

Title IX Coordinator Training Online Course

Class One: Definitions, Jurisdiction and Preliminary Matters

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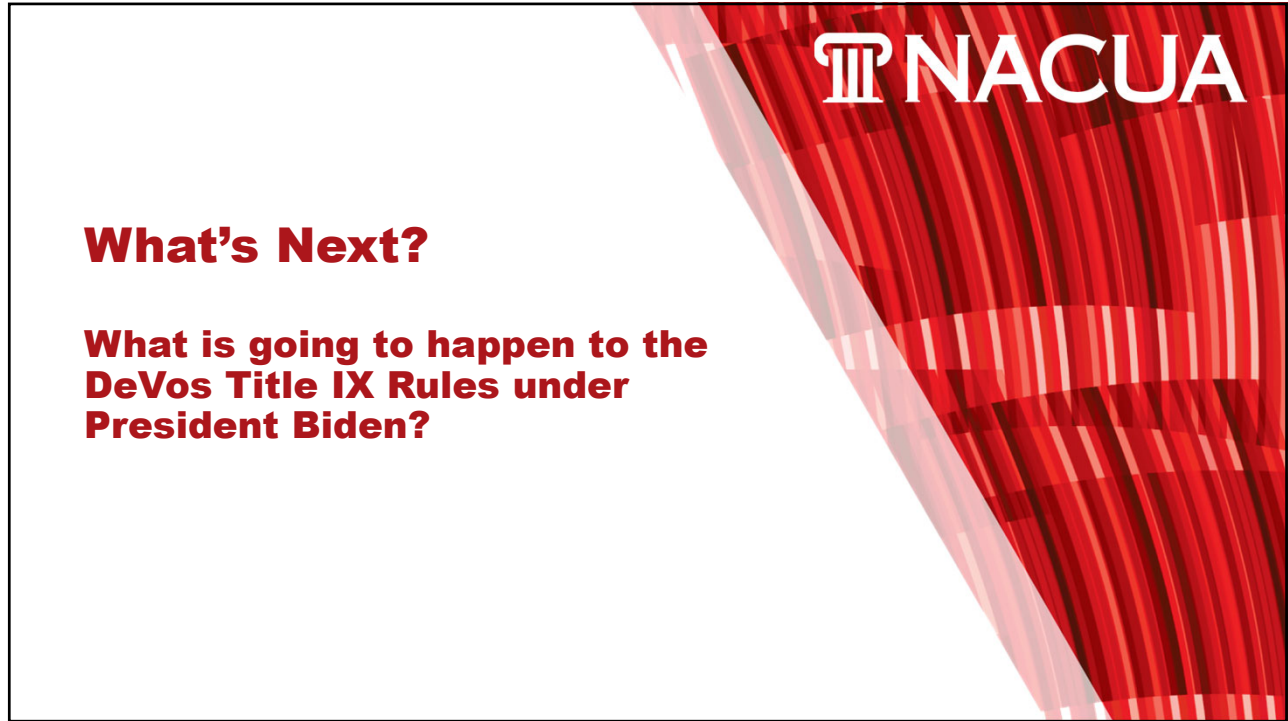
Class Overview

- The New Administration:
What to Expect?
- Definitions
- Jurisdiction
- Formal Complaints
- Supportive Measures
- Dismissals
- Informal Resolution



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What's Next?

What is going to happen to the DeVos Title IX Rules under President Biden?

3



NEWS

DECISION 2020 | GA Special | GA Senate | Senate | State results | President | House

Biden wants to scrap Betsy DeVos' rules on sexual assault in schools. It won't be easy.
The Trump administration's Title IX regulations prioritize students accused of sexual misconduct instead of their accusers, victims' advocates say.

HIGHER ED DIVE | Deep Dive | Opinion | Library | Events | Topics

Biden said he wants to undo DeVos' Title IX rule. How would he replace it?
Revoking the regulation would not be easy, and colleges would need guidance for addressing campus sexual assault in the interim.

The Harvard Crimson

Biden Administration Expected to Reverse DeVos's Title IX Regulations, Legal Experts Say

In early May 2020, former Secretary of Education Betsy D. DeVos released a controversial Title IX rule that drummed up controversy, criticism, and confusion at Harvard and beyond. How will the incoming Biden administration deal with the rule?

BY JESSICA LEE AND CHRISTINA T. PHAM | 8 hours ago

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Litigation Challenges

- Know Your IX, et al. v. DeVos filed May 14, 2020 in D. Md.
 - Dismissed with prejudice due to plaintiff's lack of standing
- New York v. U.S. Department of Education, filed June 4 in S.D.N.Y.
 - Motion for Preliminary Injunction (June 25, 2020, Denied); Stipulated Dismissal without Prejudice (November 4, 2020)
- Pennsylvania, et al. v. DeVos, filed June 4 in D.D.C.
 - Motion for Preliminary Injunction (June 23, 2020, Denied)
- Victim Rights Law Center, et al. v. DeVos, filed June 10 in D. Mass.
 - Court vacated the provision prohibiting use of testimony from persons who did not submit to cross-examination but upheld all other challenged provisions of the rule.
 - Dept. of Education announced it would not enforce the provision the Court vacated.

EDUCATION

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

Biden disavowed Education Secretary Betsy DeVos' Title IX rule.



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Biden Administration Steps

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



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What Comes Next from ED

- Notice of Formal Rulemaking
 - Anticipated in June 23, 2021 letter regarding Title IX 49th Anniversary
- Confirmation that Title IX prohibits discrimination on the basis of sexual orientation and gender identity
- Enforcement Approach



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In the meantime,

The remaining rules are the law, and any college receiving federal funds must obey them.



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Definition of Sexual Harassment

Sexual Harassment includes one or more of the following:

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

§106.30(a)

 A hand is shown holding a black magnifying glass over a word search grid. The grid contains various letters and some words, including 'QUID PRO QUO', 'HOSTILE ENVIRONMENT', and 'CLERY'. The magnifying glass is positioned over the word 'QUID'.

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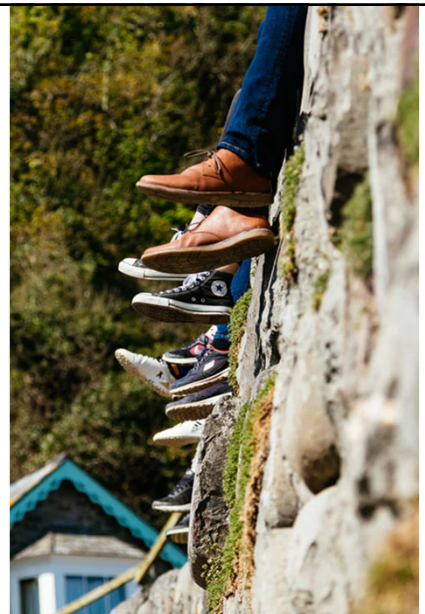
Quid Pro Quo

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



Hostile Environment

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



Clery Definitions

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

Complainant & Respondent

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



Actual Knowledge

- Institution has actual notice of sexual harassment or allegations when reported to the:
 - Title IX Coordinator(s)
 - Official With Authority to Take Corrective Actions (OWA)
- Not a respondent
- Not others who may or must report



Jurisdiction

Education Program or Activity



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

Filing a Formal Compliant

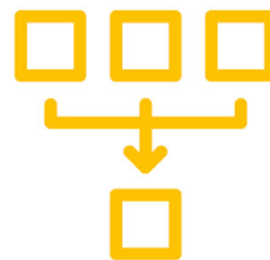
Filing a Formal Complaint

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



The Formal Complaint: More Than One Respondent

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



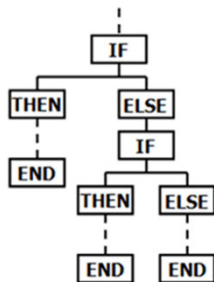
Written Notice of Allegations

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

Provide updated notice with any later discovered additional allegations.



Dismissals



Mandatory/Discretionary Dismissals

Mandatory if Conduct Alleged:

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

Discretionary If:

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



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Dismissal Results



If a formal complaint is dismissed:

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



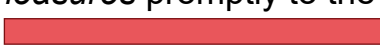

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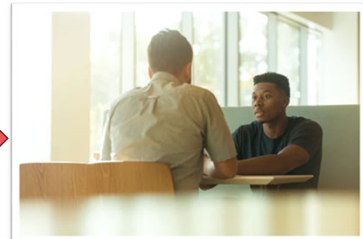
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Supportive Measures

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Response to a Report

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



26

Supportive Measures



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

Informal Resolution

Informal Resolution Requirements



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

Informal Resolution Process

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



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Class Two: Conducting a Title IX Investigation

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Class Overview:



- Questions from Class One
- President Biden's March 8 Executive Order
- Investigations Involving Employees
- Investigating a Formal Complaint
- Impartiality/Conflicts of Interest
- Relevance
- Violations of Other Policies

2

Questions from Class One

Jurisdiction & Complaints

- 1) What level of connection or control by an institution must be established before considering allegations of harassment that occurs exclusively online?
- 2) If a student were sexually assaulted in their home during a virtual lesson, would [Title IX] apply?
- 3) Would you consider a property rented for a weekend by a registered student group to be within the control of the group for that weekend and therefore within Title IX jurisdiction?
- 4) Besides a signed statement, what are other ways that the statement can be "attributed" to the complainant?
- 5) If there are multiple complaints against a respondent by different individuals can those complaints be consolidated against the respondent? If yes, how does that work during the investigation/ hearing process?



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Questions from Class One (cont'd)

Actual Knowledge & Notice of Allegations

- 1) To be clear, actual knowledge (when a report is shared with an OWA) puts the school on notice, but does not require the complainant to file/sign a formal complaint? The school is on notice (and needs to offer supportive measures and take all other steps required by law) but it's possible the complainant may NOT want to file a formal complaint (even after they've made a disclosure/report) and they have the right not to?
- 2) Could someone please touch on the interaction between Title IX and law enforcement? I just received an anonymous report of students filming sexual intercourse with other students and sending the videos around. It seems to me that law enforcement's ability to subpoena phone records etc. could lead to a much more thorough investigation. Please know I'm not suggesting we ignore Title IX policy and procedure. Just curious about timing/best practice.
- 3) What level of detail about the allegations is needed in the notice? (E.g., is it sufficient to provide notice of a report of "sexual harassment by respondent against complainant on X date at X location?" Or, do you think details about the reported sexual harassment must be included?)



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Questions from Class One (cont'd)

The Process

- 1) For mandatory dismissal, if conduct would not constitute sexual harassment if proved – is the Title IX Coordinator making that determination that the conduct was not severe/pervasive/objectively offensive?
- 2) Can the Title IX Coordinator be the facilitator/mediator of the informal resolution?
- 3) At what time do they have a right to inspect and review all the evidence collected?

March 8 Executive Order

The President's Executive Order on *Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*

- **Section 1. Policy.** It is the policy of my Administration that all students should be guaranteed an educational environment free from discrimination on the basis of sex, including discrimination in the form of sexual harassment, which encompasses sexual violence, and including discrimination on the basis of sexual orientation or gender identity.

“OCR will fully enforce Title IX to prohibit discrimination based sexual orientation and gender identity in education programs and activities that receive Federal financial assistance from the Department.” Letter to Educators on Title IX’s 49th Anniversary, June 23, 2021



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Investigations Involving Employees

The Basics:

- Remember that the regulations also apply to employees – both as those allegedly subject to Title IX sexual harassment and as those accused of engaging in Title IX sexual harassment.
- Investigations of formal complaints of conduct potentially constituting Title IX sexual harassment involving employees must comply with the regulations.
- Institutions must use the same procedures for employee and student allegations of Title IX sexual harassment.



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However:

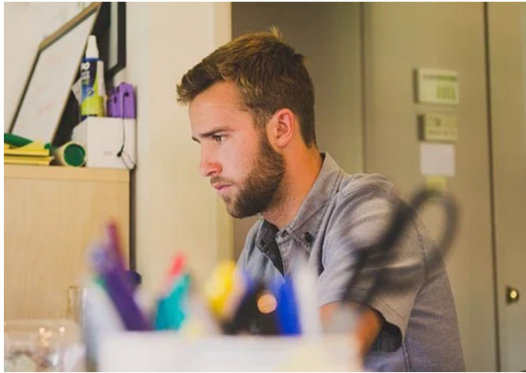
- Title VII also applies and may provide broader remedies and differs in some respects.
- Collective bargaining and other contractual obligations might also apply.
- OCR expects institutions to comply with *all* requirements.



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Title VII Requirements



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

Special Considerations

- Collective bargaining rights
- Administrative leave
- “Reasonably prompt timelines” (Title IX)
vs.
“Immediate and appropriate corrective action” (Title VII)



Investigating a Formal Complaint

13

Conducting an Investigation



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

14

Interviewing



Consider in advance whether interviews will be:

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

In interviewing, the investigator must:

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



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Review of Evidence

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



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Investigative Report



- Complete an Investigative Report that fairly summarizes relevant evidence.
- Provide to parties and their advisors for review and response at least 10 days before hearing.

Impartiality & Conflicts of Interest

Impartiality, Bias, Prejudgment & Conflict of Interest



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Understanding Relevance

20

How is Relevance Defined?



- September 4, 2020 Guidance
- Title IX Rule does not adopt the Federal Rules of Evidence for hearings conducted under Title IX.
- “The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied.”
- A school may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence.
- A school may adopt rules of order or decorum to forbid badgering a witness, and may fairly deem repetition of the same question to be irrelevant.

Relevant Evidence



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

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

Admission vs. Weight, Credibility, or Persuasiveness

- There is a difference between the admission of relevant evidence, and the weight, credibility, or persuasiveness of particular evidence.
- Because § 106.45 does not address how relevant evidence must be evaluated for weight or credibility by a decision-maker, an IHE can adopt and apply its own rules so long as:
 - The rules do not conflict with § 106.45; and
 - The rules apply equally to both parties.
- For example:
 - An IHE may, e.g., adopt a rule regarding the weight or credibility (but not the admissibility) that a decision-maker should assign to evidence of a party's prior bad acts, so long as its rule applies equally to the prior bad acts of complainants and the prior bad acts of respondents.
- **REMEMBER:** An IHE's investigators and decision-makers must be trained specifically with respect to "issues of relevance" and any relevance rules adopted by the IHE should be addressed in the IHE's publicly available training materials.



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What Is NOT Relevant?



- **September 4, 2020 Guidance**
- The Regs direct schools to exclude the following evidence and information:
 - a party's treatment records, without the party's prior written consent [§ 106.45(b)(5)(i)];
 - information protected by a legally recognized privilege [§ 106.45(b)(1)(x)];
 - questions or evidence about a complainant's sexual predisposition, and questions or evidence about a complainant's prior sexual behavior unless it meets one of two limited exceptions [§ 106.45(b)(6)(i)-(ii)]; and,
 - a decision-maker is not permitted to rely on the statements of a party or witness who does not submit to cross-examination [§ 106.45(b)(6)(i)]. **Currently, not enforced by OCR but may apply under state law or law in some federal circuits.**



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Defining Relevance in Policy



- **September 4, 2020 Guidance**
- “An IHE may **not** adopt rules excluding certain types of relevant evidence (e.g., lie detector test results, or rape kits) where the type of evidence is **not** either deemed “not relevant” (as is, for instance, evidence concerning a complainant’s prior sexual history) or otherwise barred from use under § 106.45 (as is, for instance, information protected by a legally recognized privilege).”
- Hmmm ... let’s break it down.



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All Relevant Information Is Not Created Equal



- May weigh evidence
- Considerations:
 - Is it corroborated?
 - Is there a reason the source might not be reliable?
 - Is it logical given other established facts?
- The Regs require the decision-maker to objectively evaluate only “relevant” evidence during the hearing and when reaching the determination regarding responsibility.
- The decision-maker must determine the relevance of each cross-examination question before a party or witness must answer.
- “Not probative of any material fact.”



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Violations of Other Policies

27

Violations of Other Policies

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



Update notice with later-discovered allegations.

28

Questions?

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Class Three: The Grievance Process – Hearings & Appeals

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Class Overview



- Relevance Redux & Conclusion
- Other Violations
- Due Process / Fundamental Fairness
- Credibility Determinations
- Advisors
- The Written Determination
- Appeals

2

Questions from Class 2

- Can gender discrimination ever meet the meet the Title IX severe, pervasive, or objectively offensive standard?
- You mentioned that we can instruct complainant NOT to speak with the respondent (and respondent NOT to speak with the complainant?). How do you square that with the regulation's prohibition on "gag orders"?

Relevance

Relevance Redux

The Title IX regulations do *not*:

- Adopt the Federal Rules of Evidence.
- Define "relevance."
- Permit excluding evidence that is
 - Unduly repetitious
 - Concern prior bad acts
 - Constitute character evidence.



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What is Relevant?



Evidence *is* relevant if:

- It has any tendency to make a fact more or less probable than it would be without the evidence; *and*
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The following evidence *may not* be used or considered relevant:

- Treatment records without consent.
- Protected by a legally recognized privilege.
- Questions of evidence about a complainant's sexual predisposition, and questions or evidence about a complainant's prior sexual behavior unless it meets one of two limited exceptions.
- Is made by a party or witness who does not submit to cross-examination. **Currently, not enforced by OCR but may apply under state law or law in some federal circuits.**



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- "Not probative of any material fact."



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- Employee Conduct standards



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Due Process (Fundamental Fairness)

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The Process That Is Due

A Fair Process:

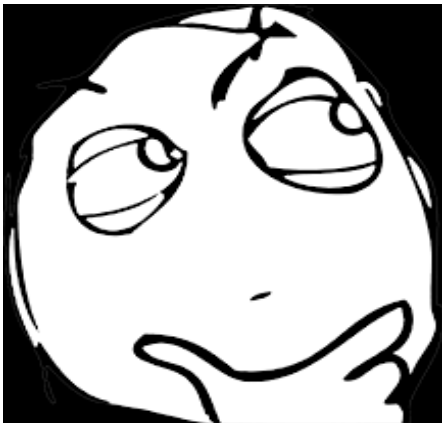
- that follows the law,
- is implemented without bias, stereotypes or pre-judgment, and
- provides an equal opportunity for parties to be heard and present evidence,
- allows the decision-maker(s) to reach a determination consistent with the standard of evidence.

12

Credibility Determinations

15

Considerations



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

16

Factors to Weigh

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

Caution



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

The Decision-Maker (Hearing Officer)

19

Getting Ready

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

20

Hearing Decorum

Points to Consider: May have rules that:

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

Advisors

Advisors



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



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More on the Advisor's Role



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



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Working with the Parties' Attorneys

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Advisor or Legal Representative

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



26

Written Determination

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Written Determination

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

28

Appeals

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Appeals

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

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

30

Appeal Process



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

Questions?

Note

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Title IX Coordinator Training Online Course

Class Four: Anatomy of an OCR Investigation

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

Class Overview



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

Questions from Class Three

- Do you see any problem with the Title IX coordinator participating in the pre-hearing meetings with parties/hearing panel chair?
- Can a party have more than one advisor present at the grievance proceeding?

Why is this Important to You?

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

What Complaints Does OCR Handle?

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

Demystifying the OCR Process

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

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

OCR Investigations: Resources

- OCR Complaint Processing Manual (Aug. 2020)
- Dear Colleague Letters and Enforcement Guidance by Statute
- Prior OCR/DOJ Resolution Agreements by Statute
- Case law can be helpful, but OCR does not always recognize court precedent unless it is directly on point and typically only federal cases (but see state cases in CA that require certain process)

Phase I: Evaluating the Complaint

OCR evaluates the complaint to determine whether it can investigate:

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

Phase I: Evaluating the Complaint

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

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

Phase I: Strategies

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

Phase II: Notification of Investigation

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

Phase II: Notification of Investigation

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

Phase II: Strategies

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

Early Resolution Options

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

Voluntary Resolution

- Institutions may seek to affirmatively resolve complaint before conclusion of the investigation by initiating negotiations for a Resolution Agreement (a/k/a “302 Agreement,” because it’s defined under CPM Section 302)
- Appropriate when the institution agrees to forego the investigation and enter a compliance agreement on some or all issues
- OCR reserves the right to include any fact learned to date in the Resolution Letter, which may create a strategic advantage in requesting a Voluntary Resolution early if you know that is where it may be headed
- Allows recipients an opportunity (5 days) to review the draft resolution letter, usually while negotiating draft resolution agreement

Phase III: Data Request

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

Phase III: Strategies

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

Phase IV: Onsite Visit

Types of Activities:

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

Phase IV: Strategies

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

Phase IV: Strategies

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

Phase V: Compliance Determination

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

Phase V: Compliance Determination

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

Resolution Examples

Typical requirements in resolution agreements:

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

Phase V: Strategies

- Seek details on findings to understand how to narrow agreement terms to findings:
 - Discuss proposed terms and how they align with legal/factual concerns
 - Review and be prepared to discuss OCR recent resolution letters addressing the same statute and similar facts
- Focus on flexibility for the institution
 - What is a realistic time period for compliance?
 - Have a candid conversation to try to determine OCR's internal flexibility (or inflexibility – often not driven by regional office) on certain issues, *e.g.*, timing

In Summary ...

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



NACUA

Questions?

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National Association of College and University Attorneys

Title IX Coordinator Training Online Course

Class Five: Title IX Training & Policies

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

Class Overview



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

Who Do You Train?

The Regulations (Title IX Personnel)

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



Consider Training Others, even though not Required by the Regulations

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

And Athletics!



NCAA Board of Governor's Policy:

https://ncaaorg.s3.amazonaws.com/ssi/violence/NCAA_CampusSexualViolencePolicy.pdf

[NCAA Board of Governors Campus Sexual Violence Policy Implementation Task Force](#)

[NCAA Sexual Violence Prevention Tool Kit](#)

[Task Force Recommended Timeline](#) (PDF)

[Task Force Recommended Checklist](#) (PDF)

[Administrator FAQ](#)

[Student-Athlete FAQ](#)

Access Sample Policies and Procedures:

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

Annual Attestation Process Resources

In the fourth year of the policy, the [following schools](#) attested that they have followed the policy requirements.

[Attestation Process FAQ](#)

NCAA Policy:

In August 2014, the NCAA's Board of Governors' Executive Committee passed a resolution that specifies that appropriately addressing sexual violence is integral to responsible intercollegiate athletics programs. Specifically, the resolution states that addressing sexual violence:

- (1) Is consistent with the values and principles articulated in the NCAA Constitution;
- (2) Is mandated by state and federal laws; and
- (3) Must be part of a collaborative effort with campus policies.

In 2016, the Board of Governors appointed a Commission to Combat Campus Sexual Violence. The Commission drafted the following aspirational culture statement for colleges and universities as:

A positive and thriving athletics team culture that revolves around respect and empathy for all, fostering a climate in which all feel that they are respected, valued and contributing members of their teams, athletics programs and institutions; and creating an environment in which students (athletes and non athletes alike) feel safe and secure, both emotionally and physically, and are free of fears of retaliation or reprisal. The positive culture exuded by a member institution's NCAA teams is the catalyst for a positive culture across an entire campus.

The Commission recommended the Board of Governors adopt an Association-wide policy to reinforce previous efforts of the Association in addressing campus sexual violence. The Board of Governors' adopted this policy.

The NCAA also produced a Toolkit in 2016, updated in 2019, that has not been updated since the publication of the 2020 Regs.

NCAA Policy: Overarching Principles

1. Intercollegiate athletics departments should be informed on and integrated in overall campus policies and processes addressing sexual and interpersonal violence prevention and acts of sexual violence, particularly those related to adjudication and resolution of matters related to sexual and interpersonal violence.
2. Intercollegiate athletics departments should review annually the most current Checklist Recommendations of the NCAA Sexual Violence Prevention Toolkit, using it as a guide with resources to conduct ongoing, comprehensive education for student- athletes, coaches and athletics administrators.
3. Intercollegiate athletics programs should utilize their platform to serve as leaders on campus through engagement in and collaboration on efforts to support campus-wide sexual and interpersonal violence prevention initiatives. This includes involving student- athletes in prevention efforts in meaningful ways across the campus, including encouraging use of leadership roles on campus to support such efforts.

Required Annual Attestation: University Chancellor/President, AD and campus Title IX Coordinator

1. The athletics department is informed on, integrated in, and compliant with institutional policies and processes regarding sexual violence prevention and proper adjudication and resolution of acts of sexual and interpersonal violence.
2. The institutional policies and processes regarding sexual violence prevention and adjudication, and the name and contact information for the campus Title IX coordinator*, are readily available within the department of athletics, and are provided to student-athletes.
3. All student-athletes, coaches and staff have been educated each year on sexual violence prevention, intervention and response, to the extent allowable by state law and collective bargaining agreements.
4. All incoming, continuing and transfer student-athletes have completed an annual disclosure related to their conduct that resulted in discipline through a Title IX proceeding or in a criminal conviction for sexual, interpersonal or other acts of violence.** Transfer student-athletes also must disclose whether a Title IX proceeding was incomplete at the time of transfer. Failure to make a full and accurate disclosure could result in penalties, including loss of eligibility to participate in athletics as determined by the member institution.
5. Institutions have taken reasonable steps to confirm whether incoming, continuing and transfer student-athletes have been disciplined through a Title IX proceeding or criminally convicted of sexual, interpersonal or other acts of violence.** In a manner consistent with federal and state law, all NCAA member institutions must share relevant discipline information and incomplete Title IX proceedings as a result of transfer with other member institutions when a student-athlete attempts to enroll in a new college or university.
6. An institution choosing to recruit an incoming student-athlete or accept a transfer student-athlete must have a written procedure that directs its staff to gather information that reasonably yields information from the former institution(s) to put the recruiting institutional leadership on notice that the student left the institution with an incomplete Title IX proceeding, was disciplined through a Title IX proceeding or has a criminal conviction for sexual, interpersonal or other acts of violence.** Failure to have it written and to gather information consistent with that procedure could result in penalties.

[Note: Item Nos. 4 to 6 above require attestation beginning with the 2022-2023 academic year attestation.]

NCAA Policy continued:

- Athletics department will cooperate with college or university investigations into reports and matters related to sexual and interpersonal violence involving student-athletes and athletics department staff in a manner compliant with institutional policies for all students.
- Schools that do not submit the required attestations will be prohibited from hosting any NCAA championship competitions for the next applicable academic year.
- International member schools and schools that do not receive federal funding, or are otherwise exempt from Title IX must submit an annual attestation from the President, AD and Title IX coordinator or institutional staff member with comparable responsibilities
- **A person who has been disciplined through a Title IX proceeding or criminally convicted, regardless of the degree, and whether the result of a plea or court determination, of either of the following:
- Interpersonal Violence is defined to include violence that is predominantly caused due to the relationship between the victim and the perpetrator, including dating and domestic violence.
- Sexual Violence is defined to include both forcible and non forcible sex offenses, ranging from sexual battery to rape.
- Other Acts of Violence is defined to include murder, manslaughter, aggravated assault or any assault that employs the use of a deadly weapon or causes serious bodily injury

Elements of a Good Training Program

Planning & Preparation

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

Required Training

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

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

Required Training

Title IX Personnel Continued:

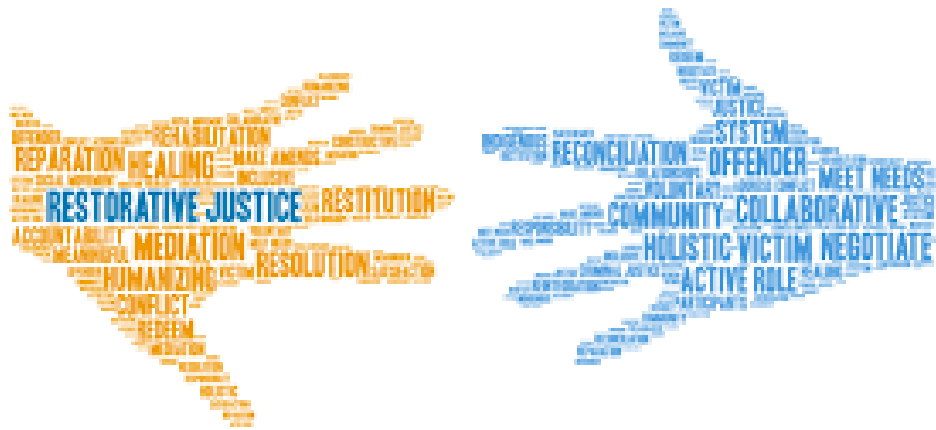
- Avoiding prejudgment of the facts at issue, conflicts of interest and bias.
- The impact of intersections of identity: sex, race, ethnicity, sexual orientation, gender identity, disability or immigration status, financial ability, or other characteristic.
- Implicit bias

Required for Investigators



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

Required for Informal Resolution Facilitators



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

Required for Decision-makers:

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

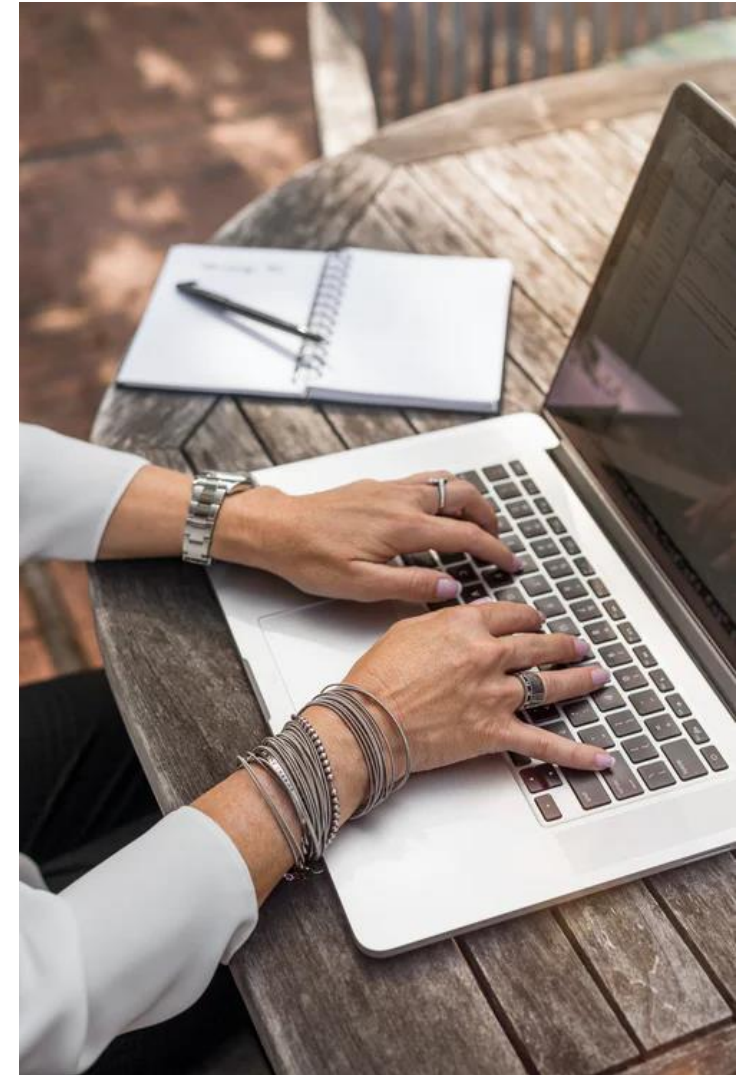


Other Training Topics

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

Training Transparency

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



And Athletics!



Benefits and Perils of Trauma- Informed Training

How to Be Fair to All

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

Auditing Training Materials

When & What to Audit

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



Policies: Management, Notice, and Some Reminders

Managing the Policies

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

Notification and Dissemination

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

Adopt & Publish

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

Notice

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

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

Policy Decision Point: Framework

All-in-One Policy

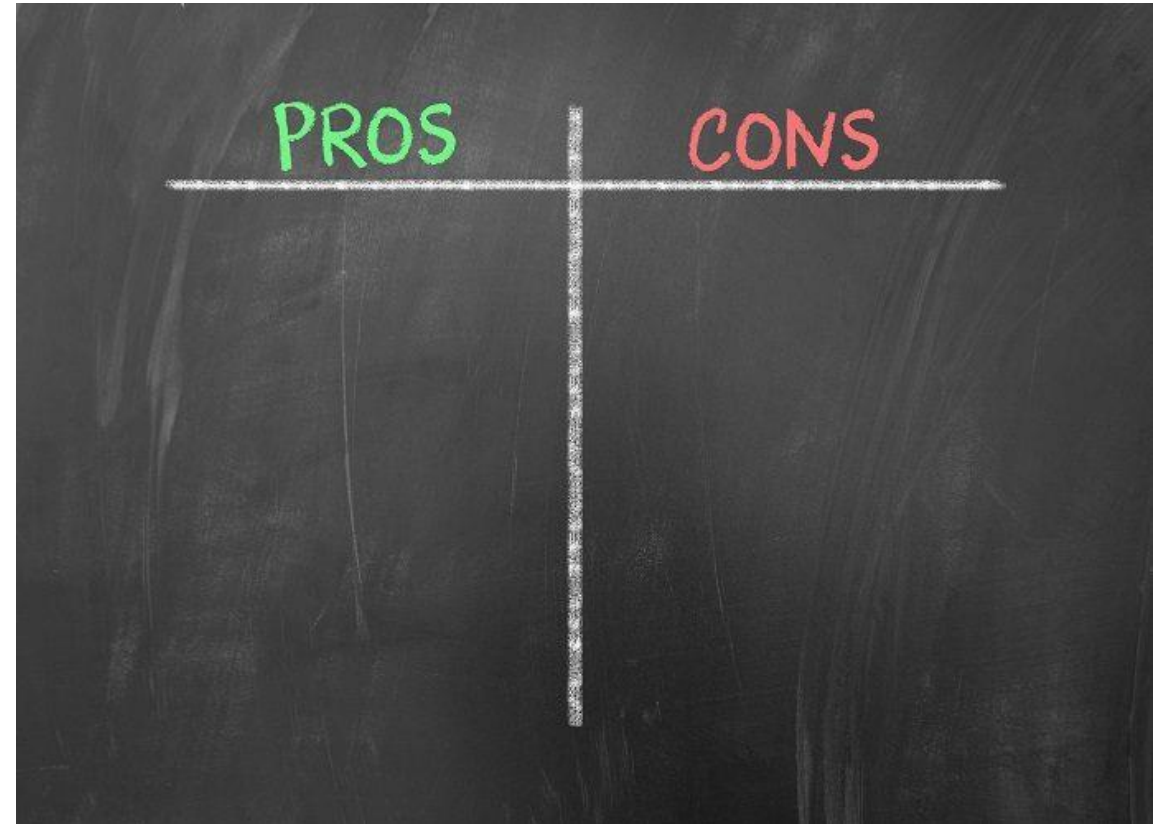
1. Treat all the Same; or
2. Decision Trees

Two Policies: If not TIX, then ...

1. Title IX Regulation+
2. Everything Else

Three plus:

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



Policy Definitions:

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



Please Note:

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

Don't Forget Clergy ...

Annual Security Report Policies

- Description of proceedings and processes for filing and handling complaints of sexual assault, dating violence, domestic violence and stalking.
- The standard of evidence used in disciplinary actions for covered offenses.
- List of possible sanctions for covered offenses.
- Range of protective measures available to victims.
- Assurances that proceedings will be prompt, fair, impartial & conducted by trained officials.
- Equal opportunity for parties to have an advisor chosen by the party.
- Simultaneous notification of result, process for appeal and when final.
- Description of primary prevention and awareness programs.
- Procedures for victims to follow if a covered crime occurs.
- Notification of services and accommodations for victims.

Record Retention 7 Years



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

And Athletics!



Questions?

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Title IX Coordinator Training Online Course

Class Six: Athletics Equity and Applying the August 2020 Regulations

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

Class Overview



- Athletic Equity
- Pay Equity
- The Regs
- Trans Athletes

Athletic Equity

3



**Sources of Law, Title IX
Enforcement, and the impact of
Pandemics
(NCAA does NOT enforce Title IX)**


Schoolhouse Rock:
<https://www.youtube.com/watch?v=tEPd98CbbMk>

4

Role of the NCAA:

- Support the membership as established by the [NCAA Constitution](#)
- Four membership DEI committees
 - Committee to Promote Cultural Diversity and Equity
 - Committee on Women's Athletics
 - Gender Equity Task Force
 - Minority Opportunities and Interests Committee
- [NCAA Inclusion Statement](#)
 - "The NCAA will provide or enable programming and education . . . "
 - Annual Inclusion Forum

5



U.S. DEPARTMENT OF EDUCATION

EADA Equity in Athletics
Data Analysis

The tools you need for Equity in Athletics analysis

- Get Data for One School**
Search for a school to view general information and EADA statistical data for the most recent year.
- Compare Data for Multiple Schools**
Select up to four schools to see a side-by-side comparison of data for the most recent year.
- Download Custom Data**
Select the EADA statistical data you are interested in for one or more years and download data for a customized group of schools.
- Generate Trend Data**
Select a subject area and a question that you are interested in, and then see the answer for a selected year, build a table, and see a graph that shows the trend over time. You can customize your results by various institutional characteristics such as athletic sanctioning body, public or private, and state.
- Download Data**
Download the complete data file for all institutions from a single data collection. Files will include all data submitted by all institutions in the selected survey year.

PART 1: ATHLETIC EQUITY

6

Athletic Equity Compliance: Three Separate and Independent Areas of Compliance



7

Activities counted as Sports for purposes of Title IX

- NCAA Championship sports are presumed to be countable.
- For non-NCAA sports, a review may consider the following, among other factors:

PROGRAM STRUCTURE AND ADMINISTRATION —

Is the program provided a budget, support services, access to coaching, equitable eligibility for athletics scholarships and awards, and are the student-athletes recruited in a manner consistent with established varsity sports?

TEAM PREPARATION AND COMPETITION —

Does the team practice and compete in a manner consistent with established varsity sport programs? Included in this review, among other factors, are the following considerations:

- Are there standardized rules of play and competition criteria for the sport?
- Are the support services provided based on the competitive needs of the program?
- Is post-season play determined by regular season performance?
- Is team selection based on athletics ability?

Dear Colleague Letter: Athletic Activities Counted for Title IX Compliance (OCR 2008), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20080917.html>.

8

Title IX Countable Participation Opportunity

OCR defines a Title IX Participant as one:

1. who is receiving the institutionally sponsored support normally provided to athletes competing at the institution involved (e.g., coaching, equipment, medical and training room services) on a regular basis during a sport's season; **and**
2. who is participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; **and**
3. who is listed on the eligibility or squad lists maintained for each sport; **or**
4. who, because of injury, cannot meet 1, 2, or 3 above but continues to receive financial aid on the basis of athletic ability.

Per guidance, "OCR considers a sport's season to commence on the date of a team's first intercollegiate competitive event and to conclude on the date of the team's final intercollegiate competitive event."

Dear Colleague Letter, *Clarification of Intercollegiate Athletics Policy Guidance: the Three-Part Test*, OFFICE FOR CIV. RIGHTS, U.S. DEP'T OF EDUC. (Jan. 16, 1996)) available at <https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>.

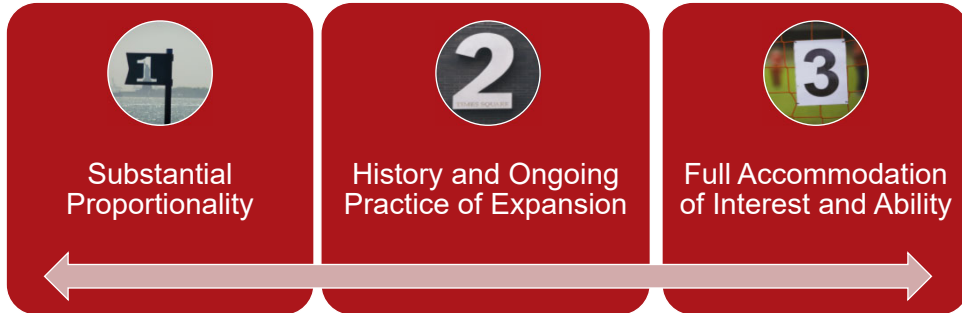
9

What about . . .



10

Equitable Participation: The Three Part Test



Prong 1.

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

Prong 2.

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

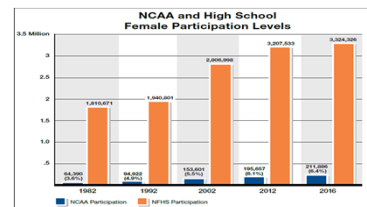
Prong 3.

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

Dear Colleague Letter, *Clarification of Intercollegiate Athletics Policy Guidance: the Three-Part Test*, OFFICE FOR CIV. RIGHTS, U.S. DEP'T OF EDUC. (Jan. 16, 1996)) available at <https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>.

11

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



ENFORCEMENT —

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

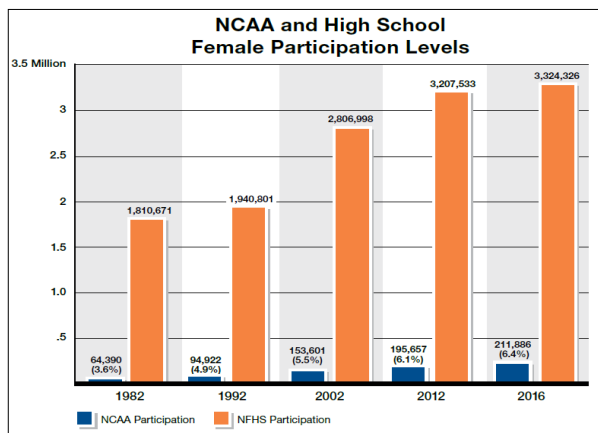
Court: No Administrative Exhaustion. No Cap on Damages. Injunctive Relief. Class Actions. Attorneys Fees.

12

OCR Substantial Proportionality

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

Prong 3: Accommodating Interest & Abilities



Does the current line up of sports effectively accommodate the athletic interests and abilities of the underrepresented sex?

What is the underrepresented sex?

Is there:

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

How much interest/ability/competition is enough?

What is the relevant pool to be assessed?

Final Participation Question: Are there Equitable Levels of Competition?

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

OR

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

15

Athletics-Based Financial Aid/Scholarship Equity



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

We would like to clarify that use of statistical tests is not appropriate in these circumstances."

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

16



17

Non-Exhaustive Areas of Review	Men's Program Overall	>/</=	Women's Program Overall
Equipment and Supplies (Apparel and Equipment)			
Scheduling (Practice, Competition)			
Travel (Mode, Housing, Food)			
Tutors/Academic Services (Personnel, Services)			
Coaches (Quantity, Quality, Compensation*)			
Facilities/Spaces (Practice, Competition, Locker Room)			
Medical (Personnel, Experience, Availability)			
Housing & Dining (Home)			
Publicity/Communications (Sports Information & Marketing)			
Support Services (Administrative, Office, Support)			
Recruiting (Financial & Other Support)			



18

Sources of Funding

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

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

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



Are the Disparities Significant? OCR v Judicial Review



Difference, on the Basis of Sex

- in benefits or services that has a . . .
- negative impact on athletes of one sex . . .
- when compared with benefits or services available to athletes of the other sex.

Disparity:

- So Substantial as to Deny Equal Opportunity to Athletes of One Sex.

Disparities that are not Substantial. . .

- Evidence to be Evaluated on a case by case basis.

See, e.g., Policy Interpretation, 44 Fed. Reg at 71,417 (1979).

Retaliation Prohibited

Retaliation is intentional discrimination on the basis of sex.

One who witnesses and complains about discrimination is protected from adverse action they encounter because of the complaints.

Recognition that coaches, teachers, administrators and students are in the best position to witness and alert schools

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



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Compensation and Pay Equity

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



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23



24

NCAA Transgender Student-Athlete Participation

- NCAA has had a **policy** for a decade.

Policy currently under review by NCAA membership committees:

- Committee on Competitive Safeguards and Medical Aspects of Sport
- Committee to Promote Cultural Diversity and Equity

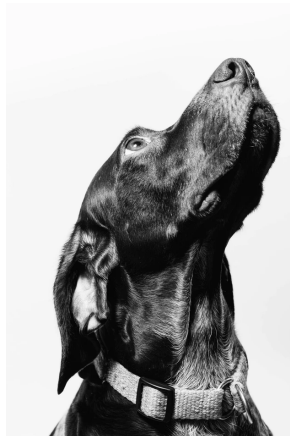
- NCAA **Summit** on Gender Identity and Student-Athlete Participation (Oct. 2020)



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25

What is the Role of the Title IX Office Around Athletic Equity?



26

Athletics: Application of the 2020 Title IX Regulations

27

Application (per the preamble):

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

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

28

Infusing Equity: Consider a Supplemental Policy

Sample Language:

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

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

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

No Retaliation Policy:

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

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

Notice:

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



Athletics:

Supportive Measures

- Can not punish, discipline, or unreasonably burden the respondent.
- Denials must be documented.



Emergency Removals

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

Findings, Sanctions, & Appeals

Training:

- Annual Per NCAA Requirements
- All Staff
 - Administration
 - Team Doctors/ATC
 - Support Staff
 - Coaches
 - GAs and Paid Student Workers
- Student-Athletes
- Cross Campus Engagement
- Reporting Protocols
- Complaint Avenues
- In Person and Safe
- Protocols for Outside Speakers
- Importance of Face Time
- Retention/Time of Day/Time of Year
- Sport Examples
 - Consider Student Involvement/Investment
- Culture of Sport/Supervisor
- Confidential Resources
- Support for Complainants and Respondents
- Spotlight/Speed/Updates/Engagement
- Head Coach Culture of Compliance

Complying with NCAA Requirements: Policy and Attestation

- NCAA Board of Governors adopted a Policy on Campus Sexual Violence on Aug. 8, 2017.
- Requires annual attestations signed by the Director of Athletics, Title IX, and President (CEO).
- April 30, 2020 BOG revisions to the Policy expanded its reach and attestation content, effective Spring 2023.
- Policy and FAQ are on the NCAA Website
- Task Force
- In the meantime:
 - Consider Discussions with Title IX, General Counsel, and others on campus.
 - Explore Compliance Position.
 - Consider Intersection with the new Regulations around Permissive Dismissals and Confidentiality.
 - Forward Comments to Regional Conference or NCAA Office.



Attestation:



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

FAQs:

- **When did the policy begin?** August 2017. The most recent amendments are effective in the 2022-23 academic year. The annual attestation period runs from March 1 – May 15 each year.
- **What is the deadline for completing the annual education for coaches, student-athletes and athletics staff?** For the 2020-21 academic year, education should be completed prior to the May 15, 2021 deadline so that presidents or chancellors, athletics directors and campus Title IX coordinators can attest to their compliance by the May 15 deadline. The attestation form will be available electronically in the NCAA Learning Portal and on ncaa.org/csvpolicy beginning March 1, 2021 and must be completed by May 15, 2021. This is a firm deadline.
- **How do I upload my completed form?** Each school's director of athletics must upload the final form in the NCAA Learning portal.
- **What type of education meets the expectations of the policy?** The policy allows member schools to determine the types and manner of education provided. The [NCAA Sexual Violence Prevention Tool Kit](#) can assist member schools in this effort. The tool kit provides checklists for campus collaboration and educational resources created specifically for student-athletes. Those resources include the online curriculum myPlaybook, which includes a course on sexual violence prevention.
- **What happens after the deadline?** A list of schools that have and have not attested to the requirements of the policy will be presented in a report to the Board of Governors at their August meeting each year. Once approved, the lists will be published on ncaa.org.
- **Which athletics staff members are expected to complete the education requirement?** While the policy does not provide a specific definition of staff for purposes of the educational prong and provides institutions the discretion to determine how far to extend their educational efforts (e.g. whether to include temporary workers, consultants or contractors), there is an expectation that all education will meet the requirements of local, state and federal law. All coaches including part-time, volunteer and assistant coaches, as well as athletics administrators full-time and temporary, and participating student-athletes are expected to complete the education.
- **If I have additional questions about the policy where should I go?** Questions may be sent to questions@ncaa.org. This inbox will only answer questions related to the policy and attestation process.

Questions?

37

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38