

Title IX Decision-maker Annual Training

August 22, 2024

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Meet Our Team



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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
- Title IX Scope
- Title IX Personnel Roles & Responsibilities
- The Title IX Process Overview
- Investigation & Adjudication: 2020 Regulations
- [Investigation & Adjudication: 2024 Regulations](#)
- Trauma-Informed Considerations
- Evidence & Assessing Credibility
- The Hearing or Questioning Opportunities
- Making a Determination
- Appeal Process

A Note about 2024 Regs

- Effective August 1, 2024
- Enforcement has been enjoined in some states, but not in Minnesota
- Enforcement has also been enjoined at institutions that have students who are members of some organizations. This includes some Minnesota institutions. In this case, continue to apply 2020 regs.
- 2020 Regs continue to apply to any situations that occurred before August 1, 2024
- OCR is not expecting all the required training to be done by August 1, 2024



Key Differences between 2020 and 2024 Regulations

- Scope of Title IX and definition of sexual harassment
- Treatment of retaliation
- Employee reporting requirements
- Training requirements
- Monitoring for barriers to reporting
- Procedure for grievance processes
- Pregnancy and parenting provisions

Title IX Overview

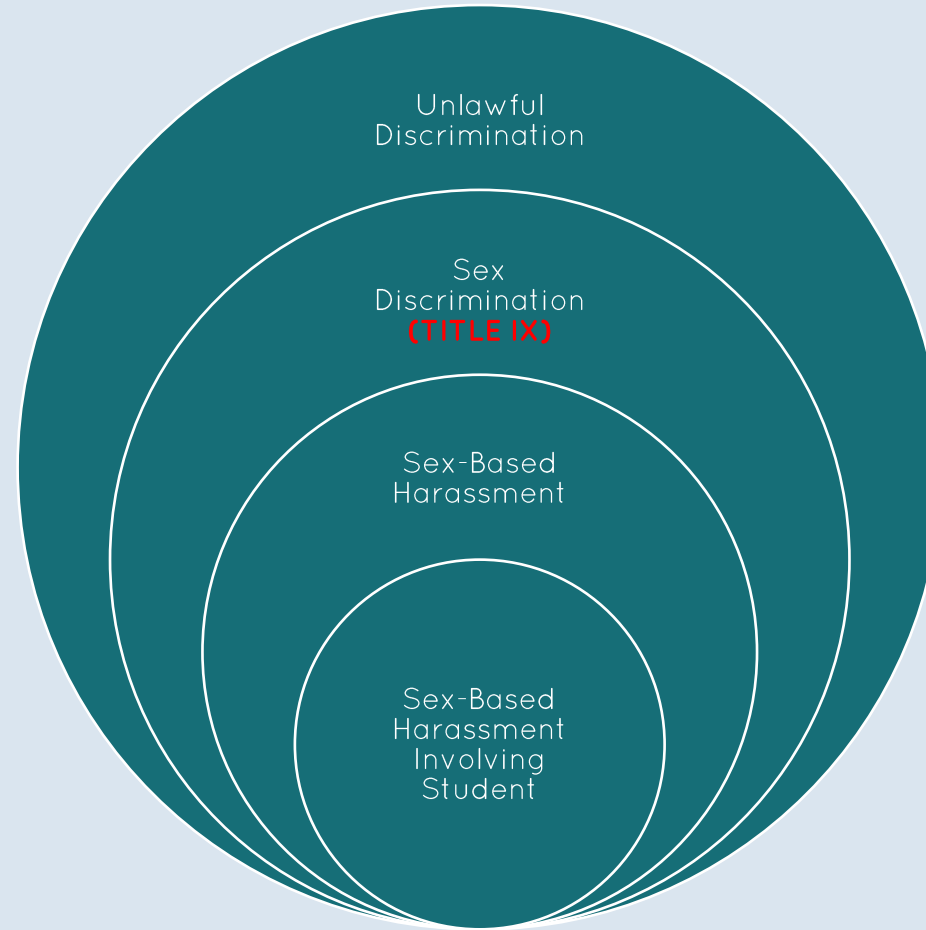
“

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

UNDERSTANDING HOW THE PIECES FIT TOGETHER



Title IX Basics

Prohibits sex
discrimination

In any program
or activity

Applies to
students,
employees,
volunteers, etc.

Scope of Regulations

2020 Regs

Discriminatory treatment (no required process)

Harassment

2024 Regs

Discriminatory treatment (provides a process for addressing these complaints)

Harassment

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 and/or pervasive

Purpose or effect of creating a hostile work/educational environment

Reasonable person in complainant's shoes

Retaliation

2020 Regs

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

2024 Regs

“Retaliation means intimidation, threats, coercion, or discrimination against any person by the recipient, a student, or an employee... for the purpose of interfering with any right or privilege secured by Title IX... or because the person has reported information, made a complaint, testified, assisted, or participated or refused to participate in any matter in an investigation, proceeding, or hearing... including an informal resolution process.”

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)

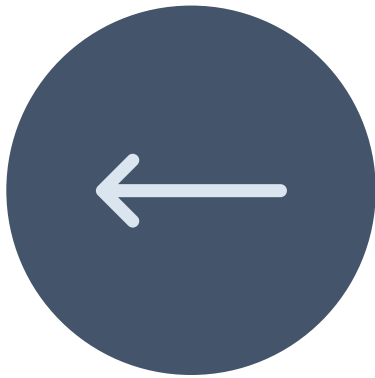
Role

- 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

FERPA



RIGHT TO ACCESS



RIGHT TO CONTROL
DISCLOSURES



RIGHT TO DISPUTE
ACCURACY

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
- **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.**
- 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

Key terms

- **Reporting party/Complainant:** individual who experienced the sexual harassment
 - **Third-party Report:** A report from someone else about an individual who experienced sexual harassment
 - **Witness:** An individual who may have knowledge about the incident
- **Responding party/Respondent:** individual accused of sexually harassing someone
- **Grievance process:** the investigation process and/or informal process used by an institution to address complaints of sexual harassment
- **Formal Complaint/Complaint:** document requesting the institution to move forward with the grievance process. Can be filed by either the reporting party or the Title IX Coordinator.
- **Supportive measures:** resources or accommodations that help either party in the aftermath of a report and/or during a grievance process. Access to supportive measures is not contingent upon pursuing a grievance process.

The Scope of Title IX

2024 Regs' Broader Scope

Covers all forms of sex discrimination & retaliation

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

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

A Note about Sex-Based Discrimination

Discrimination based on sex or gender (i.e., adverse or preferential treatment based on someone's sex, gender identity, sexual orientation, etc.) is still prohibited under the 2020 Title IX regulations; however, institutions are not obligated to implement all the same Grievance Process requirements as stated in the 2020 regulations in order to address and/or investigate those types of concerns.

Gender Equity

- Title IX Coordinator is responsible for oversight of gender equity in Athletics
- Consider periodic check-ins with other departments regarding any gender equity gaps or concerns

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.”

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



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 conduct that is so severe, pervasive, and objectively offensive that it denies a person equal access to a program or activity
- 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?
- 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.

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 (2020)

What does it mean?

- Locations, events, or circumstances...
- On or off campus...
- Over which the institution exercises substantial control over the context in which the harassment took place.

Additional requirements:

- Must have occurred within the United States.
- Includes conduct that occurred in any building owned or controlled by an officially recognized student organization.
- Institution must also have exercised substantial control over the responding party.

Program or Activity under Title IX (2024)

- 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 participating or attempting to participate in the institution's education program or activity at the time of filing a Formal Complaint.

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

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.**

Responding Party

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

2020 Regs

- Conduct that occurs outside the US; however, VAWA might still apply in these instances
- Sexual harassment that is not sufficiently severe, pervasive, and objectively offensive
- Sexual harassment that occurs outside an institution's education program or activity

2024 Regs

- Conduct that occurs outside the U.S. and/or outside an institution's program or activity that does not contribute to a hostile environment within an institution's program or activity

Title IX personnel roles and responsibilities

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/complaints as well as informal and grievance procedures
- Implements supportive measures and facilitates connection to resources
- Ensures sanction and remedy compliance
- Training oversight
- Recordkeeping

Title IX Coordinator Responsibilities



RESPOND TO
CONCERNS



ACTIVELY MONITOR
FOR BARRIERS



Training Mandates (2020 Regs)

Definitions

- Sexual harassment
- Education program or activity

Other

- Institutional policies and procedures
- Any technology for live hearings
- Training materials must be posted on institution's website and maintained for seven years
- Training cannot rely on sex stereotypes

Concepts

- Conducting an impartial investigation and hearing process
 - ... While protecting the safety of complainants and promoting accountability
- Serving impartially, without bias, and without conflicts of interest
- Relevance regarding questions, evidence, and the investigation report
- Dynamics of sexual assault, dating violence, dating violence, and stalking

Training Mandates (2024 Regs)

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-makers: Role and Responsibilities

- Hearing panel members—cannot be Title IX Coordinator or Investigator
- Attends and conducts a live hearing
- Determines whether the institution's policy has been violated under the appropriate standard of evidence
- Determines sanctions, if necessary
- Writes a Notice of Decision that includes a rationale for the finding
- Avoids bias and conflicts of interest
- 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 and reviews appropriate investigation/adjudication materials
 - Not a “re-do” of the investigation
- 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

Avoiding Prejudgment of Facts

- Don't rush to a decision
- Be mindful about keeping an open mind
- Stay rooted in your role
- Step back and check yourself

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
 - Not required for general process under 2024 regulations, but don't forget about VAWA!
- Advisors may attend meetings and interviews with the party
- Under both sets of regs, if a party does not have an advisor, the institution must provide an advisor to conduct cross-examination on the party's behalf **during the hearing**. These advisors are not required to be trained
- Consider Advisor Guidelines and what your process will be if they're not adhered to

Title IX Process Overview

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

Employee Reporting Requirements (2020 Regs)

Confidential Resources

- Not required to report disclosures to the Title IX Coordinator
- Legally privileged
- Includes licensed counselors; individuals associated with a religious order/denomination; licensed healthcare providers; victim advocates

**While working within the above capacity*

Officials with authority to institute corrective measures

- Required to report instances or disclosures of sexual harassment to the Title IX Coordinator
- Who this applies to will depend on your institution
- Deans? Directors? RAs?

Other employees

- Institutions have discretion re: reporting requirements
- Consider requiring all non-confidential employees to report disclosures or instances of sexual harassment to the Title IX Coordinator
- What about student employees?



Employee Reporting Obligations for Sex Discrimination (2024 Regs)



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
 - The importance of preserving evidence

Non-Confidential Employee 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

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*

Starting the Grievance Process

Formal Complaint initiated by Reporting Party

- 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)

Formal Complaint initiated by TIXC

Consider:

- Egregiousness of allegations?
- Use of weapon?
- Risk? Threat?
- Availability of evidence?
- Discuss with Deputies or Title IX Team
- If proceeding, notify reporting party

Complaint initiated by Reporting Party

- No more formal complaints
- Can initiate at any time
- Requests an investigation
- May be requested orally or in writing (email/online is ok)

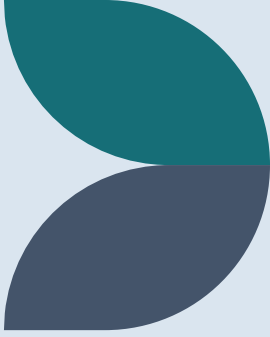


TIXC Discretion to Initiate Complaint

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

A Note about “Dismissed” Complaints



- Institutions may dismiss Complaints/Formal Complaints or allegations within them either because it's required under the 2020 regulations or due to institutional discretion.
- Institutions must offer the party/parties the option to appeal the dismissal decision.
- Decision-makers could be called upon to make a determination about an appeal of a dismissal decision.

Dismissal (2020 Regs)

Mandatory Dismissal

TIXC required to dismiss a formal complaint if:

- at the time of the complaint, the reporting party is not participating/attempting to participate in the institution's program/activity
- the alleged conduct, even if proved, would not meet the sexual harassment definition
- the alleged conduct did not occur in the institution's program or activity
- the alleged conduct happened outside the U.S.

Permissive Dismissal

TIXC may dismiss a formal complaint prior to a final decision if:

- Reporting party withdraws from the process (needs to be in writing)
- Responding party is no longer a student/employee at the institution
- Circumstances prevent the institution from collecting sufficient evidence

If dismissing:

- Must notify the parties in writing and include rationale for dismissal
- Appeals of dismissals are permitted
- Consider initiating a different disciplinary process under a separate policy (Code of Conduct? Was the allegation a VAWA offense?)



Dismissal (2024 Regs)

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

If dismissing:

- Notify parties of dismissal and right to appeal
- If appealed, need “fresh” decision-maker and allow parties opportunity to make a statement in response
- Notice of appeal must include rationale

After dismissal:

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



Emergency removal

2020 Regs

Institution may remove a student responding party IF:

- Institution goes through an individualized safety/risk assessment
- Institution decides that an immediate threat to the **physical health or safety** arising from the allegations exists
- Institution provides the responding party an opportunity to challenge the removal decision

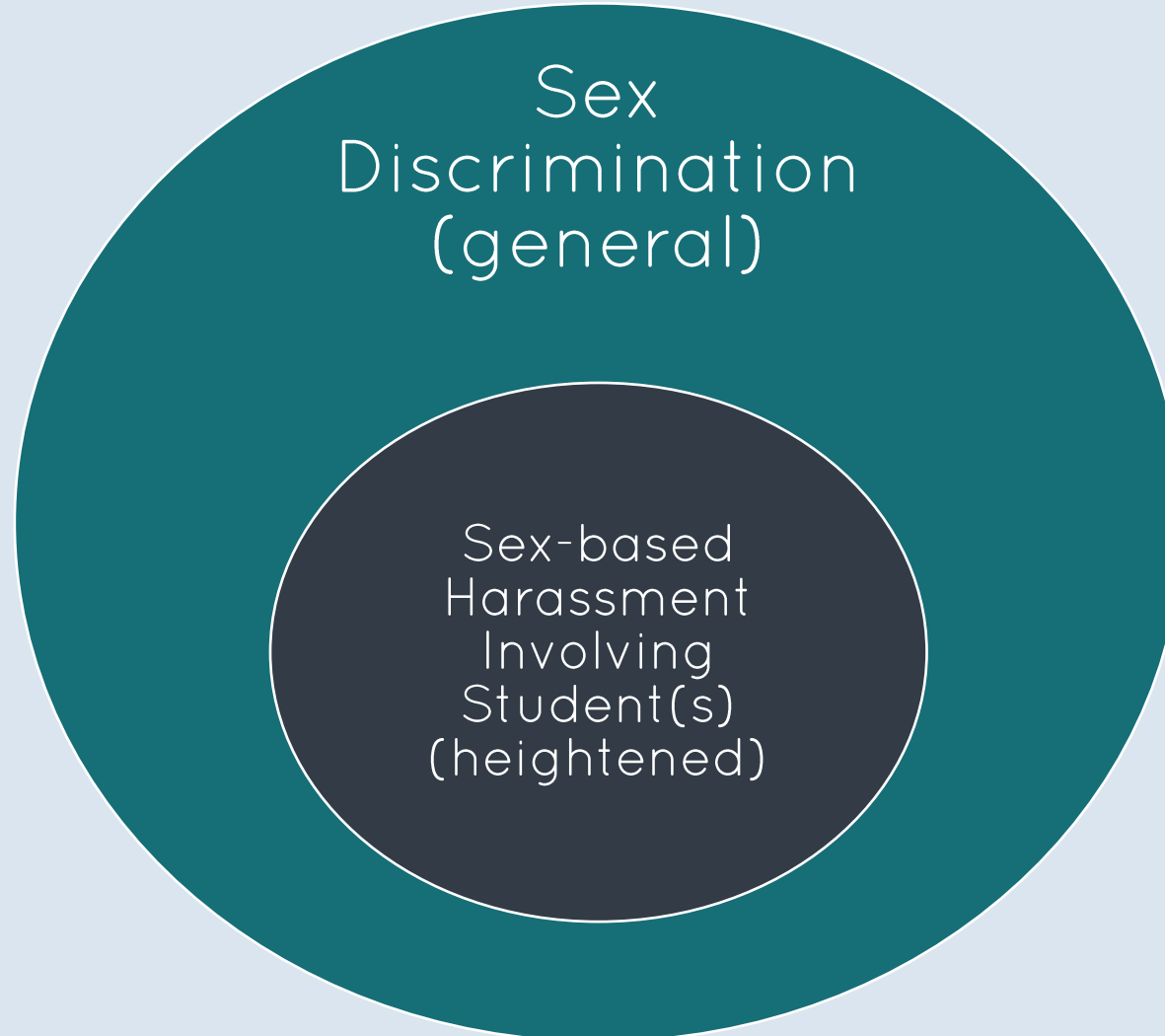
2024 Regs

- 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 (2020 & 2024)

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

Grievance Processes



Student or Employee?



What is their
primary
relationship with
institution?



Was the incident
related to their
employment with
institution?



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. ***Investigators should therefore alert TIXCs immediately if they learn of any new allegations from either party.***



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 decision-maker
- 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)



The Informal Resolution Process

- Can take the shape of shuttle diplomacy, mediation, etc.
- The opportunity to pursue Informal Resolution can be available up until a responsibility determination is made.
- It is possible that an investigator would need to pause/stop their investigation while the parties attempt Informal Resolution OR that an investigation would follow an unsuccessful Informal Resolution.
- Investigators should not utilize any information that may have been gleaned by the Informal Process facilitator as part of the investigation – keep these processes separate.

Due Process & Rights of the Parties

Notice of policies,
meetings,
investigation,
outcome, etc.*

Supportive measures
*(cannot penalize
responding party in
any way unless and
until they are found
responsible)*

Impartial Title IX
personnel

Ability to discuss
allegations

Advisor of choice (in
heightened process)

Opportunity to
identify witnesses
and provide
evidence

Ability to review
evidence and
investigation report

Ability to appeal

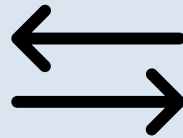
**Must include that the responding party is presumed not responsible until a determination is made at the end of the grievance process.*

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?



Intersections with Law Enforcement

- Potential for evidence from law enforcement to be incorporated into Title IX investigation (police reports, medical forensic exam reports, etc.)
- Even with concurrent processes, it is oftentimes difficult to get evidence from open law enforcement cases
- Investigations are sometimes delayed in order to accommodate law enforcement investigations



2020 Regs:

Investigation & Adjudication

The Investigation

Who should investigate? How do you decide?

Investigator determines investigation strategy (in coordination with TIXC)

Witness and party interviews

Evidence collection

Directly Related Evidence Review

Must:

- Provide review of evidence “directly related” to the allegations for parties and their advisors
- Include inculpatory and exculpatory evidence
- Include evidence upon which the institution does not intend to rely upon in making a decision
- Allow at least 10 days for review and submission of a response
- Provide copies of evidence directly to parties/advisors in electronic or hard copy format
- Evidence must be made available for review at the hearing

Next steps:

- If responses are submitted, investigator considers them prior to completing the Investigation Report
- Additional evidence collection needed? Other action?



What about...



- Evidence related to sexual history?
- Privileged information?
 - Cannot require or allow this unless privilege has been waived by the party
- Treatment/health records?
 - Only permissible if party provides voluntary, written consent to include
- Redactions?
- Ensuring parties/advisors don't share the evidence with others?
- Can/should parties see each other's responses to the evidence?
- Close of evidence?

Reporting Party's sexual behavior

- Information about a reporting party's sexual behavior or predisposition is not permitted in the Investigation Report or during the hearing *unless*:

The information is being used to prove someone other than the responding party committed the misconduct

OR

The information relates to prior sexual behavior between the reporting and responding parties and is submitted *in an effort to prove consent*

Relevant vs. Related Evidence

Relevant

Evidence is considered relevant “if it has the tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action.”

Federal Rules of Evidence 401

Directly Related

Directly related evidence “includes evidence that the institution does not intend to rely upon in reaching a determination regarding responsibility, including inculpatory and exculpatory evidence, whether obtained from a party or other source.”

34 C.F.R. § 106.45(b)(5)(vi)

Relevant Evidence

Tends to prove a fact at issue in the hearing, such as

- whether a disputed incident occurred;
- witness credibility;
- the impact of any misconduct on the complainant (e.g. mental or emotional distress, physical injury, or academic difficulty); and
- what sanctions or remedies might be appropriate.

Relevant Evidence

In summary:

Does the evidence tend to **prove** or **disprove** the allegations?

A determination regarding relevancy can rely on logic, experience, or science.

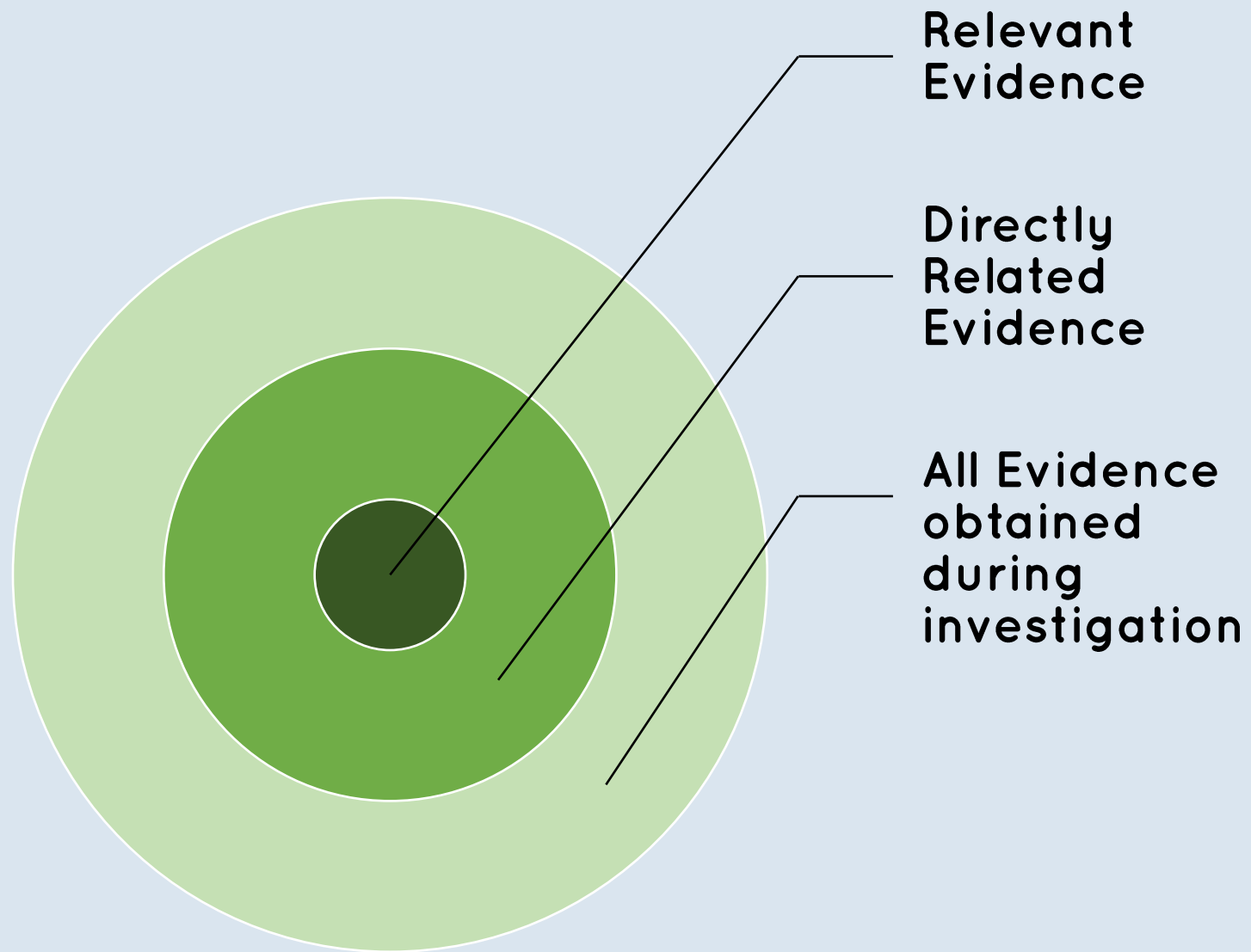
FED. R. EVID. (401), Legal Information Institute, Cornell Law School,
https://www.law.cornell.edu/rules/fre/rule_401



Directly Related Evidence

- No given definition.
- Common sense evaluation.
- Arguably a very wide net.



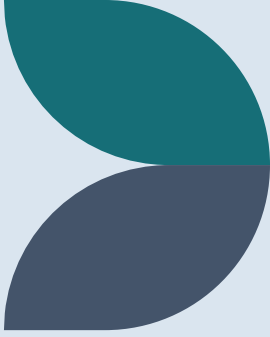


Investigation Report and Review

- Summary of relevant evidence written by the Investigator
- Must be made available for parties and advisors to review (in hard copy or electronic format) 10 days prior to hearing
- Written responses to the report are permitted and provided to the hearing panel
- Consider having the investigator share the report with the TIXC prior to sharing with the parties/advisors to ensure adherence to the institution's policies and procedures



The Hearing



- Needs to be live but can be virtual (must include video)
- Provides opportunity for parties' advisors to ask questions of the other party and witnesses
- Institutions must provide an advisor to parties who do not have an advisor during the hearing specifically for the questioning portion
- Can have a single decision-maker or multiple, but someone must make relevancy determinations during the hearing
- TIXC or another individual may be present to enforce hearing decorum and process
- Must be recorded

Who attends the hearing?

- Decision-maker(s) / Hearing Panel members
- The parties and their advisors
- Witnesses who the parties or the decision-makers have identified as needing to be present for questioning
- Title IX Coordinator may attend (to help with logistics, decorum issues, hearing process, etc.)
- General counsel may attend (or be on standby for questions)
- Investigator may attend

Hearing technology

- This will vary depending on the institution.
- Decision-makers need to be trained in how to use their institution's hearing technology.
- Remember that hearings need to be recorded.

Hearing Preparation



- TIXC assists in determining hearing format and structure (breaks, length, etc.)?
- Decision-makers should review the Investigation Report and evidence and determine:
 - What questions do they plan to ask parties/witnesses during the hearing?
 - Which witnesses do they want present, if any, during the hearing?
- Which witnesses do the parties want present, if any, during the hearing?
- Who will be the one to make relevance determinations?
- Does either party need a school-appointed advisor?
- Consider conducting pre-hearing meetings with each party and their advisor

Pre-hearing meetings



- Not required, but could be good practice to meet with each party and their advisor in advance of the hearing to discuss:
 - The hearing process and what to expect
 - Expectations regarding decorum, Advisors' participation, how any technology will be used during the hearing
 - Review the cross-examination phase of the hearing
 - Whether the parties want any witnesses present at the hearing
 - Does a party need an assigned advisor?
- Can be facilitated by the Chair, Decision-maker, or the TIXC

Role of the Hearing Panel Chair (or sole Decision-Maker)



- May facilitate the hearing, with assistance from TIXC.
- Make relevancy determinations for all questions asked during the hearing.
- Make determinations about appropriateness of questions or information provided (cannot be irrelevant, abusive, or overly repetitive).
- Ensure advisors stay in line with hearing decorum guidelines.

Hearing Decorum and Other Rules



- OK for hearing panel to take breaks to deliberate or to confer with general counsel.
- Be professional at all times. Maintain an awareness of tone, body language, facial expressions, etc.
- Expectation that all individuals present at the hearing demonstrate respect towards others.
- Advisors only speak during questioning and opening statements*
- Others?

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
- Reporting party’s prior sexual history (with two exceptions)
- Legally privileged information unless party waives privilege
- 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?

2024 Regs:

Investigation & Adjudication

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.

Evidence/Report Review

- Provide each party an equal 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
- Provide each party an equal 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
- Consider having the TIXC review the report prior to review by parties to ensure adherence to the institution's policies and procedures and catch any issues or questions
- Written responses to the report are permitted and provided to the decision-maker(s)

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

Adjudication Process: General

- Must provide a process that enables decision-maker 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 and procedures for appeal (if applicable)
- Provide remedies
- Require Title IX Coordinator to take other appropriate actions



Adjudication Process: Heightened

- All requirements under General process
- Must provide a process that enables the decision-maker 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 decision-maker 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 decision-maker determined is unclear or harassing.
- Other rules, as long as applied equally, allowed.
- Decision-maker 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.



Adjudication Process: Heightened contd.

- If no hearing, must:
 - Allow the investigator or decision-maker 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 decision-maker 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 decision-maker; or
 - 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.
 - Be virtual or in-person (party may request virtual). Must be recorded.

Adjudication Process: 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

Trauma-Informed Considerations

The Impact of Trauma on the Body and Brain



Trauma overwhelms our normal coping responses, which provide a sense of control and safety.

Trauma can impact individuals in multiple, significant ways:

- Neurologically
- Emotionally
- Psychologically
- Socially
- Biologically

Neurobiology of Trauma

- Growing body of research on this, specifically within the context of sexual violence
- During a traumatic event, an individual's ability to control their physical movements, to think rationally, and to encode memories may be significantly impaired
- This is a hard-wired response that is meant to offer protection
- This mainly has to do with the release of specific hormones during a traumatic event

Interviewing through a trauma-informed lens

- Helps you be a better investigator
- Puts interviewees at ease
- May provide context for counterintuitive reactions or occurrences
- Does NOT mean that you don't probe for credibility

Tips for being trauma-informed



- Be an authentic, non-judgmental human. Work on fostering trust, especially during an initial interview
- Slow down; silence is ok. Remember that memory recall may be slow or out of order.
- Be thoughtful about the language you use and phrasing of questions (avoid “why?” questions)
- Emphasize transparency to the extent you are able
- Help parties understand what to expect, ideally in advance
- Consider the physical (or virtual) environment of the interview
- Don’t automatically draw negative inferences based on a behavior or reaction that may be related to trauma
- Don’t use evidence of trauma as evidence that a policy violation occurred
- A trauma-informed approach should not unfairly favor the complainant OR prejudice you against the respondent

Cultural Implications

- Cultural norms and background may impact the way parties react to an incident and how they present during the investigation process
- Be aware of these potential influences; however...
- Beware of biases and stereotypes
- Consider additional training or seeking out appropriate expertise if necessary

Evidence & Assessing Credibility

Types of Evidence

Direct or
testimonial
evidence

Documentary
evidence

Real evidence

Circumstantial
evidence

Hearsay
evidence

Character
evidence

Evidence Examples

- Interviews or statements
- Texts
- Emails
- Social media posts
- Journal entries or letters
- Dating apps
- Videos
- Photographs
- Public Safety reports
- Expert reports
- Medical reports
- Keycard swipes
- Voicemails
- Wi-Fi pings
- Phone records
- Polygraph results
- Clothing
- Physical items (weapons, trash, etc.)



Weighing the Evidence



Weight of evidence is the believability or persuasiveness of evidence in probative value, not the quantity or amount of evidence. Weight of evidence is not determined by mathematics but depends on its effect in inducing belief.

Parties may argue about the weight of certain evidence during the hearing or in written statements.

Legal Information Institute, Cornell Law School,
https://www.law.cornell.edu/wex/weight_of_evidence

Assessing Credibility

Credibility: The extent to which the decision-maker can rely on a witness's testimony to be accurate and helpful in their understanding of the case.

EEOC Statement on credibility in Sexual Harassment Cases (1999)

Inherent plausibility

Is the testimony believable on its face?
Does it make sense?

Demeanor

Did the person seem to be telling the truth or lying?

Motive to falsify

Did the person have a reason to lie?

Past record

Did the alleged harasser have a history of similar behavior in the past?

Corroboration

Is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with them at around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?



Remember!

None of these factors are determinative as to credibility.

For example:

- the fact that there are no eye-witnesses to the alleged harassment by no means necessarily defeats the complainant's credibility.
- the fact that the alleged harasser engaged in similar behavior in the past does not necessarily mean that they did so again.

Assessing Credibility Contd.

Possible Factors:

- Logic/Consistency of information provided
- Corroborating evidence
- Consistency of information– substance of statements
- Plausibility of all information given
- Amount of detail provided. Factual detail assessed against assertions that have no supporting detail. (But consider whether there may be other reasons.)

A Note about Demeanor

Be careful about relying on demeanor when it comes to credibility.

Much of what you hear about “how to tell if someone is lying” is not based on actual research and has been debunked or is considered pseudoscience.



It's not easy to spot a liar



Associated with lying



No significant relationship



Associated with truth-telling

CUES	ASSUMED RELATIONSHIP	ACTUAL RELATIONSHIP
VOCAL		
Hesitations (use of speech fillers, e.g., “ah,” “um,” “er,” “uh,” and “hmmm”)	✓	X
Speech errors (grammatical errors, word or sentence repetition, false starts, sentence change, sentence incompletions, slips of the tongue, etc.)	✓	X
High-pitched voice	✓	✓
Speech rate (number of spoken words in a certain period of time)	X	X
Latency period (period of silence between question and answer)	X	X
Pauses (silent, filled, or mixed)	✓	X
VISUAL		
Gaze aversion (looking away from the conversation partner)	✓	X
Smiles (smiling and laughing)	X	X
Facial fidgeting (face touching or rubbing hair)	✓	X
Self-fidgeting (touching, rubbing, or scratching body or face)	✓	X
Fidgeting (undifferentiated)	✓	✓
Illustrators (hand and arm movements designed to modify or supplement what is being said verbally)	X	✓
Leg and foot movements	✓	X
Posture shifts (movements made to change seating position)	✓	X
Head movements (head nods and head shakes)	✓	X
Eye blinks (blinking of the eyes)	✓	X

<https://www.smithsonianmag.com/science-nature/why-you-cant-spot-liar-just-looking-180977359/>

A Note about Past Record

Also be careful about relying on a party's past record.

Determinations should be made (mostly) based on the evidence in front of you.



A Note about Memory



Memory errors do not
necessarily destroy credibility

Most people's memories are not that great

Trauma affects memory

Substance use may affect memory

A Note about Eyewitness Accounts

Can be powerful.

BUT

Well-intentioned eyewitness testimony can be problematic because our brains are not always great at accurately interpreting and remembering what we see.

And eyewitness testimony can be “contaminated.”

Assessing Credibility: Final Thoughts

- It's important to have **reasons** supporting credibility decisions.
- Remember that **unlikable** is not the same as **not credible**.
- Credibility determinations should not be based on gender, sexual orientation, race, ethnicity, nationality, ability, religion, etc.
- Reach your conclusions based on the evidence/information provided, **NOT** based on speculation, rumors, character assessment, etc.

The Hearing or Questioning Opportunity:

Prep & Day-of

Hearing could be...

- Under 2020 process, same as you've been doing.
- Under 2024 process, would be similar but with few potential differences.
 - Decision-maker can be the one to ask questions of the parties, rather than advisors
 - Must provide opportunity to rephrase unclear or harassing questions



Questioning Opportunity (if no hearing)

Heightened Process

- Parties meet individually with decision-maker(s)
- Must provide opportunity for parties to submit questions for the other party and witnesses
- Can have a single decision-maker or multiple, but someone must make relevancy determinations regarding submitted questions
- Must be recorded
- Opportunity for follow up questions until no more questions

General Process

- Must provide a process that enables decision-maker to adequately assess the credibility of witnesses

Evidence Review



- Review *and re-review* the Investigation Report, Notice of Allegations, and relevant policy definitions
 - If needed, go back to any specific evidence relating to areas in the Report that could provide useful clarity for you
- Note areas of consistency and undisputed facts and information
- Note areas of inconsistency and disputed facts and information
- Remember to stay focused on the information that matters

Developing Questions



Consider lingering questions you have after reviewing the evidence and whether to raise those during the hearing/questioning meetings

- Ensure the answer to your potential question isn't already available in the report/evidence
- Ensure your question is clear, neutral, and easily understood
- Questions should help clarify any vague details or fill in gaps
- Consider your approach with the question: How will you phrase it? Who is it directed towards? Who should ask it?

Review of hearing process at your institution

- What are the steps/phases of the hearing, and in what order?
- Will hearing panel members be in the same room? Separate rooms?
- How long do you expect the hearing to take? Should there be a time limit? What about breaks?
- What if something goes wrong?
- Who is responsible for starting/stopping the recording?

Day of the hearing/meetings



BE. ON. TIME.
Block your
schedule
accordingly.



Look professional.
Be cognizant of
potential
distractions.



Consider internet
speed and
reliability.



Bring
snacks/water.



Bring pen,
notepad, etc.



Silence cell
phones and other
devices.

Cross-examination and advisors

Cross-examination

Parties, through their advisors, are permitted to ask questions of the other party and any witnesses. Under 2024 Regs, decision-maker can ask these questions.

Direct-examination

Advisors may also question their own advisee.

Relevancy Decisions

The Hearing Panel Chair or Decision-maker is responsible for determining whether each question asked is relevant.



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
- Reporting party’s prior sexual history (with two exceptions)
- Legally privileged information unless party waives privilege
- 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?

Questioning Skills & Tips



- Even if you hear something surprising, try to remain neutral.
- Stay flexible, both in terms of your questioning but also regarding the flow of the hearing/meeting.
- Practice active listening.
 - What does this mean?
- Others?

Difficult situations

- What if a party doesn't show up to the hearing?
- What if a party refuses to answer a question?
- What if an advisor starts violating one of your hearing guidelines?
- Other difficult situations you've encountered? How did you handle them?

Making a Determination

Overview of the Deliberation Process

Standard of Evidence

Preponderance of the evidence (“more likely than not” / 50.1 percent likely) OR the clear and convincing standard

Process

If multiple decision-makers, meet to discuss determination.

Apply the applicable policy definitions to the evidence provided.

Write your determination and include rationale.

Questions to think through

- What are the undisputed facts and what are the disputed facts?
- What does the evidence show regarding the disputed facts? Which evidence is most credible? Why?
- What is the weight of the evidence provided?
- Using the appropriate standard of evidence, did a policy violation occur? **Analyze each element of a policy definition under the evidence standard.**
- What is the rationale for your decision?

The Deliberation Process

- Must provide a detailed, written rationale for the decision; must include evidence supporting the conclusions.
- Have the policy definitions close at hand for reference.
- Assess the weight of evidence provided.
- First determine your finding(s) about the allegation(s); then move on to sanctioning if applicable.
 - Provide a rationale for each finding/allegation.
 - Impact statements may be helpful when considering sanctions.

Possible Questions

What if responding party is making a case that they were mentally ill at the time of the incident? Neurodivergence? Concussion? Does that impact your decision and if so, how?

Sanctions & Remedies

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 Requirements

2020

- 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

2024: General

- Whether sex discrimination occurred under TIX
- Rationale
- Procedures and permissible bases for appeal, if applicable

2024: Heightened

- Description of allegations
- Policy and procedures used
- Decision-maker's evaluation of evidence
- Decision-maker's determination
- Sanctions & whether remedies will be provided, if applicable
- Procedures for appeal

Other Notice Requirements

- Deliver written 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 (or, if there is no appeal, on the date when the parties are notified of the determination)

Appeal Process

Appeals (2020 Regs)

Available to both parties for final determination of responsibility and dismissal of formal complaints



Required reasons for appeal:

Procedural irregularity that affected the outcome

New evidence that was not reasonably available at the time the decision was made that could affect the outcome

Conflicts of interest or bias from an official involved in the case that affected the outcome

Can allow additional grounds for appeal if desired

Appeals (2024 Regs)

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:

1. Procedural error that would have changed the outcome of the proceeding;
2. New evidence that was not available at the time of the determination and would have changed the outcome; and
3. Title IX Coordinator, investigator or decision-maker had a conflict of interest or bias
4. (Can offer additional bases if desired)

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



Appeal Process (2020 & 2024)

Requirements

- Appeal decision-maker cannot have been previously involved in the process
 - No conflict of interest or bias
 - Required training
- 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
- Determination of responsibility becomes final either on date institution notifies parties of appeal decision or date when an appeal would no longer be timely

Possible Appeal Determinations

- Affirm previous decision
- Reverse previous decision
- Return for further investigation or adjudication

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 contd.



- Additional records for each **complaint** of sex discrimination:
 - 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

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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