Association of
Title IX Administrators

Title IX Updates

Hosted by Northwestern Michigan College

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

CONTENT ADVISORY

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

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

PRINCIPLES OF EQUITY

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

JUSTICE
eliminates systemic barriers

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

EQUITY
acknowledges systemic impediments with targeted fixes

AGENCY
individuals know that access is their right

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

EQUITY REQUIREMENTS

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

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EQUITY REQUIREMENTS (CONT.)

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

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DUE PROCESS PROCEDURAL RIGHTS IN 2020 TITLE IX REGULATIONS

Right to:

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

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DUE PROCESS PROCEDURAL RIGHTS IN 2020 TITLE IX REGULATIONS (CONT.)

Right to:

- Written notice of allegations, as well as notice of the date, time, location, participants, and purpose of investigation interviews or other meetings, with sufficient time to prepare
- Inspect and review evidence and draft investigation report before finalized
- Right to argue for inclusion of "directly related" evidence at the hearing
- Ask relevant questions of the other party and witnesses through an Advisor, in the presence of the Decision-maker

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TITLE IX TEAM ROLES & RESPONSIBILITIES UNDER THE REGS

THE TITLE IX TEAM UNDER THE NEW REGS

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

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ROLE OF THE INVESTIGATOR

- Must be separate from Decision-Maker(s) or Appeals Officer(s); CAN be TIXC, if necessary
- Conduct reliable, prompt, fair, and impartial investigations
  - Work with TIXC to develop investigation strategy
  - Identify and interview parties and witnesses
  - Identify, organize, and compile relevant information
  - Maintain accurate and thorough investigation records and notes
  - Share the evidence with the parties and their Advisors
  - Provide notices to the parties (may be done in conjunction with TIXC)
- Create an investigation report that fairly summarizes relevant evidence

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ROLE OF THE DECISION-MAKER(S)

- Cannot be investigator or TIXC
- Determine whether institution's policy has been violated based upon the applicable standard of evidence
  - Decisions must be based upon an independent assessment of the evidence gathered during the investigation and/or provided during a hearing; credibility as well
  - Decisions must be based on the specific policy alleged to have been violated
  - Decisions must be impartial and free of substantive bias
- Determine appropriate sanctions/discipline
- Draft a written determination that outlines the rationale for the finding(s)

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ROLE OF THE APPEAL DECISION-MAKER

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

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ADVISOR OF CHOICE

An "Advisor of choice" may be anyone, including:

- You may establish ground rules for the participation of Advisors in all meetings
- If a party does not have an Advisor, the Investigator should inquire as to whether they would like one provided by the institution at no cost (higher ed. only)
  - Under the regulations, this will have to be done at the hearing, but it is recommended to appoint one at the outset of the process

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ROLE OF INSTITUTION-APPOINTED ADVISORS

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

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Remember:
You have no "side" other than the integrity of the process!

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WHEN DOES TITLE IX APPLY UNDER THE REGS?

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

"PROCESS A" OR "PROCESS B"?

- Due Process is at the heart of OCR's 2020 Title IX regulations. However, the Regulations effectively create two distinct processes for responding to sex-based discrimination. (see ATIXA's 1P2P model)
  - Limiting jurisdictional language and definitions of Sexual Harassment mean that "Process A" (Compliant with 34 C.F.R. ▲106.45) **only** applies when that language and those definitions are met.
  - If **any** of the allegations meet the definitions under 34 C.F.R. ▲106.30, then the "Process A" must be followed.

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"PROCESS A" OR "PROCESS B"? (CONT.)

- If **none** of the allegations meet the definitions or jurisdictional limitations under 34 C.F.R. ▲106.30, then you would follow "Process B," which meets the requirements of fundamental fairness or due process, but likely does not have some of the more prescriptive requirements of Section 106.45 (e.g., mandatory live hearing, cross-examination requirements, requirement for both parties to sign off on informal resolution)
- VAWA Section 304, state law, and case law in your jurisdiction will largely dictate your "Process B."

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GEBSER V. LAGO VISTA INDEP. SCHOOL

524 U.S. 274 (1998)

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

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

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DAVIS V. MONROE COUNTY BD. OF ED.
526 U.S. 629 (1999)

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

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

Additionally, court held:

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

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WHEN DOES TITLE IX APPLY?

- Regulations emphasize the *Davis* standard - Title IX applies, and jurisdiction is required, when the recipient has:
  - **Control over the harasser** (Respondent) AND **control over the context of the harassment**
  - "Education program or activity" means…
    - locations, events, or circumstances under substantial control
    - any building owned or controlled by an officially recognized student organization
  - At the time of filing a formal complaint, a Complainant must be participating in or attempting to participate in the Recipient's education program or activity.

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WHEN DOES TITLE IX APPLY?

Personal Jurisdiction (Cont.)

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

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WHEN DOES TITLE IX APPLY?

Covered Programs

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

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WHEN DOES TITLE IX APPLY?

Geographic Jurisdiction

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

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WHEN DOES TITLE IX APPLY?

Geographic Jurisdiction (Cont.)

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

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WHEN DOES TITLE IX APPLY?

Subject Matter

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

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WHEN DOES TITLE IX APPLY?

Subject Matter (Cont.)

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

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IF TIX JURISDICTION IS NOT PRESENT

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

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INITIAL ASSESSMENT UNDER THE REGS

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

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INITIAL ASSESSMENT

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

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

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NOTICE REQUIREMENTS PRIOR TO INVESTIGATION

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

- Notice of the resolution processess
- Detailed notice of the allegations with sufficient time to prepare a response before any initial interview, including:
  - Who
  - What
  - When
  - Where

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NOTICE TO THE INSTITUTION

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

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REPORT V. COMPLAINT

- **Distinguish between a "report" and a "formal complaint"**
- Upon receiving a **"report"** (either from the would-be Complainant or a third party):
  - Reach out and provide support.
  - Provide supportive and interim measures to the person alleged to have experienced the harassment. May also offer to would-be Respondent.
  - Explain (in writing) process to make a formal complaint.
- Upon receiving a "formal complaint:"
  - Conduct initial assessment to determine jurisdiction
  - Triggers obligation to follow "grievance process" including investigation and hearing

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FORMAL COMPLAINT

Formal Complaint

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

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REQUESTS FOR CONFIDENTIALITY

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

- The Complainant should be notified of the following:
  - The process will still be available to them anytime
  - The institution can provide resources and supportive measures
  - College may proceed if PPTVWM

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PPTVWM

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

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SUPPORTIVE MEASURES

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

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COMMON SUPPORTIVE MEASURES

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

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MANDATORY DISMISSAL OF A FORMAL COMPLAINT

The TIX Coordinator MUST dismiss the complaint at any time if the alleged conduct:

- Would not constitute sexual harassment as defined (five offenses in ▲106.30), even if proved
- Did not occur in the Recipient's education program or activity
- Did not occur against a person in the United States
- The Complainant is not participating or attempting to participate in Recipient's program at time of complaint

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DISCRETIONARY OR PERMISSIVE DISMISSAL OF A FORMAL COMPLAINT

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

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

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MANDATORY OR PERMISSIVE DISMISSAL OF A FORMAL COMPLAINT

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

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

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EMERGENCY REMOVAL

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

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

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EMPLOYEE ADMINISTRATIVE LEAVE

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

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THE INVESTIGATION REPORT AND EVIDENCE REVIEW

THE INVESTIGATION REPORT

- The investigation report is the one comprehensive document summarizing the investigation, including:
  - Results of interviews with parties and witnesses
  - Unbiased summary or compilation of other information collected
    - E.g., copies of texts, emails, and social networking messages; information from law enforcement; medical exams; video surveillance; photographs

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THE INVESTIGATION REPORT

- References or contains all applicable policies and procedures
- Provides timeline of investigation steps
- Describes the allegations
- Describes and includes evidence gathered, including statements and interviews
- Explains unsuccessful attempts to collect information and/or interview witnesses

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IMPORTANCE OF THE REPORT

- Decision process:
  - Investigator (through the TIXC) refers the investigation report to the Decision-maker(s) without determination
  - Investigator ≠ Decision-maker
- Report should highlight the relationships between different pieces of evidence
  - Contradictory, corroborating, (in)consistencies, etc.
  - Investigator's opinion is not controlling but should point the Decision-maker(s) toward decisive or corroborating evidence without telling them how to interpret it

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EVIDENCE AND REPORT REVIEW BY PARTIES PART 1

Prior to the completion of the investigation report:

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

Source: § 106.45(b)(5)(vi)

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PARTY ACCESS TO EVIDENCE/ REPORT

- Whether included as relevant in the investigation report or not, all such directly related evidence is subject to the parties' inspection and review and must be available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination

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EVIDENCE AND REPORT REVIEW BY PARTIES PART 2

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

- The final investigation report summarizing relevant evidence must be sent:
  - To each party and Advisor
  - In an electronic format or hard copy
  - For the parties' review and written response
- A separate file of all directly related evidence will also be shared (this evidence is excluded from the report)
- For K-12 schools without a hearing, this must occur 10 days prior to time of determination regarding responsibility

Source: § 106.45(b)(5)(vii) and § 106.45(b)(6)(ii)

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PREPARING FOR THE HEARING

MUST DO: PREP FOR THE HEARING

All Decision-Makers Must Review:

- Written Notice of Investigation and Allegations (NOIA)
- Policy (policies) alleged to have been violated
  - What does it take to establish a policy violation?
  - Identify the elements of each alleged offense
  - Break down the constituent elements of each relevant policy.
- All the materials carefully and thoroughly
- Review and re-review the investigation report

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MUST DO: PREP FOR THE HEARING (CONT.)

Decision-Makers Must Thoroughly Review All Materials:

- Recommend you review materials multiple times
  - Note all areas of consistency/undisputed information
    - Often does not require questions in hearing
  - Note all areas of inconsistency/disputed information
    - These should be the main focus of questioning
- Prepare questions in advance
  - Will have more questions arise, but be prepared going in, no matter how experienced you are

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PRE-HEARING MEETINGS

- Although not explicitly required or even mentioned in the Title IX regulations, the Chair or Decision-maker may conduct pre-hearing meetings for each party (in writing, or in person)
  - Answer questions about the hearing and its procedures
  - Clarify expectations regarding logistics, decorum, the role of Advisors, and technology
  - Discuss witness and party participation and cross-examination
  - Discern any conflicts of interest/vet recusal requests
  - Consider any questions regarding relevance of evidence or proposed questions and may make pre-hearing rulings

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HEARING OFFICER/DECISION-MAKER RESPONSIBILITIES

Rank your Top 3 **responsibilities** as a Decision-maker.
Identify what you consider least important

	Your Rank	Group Rank
▪ Finding the truth		
▪ Providing a just result		
▪ Providing an educational process		
▪ Making a safe community		
▪ Upholding the institution's policy		
▪ Ensuring a fair process		
▪ Protecting the institution from liability		
▪ Punishing wrongdoing		

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THE GOAL

AN EQUITABLE RESULT FROM AN EQUITABLE PROCESS

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THE HEARING

LIVE HEARING

- A live hearing, whether with a panel or an administrator, is required by OCR for Higher Ed.
- Hearings facilitate the parties' ability to review all available evidence and ask questions of witnesses and each other.
- Can the hearing be waived?
- Investigators should be prepared to be subjected to cross-examination at the hearing.
- Avoid off-line discussions of case with any of the Decision-makers.

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WHAT ROLE DOES THE INVESTIGATOR PLAY IN A HEARING?

- The Investigator is often a key witness at any hearing
- The investigation report is admitted as evidence
- The Investigator may be questioned and subjected to cross-exam by all parties' Advisors
  - Why did you decide some evidence relevant; other evidence was not?
- The Investigator's opinions regarding credibility and responsibility should not influence the hearing, so questions about the Investigator's opinions should be avoided; Investigators should not volunteer, and Decision-makers should not probe for, this information

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WHAT DOES IT MEAN TO BE A "DECISION-MAKER?"

- 2020 Title IX regulations require a "Decision-maker" to determine whether a Respondent has violated policy
  - May be a single person (a.k.a. "Hearing Officer")
  - May be a panel of Decision-makers
  - May be internal or external individuals
- Required separation of roles
  - Title IX Coordinator may not serve as "Decision-maker"
  - Investigator(s) may not serve as "Decision-maker"
- Appeal Decision-maker is a separate role
  - May also be a single person or panel; previously uninvolved

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WHEN AND HOW THE "DECISION-MAKER" WORKS

- Required live hearing for colleges and universities
  - May take place in person; however, must provide an option for a video conference
  - Key new element is that the parties may cross-examine each other and witnesses, through an Advisor

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THE HEARING: GENERAL LOGISTICS

- Recording
  - How, by whom, etc.
  - Redundant devices?
- Attendance by parties and witnesses
- Location and room set-up
  - Comfort items (water, tissues, meals if needed)
  - Privacy concerns; sound machine
- Seating arrangements
- Materials
- Access to administrative support if needed (phones, copiers, email)
- Advisors
- Parties and witnesses waiting to testify
- Breaks
- Use of A/V
- Waiting for a decision

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HEARING DECORUM

- Be professional, but avoid lawyer-like approach
  - This is not court – this is an administrative process at a school
  - You are not cross-examining or interrogating, you are striving to determine whether the Respondent(s) violated institutional policy
- Be respectful
  - Tone, manner, questioning
  - Sarcasm or being snide is never appropriate
  - Maintain your composure; never allow emotion or frustration to show
  - De-escalate or take breaks if emotions/tensions are running high

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HEARING DECORUM (CONT.)

- Work to establish a baseline of relaxed conversation for everyone in the room
- Use active listening skills
- Listen carefully to everything that is said
  - Try not to write too much when people are talking
  - Track questions/answers to avoid permitting too much repetition, and in case you need to repeat a question back
  - If questioning, focus on the answer, rather than thinking about your next question
- Nod affirmatively
- Do not fidget, roll your eyes, or give a "knowing" look to another panel member
- Do not look shocked, smug, stunned, or accusing

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THE HEARING

Tips for Hearing Officers/Decision-Makers:

- Recognize the need for flexibility with the order of statements and questioning, depending on the circumstances.
- Be familiar with your institution's hearing procedures; review again before each hearing.
- If a procedural question arises that must be addressed immediately, take a short break to seek clarification.
- Will you have legal counsel available by phone/text/in person?
- Apply all appropriate institutional policies, procedures, and standards.

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THE HEARING

Hearing Testimony: The Role of the Chair/Decision-Maker

- Determine the relevance and appropriateness of questions. Pause after each question to "rule" on relevance. Must state rationale for the record.
- When necessary, the Chair provides directives to disregard a question or information deemed irrelevant, abusive, or unduly repetitive.
- Manage Advisors as necessary, including cross-examination.
- Maintain the professionalism of all Decision-Makers.
- Recognize positional authority.

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DECISION-MAKING SKILLS, PART ONE

- Understanding Evidence
- Relevance

EVIDENCE

- No restriction on parties discussing case or gathering evidence
- Equal opportunity to:
  - Present witnesses, including experts
  - Present evidence
  - Inspect all evidence, including evidence not used to support determination
- Institution cannot limit types/amount of evidence that may be offered except that it must be relevant
- Parties may have access to all gathered evidence that "directly relates" to the allegations available for reference and use at the hearing, but they must make the case for its relevance

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ASK YOURSELF

Is it **relevant**?

Is it **reliable**?
(Is it credible?)

Will we **rely** upon it as evidence supporting a rationale/the written determination?

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UNDERSTANDING EVIDENCE

- The formal federal rules of evidence do not apply in Title IX hearings, but rules crafted by OCR for Title IX complaints do
- If the information helps to prove or disprove a fact at issue, it should be admitted because it is relevant
- If credible, it should be considered
  - Evidence is any kind of information presented with the intent to prove what took place
  - Certain types of evidence may be relevant to the credibility of the witness, but not to the alleged policy violation directly
- **Relevance → admissibility of the evidence**
- **Credibility → how much weight admissible evidence is given**

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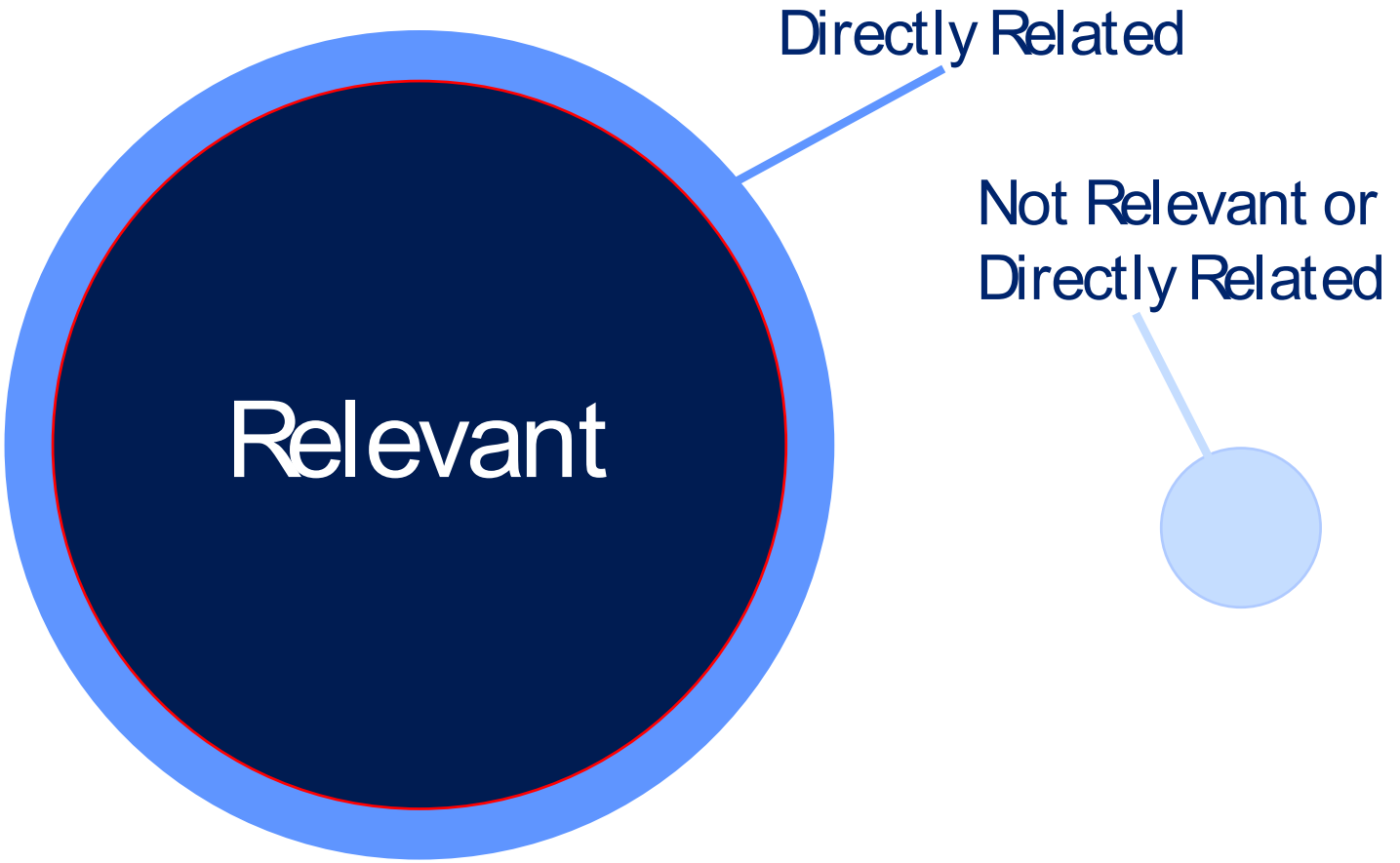
UNDERSTANDING EVIDENCE



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RELEVANCE

- Evidence is generally considered **relevant** if it has value in proving or disproving a fact at issue, and relevance means the evidence may be relied upon by the Decision-maker
  - Regarding alleged policy violation and/or
  - Regarding a party or witness's credibility
- The Investigator will have made initial relevance "decisions" by including evidence in the investigation report
- Relevance is ultimately up to the Decision-maker, **who is not bound by the Investigator's judgment**
- **All** relevant evidence must be objectively evaluated and considered – both inculpatory and exculpatory

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OTHER EVIDENCE MAY BE DIRECTLY RELATED

Directly Related Evidence:

- Connected to the complaint but is neither inculpatory nor exculpatory and will not be included within the investigation report
- Comes to Decision-maker(s) pre-hearing via:
  - Bucket 1: (the investigation report); or
  - Bucket 2: evidence file of what is considered directly related
- How do you handle records that combine elements of both relevant and directly related evidence?
- While the Investigator has initially sorted the evidence into these buckets, the Decision-maker makes the final allocation of what evidence will be relied upon and what will not.

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WEIGHTING EVIDENCE

- Decision-maker may consider and assign weight to different types of evidence, when relevant and credible (see next slide)
- Decision-makers should typically only consider impact statements during sanctioning

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Documentary Evidence	e.g., supportive writings or documents
Electronic Evidence	e.g., photos, text messages, and videos
Real Evidence	i.e., physical objects
Direct or Testimonial Evidence	e.g., personal observation or experience
Circumstantial Evidence	i.e., not eyewitness, but compelling
Hearsay Evidence	e.g., statement made outside the hearing but presented as important information
Character Evidence	subject to relevance determination; often not probative of the underlying allegation

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OVERVIEW OF THE DELIBERATION PROCESS

- Parse the policy (elements that compose each allegation)
- Assess credibility of evidence and assess statements as factual, opinion-based, or circumstantial
- Apply evidentiary standard to determine if policy has been violated
- Decisions must be based only upon information/evidence in the investigation report or presented at the hearing
- Do not turn to any outside "evidence"
- Assess evidentiary weight.

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DELIBERATIONS

General Information

- Must provide detailed, written the rationale for and evidence supporting its conclusions
- Typically, there is no specific order in which allegations must be addressed. When in doubt, start with the most serious
- Ensure an impartial decision that is free of substantive bias

Withhold judgment until all the evidence has been considered.

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DELIBERATIONS: CREDIBILITY

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

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DELIBERATIONS

Findings, Impact Information, and Sanctions

- Separate the "Finding" from the "Sanction"
  - Do not use impact-based rationales for findings (e.g., intent, impact on the Complainant, impact on the Respondent)
  - Use impact-based rationales/evidence for sanctions only
- Impact/mitigation statement(s) should only be considered if and after the Respondent is found in violation
- Whether Respondent violated policy should be distinct from factors that aggravate or mitigate the severity of the violation
- Be careful – do not heighten the evidentiary standard because the sanctions may be more severe

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SANCTIONING IN SEXUAL MISCONDUCT CASES

Title IX and case law require:

- Decision-maker should also decide sanction if credibility will influence the sanction
- Recipients to act reasonably to bring an end to the discriminatory conduct **(Stop)**
- Recipients to act reasonably to prevent the future reoccurrence of the discriminatory conduct **(Prevent)**
- Recipients to restore the Complainant as best they can to their pre-deprivation status **(Remedy)**

- This may create a clash if the sanctions only focus on educational and developmental aspects
- Sanctions for serious sexual misconduct should not be developmental as their primary purpose

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WRITTEN DETERMINATIONS

Decision-maker issues a detailed, written determination regarding responsibility that includes the following:

- Policies alleged to have been violated
- 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
- Statement of and rationale for the result as to each specific allegation.
  - Should include findings of fact and conclusions

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WRITTEN DETERMINATIONS (CONT.)

- Sanctions imposed on Respondent (if any) and rationale for sanctions chosen (or sanctions not chosen)
- Whether remedies designed to restore or preserve equal access to the education program or activity will be provided by the Recipient to the Complainant
- Procedures and bases for any appeal

The Decision-maker should author the written determination

- May follow a template provided by the Title IX Coordinator

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WRITTEN DETERMINATIONS: LOGISTICS

- The written determination should be provided to the parties simultaneously
- The determination becomes final either on the date that the Recipient provides the parties with the written determination of the result of the appeal, or if an appeal is not filed, the date on which an appeal would no longer be considered timely
- FERPA cannot be construed to conflict with or prevent compliance with Title IX
- Will this letter be reviewed by the Title IX Coordinator and/or legal counsel?

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APPEALS

- Elements Under the 2020 Regulations
- Grounds for Appeal
- Process Flowchart
- Other ATIXA Recommendations

APPEALS

The Appeal Decision-maker may be an individual or a panel

- Cannot be the Title IX Coordinator
- Cannot be the Investigator or Decision-maker in the original grievance process
- Recipient may have a pool of Decision-makers who sometimes serve as hearing or appeal Decision-makers
- Recipient may have dedicated Appeal Decision-makers

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APPEAL RESPONSE

- When an appeal is filed, the Recipient must notify the other party and implement appeal procedures equally for all parties
- Give the parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome
- The Chair may be called upon by the Appeal Decision-maker to inform the appeal process
  - Likely a paper exchange; not in-person

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BASES FOR APPEAL

- Title IX Regulations specify three bases for appeal:
  - Procedural irregularity that affected the outcome
  - New evidence that was not reasonably available when the determination of responsibility was made that could affect the outcome
  - Title IX Coordinator, Investigator, or Decision-maker had a general or specific conflict of interest or bias against the Complainant or Respondent that affected the outcome.
- Recipients may offer additional bases for appeal so long as they are offered equally to both parties

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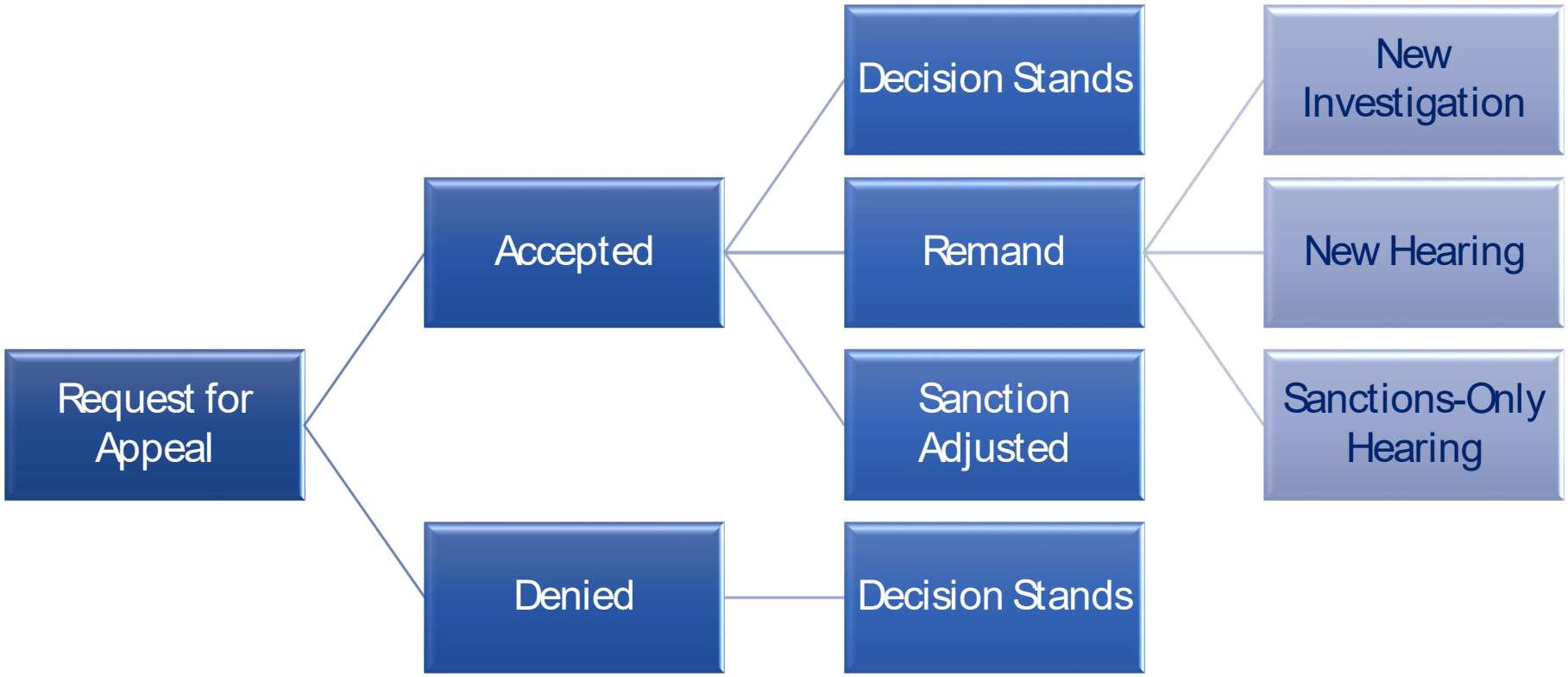
APPEALS: THE PROCESS



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APPEALS: OTHER ATIXA RECOMMENDATIONS

- One level of appeal
- Short window to request an appeal
  - May always grant an extension if necessary
- Document-based and recording review
  - NOT de novo
  - In other words, not a "second-bite of the apple"
- Deference to original Decision-maker(s)

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POLICY DEFINITIONS

- Sexual Harassment (Umbrella category)
  - Sexual Harassment (offense)
  - Quid Pro Quo Sexual Harassment
  - Sexual Assault
  - Dating Violence
  - Domestic Violence
  - Stalking
- Retaliation

REQUIRED DEFINITIONS – TIX REGULATIONS

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

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

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HOSTILE ENVIRONMENT: "UNWELCOME"

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

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HOSTILE ENVIRONMENT: "REASONABLE PERSON"

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

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HOSTILE ENVIRONMENT: "SEVERE"

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

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HOSTILE ENVIRONMENT: "PERVASIVE"

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

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HOSTILE ENVIRONMENT: "OBJECTIVELY OFFENSIVE"

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

- Physically threatening
- Humiliation
- Intimidation
- Ridicule
- Abusive

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HOSTILE ENVIRONMENT: TOTALITY OF THE CIRCUMSTANCES

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

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HOSTILE ENVIRONMENT: TOTALITY OF THE CIRCUMSTANCES (CONT.)

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

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SEXUAL ASSAULT

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

- **Rape** - Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the Complainant.

- **Sodomy** - Oral or anal sexual intercourse with another person, forcibly and/or against that person's will or not forcibly or against the person's will (non-consensually) in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

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SEXUAL ASSAULT (CONTD.)

- **Sexual Assault with an Object** - To use an object or instrument to penetrate, however slightly, the genital or anal opening of the body of another person, forcibly and/or against that person's will or not forcibly or against the person's will (non-consensually) in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

- **Fondling** - The touching of the private body parts of another person (buttocks, groin, breasts) for the purpose of sexual gratification, forcibly and/or against that person's will (non-consensually) or not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

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SEXUAL ASSAULT (CONTD.)

- **Incest** - Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by [insert state] law.

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

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CONSENT

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

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OVERVIEW OF THE THREE QUESTIONS

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

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

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

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DATING VIOLENCE

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

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DOMESTIC VIOLENCE

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

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DOMESTIC VIOLENCE (CONTD.)

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

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STALKING

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

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STALKING (CONTD.)

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

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

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OTHER POLICY DEFINITIONS

- Retaliation
- Sexual Exploitation

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RETALIATION – REGULATION DEFINITION

▲106.71 Retaliation

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

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RETALIATION – REGULATION DEFINITION

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

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RETALIATION

▲106.71 Retaliation.

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

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RETALIATION

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

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

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ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION

Sexual Exploitation (non-Title IX sexual harassment)

- Occurs when one person takes non-consensual or abusive sexual advantage of another for their own advantage or benefit, or to benefit or advantage anyone other than the one being exploited, and that behavior does not otherwise constitute one of other sexual misconduct offenses.
- Examples of sexual exploitation include, but are not limited to:
  - Invasion of sexual privacy
  - Non-consensual digital, video, or audio recording of nudity or sexual activity

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ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION (CONT.)

- Examples (continued):
  - Unauthorized sharing or distribution of digital, video, or audio recording of nudity or sexual activity
  - Engaging in voyeurism
  - Going beyond the boundaries of consent (such as letting your friend hide in the closet to watch you having consensual sex)
  - Knowingly exposing someone to or transmitting an STI, STD, or HIV to another person
  - Intentionally or recklessly exposing one's genitals in non-consensual circumstances or inducing another to expose their genitals
  - Sexually-based bullying may also be a form of sexual exploitation

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NAVIGATING FIRST AMENDMENT PROTECTIONS

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NAVIGATING FIRST AMENDMENT PROTECTIONS

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

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

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NAVIGATING FIRST AMENDMENT PROTECTIONS (CONT.)

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

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Questions?

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