

Title IX Coordinator & Deputy Annual Training

June 13, 2024

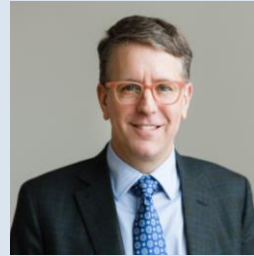
Kari Hohn & Carl Crosby Lehmann



Meet Our Team



Sean Somermeyer
Partner



Carl Crosby Lehmann
Partner



Mary Dunnewold
Partner



Nina Harris
Director



Kari Hohn
Director

Ballast Offerings

1

Drafting & Updating

Policy and process development and review

2

Training

Legally compliant Title IX and non-discrimination trainings tailored to individuals' roles and knowledge base

3

Investigators, Alternative Resolution Facilitators, & Decision-makers

Trained, skilled, experienced, and practical

4

Interim Roles

Interim services to fill gaps in various Title IX positions

5

Advice & Coaching

Legal and non-legal advising

Ballast Philosophy & Approach



Collaborative partnerships that honor institutional knowledge and values



Practical solutions that are compliant and make sense for your specific institution and community



Reasonable and fair pricing that acknowledges the financial constraints institutions are facing



First-hand experience and understanding from individuals who have previously worked within higher education institutions

Agenda

- Title IX Overview
- The Broader Scope of Title IX
- Creating and implementing your policies and procedures
- Title IX personnel roles and responsibilities
- Oversight of reports and Grievance Procedures
- General Title IX Oversight
- Q&A
- Discussion

Title IX Overview

- Essential compliance elements
- The Clery Act & VAWA
- Student Privacy and FERPA
- MN State Law

“

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

”

20 U.S.C. § 1681

Title IX Basics

Prohibits
gender
discrimination

In any program
or activity

Applies to
students,
employees,
volunteers, etc.

Types of Discrimination

Discriminatory Treatment

Harassment

Anti-Retaliation

Discriminatory Treatment

Disparate Treatment

Intentional
Discrimination

Legitimate Non-
Discriminatory Purpose

Disparate Impact

Facially Neutral But Results
in Adverse Impact

Discriminatory Intent Not a
Necessary Factor

Bona fide qualification /
Necessity



Harassment

Quid Pro Quo

Something for something

Abuse of position of authority

VAWA Crimes

Sexual Assault

Dating Violence

Domestic Violence

Stalking

Hostile Environment

Conduct relating to protected class status

Unwelcome

Severe **or** pervasive

Purpose or effect of creating a hostile work/educational environment

Reasonable person in complainant's shoes

Sexual Harassment & Title IX

Publish Notice of Nondiscrimination

Designate Title IX Coordinator

Disseminate Policy

Investigate Complaints

Adopt and Publish Fair and Equitable Grievance Procedures

Train Individuals with Heightened Responsibilities

Train Students and Employees

Retaliation

- Mistreatment directed at employee/student who has:
 - Complained about discrimination
 - Participated in an investigation, hearing or other proceeding
 - Refused to participate in an investigation, hearing or other proceeding
- Includes mistreatment for raising discrimination that affects others
- Also includes mistreatment of individuals closely related to someone who has complained
- Conduct that would dissuade a reasonable person from bringing a complaint or participating in an investigation
- **Must be part of your Title IX grievance process**

Office for Civil Rights (OCR)

Role

- Establishes compliance standards and guidance
- Enforces Title IX through investigations and compliance reviews

Guidance

- Regulatory and sub-regulatory guidance
- Dear Colleague Letters, Amendments to Title IX Regulations, Q&As, Notices of Interpretation

Clery Obligations – The WHO

Campus Security Authorities (CSAs)

- Campus police / security personnel
- Individuals with responsibilities for campus security
- Individuals assigned to receive reports of crimes
- An official with significant responsibility for campus events and activities including student discipline and student judicial processes

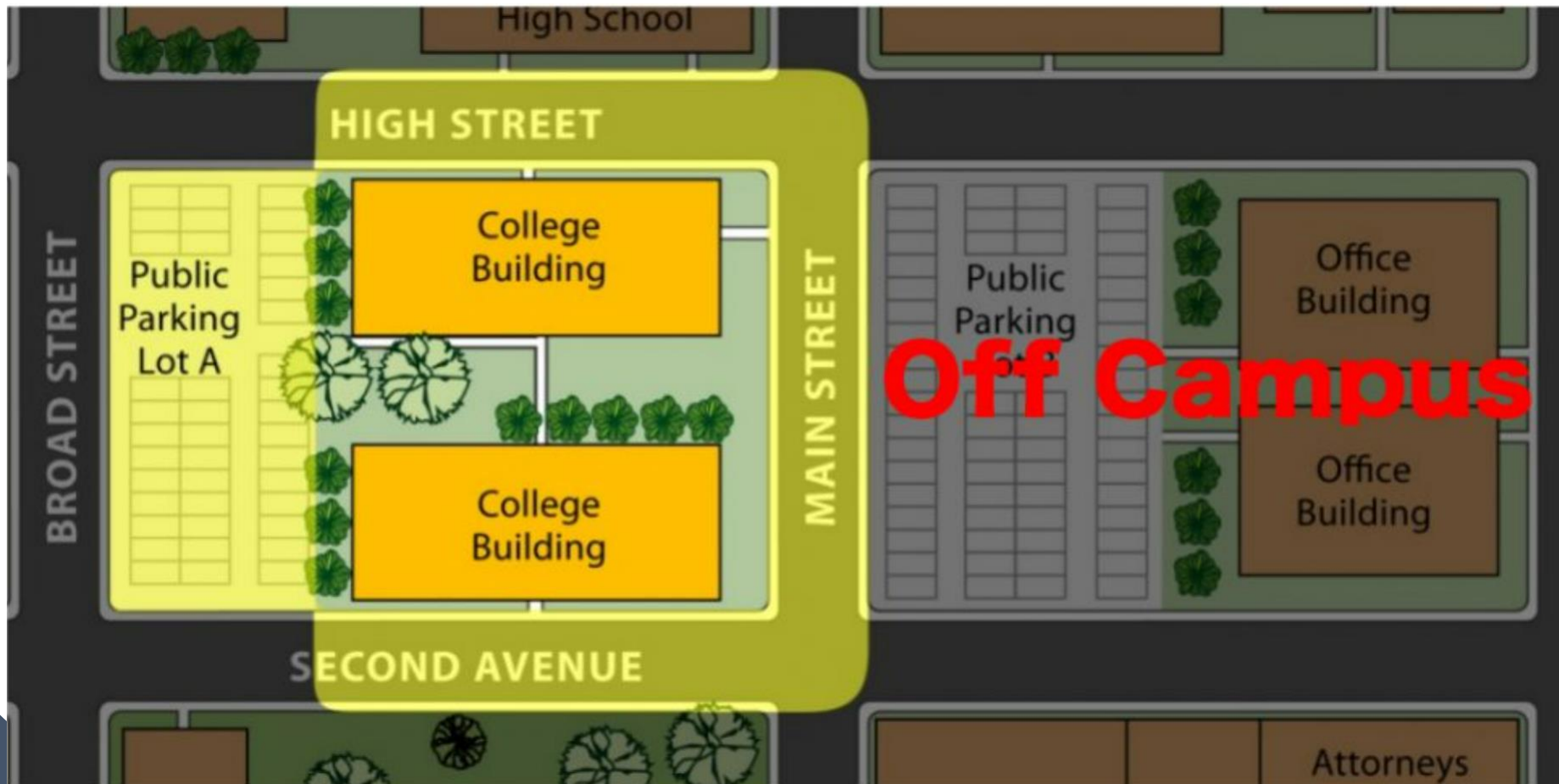
Clery Obligations – The WHAT

Serious crimes – Murder/Homicide; Sexual Assault; Robbery; Aggravated Assault; Burglary; Motor Vehicle Theft; Arson; Drug/Alcohol/Weapons Violations

Hate Crimes

Domestic/Dating Violence and Stalking

Clery Obligations – The WHERE



Clery Obligations – The WHEN

Immediately:

Timely Warnings / Emergency Notifications

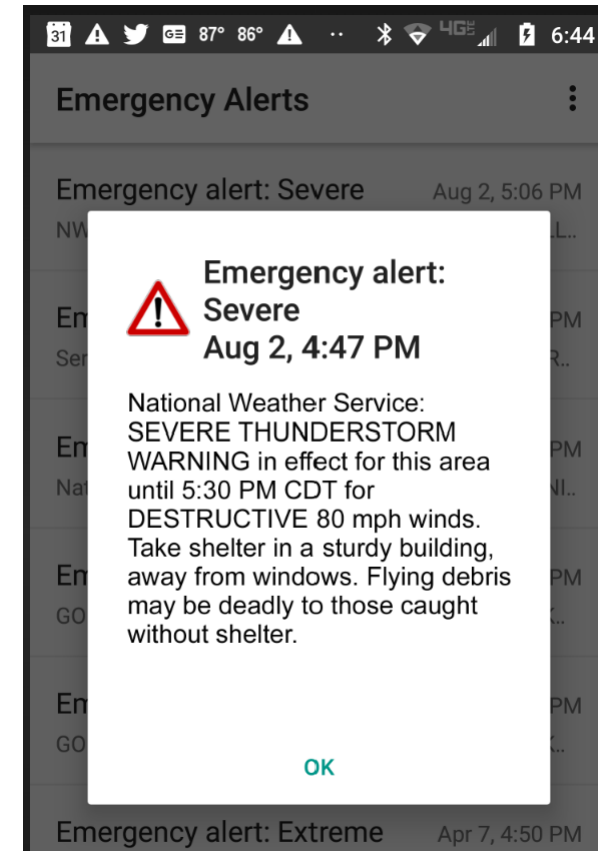
Annually:

Annual Security Report

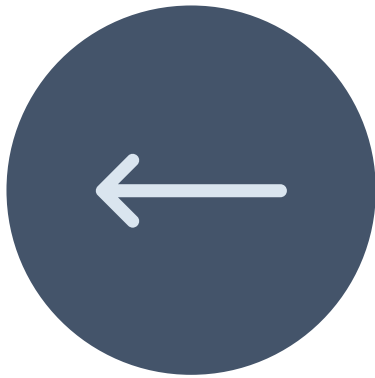
Report to DOEd

When Requested:

Maintain a daily crime log



FERPA



RIGHT TO ACCESS



RIGHT TO CONTROL
DISCLOSURES



RIGHT TO DISPUTE
ACCURACY

FERPA – What is an “Education Record”



DIRECTORY INFORMATION



OTHER PERSONALLY IDENTIFIABLE
INFORMATION

FERPA – Right to Access

- Any Information Maintained About Student
 - Exceptions: Parent's Financial Information and Recommendation Letters
- Must Reasonably Specify Information Requesting / No Right to Standing Requests
- 45 Days to Respond
- Not Required to (Re)Create Records that Never Existed / No Longer Exist

FERPA – Right to Control Disclosures

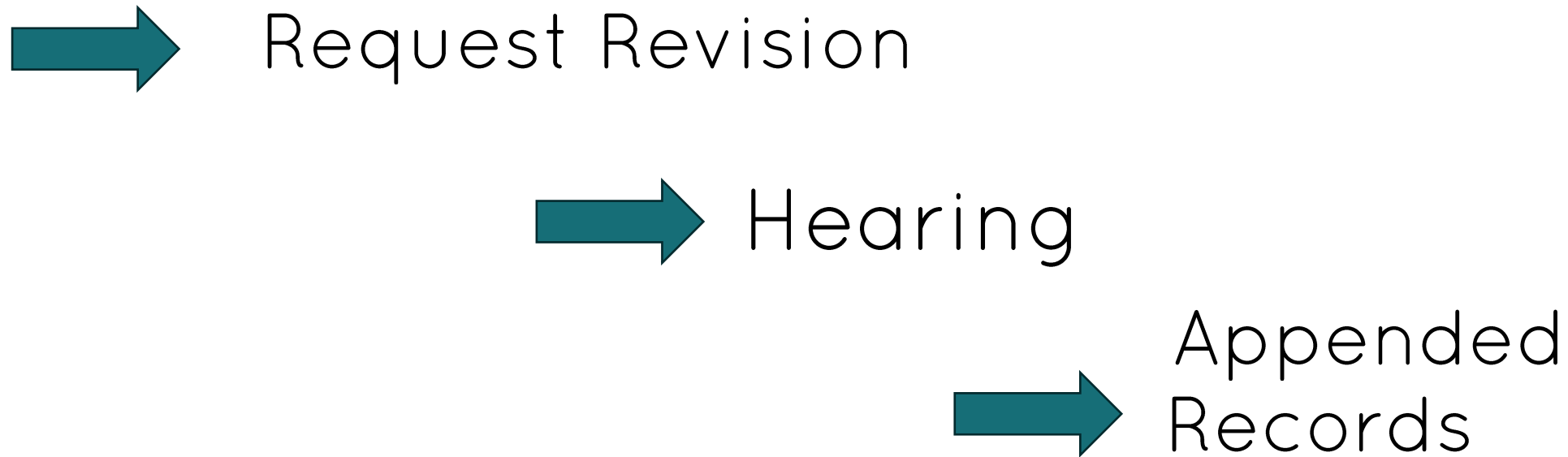
General Rule – Must have Student's Consent

Exceptions:

- Parents of “Dependent” Students
- Title IX Records for Parties and Advisors
- Legitimate Educational Interests
- Subpoena / Court Order
- Health / Safety Emergency
- Employment Records / Treatment Records / Public Safety Records

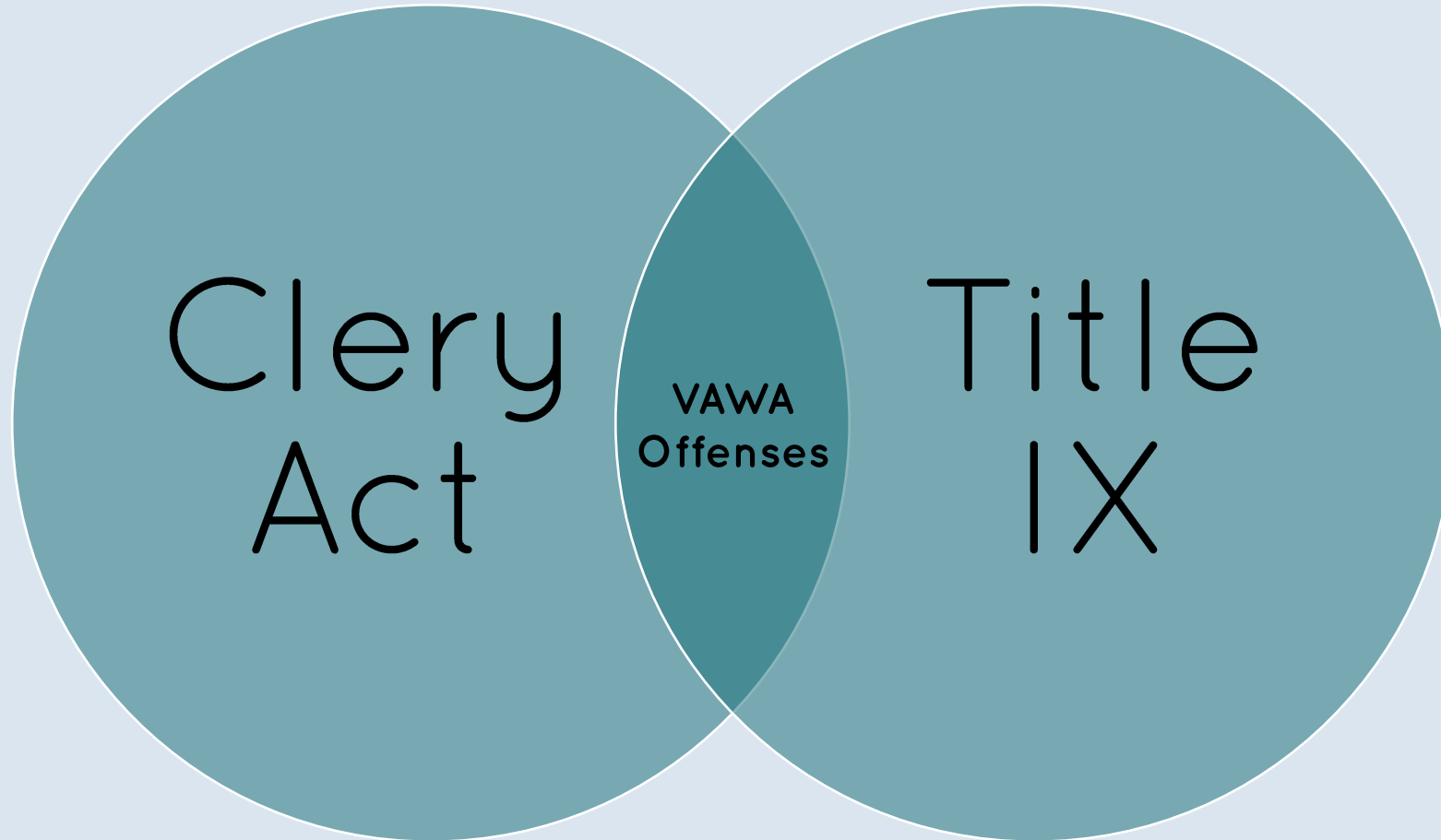
And there's more...

FERPA – Right to Dispute Accuracy of Records



Not For Use to Dispute Decisions / Only Inaccuracies in Records

Relationship between Laws



MN State Statute 135A.15

Institutions must:

- Incorporate sexual harassment policy requirements
- Inform victims of their rights
- Include reporting procedures and disciplinary processes in their policy
- Incorporate an amnesty policy
- Coordinate with law enforcement
- Health services must be confidential and screen for sexual violence and harassment
- Provide an online reporting system that permits anonymous reports
- Report annual statistics on sexual ~~assault~~ **misconduct**

MN State Statute 135A.15

Misconduct Includes:

- Sexual Assault, Dating Violence, Domestic Violence and Stalking
- Sexual Extortion
- Sex Trafficking
- Nonconsensual Dissemination of Sexual Images and Deepfake Sexual Images

MN State Statute 135A.15

Other Notable Changes in Law

- “To the extent possible, trainings must be culturally responsive and address the unique experiences and challenges faced by students based on race, ethnicity, color, national origin, disability, socioeconomic status, religion, sex, gender identity, sexual orientation, and pregnancy or parenting status”
- If institution utilizes a hearing, must allow parties’ advisors to make opening and closing statements on their behalf in addition to assisting with questions of witnesses.

MN State Statute 135A.062

Student Criminal Background Checks

- Cannot inquire into criminal history of an applicant for admission
- After an admission offer is made, may only inquire into any “violent felony or sexual assault” within previous 5 years
- Must provide student opportunity to provide explanatory statement, letter of recommendation, evidence of rehabilitation, and other information
- If institution rescinds an offer of admission, must provide the student with an explanation of the decision and an opportunity to appeal

MN State Statute 135A.1581

Parenting Students

- Applies to students with children 12 and under
- Must provide factsheet on legal rights and resources for student parents
- By June 30, 2026, must keep census of all student parents

Title IX's Broader Scope

- Distinguishing between sex discrimination and sex-based harassment
- Nondiscrimination Policy & Notice
- New scope of education program or activity
- Parties' relationships with the institution
- When Title IX does not apply

Broader Scope

Covers all forms of gender discrimination & retaliation

Covers all conduct impacting participation in a program of activity in the U.S.

Covers students, employees and third parties participating (or attempting to participate) in programs or activities

Pregnancy and Parenting

- Pregnancy or related conditions = pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions.
- Institutions must treat pregnancy or related conditions in the same way and under same policies as other temporary medical conditions
- Cannot discriminate on the basis of current, potential, or past pregnancy or related conditions or on the basis of current, potential, or past parental, family, or marital status

Gender identity

In the circumstances where it is ok to separate or treat differently on the basis of sex, institutions cannot do so by subjecting a person to **more than de minimis harm**.

“Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person’s gender identity subjects a person to more than de minimis harm on the basis of sex.”

Sexual harassment =

conduct on the basis of sex that satisfies at least one of the following:

Quid Pro Quo

- Employee conditions an outcome on an individual's participation in unwelcome sexual conduct

Hostile Environment

- Unwelcome sex-based conduct that is subjectively and objectively offensive and is so severe **or** pervasive that it limits or denies a person's ability to participate in/benefit from program or activity

VAWA Crimes

- Sexual assault
- Dating Violence
- Domestic Violence
- Stalking

Hostile Environment Considerations

- Perspective of a “reasonable person” (consider age, abilities, positions of authority, etc.)
- Does it meet the definition (“so severe or pervasive”)?
- Does the conduct deny “equal access”? Does not need to be a total or complete loss of access, but *equal*?
- Consider the type of misconduct, how often it happened, where it took place, etc.

Examples of Sexual Harassment

- Unwelcome sexual flirtations, advances, touches, or propositions
- Verbal abuse of a sexual nature
- Requests for sexual favors
- Recording video or photographs of a sexual nature without consent
- Cyber harassment
- Punishing or threatening to take adverse action against a subordinate or student for refusing to comply with sexual demands

Sexual Assault

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

Rape: Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without their consent, including instances where they are incapable of giving consent because of age or temporary or permanent mental or physical incapacity.

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

Incest: sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law

Sexual Assault contd.

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

Statutory Rape: Nonforcible sexual intercourse with a person who is under the statutory age of consent

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

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



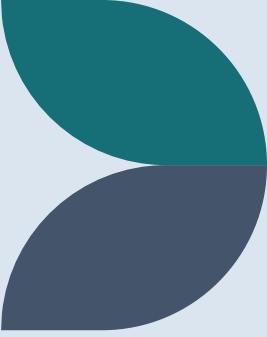
Sexual Misconduct

Remember policy must also address **sexual extortion, sex trafficking** and **deepfake images**.

MN Law changed sexual assault to **sexual misconduct**, which is defined to include:

- Sexual assault
- Domestic violence
- Dating violence
- Stalking
- Nonconsensual distribution of sexual images including deepfakes depicting intimate parts or sex acts
- Sexual extortion
- Sex trafficking

Nonconsensual distribution of sexual images including deepfakes depicting intimate parts or sex acts



Revenge porn

Deepfake = “an image or recording that has been convincingly altered and manipulated to misrepresent someone as doing or saying something that was not actually done or said”

Extortion

Subdivision 1. **Crime defined.** (a) A person who engages in sexual contact with another person and compels the other person to submit to the contact by making any of the following threats, directly or indirectly, is guilty of sexual extortion:

- (1) a threat to withhold or harm the complainant's trade, business, profession, position, employment, or calling;
- (2) a threat to make or cause to be made a criminal charge against the complainant, whether true or false;
- (3) a threat to report the complainant's immigration status to immigration or law enforcement authorities;
- (4) a threat to disseminate private sexual images of the complainant as specified in section 617.261, nonconsensual dissemination of private sexual images;
- (5) a threat to expose information that the actor knows the complainant wishes to keep confidential; or
- (6) a threat to withhold complainant's housing, or to cause complainant a loss or disadvantage in the complainant's housing, or a change in the cost of complainant's housing.

Sex trafficking

Subd. 7a. **Sex trafficking.** "Sex trafficking" means:

(1) receiving, recruiting, enticing, harboring, providing, or obtaining by any means an individual to aid in the prostitution of the individual; or

(2) receiving profit or anything of value, knowing or having reason to know it is derived from an act described in clause (1).

Consent

Institutions are not required to maintain a particular definition of consent; however, they should include a definition in their policy.

Consent is words or overt actions by a person clearly and affirmatively communicating a freely-given, present agreement to engage in a particular form of sexual contact.

Incapacitation

- An individual's physical and/or mental inability to make informed, rational judgments
- Incapacitated individuals cannot give consent to sexual contact
- Intoxication vs. Incapacitation
- Examples include: sleep, unconsciousness, or intermittent consciousness
- Signs include: slurred speech, difficulty walking, vomiting
- May also exist due to mental or developmental disability
- **Frequent decision point for adjudicators:** 1) *Was the complainant incapacitated;* and 2) *did or should the respondent (or a reasonable person) know/have known?*

Dating Violence

Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the Complainant. The existence of such a relationship shall be determined based on the Complainant's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

- Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
- Dating violence does not include acts covered under the definition of domestic violence.

Domestic Violence

A felony or misdemeanor crime of violence committed:

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

Stalking

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for their safety or the safety of others; or suffer substantial emotional distress.

Course of conduct means **two or more acts**, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.

Sexual exploitation

A form of sexual harassment that involves one or more of the following behaviors committed for any purpose, including sexual arousal or gratification, financial gain, or other personal benefit:

- taking sexual advantage of another person without consent;
- taking advantage of another's sexuality; or
- extending the bounds of consensual sexual contact without the knowledge of the other individual.

What are some examples of sexual exploitation?

Nondiscrimination Policy

Statement that institution does not discriminate on the basis of sex and prohibits sex discrimination in any education program or activity including, but not limited to, admissions and employment.

Notice of Nondiscrimination

Statement of nondiscrimination policy with information on how to report concerns.

- Restatement of Nondiscrimination Policy;
- Statement that inquiries about the application of Title IX may be referred to the Title IX Coordinator, the Office for Civil Rights, or both;
- The name or title, office address, email address, and phone number of the Title IX Coordinator;
- How to locate the Nondiscrimination Policy and Grievance Procedures;
- How to report information about conduct that may constitute sex discrimination and how to make a complaint of sex discrimination;
- Ensure that Notice of Nondiscrimination is published in a prominent location on institution's website;

For each handbook, catalogue, announcement, bulletin, application for admission, and employment application either:

- Include the full contents of the Notice of Nondiscrimination, or
- Include a statement that the institution prohibits sex discrimination in all programs and activities; that concerns or questions may be reported to the Title IX Coordinator, and provide a link of the full Notice of Nondiscrimination from the institution's website

Program or Activity under Title IX

- All sex discrimination occurring under a recipient's education program or activity in the United States
- Obligation to address a sex-based hostile environment in an education program or activity even when some conduct alleged to be contributing to the hostile environment
 - occurred outside the recipient's education program or activity, or
 - outside the United States

Parties' relationship with the institution

Reporting Party

Must be a student or employee; or an individual participating or attempting to participate in the institution's education program or activity at the time of alleged discrimination

**Broad interpretation of "participating or attempting to participate in"*

Responding Party

The person alleged to have violated policy prohibiting discrimination. An institution's ability to take disciplinary action under Title IX is limited when the Responding Party is not affiliated with the institution.

**But... should still consider appropriate action steps to facilitate reporting party's participation in education programs and activities.*



When Title IX does not apply

- Conduct that occurs outside the US unless contributing to hostile environment sex-based harassment
- Sexual harassment that occurs outside an institution's education program or activity

Creating and implementing your policies and procedures

- General recommendations
- Options for structuring your policy/procedures
- Required policy definitions & elements
- Additional best practice recommendations

General recommendations

- Be intentional about who helps craft/revise your policies and procedures (Title IX Coordinator should be central!)
- Gather input from key stakeholders whenever possible – helps with buy-in down the road
- Internally maintain previous policies
- Ensure your Title IX policy doesn't conflict with or contradict any other existing institutional policies
- Plan for community-wide education about any updated policies
- Policies should be published, easily accessible, and posted widely. Be diligent about removing old policies from websites, resources, materials, etc.
 - Include updated policies on the website and all handbooks/catalogs provided to applicants for admission and employment
- Use easily understandable language

Structuring your policy and procedures

Considerations:

- Barriers to reporting
- Clarity / minimizing confusion
- Equity
- Institutional mission
- Cost
- FERPA interaction
- Consistency with other discrimination grievance processes and other campus processes

Required Policy Definitions & Elements

Sexual harassment

- Quid Pro Quo
- Hostile environment
- Sexual misconduct
- Sexual assault
- Domestic violence
- Dating violence
- Stalking

Others

- Sexual exploitation
- Consent
 - Force
 - Incapacitation
- Retaliation
- Program or activity
- Formal complaint
- Reporting/Responding Party/Complainant/Respondent

Elements

- Scope of policy
- Notice of non-discrimination
- Supportive measures
- Reporting process
- Grievance process
- Rights of parties
- Potential sanctions and remedies



Grievance Process
for Discrimination
on Basis of Sex
Complaints

Grievance Process
for Sex-Based
Harassment
Involving Student

Policy and Process Best Practices

Templates

Conversation
checklists

Case tracking
system

Amnesty
policy*

Informal
resolution

Consensual
relationships

Student &
community
reviewers

Title IX personnel roles and responsibilities

- Title IX Coordinator role and responsibilities
- Training mandates
- Role of the investigator
- Role of decision-makers
- Avoiding bias and conflicts of interest
- Role of advisors

Title IX Coordinator Responsibilities



RESPOND TO
CONCERNS



ACTIVELY MONITOR
FOR BARRIERS



Title IX Coordinator: Role and Responsibilities

Must designate at least one Title IX Coordinator

Should have significant autonomy and seniority

Consider how the Coordinator best fits into the institution's organizational chart

- Creates and implements legally compliant policy and procedures
- Oversees response to reports and formal complaints as well as informal and grievance procedures
- Implements supportive measures and facilitates connection to resources
- Ensures sanction and remedy compliance
- Training oversight
- Recordkeeping

Training Requirements

	All employees	Investigators	Decisionmakers	Persons responsible for grievance procedure or supportive measures	Informal Resolution Facilitators	Title IX Coordinator / Title IX Team
Duty to address sex discrimination in programs and activities	✓	✓	✓	✓	✓	✓
Definitions of sex discrimination and scope of conduct covered (including sex-based harassment and accommodating pregnancy and related conditions)	✓	✓	✓	✓	✓	✓
Reporting obligations including responsibility to provide Title IX Coordinator name, contact and other information when notified of a student's pregnancy or related conditions	✓	✓	✓	✓	✓	✓
Institution's duty to respond promptly and effectively to reports of sex discrimination; duty to identify and address barriers to reporting; duties of non-confidential employees to report or otherwise respond when aware of conduct that may reasonably constitute sex discrimination		✓	✓	✓		✓
Grievance procedures under institution's policy		✓	✓	✓		✓
How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias		✓	✓	✓	✓ – No need to cover avoiding prejudgment of facts	✓

Training Requirements	All employees	Investigators	Decisionmakers	Persons responsible for grievance procedure or supportive measures	Informal Resolution Facilitators	Title IX Coordinator / Title IX Team
Rules and practices surrounding the institution's informal resolution process					✓	✓
Duty to coordinate efforts to comply with Title IX and Coordinator's responsibility for ultimate oversight of institution's Title IX obligations						✓
Specific actions to be taken to prevent discrimination and ensure equal access for students who are pregnant or have a related condition						✓
Overseeing institution's prompt and effective response to sex discrimination reports including: equitable treatment of parties; notifying the complainant of the grievance process and any informal resolution process (and same to the respondent if complaint is made); initiating the grievance process; determining whether institution should initiate a complaint; taking remedial steps regardless of whether a complaint is initiated						✓
Offering and coordinating supportive measures for parties						✓
Recordkeeping for at least 7 years of: all complaints of sex discrimination; institution's response; whether the grievance or informal process used; resulting outcome of any process used; all training materials to be made available to anyone upon request						✓

Investigator: Role and Responsibilities

- Can be internal or external
- Burden to collect sufficient evidence
- Conducts fair, prompt, and impartial investigations
 - Identifies witnesses and evidence
 - Provides parties opportunity to submit evidence
 - Identifies factual issues
 - Maintains records, recordings, etc.
 - Creates an investigation report
- Works in coordination with the Title IX Coordinator, particularly around evidence and report review
- Maintains impartiality and avoids bias
- Receives annual training

Decision-maker: Role and Responsibilities

- Could be investigator, adjudication panel, or hearing officers
- Must provide process to question parties and witnesses to adequately assess credibility
- If process includes a hearing, allow advisors to provide opening and closing statements and assist with questions
- Determines whether the institution's policy has been violated under the preponderance of evidence standard of review
- Determine sanctions - could be separate decision-maker(s) from responsibility decision-maker(s)
- Provides a written determination whether sex discrimination including a rationale
- Avoids bias and conflicts of interest
- Receives annual training



Appeals Officer: Role and Responsibilities

- Determines party's appeal under relevant appeal process (sex discrimination vs. sex-based harassment involving a student)
- May meet with parties
- Provides written determination that includes a rationale for the outcome
- Avoids bias and conflicts of interest
- Receives annual training



Conflicts of Interest



Biases *for* or *against* reporting or responding parties individually or generally



A material connection to the parties, witnesses, or issues that would cause a reasonable person to question partiality



Immediately disclose any potential conflicts of interest to the Title IX Coordinator



Conflicts of interest may be raised on appeal



Incorporate an avenue for parties to raise potential conflicts of interest early in the process

Avoiding Bias

Bias = tendency
to like or dislike;
may involve
stereotypes

Might be
implicit

Avoid
prejudgment of
the facts

Frequent implicit biases

- Race
- Gender
- Gender identity
- Gender expression
- Sexual orientation
- Religion
- National origin
- Ethnicity
- Age
- Disability
- Marital status
- Veteran status

Advisors

- Advisors assist parties throughout the process; can be attorneys, advocates, friends, family members, mentors, etc.
- Parties have the right to an advisor of their choice
- Advisors may attend meetings and interviews with the party
- Consider Advisor Guidelines for process, including role in hearing if grievance process includes hearings
- What if an advisor is being overtly disruptive or not adhering to your Advisor Guidelines?

Oversight of reports and Grievance Procedures

- Employee reporting requirements
- Responding to a report
- Starting the Grievance Process
- Dismissal
- Rights of the parties
- Emergency removal and administrative leave
- Notice of Allegations
- Informal Resolution process
- Investigation
- Evidence/report review
- Making a determination
- Sanctions
- Notice of Decision
- The Appeal process

Reporting Methods

Direct
communication
from the reporting
party to the Title IX
Coordinator

Third-party reports
from faculty,
concerned friends,
RAs, etc.

Online reports

Anonymous reports

Non-Confidential Employee Reporting Obligations for Sex Discrimination

Authority to institute
corrective measures OR
responsibility for
administrative leadership,
teaching, or advising

*Notify Title IX Coordinator of any
sex discrimination*

All other employees
(except person
experiencing
discrimination)

*Either notify Title IX Coordinator
or provide information on how to
report sex discrimination*

Reporting Obligations for Student Employees

“A postsecondary institution must reasonably determine and specify whether and under what circumstances a person who is both a student and an employee is subject” to these reporting requirements.

Confidential Employees

- Must notify community of who are confidential employees and how to contact them
- Confidential employees must:
 - Explain their confidential status
 - Provide contact information for the Title IX Coordinator
 - Provide a description of what the Title IX Coordinator can provide
 - Explain how to report sex discrimination

Public Awareness Events

Held on campus or through on-line platform

Purpose to raise awareness of sex-based harassment related to institution's programs or activities

“Not obligated to act” except:

- Immediate and serious threat to health or safety
- Still need to consider in efforts to prevent future sex-based harassment



Non-Confidential Reporting Obligations for Pregnancy and Related Conditions

Employees who learn about a student's pregnancy or related condition must promptly:

- 1) Provide that student with the Title IX Coordinator's contact information and
- 2) Inform the student that the Title IX Coordinator can coordinate specific actions to prevent discrimination and ensure the student's equal access to programs and activities

*Pregnancy or related conditions = pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions.

Responding to a Report

After receiving a report:

- Title IX Coordinator should reach out to the affected individual **quickly**
- Offer the affected individual an initial conversation
- Email resources the individual might need/want to take advantage of right away
- Acknowledge that if the individual does not choose to engage right now, that you will always be available going forward
- However, delaying complaints or law enforcement reports can make investigating more difficult

What about anonymous reports?

- If the report names the individual who experienced the misconduct, reach out to that individual ASAP
- If the report only names the individual who perpetrated the misconduct, consider next steps (meeting? Available evidence?)
- If possible, consider reaching out to the reporter for additional information
- Consider potential patterns (i.e., multiple reports from the same location? About the same person?)
- Duty to attempt remedies

Initial Conversation with a Reporting Party

Process Options:

- Law enforcement report
- Grievance Process
 - Informal Process
- Taking time to decide what to do next, if anything
- Potential for TIXC Complaint –Grievance Process
- Preservation of evidence
- Other options permitted by your policy, if not Title IX?

Supportive Measures:

- Goal is to restore or preserve access to programs and activities and/or provide support during the grievance or informal processes
- Cannot be punitive
- Individualized assessment (could be counseling, deadline extensions, increased security, leaves, changes in classes, work, housing, etc.)
- Must be kept on need-to-know basis
- Must provide parties with a timely opportunity to seek modification or reversal of an institution's decision to provide, deny, modify, or terminate a supportive measure

Next steps for TIXC:

- Does the reported incident fall within the scope of your policy? If so, which process would apply?
- Notify others at the institution who need to know?
- Timely warning?
- Emergency removal?
- TIXC Complaint if reporting party declines Grievance Process?

**Explain that access to these resources is not contingent upon moving forward with grievance process*

Emergency Removal

- Must undergo an individualized assessment and determine that an “imminent and **serious** threat to the health or safety of a complainant or any students, employees, or other persons arising from the allegations of **sex discrimination** justifies removal”
 - Threat no longer needs to be “physical,” but “serious”
 - Applies to all forms of sex discrimination, not just sex-based harassment
- Must provide respondent with notice and opportunity to challenge immediately following the removal

Administrative Leave

Can place employee respondent on administrative leave during a pending grievance process

Starting the Grievance Process

Initiated by Reporting Party

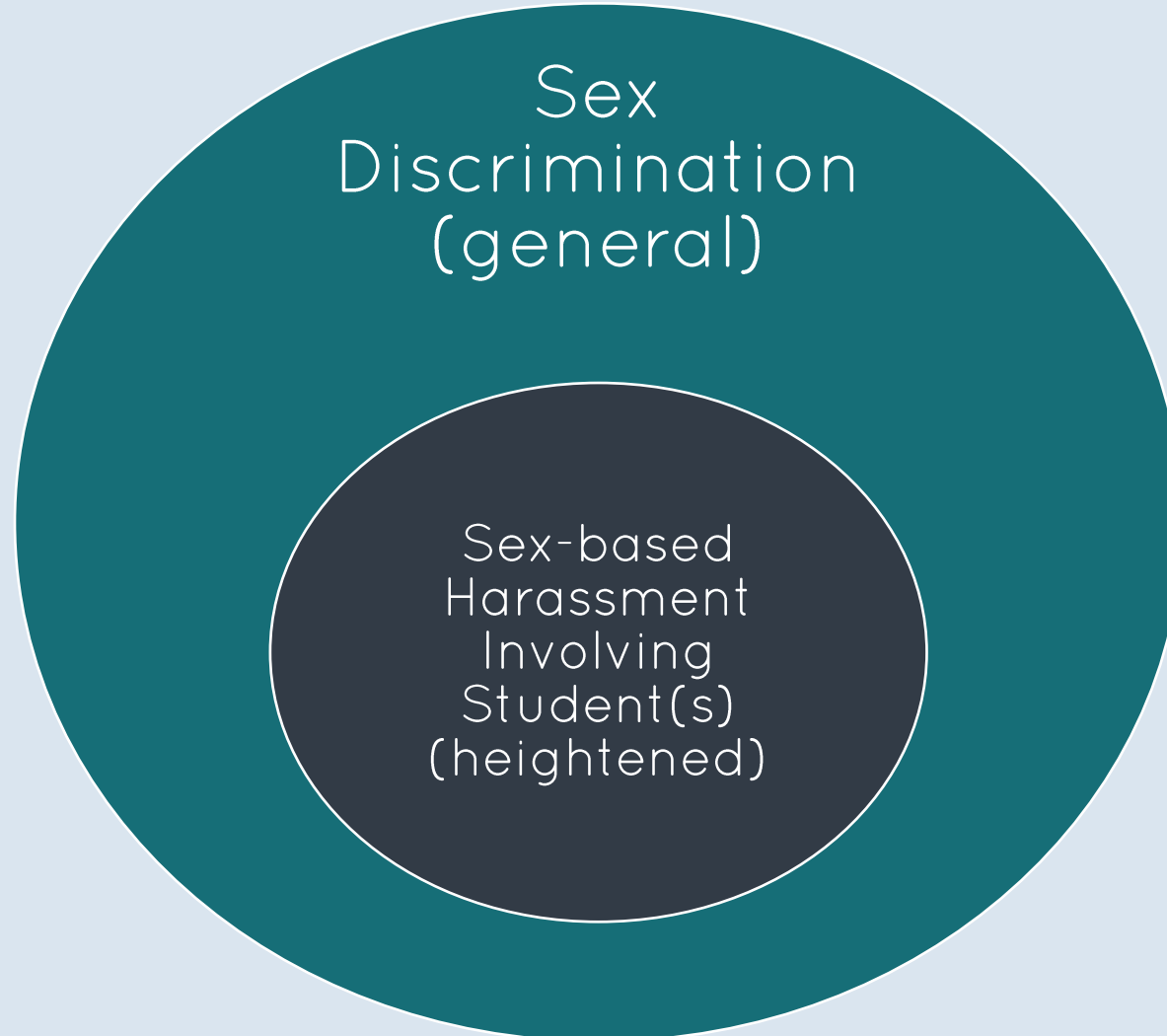
- No more formal complaints
- Can initiate at any time
- Requests an investigation
- Must be signed and in writing, but can be on paper or electronic (i.e., via email)

TIXC Discretion to Initiate Complaint

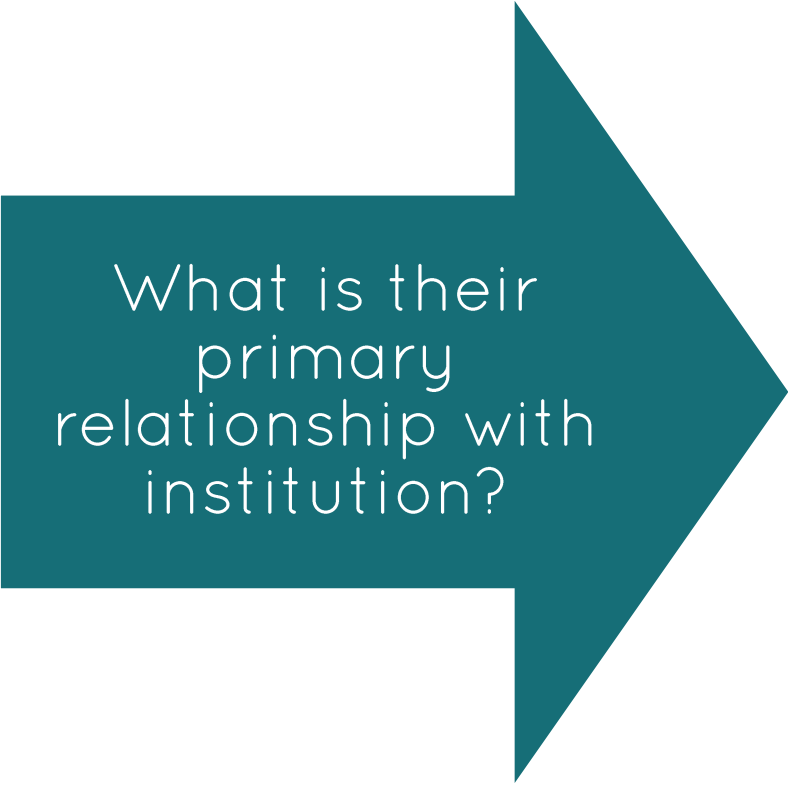
Coordinator must consider, at a minimum, the following factors:

1. Complainant's request not to proceed
2. Complainant's reasonable safety concerns regarding initiation of a complaint
3. The risk that additional acts of sex discrimination would occur if a complaint is not initiated
4. The severity of the allegations, including potential sanctions if substantiated
5. The age and relationship of the parties
6. The scope of the discrimination (patterns, how many impacted, etc.)
7. The availability of evidence
8. Whether the institution could end and prevent the discrimination without a grievance process

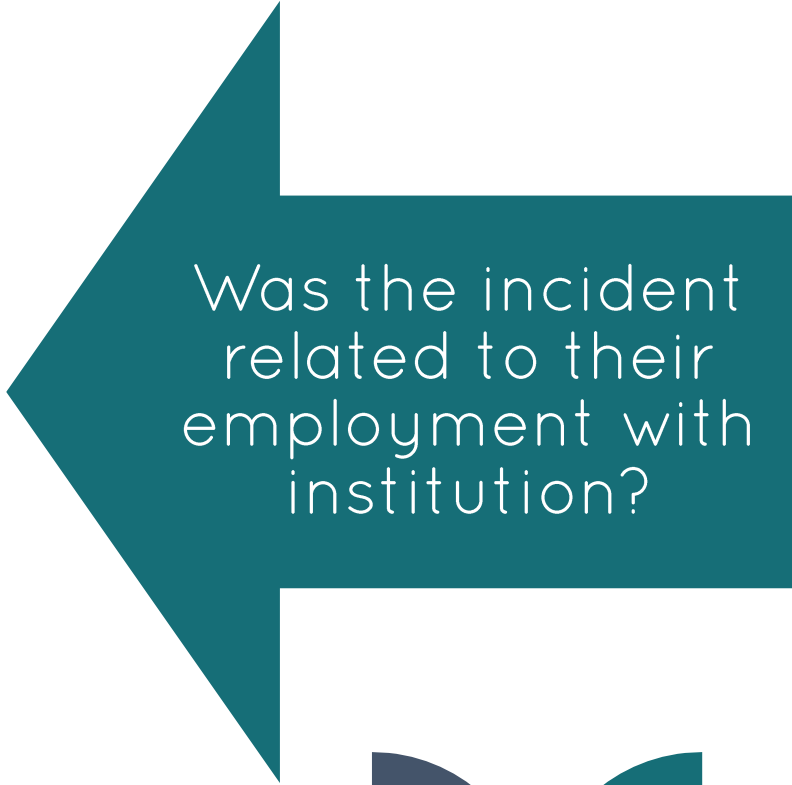
Grievance Processes



Student or Employee?



What is their
primary
relationship with
institution?



Was the incident
related to their
employment with
institution?

Requirements for General Grievance Process

- Must be in writing and provide for prompt equitable resolution
- Complainants may be a student, employee or third party participating or seeking to participate in program or activity
- Requirements relating to respondents not applicable when institution is accused of sex discrimination
- Treat parties equitably, respondent presumed not responsible, burden on institution to conduct sufficient investigation
- Decisionmaker may be the same person as the Title IX Coordinator of investigator
- No conflicts of interest or bias
- Exclude certain types of evidence unless provided voluntary consent (privileged evidence, health records, etc.)
- Exclude evidence that relates to the complainant's sexual interests or prior sexual conduct, unless used to prove consent or identity
- Take reasonable steps to protect privacy of the parties and witnesses
- Reasonably prompt time frames for each major stage:
 - Evaluation
 - Informal resolution
 - Determination
 - Appeal

Notice of Allegations: General

Provide written notice to parties including:

- Grievance procedures, including informal process (if applicable)
- Sufficient information to permit response
- Anti-retaliation statement
- Statement that parties will have opportunity to access **relevant** evidence or description of relevant evidence (evidence available upon request)

*Must update if additional allegations later added to investigation



Notice of Allegations: Heightened

- All General Notice requirements
- Allegations potentially constituting sex-based harassment
- Respondent presumed not responsible
- Parties will have opportunity to present evidence to a trained impartial decisionmaker
- May have an advisor who may be an attorney
- Will have access to **relevant** evidence or an investigation report (with evidence available upon request)
- Notice of prohibition against knowingly making false statements/submitting false information

*May delay providing written notice of allegations if there are safety concerns of those receiving the notice (use individualized safety and risk analysis, not speculation or stereotypes)



Dismissal

Institution may dismiss if:

- Unable to identify respondent after taking reasonable steps to do so
- Respondent not participating in program or activity
- Complainant voluntarily withdraws allegations – **obtain the complainant's withdrawal in writing**
- Determine that alleged conduct could not be sex discrimination even if true
- Notify parties of dismissal and right to appeal
- Notify complainant/parties of option to appeal
 - If appealed, need “fresh” decisionmaker and allow parties opportunity to make a statement in response
 - Notice of appeal must include rationale

After dismissal, institution must:

- Offer supportive measures to complainant (and respondent if notified)
- Have TIXC take steps to ensure that sex discrimination does not continue or recur

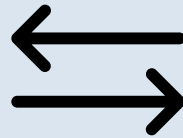


Consolidation of Complaints

- Consolidation allowed if the allegations arise out of the same facts or circumstances.
- If any of the allegations involve sex-based harassment and a student, must use heightened grievance process for all allegations you're consolidating.

Cross-Complaints

How does your institution handle situations where both parties have complaints against the other?



Informal Resolution: General Terms

- Not required to offer informal
- Cannot require participation; must obtain parties' voluntary consent
- May decline to permit in certain cases (e.g., future risk of harm)
- Available any time prior to responsibility decision
- Title IX Coordinator still responsible for addressing discrimination
- NPRM and 2020 regs said informal processes with student complainant and employee respondent weren't allowed – that is now gone for higher education



Informal Resolution: Notice Requirements

Before initiating process must provide notice to the parties of:

- The allegations
- The requirements of the informal process
- The right to withdraw at any time
- That any resolution will preclude future grievance procedures arising out of the same allegations
- Potential terms that may be requested
- The records that will be maintained
- Whether and how the institution could utilize information obtained through the informal process in a grievance procedure
- Facilitator cannot be investigator or decisionmaker
- Facilitator must be trained; cannot have a conflict of interest or bias



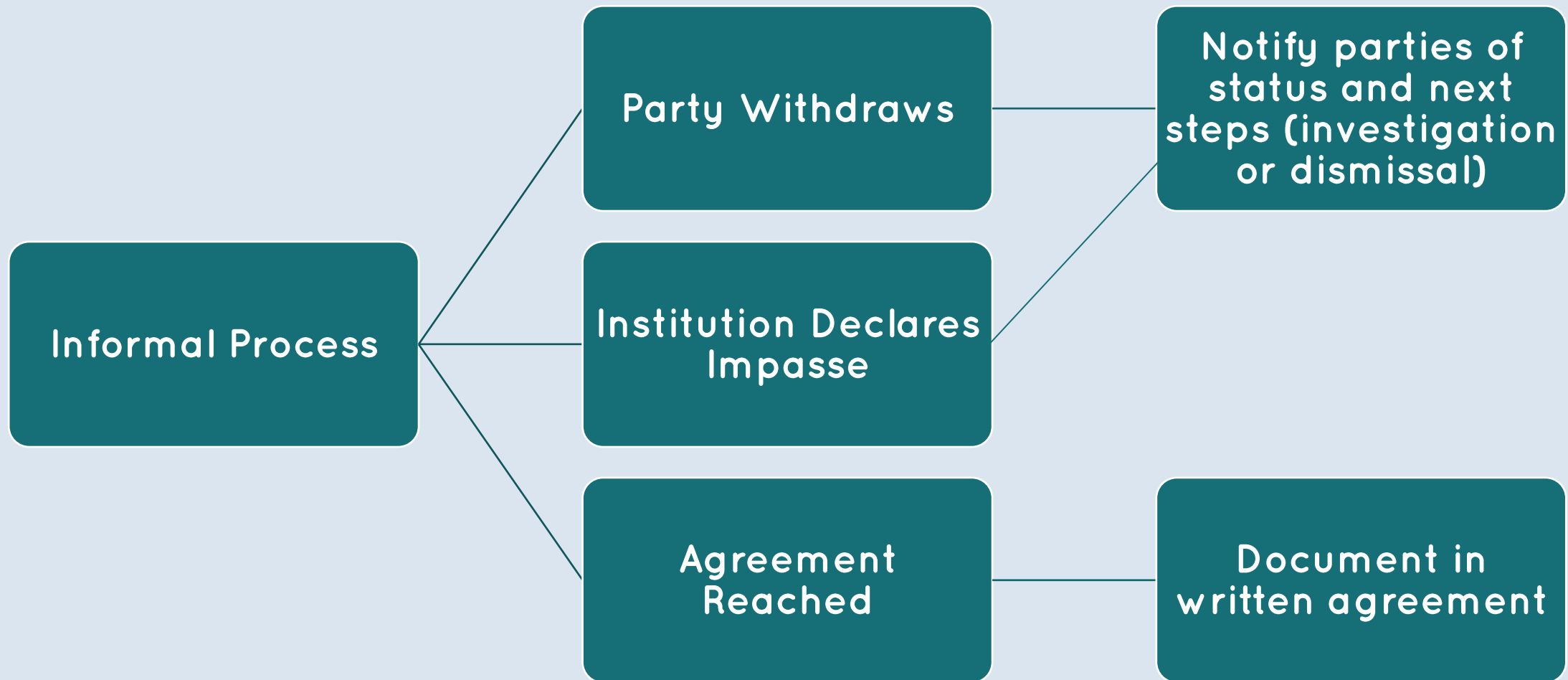
Pros and Cons

Pros

- Quick
- Low/No confrontation
- Parties in control
- Parties feel heard
- Focus on resolution; not conflict
- Less resources and risk

Cons

- Coercive?
- Doesn't hold perpetrators accountable?
- Lack of due process?
- Puts community at risk?
- Party changes mind?



Potential Terms of Resolution

- Suspension
- No contact order
- Nondisparagement
- Change in classes (now and future)
- Change in residence hall (now and future)
- Withdrawal from athletics team or co-curricular activities
- Reimburse expenses
- Boundary counseling and other mental health or addictions services
- No further action or investigation
- No admission of responsibility
- Agreement not to sue
- Impact of not following terms

Complaint Investigation: General

- Must ensure burden is on recipient to conduct investigation that gathers sufficient evidence
- Provide same opportunity to all parties to present witnesses and evidence
- Review all evidence gathered and determine what is relevant and whether impermissible (privileged, treatment records, or complainant's "sexual interests or prior sexual conduct")
- Provide each party an opportunity to access relevant evidence or a description of evidence* and a reasonable opportunity to respond
 - Institution must take steps to prevent and address parties' unauthorized disclosure of evidence during review process
- Institution may adopt additional provisions, but must apply equally to both parties

*If providing a description of the evidence, must provide access to evidence upon request



Complaint Investigation: Heightened

- All requirements under General process
- Provide each party an opportunity to access relevant evidence or an investigation report*, and a reasonable opportunity to respond
 - Review period must be provided in advance of a live hearing, if having one, but response can occur prior to, during, or both prior to and during the live hearing
- Date, time, location, participants and purpose of all meetings where party is invited to attend, with sufficient time to prepare to participate
- Opportunity to be accompanied by advisor – may impose limits on extent of participation
- Same opportunity, if any, to have others present
- Decide whether to permit expert witnesses
- Permit reasonable extensions of timelines for good cause

*If providing an investigation report, must provide access to evidence upon request



Relevant means related to the allegations of sex discrimination under investigation as part of the grievance procedures... Questions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred, and evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred.

Evaluating Evidence, Assessing Credibility, and Making Decision: General

- Must provide a process that enables decisionmaker to adequately assess the credibility of witnesses
- Use preponderance of evidence standard unless institution uses clear and convincing standard in all other comparable proceedings
- Notify parties of outcome in writing, include rationale, procedures for appeal (if applicable), and any disciplinary sanctions imposed on the respondent
- Provide remedies
- Require Title IX Coordinator to take other appropriate actions



Evaluating Evidence, Assessing Credibility, and Making Decision: **Heightened**

- All requirements under General process
- Must provide a process that enables the decisionmaker to question parties and witnesses to adequately assess a party's or witness's credibility to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination.
- Have decisionmaker determine whether proposed questions are relevant/impermissible prior to the question being posed and must explain decision to exclude.
- Must give party opportunity to clarify or revise a question that decisionmaker determined is unclear or harassing.
- Other rules, as long as applied equally, allowed.
- Decisionmaker may choose to place less or no weight upon statements by a party or witness who refuses to respond to relevant questions but cannot draw inference about whether sex-based harassment occurred based solely on party's or witness's refusal to respond.



Evaluating Evidence, Assessing Credibility, and Making Decision: **Heightened contd.**

- If **no hearing**, must:
 - Allow the investigator or decisionmaker to ask questions during individual meetings with a party or witness;
 - Allow each party to propose questions that they want asked of any party or witness and have those questions asked by the investigator or decisionmaker during one or more individual meetings, including follow-up meetings; and
 - Provide each party with an audio or audiovisual recording or transcript with enough time for the party to have a reasonable opportunity to propose follow-up questions.
- If **hearing**, must:
 - Allow each party to propose questions they want asked of any party or witness and have those questions asked by decisionmaker;
 - Allow each party's advisor to ask any party or witness questions on party's behalf;
 - Provide an advisor for parties who do not have one; and
 - Be virtual or in-person (party may request virtual). Must be recorded.

Evaluating Evidence, Assessing Credibility, and Making Decision: **Heightened contd.**

Notify parties of outcome in writing including:

- description of alleged harassment;
- information about grievance process;
- evaluation of the evidence;
- any disciplinary sanctions;
- any remedies provided, including any remedies provided to other students identified to be experiencing the effects of the sex-based harassment;
- process for appeal



Adjudication Options

01

Investigator Decides
Responsibility & Any
Sanctions /
Remedies

02

Investigator Decides
Responsibility –
Adjudicator(s)
Decide Sanctions /
Remedies

03

Investigator
Provides Report –
Adjudicator(s) Meet
with Parties and
Witnesses and
Decide
Responsibility,
Sanctions and
Remedies

04

Investigator
Provides Report –
Hearing Officer or
Panel Decides
Responsibility,
Sanctions /
Remedies

05

Investigator
Provides Report –
Hearing Officer or
Panel Decides
Responsibility –
Adjudicator(s)
Decides Sanctions /
Remedies

Relevancy Determinations

Does the information help me in deciding if there was a policy violation?

Does it **“move the dial”** in proving or disproving the allegations?

Off limits:

- Medical or treatment records without voluntary, written consent
- Legally privileged information unless party waives privilege
- Reporting party's sexual interests or prior sexual conduct unless offered to prove consent or that someone other than Respondent committed act

- Know where the line is regarding evidence or questioning intended only to harass or embarrass another party
- What about Responding Party's prior or subsequent misconduct?
- What about evidence or questioning that is duplicative or repetitive?

Sanctions

Need to stop,
prevent, and remedy!

Consider educational
and developmental
sanctions

Engage in a risk
assessment to help
determine
appropriate
sanctions

Sanctions should
reflect the severity of
the behavior
(consider prior
misconduct)

Consider any
loss/injuries to the
Reporting Party or
the institution and
how to rectify those,
if possible

Can consider past
cases of similar
misconduct with
assistance from Title
IX Coordinator

Common Sanctions & Remedies

Students

- Probation
- Loss of leadership positions
- Loss of privileges
- Housing changes
- Limited access to campus
- Counseling or required education
- Suspension
- Expulsion

Employees

- Loss of leadership positions
- Loss of privileges
- Required education
- Disciplinary letter
- Unpaid suspension
- Demotion
- Termination

Notice of Decision

Should include:

- Allegations
- Procedural steps
- Findings of fact
- Decision regarding responsibility
- Rationale for each allegation/decision
- Sanctions, if applicable
- Whether remedies will be provided
- Appeal process information

Other requirements:

- Deliver notice simultaneously to the parties
- Decision/sanctions become final when parties are notified of the appeal decision OR when the deadline to submit an appeal has passed

Appeals

General: Must provide appeal process that, at a minimum, is the same as offered in other comparable proceedings, if any, including other discrimination complaint proceedings.

Heightened: Must provide for appeal on the following bases:

Procedural error that would have changed the outcome of the proceeding;

New evidence that was not available at the time of the determination and would have changed the outcome; and

Title IX Coordinator, investigator or decisionmaker had a conflict of interest or bias
(Can offer additional bases if desired)

Heightened procedure also applies to appeals of **dismissals** under either procedure.

Determination of responsibility becomes final either on date institution notifies parties of appeal decision or date when an appeal would no longer be timely.



Appeal Process contd.

- Appeal decision-maker cannot have been previously involved in the process
- Timeframe for accepting appeals?
- Let parties know if an appeal was received and that the other party has an opportunity to respond
- Must send appeal decision and rationale to parties simultaneously
- Possible outcomes?
 - Affirm previous decision
 - Reverse previous decision
 - Return for further investigation or adjudication

Steps once the Process is Over

Notice to parties that the process is over

Sanction and remedy adherence and monitoring; respond to violations

Checking in with parties as appropriate, particularly regarding ongoing supportive measures

Additional prevention measures? School-wide messages, campaigns, training, etc.?

Recordkeeping

Feedback mechanism regarding the Title IX process?

General Title IX Oversight

- Recordkeeping and documentation
- Pregnancy & other gender equity
- Managing campus climate
- Assessing compliance

Recordkeeping

Must maintain all records for at least 7 years

- All training materials made available to the public **upon request**
- Records of efforts to prevent discrimination on basis of pregnancy and related conditions
- Records for each report of sex discrimination:
 - Efforts to encourage alleged victims to meet with Title IX Coordinator;
 - If crime alleged, efforts to encourage alleged victim to notify law enforcement;
 - If met with Title IX Coordinator, notes of intake meeting, including whether complainant decided to proceed with grievance process, informal resolution process, or no process;
 - Supportive measures offered and received by complainant (and respondent if applicable), and any documentation relating to concerns raised or challenges to supportive measures;

Recordkeeping



- Additional records for each complaint of sex discrimination:
 - Details of complaint including:
 - Information about each incident;
 - Where the incident(s) took place;
 - Names of the individuals involved and whether alleged victim, alleged perpetrator or witness;
 - When the incident(s) occurred;
 - All documentation surrounding the informal resolution process (if applicable), including the parties' consent to participate and any written agreement reached;
 - All documentation surrounding grievance process including any investigation report, witness interviews, evidence gathered, and correspondence relating to grievance process;
 - Decision reached by adjudicator(s) including whether respondent found responsible, notice of decision, what actions taken in response to the determination including remedies taken

TIXC Role when informed of student pregnancy or a related condition

- Provide notice of nondiscrimination and institutional obligations
- Offer individualized “reasonable modifications” to policies, practices, or procedures to prevent discrimination and ensure equal access to programs and activities
 - Examples include breaks during class for milk expression, to breastfeed, attend health appointments, changes in schedule, extensions for class work, rescheduling exams, etc.
- Must allow voluntary leaves of absence with reinstatement right to cover, at minimum, the student’s healthcare provider’s recommendation
- Permit access to separate but comparable resources
- Maintain grievance process
- Must provide adequate lactation space
- Provisions around when institutions can request supporting documentation and when they can require a healthcare provider’s certification to participate.

Institutional treatment of pregnancy or related conditions for employees

- Comparable treatment to temporary disabilities
- Right to leave and reinstatement for employees
- Right to lactation space and breaks

Gender Equity

- Title IX Coordinator is responsible for oversight of gender equity in admissions, employment, educational opportunities, athletics, co-curricular activities, etc.
- Consider periodic check-ins with other departments regarding any gender equity gaps or concerns

Campus Climate Management

- Periodic campus climate surveys are useful in determining experiences or perceptions on campus that you might not be aware of
- Strategies for combatting misperceptions about Title IX?
 - Focus groups or individual meetings
 - Targeted resource development and deployment
 - Bolstering website content
 - Community-wide messages
 - Forums or events
 - Consider engaging campus partners and student leadership
 - What about managing repercussions stemming from individual cases?

Assessing Compliance



Templates and
checklists for all
steps of the process



Internal reviews



Feedback
mechanisms from
parties



Internal case
debriefs with team
members



Professional
development

Helpful Resources (all free!)

- Ballast Title IX Policy & Procedure Implementation Guide (2024)
- Ballast 2024 Title IX Regulations Webinar
 - <https://somsull.com/ballast/ballast-resources/>
- Ballast Office Hours
 - <https://somsull.com/ballast/ballast-trainings/>
- U.S. Department of Education Policy Resource
 - [resource-nondiscrimination-policies.pdf \(ed.gov\)](https://www.ed.gov/resource-nondiscrimination-policies.pdf)

Keep in touch!



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