



ADVANCED TITLE IX TRAINING

Maryland Affinity Group
June 2019



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ED.D.**

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THE GOAL



Stop the Behavior

Reliable

Effective

Remedy

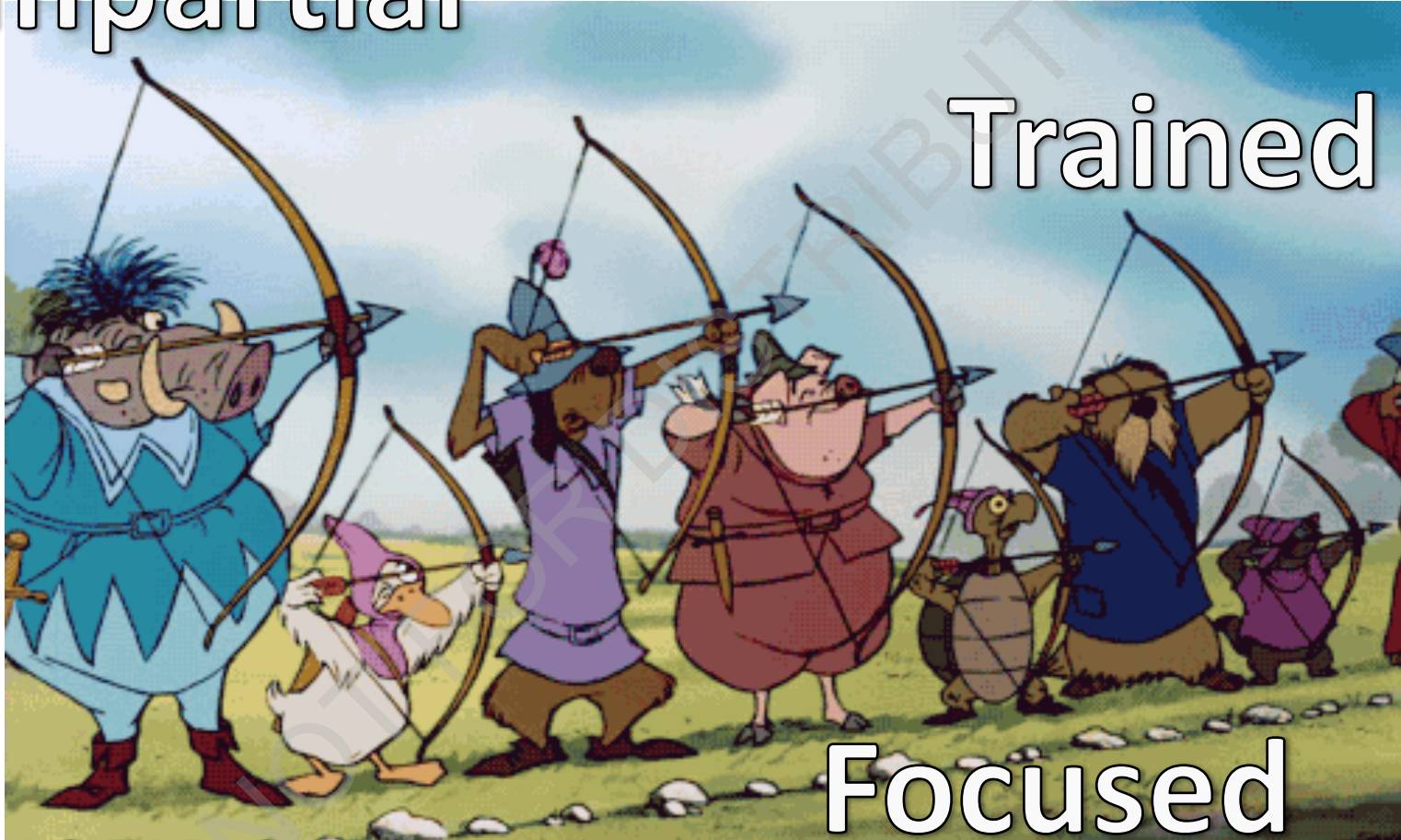
Prevent Recurrence



THE GOAL

Impartial

Trained



Focused

Competent

THE GOAL



MAKING THE APPROPRIATE DECISION

*Remember, you have no
side other than the
integrity of the process*

RETALIATION

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ELEMENTS OF A RETALIATION CLAIM



- The following elements establish an *inference of retaliation*:
 - Did the reporting party engage in protected activity?
 - Was reporting party subsequently subjected to adverse action?
 - Do the circumstances suggest a connection between the protected activity and adverse action?
- What is the stated non-retaliatory reason for the adverse action?
- Is there evidence that the stated legitimate reason is a pretext?

Facts

- While not a Title IX case, retaliation analysis under Title VII can be informative to Title IX practitioners.
- Lara Carlson was hired in 2009 as a tenure-track professor.
- In 2011, Paul Visich (Carlson's supervisor and tenure committee review chair) engaged in sexually harassing behaviors towards Carlson:
 - Touched Carlson's knee, thigh, and hand.
 - Stared at her chest while speaking with her.
 - Sent her inappropriate and sexually charged emails and comments.
- Carlson reported to HR and her Dean and asked he no longer supervise her or be the head of her tenure committee. Neither happened.

Facts

- She was forced her to meet with Visich directly, despite her objections.
- Six months later, Visich gave Carlson a very negative performance review. He also caused her to be removed as the head of College Bowl team and made changes to the prerequisite to one of her courses that had the effect of radically diminishing its enrollment.
- Promotion and tenure review committee rejected Visich's negative evaluation.
- At Carlson's second request, Visich was removed as chair of her tenure review committee and she again requested a new supervisor.

CARLSON V. UNIV. OF NEW ENGLAND

NO. 17-1792 (1ST CIR. 2018), AUGUST 10, 2018..



Facts

- The Dean instead transferred her to a different department. Carlson agreed to the transfer, “if she were allowed to ‘keep [her] classes and continue to do [her] job.’”
- Carlson awarded tenure in 2014 but was removed from teaching courses and advising students in previous department; also removed from their website, which had funding implications. Received minimal raise (smallest since arriving at UNE).
- Filed a complaint in federal court alleging retaliation under Title VII and the Maine Human Rights Act.
- District Court granted summary judgment for UNE.

Decision

- 1st Cir. Reversed, stated that the department transfer, removal from courses, etc. may constitute retaliation
- The court held that UNE induced Carlson to agree to the department transfer under false pretenses and misrepresentations.
- UNE's Dean was inconsistent in her explanations of the changes to Carlson's teaching responsibilities (possible pretext).
- Carlson would not have accepted the transfer but for the misrepresentations.

CARLSON V. UNIV. OF NEW ENGLAND

NO. 17-1792 (1ST CIR. 2018), AUGUST 10, 2018.



Takeaways

- When taking action that could be considered retaliatory, an institution must be able to put forward non-retaliatory justification for the action.
- If allegations of sexual harassment have occurred, institutions should work with the parties to determine how to stop, prevent, and remedy the behavior.
- Note that the First Circuit upheld the district court's finding that Carlson did not meet her burden of producing evidence to demonstrate that the salary issues could constitute an adverse action, because she did not produce sufficient evidence of the overall financial picture of the university during the years in question.

TITLE IX, FIRST AMENDMENT & BIT

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JOHN DOE v. VALENCIA COLLEGE

U.S. 11TH CIR. CT OF APPEALS (SEPT. 13, 2018)



- **Facts**

- Doe (age 42) and Roe (age 24) were biology lab partners in summer 2014.
- Doe bought Roe gifts and shared his affection for her.
- Roe said she was not interested, had a boyfriend, and did not want to give him the wrong impression.
- Doe saw a Facebook posting that made him think Roe was single again, so he reached out.
- Roe and her boyfriend called Doe and told him to stop.
- ***Doe did not stop.***

JOHN DOE v. VALENCIA COLLEGE

U.S. 11TH CIR. CT OF APPEALS (SEPT. 13, 2018)



- **Facts (cont.)**

- During the investigation, Doe admitted he sent Roe inappropriate messages, many of them sexually and some sexually explicit photos.
- Roe and boyfriend filed a complaint with police.
- Police called Doe and told him to stop; **he didn't stop.**
- In August, an emotional Roe reported to Valencia's Dean of Students.
- DOS implemented a NCO and provided him notice of the charges.
- Doe then sent 20 messages to Roe to convince her to withdraw her complaint.

JOHN DOE v. VALENCIA COLLEGE

U.S. 11TH CIR. CT OF APPEALS (SEPT. 13, 2018)



- **Facts (cont.)**

- Doe ultimately found responsible for Stalking – a violation of Valencia's Code of Conduct and suspended for one year.
- Decision upheld on appeal
- In his lawsuit, Doe alleged that Valencia:
 - Had policies that were overbroad and vague;
 - Violated his 1st Amendment rights;
 - Violated his due process rights; and
 - Violated Title IX (erroneous outcome)
- Court rejected all of his arguments

JOHN DOE v. VALENCIA COLLEGE

U.S. 11TH CIR. CT OF APPEALS (SEPT. 13, 2018)



- The court upheld Valencia's stalking policy.
 - Doe argued it was subjective because it used the words “alarms, torments, or terrorizes,”
 - Court said Doe's conduct was “clearly proscribed” and the policy included language the actor's behavior must be willful, malicious, and repeated; and
 - Language that the victim must also be “reasonably and seriously alarm[ed], tormented, or terrorized.”
- 1st Amendment not violated because he continued to harass Roe even after repeated requests for him to stop from Roe and the police; and a no contact order from the College

JOHN DOE v. VALENCIA COLLEGE

U.S. 11TH CIR. CT OF APPEALS (SEPT. 13, 2018)



- Court relied on *Tinker v. Des Moines* (signature 1st Amendment case) to indicate:
 - He interfered with Roe’s rights
 - Valencia is entitled to take off-campus jurisdiction
- Due process claim failed because he did not have a constitutionally protected right to enrollment at Valencia
 - Even if he did, court noted the school did not act in an arbitrary or capricious manner
- No erroneous outcome under Title IX because:
 - He failed to provide facts that cast “some articulable doubt on the accuracy of the disciplinary proceeding”
 - There is no casual connection between the outcome and gender bias

DUE PROCESS

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WHAT IS DUE PROCESS?



- Two overarching forms of due process:
 - **Due Process in Procedure:**
 - Consistent, thorough, and procedurally sound handling of allegations
 - Institution substantially complied with its written policies and procedures
 - Policies and procedures afford sufficient Due Process rights and protections
 - **Due Process in Decision:**
 - Decision reached on the basis of the evidence presented
 - Decision on finding and sanction appropriately impartial and fair

DOE v. UNIVERSITY OF CINCINNATI

U.S. CT. OF APPEALS, 6TH CIR. (SEPT. 25, 2017)



- **Facts**

- John Doe was a graduate student at UC
- Aug-Sept 2015: John Doe met Jane Roe on Tinder and after a few weeks, met in person, then went to his apartment, where they engaged in sexual intercourse
- Three weeks later, Roe reported to UC's Title IX office that Doe had sexually assaulted her.
- UC's Title IX office investigated the allegation (took nearly 5 months), then referred the matter to a faculty/student hearing board
- Evidence is disclosed to the accused in advance of the hearing

DOE v. UNIVERSITY OF CINCINNATI

U.S. CT. OF APPEALS, 6TH CIR. (SEPT. 25, 2017)



- **Facts (cont.)**

- Hearing provided a “circumscribed form of cross-examination”
 - Provide written questions to the panel who determine relevance and whether the question will be asked
- Hearing held on June 27, 2016, but Roe did not attend
- Doe did not know Roe would not attend
- UC altered its procedures in her absence and Doe was unable to ask her any questions
- Chair read Roe’s closing statement into evidence

DOE v. UNIVERSITY OF CINCINNATI

U.S. CT. OF APPEALS, 6TH CIR. (SEPT. 25, 2017)



- **Facts (cont.)**

- Hearing board deliberated, found Doe responsible, and recommended a 2-year suspension, which UC's Asst. Dean accepted.
- Appellate administrator recommended that UC lessen the suspension to 1 yr.
- UC's Dean of Students accepted this recommendation
- Doe informed of final decision in Sept. 2016, with sanction to start at the end of Fall 2016.

DOE v. UNIVERSITY OF CINCINNATI

U.S. CT. OF APPEALS, 6TH CIR. (SEPT. 25, 2017)



- Doe sued UC for violation of Title IX and violation of due process and moved for preliminary relief enjoining UC from enforcing the decision
 - Doe argued UC's action was unconstitutional, as he was provided no opportunity to cross-examine Roe, per UC procedures.
 - District Court agreed.
- UC appealed the District Court's decision on the preliminary injunction
- 6th Circuit upheld the District Court's decision

DOE v. UNIVERSITY OF CINCINNATI

U.S. CT. OF APPEALS, 6TH CIR. (SEPT. 25, 2017)



- **6th Circuit's decision**

- Due process: **Where credibility is the deciding factor/pivotal issue**, the Complainant's absence from the hearing made it difficult and problematic for the “trier of fact” to assess credibility
- The inability to confront one's accuser rendered the process fundamentally unfair.
- Cross examination in some form is essential to due process, even if indirect or via video conferencing; does not have to be at the same level as a judicial trial
- Limited their decision to the facts of the case and UC's procedures, but it is a reflection of the due process needed when a student is facing suspension or expulsion.

JOHN DOE v. CALIFORNIA STATE UNIV.

SUPERIOR COURT OF CALIFORNIA (JULY 12, 2018)



Due process-based case

- **Facts**

- Doe expelled from Cal Poly, San Luis Obispo in 2016 for sexual assault
- Cal Poly received notice from Jane Roe's roommates
- Doe and Roe attended a fraternity party, danced, and kissed
- Roe alleged they went to a room at the party where Doe:
 - Forcibly kissed Roe
 - Held her down on a bed
 - Bit her lip until it bled, and removed her shirt.
- Roe alleged she fought back and was able to leave the house.

JOHN DOE v. CALIFORNIA STATE UNIV.

SUPERIOR COURT OF CALIFORNIA (JULY 12, 2018)



- **Facts (cont.)**

- Roe was reluctant to participate and provided a statement
- Roe refused to provide Doe's name, related text messages, or to participate in a formal resolution
- University initiated a “confidential resolution”
- Doe argued encounter was consensual
- Eyewitness walked in on Doe and Roe and said it appeared consensual
- Doe provided text messages after alleged incident between him and Roe
- Doe recommended three additional witnesses, who were not interviewed
- Doe was expelled and his appeal was denied

JOHN DOE v. CALIFORNIA STATE UNIV.

SUPERIOR COURT OF CALIFORNIA (JULY 12, 2018)



- In his filing, Doe cited due process issues, such as:
 - Three additional witnesses who were not interviewed
 - Doe was not able to pose questions to Roe because she did not participate in the process
 - Doe was not able to pose questions, directly or indirectly, to Roe's roommates or other witnesses.
 - Several key pieces of evidence were misrepresented in the investigation report
 - Doe was informed of the determination of responsibility, but was told the investigation report was not yet complete
 - Not allowed to review report

JOHN DOE v. CALIFORNIA STATE UNIV.

SUPERIOR COURT OF CALIFORNIA (JULY 12, 2018)



- Judge ordered the expulsion be reversed.
- Judge noted that the University:
 - Failed to inform Doe of the complete allegations, including policies violated.
 - Failed to disclose all evidence on which the determination relied.
 - Failed to allow Doe to question Roe or witnesses, directly or indirectly, despite the university's reliance on the credibility of testimony.
 - Reached a determination that was not supported by substantial evidence.

JOHN DOE v. CALIFORNIA STATE UNIV.

SUPERIOR COURT OF CALIFORNIA (JULY 12, 2018)



- **Key Takeaways**

- Reporting party's lack of participation is a significant due process concern.
- Provide parties an opportunity to review and respond to all relevant evidence.
- Question reporting and responding party's witnesses. If witnesses are not interviewed, document the rationale.
- Provide for direct or indirect questioning between the parties and of witnesses
- Provide an opportunity to review the investigation report once all evidence is collected.

JANE ROE v. JAVAUNE ADAMS-GASTON, ET AL.

U.S. Dist. Ct., S. Dist. Ohio, E Div. (April 17, 2018)



- This case involved an Ohio State University student who was charged twice for sexual misconduct. She was initially suspended, then expelled following the second hearing.
- Roe argued that she was denied her right to due process because she was unable to cross-examine adverse witnesses during the hearing.
- She sought, and was awarded, a preliminary injunction against the university for her expulsion.
- In this case Ohio State conducted a thorough investigation and provided a written report to the hearing board including interview notes taken by the investigator.
- Both parties attended the first hearing.

JANE ROE v. JAVAUNE ADAMS-GASTON, ET AL.
U.S. DIST. CT., S. DIST. OHIO, E DIV. (APRIL 17, 2018)



- Hearing panel felt Roe was not credible and her account was not plausible, as compared to the reporting party and witnesses.
- In the second hearing, the reporting party did not attend, but sent a statement directly to hearing officer and asked that statements be read aloud during the hearing; Roe objected to the statements being read, but the statements were in the hearing packet.
- 3 adverse witnesses did not attend, but their statements were in the hearing packet.
- Hearing officer found Roe in violation; found her statement lacked credibility as compared with the credible and plausible statements of reporting party and witnesses.
- Roe was expelled.

JANE ROE v. JAVAUNE ADAMS-GASTON, ET AL.
U.S. DIST. CT., S. DIST. OHIO, E DIV. (APRIL 17, 2018)



- Roe sued, stating OSU deprived her of due process because she could not cross examine the reporting party and the witnesses.
- The Court held that a hearing was necessary.
- The hearing does not need to have the formalities of a criminal trial but the accused student must be given an opportunity to respond, explain, and defend herself.
- Due process requires an opportunity to confront and cross examine adverse witnesses, especially where the evidence consists of the testimony of individuals whose memory might be faulty or motivated by malice or vindictiveness.
- Hearing panel should be given an opportunity to assess demeanor.

JOHN DOE v. UNIV OF MICHIGAN, ET AL.
U.S. DIST. CT., E. DIST. MICHIGAN, S DIV. (JULY 6, 2018)



- Doe completed all graduation requirements then was accused of sexual assault. He sought a preliminary injunction preventing the investigation, indicating Michigan's policy violated due process rights.
 - Doe alleged that due process requires a live hearing and an opportunity for cross examination.
- Michigan's policy provided for an investigation. The investigator provides the opportunity for the parties to pose questions to each other or to witnesses; investigator makes a finding and provides a rationale to the TIXC and General Counsel.
- Court found in Doe's favor, citing the high risk of harm (expulsion).

JOHN DOE v. UNIV OF MICHIGAN, ET AL.
U.S. DIST. CT., E. DIST. MICHIGAN, S DIV. (JULY 6, 2018)



- Court said Michigan's method of private questioning through an investigator leaves Doe with no way of knowing which questions are actually being asked of adverse witnesses or their responses.
- Without a live proceeding, the court said the risk of an erroneous deprivation of Doe's interest in his reputation, education and employment is significant.
- Interestingly, court did not require Michigan to change its process.

DOE V. BAUM

903 F.3D 575 (6TH CIR. SEP. 7, 2018).



Facts

- Jane Roe accused John Doe of sexual misconduct – claiming she was incapacitated during the interaction.
- The University of Michigan investigated over the course of 3 months, interviewing 25 people.
 - “The investigator was unable to say that Roe exhibited outward signs of incapacitation that Doe would have noticed before initiating sexual activity. Accordingly, the investigator recommended that the administration rule in Doe’s favor and close the case.”
- The administration followed the investigator’s recommendation, found for Doe, and closed the case.
- Roe appealed.

DOE V. BAUM

903 F.3D 575 (6TH CIR. SEP. 7, 2018).



Facts

- The 3-member Appellate Board reviewed the evidence and reversed the investigator's decision. The Board did not meet with anyone or consider any new evidence. The Board felt Roe was more credible.
- Before sanctioning, Doe withdrew, one semester shy of graduation.
- Doe sued, alleging Title IX and Due Process violations.
- On a Motion to Dismiss by Michigan, the District Court dismissed the case, but 6th Circuit reversed.
- Due Process and the Title IX Erroneous Outcome claims survived.

Decision

- Due Process
 - "Our circuit has made two things clear:
 - (1) If a student is accused of misconduct, the university must hold some sort of hearing before imposing a sanction as serious as expulsion or suspension, and
 - (2) When the university's determination turns on the credibility of the accuser, the accused, or witnesses, that hearing must include an opportunity for cross-examination."
 - "If a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder."
 - "Either directly by the accused or by the accused's agent."

Decision

- Title IX Erroneous Outcome
 - The due process issues informed their finding.
 - The court cited significant public scrutiny and fear of losing federal funding due to an OCR investigation that began two years prior into whether UM's policy and procedure discriminated against female reporting parties.
 - While the court recognized that external pressure alone is not enough to state a claim that the university acted with bias, the court found that it could be possible here when:
 - Appellate Board dismissed all the evidence provided by male witnesses.
 - All the male witnesses were on Doe's side, and the female witnesses were on Roe's side.
 - Appellate Board found Doe's witnesses were biased because they were his fraternity brothers, but found Roe's sorority sisters credible.

DOE V. BAUM

903 F.3D 575 (6TH CIR. SEP. 7, 2018).



Takeaways

- In the 6th Circuit, decision-makers must hold a live hearing with cross-examination when credibility is a central issue – providing the parties with an opportunity to submit written statements is not sufficient.
- Additional due process may be required when the student is facing suspension or expulsion.
- Courts in the 6th Circuit may balance the rights of the responding party with the burden on the institution to provide more due process and rule in favor of the rights of the responding party as a consequence.
- This will likely continue to be a hot button area that will evolve in the legislatures and courts.

Facts

- Roe reported Doe sexually assaulted her to University Police.
- The University of Dayton hired TNG Partner and President Daniel Swinton to conduct an external investigation.
- University provided Doe w/ “Notice of Investigation” letter:
 - Provided Doe a copy of Roe’s complaint.
 - Directed him to the relevant Student Handbook provisions.
 - Identified the investigators.
 - Advised him of his right to a support person, including an attorney.
 - Advised he would not be able to submit information outside of the investigation.
 - Generally advised him of the process.

Facts

- Doe was found responsible of nonconsensual sexual intercourse and suspended for a year and a half.
- Doe appealed. The Appellate Board found that neither Doe nor Roe were given the opportunity to submit questions to the Hearing Board.
- To remedy the error, the Appellate Board sent Doe and Roe back to the Hearing Board where they:
 - Were given an opportunity to listen to a recording of the hearing.
 - Were given an hour to submit questions.
 - Had their questions considered by the Hearing Board.

Facts

- The Hearing Board found that none of those questions would have changed the outcome of the hearing.
- The Appellate Board upheld the Hearing Board's decision.
- Doe sued for defamation, breach of contract, negligence, and Title IX violations.

Decision

- The 6th Circuit dismissed all of Doe's claims.
- Public policy requires that sexual assault victims have the ability to share details with those who can help them.
 - Telling friends, without broader publication is not defamation.
- Prohibiting students from directly cross-examining others -**not** a due process violation.
- Doe failed to plead facts sufficient to indicate Dayton deviated from its policies or procedures.
- Doe failed to plead any facts that indicated gender bias or that Dayton treated females more favorably than males.

Takeaways

- Clearly articulate parties' rights - in writing.
 - Court favored comprehensiveness of ATIXA's model "Notice of Investigation."
- Errors found during an appeal should be referred back to Hearing Board/Decision-Makers – not adjusted by Appeals Officer/Board.
 - When error is immaterial, finding should be upheld.
- Remedies for errors should be applied equitably.
 - Both Doe and Roe had opportunity to submit questions.

Facts

- John Doe, a student-athlete, was accused of non-consensual sexual acts stemming from an incident with Jane Roe, an athletic trainer.
- After drinking earlier in the evening, Roe went to Doe's apartment to smoke marijuana. Roe reported that Doe pushed himself on her, held her hand down, pulled her hair, put his hand over her mouth, and engaged in intercourse.
- Doe reported it was consensual and cited her moans and facial expressions as evidence that she was actively participating and enjoying the interaction.
- In an investigative interview, Doe described a previous sexual encounter with Roe during which Doe "fingered" Roe. Roe did not initially remember the encounter and became visibly upset when an investigator shared that Doe reported digitally penetrating her.

Facts

- USC began an investigation into Roe's original allegations and added the additional encounter Doe reported in his interview.
- Doe suggested that Roe fabricated the allegations so she wouldn't be fired as an athletic trainer. The investigator did not pursue this theory.
- The investigator also disregarded testimony that Roe had been disciplined for having sex with a football player and had signed an agreement not to do so in the future.
- Doe was found responsible for non-consensual sexual acts stemming from the initial reported incident and was found not responsible for the additional incident. His expulsion was upheld.

Holding

- Superior court upheld USC's action and Doe appealed. While appeal was pending, Doe was expelled from USC for unrelated conduct code violations.
- Appeals court vacated USC's findings against Doe on several grounds:
 - If credibility is a central issue and potential sanctions are severe, fundamental fairness requires a hearing, with cross-examination, before a neutral adjudicator with power to independently judge credibility and find facts.
 - Fundamental fairness dictates the factfinder cannot be a single individual with divided and inconsistent roles.
 - The investigator should fully explore theories that may shine light on credibility of a witness and not solely rely on the parties' lists to identify witnesses.

Takeaways

- Consider the levels of checks and balances present in your process and make sure there is a decision-maker who is at least one step removed from the investigator.
 - USC’s system placed a “single individual in the overlapping and inconsistent roles of investigator, prosecutor, fact-finder, and sentencer.”
 - The investigator here had “unfettered discretion” to determine what evidence to consider, which witnesses to interview, and what determination and sanction to impose.
- A thorough investigation will likely result in additional witnesses which should be interviewed to ensure a complete review of all available evidence.
- The investigator should fully explore all theories that may shine light on the credibility of the parties.

DOE v. SYRACUSE UNIVERSITY

U.S. DIST. CT., N.D.N.Y. (MAY 8, 2019)



- **Facts**

- Doe and Roe met at a bar, initially with a group of friends.
- Roe invited Doe back to her dorm, where they began to kiss.
- She performed what he believed to be consensual oral sex.
- She asked her roommates to leave and they had vaginal intercourse in her bedroom.
- They exchanged several texts over the next few days.
- Several days later they had drinks and went to a local restaurant together.

DOE v. SYRACUSE UNIVERSITY

U.S. DIST. CT., N.D.N.Y. (MAY 8, 2019)



- **Facts**

- Four days later, Doe heard a rumor that he had done “unspeakable things” to Roe.
- Doe avoided Roe.
- Two months later, she brought a formal complaint for alleged sexual misconduct.
- She alleged that the oral sex was non-consensual, that she withdrew consent prior to the vaginal sex, and that he had engaged in non-consensual anal sex.
- Syracuse appointed an internal investigator.

DOE v. SYRACUSE UNIVERSITY

U.S. DIST. CT., N.D.N.Y. (MAY 8, 2019)



- **Doe's Allegations Regarding the Investigation**

- Doe's original notice did not provide any details of the allegations.
- Learned that Roe's allegations had changed over time.
 - At first she reported that the vaginal sex was consensual, but in a later interview she claimed that she had withdrawn consent during the sex.
- Claimed that the investigator was not neutral and impartial because of his extensive background with victims of sexual assault.
- Investigator characterized Roe's testimony as "consistent" despite the inconsistencies.
- Doe told the investigator that Roe was giving different accounts of what had happened to different people on campus.
 - Investigator only interviewed Roe once and did not investigate the issues Doe raised as to Roe's credibility.

DOE v. SYRACUSE UNIVERSITY

U.S. DIST. CT., N.D.N.Y. (MAY 8, 2019)



Doe's Allegations Regarding the Investigation

- Investigator did not provide Doe with all of Roe's submitted evidence.
 - Letter from a nurse that relayed Roe's own report of the incident and reports of vaginal bleeding.
 - However, in the investigation she reported anal bleeding.
- Investigator did not allow Doe to respond to all of Roe's evidence before it was provided to the Conduct Board.
 - Doe did not have an opportunity to show the inconsistencies in Roe's story.
- Doe did not know the identities of the other witnesses.
- Investigator's report characterizes her account as fully plausible and credible, despite witness testimony regarding the interactions between Roe and Doe, including her roommates who were present on the night in question.

DOE v. SYRACUSE UNIVERSITY

U.S. DIST. CT., N.D.N.Y. (MAY 8, 2019)



- **Doe's Allegations Regarding the Hearing and Decision**

- Doe and Roe each appeared separately at the Conduct Board hearing.
- The investigator did not testify nor did any witnesses.
- Doe had no opportunity to question Roe nor any witnesses.
- Her interview was not recorded, despite SU policy.
- Board found credible her claim of withdrawn consent during vaginal sex.
 - “[Her] actions are consistent with a traumatic event such as she described in her statement.”
- Indefinitely suspended for one year or until Roe graduates.

DOE v. SYRACUSE UNIVERSITY

U.S. DIST. CT., N.D.N.Y. (MAY 8, 2019)



- **Doe's Allegations Regarding the Appeal Process**

- Appealed even though he had not yet received a transcript of the hearing that he had requested.
 - The transcript did not include Roe's testimony or questions asked of her due to the "technical difficulties" with the recording.
- Appeals Board upheld the decision and rejected his procedural and substantive challenges to the investigation, hearing, and decision.

DOE v. SYRACUSE UNIVERSITY

U.S. DIST. CT., N.D.N.Y. (MAY 8, 2019)



- **Court's Analysis**

- Doe's allegations here are enough to “cast an articulable doubt” on the outcome of his case, including ample allegations of gender bias.
- Court points to several of Doe's allegations raising significant questions about Roe's credibility.
- Syracuse officials, including the investigator and the adjudicators, did seem to be influenced by “trauma-informed investigation and adjudication processes.”

DOE v. SYRACUSE UNIVERSITY

U.S. DIST. CT., N.D.N.Y. (MAY 8, 2019)



- **Takeaways**

- Trauma-informed processes have a place in investigations, not hearings.
- Trauma-informed processes cannot be a substitute for credibility analyses.
- Responding party should:
 - Have access to all evidence that will be seen by the adjudicators.
 - Have an opportunity to raise credibility issues regarding the reporting party and all witnesses.
 - Have an opportunity to raise questions/concerns about the investigator.

PREGNANCY & TITLE IX

“A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.”

34 C.F.R. 106.40

- June 2007 “Dear Colleague Letter”
- June 2013 DCL on Pregnant and Parenting Students
- Regulatory Language
- Case Discussion

OCR, TITLE IX, AND PREGNANCY



- Admissions
- Academics
 - Registration
 - Coursework Accommodation and Completion
- Residence Halls
- Extra-curricular Activities
- Athletics
- Health Insurance Coverage
- Employment
 - Hiring
 - Benefits and bonuses
 - Leave and job protection upon return from leave

PREGNANCY & TITLE IX: CULTURAL VARIABLES AND CHALLENGES



- Pervasive and systemic discrimination against women
- Male-as-breadwinner: Historical context
- Power and privilege
- Body integrity and choices
- Degree completion percentages
- The “Mommy Track”
- Academic and institutional deadlines, timeframes, and requirements that do not account for pregnancy
- Fear of women “abusing” accommodations or exceptions
- Accommodations often require more work on our part

PREGNANCY & TITLE IX: CULTURAL VARIABLES AND CHALLENGES



- Admissions and hiring barriers
- Blaming women for their pregnancy
- Belief that pregnancy weakens a person
- The “inconvenience” created by a pregnant student or employee
- Conflicting valuation of priorities
- Perception of “special treatment”
- Religious beliefs on birth control, pregnancy, abortion, etc.
- Confluence of pregnancy with racial, ethnic, and other cultural variables
- What else?

PREGNANCY & TITLE IX: LEGAL FRAMEWORK

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OCR, TITLE IX, AND PREGNANCY



June 25, 2007 “Dear Colleague Letter”

- Affirms the application of the pregnancy-related portions of the regulations to athletics departments, and summarized a school’s obligations to pregnant student-athletes.
- The June 25, 2007 DCL also includes:
 - Information on how to develop programs to support these students;
 - An overview of students’ rights under Title IX; and
 - Guidance on how to share your complaint if you feel your rights are not being met.
- While the pamphlet is focused on secondary education, the DCL states that “legal principles apply to all recipients of federal financial assistance, including postsecondary education.”

PREGNANCY & TITLE IX



- June 25, 2013 DCL on pregnancy and parenting students:
 - Educators must ensure pregnant and parenting students are not discriminated against.
 - Educators must ensure that pregnant and parenting students are fully supported in preparation for graduation and careers.
 - Secondary school administrators, teachers, counselors, and parents must be well educated on the rights of pregnant and parenting students as provided under Title IX.

PREGNANCY & TITLE IX: REGULATORY LANGUAGE

“A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.”

34 C.F.R. 106.40

PREGNANCY & TITLE IX: TITLE IX REGULATORY LANGUAGE



Pregnancy defined

- “Pregnancy and related conditions:
A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's **pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom**, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.” 34 C.F.R. 106.40

PREGNANCY & TITLE IX: TITLE IX REGULATORY LANGUAGE



Physician Certification

- “Pregnancy and related conditions (cont.):

A recipient **may require** such a student to **obtain the certification of a physician** that the student is physically and emotionally able to continue participation in the normal education program or **activity so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.**” 34 C.F.R. 106.40

PREGNANCY & TITLE IX: TITLE IX REGULATORY LANGUAGE



Pregnancy as Temporary Disability

- “Pregnancy and related conditions (cont.):

A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom **in the same manner and under the same policies as any other temporary disability** with respect to any medical or hospital benefit, service, plan, or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.” 34 C.F.R. 106.40

PREGNANCY & TITLE IX: TITLE IX REGULATORY LANGUAGE



Leave Policies

- “Pregnancy and related conditions (cont.):

In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom as **a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.”**

34 C.F.R. 106.40

PREGNANCY & TITLE IX: OCR GUIDANCE



- “A school **may require** a pregnant student or student who has given birth **to submit medical certification** for school participation **only if the school also requires such certification from all students with physical or emotional conditions requiring the attention of a physician.**”
- “Thus, for example, a student who has been hospitalized for childbirth must not be required to submit a medical certificate to return to school if a certificate is not required of students who have been hospitalized for other conditions.”

Source: Department of Education (June 2013), Supporting the Academic Success of Pregnant and Parenting Students, p. 6.

PREGNANCY & TITLE IX: OCR GUIDANCE



- **“Schools cannot require a pregnant student to produce a doctor’s note in order to stay in school or participate in activities**, including interscholastic sports, unless the same requirement to obtain a doctor’s note applies to all students being treated by a doctor.”
- “That is, schools cannot treat a pregnant student differently from other students being cared for by a doctor, even when a student is in the later stages of pregnancy; **schools should not presume that a pregnant student is unable to attend school or participate in school activities.**”

Source: Department of Education (June 2013), Supporting the Academic Success of Pregnant and Parenting Students, p. 8.

PREGNANCY & TITLE IX: OCR GUIDANCE



- “When the student returns to school, **she must be reinstated to the status she held when the leave began**, which should include giving her the opportunity to make up any work missed.”
- “A school may offer the student alternatives to making up missed work, such as:
 - Retaking a semester.
 - Taking part in an online course credit recovery program, or
 - Allowing the student additional time in a program to continue at the same pace and finish at a later date, especially after longer periods of leave.
- The student should be allowed to choose how to make up the work.”

Source: Department of Education (June 2013), Supporting the Academic Success of Pregnant and Parenting Students, p. 10.

- NCAA Guidance

- A pregnant student-athlete's physician should make medical decisions regarding sports participation.
- A student-athlete with a pregnancy-related condition must be provided with the same types of modifications provided to other student-athletes to allow continued team participation.
- Pregnant student-athlete cannot be harassed due to pregnancy.
- A student-athlete whose athletic career is interrupted due to a pregnancy-related condition will typically be entitled to a waiver to extend her athletic career.

SPECIAL TOPICS



- Nursing rooms, mothers' lounges, etc.
- Children at school and in the classroom...No.
- Residence halls
 - Cannot remove prior to birth of child
 - Refund
 - Help
- Labs, chemicals, exposure to diseases, etc.
 - Reasonable restrictions for health and safety (as deemed by a physician) are permitted.
- Cohort programs
- Licensure requirements

SUPPORTING STUDENTS



- Develop support networks for students
 - E.g.: Pregnant and parenting student organizations (all-comers)
 - Classes: Pre-natal classes, parenting, life-skills, etc.
 - Work with student government
 - Harness knowledge and experience from employee programs
- Supporting partners or spouses
 - Leave and/or excused absences
 - Treat with equal dignity and understanding
 - Stop asking “what do we have to do?” and instead shift to “what can we do?”

STRATEGIES FOR COMPLIANCE



- Detailed institutional policies
- Institutional enforcement procedures
- Centralized grievance process
- Title IX Coordinator's central role
- Develop a Resource Guide
- **Train and educate** students, faculty, staff, administrators, coaches
- Flexibility (when possible) with course tracks
- Posters in residence halls and student spaces
- Work with Case Manager
- Focus on supportive services

TRAINING FOR STUDENTS



- Title IX's requirements and protections
- How to file a complaint
- Who is the TIX Coordinator (and deputies)?
- Online resources and tools
- Online reporting mechanism
- Empower to approach faculty, coaches, and administrators
- Train students to support each other
- Develop and support programming that targets barriers and problematic social context

TRAINING FOR FACULTY



- Faculty are typically the biggest area of institutional non-compliance with Title IX and pregnancy
- Title IX's requirements
 - Faculty should know that compliance often does require more effort on the part of faculty
 - Referral to Title IX Coordinator
- Provide faculty with a resource handout they can provide to students
- Blaming the student is NEVER acceptable
- TIX Coordinator should:
 - Train all faculty on requirements
 - Develop working relationships with Deans' offices and Department Chairs (when possible)

PREGNANCY & TITLE IX CASE DISCUSSION



- January 2018: Jill, a student, has had a difficult pregnancy and is six months pregnant. She has been able to maintain solid grades up to this point, but has just been informed by her doctor that she must stay in bed for the remainder of her pregnancy. She approaches her advisor and asks him what her options are with her coursework.



PREGNANCY & TITLE IX CASE DISCUSSION



- Sasha is an elementary education teacher who has fulfilled all of her course requirements and is one-third of the way through her required student teaching experience when she has a baby. She faced medical complications with the birth and her doctor tells her she will miss at least a month of her student-teaching. If her graduation date is delayed, she will miss that year's hiring cycle.
- What are some possible approaches?

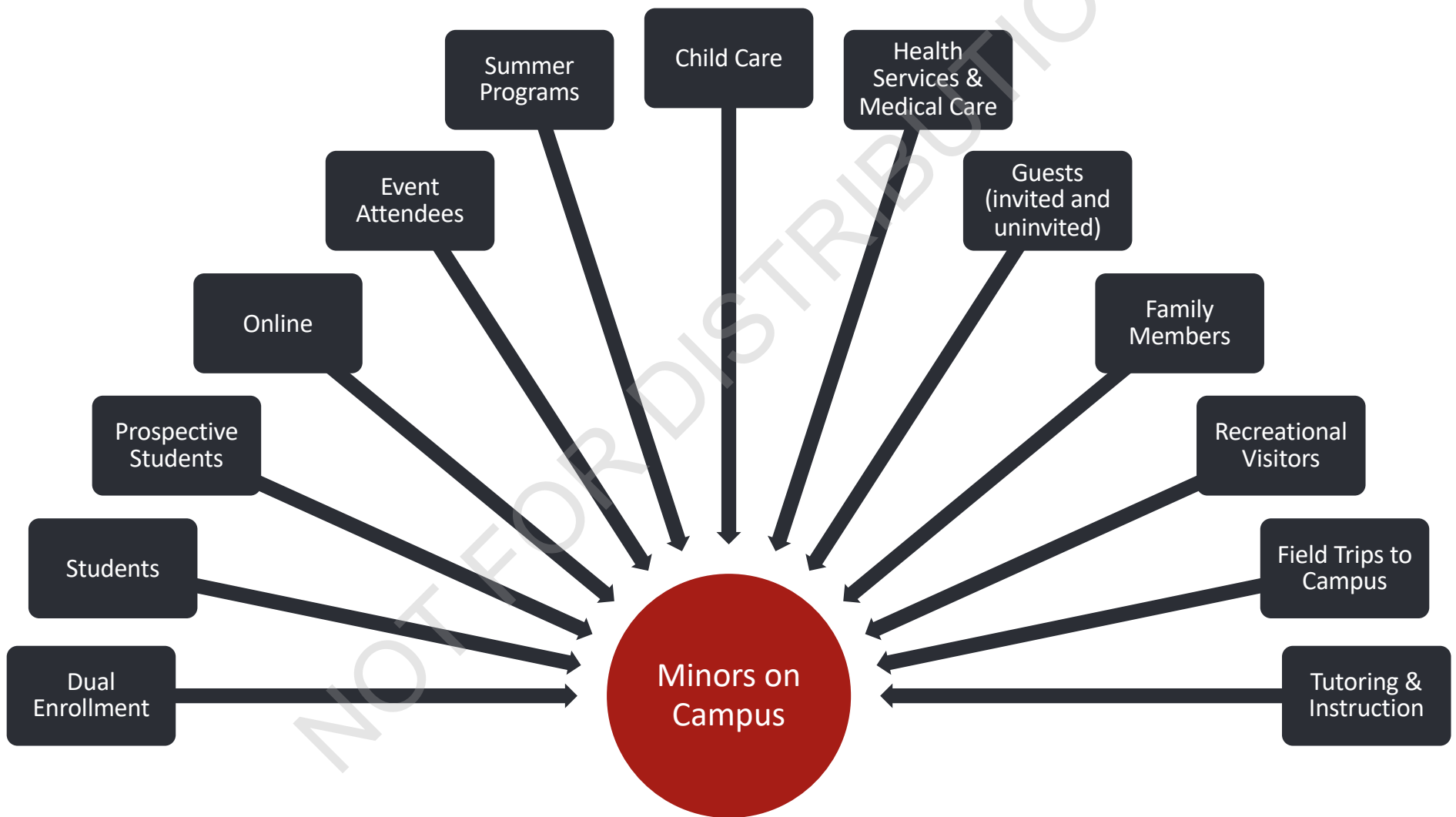


MINORS & TITLE IX

- Minors on Campus
- Operative Questions
- Sample Policy
- Abuse Prevention
- More Concerns



MINORS & TITLE IX



MINORS & TITLE IX



- Minors as students.
 - Students under the age of 18 may enroll full- or part-time in college. When they do, FERPA rights shift from their parents to them, and privacy protections attach to their education records.
- So, when are they “students?”
 - Dual enrollment.
 - High school on campus.
 - Continuing education.
 - Recruits.

MINORS AND TITLE IX: SOME OPERATIVE QUESTIONS



- How many minors are on your campus each day?
- Who knows they are there?
- Who is responsible for them?
- Do those parties know the different responsibilities in terms of:
 - Reporting/referring.
 - BIT/Title IX/Clery.
 - Parental notification.
- Are those parties trained/checked?
 - By whom?

MINORS & TITLE IX: CAMPS EXAMPLE



- When is a camp “ours?”
- What are our responsibilities at each point on the continuum?



Not ours:

- Run by a different entity.
- They hire the staff.
- We rent them space only.

Kind of ours:

- The money comes through a shell or through the school first.
- The employees are our students or temp hires.
- May have our name on it – kind of.

Completely ours:

- The money comes into the school.
- The staff are our employees.
- It has our name on it.

- Additional policy issues:
 - Classifying minors – see state law.
 - Jurisdiction.
 - Acts against or by non-affiliated persons (e.g. third parties, guests, invitees, and minors).
 - Who has access to minors?
 - Employees.
 - Students.
 - Quasi-employees.

- Additional policy issues:
 - Facility usage policies.
 - e.g.: Recreation center, overnight visitation, conference facilities, athletic facilities, event facilities, etc.
 - Communication and interaction with parents/guardians.
 - Communication and interaction with minors – who will have it?

MINORS & TITLE IX: SAMPLE POLICY



- Abuse involving minors – model policy language:
 - In addition to having students who are minors enrolled, [College] hosts minors as guests and as campers. [State] law narrowly imposes duties on mental health professionals, counselors, clergy, and law enforcement to report certain crimes involving minors, and abuse, to appropriate officials. [College]’s protocol is that **all employees will report all suspected child abuse, sexual abuse of minors, and criminal acts by minors to [the Security Office] without delay.** Clery Act reporting of offenses for statistical purposes occurs whether victims are minors or adults.

MINORS & TITLE IX: ABUSE PREVENTION



- Preventing and detection – sexual abuse of minors:
 - Policies.
 - Screening and selection.
 - Training.
 - Monitoring and supervision.
 - Consumer participation – educate parents and guardians.
 - Reporting systems and mechanisms.
 - Response – prompt, effective, and compliant with laws.
 - Administrative practices.

Source: “Managing the Risks of Minors on Campus,” Arthur J. Gallagher & Co.

MINORS & TITLE IX: MORE CONCERNS



- Additional issues to consider:
 - Infants and nursing mothers (covered more in pregnancy section).
 - Student's children in the classroom.
 - Inadequate supervision.
 - Alcohol and controlled substances.
 - Unplanned time.
 - Restrooms, locker rooms, and residential facilities.
 - Issues of statutory rape (state law dependent).
 - Close-in-age exceptions to reporting/statutory.

AMERICANS WITH DISABILITIES ACT

- ADA/Section 504
- Qualified Individual with a Disability
- Animals on Campus

LEGAL LANDSCAPE OF DISABILITY LAW



- Titles II and III of the Americans with Disabilities Act of 1990 (ADA).
- Section 504 of the Rehabilitation Act of 1973.
- Fair Housing Act (FHA).
- State laws.

WHY IS IT IMPORTANT TO UNDERSTAND DIFFERENT LAWS?



- Laws apply differently to housing than to the campus in general, including classrooms and dining facilities.
- Laws apply different definitions and standards as it relates to service vs. assistance/emotional support animals (ESAs).
- Laws may impose different standards or response protocols.

SECTION 504 OF THE REHABILITATION ACT, 1973



- A federal civil rights law, prohibits discrimination on the basis of disability in **all programs or activities that receive federal financial assistance**.
- Forbids institutions from excluding or denying individuals with disabilities an **equal opportunity** to receive program benefits and services.
- Codified at 29 U.S.C. § 701.
- Enforced by the U.S. Department of Education.
 - Compliance guidelines by OCR.
- Covers “any program or activity.”
- Individuals with disabilities are also protected from discriminatory harassment directed at them because of their disability.

SECTION 504

SCOPE OF COVERED PROGRAMS



- All of the college's operations, programs, and activities are subject to Section 504 requirements, including:
 - Academics.
 - Athletics.
 - Employment.
 - Housing.
 - Events.
 - Web-based educational services.

SECTION 504/ADA GENERAL COMPLIANCE REQUIREMENTS



- If the institution accepts federal funds or employs more than 50 people the institution **must designate an employee to coordinate all efforts to comply** with and carry out its responsibilities, including:
 - **Ensuring dissemination of notice** of the institution's non-discrimination policy.
 - **Adopting civil rights grievance procedures** that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints of discrimination.
 - **Conducting investigations** of complaints regarding noncompliance with the legal mandates of ADA or 504.
 - **Providing notice** of the name, office address, and telephone number of the employee or employees designated to oversee 504/ADA compliance.
- This does not mean the 504/ADA Coordinator is to hold the position of disability coordinator!

TYPICAL 504/ADA COORDINATOR ADMINISTRATIVE REQUIREMENTS



- The Section 504/ADA Coordinator is, at a minimum, responsible for:
 - Coordinating and monitoring compliance with Section 504 and Title I, II or Title III of the ADA;
 - Overseeing state civil rights requirements regarding discrimination and harassment based on disability;
 - Overseeing prevention efforts to avoid Section 504 and ADA violations from occurring;
 - Implementing the institution's discrimination complaint procedures with respect to allegations of Section 504/ADA violations, discrimination based on disability, and disability harassment

TITLE II & III ADA, 1990



- **Title II:**

- Prohibits discrimination on the basis of disability by public entities, including state colleges and universities, regardless of whether they receive federal financial assistance.

- **Title III:**

- Prohibits discrimination on the basis of disability in private education facilities and in the activities of places of public accommodation (businesses that are generally open to the public and that fall into one of 12 categories listed in the ADA).

The language of the ADA tracks Section 504 and explains that the remedies, procedures, and rights under the ADA are the same as under the Rehabilitation Act.

WHO IS PROTECTED UNDER SEC 504 & ADA?



- Under this law, **qualified individuals with disabilities** are defined as:
 - Persons with a physical or mental impairment which substantially **limits one or more major life activities**;
 - Persons who have a record of having a physical or mental **impairment**; or
 - Persons who are regarded as having a physical or mental **impairment** that substantially limits one or more major life activities.

WHAT DOES IT MEAN TO BE A “QUALIFIED INDIVIDUAL WITH A DISABILITY”?



- A qualified individual with a disability is someone who, with or without **reasonable modifications** to rules, policies, or practices or provision of auxiliary aids and services, meets the **essential eligibility requirements** to be able to receive the receipt of services or to participate in programs or activities of the educational entity.
- All qualified individuals with a disability **must be provided with aids, benefits, or services that provide an equal opportunity** to achieve the same result or level of achievement as others.

WHAT IS A “PHYSICAL OR MENTAL IMPAIRMENT”?



A “Physical Impairment”

- Is any physiological disorder or condition, cosmetic disfigurement or anatomical loss that affects one or more of the body systems, such as:

Neurological

Musculoskeletal

Special sense organs

Respiratory (including speech)

Cardiovascular

Reproductive

Digestive

Genitourinary

Lymphatic

Skin & Endocrine

Bladder

Circulatory

Immune

Normal cell growth

Bowel

A “Mental Impairment”

- Is a mental or psychological disorder includes mental retardation, emotional or mental illness, and specific learning disorders

EXAMPLES OF A “MAJOR LIFE ACTIVITY”



- Major life activities include caring for one's self, performing manual tasks such as:
 - Walking
 - Seeing
 - Hearing
 - Speaking
 - Breathing
 - Working
 - Learning
 - Concentrating
 - Eating
 - Sleeping
 - Standing
 - Lifting
 - Bending
 - Reading
 - Thinking
 - Communicating
- Non-exhaustive list; greatly expanded under the ADAAA

FAIR HOUSING ACT



- FHA **applies to residential “dwellings,”** a term that likely encompasses campus housing, including residence halls.
- FHA makes it unlawful to “discriminate against any person in the terms, conditions, or privileges of sale or rental of a **dwelling, or in the provision of services or facilities in connection with such a dwelling because of a handicap...**”
- FHA requires allowance for **“assistance animals”** for a qualified individual with a disability in all dwellings.
- Enforced by the Department of Housing and Urban Development, Fair Housing Act.

HUD ASSISTANCE ANIMAL REQUIREMENTS



- Those seeking to have their assistance animal must have a qualifying disability.
- There must be an identifiable relationship or nexus between the disability and the assistance the animal provides.
- The animal that the individual with a disability wishes to accompany them must be necessary to afford the person with an equal opportunity to use and enjoy a dwelling.
- The assistance animal must meet reasonable standards for the housing environment.

HUD GUIDELINES REGARDING ASSISTANCE ANIMALS



- As long as the animal alleviates the “effects” of the disability and the animal is reasonably supported, it is acceptable.
- Species other than dogs, with or without training, and animals that provide emotional support are recognized as “assistance animals.” Courts have also upheld that animals need not be trained, nor do they need to be dogs to qualify as “reasonable accommodations.”
- Animals who pose a direct threat to the health and safety of others; who cause substantial physical damage to the property of others; who pose an undue financial and/or administrative burden; or would fundamentally alter the nature of the provider’s operations may be excluded.

ACCOMMODATION PROCESS



- If an individual needs an accommodation, they have the initial obligation to provide notice to the institution of a qualifying disability and need for an accommodation.
- Institutions may establish reasonable standards for documentation.
- Institutions should engage in an “interactive process” to determine appropriate accommodations that meet the individual’s needs.
- Aids and adjustments must be provided in a timely manner.

CONSIDERATIONS FOR PROVIDING “EQUALITY” IN OPPORTUNITIES



- What can the institution do to provide students with disabilities equal access to the educational benefits or opportunities provided through technology?
- How do the educational opportunities and benefits provided to students with disabilities compare to those provided to students without disabilities?
 - Are they equally available?
 - Are they available in a timely manner, similar to those provided to students without disabilities?
 - Will it be more difficult for students with disabilities to obtain the educational opportunities than for non-disabled students?

IS IT A IX?

When does Title IX apply?

- Jurisdiction
- Covered Programs
- Covered Individuals
- Subject Matter

WHEN DOES TITLE IX APPLY?



Jurisdiction

- Jurisdictional Limitations.
 - Geographic.
 - Temporal.
- When is a student a “student”?
 - Upon **application** to the institution?
 - Once **admitted** to the institution?
 - Once **registered**?
 - Upon **matriculation**?
 - What about winter and summer **breaks**?
- When is an employee and employee?
 - Exempt vs. Non-Exempt Employees

WHEN DOES TITLE IX APPLY?



Jurisdiction for Off-Campus Incidents:

- For Sexual Harassment and Discrimination cases.
 - There is an expectation that you should exercise SOME jurisdiction over off-site/off-campus incidents - “Nexus.”
- If Title IX jurisdiction is not present, the behavior could still violate:
 - Institutional harassment/discrimination policies.
 - Student Handbook/Conduct policies.
 - Technology/Acceptable Use policies.
 - Employee Handbook/Policies.
 - Professionalism standards.

WHEN DOES TITLE IX APPLY?



Jurisdiction for Off-Campus Incidents:

- This means you will be taking discretionary jurisdiction over incidents off-campus or on non-school property.
 - See, e.g. *Simpson v. Colorado*.
- When?
 - Whenever your policy says.
 - Nexus.
 - When the behavior occurs on property you own or control.
 - When the behavior occurs in programs/events you sponsor.
 - When the downstream effects of purely off-site conduct cause a discriminatory impact at school/on campus.

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 or not, **all** institutional programs are covered.
- All programs using facilities of the funding recipient.
 - (e.g. camps using your fields/stadium).
- Includes hospitals, residency programs, branch, or satellite campuses.

WHEN DOES TITLE IX APPLY?



Jurisdiction over incidents outside of the United States:

- The *Davis* standard is that Title IX applies and jurisdiction is required when the institution has:
 - **Control over the harasser (discriminator); AND**
 - **Control over the context of the harassment (discrimination).**
- Campus policy may clearly exercise jurisdiction.
- Current OCR may not enforce extraterritorial complaints (under proposed regs).

WHEN DOES TITLE IX APPLY?



Covered Individuals

- Students – In-school/On-campus & online/distance.
- Dual Enrollment students.
- Faculty.
- Staff.
- Campers.
- Medical Residents.
- Subcontractors, vendors.
- Guests/visitors.

(as either Reporting or Responding Party)

WHEN DOES TITLE IX APPLY?



- If Responding Party is not affiliated in any way with the institution, the institution lacks authority to take disciplinary action.
 - Employee of an outside company (e.g.: vendor, construction worker, etc.).
 - Guest or invitee.
 - Prospective student.
 - Former student.
 - Former employee.
 - Student from another institution.

WHEN DOES TITLE IX APPLY?



- Examples where institution lacks disciplinary authority:
 - A student is sexually harassed by a student from another institution.
 - A student withdraws, or an employee resigns in the midst of an investigation.
- Institution must still:
 - Provide support and resources to the reporting party and the community.
 - Determine if there are patterns or institutional variables that contributed to the alleged incident.
 - Take what action it can (e.g.: trespass the person).

WHEN DOES TITLE IX APPLY?



Subject Matter

- Unwelcome sex-based and gender-based conduct.*
- Unwelcome conduct of a sexual nature.*
- Sex discrimination.
- Gender discrimination.
 - Including gender identity discrimination; and
 - Sexual orientation discrimination that implicates gender.
- Pregnant and parenting student (employee?) discrimination.

*Unwelcome conduct must create a discriminatory effect and create a hostile environment. Quid pro Quo or retaliation

WHEN DOES TITLE IX APPLY?



Subject Matter

- Hostile environment sexual harassment.
- *Quid Pro Quo* sexual harassment.
- Retaliatory harassment.
- Sexual violence.
- Intimate Partner Violence/Relationship violence.

WHEN DOES TITLE IX APPLY?



Subject Matter

- And, sex/gender-based:
 - Stalking.
 - Hazing.
 - Bullying.
 - Arson.
 - Vandalism.
 - Theft.
 - And any other policy violation that is sex/gender based that causes a discriminatory effect.

WHEN DOES TITLE IX APPLY?



Subject Matter

- 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 (or CA) university.
 - Must be **severe, pervasive (persistent), and objectively offensive**.
 - Subjectively offensive conduct cannot be disciplined at a public (or CA) university unless it is also objectively offensive.
- May still provide support and resources to the Reporting Party and the community as appropriate.

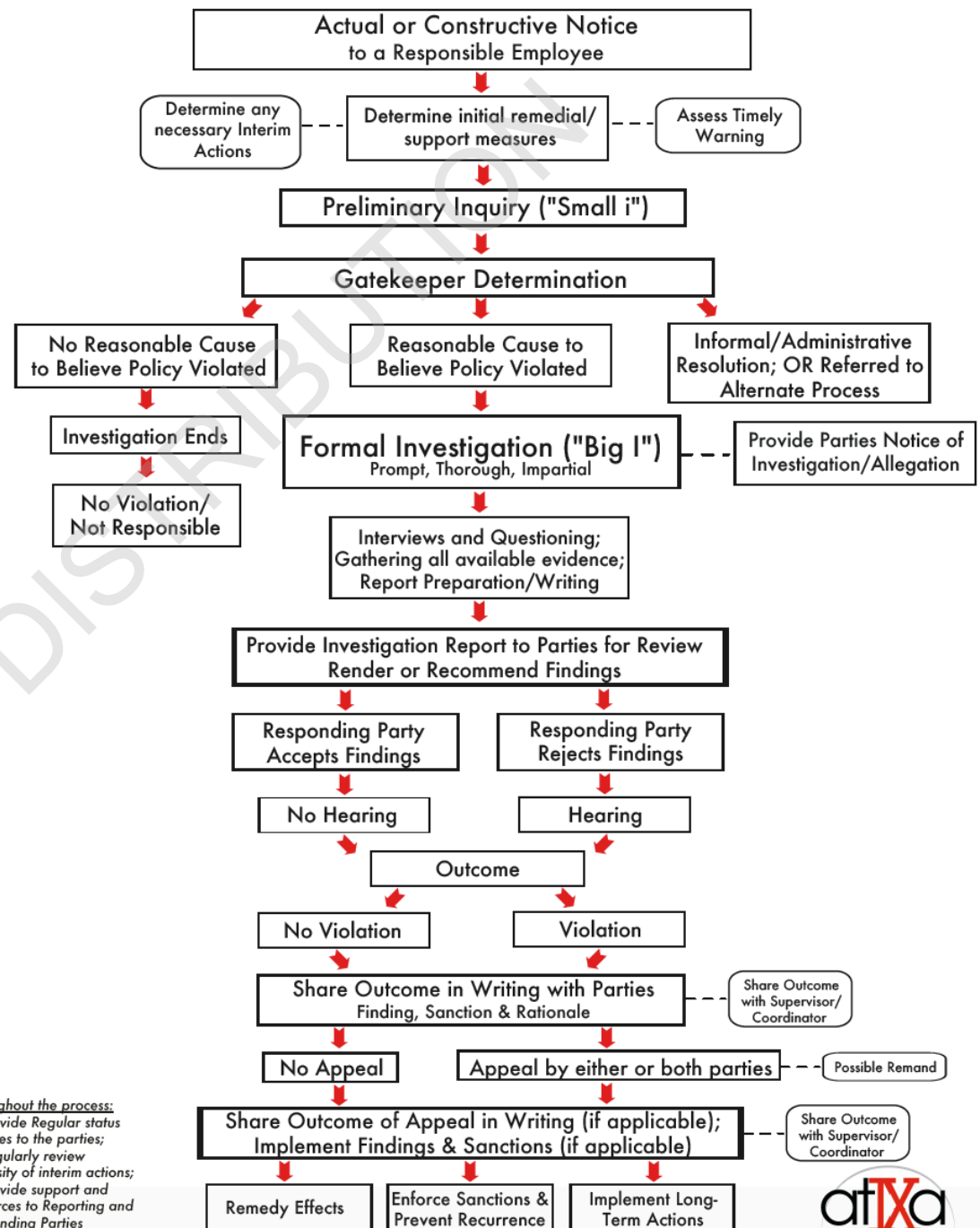
SMALL GROUP DISCUSSION QUESTIONS



- Does your institution exercise jurisdiction over off-campus/non-school property incidents? Under what circumstances?
 - For Students? Faculty? Staff?
- When is a student officially a student under your code of conduct and/or Title IX policies?
- What are you doing to address off-campus intimate partner violence?
- What are you doing to address online harassment and discrimination?

INVESTIGATION AND HEARING PANEL HYBRID MODEL

INVESTIGATION AND HEARING PANEL HYBRID MODEL FLOWCHART





OCR-COMPLIANT PROCEDURES

Minneapolis, MN

June 2019

LAWS, COURTS, AND REGULATIONS



- **Laws** passed by Congress (e.g.: Title IX) – Enforceable by Courts and OCR
 - Federal Regulations – **Force of law**; Enforceable by Courts and OCR
 - Regulatory Guidance from OCR – Enforceable only by OCR (e.g.: 2001 Guidance)
 - Sub-Regulatory Guidance from OCR – Enforceable only by OCR (e.g.: 2011 DCL)
- Federal Caselaw – **Force of law** based on jurisdiction
 - Supreme Court – binding on entire country
 - Circuit Courts of Appeal – binding on Circuit
 - District Court – binding on District
- State caselaw – **Force of law**; binding only in that state based on court jurisdiction

STAY ABOVE THE FLOOR



- Law, Caselaw and Federal Regulations set the floor
 - OCR Guidance typically elevates the floor
 - States can pass laws that exceed federal requirements (e.g.: NY's "Enough is Enough" law)
- Regressing to the floor = doing the bare minimum
 - Will continue the cycle of inequity and unfairness
- Civil Rights issues demand more than bare minimum
- Industry standards already exceed the floor
 - Regression to the floor increases risk of lawsuit and negligence-based liability

INDUSTRY STANDARDS



- The field has adopted numerous practices and created industry standards that exceed basic requirements
- Standards stem from Student Services/Affairs, HR, Legal Affairs, OCR Guidance, Courts, Law, Professional Associations
- ATIXA's policy and procedure model – 1P1P – encompasses industry standards
- ATIXA's publications and resources provide guidance where government does not

OVERVIEW OF PROPOSED REGULATIONS



- November 29, 2018: OCR published proposed amendments to Title IX regulations:
 - Provided 60 days for public comment – open until January 28th
 - OCR will then review comments and finalize the regulations
 - OCR has to respond materially to comments
 - Will amend the Code of Federal Regulations
 - **Will have the force of law once adopted**
 - Proposed amendments are significant, legalistic, and very due process-heavy
 - Will likely go into effect 30 days after final regulations published in Federal Register

INTERVENING VARIABLES



- Congress and a newly-installed Democratic House and Committees
- Title IX has become a political football
- Lawsuits & injunctions by:
 - Parties
 - States: Attorneys General
 - Possible enforcement injunctions by Federal judges
- Conflicts between proposed regulations and state laws (e.g.: CA and NY)
- Campus/school protests
- Public perception

DUE PROCESS CASELAW



- The pro-reporting party imbalance prompted hundreds of lawsuits by responding parties
 - Wave of John Doe cases with unfavorable findings toward schools
 - Rise in lawsuits alleging selective enforcement, negligence, deliberate indifference, etc.
- Courts began requiring heightened levels of due process
- Sixth Circuit leads this revolt
- Trump-era OCR shifting imbalance back toward responding parties, using courts and due process as their rationale
- Balance will not result from proposed new regulations

DELIBERATE INDIFFERENCE STANDARD



- In *Gebser* (1998) and *Davis* (1999), the Supreme Court held that a funding recipient is liable under Title IX for deliberate indifference **only** if:
 - The alleged incident occurred where the funding recipient controlled both the harasser and the context of the harassment;
AND
 - Where the funding recipient received:
 - Actual Notice
 - To a person with the authority to take corrective action
 - Failed to respond in a manner that was clearly unreasonable in light of known circumstances
- OCR has historically used a broader, less stringent standard

“NOT DELIBERATELY INDIFFERENT”



- Safe Harbors in the Proposed 2019 Regulations:
 - If the school follows procedures (including implementing any appropriate remedy as required), then not deliberately indifferent.
 - If reports by multiple complainants of conduct by the same respondent, Title IX Coordinator must file a formal complaint. If the school follows procedures (including implementing any appropriate remedy as required), not deliberately indifferent.
 - For IHEs, if no formal complaint and school offers and implements supportive measures designed to effectively restore or preserve the reporting party's access, not deliberately indifferent. Must inform reporting party of right to file formal complaint later.
 - No deliberate indifference merely because OCR would come to different determination based on the evidence. Biases process?

NOTICE, JURISDICTION, & DELIBERATE INDIFFERENCE

—

NOT FOR DISTRIBUTION

NOTICE TO THE INSTITUTION



- Proposed regulations would not require a Title IX investigation unless the institution receives actual notice through a “formal complaint”:
 - Actual notice defined as:
 - The reporting party filing a formal, written, signed complaint with TIX Coordinator; or
 - The TIXC may file a formal written complaint on behalf of reporting party
 - Conflict of Interest? Impartiality concern?
 - Eliminates OCR’s constructive notice standard
 - What to do if institution receives notice in some other way?
 - Industry standards

RESPONSIBLE EMPLOYEE SHIFTING?



- Currently, a **responsible employee** includes any employee who:
 - Has the authority to take action to redress the harassment; or
 - Has the duty to report harassment or other types of misconduct to appropriate officials; or
 - Someone a student could reasonably believe has this authority or responsibility;

RESPONSIBLE EMPLOYEES?



- Proposed regulations shift “actual notice” to:
 - Anyone who has the authority to take action to redress the harassment
 - All pre-K-12 teachers when conduct is student-on-student
- This is ONLY the standard for when OCR would deem a school to be on notice; it is the floor.
- ATIXA has not changed its recommendation to require all non-confidential employees to report harassment or discrimination
- Continue to train employees on obligation to report

- Jurisdiction
 - *Davis* standard – control over the harasser and the context of the harassment
 - “occurs within its education program or activity”
- Geography should not be conflated with the Clery Act – education programs or activities can be off-campus, online
- Proposed regulations specify “harassment...against a person in the United States”
 - Unclear effect on study abroad programs or school-sponsored international trips – “nothing in the proposed regulations would prevent...”
- Open question of student/employee harassment of non-student/employee

- Current requirement to address on-campus effects of off-campus misconduct
 - Even if conduct took place outside education program or activity, schools responsible for addressing effects that manifest in the program/activity
 - Students and/or employee conduct outside program, IPV
- Leaked draft of regulations prior to publication indicated schools “are not responsible” for exclusively off-campus conduct but could be responsible for on-going on-campus /in program effects
- Published proposal eliminated this comment, presume *Davis* standard still applies – “nothing in the proposed regulations would prevent...”

DEFINITIONS

—

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DEFINITIONS: SEXUAL HARASSMENT



- Current OCR Definition of Sexual Harassment is “unwelcome conduct of a sexual nature”
 - Includes quid pro quo “requests for sexual favors”
 - When sexual harassment constitutes sex discrimination by causing a hostile environment (discriminatory effect), prohibited by Title IX
- Proposed regulations
 - Conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct (QpQ)
 - Unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity (HE)
 - Sexual assault, as defined in 34 CFR 668.46(a)
- No mention of retaliatory harassment in proposed regs

DEFINITIONS: SEXUAL HARASSMENT



- ATIXA model definitions

- *Quid pro quo* sexual harassment

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature by a person having power or authority over another when submission to such sexual conduct is made either explicitly or implicitly a term or condition of rating, evaluating, or providing a benefit to an individual's educational or employment development or performance.

- *Hostile environment* sexual harassment

Unwelcome sexual, sex-based and/or gender-based verbal, written, online and/or physical conduct that is severe, or persistent or pervasive, and objectively offensive, such that it unreasonably interferes with, denies, or limits someone's ability to participate in or benefit from the institution's education or employment programs.

DEFINITIONS: SEXUAL HARASSMENT



- ATIXA model definitions (cont.)
 - *Retaliatory* sexual harassment
When adverse action required by the definition of retaliation takes the form of harassment, the conduct can be both sexual harassment and retaliation. It is also possible that retaliatory actions can take the form of hostile environment harassment.
- Proposed regulations written around a recipient's obligation to respond to sexual harassment
 - Conflate "sexual harassment" with "hostile environment"
- Neglect element of substantial harm within QpQ harassment
- "Unwelcome conduct" lower standard than "hostile environment"

DEFINITIONS: SEXUAL HARASSMENT



- Confusion regarding “hostile environment” remains
 - Proposed regulations adopt problematic *Davis* definition:
 - Unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive...
 - Vulnerable to interpretation that conduct must be pervasive **and** severe
 - Neglects the difference between persistent and pervasive
- Industry standard aligns with Title VII caselaw & provides clearer standard
 - Unwelcome *sexual* conduct, *or conduct* on the basis of sex, that is so severe *or* pervasive (*or* persistent) **and** objectively offensive...

DEFINITIONS: NOTICE



- “Notice” is the benchmark indicating when an institution is required to stop, prevent, and remedy
- Current OCR definition of notice – “knew or should reasonably have known”
 - Incorporates both actual and constructive notice
- Proposed regulations restrict to actual notice exclusively
 - *Actual knowledge* means notice to Title IX Coordinator or any official with authority to institute corrective measures
 - *Respondeat superior* or constructive notice insufficient
 - PK-12 teachers are “officials” – post-secondary faculty are not
 - Mere ability or obligation to report does not qualify as “official”

DUE PROCESS

—

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DUE PROCESS OVERVIEW



- Proposed regulations place heavy emphasis on due process protections for the responding party
- New standard of proof mandates
- Notice at various investigation stages
- Collection and production of evidence for review
- Mandate for determination and sanction process
- Live hearings with cross-examination
- Schools provide advisor; must allow advisor questioning of parties/witnesses

STANDARD OF PROOF

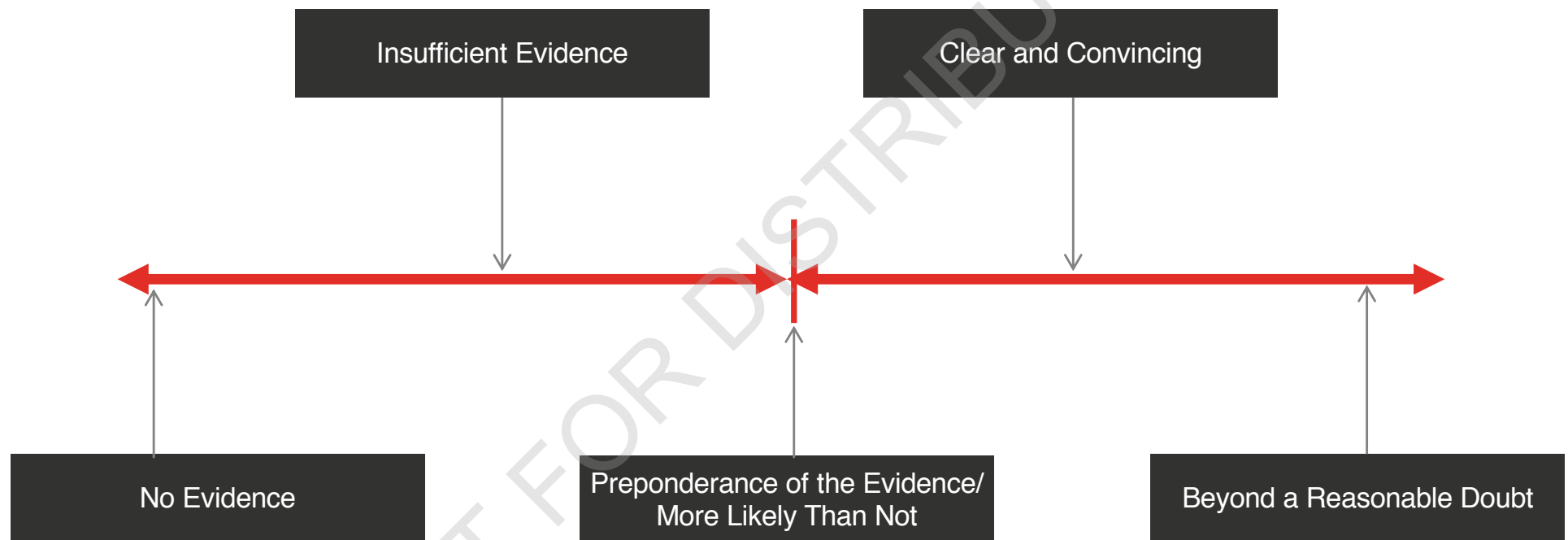


- Current OCR standard – preponderance of the evidence is standard civil court will use to evaluate school's response
- Proposed regulations allow preponderance only if same for other conduct code violations, otherwise must use clear & convincing
- Effectively mandates clear & convincing for schools with higher standards for other proceedings (i.e. AAUP faculty hearings)
- May create incongruence between school process and court scrutiny (where preponderance will still be the standard)
- ATIXA position – preponderance only equitable standard

UNDERSTANDING EVIDENCE THRESHOLDS



EVIDENTIARY STANDARDS



- Proposed regulations specify “prompt timeframes” written into grievance procedures
- Temporary delays only allowable for “good cause” and with written notice of the delay to parties
- OCR does not appear to contemplate reasonable delays at the earliest points of an investigation
- Responding party may not yet know of investigation or allegations
 - written notice of delay may be first indication

WRITTEN, DETAILED NOTICE



- Proposed regulations require several written, detailed notices to the parties
 - Any reasonable delay for good cause
 - Upon receipt of a formal complaint
 - Sufficient details – identity of parties, alleged violations, date, location
 - Sufficient time to prepare a response
 - Informal process requirements, if applicable
 - All hearings, interviews, and meetings requiring attendance with sufficient time to prepare
 - Upon determination of responsibility, including sanctions
- Notice requirements may affect industry standard investigative practices
- *Doe v. Timothy P. White, et. al., (2018)*

INFORMAL RESOLUTION OPTIONS



- Proposed regulations allow informal resolution at any time prior to a final determination, at discretion of TIXC
 - Requires detailed notice to the parties
 - Allegations
 - Requirements of the process
 - Circumstances which would preclude formal resolution
 - Consequences of participation
 - Obtain voluntary, written consent
- Does not preclude certain offenses from informal resolution
- May restrict restorative practices after a determination

SUPPORTIVE MEASURES



- Non-disciplinary, non-punitive individualized services
- Must not unreasonably burden other parties
- Proposed regulations address mutual restrictions, neglect unilateral or individualized restrictions
- Appears to anticipate, but also prohibit, that one party will sometimes be restricted more than the other
- May chill reporting if automatic mutual restrictions limit access to education program

BURDEN OF PROOF ON FUNDING RECIPIENT TO GATHER EVIDENCE



- Burden of proof and burden of gathering evidence on the school, not the parties
- “Sufficient to reach a determination” = appropriately thorough?
- Unclear if all relevant evidence must be collected
- Parties may be able to request certain evidence be obtained
- Evidence collected by law enforcement is admissible
- Who determines what evidence is relevant and sufficient?

“PRESUMPTION OF INNOCENCE”



- Proposed regulations require published grievance procedures include a presumption of innocence for the responding party
- No change from effective procedures – determination has always been based on evidence
- Presumption is a legal framework, may create inequity
- Unclear how presumption will work procedurally
- Should there be an equitable presumption that the reporting party is telling the truth?

CONFLICT OF INTEREST, OBJECTIVITY, AND BIAS



- Existing mandate for impartial resolutions with fair procedures
- Proposed regulations prohibit conflicts-of-interest or bias with coordinators, investigators, and decision-makers against parties generally or an individual party
- Training mandates apply to PK-12 as well as higher ed
- Unclear how prohibition of bias against reporting/responding parties establishes equity under Title IX or falls within OCR's statutory authority
- Due process mandate does not distinguish public v. private

INVESTIGATION AND RESOLUTION MODELS



- Treatment of reporting/responding parties may constitute discrimination
- The end of the single investigator model – live hearing required for all postsecondary resolution proceedings
- Must allow advisor to be present at all meetings, interviews, hearings
- If no advisor, school must provide one
- Statutory authority exceeded with procedural mandates?

PROVIDING PARTIES WITH COPIES OF ALL EVIDENCE



- All relevant evidence considered – inculpatory and exculpatory
- No restriction on discussing case or gathering evidence
- Equal opportunity to inspect all evidence, including evidence not used to support determination
- May chill reporting if irrelevant information must be provided to either party
- Unclear at what point in process evidence must be provided
- No limits on types/amount of evidence offered
- Creates possible equitable limits on evidence for both parties

PROVIDING COPIES OF INVESTIGATION REPORT FOR REVIEW AND COMMENT



- Proposed regulations mandate creation of an investigation report
- Must fairly summarize all relevant evidence
- Provided to parties at least 10 days before hearing or other determination
- Parties may review and submit written responses to report
- Unclear if analysis (including credibility) and findings of fact should be included
- Unclear if a full report or a summary is required

LIVE HEARING



- Proposed regulations mandate live hearing for postsecondary institutions, optional for PK-12
- Parties must attend hearing, otherwise all testimony submitted by absent party must be excluded
- Hearing administrator may not be Title IX Coordinator or the investigator
- Must allow live cross-examination to be conducted exclusively by each party's advisor (separate rooms still allowed)
- Unclear how irrelevant questions will be screened, but rationale for excluding questions required (verbal or written?)

- Advisor can be anyone – no restrictions in proposed regulations
- If a party does not have an advisor to conduct cross-examination, the school must provide one
- Advisor must be “aligned with the party”
 - “Defense” and “prosecution” advisors?
- No prior training required, no mandate for school to train
- ED presumes no financial impact because all parties retain counsel; not at institutional expense
- Mandate for higher education only – PK-12 may still conduct indirect cross-examination through hearing administrator

- If schools offer appeals (not required), must be made available equitably
- All parties receive notification of any appeal
- Opportunity for all parties to support or oppose outcome
- Written decision with rationale delivered simultaneously to all parties
- Appeal decision-maker cannot have had any other role in the investigation or resolution process
- “Reasonably prompt” timeframe for producing appeal decision

IMPACT ON EMPLOYEES



- Proposed regulations often refer exclusively to “students,” but employees are also affected
- Tenured faculty cross-examining students at a live hearing
- Faculty found responsible – sanctions affirmed by committee?
- Union employees – diminished right to an advisor because of union representation?
- Extensive due process protections for at-will employees accused of misconduct
- Potential inequity in employee processes for Title VII-based sexual harassment
 - More due process for sex discrimination than race discrimination

OTHER ELEMENTS IN THE PROPOSED REGS



- Remedial action required by OCR for noncompliance with Title IX will not include money damages
 - OCR clarifies that reimbursements or compensation do not fall within the meaning of this provision
- Institutions may presume religious exemption
 - If under OCR investigation, may then be required to submit exemption justification in writing
 - Allows institutions to avoid public assertion of exemption from certain civil rights protections
 - Problematic for students/employees who deserve to know if certain protections are not honored at their institution

OTHER ELEMENTS IN THE PROPOSED REGS



- Statement that proposed regulations do not restrict or deprive rights under the First, Fifth, and Fourteenth Amendments, FERPA, the Clery Act, or Title VII of the Civil Rights Act.
 - Clery/VAWA and FERPA considerations?
 - Clery Act provisions do not apply to PK-12 – the proposed regulations extend many Clery Act requirements to PK-12

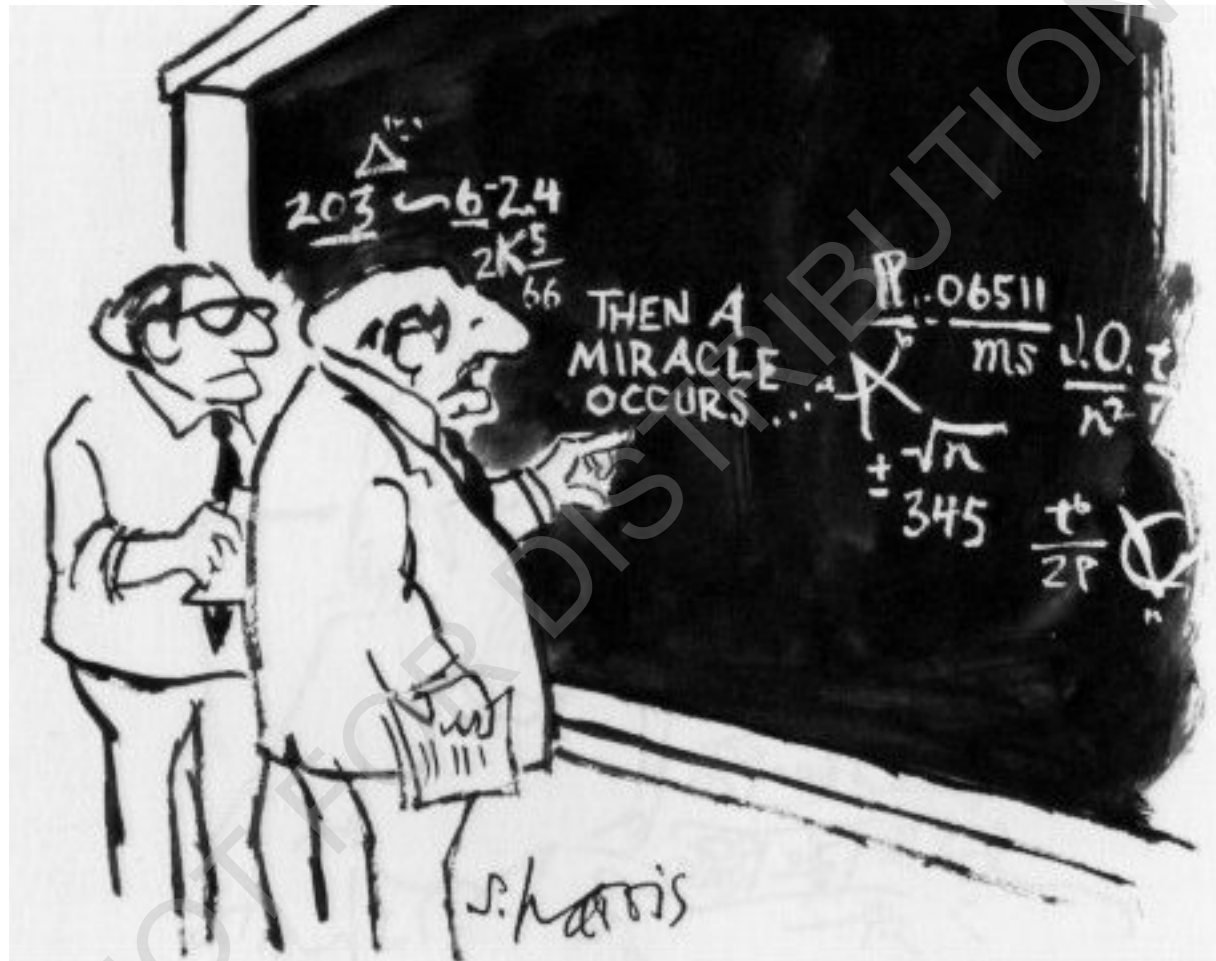
OPERATING OUTSIDE THE TIX FRAMEWORK



- *Ultra vires?*
 - Require signed formal complaint rather than actual notice
 - Prescribed standard of evidence for Title IX procedures
 - Mandated standard of proof for other conduct procedures
 - Extension of Clery/VAWA definitions and requirements to PK-12
 - Require live hearings for Title VII sexual harassment procedures
 - Individualized safety and risk analysis prior to interim suspension on an “emergency basis”
 - Treatment of responding party may constitute discrimination
 - Regulation of due process elements in internal procedures – blanket application to public and private institutions
 - Notice requirement upon receipt of formal complaint
 - Mandatory live hearing at public and private higher education institutions
 - Recordkeeping requirements


THE INVESTIGATION REPORT: AN OVERVIEW

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“I think you should be more explicit here in step two.”

from *What's so Funny about Science?* by Sidney Harris (1977)

A black and white photograph of a chalkboard. The words 'Show Your Work' are written in a large, white, cursive script across the center of the board. A large, light gray watermark with the text 'NOT FOR DISTRIBUTION' is oriented diagonally from the bottom left to the top right, passing over the chalkboard image.

Show Your Work

THE INVESTIGATION REPORT



THE INVESTIGATION REPORT (CONT.)



- The investigation report is the one comprehensive document summarizing the investigation, including:
 - Results of interviews with parties and witnesses.
 - Summary of other information collected (i.e., information from police reports including pretext calls, medical exams, video surveillance and photographs, copies of texts, emails, and social networking messages, etc.).
 - Analysis
 - Credibility determinations
 - Conclusion

THE INVESTIGATION REPORT: CONTENT OVERVIEW



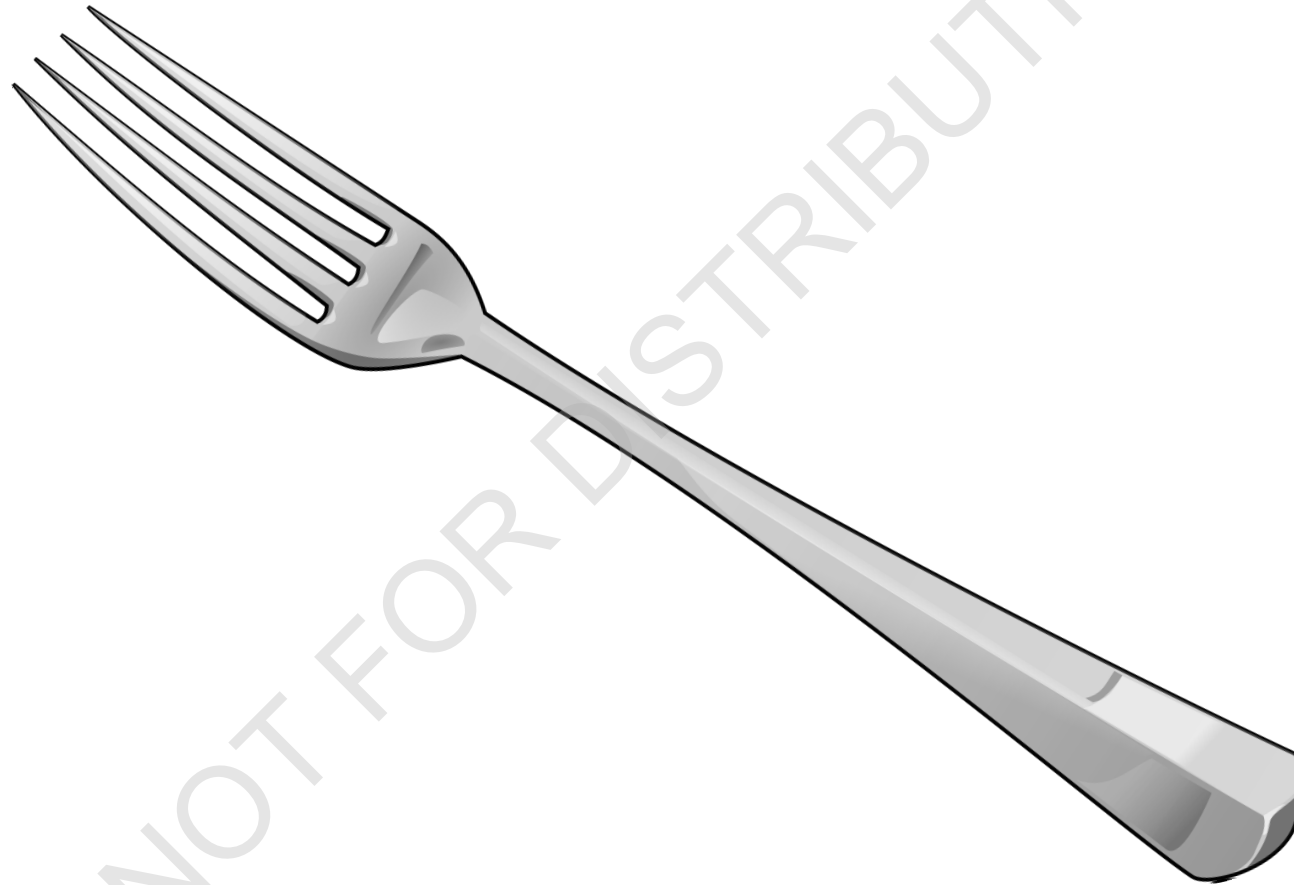
- I. Introduction
- II. Executive Summary
- III. Scope of Investigation
- IV. Jurisdiction
- V. Allegations
- VI. Evidentiary Standard
- VII. Applicable Policies
- VIII. Parties & Witnesses

THE INVESTIGATION REPORT: CONTENT OVERVIEW



- IX. Investigation Timeline
- X. List of Relevant Evidence & Witness Statements
- XI. Summary of Relevant Evidence & Witness Statements
- XII. Discussion and Analysis
- XIII. Credibility Analysis
- XIV. Findings
- XV. Conclusion
- XVI. Appendix

THE PROCESS



INVESTIGATION FILE VS. INVESTIGATION REPORT



- What goes in the file vs. the report is not lockstep
- Report has to be much more robust
- Notes – file, report, or appendix?
- Evidence – file, report, or appendix?
- How are the files organized?
- Personal/Private Notes
- FERPA – education record
- Employment record privacy
- What about sexually explicit content (e.g.: photos, videos, etc.)?

INVESTIGATION FILE VS. INVESTIGATION REPORT

- Where is the investigation file housed?
 - Students? Employees?
- Where is the Investigation report housed?
 - Students? Employees?
- Relevant evidence vs. irrelevant evidence
 - Proposed Regs. may influence this, including disclosure to parties
- Open Records Laws
- Draft Reports
- Providing Evidence – timing, how, what
- Providing the Report – timing, how, what

- Among the most significant problems for decision-makers
- Bias can represent any variable that improperly influences a finding and/or sanction
- There are many forms of bias that can impact decisions and sanctions:
 - Pre-determined outcome
 - Partisan approach by investigators in questioning, findings, or report
 - Partisan approach by hearing board members in questioning, findings, or sanction
 - Intervention by senior-level institutional officials
 - Not staying in your lane
 - Improper application of institutional procedures
 - Improper application of institutional policies

BIAS & PREJUDICE: AREAS OF CONCERN



- Role of Alcohol
- Student Development...
- **Own experiences...**
- Student-Athletes
- Fraternity/Sorority Life
- Disabilities & Mental Illness
- International Students
- Sex/Gender
- Gender Identity
- Race
- Ethnicity
- Nature of the Violation
- Religion or Religious beliefs
- Academic Field of Study/Major
- Veteran Status
- Socioeconomic Status
- Politics
- Attitude
- Pre-disposition towards one party

THE INVESTIGATION REPORT: BEGINNING THE REPORT



SAMPLE TEMPLATE FOR INVESTIGATIVE REPORTS

This is just one example that may be useful. You should consult with a licensed attorney in your own jurisdiction before adopting this template.

University of Knowledge

Date of Report:

This report addresses alleged violations of the Policy Name(s) of the University of Knowledge. Names of Investigators conducted the investigation into these allegations. This report will determine whether it is more likely than not that there has been a violation of the relevant university policy or policies.

Executive Summary:

(Summarize findings here.)

Procedural History:

Include the date of the incident, the date on which it was reported, how and to whom (generally) it was reported, the date on which investigators were assigned to it, and the date on which the investigation closed.

On Month XX, 20XX, Reporting Party met with Name Here in the Office of Victim Assistance at University of Knowledge along with Name Other Present Parties. Reporting Party reported that General Allegations occurred on Month XX, 20XX. Reporting Party has not reported this matter to law enforcement at this time, although she is aware of this option.

This report was referred to Investigators Name Here and Name Here on Month XX, 20XX. Both investigators were present in person for each interview. They alternated questioning and note-taking roles. This investigation was completed on Month XX, 20XX.

Involved Parties:

Reporting Party is (e.g., a first-year undergraduate female residing in the residence halls).

1. Responding Party is (e.g., a male graduate student and a residence advisor in the residence halls).
2. Witness 1 is (e.g., a freshman female residing in the residence halls and Reporting Party's roommate).
3. Witness 2 is (e.g., a male undergrad living off-campus and a classmate and friend of Reporting Party).
4. Witness 3 is (e.g., an employee of Nearby Bar; employee is not affiliated with the university).

BEGINNING THE REPORT



- When to start?
- Formatting: Value of a template
- Where to start?
- Length?
- Setting aside the time...
- Efficiency tips
- Where would you start with the case study?

APPLICABLE POLICIES: SAMPLE TEXT 2



- COLLEGE's Sexual Misconduct Policy supplies the applicable policy violations and elements required to establish a violation Sarah Young's complaints. The policies at issue are:
 - **Sexual Assault**
 - Non-consensual sexual penetration
 - Non-consensual sexual contact
 - **Sexual Harassment**
- The following definitions supply the elements required to establish a violation...

APPLICABLE ALLEGATIONS AND SCOPE OF INVESTIGATION: SAMPLE TEXT 1



It is alleged that BK:

- Engaged in an intimate relationship with an undergraduate student enrolled in one of his courses – KF – during the Fall 2017 semester both on- and off-campus.
 - Applicable Policies:
 - Sexual Misconduct: Quid pro Quo
 - Consensual Sexual Relations
 - Sexual Harassment

APPLICABLE ALLEGATIONS AND SCOPE OF INVESTIGATION: SAMPLE TEXT 1



- Repeatedly and intimately touched the hand of an undergraduate student – AD – enrolled in one of his classes and kissed her on the cheek on two occasions – once in Spring 2017, the other in Fall 2017.
 - Applicable Policies:
 - Sexual Harassment
 - Sexual Misconduct: Quid pro Quo

APPLICABLE POLICIES AND SCOPE OF INVESTIGATION: SAMPLE TEXT 1



- Provided alcohol and marijuana to and consumed alcohol and marijuana with a number of undergraduate and underage students both on- and off-campus.
 - Applicable Policies:
 - Alcohol Consumption in the Classroom
 - Unprofessional Conduct
 - Violation of laws

APPLICABLE POLICIES AND SCOPE OF INVESTIGATION: SAMPLE TEXT 1



- Engaged in unprofessional and improper behavior while teaching his History courses, such as swearing regularly and repeatedly making a number of sexually-oriented comments not germane to the subject matter.
 - Applicable Policies:
 - Sexual Harassment
 - Unprofessional Conduct

APPLICABLE POLICIES AND SCOPE OF INVESTIGATION: SAMPLE TEXT 1



- Engaging in an intimate relationship with two undergraduate students (twins).
 - Applicable Policies:
 - Sexual Misconduct: Quid pro Quo
 - Consensual Sexual Relations

INTRODUCTION: SAMPLE TEXT



- In February 2018, a group of female undergraduate students approached History faculty member SQ as well as History Department Chair LW to express their concerns regarding a visiting faculty member in the History Department – BK – and his behavior in class. Following the initial meetings, SQ and LW learned that BK allegedly touched a student's hand and kissed her cheek in a way that made her very uncomfortable, and learned of another student who allegedly had an intimate relationship with him while she was in his class.

INTRODUCTION: SAMPLE TEXT



- The allegation noted that the student did not feel she could end the relationship for fear of retaliation by BK. The identity of the first student was known, but the second was not. LW notified the College's Title IX Coordinator. The first student also reported directly to the Title IX Coordinator.
- The College began a preliminary inquiry, during which it learned the identity of the second student and sufficient information was presented to warrant a full Title IX investigation. During the course of the investigation, the College learned of a number of concurrent and related behaviors regarding BK and his interaction with students that warranted further investigation as well.

JURISDICTION EXAMPLE



- The alleged Title IX-based misconduct occurred between a faculty member – Kirby – and two of his students – Caldwell and Bennett. The alleged incidents involving Caldwell occurred over the course of the Fall 2017 semester, while those with Bennett occurred in both Spring 2017 and Fall 2017.

JURISDICTION EXAMPLE



- In both cases, the alleged Title IX-based conduct occurred both on- and off-campus. During the Fall 2017 semester, Caldwell was enrolled in one of Kirby's classes, and both students are in the History program, where Kirby is a visiting faculty member. As Kirby is a faculty member, and Caldwell and Bennett are students in his department, and some of the alleged misconduct occurred on-campus, the College believes that these behaviors are covered by Title IX, could impact its educational program, and exercises its jurisdiction accordingly.

JURISDICTION EXAMPLE



- Kirby is alleged to have made a number of inappropriate, unprofessional, and sexually harassing comments while teaching his classes, in written feedback to students, and in emails with students. These alleged behaviors fall clearly within the College's Title IX jurisdiction.

THREE TYPES OF SEXUAL HARASSMENT



1.
Hostile
Environment

2.
Quid Pro Quo

3.
Retaliatory
Harassment

ATIXA MODEL DEFINITIONS: HOSTILE ENVIRONMENT



- A hostile environment is created when sexual harassment is:
 - *Sufficiently severe, or*
 - **Persistent or pervasive, and**
 - **Objectively offensive that it:**
 - *Unreasonably interferes with, denies, or limits someone's ability to participate in or benefit from the university's educational [and/or employment], social, and/or residential program.*
- From both a subjective (the Reporting Party's) and an objective (reasonable person's) viewpoint.

ATIXA MODEL DEFINITIONS: HOSTILE ENVIRONMENT



- Totality of the circumstances to consider:
 - The frequency (persistent or pervasive), nature, and severity of the conduct.
 - Whether the conduct was physically threatening.
 - Whether the conduct was humiliating.
 - The identity of and relationship between the Responding Party and the Reporting Party.
 - The age and sex of the Responding Party and the Reporting Party.
 - The size of the school, location of the incidents, and context in which they occurred.
- *See OCR's 2001 Revised Sexual Harassment Guidance.*

ATIXA MODEL DEFINITIONS: HOSTILE ENVIRONMENT



- Totality of the circumstances to consider:
 - The effect on the Reporting Party’s mental or emotional state.
 - Whether the conduct was directed at more than one person.
 - Whether the conduct unreasonably interfered with the Reporting Party’s educational or work performance.
 - Whether the statement was an utterance of an epithet which was offensive, or offended by discourtesy or rudeness.
 - Whether the speech or conduct deserves the protections of academic freedom or the First Amendment protection.
 - “Constellation of surrounding circumstances.”
- *See OCR’s 2001 Revised Sexual Harassment Guidance.*

“SEVERE”



*“The more severe the conduct, the less the need to show a repetitive series of incidents; this is particularly true if the harassment is physical.”
—(2001 Guidance)*

- Physical is more likely to be severe without need for repetition:
 - “attempts to grab a female student's breasts or attempts to grab any student's genital area or buttocks” (2001 Guidance).
- Non-consensual sexual intercourse or contact are almost always sufficiently severe.
- Consider the circumstances: E.g. the ability for Reporting Party to escape the harassment.
- Accompanied by threats or violence.

“PERVASIVE”



- Widespread.
- Openly practiced.
- Well-known among students or employees — reputation of a department etc.
- Occurring in public spaces (more likely to be pervasive).
- “Harassment is pervasive when incidents of harassment occur either in concert or with regularity” (2001 Guidance – Footnote 44).
- Frequency of the conduct is often a pervasiveness variable.
 - Intensity/duration.
- Unreasonable interference.
- A “gauntlet of sexual abuse” *Meritor v. Vinson*, 477 U.S. 57 (1986).

“PERSISTENT”



- Repeated.
 - Intensity.
 - Duration.
 - Welcomeness.
- Defined:
 - Continuing to do something or to try to do something even though other people want you to stop.
 - Continuing beyond the usual, expected, or normal time; not stopping or going away (Merriam-Webster.com).

“OBJECTIVELY OFFENSIVE”



- Reasonable person standard in context.
- “I know it when I see it...”
- Age and relationships of Reporting and Responding Parties.
- Number of persons involved.
- Frequency.
- Severity.
- Physically threatening.
- Humiliation.
- Intimidation.
- Ridicule.

SEVERE? PERVASIVE? PERSISTENT? OBJECTIVELY OFFENSIVE?



- Student-based examples: Do these create a Hostile Environment?
 - Female student “sexts” pictures of herself to a male classmate.
 - A student draws a penis on the whiteboard at the front of the class. What about a whiteboard on the student’s residence hall door or in a student’s locker?
 - “Revenge porn” pictures posted online?
 - A student viewing porn on a computer in the library?
 - A student calling another a C-nt?

Student-Based Examples: Do these create a Hostile Environment?

HOSTILE ENVIRONMENT?



Hostile Environment?

HOSTILE ENVIRONMENT?



Hostile Environment?

SEVERE? PERVASIVE? PERSISTENT? OBJECTIVELY OFFENSIVE?



- Faculty-Based Examples: Do these create a Hostile Environment?
 - Giving a student a back-rub.
 - Require students to read *50 Shades of Grey* and give an assignment to compare their own experiences against those from the book.
 - Female faculty member repeatedly referring to male students as “penises.”
 - Repeatedly telling “dirty” jokes in class.
 - Calling a colleague a “bitch” in a meeting.

SEVERE? PERVASIVE? PERSISTENT? OBJECTIVELY OFFENSIVE?



- Staff-Based Examples: Do these create a Hostile Environment?
 - Telling dirty jokes: In common area? Staff meeting? To a single individual?
 - Sending porn to a colleague?
 - Rolling eyes and making masturbation motion with hand at comments during a staff meeting?
 - Repeated staring at a colleague of the opposite sex; accompanied by occasional winking?
 - A supervisor repeatedly mentioning how much they like a supervisee's outfits?

Staff-Based Examples

TITLE IX COORDINATOR: TRAINING OVERSIGHT

- Employees
- Students
- Hearing Panels/Decision-Makers
- Investigators
- Appeals Officers

SUPERVISOR OF TRAINING



- General training content categories:
 - Legal Overview: Title IX, Clery, caselaw, and regulations.
 - Institutional policy.
 - Institutional procedures.
 - Reporting.
 - Working with Reporting Parties & Responding Parties.
 - Resources, support, and remedies for Reporting Parties.
 - Resources and support for Responding Parties.
 - Consent in sexual interactions.
 - Rights of parties in complaint, investigation, hearing, and appeals.
 - Sanctions/repercussions.
 - Additional prevention and community education.

SUPERVISOR OF TRAINING



- Trainee Populations:

- **Title IX Compliance Officers.**

- E.g.: Coordinator and Deputies, Investigators, decision makers, hearing board members (including appeals), and others involved in processing, investigating, or resolving complaints.

- **First Responders.**

- E.g.: RAs, health center employees, counselors, sexual assault response coordinators, academic advisors, School Resource Officers, and public safety.

- **All Faculty/Teachers & Staff; ATIXA Responsible Employees.**

- ATIXA recommends making all faculty and staff responsible employees.

- **All Students.**

- Undergraduate, graduate, primary students, secondary students, professional, distance, and online, etc.

TRAINING COORDINATION AND OPERATIONALIZATION



- Centralization and oversight of school/district/campus-wide efforts.
- How?
 - In person? Online? Classroom?
 - Administrator-driven? Peer-driven?
- When/how often?
 - Orientation: summer orientation, orientation (student, faculty, and staff).
 - Follow-up is crucial.
 - Ongoing prevention and awareness campaigns.
 - Programs, conversations, speakers, parent programs, hall and floor meetings, first-year seminar, third-party online training, etc.

TRAINING OVERSIGHT FOR EMPLOYEES, BOARDS, INVESTIGATORS & APPEALS OFFICERS



- Each of these groups will be different.
- Must identify the compliance elements that constitute required knowledge for each entity.
- Must ensure training materials are not biased in favor of reporting or responding parties.
- Consider most effective approach for training, as well as most efficient.
 - For example, investigators will be responsible for thoroughness, fairness, and equity in the investigation. Their training must be extensive.
 - Appeals officers must have a comprehensive understanding of the process; should be in-person using case studies.
 - Employees need general resource and reporting information and could be trained by video.

CLERY ACT (VAWA 2013 – SEC. 304) REQUIRED TRAINING



- VAWA 304 contains certain training elements:
 - Annual training for those involved in disciplinary proceedings (e.g., investigators, hearing boards/decision-makers, and appellate officers) on:
 - Domestic violence, dating violence, sexual assault, and stalking.
 - How to conduct “an **investigation** and a **hearing process** that protects the safety of victims and promotes accountability.”
 - Relevant evidence and how to analyze it.
 - Questioning techniques.
 - Institution’s procedures.
 - Avoiding actual or perceived conflicts of interest.
 - Appeals.

INVESTIGATOR/HEARING BOARDS/DECISION-MAKER COMPETENCIES



- The Legal Landscape
- The Conduct/Disciplinary Process
- Due Process & Fairness
- Investigation and Resolution Procedures
- Title IX & VAWA requirements
- Critical Thinking Skills
- Questioning Skills
- Weighing Evidence
- Analyzing Policy
- Standards of Evidence
- Sexual Misconduct/ Discrimination
- SANE and Police Reports
- Intimate Partner Violence
- Bias/Prejudice/Impartiality
- The Psychology/Sociology of the Parties
- Stalking/Bullying/Harassment
- Deliberation
- Sanctioning/Remedies
- The Appeals Process
- Support and Resources for the Parties

- The institution's policies and procedures.
- Applicable federal and state law and court decision.
- Applicable legal standards and framework.
- Investigative techniques, including specifically interviewing witnesses.
- Cultural sensitivity; diversity competence.
- How to analyze evidence in relation to the legal standard.
- How to synthesize evidence, write reports, and make findings.
- Documentation requirements.

TRAINING FOR STUDENTS & EMPLOYEES



- Review institutional policies.
- Discussion of consent (use case studies).
- Discussion regarding how to report.
 - Where to find reporting resources.
- Presentation of resources.
- Present statistics and role of drugs and alcohol, and introduce “incapacitation.”
- Discussion of privacy and confidentiality.
- Discussion of rights of all parties.
- Provision of resource/reporting guide.

TRAINING FOR STUDENTS & EMPLOYEES



- The school's resources for sexual assault/harassment victims including:
 - Title IX Administrator or Deputy Administrator.
 - Law enforcement/School Resource Officer — campus and local.
 - Student conduct/student discipline.
 - EOP/EEO officers.
 - Victims' services/advocates.
 - Counseling services.
 - Health services.
 - Remedial measures available (e.g. no-contact orders, course or work adjustments, etc.).

SMALL GROUP DISCUSSION: TRAINING



- What are you doing that works?
 - Faculty?
 - Staff?
 - Students?
 - Responsible Employees?
- What has not worked?
- How do you reach as many as possible?
- How do you ensure impartial training?

CONTACT INFORMATION

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