 2

Additional Sex-Based Discrimination Prohibitions

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Other Laws

- State Laws
- Title VII
- FMLA
- Pregnant Workers Fairness Act
- Equal Pay Act

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Other Examples of Sex Based Discrimination

- Pay inequity
- Sexual Exploitation
- Sexual violence/misconduct
- Treating a person inconsistent with their gender identity

Slide 29

End of Module 2

Thank you!

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MODULE 3

Slide 1

NACUA Online Course Title IX Coordinator Training

Module 3: Receiving a Report

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Slide 2

Submodules

1. What's a report? What's our obligation with respect to reports?
2. How should I reach out to a potential complainant? What should I cover in an intake meeting?
3. What are supportive measures?
4. When should the Title IX Coordinator initiate a complaint?

Slide 3

Submodule 1

What's a report? What's our obligation with respect to reports?

Slide 4

What constitutes a report?

- Notice to the institution of alleged sex discrimination in its education program or activities
 - Can be oral or in writing
 - Notice triggers a response from the institution (via the Title IX Coordinator)

Alleged by whom? Notice to whom?

Slide 5

Alleged by whom?

Student, Employee, Visitor, Stranger

Any other person who was participating or attempting to participate in the P&A at the time of the conduct.

Slide 6

2020 Regs v. 2024 Regs

- *Actual knowledge* no longer is the sole factor triggering notice and a school's response obligation.
- Instead, all employees – even confidential employees – must do something when they become aware of conduct that may constitute sex discrimination.
- Much broader than officials with authority to institute corrective measures under the current regulations.

Slide 7

Employee Notification Requirements (under 2024 Final Rule)

Notify Title IX Coordinator

- Any employee with authority to institute corrective measure on behalf of recipient
- Any employee with responsibility for administrative leadership, teaching, or advising

Notify Title IX Coordinator or Provide Reporting Information

- All other employees who are not confidential employees

* Do not apply to an employee/student who has personally been subject to possible sexual discrimination

Slide 8

Notification Requirements

Confidential Employee means:

1. An employee whose communications are privileged or confidential under state/federal law.
2. An employee designated as confidential by the school.
3. Researchers who are conducting IRB approved human research on sex discrimination- only applies to information while conducting research.

*For 1 and 2, the employee's confidential status is limited to information received about sex discrimination in connection with providing those services.

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Notification Requirements

Confidential Employees must explain to person disclosing the conduct that may be sex discrimination:

- They are confidential employees and not required to notify TIX Coordinator;
- How to contact TIX Coordinator and how to make a complaint; and
- That the TIX Coordinator may be able to offer and coordinate supportive measures.

Slide 10

Notification to Certain Categories of Employees Triggers Response Obligations

- Employees with authority to institute corrective measures
- Administrative leadership, teaching or advising
- All other employees

Slide 11

Notification That Does Not Trigger a Response Obligation

Confidential Employees

- Employees subject to applicable Federal or State law privilege;
- Employees recipient has designated as confidential; or
- Employees who conduct IRB-approved research.

Public Awareness Events

- Held on campus or through an on-line platform sponsored by institution;
- Notification requirements still apply to employees, but the Title IX Coordinator's obligations would not apply

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Title IX Coordinator Response Obligations: 2020 Regs

106.44(a) - Recipient's Response to Sexual Harassment

- Treat complainant and respondent equitably by offering supportive measures
- Explain to the complainant the process for filing a complaint

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Title IX Coordinator Response Obligations: 2024 Regs

106.44(f) - Notice Requirements for a TIXC

- Treat complainant and respondent equitably
- Notify complainant of grievance procedures
- If complaint made, notify respondent of grievance procedures
- **Offer/coordinate supportive measures**
- If complaint made, initiate grievance or IR procedures
- If no complaint made, determine whether to initiate a complaint
- Take other "appropriate prompt and effective" action to ensure that sex discrimination does not occur or recur (including remedies for the complainant)

* If TIXC reasonably determines that the alleged conduct could not constitute sex discrimination under TIX, then these requirements do not apply

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Submodule 2

How should I reach out to a potential complainant? What should I cover in an intake meeting?

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Initial Outreach: Mode

Can be call, email or messages

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Initial Outreach: Information to be Conveyed

- Who you are and your role
- Why you are reaching out
- What you want to discuss
- Link to website with information about resources?
- Will there be another outreach?
- Alternative places to seek support/resources?
- Subject line?

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Initial Outreach: Information to be Conveyed

- Who you are and your role
"My name is Bindu and I am the Title IX Coordinator here at the College. I am here to assist community members who may have been affected by [sexual harassment, sexual misconduct, interpersonal violence]."
- Why you are reaching out
"I received information from your [RA/faculty member] that you may have experienced [broad description of conduct]."
- What you want to discuss
"If you are interested, I welcome an opportunity to meet with you to discuss resources and reporting options to ensure that the College is a place where you feel supported."

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What if you get no response?

Situations with limited information

- Consider a follow-up outreach [2 weeks?] later
- Review existing information to determine if action is necessary even without a complaint (education? campus message?)
- Clery report?

Situations leading to a TIXC-initiated complaint

- Follow-up with would-be complainant to explain the process being initiated and offer an opportunity to participate and/or meet with you to discuss their concerns
- Clery report?

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Initial Meeting

Guidance from the 2024 Regs

- Notify complainant of grievance procedures
- Offer/coordinate supportive measures
- If complaint made, initiate grievance or IR procedures
- If no complaint made, determine whether to initiate a complaint
- Take other "appropriate prompt and effective" action to ensure that sex discrimination does not occur or recur (including remedies for the complainant)

Slide 20

Initial Meeting

- initial meeting ≠ investigative interview
- support person is welcome
- assure individual that resources/supportive measures are available even without a complaint
- assess safety
- students: academic or extracurricular concerns?

- employees: schedule or work location concerns?
- discuss supportive measures
- discuss logistics of following up
- document/notes of meeting

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Follow-up after Initial Meeting

- Follow-up email summarizing options provided
 - Discuss a rough timeline for deciding on next steps
- Are check-ins necessary/wanted?
- Assess whether new information changes TIXC-initiated complaint analysis
- Assess whether other measures are necessary to “ensure sex discrimination does not occur or recur”
- Clery report?
- Implement supportive measures

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Submodule 3

What are supportive measures?

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Definitions

2020 Regulations: § 106.30

Supportive measures means nondisciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment, or deter sexual harassment.

2024 Regulations: § 106.2

Supportive measures means individualized measures offered as appropriate, as reasonably available, without unreasonably burdening a complainant or respondent, not for punitive or disciplinary reasons, and without fee or charge to the complainant or respondent to:

- (1) Restore or preserve that party’s access to the recipient’s education program or activity, including measures that are designed to protect the safety of the parties or the recipient’s educational environment; or
- (2) Provide support during the recipient’s grievance procedures under § 106.45, and if applicable § 106.46, or during the informal resolution process under § 106.44(k).

Slide 24

“Unreasonably Burden”

§ 106.44(g)(2)

“Supportive measures must not unreasonably burden either party...”

But the Preamble clarifies this language, *supportive measures can now burden both complainants and respondents, but neither party can be unreasonably burdened*

- The fact that a measure is burdensome does not determine whether it is a supportive measure or a disciplinary measure.
- The Department expects schools to engage in a fact-specific inquiry to determine whether supportive measures constitute a reasonable burden on parties.

Slide 25

So, can we impose involuntary changes in class, work, housing or extracurricular activities?

Slide 26

Emergency Removal ≠ Supportive Measure

Slide 27

Examples of Supportive Measures

- Counseling services
- Academic accommodations
- Schedule modifications
- Campus escort services
- Contact restrictions
- Changes in working conditions
- Changes in housing
- Leaves of absence
- Increased security and monitoring of campus areas
- Training and education programs related to sex-based harassment
- Other similar measures

Slide 28

Potentially Sticky Issues

Privacy around supportive measures

- The recipient will maintain as confidential any supportive measures provided to a complainant or respondent, to the extent possible.

Mutual or Non-mutual Contact Restrictions

- 2024 Final Rule allows for “restriction on contact applied to one or more parties.”

Slide 29

Factors to Consider re: Contact Restrictions

- Needs expressed by the complainant or respondent
- Ages of the parties involved
- The nature of the allegations and their continued effect on the complainant or the respondent
- Whether the parties continue to act directly in the school's education program or activity

- Whether steps have been taken to mitigate the harm from the parties' interactions, such as implementation of a protective order

Slide 30

Challenging Supportive Measures (under 2024 Final Rule §106.44(g)(4))

Schools must provide the parties with an opportunity to challenge the supportive measures that are applicable to them

- Decisionmaker cannot be the same person who implemented the measures;
- The parties can seek modification or reversal of the school's decision to provide, deny, modify, or terminate supportive measures; and
- If the circumstances that impact a party change materially after the appeal, the school must provide another opportunity to challenge

Slide 31

Submodule 4

When should the Title IX Coordinator initiate a complaint?

Slide 32

Initiating the Grievance Process

2020 Regulations

- Formal Complaint – Signed, written, formal request

2024 Regulations

- Complaint – Oral or written request; Objectively understood to request investigation/adjudication; No magic words

Slide 33

The Title IX Coordinator may initiate a complaint only after determining that the alleged conduct “presents an imminent and serious threat to the health or safety of a complainant or other person, or that conduct as alleged prevents the recipient from ensuring equal access based on sex to its education program or activity.” § 106.44(f)(1)(v)(B)

Slide 34

TIXC-initiated Complaint

The Title IX Coordinator must consider, at a minimum, the following factors:

- Complainant's request not to proceed
- Complainant's reasonable safety concerns
- Risk that additional sex discrimination occurs
- Severity of alleged sex discrimination
- Age and relationship of parties
- Scope of alleged sex discrimination
- Availability of evidence
- Whether school could end sex discrimination within its grievance procedures

Slide 35

Practical Tip: Keep these factors in mind during your report assessment and your initial meeting with the potential complainant

Slide 36

TIXC-initiated Complaint

If the Title IX Coordinator initiates a complaint, the TIXC does not “stand in” for the complainant.

- The rights or obligations of “the parties” with respect to the grievance procedures do not apply to the Title IX Coordinator.

TIXC must notify the complainant before initiating complaint contrary to their wishes and appropriately address reasonable safety concerns.

Slide 37

Thank you!

Slide 38

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MODULE 4

Slide 1

NACUA Online Course Title IX Coordinator Training

Module 4: Handling a Complaint

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Slide 2

Welcome to Module 4: Handling a Complaint

- Report
- Initial Assessment
- Complaint
- Emergency Removal and Administrative Leave
- Notice of Allegations
- Investigation
- Decision-Making Process
- Appeals
- Informal Resolution

Slide 3

Submodule 1

What Constitutes a Complaint?

Slide 4

2020: Definition of Formal Complaint

- 34 CFR 106.30(a)
 - Must be a document - can be electronic
 - Must be filed by the complainant or signed by the Title IX Coordinator
 - Complainant must be participating in or attempting to participate in the education program or activity of the recipient at the time of filing
 - Must allege sexual harassment against a respondent
 - Must request that the recipient investigate the allegation of sexual harassment

Slide 5

2020: Status of Complainant

- Where a Title IX Coordinator files a complaint, that does not make them the "complainant."
- "[T]he complainant will still be treated as a party in such a grievance process." 85 FR 30131

Slide 6

2020: Best Practices

- Confer with the complainant regarding their wishes
- Ask if they will participate in the process if the Coordinator files a complaint
- Consider whether there is sufficient evidence to support the concern if the complainant does not wish to proceed
- Consider other appropriate factors (see 2024 regulations for examples at 34 CFR 106.44(f)(1)(v)(A))
- Notify the complainant of your decision and determine whether additional supportive measures will be necessary

Slide 7

2020: Now that you have a complaint...

- As a Title IX Coordinator, a formal complaint requires action. Your choices:
 - Dismiss the formal complaint to another process
 - Dismiss the formal complaint entirely
 - Offer informal resolution
 - Proceed with an investigation
- We will talk about each of these options in the upcoming submodules.

Slide 8

2020: Reluctant Complainant Hypothetical

- Complainant student reports that Respondent, their athletic coach, has sexually harassed them.
- Complainant is concerned about filing a formal complaint due to potential retaliation from other team members and coaches.
- Complainant expresses that they do not wish the coach to be fired, but only to stop the behavior.

Slide 9

2020 vs. 2024

- Under the 2020 regulations, "formal complaints" were required to be in writing and had formal requirements to meet before the process could proceed
- Under the 2024 regulations, the definition of a complaint is much broader, which means more information will constitute a complaint and require action on the part of the recipient

Slide 10

2024: Definition of a Complaint

- 34 CFR 106.2:
"Complaint" means an oral or written request to the recipient that objectively can be understood as a request for the recipient to investigate and make a determination about alleged discrimination under Title IX or this part."

Slide 11

2024: Oral Complaints

- Document, document, document!

- Consider sending the documentation to complainant to allow them to revise the complaint for completeness and accuracy.
 - Consider putting a deadline on such review so that you can move forward in an appropriate timeframe.

Slide 12

2024: When Coordinator initiates a complaint

- Coordinator must notify the complainant prior to doing so and address reasonable safety concerns, including by providing supportive measures

Slide 13

2024: Now that you have a complaint...

- You have the following options:
 - Discretionary dismissal;
 - Investigation and Decision-Making;
 - Informal Resolution
- We will talk about each of these options in the upcoming submodules.

Slide 14

2024: Reluctant Complainant Hypothetical

- Complainant student reports that Respondent, their athletic coach, has sexually harassed them.
- Complainant is concerned about filing a formal complaint due to potential retaliation from other team members and coaches.
- Complainant expresses that they do not wish the coach to be fired, but only to stop the behavior.

Slide 15

Submodule 2

What is an initial assessment?

Slide 16

Initial Assessment: Hypothetical

- Bob the employee calls your office to indicate that he has received a report from a student, Kai, who has experienced sexual misconduct.
- You reach out to Kai, who agrees to come in.
- Kai accepts supportive measures and verbally indicates they would like to proceed with an investigation into whether Leslie, their partner, sexually assaulted them.
- Kai is highly emotional and unable to communicate specifics of the sexual assault.
- What do you do?

Slide 17

Initial Assessment Goal

- Get sufficient information to determine:
 - Appropriate supportive measures

- Whether there are steps that can be taken now to eliminate or prevent additional concerns
- Whether the policy applies, or whether the case should be referred elsewhere
- The necessary details to share with the parties in the Notice of Allegations

Slide 18

Initial Assessment: Considerations

- Does this situation fall under your Title IX policy?
- Does it fall under other policies at the institution?
- What additional information do I need to make such determinations?
- Note: This phase typically occurs prior to sending out the Notice of Allegations

Slide 19

Initial Assessment: Approaches

- Additional intake meeting to get necessary details?
- Refer complainant for an initial interview with the investigator to minimize repetition of information?

Slide 20

Initial Assessment: Back to Kai

- Option: Ask Kai to come back in for a meeting.
 - Kai tells you that they were raped on September 1st in a residence hall room.
 - Notice of Allegations is sent.
 - Kai sits for an interview and reveals multiple incidents.
 - Notice of Allegations is amended.
- Option: Send Kai to an investigative interview as part of the initial assessment.
 - Kai sits for an interview and reveals multiple incidents.
 - Notice of Allegations is sent containing all allegations.

Slide 21

Referring Elsewhere

- What if Kai tells you that Leslie is completely unrelated to the institution?
- What if Kai tells you that this sexual assault occurred prior to either Kai or Leslie arrived at the institution?
- What if Kai describes a sexual assault that occurred on a study abroad trip?

Slide 22

Combining Cases

- Recipient may consolidate cases against more than one respondent, or by more than one complainant against one or more respondents, or by one party against another party, when the allegations arise out of the same facts or circumstances
- Under the 2024 regulations, if part of the consolidated case qualifies for the 106.46 process, then the entire consolidated case must use that process

Slide 23

Submodule 3

When can you dismiss a complaint, and who hears an appeal?

Slide 24

2020: Dismissals

- 2020 regulations are specific as to jurisdiction
- If a formal complaint does not meet the strict threshold requirements, there are mandatory dismissal provisions
 - The process to which you dismiss the allegations differs by institution.
 - It can be identical to your Title IX procedure, or it can be very different.
- Institutions can also exercise discretionary dismissals

Slide 25

2020: Mandatory Dismissal - 106.45(b)(3)

- An institution must dismiss a formal complaint if:
 - The conduct alleged in the formal complaint would not constitute sexual harassment as defined by § 106.30 even if proved
 - The conduct did not occur in the recipient's program or activity
 - The conduct did not occur against a person in the United States
- Mandatory dismissal does not preclude using another institutional policy to address the conduct
- Institution must provide written notice to both parties of the dismissal and the reasons
- No appeal from dismissal is required, but it may be a good practice

Slide 26

2020: Discretionary Dismissal - 106.45(b)(3)

- An institution may dismiss a formal complaint if:
 - A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein
 - The respondent is no longer enrolled or employed by the recipient
 - Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein
- Discretionary dismissal does not preclude using another institutional policy to address the conduct
- Institution must provide written notice to both parties of the dismissal and the reasons
- No appeal from dismissal is required, but it may be a good practice

Slide 27

2020: Exercising Discretion

- If the complainant wishes to withdraw the complaint, should the Title IX Coordinator elect to continue the complaint?

- If the respondent disaffiliates from the institution:
 - Does the complainant wish to go forward?
 - Does the institution have any disciplinary action that can be taken against the respondent?
 - No trespass orders
 - No re-enrollment/re-employment

Slide 28

2020: Communicating about Dismissal

- If you are dismissing a case, what are the next steps?
- Is the dismissal "the end" of this matter, or is it merely a shift to another process?
- Are the parties still entitled to supportive measures?
- Will you allow for an appeal? (This is not required under 2020 regulations.)

Slide 29

2024: Discretionary Dismissal – 106.45(d)

- Under the 2024 regulations, there is not a mandatory dismissal requirement *per se*
- The recipient may dismiss a complaint of sex discrimination if:
 - The recipient is unable to identify the respondent after taking reasonable steps to do so;
 - The respondent is not participating in the recipient's education program or activity and is not employed by the recipient;
 - The complainant voluntarily withdraws any or all of the allegations in the complaint and the Title IX Coordinator declines to initiate a complaint, and the recipient determines that without the complainant's withdrawn allegations, the conduct that remains alleged in the complaint, if any, would not constitute sex discrimination even if proven

Slide 30

2024: Discretionary Dismissal – cont.

- The recipient may dismiss a complaint of sex discrimination if:
 - The recipient determines the conduct alleged in the complaint, even if proven, would not constitute sex discrimination even if proven. Prior to dismissing the complaint for this reason, the recipient must make reasonable efforts to clarify the allegations with the complainant.

Slide 31

2024: Dismissal Appeals

- Recipient must promptly notify the complainant of the reason for the dismissal. (Notification goes to both parties if the respondent is aware of the complaint.)
 - Not required to be in writing, but documentation is necessary.
- Discretionary dismissal may be appealed. Appeal must be accessible to any party that is notified of the dismissal.
 - Trained appeals officer cannot have taken part in the dismissal decision.

- Parties must be provided a reasonable and equal opportunity to make a statement about the dismissal decision.
- Parties must be notified of the results and rationale.

Slide 32

2024: Post-Dismissal

- Parties who were aware of the complaint must be offered supportive measures.
- Title IX Coordinator must take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient's education program or activity.

Slide 33

Dismissal Hypothetical #1

- Hunter alleges sex-based harassment against Taylor (a student).
- Leslie alleges sex-based harassment against Taylor.
- Both sets of allegations are similar and violent.
- Taylor, facing criminal charges, withdraws from the institution.
- Do you dismiss?

Slide 34

Dismissal Hypothetical #2

- Alex, a student, alleges sex discrimination against Casey, a faculty member.
- Alex and Casey reach a private settlement agreement – but not through your informal resolution process. Alex then requests to withdraw the complaint.
- Do you dismiss the complaint?

Slide 35

Dismissal Hypothetical #3

- Charlie makes an allegation of sex-based harassment against Addison, who then makes allegations of sex-based harassment against Charlie.
- Both parties are struggling with mental health concerns and are admitted separately to residential treatment. This results in both parties taking medical leave from the institution.
- Neither party is available to sit for interviews.
- Do you dismiss?

Slide 36

Dismissal Appeals

- Choose a trained person that is not otherwise involved with the case and has no conflict of interest or bias.
- Consider whether using this person in this manner may conflict them out of being your appeals officer later down the road.

Slide 37

Submodule 4

When is an emergency removal appropriate?

Slide 38

2020: Emergency Removal – 106.44(c)

- May remove a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the **physical** health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal
- Must provide the respondent with notice and an opportunity to challenge the decision immediately following the removal

Slide 39

2024: Emergency Removal – 106.44(h)

- May remove a respondent from a recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an imminent and serious threat to the health or safety of a complainant or any students, employees, or other persons arising from the allegations of sex discrimination justifies removal
- Must provide the respondent with notice and an opportunity to challenge the decision immediately following the removal

Slide 40

Considerations

- Is full removal from the entire program truly required, or are lesser options available?
- Can the removal be mitigated in any way to help the respondent continue to access the educational program or activity (i.e. switching to an online program?)

Slide 41

Appeals

- Choose a trained person that is not otherwise involved with the case and has no conflict of interest or bias.
- Consider whether using this person in this manner may conflict them out of being your appeals officer later down the road.
- The procedure is not clear, but typically would involve notice and an opportunity to be heard.

Slide 42

Emergency Removal Hypothetical #1

- Jordan is accused of engaging in sexual assault multiple times over the course of their relationship with their partner, Cameron
- Cameron wants Jordan removed from campus
- A no contact order is in place
- Jordan and Cameron are in different educational programs and different residence halls

- Is emergency removal appropriate?

Slide 43

Emergency Removal Hypothetical cont.

- Jordan is a varsity athlete who is in season at the moment
- Jordan's coach suspends Jordan from the team due to the allegations
- Is this permissible?

Slide 44

Submodule 5

When is administrative leave appropriate?

Slide 45

2020: Administrative Leave

- 106.44(d) - A recipient is permitted to place a **non-student employee** on administrative leave during the pendency of a grievance process.

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2024: Administrative Leave

- 106.44(h) - A recipient is permitted to place an **employee respondent** on administrative leave from **employment responsibilities** during the pendency of the recipient's grievance procedures

Slide 47

Administrative Leave: Factors to Consider

- What are the risks in leaving the employee in their position during the pendency of the grievance proceedings?
 - Exposure to others/ongoing issues?
 - Publicity
 - Ability to continue to perform their job
 - Are any restrictions appropriate if administrative leave is not used?
- Administrative leave is typically with pay and is not disciplinary in nature.
- Consult with an attorney before putting employees on unpaid leave.

Slide 48

Administrative Leave: Hypothetical #1

- Dakota, an employee, has made a complaint of sex discrimination against their supervisor, Adrian
- No violence is alleged
- Is administrative leave appropriate?
- If you do not put Adrian on administrative leave, what supportive measures should be put in place?

Slide 49

Administrative Leave: Hypothetical #2

- Jamie, a student, has made allegations of stalking against Arden, a custodian in the building where Jamie takes classes
- Jamie has provided text messages from Arden asking Jamie out on a date
- Is administrative leave appropriate?
- If you do not put Arden on administrative leave, what supportive measures should be put in place?

Slide 50

Administrative Leave: Hypothetical #3

- Riley and Asher, both student athletes, claims that their coach, Harper, has been engaging in voyeurism while the athletes are showering after practice
- Is administrative leave appropriate?
- If you do not put Coach Harper on administrative leave, what supportive measures should be put in place?

Slide 51

Submodule 6

What are reasonable timelines?

Slide 52

2020: Timelines

- 106.45(b)(1)(v) - Recipients must include "reasonably prompt time frames" for the grievance process
- Your policy may provide for temporary delays and limited extensions of time frames for good cause
- Extensions require written notice to the parties of the delay and the reasons for it
- Good cause includes the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities

Slide 53

2024: Timelines

- 106.45(b)(1)(v) - Recipients must include "reasonably prompt time frames" for the grievance process
- Your policy may provide for temporary delays and limited extensions of time frames for good cause
- Extensions require written notice to the parties of the delay and the reasons for it
- Good cause includes the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities

Slide 54

What is reasonable?

- Prior 2020, guidance suggested that an entire process (complaint to adjudication) should take less than 60 days.

- This was not always realistic given the schedules of parties, advisors, and witnesses.
- Concurrent criminal cases can affect the availability of evidence, and it can take a while to obtain medical records with consent.
- Under the 2020 regulations, the parties get 10 days to review the draft report/evidence and 10 days to review the final report, which adds an extra 20 days to the process.

Slide 55

Some thoughts on choosing

- Consider by section:
 - Initial assessment
 - Investigation
 - Hearing
 - Writing the decision
 - Appeals
 - Informal resolution (can run concurrently with other parts of the process)
- How long has your process previously taken?
- Are there times during the year when the process is likely to take longer due to the calendar?

Slide 56

"Reasonable" is ambiguous

- What is reasonable in a particular situation may be shorter or longer
- Documentation of all delays is helpful in case the situation is challenged later, even where delays occur within the timelines in your policy

Slide 57

Submodule 7

What goes into a notice of allegations?

Slide 58

2020: Notice of Allegations Overview

- Notice of Allegations goes to both parties (if known)
- Notice must be provided with a copy of the grievance process, including any informal resolution process
- Notice must be provided "upon receipt of a formal complaint"

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2020: Notice of Allegations Contents

- Must include:
 - Allegations potentially constituting sexual harassment as defined in the regulations
 - Sufficient details known at the time, including:
 - Identities of the parties involved in the incident, if known
 - Conduct allegedly constituting sexual harassment

- Date and location of the alleged incident, if known
 - Statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process
- Must be provided with sufficient time to prepare a response before any initial interview

Slide 60

2020: Notice of Allegations Contents (cont.)

- Must include:
 - Notification that the parties may have an advisor of their choice, who may be, but is not required to be, an attorney
 - Notification that the parties and advisors may inspect and review evidence as provided in Section 106.45(b)(5)(vi)
 - Notification of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process

Slide 61

2024: Notice of Allegations Overview

- There are two regulations regarding the Notice of Allegations
 - 106.45 - applies whenever the grievance procedure is initiated
 - 106.46 - applies only to cases involving allegations of sex-based harassment where at least one of the parties is a student
- We will start with the general requirements in 106.45, and then talk about the heightened requirements in 106.46
- There is no reason that you cannot provide the robust notice under 106.46 to parties in a 106.45 case

Slide 62

2024: NOA Contents – 106.45

- Provided to both parties (if known)
- Provided upon initiation of the grievance procedures
- Must include all of the following:
 - The grievance procedures to be used, and any informal resolution process
 - Sufficient information available at the time to allow the parties to respond to the allegations, including:
 - Identities of the parties involved in the incident(s)
 - Conduct alleged to constitute sex discrimination under Title IX
 - Date(s) and location(s) of the alleged incident(s) to the extent that information is available

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2024: NOA Contents – 106.45 (cont.)

- Must include all of the following:
 - Statement that retaliation is prohibited

- Statement that the parties are entitled to an equal opportunity to access the relevant and not otherwise impermissible evidence or an accurate description of the evidence, and if a description is provided, the parties are entitled to an equal opportunity to access the relevant and not otherwise impermissible evidence upon the request of any party

Slide 64

2024: NOA Contents – 106.46

- Provided to both parties (if known)
- Provided upon initiation of the grievance procedures
- Must include all of the following:
 - Everything listed in 106.45 (previous slides)
 - The respondent is presumed not responsible for the alleged sex-based harassment until a determination is made at the conclusion of the grievance procedures under this section and that prior to the determination, the parties will have an opportunity to present relevant and not otherwise impermissible evidence to a trained, impartial decisionmaker
 - The parties may have an advisor of their choice who may be, but is not required to be, an attorney

Slide 65

2024: NOA Contents – 106.46 (cont.)

- Must include all of the following:
 - If applicable, the institution's code of conduct prohibits knowingly making false statements or knowingly submitting false information during the grievance procedure

Slide 66

Amendments

- If in the course of an investigation, new allegations are uncovered, the recipient must provide notice of the additional allegations to the parties whose identities are known

Slide 67

Things to Consider

- Your investigative report and decision should quote the allegations as cited in this Notice. The Notice starts the process and defines the scope of the case.
- This is an opportunity to demonstrate transparency and build trust at the very beginning of the process.

Slide 68

Submodule 8

How does informal resolution work?

Slide 69

Overview – Informal Resolution (1 of 2)

- Informal resolution is available at any time
- Both parties must agree to participate in writing, in a consent form that meets the regulatory requirements
- Informal resolution need not be offered in all cases; the Title IX Coordinator has discretion to determine when it is appropriate
- Because the institution is enforcing the terms of the agreement, it should sign off on the agreement in addition to the parties
- The institution cannot force anyone to participate or reach agreement
- The person conducting the informal resolution must be trained and have no conflict of interest/bias

Slide 70

2020 vs. 2024 Regs

- 2020 only: Cannot use the process to resolve allegations that an employee sexually harassed a student
- *2024 only: No restrictions on when it can be used*
- 2020 only: Must have a "formal complaint" before the process can be initiated
- *2024 only: No complaint necessary to implement informal resolution*
- 2020 only: Can be conducted by anyone with training and no conflict/bias
- *2024 only: Cannot be conducted by the investigator or decisionmaker*

Slide 71

2020: Consent to Informal Resolution

34 CFR 106.45(b)(9)

- Allegations
- Requirements of the informal resolution process – including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations
 - The party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint
- Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared

Slide 72

2024: Consent to Informal Resolution

34 CFR 106.44(k):

- Allegations
- Requirements of the informal resolution process
- Prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and to initiate or resume the recipient's grievance procedures
- The parties' agreement to a resolution at the conclusion of the informal resolution process would preclude the parties from initiating or resuming grievance procedures from the same allegations

Slide 73

2024: Consent to Informal Resolution (cont.)

34 CFR 106.44(k):

- The potential terms that may be requested or offered in an informal resolution agreement, including notice that an informal resolution agreement is binding only on the parties
 - Restrictions
 - Restrictions on respondent's participation in one or more education programs or activities or attendance at specific events (including restrictions that could have been imposed as remedies or disciplinary sanctions if the respondent had been found responsible)
- What information the recipient will maintain and whether and how the recipient could disclose such information for use in grievance procedures, if grievance procedures are initiated or resumed

Slide 74

What does it look like?

- Many options:
 - Shuttle diplomacy
 - Group discussion
 - Restorative justice
- At the end, if successful, the parties have an agreement in hand and the case is closed

Slide 75

Informal Resolution Hypo #1

- Devin alleges that their partner, Nico, has engaged in dating violence
- Devin and Nico are on the same sports team, live in the same residence hall, and are in the same relatively small major
- How might this be resolved?

Slide 76

Informal Resolution Hypo #2

- Avery, a student, brings a claim that Professor Jones has engaged in sex discrimination by grading men more stringently than women
- How is this approached under the 2020 regulations?
- The 2024 regulations?

Slide 77

Informal Resolution Hypo #3

- Flynn, a student, alleges that Grey, a student, has been stalking Flynn on campus
- Flynn and Grey successfully reach an informal resolution agreement
- Flynn returns to your office, suggesting that they found Grey on their residence hall stoop, in violation of the agreement
- What do you do next?

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Submodule 9

What is required for investigations?

Slide 79

Overview of Investigations

- Under Title IX, the institution (not the parties) has the obligation to gather the relevant evidence
- Under the 2020 regulations, the investigator cannot be the person who decides whether the respondent is responsible for a policy violation
- Under the 2024 regulations, the investigator might be the person who makes the decision, depending on your choice of structure
- Even if the investigator makes the decision, it is helpful to stay neutral and curious during the investigation phase

Slide 80

Setting the Potluck

- Picture the investigator as the person who hosts a potluck
- Each party and witness is invited to bring something – but the host cooks too!
- The parties will get a chance to walk around the table and decide what looks good and what doesn't
- Ultimately, the decision-maker will be the person who declares that the meal is complete and it's time to eat
- Make sure the parties have equal access to see what is on the table, to add to it, and to add extra plates for new witnesses

Slide 81

Writing the Menu

- Under the 2024 regulations, you can let the parties peruse the table, or you can write a detailed menu of what's on the table
 - If they ask, you still have to let them peruse the table
 - What are the pros and cons of starting with the menu?

Slide 82

Duplicate Dishes

- The investigator decides what stays on the table (relevant and not impermissible) and what goes (not relevant or impermissible)
- "If everyone brings what they want, and they all bring potato chips, then we'll only have potato chips and we'll all be happy."
 - If two people bring potato chips, do you remove one? Which one?

Slide 83

Commenting on the Food

- Before the report is finalized, the parties get a reasonable opportunity to respond to the evidence/description

- Under the 2020 regulations and 2024 106.46, the parties get another reasonable opportunity to respond to the final report (which, under the 2024 regulations, may occur at a live hearing)

Slide 84

What if someone doesn't bring food?

- There is an empty spot on the banquet table where their offering would have been.
- We don't make any assumptions as to why they didn't bring food.

Slide 85

Investigator Steps

- Contact parties:
 - Request interviews
 - Request witness list
 - Request evidence
- Contact witnesses:
 - Request interviews and evidence
- Seek evidence from other sources
 - Security footage
 - Card swipes
 - Law enforcement records
 - Medical records

Slide 86

Investigator Steps (cont.)

- Allow parties to review evidence/summary and provide a written response
 - 10 days under 2020 regulations, "reasonable" time under 2024 regs
- Prepare final report
 - 10 days under 2020 regulations
 - "Reasonable time" under 2024 regulations (if 106.46)
- Decisionmaker phase begins
- See Module 5 for investigative skills

Slide 87

2024 Regulations - Single Investigator Model

- Under 106.45, it is possible for a single investigator model, where the investigator becomes the decisionmaker
- Under 106.46, this is also possible. If the intention is to use an asynchronous model, make sure your investigator records every interview from the start of the investigation.

Slide 88

To Record, or Not?

- Must record interviews if using a 106.46 asynchronous model
- No federal rule regarding recordings; check state law

- Be consistent in your chosen practice and consider putting it in your policy
- Always disclose on the recording and get consent at the outset of the interview
- Consider how your decisionmaker can review interview recordings
- When you record hearings, it is incredibly helpful for the decisionmaker to have a transcript when writing the opinion

Slide 89

Submodule 10

What are the role of advisors and support persons during the process?

Slide 90

2020: Advisors

- Parties may have an advisor of their choice at every meeting relating to the grievance process
- Parties must have an advisor at the hearing to conduct cross-examination on their behalf
 - If they do not have an advisor of choice, the institution must provide an advisor of its choice

Slide 91

2024: Advisors

- Under 106.45, there is no requirement to allow parties to have advisors of choice
 - But – remember that if it is a Clery case, advisors of choice must be permitted
- Under 106.46, the parties may have advisors of choice
 - Advisors are only required at a live cross-examination hearing, in which case the institution must appoint them if the party does not have one

Slide 92

What can an advisor do?

- They may attend every meeting with their party
- They may review the evidence/description
- They may assist their parties in preparing for the process
- If cross-examination is part of the process, they must conduct the cross-examination on behalf of their party
- Everything else is up to your institution's own rules

Slide 93

What do most institutions allow?

- Most institutions provide by policy that the advisor is essentially a "potted plant" at all points other than during cross-examination
- Set decorum standards for advisors
- Consider offering a meeting with each advisor to explain process, if they did not sit with their party through intake

Slide 94

Questions to Consider re: Advisors

- Can advisors submit evidence?
- Can advisors submit witness lists?
- Do advisors give opening/closing statements? (Does anyone?)
- If an advisor has a busy schedule, how long are you willing to wait for them to get things scheduled?

Slide 95

Remember: FERPA

- Sometimes, students may have an advisor that is not their advisor of choice
- Consider getting written consent from the student party for communications with their advisor

Slide 96

Dealing with Difficult Advisors

- Set boundaries for behavior
- Remind advisors of their role under your policy
 - It helps to give them information about how they are permitted to help their party, so they can focus their energy in a positive manner
- Remove disruptive advisors after warning(s)

Slide 97

Submodule 11

2024 Regulations: Is a single investigator model right for your campus?

Slide 98

Single Investigator Model - A History

- This refers to a grievance process in which the investigator also makes the decision regarding responsibility
 - It has been the standard in many HR and student conduct investigations for generations
- In 2018, *Doe v. Baum* (6th Cir.) provided that public schools must offer live cross-examination to students accused of sexual harassment where credibility is in question
 - Case law has deviated from this – check your jurisdiction
- This was expanded to all schools in the 2020 regulations

Slide 99

2024 Regulations – A return to SIM?

- Under 106.45, a single investigator model is virtually required, as the decisionmaker must have the ability to ask questions of the parties and witnesses, to the extent credibility is in dispute and relevant
- Under 106.46, the investigator can run any of the three hearing models

Slide 100

Considerations for Single Investigator Model

- Objectivity?
- Reduction in bias concerns?
- Consideration of multiple perspectives?
- Efficiency?
- Effectiveness?
- Use of resources?
- Remember: Regardless of what model you use, SHOW YOUR WORK.

Slide 101

Submodule 12

What are the best practices for sharing evidence?

Slide 102

Sharing Evidence

- 2020: Must share evidence before the report is finalized, and again after the report is finalized
- 2024: Same as 2020 for 106.46; only share before report is finalized for 106.46

Slide 103

Privacy Protections

- Under 2020: Nothing
- 2024: Must take reasonable steps to prevent and address the parties' unauthorized disclosure of information and evidence obtained solely through the grievance process
 - Does not include disclosure for purposes of litigation or administrative proceedings related to the complaint
 - See 106.45(f)(4)(iii) and 106.46(e)(6)(iii)

Slide 104

Sharing: Practices to Consider

- Some schools share using a virtual platform that restricts printing, downloading, sharing, and screenshotting, then remind parties of their obligations
- Some schools allow in-person review only, and require the signing of a non-disclosure agreement to access the documents through a virtual platform
- Some schools watermark every document so that if it is shared, they can determine who shared it

Slide 105

Submodule 13

What is required for the decision-making process?

Slide 106

2020: Live Hearings

- Must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility

- Conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally
 - Is subject to decorum standards set by the institution
- Hearings can be virtual or in person, but the decision-maker and parties must be able to see the party or witness answer questions

Slide 107

2020: Relevancy

- After each question by an advisor, the decisionmaker determines relevancy and explains any decision to exclude a question as not relevant
 - Preamble indicates that this determination is to be made verbally
- Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence are offered to provide 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

Slide 108

2020: Failure to Participate

- Original regulation: If you don't answer all relevant cross-examination questions, your statements can't be considered
- This was vacated by a court. See Question A from July 2021 Q&A from the U.S. Department of Education (as updated June 28, 2022)
- Check the case law in your jurisdiction

Slide 109

2024: Three options under 106.46

- 106.45 - Single investigator model (decisionmaker must question parties/witnesses)
- 106.46 -
 - Asynchronous hearing
 - Hearing-officer led hearing
 - Live cross-examination hearing (same as 2020 regulations)

Slide 110

2024: Asynchronous Model

1. Interview all parties and witnesses; record interviews
2. Provide recordings or transcripts to parties and solicit follow-up questions
3. Determine which of these questions are necessary; conduct follow-up record interviews; return to step 2
4. Make determination

Note: You could do the evidence review between 1 and 2 or between 3 and 4.

Slide 111

2024: Hearing Officer Led Hearing

- After evidence review, allow parties to provide response
- All parties gather (advisors optional)
- Hearing officer asks questions
- Hearing officer solicits follow-up questions from parties during break
- Hearing officer asks follow-up questions; repeat step 4
- Hearing ends

Slide 112

2024: Live Cross-Examination

- After evidence review, allow parties to provide response
- All parties gather (advisors mandatory)
- Hearing officer and advisors ask questions and follow-up questions
- Hearing ends

Slide 113

2024: 106.46 Considerations

- Retraumatization?
- Efficiency and timelines?
- Patience of parties and witnesses for multiple rounds of follow-up?
- Skill of investigators and decision-makers?
- Anxiety of parties and witnesses to undergo live cross-examination?

Slide 114

2024: Choices

You may select different options for different situations, as long as the policy is clear as to the criteria regarding when each will be used. Consider:

- Nature of the allegations
- Whether the parties are participating
- Whether respondent wishes to accept responsibility
- Due process requirements in your state (as case law may apply them)
- State law requirements (if more protective than federal law)

Slide 115

2020: Written Decision Requirements

- Apply standard of evidence
- Identify the allegations potentially constituting sexual harassment
- Describe procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held
- Findings of fact supporting the determination
- Conclusions regarding the application of the recipient's code of conduct to the facts

Slide 116

2020: Written Decision Requirements (cont.)

- Statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant
- The recipient's procedures and permissible bases for the complainant and respondent to appeal

Slide 117

2024: Written Decision under 106.45

- Use the appropriate standard of evidence
- Evaluate the relevant and not otherwise impermissible evidence for its persuasiveness
- Notify the parties in writing of the determination whether sex discrimination occurred under Title IX, including the rationale for such determination, and the procedures and permissible basis for the complainant and respondent to appeal, if applicable

Slide 118

2024: Written Decision under 106.45 (cont.)

- If there is a determination that sex discrimination occurred, as appropriate, require the Coordinator to:
 - Coordinate the provision and implementation of remedies to a complainant and other persons the recipient identifies as having had equal access to the recipient's education program or activity limited or denied by sex discrimination,
 - Coordinate the imposition of any disciplinary sanctions on a respondent, including notification to the complainant of any such disciplinary sanctions,
 - Take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the institution's education program or activity

Slide 119

2024: Written Decision under 106.46

- Everything under 106.45 plus:
 - Description of the alleged sex-based harassment
 - Information about the policies and procedures used to evaluate the allegations
 - Evaluation of the relevant and not otherwise impermissible evidence and determination whether sex-based harassment occurred
 - When the decisionmaker finds that sex-based harassment occurred, any disciplinary sanctions imposed on the respondent, whether remedies other than the imposition of disciplinary sanctions will be provided to the

- complainant and, to the extent appropriate, other students identified by the institution to be experiencing the effects of the sex-based harassment
- Procures for the parties to appeal

Slide 120

Submodule 14

What is the process for appeals?

Slide 121

2020: Appeals

- Must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:
 - Procedural irregularity that affected the outcome of the matter
 - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter
 - Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affect the outcome of the matter
- Institutions can provide other bases to both parties equally

Slide 122

2024: Appeals under 106.45

- Must offer the same appeals process offered in all other comparable proceedings, if any, including proceedings relating to other discrimination complaints
- If 106.46 applies, must offer an appeal on the bases set forth in 106.46(i)(1)

Slide 123

2024: Appeals under 106.46

- Must offer an appeal from the determination as to whether sex-based harassment occurred, and from a dismissal of a complaint or any allegations therein, on the following bases:
 - Procedural irregularity that would change the outcome
 - New evidence that would change the outcome and that was not reasonably available when the determination whether sex-based harassment occurred or dismissal was made
 - The Title IX Coordinator, investigator, or decisionmaker had a conflict of interest or bias for or against complainant or respondents generally or the individual complainant or respondent that would change the outcome
 - Any other additional bases if the institution wishes, but they must be provided equally to the parties

Slide 124

Appeal Procedures

- Appeals officer should not have been previously involved in the case in a meaningful manner
- No conflict of interest/bias
- Set a reasonable deadline for appeal
- Allow non-appealing party to respond by reasonable deadline
- Set a timeline that allows for the review of the entire record
- Decision in writing – explain rationale and result
- Decision goes to both parties simultaneously

Slide 125

Other Bases for Appeal

- If you want to add more bases for appeal, it is not required, but here are some that are often used:
 - Sanction is not proportionate to the conduct
 - Decision was clearly erroneous based on the evidentiary record
 - Written decision was arbitrary and capricious
- Check case law and state law

Slide 126

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MODULE 5

Slide 1

NACUA Online Course Title IX Coordinator Training

Module 5: Investigative Skills

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Slide 2

Investigation Mission

- Neutral/Impartial
- Free From Bias or Prejudgment
- Thorough
- Do No Harm
- Trauma Informed
- Accurately Documented

Slide 3

How can I make interviewees more comfortable?

Agency: “The capacity, condition, or state of acting or of exerting power”

Slide 4

Checking In

- Be genuine
- Acknowledge Stress
- Warm up

Slide 5

Provide Information

- Explain your role as a neutral
- Explain their role (puzzle piece)
- Note taking/recording
- Anticipated length of interview
- Rest of process
- Right to representation
- Advise about retaliation
- Do they have questions

Slide 6

Active Listening

- 100% of your attention
- Eliminate distractions

- Ask for clarifications
- Ask for details

Slide 7

Professionally Empathetic

- Moderate Pace/Breaks
- Limit Comments
- Don't share
- Don't judge
- Acknowledge difficulty
- Set tone

Slide 8

Get All of the Information to Complete the Puzzle

- Physical Evidence
- Documentary Evidence
 - Social media
 - Police reports
 - Diary entry
- Demonstrative Evidence
 - Photos
 - Videos
 - Maps
 - Security footage
- Verbal Evidence
 - Witness Statements

Slide 9

- Thorough Preparation
- Chronology
- Outline
- Checklist
- Documents
- Structure

Slide 10

Investigation Checklist

- ☐ Survivor's name or anonymity requested
- ☐ Place of occurrence
- ☐ Nature of occurrence
- ☐ Time of occurrence
- ☐ Time of reporting
- ☐ Alcohol involved: Drugs involved

- ☐ Physical Injury
- ☐ Name of accused; known or unknown
- ☐ Other crimes evidence/priors
- ☐ Complainant's description of event
- ☐ Names of witnesses
- ☐ Interviews of all parties
- ☐ Prior contacts between complainant and accused
- ☐ School records
- ☐ Intimidation attempts
- ☐ Court / Cease & Desist Orders

Physical Evidence:

- ☐ Injury / Medical Evidence - records
- ☐ Security Monitoring Records / Visitor Logs / Audio-Video recordings
- ☐ Telephone records
- ☐ Voicemail
- ☐ Text / E-mail / Social Media
- ☐ Clothing / Tangible Objects
- ☐ Any other physical / forensic evidence
- ☐ 911 Tape
- ☐ Photographs of the scene
- ☐ Photographs of injuries
- ☐ Advised re: law enforcement report
- ☐ Advised re: preservation and medical treatment
- ☐ Advised re: counseling
- ☐ Concerns regarding safety of community
- ☐ Discharge Title IX responsibilities
- ☐ Discharge Clery responsibilities

Slide 11

The Basics

- Presumption that respondent is not responsible for alleged sex discrimination until a determination is made at conclusion of grievance procedures
- Burden on the school, not the parties
- Equal opportunity for parties to present witnesses and evidence
- Equal opportunities for parties to review evidence
- Equal opportunities for parties to be accompanied by an advisor

- Objective evaluation of all relevant evidence
- Apply standard of evidence to evaluation facts

Slide 12

Impermissible Evidence

2020 Regs

- Party's records made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional... made or maintained in connection with treatment to a party without party's written consent

2024 Regs

- Protected by a legal privilege
- Provided to a confidential employee
- Records maintained by a recognized medical professional
- Relating to complainant's sexual interests or prior sexual conduct (limited exception)

Slide 13

Details are Important

- What, When, Where?
- How did it make you feel?
- Who was there? What did they see?
- Any recordings? Contemporaneous texts, social media?
- What words were exchanged?
- Nature of relationship between parties?

Slide 14

Establish Rapport/Rhythm

- Prompt with questions; Follow their train
- Ask clarifying questions
- Probe for details
- Worry about relevancy later
- Balance tracking and being open to new leads
- Be comfortable with silence

Slide 15

Credibility Assessments

- Is the witness's narrative logical?
- Is there a motive to falsify? (bias, interest, other motive)
- Is there a witness or other evidence to corroborate?
- Is there evidence that is inconsistent with the interview statement?
 - How major or minor are the inconsistencies
 - Is there a reasonable explanation for the inconsistencies?
- Is there continuing harassing behavior?
- Does either party have a pattern of past similar behavior?

- Was the witness in the best position to perceive matters about which they testified?
- Did the person seem to be telling the truth: why or why not?
- Consider the impact of trauma?

Slide 16

Asking Hard Questions

- Preface hard questions
- Break them down
- Avoid questions implying judgment: "Why?"
- Focus on details
 - Senses
 - What were they thinking
 - How did they feel
 - Facts, not explanation
- Reestablish witness agency

Slide 17

Motive

- You may consider whether a witness had, or did not have, a motive to lie.
- If a witness had a motive to lie, you may consider whether and to what extent, if any, that motive affected the truthfulness of that witness's testimony.
- If a witness did not have a motive to lie, you may consider that as well in evaluating the witness's truthfulness.

Slide 18

Preponderance of the Evidence

- What are the elements to establish a violation?
 - Sexual contact/conduct
 - Welcome/unwelcome or consent/unconsented
 - Differences for hostile environment
 - Other discrimination
- As to each element
 - Balance of probabilities
 - More likely than not

Slide 19

Matters of Evidence

- Preponderance of the evidence is determined by the superior weight of all the evidence
 - This is not necessarily determined by a greater number of witnesses
 - Consider quality of the evidence
 - Consider opportunity for knowledge, information possessed
 - Consider credibility (with caution)

Slide 20

Types of Evidence

- Direct
 - Based on personal knowledge or observation, that if true, proves a fact without inference or presumption.
- Circumstantial
 - Based on inference and not on personal knowledge or observation.
- Corroborating
 - Evidence that differs from but strengthens or confirms what other evidence shows.

Slide 21

Alcohol and Drugs

- BAC
- Strength of Drink
- Weight, gender and food
- Rate of Consumption. Studies have shown that an adult male can metabolize one drink (1.5 oz. of 80 proof) in about 2 hours. 4 drinks in about 7 hours – resulting in BAC of 0.
- Medication
- Fatigue
- How does consumption of alcohol affect witness evidence?

Slide 22

Trauma Informed Interviews

- Consider that trauma might influence an individual's ability to recall an event or information about an event
- Trauma might influence how and when an individual recalls information about an event
- Be sure to offer interviewee the right to have a support person
- Calm and caring atmosphere; not rushed
- Address concerns first
- Organize interview
 - Safety concerns/assessment
 - Support measures
 - Evidence preservation

Slide 23

Trauma Informed Interviews

- Allow witness to begin where they feel comfortable and are able
- Avoid blaming, leading, implying doubt
- Focus on what witness recalls (before, during, after)

Slide 24

Documentation

- Notes
- Summary of Notes
- Inculpatory
- Exculpatory
- Irrelevant

Slide 25

Thank You!

Slide 26

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MODULE 6

Slide 1

NACUA Online Course Title IX Coordinator Training

Module 6: Practical Hearing Skills

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Slide 2

Welcome to Module 6: Practical Hearing Skills

- Pre-Hearing Conferences
- Procedural Elements
- Choosing Your Questions
- Deciding Relevancy
- Role of the Advisor and Support Person

Slide 3

Submodule 1

Is it helpful to have a pre-hearing conference?

Slide 4

2020 vs. 2024

- 2020 regulations – live hearing required
- 2024 regulations – live hearing not always required

My take: pre-hearing conferences are best used for procedures where the parties will be in the same physical or electronic location at the same time for questioning.

Slide 5

Pre-Hearing Conferences

- These are not required under any version of the Title IX regulations.
- These are not prohibited under any version of the Title IX regulations.
- Pre-hearing conferences are generally held to ensure the parties (and their advisors) understand the purpose of the hearing, their rights and responsibilities, the order of the hearing, decorum expectations, and other procedural details.
- Pre-hearing conferences also allow the decision maker to get more information about witnesses and any evidentiary issues.

Slide 6

Why Hold Them?

- Keep the emotional temperature turned down.
- Answer procedural questions of the parties/advisors.

- Get a preview of what to expect at the hearing in terms of concerns the parties/advisors may have.
- Get witness lists and discuss hearing dates.
- Begin building rapport with the parties so they feel comfortable answering your questions.
- Typically makes for more efficient hearing.

Slide 7

Who Comes?

- Multiple models
 - One big conference
 - Two conferences – one for each party
- Who runs them?
 - Title IX Coordinator or Hearing Coordinator
 - Decision Maker
- Can you require a party and/or advisor to participate in a pre-hearing conference?

Slide 8

To-Do List (1 of 2)

- Explain the nature of a pre-hearing conference
- Outline the goals of the hearing
- Explain roles of attendees at the hearing and determine identities of who will attend
- Discuss logistics (e.g. using Zoom, breaks)
- No contact orders vs. Protection orders
- Discuss prohibited questions and relevancy

Slide 9

To-Do List (2 of 2)

- Outline the order of the hearing
- Effect of decision not to participate
- Witnesses to be called
- Evidentiary questions to be considered prior to hearing
- Answer any procedural questions they may have

Slide 10

Submodule 2

What procedural elements are helpful at a hearing?

Slide 11

In-Person Hearing Preparation

- Where will the parties wait before the hearing begins?
- Will they have different spaces for the hearing?
 - Do you need to define which doors they will use to enter/exit?

- Where will they go for breaks to confer with their advisor and support person?
- Where will the witnesses wait?
- How will we ensure that witnesses do not speak with each other?
- Do you need security present?

Slide 12

Virtual Hearing Preparation

- Ensure that parties, advisors, and witnesses cannot automatically enter the hearing without being admitted
- Admit hearing administrators first
- Tech check
 - Admit one party, advisor, and support person
 - Do tech checks to make sure everyone can see and hear
 - Put party, advisor, and support person in break out room for just them
 - Repeat for the other party, advisor, and support person
- Bring everyone together to begin the hearing

Slide 13

Are these in your policy?

- Opening statements
- Questioning of own party
- Closing statements

Slide 14

Scripts

- Scripts are incredibly important
- They ensure you miss nothing, and that you are using policy language to reflect the hearing procedures
- Does your institution already have one?
- Put right at the top: a reminder to turn on the recording!

Slide 15

Welcome

- Date and time the hearing is starting
- Your name and role
- Case number, if applicable
- Introduce the other people in the room
- Ensure there is no one else in the room (if attendees are virtual)

Slide 16

Role of Decision Maker

- Maintain an orderly, respectful, and fair hearing
- Maintain control and ensure efficiency
- Respond to disruptive behaviors, including removal of individuals
- Make relevancy determinations

- Question the parties and witnesses
- Make a decision using the appropriate standard of evidence

Slide 17

Advisor Expectations and Decorum

- Remind parties and advisors of behavioral expectations
- Explain the procedure for requesting a break to hold discussions
- If virtual, encourage the parties not to use the software chat to communicate
- If parties are not in the same location as the advisor, outline what is and is not acceptable communication (and when it is not OK)
- What if they have an objection?
- Support persons have no active role

Slide 18

Rights

- Notice
- Access to files
- Request witnesses
- Not to participate (explain consequences, if any, for not participating)
- To challenge the Decision Maker for cause
- To submit questions or have an advisor ask questions, depending on the procedures being used
- To file an appeal of the decision

Slide 19

Responsibilities

- Protect the integrity and confidentiality of the hearing
- Provide truthful information to the extent they choose to answer questions
 - Failure to provide truthful information will be subject to discipline
- Communicate in a respectful manner
- Abide by the directions of the Decision Maker

Slide 20

Allegations

- Read allegations into the record
- Note which provisions of the policy may have been violated if these allegations are true
- Some institutions ask Respondent if they accept responsibility for the allegations
 - If they choose to do so, prepare a colloquy to ensure they understand the impact of doing so

Slide 21

Timing of the Hearing

- Are both parties planning to answer questions?

- Which witnesses have indicated they will attend, and when will they arrive?
- Which witnesses have declined?
- Which witnesses have failed to respond?

Slide 22

Opening Statement?

- These are not required by the regulations.
- Institutions who allow them typically require them to be given by the parties themselves, not the advisors.

Slide 23

Order of Questioning (1 of 2)

- There is no regulatory requirement as to the order of questioning.
- At a typical hearing, most choose this order:
 - Complainant
 - Respondent
 - Witnesses according to availability

Slide 24

Order of Questioning (2 of 2)

- Encourage parties to be flexible. Their testimony may get delayed or interrupted to accommodate witness availability.
- If a Respondent does not participate in the investigation, consider having them testify first so that their story is present in the record before the Complainant is questioned.

Slide 25

Who asks first?

- When advisors are asking the questions, the regulations do not provide who goes first.
 - Decision Maker could go first, to set a neutral tone.
 - Advisors could go first, to ensure they can ask all the questions they want.
 - There are no right or wrong answers, but be consistent.
 - Which order do you want the advisors to go in?
- When the Decision Maker asks all the questions, consider having them ask their own questions before the parties submit questions, to improve efficiency.

Slide 26

When Questioning Starts

- Is their testimony voluntary?
- Do they understand they can choose to answer some, all, or none of the questions posed to them?
- Have they been pressured or coerced into participating?
- Do they understand that to the extent they choose to answer questions, they will be subject to disciplinary action for failure to provide truthful information?

- To witnesses: Is anyone else present in the room with them? Are they recording or livestreaming the hearing?

Slide 27

Closing Statement?

- These are not required by the regulations.
- Institutions who allow them typically require them to be given by the parties themselves, not the advisors.

Slide 28

Conclusion

- Thank everyone for their participation
- Remind about no retaliation
- Remind about the continued availability of supportive measures
- If there is a no contact order, it continues until further notice
- When can they expect the decision?

Slide 29

Transcripts

- Decision Maker will need access to the recording or to the transcript in order to properly cite evidence obtained at the hearing. Which is right for you?
 - Public records?
 - Time to review recording versus review transcript?
 - Appeals officer time to review recording versus transcript?

Slide 30

Submodule 3

How do I decide what questions to ask?

Slide 31

Disputed vs. Undisputed Facts

Undisputed Facts

- What do the parties agree on?
- What does the objective evidence demonstrate?

Disputed Facts

- What key facts do the parties disagree about?
- Do they go to credibility, facts, or both?

Slide 32

Pieces and Parts

- Focus on your disputed facts!
- What facts are necessary to resolve to determine whether each element of the alleged prohibited conduct is met?
- What facts are necessary to resolve because they are key credibility issues?

- What information do you need to ask about to make a determination, using the appropriate standard of evidence, as to whether each of these facts occur?

Slide 33

Don't Skip Consent Questions

- Consent often requires a very nuanced consideration of both verbal and non-verbal communication and actions
- It is difficult to be asked nuanced questions, so we ask carefully and frame our questions to be respectful of the individuals we are questioning
- If we don't ask the difficult questions, how can we conduct a full, robust analysis and ensure we are using the best evidence to reach decisions?

Slide 34

Consent Questions: Examples (1 of 2)

- Where were they touching your body at that moment?
- Where was their body weight? Where was yours?
- How did you transition from that position to this other position?
- How did that person transition between these positions?
- You indicated that they removed your clothing. Do you recall how they did that?
- How did you respond to that, if at all? Did you say anything? Did you move in any way?

Slide 35

Consent Questions: Examples (2 of 2)

- How did you know that they were "into it" (reflecting back whatever phrase they had used)?
 - Did they say anything in that moment?
 - Did they make any noises?
 - Did they move their body in any way?
 - Did they help you in any way?
- Did you kiss them back?
- How did the situation transition from conversation to sexual contact?

Slide 36

Impact Matters

- The impact of a respondent's conduct may be an element of the prohibited conduct (e.g. hostile environment, stalking)
- The impact on a respondent is not an element of prohibited conduct (unless they are also a complainant...)
- All parties and witnesses may have impact information
- Help the parties understand that when you ask about impact, this is because it is part of the required analysis – not because you are more sympathetic to the complainant

Slide 37

Difficult Questions

- "Help me understand" - use to evaluate evidence that appears to conflict
 - You told the police X, but you told the investigators "not X" - can you help me understand what is correct?
 - You told the investigators X, but in the text message, you say Y – can you help me understand why that is?
 - You told the police ABC, the investigators BCD, and your best friend ACE. Can you help me understand the reasons why these statements differed?

Slide 38

Tricky Questions

- "Why did you do that?"
- "Why didn't you do that?"
- "What were you thinking?"
- "What is the reason you asked for a break?"
- "Why did you refuse to answer that question?"

Slide 39

Remember

- Your "gut feeling" isn't evidence, but can help point you to areas where you need to ask more questions.
- Under all versions of the regulations, the institution has the burden to gather the best evidence, and your Decision Maker has the last opportunity to do so.
- If they don't ask, the answer never gets included.
- Ask the questions!

Slide 40

Submodule 4

How do I decide which questions are relevant?

Slide 41

Strategy

- Is the question impermissible? If yes, then do not permit question.
- Is the question relevant?
 - Relating to the allegation of misconduct?
 - Relating to the context of the allegation?
 - Relating to credibility?

Slide 42

Impermissible Evidence

- Evidence protected under privilege, unless the person who holds the privilege has waived that privilege
- Medical and psychological records, unless the patient gives voluntary written consent for the inclusion of the records in the process
- "Rape shield" evidence – see next slides

Slide 43

2020 – Rape Shield Exclusion

- Questions and evidence about the *complainant's* sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about prior sexual behavior are 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).

Slide 44

2024 – Rape Shield Exclusion

- Evidence that relates to the *complainant's* sexual interests or prior sexual conduct, unless evidence about the complainant's prior sexual conduct is offered to prove that someone other than the respondent committed the alleged conduct or is evidence about specific incidents of the complainant's prior sexual conduct with the respondent that is offered to prove consent to the alleged sex-based harassment. The fact of prior consensual sexual conduct between the complainant and respondent does not by itself demonstrate or imply the complainant's consent to the alleged sex-based harassment or preclude determination that sex-based harassment occurred. 106.45(a)(7)(iii).

Slide 45

Definition of Relevance

- 2020 – No definition given
- 2024 - "Related to the allegations of sex discrimination under investigation as part of the grievance procedures under 106.45, and if applicable 106.6. Questions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred, and evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred."

Slide 46

Relevance is a Broad Concept

- Is it in the ballpark?
- When the evidence is more of a tailgate, balance hearing efficiency with making parties feel their evidence has been heard.

Slide 47

Hypothetical

- Complainant is alleging dating violence against Respondent.
- They have been dating for six months.
- One incident could also constitute sexual assault.

Slide 48

Example #1

- Respondent, why didn't you participate in an investigative interview and instead had your attorney write a letter on your behalf?

Slide 49

Example #2

- Complainant, have you ever had sex with Witness 1?

Slide 50

Example #2a

- Complainant, did you also have sex with Witness 1 on the evening in question?

Slide 51

More Examples

- When did you start dating?
- Where did you go to dinner on the evening in question?
- Have you ever heard of a person named Notta Witness?
- Is this the first Title IX claim you've had brought against you?

Slide 52

Relevancy Rulings

- In live cross hearings – my verbal ruling is the question mark on the end of the advisor's question
- In other hearings – relevancy rulings can be made before submitted questions are asked, and may be explained in "batches" by topic

Slide 53

Objection?

- There is no right to object, unless your policy grants that right
- Explain your relevancy determinations on the record
 - Consider more detailed written determinations where necessary (such as pattern evidence)
- It is easier to listen to something and reject it later, than to reject it now and never listen to it

Slide 54

Submodule 5

What is the role of the advisor and support person at the hearing?

Slide 55

Support Person

- They have no role at the hearing.
- They are a silent supportive presence.

Slide 56

Advisors

- Live hearing with cross examination – they ask questions

- They ask relevant, permissible questions that meet the decorum standards
- They do not otherwise speak for their party
- They do not answer questions for their party
- They can quietly provide advice to their party
- Other contexts – they have no speaking role unless your policy grants them one
 - They can quietly provide advice to their party

Slide 57

No Advisors?

- Where a live hearing with cross examination is held, the party must bring an advisor. If they do not, the institution must appoint one.
 - This is true even if the party does not wish to participate.
 - This is true even if the party does not wish to have an advisor.
- The presence of an advisor is not required, but is permitted, in every other hearing type.
- What if you strongly suspect that an advisor will not show up when they are required?

Slide 58

Advisor Behavior

- Remind them of your policy regarding "objections"
- Decision Maker is responsible for enforcing decorum
- Consider whether a warning is appropriate before removing an advisor
- If appropriate, remind them that there is no need to "preserve an argument for appeal" under the procedures

Slide 59

Questions?

Slide 60

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MODULE 7

Slide 1

NACUA Online Course Title IX Coordinator Training

Module 7: Writing a Decision

Bindu Jayne, Title IX Coordinator, Swarthmore College

Lucy France, General Counsel, University of Montana

Melissa Carleton, Partner and Higher Ed Co-Chair, Bricker Graydon LLP

Slide 2

Submodule 1

How do I make a decision?

Slide 3

Congratulations!

- The investigation is over.
- The hearing, if any, has been held.
- Now it's time to do the real work – deciding:
 - What happened?
 - Does what happened constitute a policy violation?

Slide 4

Know the File

- Read the investigative report
- Read all attachments/evidence gathered
- Read all interview transcripts (if any)
- Read all responses to evidence
- Read the hearing transcript or listen to the hearing
- Take amazing notes as you review
 - What is disputed/undisputed?
 - Where are there contradictions?
 - What sticks out at you as being particularly important?

Slide 5

Next, what do you need to decide?

- Look back to the allegations listed in the notice of investigation
- Break each down by element. Example:
 - Did the respondent touch complainant's private body part?
 - Did the respondent do so for sexual gratification?
 - Did the respondent do so without consent of the complainant?
 - [Was the complainant incapacitated?]
 - [Was consent voluntary in that it was not forced or coerced?]

- [Was the complainant otherwise capable of consenting (age, disability, etc.)?]
- What undisputed facts fit under each element?
- What is disputed that you must resolve before you can analyze each element?

Slide 6

For each disputed fact to resolve

- Do you have objective evidence on which to rely?
 - If so, does a party or witness contradict that evidence such that it affects their credibility?
- What weighs in favor of the fact having occurred?
- What weighs against the fact having occurred?

Slide 7

Standard of Evidence

- Most institutions use the preponderance of the evidence, which means "is it more likely than not"
- A few institutions use clear and convincing evidence, which generally means "is it highly probable"
- Check your policy language for specific definitions!
- Note that this standard is applied to determine both your facts and your conclusions
 - Example: Is it more likely than not that Complainant said the words, "No, stop?" during the encounter?
 - Example: Is it more likely than not that Respondent acted without Complainant's consent?

Slide 8

Weighing Opposing Information

- Details – Is one story more detailed than another?
- Corroboration – What can be corroborated by other evidence?
- Contradiction – What is contradicted by other evidence?
- Consistency – Has a party or witness been consistent over time?
- Credibility – Does the party or witness have a particular motive or bias?
 - Note: All parties have a motive to lie to "win," but that isn't usually particularly helpful in weighing information.
- Plausibility – Is the evidence possible?
- Reliability – Was the witness in the position to observe?

Slide 9

Demeanor

- Some individuals try to interpret non-verbal cues in relation to whether their information is trustworthy
- Non-verbal cues require the observer to assign values to those cues. Example:

- Lack of eye contact – Lying, deferential to authority, on the autism spectrum?
 - Fidgety – Lying, physically uncomfortable, naturally anxious, hyperactive?
- How confident are you in assigning your values to someone else's non-verbal behavior?

Slide 10

The Role of Trauma in Deciding

- Individuals may have difficulty recalling information due to trauma that happened prior to, during, or after the incident in question
- Trauma can help explain gaps in the information
 - So can the passage of time, lack of attention in the moment, lying, etc.
- Being traumatized is not an element of any policy violation
 - However, impact matters for hostile environment and stalking
 - Signs of trauma ≠ policy violation
 - No signs of trauma ≠ no policy violation
- What do you do in cases involving trauma? Keep listening!

Slide 11

Fact by Fact

- Determinations are made fact by fact, according to the standard of evidence
- Credibility is evaluated fact by fact, not necessarily human by human
 - Someone may not be credible (or may not be as credible) and still not be a liar
- If you are using preponderance of the evidence and your scale is at 50-50, the tie goes to the respondent

Slide 12

Analysis

- Once you have a list of:
 - Undisputed facts; and
 - Disputed facts that you have resolved
- Now you know what happened! Apply the facts as you have found them to the language in the policy.
 - Is every required element met according to your standard of evidence?
 - If yes – Policy violation
 - If even one is missing – No policy violation

Slide 13

Sanctioning

- Your institution may permit impact/mitigation statements from the parties – which you should review
- If there is a policy violation, check your policy to see who determines sanctions
 - Unionized employees may have a process in their collective bargaining agreement
- Potential sanctions should be listed in your policy

- Your institution likely has standard language for certain sanctions, which may be kept by your Title IX office, your student conduct office, your Provost's office, or HR, depending on the respondent's status

Slide 14

Sanctioning Factors

Check your policy for factors to consider, which often include:

- Prior disciplinary history
- How similar conduct has previously been sanctioned
- Nature and violence of the conduct at issue
- Impact on the community
- Whether the respondent has accepted responsibility
- Whether the misconduct involved violating a no contact order
- Other mitigating/aggravating circumstances

Slide 15

Remedies

If the Complainant requires additional assistance to remedy the effects of the policy violation, your decision should note that they are entitled to remedies.

Remedies are typically confidential to the Complainant, unless the Respondent has to know about them in order to implement them.

Slide 16

Most Important Things

- Consider only the information presented through the process
- Consider whether your opinion is free from bias:
 - For or against complainants or respondents generally
 - For or against a particular complainant or respondent
 - If the genders of the parties were altered, would that affect the outcome? (It shouldn't!)
- Reach decisions based on the evidence, not your "gut"
- Be able to articulate your reasons for each finding (because you're getting ready to write them out!)

Slide 17

Submodule 2

What must be included in a written decision?

Slide 18

2020 Regulations (1 of 2)

- Identification of the allegations potentially constituting sexual harassment as defined in 106.30
- A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties,

interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held

- Findings of fact supporting the determination
- Conclusions regarding the application of the recipient's code of conduct to the facts

Slide 19

2020 Regulations (2 of 2)

- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant
- The recipient's procedures and permissible bases for the complainant and respondent to appeal

Slide 20

2024 Regulations - 106.45

- Must notify the parties in writing of the determination whether sex discrimination occurred under Title IX or this part including the rationale for such determination, and the procedures and permissible bases for the complainant and respondent to appeal, if applicable

Slide 21

2024 Regulations - 106.46 (1 of 2)

- A description of the alleged sex-based harassment
- Information about the policies and procedures that the postsecondary institution used to evaluate the allegations
- The decisionmaker's evaluation of the relevant and not otherwise impermissible evidence and determination whether sex-based harassment occurred

Slide 22

2024 Regulations - 106.46 (2 of 2)

- When the decisionmaker finds that sex-based harassment occurred, any disciplinary sanctions the postsecondary institution will impose on the respondent, whether remedies other than the imposition of disciplinary sanctions will be provided by the postsecondary institution to the complainant, and, to the extent appropriate, other students identified by the postsecondary institution to be experiencing the effects of the sex-based harassment
- The procedures for the complainant and respondent to appeal

Slide 23

Submodule 3

What are the best practices for writing a decision?

Slide 24

Double Storytelling

- Tell the story of the incident(s)
- Tell the story of how you got to where you did

Slide 25

Connect the Dots

An image showing a linear arrow pointing right, overlaid with blocks from left to right reading, charges, policy, facts and analysis.

Slide 26

My Typical Practice

- Different institutions use different templates
- Let's talk about how I craft a decision when there is no template provided

Slide 27

Heading

- Confidential
- Institution
- Party names
- Date of decision
- My name/role

Slide 28

Introduction/Allegations

- Who are the parties and what are their roles
- When was the report received
- When was notice provided
- What were the allegations included in the notice
- If true, these allegations could constitute _____ in violation of the _____ Policy.

Slide 29

Procedural Steps

- Explain the history of the investigation
- Who was interviewed?
 - Who wasn't interviewed, and why?
- What evidence was gathered?
 - What wasn't gathered, and why?
- Were there any evidentiary disputes that need to be explained, such as relevancy?
- Are there any anomalies in the procedures that should be explained?
- "X did not participate, as is their right..."

Slide 30

Jurisdiction

- Explain why this matter fits under this policy

Slide 31

Applicable Policy Language

- Copy and paste excerpts straight from the policy at issue
- Use ellipses to indicate where you have removed language that is not relevant
- Remember to use the language that was in place at the time the conduct was alleged to have occurred

Slide 32

Findings of Fact

- Many different structural components can be used, depending on the facts of the case. Examples:
 - Undisputed facts (with citations)
 - Undisputed timeline (with citations)
 - Disputed facts broken down by segment of the incident
 - What did complainant say?
 - What did respondent say?
 - What did the witnesses say?
 - What does the evidence show?
- How do you weigh the evidence? Show your work!
- "The Decision Maker determines, by a preponderance of the evidence..."

Slide 33

Findings of Fact - Tips

- Use at least one citation for every sentence that presents evidence
- Consider explaining how your citations work (e.g. "Tr. 1 refers to Transcript of Day 1 of the Hearing")
- Don't forget to include findings about impact if it is an element of the policy provision you are considering
 - "Footnote: This decision focuses on the impact to the complainant because the decision maker is required to analyze the impact on the complainant to make a determination as to whether a policy violation occurred. The decision maker appreciates that this situation has also impacted respondent."
- For the most important evidence, copy it straight into the decision. Screenshots, transcript excerpts, etc.

Slide 34

Analysis

- Use the facts you have determined and apply your policy language
- You do not have to analyze things in order! It may make more sense to sequence the violations based on which elements overlap
- Make sure it is clear for each allegation that you are using your standard of evidence

Slide 35

Keep in Mind

- Complete
- Unambiguous
- Respectful
- Valued
- Empathetic
- Spelling/Grammar

Slide 36**Tone Check**

- Read it from the perspective of the complainant
- Read it from the perspective of the respondent
- Is your tone appropriately neutral?
- Will both parties feel heard?

Slide 37

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MODULE 8

Slide 1

NACUA Online Course Title IX Coordinator Training

Module 8: Title IX Training & Recordkeeping

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Melissa Carleton, Partner and Higher Ed Co-Chair, Bricker Graydon LLP

Slide 2

A graphic outlining the submodules in the course.

In the center is a circle labeled “Module 8: TIX Training & Recordkeeping.” Surrounding the center circle are smaller circles labeled “Submodule 1: Employee Training,” “Submodule 2: Specific Roles Requiring Add'l Training,” “Submodule 3: Recordkeeping,” and “Submodule 4: Other Training Req'ts related to TIX.”

Slide 3

Submodule 1

What training is required for employees under Title IX?

Slide 4

Employee Reporting Obligations (under 2024 Final Rule)

- Notify Title IX Coordinator
 - Any employee with authority to institute corrective measure on behalf of recipient
 - Any employee with responsibility for administrative leadership, teaching, or advising
- Notify Title IX Coordinator or Provide Reporting Information
 - All other employees who are not confidential employees

*Do not apply to an employee/student who has personally been subject to possible sexual discrimination.

Slide 5

Employee Reporting Obligations: Pregnancy or Related Conditions

§ 106.40

Notice requirement re: pregnancy or related conditions - when an employee learns of a student's pregnancy or related condition, the employee must provide the TIXC's contact info and inform them that the TIXC can coordinate specific actions to prevent sex discrimination and ensure student's equal access

Slide 6

Training Required for “All Employees”

- 2020 TIX Regulations
 - Nothing
- 2024 TIX Regulations
 - School's obligation to address sex discrimination in education program or activity
 - The scope of conduct that constitutes sex discrimination, including sex-based harassment
 - Notification requirements re: student pregnancy
 - Notification requirements re: sex discrimination

Slide 7

Employee Training

"All Employees" Training Requirements

- School's obligation to address sex discrimination in education program or activity
- The scope of conduct that constitutes sex discrimination, including sex-based harassment
- Notification requirements re: student pregnancy
- Notification requirements re: sex discrimination

§ 106.8(d)(1)

Slide 8

Frequency of Training

- "Promptly upon hiring" AND
- "Change in position that alters duties under Title IX" AND
- "Annually thereafter"

Slide 9

Logistical Tips & Considerations

- Are there times of the year when all employees are in one place? (or all staff? or all faculty?)
- How will you know when a person is hired or changes roles?
- How are you tracking?
- Should all employees be trained on documenting oral complaints?

Slide 10

Submodule 2

What specific roles require additional training?

Slide 11

Specific Roles

- Investigators
- Decisionmakers
- "Other persons who are responsible for implementing the recipient's grievance procedures..."

- “Other persons who... have the authority to modify or terminate supportive measures”
- Facilitators of informal resolution process
- Title IX coordinators and designees

§ 106.8(d)(2)- (4)

Slide 12

Specific Roles

- Investigators
- Decisionmakers
- “Other persons who are responsible for implementing the recipient’s grievance procedures...”
- “Other persons who... have the authority to modify or terminate supportive measures”
- Facilitators of informal resolution process
- Title IX coordinators and designees

§ 106.8(d)(2)

Slide 13

Training Topics - §106.8(d)(2)

- All of the “all employees” topics
- Obligations under §106.44 (notice and response requirements; supportive measures; informal resolution)
- Grievance procedures under §106.45 and §106.46 (if applicable)
- How to serve impartially, including by avoiding prejudgment of the facts at issue, COI, and bias
- meaning and application of term “relevant” and impermissible evidence

Slide 14

Specific Roles

- Investigators
- Decisionmakers
- “Other persons who are responsible for implementing the recipient’s grievance procedures...”
- “Other persons who... have the authority to modify or terminate supportive measures”
- Facilitators of informal resolution process
- Title IX coordinators and designees

§ 106.8(d)(3)

Slide 15

Training Topics - §106.8(d)(3)

- All of the “all employees” topics
- Rules and practices of the school’s informal resolution process
- How to serve impartially, including by avoiding conflicts of interest and bias

Slide 16

Specific Roles

- Investigators
- Decisionmakers
- “Other persons who are responsible for implementing the recipient’s grievance procedures...”
- “Other persons who... have the authority to modify or terminate supportive measures”
- Facilitators of informal resolution process
- Title IX coordinators and designees

§ 106.8(d)(4)

Slide 17

Training Topics - §106.8(d)(4)

- All of the “all employees” topics
- All of the investigators/decisionmakers/others responsible for grievance procedures and supportive measures topics
- All of the informal resolution facilitators topics
- TIXC responsibilities
- Responses to students experiencing pregnancy or related conditions
- TIXC response obligations
- Supportive measures implementation process
- Recordkeeping system
- “Any other training necessary to coordinate the recipient’s compliance with Title IX”

Slide 18

Training Requirements

- For All Employees:
 - “All Employees” Req’ts
- For Investigators, Decisionmakers, Appellate Reviewers, Anyone implementing grievance process or providing / terminating supportive measures:
 - “All Employees” Req’ts
 - School’s Grievance Process
 - How to Serve Impartially
 - Meaning & Application of the Term “Relevant”
- Informal Resolution Facilitators
 - “All Employees” Req’ts
 - How to Serve Impartially
 - School’s Informal Resolution Process
- TIX Coordinators and Designees
 - “All Employees” Req’ts
 - School’s Grievance Process
 - How to Serve Impartially

- Meaning & Application of the Term “Relevant”
- School’s Informal Resolution Process
- TIXC Duties & Obligations
- School’s Record Keeping System & Req’ts
- Training Req’ts

Slide 19

Submodule 3

What do I need to know about recordkeeping?

Slide 20

General Recordkeeping Requirement

- Records must be kept for a period of at least seven years.
- Considerations:
 - Paper or electronic files?
 - Succession planning?
 - Case management system?

Slide 21

What records do you need to keep?

For each COMPLAINT of sex discrimination:

2024 TITLE IX FINAL RULE

- records documenting the informal resolution process or
- records documenting the grievance procedures.
- records documenting the resulting outcome.

2020 TITLE IX REGULATIONS

- records of investigations, incl. determinations, any audio/AV recordings or transcript, sanctions, and remedies
- Any appeal and its result
- Any informal resolution and its result

Slide 22

What records do you need to keep?

For each NOTIFICATION the TIXC receives of conduct that could reasonably constitute sex discrimination:

2024 TITLE IX FINAL RULE

- records documenting the actions taken to meet the school’s response obligations.

2020 TITLE IX REGULATIONS

- records of any actions taken in response to a report, incl. supportive measures.
- document basis for conclusion that response was not deliberately indifferent.

- if SMs not provided, document why response was not clearly unreasonable in light of known circumstances.

Slide 23

What records do you need to keep?

Training Materials

2024 TITLE IX FINAL RULE

- All materials used to provide training to “all employees” and the specific roles.
- Training materials must be available upon request for inspection by members of the public.

2020 TITLE IX REGULATIONS

- All materials used to train TIXCs, investigators, decisionmakers, and IR facilitators.
- Training materials must be publicly available on its website.

Slide 24

What records do you NOT need to keep?

- Notable change between the NPRM and the 2024 Title IX Final Rule:
 - Recordkeeping requirement does NOT apply to records re: pregnancy or related conditions that demonstrate that the school has met its obligations to provide reasonable modifications to students and lactation time/space to students and employees.

Slide 25

Submodule 4

Are there other training obligations I should be considering?

Slide 26

YES

Slide 27

Clery Act/ VAWA Amendments

- Officials involved in disciplinary proceedings must receive training on “issues related to dating violence, domestic violence, sexual assault, and stalking and on how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability.”
- Training must be provided annually.

34 C.F.R. § 668.46(k)(2)(ii)

Slide 28

Clery Act/ VAWA Amendments

- An institution’s Annual Security Report must include a statement of policy that addresses primary prevention and awareness programs directed at incoming students and new employees.

34 C.F.R. § 668.46(j)(1)(i)

Slide 29

Clery Act/ VAWA Amendments

- An institution's Annual Security Report must also include a statement of policy that addresses ongoing prevention and awareness campaigns directed at students and employees.

34 C.F.R. § 668.46(j)(1)(ii)

Slide 30

NCAA Policy on Campus Sexual Violence

- Annually the President, Director of Athletics, and TIXC must attest to (among other things) the following:
 - 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.

Slide 31

Other Places You May Find Training Requirements

- State laws
- Research Funding Contracts
- Accreditation Requirements
- Grants

Slide 32

Thank you!

Slide 33

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MODULE 9

Slide 1

NACUA Online Course Title IX Coordinator Training

Module 9: Pregnancy and Parenting

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Slide 2

Pregnancy and Parenting: Submodules

- What do the Title IX regulations say about “pregnancy or related conditions”?
- How does the reasonable modification process work?
- What other statutes should I be aware of related to pregnancy or parenting?

Slide 3

Submodule 1

What do the 2024 Title IX regulations say about “pregnancy or related conditions”?

Slide 4

Pregnancy or Related Conditions

§ 106.2

Pregnancy or related conditions means:

- Pregnancy, childbirth, termination of pregnancy, or lactation;
- Medical conditions related to [above]; or
- Recovery from [above].

Slide 5

Topic Areas

Sex Discrimination

Admissions and Employment

Notice and Response re: Students

Reasonable Modifications

Lactation Space

Slide 6

Sex Discrimination

§ 106.10

Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.

§ 106.40(b)(1)

A recipient must not discriminate in its education program or activity against any student based on the student's current, potential, or past pregnancy or related conditions.

§ 106.57(b)

A recipient must not discriminate against any employee or applicant for employment on the basis of current, potential or past pregnancy or related conditions.

Slide 7

Pregnancy or Related Conditions

§ 106.21 – ADMISSIONS

- Treat pregnancy or related conditions the same as it treats a temporary disability or physical condition under the same policies
- Must not adopt any policy, practice, or procedure concerning the current, past, future, or potential parental, family or marital status that treats persons differently on basis of sex
- Must not make pre-admission inquiry into marital status (including Miss/Mrs. designation)

§ 106.57 - EMPLOYMENT

- Cannot discriminate against employees/applicants for employment on basis of current, potential, or past pregnancy or related conditions
- Comparable treatment to other temporary medical conditions
- Voluntary leaves of absence
- Access to lactation time and space

Slide 8

Notice and Response: Receiving Notice

§ 106.40

Notice requirement re: pregnancy or related conditions - when an employee learns of a student's pregnancy or related condition, the employee must provide the TIXC's contact info and inform them that the TIXC can coordinate specific actions to prevent sex discrimination and ensure student's equal access

Slide 9

Notice and Response: Responding (1 of 2)

§ 106.40

After receiving notice, a TIXC must:

- Notify the student of the school's obligations re: pregnancy and related conditions and provide school's notice of nondiscrimination
- Allow voluntary access to separate and comparable portion of program or activity
- Allow voluntary leave of absence (and reinstate to same academic/extracurricular status as pre-leave)

Slide 10

Notice and Response: Responding (2 of 2)

§ 106.40

After receiving notice, a TIXC must:

- Comparable treatment to other temporary medical conditions
- Very limited situations where a certification to participate is permissible
- Provide the student with voluntary reasonable modifications to policies/practices/procedures
- Ensure availability of lactation space

Slide 11

Lactation Space

§ 106.40(b)(3)(v)

- Must ensure access; must be a space other than a bathroom that is clean, shielded from view, and free from intrusion of others
 - State or local laws may require more specific features, such as a chair, flat surface, electrical outlet, running water, or refrigerated storage
- Under TIX, Institutions have discretion on size, number, and administration of lactation spaces
 - But consider "access" after typical business hours
- No supporting documentation required!

Slide 12

Pregnancy and Parenting: Submodules

- ✓ 1. What do the Title IX regulations say about “pregnancy or related conditions”?
- 2. How does the reasonable modification process work?
- 3. What other statutes should I be aware of related to pregnancy or parenting?

Slide 13

Stay Tuned for submodules 2 and 3!

Slide 14

Submodule 2

How does the reasonable modification process work?

Slide 15

Topics

Walk through of the reasonable modification process

Common areas for requests

Comparison to other “reasonable accommodation” processes

Slide 16

Reasonable Modifications

§ 106.40(b)(3)(ii)(A)

"a recipient must make reasonable modifications to its policies, practices, or procedures as necessary to prevent sex discrimination and ensure equal access to the recipient's education program or activity; that each modification must be based on a student's individualized needs; that the recipient must consult with the student when determining what modifications are required; and that a modification that a recipient can demonstrate would fundamentally alter the nature of its education program or activity is not a reasonable modification."

- If a student accepts the offered modification, it must be implemented. (§ 106.40)(b)(3)(ii)(B))

Slide 17

Reasonable Modifications

§ 106.40(b)(3)(ii)(C)

Examples of reasonable modifications:

- breaks to express breast milk;
- breaks to attend to pregnancy-related health needs and eat, drink, use restroom
- intermittent absences to attend medical appts
- changes in physical space
- elevator access
- access to online/homebound education
- changes in schedule/course sequence
- extensions; rescheduling exams
- allowing to sit/stand
- counseling

Slide 18

Reasonable Modifications

Supporting documentation

A recipient must not require supporting documentation under §106.40(b)(3) unless the documentation is necessary and reasonable to determine the reasonable modifications. (89 FR 33789-90)

Delegation/ Collaboration with Disability Services

TIXC can delegate but must maintain ultimate oversight of this process. A recipient may delegate to personnel to perform the duties, including to those who support persons with disabilities. (89 FR 33778)

Slide 19

2024 TIX Regs: Reasonable Modification Process

1. TIXC receives notice
 - a. Remember employee just needs to provide TIXC contact information to student experiencing pregnancy or related conditions.
2. Initial meeting between TIXC and student

- a. Meeting offered to discuss student's requests, options for addressing any concerns, and resources for student. Focus on the student's expressed individualized needs.
3. Evaluate modification requests
 - a. This will likely require communications with the home unit/department. Consider if and what documentation is necessary. Assess whether a fundamental alteration.
4. Offer reasonable mod based on student's individualized needs
 - a. School can offer a single option, select options, or a range - as long as they are based on student's individualized needs.
5. Implement IF accepted by student
 - a. Student retains ultimate decision of whether to suggest an alternative, accept the offered modification, or maintain status quo.

Slide 20

Common Requests for Modifications

- excused absences for appts
- remote learning option
- rescheduling exams because of pregnancy-related absences
- periodic breaks to move, express milk, use restroom
- remaining in program while on bedrest
- clinical student requests to miss portions of their clinical rotation
- clinical instructors concerned about their pregnant students' ability to engage in physical tasks (or be exposed to chemicals)

Slide 21

Reasonable Modifications under Title IX

§ 106.40(b)(3)(ii)(A)

- applies to students experiencing pregnancy or related conditions
- limited documentation permitted
- threshold: "fundamentally alter the nature of its education program or activity"

Slide 22

Reasonable Accommodations under PWFA

29 CFR 1636

- applies to qualified applicants or employees who have known "limitations."
 - limitations: physical or medical conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions.
- once employer is notified; engage in interactive process
- limited documentation permitted
- threshold: "undue hardship"

Slide 23

Reasonable Accommodations under ADA/504

89 FR 31320

- applies to qualified individuals with a disability
- supporting documentation regarding the nature of the disability and the requested accommodation is permissible
- interactive process required
- threshold: undue hardship

Slide 24

Train, train, and train some more.

Slide 25

Stay tuned for submodule 3!

Slide 26

Submodule 3

What other statutes should I be aware of related to pregnancy or parenting?

Slide 27

Pregnancy and Parenting: Submodules

- ✓1. What do the Title IX regulations say about “pregnancy or related conditions”?
- ✓2. How does the reasonable modification process work?
- 3. What other statutes should I be aware of related to pregnancy or parenting?

Slide 28

There’s more?!

TITLE IX ✓

ADA/ 504

TITLE VII/ PREGNANCY DISCRIMINATION ACT

EEOC/ PREGNANT WORKERS FAIRNESS ACT

FLSA / PUMP ACT

FMLA

Slide 29

Disability Law: ADA/504

- The ADA and Section 504 will apply where a pregnancy or childbirth-related concern substantially limits one or more major life activities (walking, sitting, standing, etc.)
- When this is the case, engage in the interactive process to determine whether the accommodations requested by the employee are reasonable.

Remember ... A healthy pregnancy is *not* a disability.

Slide 30

Pregnancy Discrimination Act

- The PDA amended Title VII of the Civil Rights Act of 1964 to make employment discrimination on the basis of pregnancy, childbirth or related medical conditions constitute sex discrimination under Title VII.

- People who are pregnant or affected by pregnancy-related conditions must be treated in the same manner in all terms and conditions of employment as other applicants or employees with similar abilities or limitations.

Slide 31

Pregnancy Discrimination Act

- Practical reminders:
 - employers must permit a pregnant employee to do the job for as long as the employee is capable
 - if you are providing temporary assistance to non-pregnant employees, plan on doing the same for pregnant employees
 - if a pregnant employee goes on leave, they are entitled to the return and accrual rights of other employees that go on leave

Slide 32

Pregnant Workers' Fairness Act

- The PWFA requires all private and public sector employers with at least 15 employees, to make reasonable accommodations for known limitations related to the pregnancy, childbirth, or related medical condition of a job applicant or employee, unless doing so would impose an undue hardship.
- "Pregnancy, childbirth or related medical conditions" includes vaginal and Cesarean deliveries, miscarriage, abortion, postpartum depression, edema, placenta previa, and lactation

Slide 33

Pregnant Workers' Fairness Act

- Reasonable accommodations may include-- flexible breaks; changing equipment/uniform; changing work schedules; telework; temporary reassignment; leave for health care appointments; temporary suspension of one or more essential functions of the job; leave for healthcare appointments; leave to recover from childbirth/other medical condition related to pregnancy/childbirth
- Employer is not required to seek medical documentation and should only do so when it is "reasonable under the circumstances"

Slide 34

Providing Urgent Maternal Protections for Nursing Mothers (PUMP) Act

- Expands FLSA
- Provides covered employees who are nursing with reasonable break time to express milk for up to one year after the child's birth
- Requires employers to provide a space other than a bathroom, that is shielded from view, and free from intrusion to express breast milk.
- Applies to exempt & non-exempt employees
- Applies regardless of work site, including telework

Slide 35

Family Medical Leave Act (FMLA)

- If the employee is eligible for FMLA leave, they may take up to 12 work weeks in a 12-month period for:
 - birth/adoption (even if no serious health condition)
 - to care for a spouse, child, or parent with a serious health condition
 - for a serious health condition that makes the employee unable to perform the essential functions of the job

Slide 36

General Takeaways

- educate your faculty/supervisors to consult with TIXC when they are informed of a student/colleague who is experiencing pregnancy or a related condition and is seeking some changes to their work/school arrangements
- when on notice that a student or employee is experiencing pregnancy or a related condition and needs some adjustments made, make sure you understand the underlying needs
- the decision to take or leave an accommodation/modification is the individual's (not the institution's)

Slide 37

Pregnancy and Parenting: Submodules

- ✓1. What do the Title IX regulations say about “pregnancy or related conditions”?
- ✓2. How does the reasonable modification process work?
- ✓3. What other statutes should I be aware of related to pregnancy or parenting?

Slide 38

Thank you!

Slide 39

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MODULE 10

Slide 1

NACUA Online Course Title IX Coordinator Training

Module 10: Athletics

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Slide 2

Submodule 1

What is the requirement for equity in athletics, and how does the Department of Education determine if an institution is compliant?

Slide 3

34 CFR 106.41

- This is the primary regulation that governs equity in athletics
- 2020 and 2024 regulations are substantively the same
 - 2024 regulations deleted paragraph (d), which provided a three-year transition period to comply with the regulation, which lapsed decades ago
- The U.S. Department of Education has issued guidance and many resolution agreements that help understand how they enforce this regulation

Slide 4

34 CFR 106.41(a)

(a) *General*. No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

Slide 5

34 CFR 106.41(b)

(b) *Separate teams*. Notwithstanding the requirements of paragraph (a) of this section, a recipient **may** operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

Slide 6

34 CFR 106.41(c)

(c) *Equal opportunity*. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

Slide 7

34 CFR 106.41(c) Factors (1 of 2)

- (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- (2) The provision of equipment and supplies;
- (3) Scheduling of games and practice time;
- (4) Travel and per diem allowance;
- (5) Opportunity to receive coaching and academic tutoring;

Slide 8

34 CFR 106.41(c) Factors (2 of 2)

- (6) Assignment and compensation of coaches and tutors;
- (7) Provision of locker rooms, practice and competitive facilities;
- (8) Provision of medical and training facilities and services;
- (9) Provision of housing and dining facilities and services;
- (10) Publicity.

Slide 9

34 CFR 106.41(c) Expenditures

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 with this section, but 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.

Slide 10

How does OCR enforce equitable opportunities?

Three areas evaluated for compliance per 1979 policy interpretation:

- Participation opportunities (three-part test)
- Athletic scholarships
- Benefit and treatment areas

We will talk about each in the coming slides

Slide 11

Note about Boosters

- OCR will consider anything that a booster does to be an action of the institution itself for purposes of equity

- This requires your athletic staff to ensure all gifts are "over the table" for purposes of ensuring equity
- This requires your athletic and advancement staff to be prepared to explain Title IX requirements
- If the donor will not provide an equitable gift, can your institution make up the difference to maintain compliance?

Slide 12

Participation Opportunities – Key Guidance

- December 1979 Policy Interpretation "Three-Part Test"
- 1996 Clarification of Three-Part Test
- 2008 Guidance on Athletic Activities Counted
- 2010 Guidance on Part Three

Slide 13

Three-Part Test

- Know your numbers
- Know your history
- Know your students' interests

You only need to pass one part to be in compliance.

Slide 14

Three-Part Test: Part One

The number of male and female athletes is substantially proportionate to their respective enrollments.

"Know your numbers":

- How many students are enrolled?
- How many students are athletes?

Slide 15

Part One: Examples from OCR (1 of 2)

This Year (compliant):

- Enrolled: 52% Men; 48% Women
- Athletes: 52% Men; 48% Women

Next Year (compliant):

- Enrolled: 51% Men; 49% Women
- Athletes: 52% Men; 48% Women

Slide 16

Part One: Examples from OCR (2 of 2)

Big School (non-compliant):

- Enrolled: 48% Men; 52% Women

- Athletes: 53% Men; 47% Women

Little School (compliant):

- Enrolled: 51% Men; 49% Women
- Athletes: 52% Men; 48% Women

Slide 17

Three-Part Test: Part Two

Is there a history and continuing practice of program expansion for the underrepresented sex?

"Know your history"!

Slide 18

Part Two – Keep Your Chronology

- When did you add each team?
- When did you elevate each team?
- What did your numbers look like over the years?
- How have you responded when new teams were requested?
- Do you have a plan in place to monitor interest and expand opportunities?

Slide 19

Three-Part Test: Part Three

Is your institution fully and effectively accommodating the interests and abilities of the underrepresented sex?

"Know your student interest":

- Is there unmet interest in a particular sport?
- Is there sufficient ability to sustain a team?
- Is there a reasonable expectation of competition for the team?

Slide 20

Athletic Scholarships

Key resource: July 23, 1998 Dear Colleague Letter: Bowling Green State University

- "Title IX requires that such scholarships be made available to the separate men's and women's athletic programs in a manner which is 'substantially proportionate' to the participation rates of male and female athletes"
- Example: If 60% of athletes are men, the expectation is that 60% of the annual scholarship funding will be awarded to men (within 1% in either direction).
- They will consider legitimate nondiscriminatory reasons for a larger disparity.

Slide 21

Benefits and Treatment Areas

This focuses on the "laundry list" in 106.41.

December 1979 Policy Interpretation contains information on each of these key factors when comparing men to women.

Slide 22

Equipment and Services

- The quality of equipment and supplies
- The amount of equipment and supplies
- The suitability of equipment and supplies
- The maintenance and replacement of the equipment and supplies
- The availability of equipment and supplies

Slide 23

Scheduling of Games and Practice Times

- The number of competitive events per sport
- The number and length of practice opportunities
- The time of day competitive events are scheduled
- The time of day practice opportunities are scheduled
- The opportunities to engage in available pre-season and post-season competition

Slide 24

Travel and Per Diem Allowances

- Modes of transportation
- Housing furnished during travel
- Length of stay before and after competitive events
- Per diem allowances
- Dining arrangements

Slide 25

Opportunity to Receive Coaching and Academic Tutoring

- Coaching:
 - Relative availability of full-time coaches
 - Relative ability of part-time and assistant coaches
 - Relative availability of graduate assistants
- Academic tutoring:
 - The availability of tutoring
 - Procedures and criteria for obtaining tutorial assistance

Slide 26

Assignment and Compensation of Coaches and Tutors (1 of 2)

- Does the institution's compensation or assignment policies or practices deny male and female athletes coaching of equivalent quality, nature, or availability?
- Factors to consider: range and nature of duties, experience of individual coaches, number of participants for particular sports, number of assistant coaches supervised, and level of compensation

- "There may be unique situations in which a particular person may possess such an outstanding record of achievement as to justify an abnormally high salary"

Slide 27

Assignment and Compensation of Coaches

- Assignment of coaches – Training, experience, professional qualifications, and professional standing
- Compensation of coaches – Rate of compensation (per sport/season), duration of contracts, conditions relating to contract renewal, experience, nature of coaching duties performed, working conditions, other terms and conditions of employment

Slide 28

Assignment and Compensation of Tutors

- Assignment of tutors – Tutor qualifications, training, experience, and "other qualifications"
- Compensation of tutors: Hourly rate of payment by nature subjects tutored, pupil loads per tutoring season, tutor qualifications, experience, other terms and conditions of employment

Slide 29

Provision of Locker Rooms, Practice and Competitive Facilities

- Quality and availability of the facilities provided for practice and competitive events
- Exclusivity of use of facilities provided for practice and competitive events
- Availability of locker rooms
- Quality of locker rooms
- Maintenance of practice and competitive facilities
- Preparation of facilities for practice and competitive events

Slide 30

Provision of Medical and Training Facilities and Services

- Availability of medical personnel and assistance
- Health, accident and injury insurance coverage
- Availability and quality of weight and training facilities
- Availability and quality of conditioning facilities
- Availability and qualifications of athletic trainers

Slide 31

Provision of Housing and Dining Facilities

- Housing provided
- Special services as part of housing arrangements (e.g. laundry facilities, parking space, maid service)

Slide 32

Publicity

- Availability and quality of sports information personnel
- Access to other publicity resources for men's and women's programs
- Quantity and quality of publications and other promotional devices featuring men's and women's programs

Slide 33

Name, Image, and Likeness?

- There is considerable discussion about NIL agreements and how they may be analyzed through a Title IX equity lens
- Case law is developing as we speak!

Slide 34

Digging Into the Details

- Review the 1979 Policy Interpretation and other guidance to help dig into the details of each area
- Search for recent OCR resolution letters that demonstrate how they are currently enforcing complaints in these areas:
 - <https://ocrcas.ed.gov/ocr-search>

Slide 35

Starting the Conversation

- Ask your athletic director if you can check in about Title IX compliance to get a general sense of what has been done and what needs to be done
 - Have there been past OCR complaints? Are there any currently?
 - Has a gender equity study ever been performed? If so, can you have a copy of the latest one?
 - Which part of the three-part test does your institution rely on for compliance?
 - How can I help ensure that we are meeting the requirements?

Slide 36

Submodule 2

What considerations should be taken into account when adding or discontinuing athletic teams?

Slide 37

General Considerations

- How will the elimination of the team affect your compliance with each part of the three-part test?
 - Does it affect your numbers?
 - Even eliminating *both* a men's and women's team could put you out of compliance.
 - Does it affect your history by moving away from compliance, instead of towards it?

- Does it affect your students' interests by removing a sport where there is still significant interest?
- What impact does this have on the equity of scholarships and benefits?

Slide 38

Recent Litigation

- *Balow v. Michigan State University*, 620 F. Supp. 3d (W.D. Mich. Aug. 8, 2022)
 - University eliminated men's and women's swimming/diving programs; women's team members challenged under Title IX
 - Court applied three-part test
 - Eliminating the programs contributed to an imbalance in athletic participation opportunities that already existed
 - Court found an average participation gap of 31 opportunities for women over 8 years – larger than the smallest Big Ten women's swimming/diving team
 - University required to create Title IX compliance plan

Slide 39

Takeaways

- Before making decisions to eliminate teams for men or women or both, run your numbers
 - Are you compliant now?
 - Would you be compliant if you eliminate the team(s)?
 - Are you making a noncompliance issue worse?
- If you are challenged, you're going to have to create a compliance plan.
 - You should already be moving in this direction!

Slide 40

Submodule 3

What does the NCAA require in terms of handling sexual violence cases?

Slide 41

NCAA – Policy on Campus Sexual Violence

- This policy is regularly revised. The latest version is available at <https://www.ncaa.org/csvpolicy>.
- Member institutions must annually attest to their compliance with the NCAA.
 - Those that don't will be fined, and their names will be posted on the NCAA website.
- The policy requires the University Chancellor/President, the Director of Athletics, and the campus Title IX Coordinator to attest annually to certain statements.

Slide 42

Attestations (1 of 6)

- 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.

Slide 43

Attestations (2 of 6)

- 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.

Slide 44

Attestations (3 of 6)

- 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.

Slide 45

Attestations (4 of 6)

- 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. Transfer student-athletes also must disclose whether a Title IX proceeding was incomplete at the time of transfer. Failure to make a full and accurate disclosure could result in penalties, including loss of eligibility to participate in athletics as determined by the member institution.

Slide 46

Attestations (5 of 6)

- 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, all NCAA member institutions must share 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.

Slide 47

Attestations (6 of 6)

- An institution choosing to recruit an incoming student-athlete or accept a transfer student-athlete must have 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. Failure to have it written and to gather information consistent with that procedure could result in penalties.

Slide 48

Bonus requirement

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

Slide 49

Applies to...

- A person who has been disciplined through a Title IX proceeding or criminally convicted, 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: A term used to include both forcible and nonforcible sex offenses, ranging from sexual battery to rape.
 - Other Acts of Violence: Crimes including murder, manslaughter, aggravated assault or any assault that employs the use of a deadly weapon or causes serious bodily injury

Slide 50

Takeaways

- Check the current policy language each August
- Create your plan to ensure you can sign the attestations
- Deadline: First Friday of November each year

Slide 51

Submodule 4

What are some sticky issues relating to Title IX and athletics?

Slide 52

Hazing

- Hazing may also constitute prohibited conduct under your Title IX policy
- Title IX is a federal statute, whereas hazing is typically covered by state law
- Work with legal counsel to ensure compliance

Slide 53

Interim Suspensions

- Title IX does not permit disciplinary action to be taken against a respondent until the process has been completed
- Coaches may consider whether to suspend a player from the team due to Title IX charges

- Consult with counsel to determine whether such a suspension may violate Title IX obligations

Slide 54

Recruiting

- Does your institution have a process for determining whether to admit a student with a disciplinary record?
- Does your institution apply that process for students who have been found responsible for Title IX prohibited conduct?
- How does your institution evaluate risks to determine whether a student with a disciplinary record can safely join your campus community?
- Are coaches knowledgeable about that process when recruiting transfer students, and are they informing such students that the process will occur?

Slide 55

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