Title IX Coordinator Training	TNACUA	·	
Online Course: Fundamentals of			
the August 2020 Regulatory		*	
Requirements	A A S A S A S A S A S A S A S A S A S A		
Module 1: Jurisdiction and Other	A THE STATE OF THE	-	
Threshold Topics		-50	
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Course Overview

- Jurisdiction and Other Threshold Topics
- •Formal Complaints, Investigations, and Grievance Procedures
- Policy and Training Obligations

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Title IX Final Regulation

- Effective August 14, 2020
- Where to Begin
 - Inventory
 - Implementation Plan

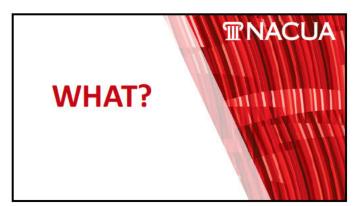


PLAN & DOCUMENT YOUR EFFORTS

- Inventory
 - Current Title IX Procedures
 - Clery Act Policies & Compliance
 - Student Conduct Code
 - HR Policies & Agreements
 - State or Local Laws or Regulations
- Implementation Plan
 - · What?
 - · Who?
 - · When?

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Jurisdiction: What,
Who, Where, When,
How?



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DEFINITION OF SEXUAL HARASSMENT §106.30(a): Sexual Harassment to include one or more of the following: 1. Quid Pro Quo 2. Hostile Environment 3. Clery Definitions TNACUA **QUID PRO QUO** 1. Conditioning provision of an aid, benefit, or service on participation in unwelcome sexual conduct 2. Carried out by an employee TNACUA HOSTILE ENVIRONMENT · Unwelcome sexual conduct • "So severe, pervasive, and objectively offensive" (2020) • Pattern or practice or sustained and non-trivial (2001) · "Effectively denies equal access"

· Denies or limits a student's ability to participate in or benefit from

• "[S]tanding in the shoes of the complainant." (Preamble, p. 514)

• Interferes with or limits a student's ability to participate or benefit from

(2001)

(2011)

· "Determined by a reasonable person"

CLERY DEFINITIONS

- Sexual Assault a forcible or non-forcible sex offense under the FBI UCRS (as defined by the Clery statute)
 - Rape, attempted rape, sodomy, fondling, statutory rape
- Dating Violence violence by a person who is or has been in a romantic or intimate relationship (Clery statute)
- Domestic Violence violence by a current or former spouse or intimate partner, co-parent, living partner, youth or other under state law
- Stalking fear for safety or safety of other or suffer substantial emotional distress

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COMPARE TO

- Institution Conduct Code
- Court standards
- Title VII
- State law

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WHO?

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IN ADDITION TO STUDENTS...APPLIES TO EMPLOYEES

§106.51 Employment

- "No person shall, on the basis of sex, be excluded from participation in, or denied benefits of, or be subjected to discrimination in employment..."
- Remains unchanged by current amendments

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WHAT'S NEW THEN...

- 2011 Guidance directed at student-on-student sexual violence
- Courts and OCR have relied on Title VII when considering employees' complaints alleging sexual harassment even under Title IX.
- OCR acknowledges differences, expects institutions of higher education (IHEs) to comply with both Title IX and Title VII requirements.
 - OCR will try to "avoid an actual conflict" regarding employer's obligations. (Preamble p. 1511.)

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OTHER CHANGES

- Requires IHEs to handle allegations by employees, including at-will employees, using the same procedures it uses for students
- Independent contractors and volunteers are *not* considered employees who may create *quid pro quo* Title IX liability.
- Actions by non-employees may create liability for other types of sexual harassment. (Preamble p. 448)
- Volunteers who experience discrimination *may* be covered. (Preamble p. 1544)

TITLE VII – SEXUAL HARASSMENT DEFINITION

- Conduct
 - Unwelcome sexual advances
 - Requests for sexual favors
 - Other verbal or physical conduct of a sexual nature
- Viewed by a reasonable person in the Complainant's position

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WHEN...

- Submission becomes a term or condition of employment
- Rejection is used as the basis for an employment decision
- The conduct unreasonably interferes with work performance or creates a hostile, intimidating or offensive environment

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EMPLOYEE-EMPLOYEE HARASSMENT

- Employer's knowledge
 - · Knew or should have known
- Immediate and appropriate corrective action
 - Reasonably calculated to end the harassment and prevent recurrence
- Actions by third parties

SUPERVISOR LIABILITY

- Tangible Employment Action
 - Strict liability
- No tangible employment action
 - Employer takes reasonable care to prevent and correct promptly

and

Employee unreasonably failed to use employer's preventive or corrective options

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INSTITUTIONAL REQUIREMENTS

- Contractual Obligations
 - Collective bargaining agreements
 - Employee handbooks
 - Individual employee contracts



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OTHER LEGAL REQUIREMENTS

- Conflicting state requirements
 - •State laws
 - State administrative rules and regulations
- Choice of IHE to accept federal funding

OTHER ISSUES

- Procedures
 - Serial or parallel
 - Clearly identify what applies to employees
- Student employees
- · Clery obligations to employees
- Notification to all employees and applicants (§106.8)

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JURISDICTION

- No distinction between on- or off-campus
 - If in a location, at an event, or in circumstances that meet the definition
- Only in the United States
 - Harassment must occur against a person in the United States
 - · Study abroad & foreign employment

BUT DON'T FORGET...

- May apply other institutional conduct standards and procedures
- Clery applies to students and employees regardless of location.
- Title VII applies to U.S. citizens working for U.S. corporations abroad.

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EDUCATION PROGRAM OR ACTIVITY

- §106.44(a): Locations, events, or circumstances over which IHE exercises substantial control over both the respondent and the context in which the sexual harassment occurred
- Any building owned or controlled by a recognized student organization
- Training on the scope of the institution program or activity



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ACTUAL KNOWLEDGE

- §106.30 (a): Notice to Title IX Coordinator or any official who has authority to institute corrective measures
- Sexual harassment or allegations of sexual harassment
- No vicarious liability, constructive notice or "should have known"

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OFFICIAL WITH AUTHORITY

- · Authority to institute corrective measures
- Not an official with authority (OWA)
 - An official with only the ability or obligation to report
 - An official with only the ability or obligation to inform student about how to report
 - An official having been trained to report or inform students how to report
- Respondents are not OWAs

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IMPLEMENTATION ISSUES

- Institutions determine who is OWA
 - Institutions decide who must, may or may only with a student's consent report sexual harassment.
 - Make a list of who has authority
 - Need not give notice of all OWAs only Title IX Coordinator information
- Responsible employees
 - No longer in regulations
 - $\bullet\,$ Institutions now may want to re-conceptualize if or how they will designate.
 - May require employees to inform IHE
 - Resident Assistants

RETALIATION §106.71(a)

- No retaliation by any person to interfere with any right "secured by Title IX"
- No retaliation for
 - Making a report or complaint
 - Participating or refusing to participate
- Filing charges regarding conduct that arises out of the "same facts or circumstances" but does not involve sex discrimination

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CONFIDENTIALITY

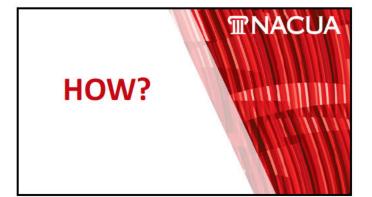
- IHEs must keep confidential the identity of any individual
 - Who has made a report or filed a complaint
 - Who has been reported as a perpetrator
 - Who has been a witness
- Exceptions
 - FERPA
 - Legal obligations
 - Carry out the purposes of these regulations

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RETALIATION AGAINST EMPLOYEES

- Future employment decisions
- Employment references
- Licensing Boards

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THE INITIAL REPORT

- · Anyone may report
 - · Not automatically a formal complaint
- Institution response to notice
 - Offer of supportive measures
 - Explanation of formal complaint process
 - Compare to Clery

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MAKING REPORTS

- Who
- Any individual
 - alleged to be the victim of conduct that could be sexual harassment
 Distinguish from Formal Complaint
- Against Whom
 Any individual
 - - Reported as perpetrator of conduct that could be sexual harassment
- Distinguish from Formal Complaint

INSTITUTION RESPONSE

- Promptly contact the Complainant to discuss the availability of supportive measures
 - Consider complainant's wishes
 - Make clear available with or without formal complaint
- Explain the process for filing a formal complaint
- Treat complainants and respondents equitably
- Consider Clery obligations

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SUPPORTIVE MEASURES §106.30(a)

- Non-disciplinary, non-punitive individualized services
 Impose actions that are disciplinary sanction or not supportive measure only *after* a grievance process
- Appropriate, reasonably available, free to complainant or respondent
- Restore equal access without unreasonably burdening the other party
- Confidential, if possible

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EMERGENCY REMOVALS §106.44(c)

May remove respondent from education program or activity if:

- Conduct an individualized safety and risk analysis,
- Determine that respondent poses an immediate [imminent] threat to the *physical* health or safety of *anyone* justifying removal
- The threat arises from the allegations of sexual harassment, and
- Provide opportunity for respondent to challenge removal immediately thereafter.

,			

BUT...



- This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the American with Disabilities Act.
- Review disability policies regarding danger to self or others

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EMERGENCY REMOVALS

Other Points to Consider:

- Not limited to instances of sexual assault
- Who will conduct the assessment and make the decision?
- Beyond verbalized threats, what information will be considered?
- Institution can determine the scope of removal.
- No specific timeframes may (not required to) reassess
- What will respondent's ability to challenge it look like?
- Separate from non-student employee Administrative Leave

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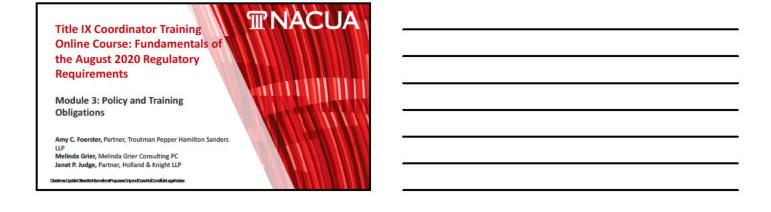
Title IX Coordinator Training Online Course Module 2 Assessment

Instructions: Please read each statement and indicate whether it is true or false.

1.	1. The Title IX Coordinator can sign a formal comp	laint.
	True False	
2.	A formal complaint must be dismissed when the employed by or enrolled at the institution.	respondent is no longer
	True False	
3.	 As long as the parties provide their informed concordinator agrees, informal resolution is an op IX Coordinator receives a report of Title IX sexual 	tion any time after the Title
	True False	
4.	 The parties and their advisors must be permitte directly related to the allegations of Title IX sex IX Coordinator's office. 	
	True False	
5.	 If the complainant has an attorney as an advisor not identified an advisor, the institution must pr an attorney as an advisor for the sole purpose of examination at the hearing. 	ovide the respondent with
	True False	



6.	If a witness is not available to testify at a hearing, the witness's statement can be considered by the decision-maker at the hearing only if the statement was signed under oath.				
) _{True}	☐ False			
7.		regarding the investigation and hearing process must be ed for 10 years.			
) _{True}	□ False			



Title IX Coordinator(s) §106.8

Designation:

- Regulations refer to Title IX Coordinator in multiple ways, suggesting that it may be one or more persons.
 - "At least one employee"
- Must be referred to as the Title IX Coordinator.
- Notification provisions apply to <u>all</u> personnel with this responsibility.

Any person may report sex discrimination, including sexual harassment to the Title IX Coordinator(s) at any time, day or night, in person, by mail, by email, by phone, or by any other means that results in notice (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sexual discrimination or sexual harassment).



Dissemination of Policy §106.8

- Title IX Coordinator(s) contact info:
 - Name or Title, Office Address, Email, Telephone Number.
- · Website.
- · Handbook or Catalog.
- · School must not use or distribute a publication stating that the school treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by Title IX.

Required Notification Recipients

Applicants: Admission & Employment Students Employees Unions Professional Orgs with CBA/PAs

<u>Discuss</u>: Parents/Legal Guardians*

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Dissemination of Policy §106.8

Notification of Policy: Elements

- School does not discriminate on the basis of sex in its education program or activity.
- School is required by Title IX not to discriminate.
- School's nondiscrimination policy extends to admission and employment.
- Inquiries may be directed to the Title IX Coordinator, to the Assistant Secretary, or both.
- How to file a complaint language.*



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Adoption of Grievance Procedures §106.8

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

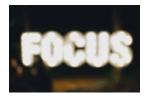
Notice

Policy Decision Point: Framework All-in-One Policy Treat all the Same; or 2. Decision Trees Two Policies: If not TIX, then ... Title IX Regulation+ 2. Everything Else Three plus: TIX Regulation Conduct 2. Other Sexual Misconduct 3. Other Prohibited Conduct TNACUA

Please Note:

"Nothing in this part may be read in derogation of any individual's rights under Title VII of the Civil Rights Act of 1964"

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



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Definitions (Suggestions):

- Actual Knowledge
- Complainant/Respondent
- Consent
- Formal Complaint
- Prohibited Conduct
 - Sexual Harassment
 Sexual Assault
 Dating Violence
 Domestic Violence
 Stalking

- Supportive Measures/Remedial Measures
- Disciplinary Measures
- Title IX Coordinator
- Officials with Authority/Required Reporters
- Confidential Resources
- Evidence
 Standard of Evidence
 Directly Related
 Relevant
- Deliberate Indifference
- Education Program or Activity
- Informal Resolution
- Emergency Removal

Policy Elements:

- Non-Discrimination Policy Language
- Filing a Complaint:
 - Title IX Coordinator: Office Address, Email Address, Telephone Number
- Response:
- Supportive Measures, including Confidentiality (§106.30), as distinguished from Remedies.
- Emergency Removals: §106.44(c)



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Grievance Process: Formal Complaints

- Formal Complaint/Actual Knowledge

- Jurisdictional Issues:
 Dismissal of a Formal Complaint
 Written Notice/Appeal
 Option for Other Proceedings
 Consolidation of a Formal Comp
 Investigations of a Formal Comp
- Emergency Removals Notice of Allegations
- Advisor of Choice/Guidelines



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Grievance Process: Formal Complaints

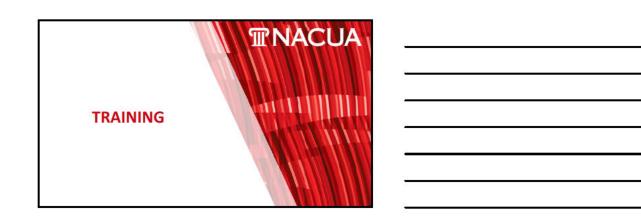
- Informal Resolution Options
- No Conflict Provisions
- Range of Equitable Supportive Measures
- Investigations

 - Burden of Proof
 Evidence/Rape Shield
 - Notice
 - Access to Evidence
- Access to Investigative Report • Confidentiality Provision



Grievance Process: Formal Complaints - Hearings - Venue: Same or Separate Rooms - Decorum Provisions - Access to Evidence - Relevance Determinations - Sandard of Evidence - Cross Examination Guidelines - Expert Witnesses - Recording - Determinations of Responsibility/Notice - Determination of Remedies/Sanctions, where appropriate - Appeals

Grievance Process: Formal Complaints Possible Remedies/Sanctions Non-Retaliation Confidentiality/First Amendment Reasonably Prompt Timeframes Short-Term, Good Cause Delays Extensions of Time Recordkeeping Materially False Statements Training





Training

A school must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on:

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

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Title IX Personnel:

- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest and bias.
- Including: sex, race, ethnicity, sexual orientation, gender identity, disability or immigration status, financial ability, or other characteristic.
- **Implicit bias training not required.

Training



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Decision-Makers:

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

Training



Training Investigators: Training on issues of relevance to create an investigative report that fairly summarizes relevant evidence. TNACUA

Training:

Must not rely on sex stereotypes

Must promote impartial investigations and adjudications

Must be maintained for 7 years.

Must be posted on website, if any, or Available for members of the public to inspect.

All Up-to-Date Training Materials



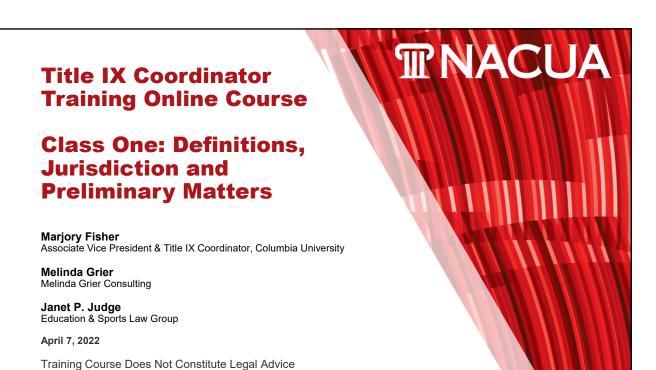
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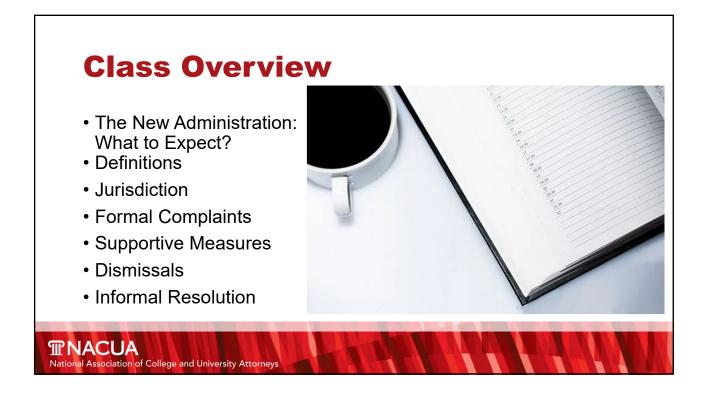
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Biden Administration Steps

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



What Comes Next from ED

- December 2021
 - The Department anticipates issuing the Title IX notice of proposed rulemaking by April 2022
- February 2022
 - The Department sent its draft of the proposed amendments to the Title IX regulations to Office of Information and Regulatory Affairs (OIRA), the agency within OMB that coordinates review.
- · Currently
 - OIRA is scheduling meetings with any who request. Currently scheduled through April.





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What's In the New Rules?

 Despite unofficial reports, we don't know

"New Title IX rules set to assert rights of transgender students"

Washington Post March 30, 2022



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Litigation Challenges to Current Rules

- Know Your IX, et al. v. DeVos filed May 14, 2020 in D. Md.
 - Dismissed with prejudice due to plaintiff's lack of standing New York v. U.S. Department of Education, filed
- New York v. U.S. Department of Education, filed June 4 in S.D.N.Y.
 - Motion for Preliminary Injunction (June 25, 2020, Denied); Stipulated Dismissal without Prejudice (November 4, 2020)
- Pennsylvania, et al. v. DeVos, filed June 4 in D.D.C.
 - Motion for Preliminary Injunction (June 23, 2020, Denied)
- Victim Rights Law Center, et al. v. DeVos, filed June 10 in D. Mass.
 - Court vacated the provision prohibiting use of testimony from persons who did not submit to cross-examination but upheld all other challenged provisions of the rule.
 - Dept. of Education announced it would not enforce the provision the Court vacated. August 2021

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

Biden disavowed Education Secretary Betsy DeVos' Title IX rule.



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In the meantime,

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



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Definition of Sexual Harassment

Sexual Harassment includes one or more of the following:

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

§106.30(a)





Quid Pro Quo

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



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Hostile Environment

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



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Clery Definitions

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

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Complainant & Respondent

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



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Actual Knowledge

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





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Education Program or Activity



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

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Filing a Formal Complaint

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

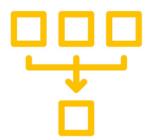


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The Formal Complaint: More Than One Respondent

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



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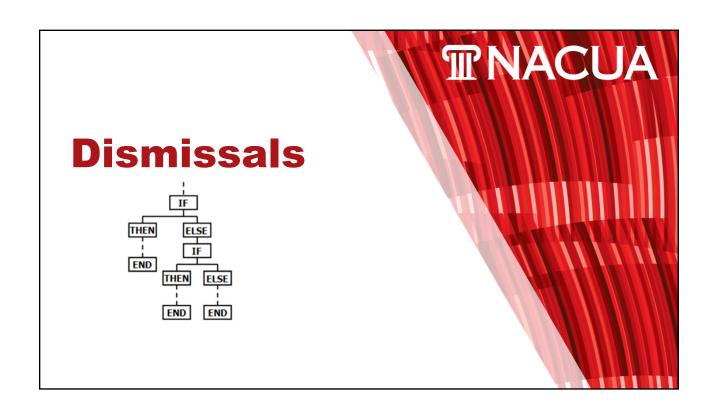
Written Notice of Allegations

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

Provide updated notice with any later discovered additional allegations.



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Mandatory/Discretionary Dismissals



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



Discretionary If:

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

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Dismissal Results



If a formal complaint is dismissed:

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

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Response to a Report

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





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Supportive Measures



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



Informal Resolution Requirements



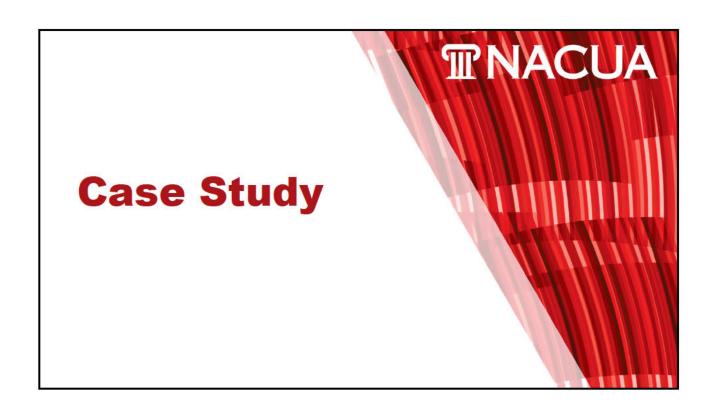
- · Only after a formal complaint is filed
 - · At any point in the process
 - May return to formal process if informal resolution does not resolve the matter
- All forms of sexual harassment
 - NOT Allegations of employee against student harassment
 - ONLY When the institution deems it appropriate
-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

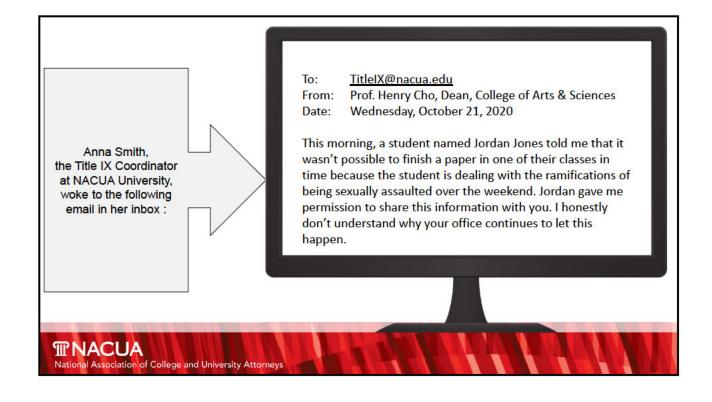
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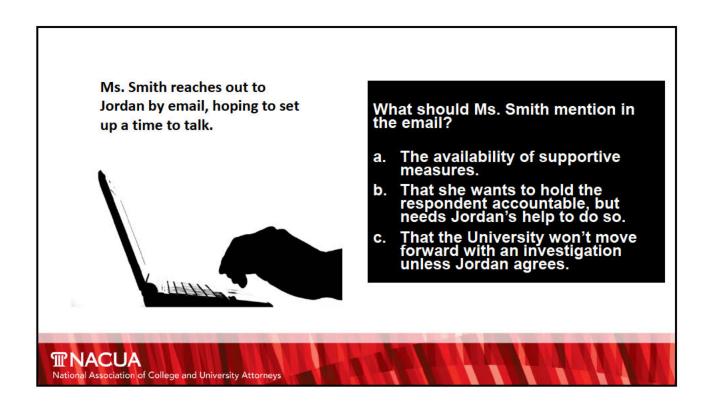
Informal Resolution Process

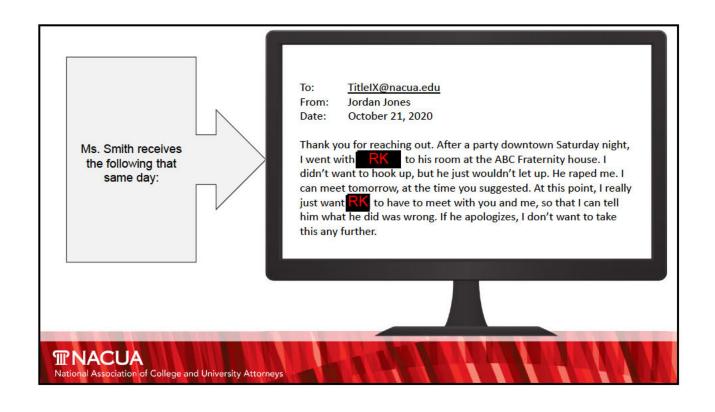
- Parties must be given written notice of:
 - The allegations and the requirements of the informal resolution process;
 - The right to withdraw from the informal procedure at any time prior to agreeing to a resolution:
 - The circumstances precluding parties from resuming the formal complaint arising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











Ms. Smith confirms that she'll meet with Jordan on Thursday, October 22.



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Jordan's Narrative:

I was at a party at a house downtown Saturday night. I wasn't going to go, but my friend, Mark, asked me to meet him there. He's been having trouble with another student who just won't leave him alone, so he's pretty much been going to class and just hanging out in his room since the semester started. I needed to get him out of there.

Anyway, the party was pretty sloppy. A huge group of us were dancing in the basement and drinking. RK came over at some point – we had hooked up once last year, but I hadn't run into him yet this year.



Jordan's Narrative (con't):



I was feeling pretty buzzed and decided to leave around midnight. Mark was finally having a good time, so he didn't want to leave. RK said he'd walk me back to my room. His fraternity's house was on the way. We stopped there so I could see it, but I told him I didn't want to hook up. I felt a bit dizzy, so I laid down on RK bed and he laid down next to me. We made out for awhile, but then I needed to use the bathroom, so he showed me where it was. When I was done, I told him I should probably get going, but he wanted to lay back down for a bit. I had my back toward him, but RK rolled me over. At that point, I was scared of what he'd do if I tried to leave. He raped me. I fell asleep after, but then woke up around 3 a.m. and left.

RK is dangerous. He's going to do this to someone else. The University has to do something.





Is this a formal complaint, triggering an investigation under your policy?

- a. Yes
- b. No
- c. Unsure

Jordan files a formal complaint with Ms. Smith.

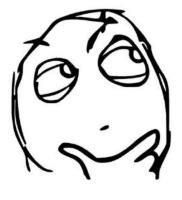
Before calling **RK** in for an interview, Ms. Smith needs to send both **RK** and Jordan a Notice of Allegations, including:

NOTICE

- · Access to the Title IX-mandated policy.
- Notice of the allegations that may constitute the prohibited conduct, with sufficient detail for RK to prepare a response before any initial interview.
- · Notice of the Parties' entitlement to an Advisor of choice.
- · The identity of the Investigator Jean McDonald.
- Notice that the Parties may inspect and review evidence gathered during the investigation.
- Notice that the University's policies prohibit knowingly making false statements or knowingly submitting false information.

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What else, if anything?

- An explanation that the matter will be referred to the police.
- An explanation of any rules of decorum that will govern the University hearing.
- The presumption that RK is not responsible unless or until there is a determination following the University hearing.

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Title IX Coordinator Training Online Course

Class Two: Conducting a Title IX Investigation

Marjory Fisher

Associate Vice President & Title IX Coordinator, Columbia University

Melinda Grier

Melinda Grier Consulting

Janet P. Judge

Education & Sports Law Group

Training Course Does Not Constitute Legal Advice

Class Overview:



- Questions from Class One
- President Biden's March 8, 2021
 Executive Order

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- Investigations Involving Employees
- Investigating a Formal Complaint
- Impartiality/Conflicts of Interest
- Relevance
- Violations of Other Policies

Questions from Class One

Handling the Complaint, Investigation and Supportive Measures:

- 1) Is temporarily relocating a Respondent to a different residence hall an acceptable supportive measure?
- 2) May the written complaint be shared with the Respondent as part of the notice of allegations or should it only be a summary? If the written complaint is not shared as part of the notice of allegations, should it be included in the evidence the Respondent is allowed to inspect?
- 3) Is a complaint with similar facts against the same Respondent by different Complainants considered one with the same set of facts?
- 4) Who can pursue the complaint if the Complainant withdraws?



Questions from Class One (cont'd)

Informal Resolution:

- 1) What training qualifies someone to facilitate an informal resolution?
- 2) If an informal resolution process moves back to the formal process, could documents that were part of the informal resolution be used in the formal resolution process?
- 3) If a Respondent admits responsibility during the informal resolution process, should that be treated as a conduct violation on their education record?
- 4) If a student who participated in sexual misconduct matter that was resolved using an informal resolution process is later subject to a background check, should the institution disclose that the student was the subject of a complaint that was resolved using an informal resolution process?



Questions from Class One (cont'd)

Clery:

- 1) Does "stalking" as included from the Clery definitions require a sexual component to be a violation?
- 2) Do the most current VAWA amendments lead to a change in how Title IX works?

The Process:

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





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

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

"OCR will fully enforce Title IX to prohibit discrimination based sexual orientation and gender identity in education programs and activities that receive Federal financial assistance from the Department."

Letter to Educators on Title IX's 49th Anniversary, June 23, 2021



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Statement by Secretary of Education Miguel Cardona on Newly Signed Florida State Legislation – 3.28.22

U.S. Secretary of Education Cardona issued the following statement in response to the Florida Legislature's Parental Rights in Education bill being signed into law:

- "By signing this bill, Gov. DeSantis has chosen to target some of Florida's most vulnerable students and families, all while under the guise of 'parents' rights.'
- Make no mistake: this is a part of a disturbing and dangerous trend across the country of legislation targeting LGBTQI+ students, educators, and
 individuals.
- This comes at a time when we know lesbian, gay, bisexual, and questioning students are three to four times more likely than non-LGBTQI+ students to report experiencing persistent feelings of sadness, hopelessness, and even self harm – not because of who they are but because of the hostility directed at them.
- I've spoken to parents and families in Florida and they've consistently told me that this legislation doesn't represent them or what they stand for.
 Instead of telling some students or families it's not okay to be who they are, our Department is fighting for dignity and opportunity for every student and family.
- We will continue to prioritize getting billions of dollars of American Rescue Plan funds into schools and classrooms across the country to support the mental health and academic needs of students, educators, and families.
- . And, we will be monitoring this law upon implementation to evaluate whether it violates federal civil rights law.
- As always, any student who believes they are experiencing discrimination, including harassment, at school or any parent who is concerned that
 about their child experiencing discrimination can file a complaint with our Office for Civil Rights."

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Investigations Involving Employees

The Basics:

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



However:

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

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Title VII Requirements



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

Special Considerations

- Administrative leave
- Title IX
 - "Reasonably prompt timelines," and
 - supportive measures only against a Respondent until the process is complete
- Title VII
 - "Immediate and appropriate corrective action"







Conducting an Investigation



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

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Consider in advance whether interviews will be:

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

When interviewing, the investigator must:

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

Review of Evidence

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

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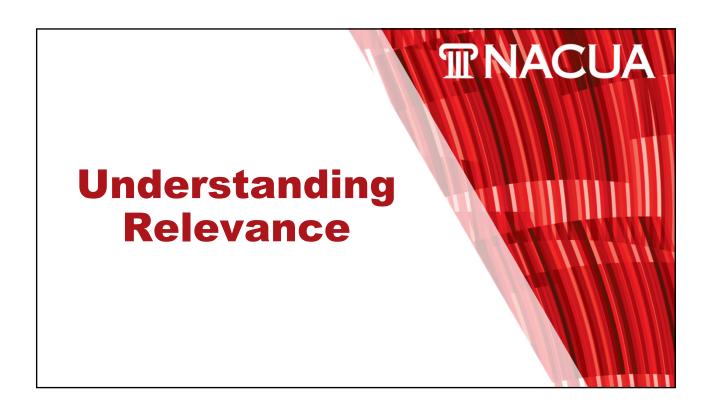
Investigative Report



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







How is Relevance Defined?



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

Relevant Evidence



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

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

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Admission
vs.
Weight,
Credibility, or
Persuasiveness

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

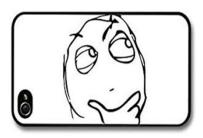
What Is NOT Relevant?



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

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Defining Relevance in Policy



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

All Relevant Information Is Not Created Equal



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



Violations of Other Policies



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

Remember to update notice with later-discovered allegations.





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Class Three: The Grievance Process – Hearings & Appeals

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Melinda Grier

Melinda Grier Consulting

Janet P. Judge

Education & Sports Law Group

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

Class Overview



- Relevance Redux & Conclusion
- Other Violations
- Due Process / Fundamental Fairness

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- Credibility Determinations
- Advisors
- The Written Determination
- Appeals



Relevance Redux

The Title IX regulations do *not*:

- Adopt the Federal Rules of Evidence.
- Define "relevance."
- Permit excluding evidence that:
 - Concerns prior bad acts.
 - · Constitutes character evidence.



What is Relevant?



Evidence is relevant if:

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

The following evidence *may not* be used or considered relevant:

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

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Admission vs. Weight, Credibility, or Persuasiveness

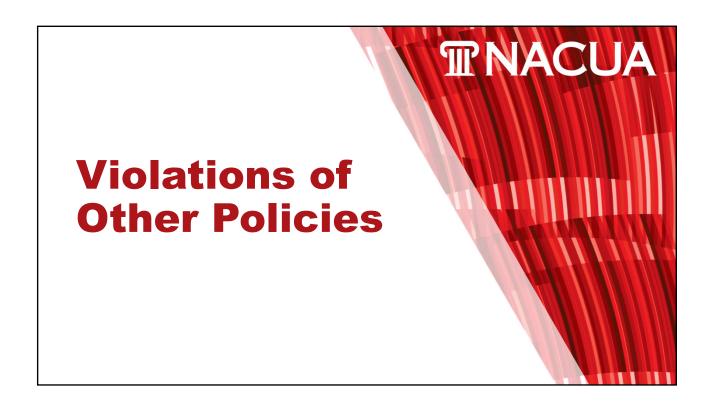
- There is a difference between the admission of relevant evidence, and the weight, credibility, or persuasiveness of particular evidence.
- Because § 106.45 does not address how relevant evidence must be evaluated for weight or credibility by a decision-maker, an IHE can adopt and apply its own rules so long as:
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 - Violations occurring in programs or at locations outside the current definition
 - Violations that don't meet the standards under the regulations
- Student Conduct violations
- Employee Conduct standards

Update notice with later-discovered allegations.







A Fair Process:

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

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The Process

That Is Due

Title IX Sexual Harassment Grievance Process: Elements of "Due Process"



- Notice to the Respondent of the allegations
 - · Opportunity to respond
 - · Adequate opportunity to prepare before responding
- Notice to the Parties of the process that will be used, including appeals
- Opportunity to present evidence and witnesses
- Cross-examination, including questioning of witnesses
- Live hearing (in separate spaces upon request and as appropriate)
- Opportunity to have advisors of choice

State the Standard of Evidence



Same standard of evidence for all.

Either:

- Preponderance of the evidence, i.e., more likely than not; or
- Clear and convincing evidence, i.e., substantially more likely to be true than not.

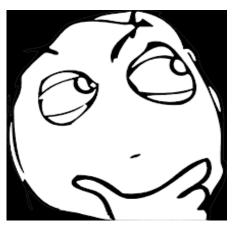
And Not:

 Beyond a reasonable doubt (no other reasonable explanation possible – criminal cases).





Considerations



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

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Factors to Weigh

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

Caution



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



Getting Ready

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

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Hearing Decorum

<u>Points to Consider</u>: May have rules that:

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



Advisors



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

More on the Advisor's Role



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





Advisor or Legal Representative

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







Written Determination

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





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

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

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Appeal Process



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



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Title IX Coordinator Training Online Course

Class Five: Title IX Training & Policies

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Education and Sports Law Group

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

Class Overview



- Audiences To Be Trained
- Elements of a Good Training Program

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- Benefits and Perils of Trauma-Informed Training
- Auditing Training Materials
- Developing and Revisiting Policies
- Records Retention and Posting

Remaining Questions

- Can a complainant appeal when a school chooses to dismiss a complaint because the respondent is no longer enrolled? If the respondent re-enrolls during a later trimester, must we need re-open the complaint if the complainant requests it?
- Do you agree we could limit the length of appeals statements? If so, does it depend on number of allegations/findings?
- Can you limit advisor shopping when it appears to be a delay tactic?
- I see that there is a section in the Case Processing Manual about appeals. Do you have any words of wisdom with regard to replying to appeals?





The Regulations (Title IX Personnel)

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



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Consider Training Others, even though not Required by the Regulations

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

And Athletics!



NCAA Board of Governor's Policy:

https://ncaaorg.s3.amazonaws.com/ssi/violence/NCAA CampusSexualViolencePolicy.pdf

NCAA Board of Governors Campus Sexual Violence Policy Implementation Task Force

NCAA Sexual Violence Prevention Tool Kit

Task Force Recommended Timeline (PDF)

Task Force Recommended Checklist (PDF)

Administrator FAQ

Student-Athlete FAQ

Access Sample Policies and Procedures:

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

Annual Attestation Process Resources

In the fourth year of the policy, the <u>following schools</u> attested that they have followed the policy requirements.

Attestation Process FAQ

NCAA Policy:

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

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

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

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

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

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



NCAA Policy: Overarching Principles

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



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

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

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

NCAA Policy continued:

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



Planning & Preparation

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

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Required Training

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

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



Required Training

Title IX Personnel Continued:

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

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Required for Investigators



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

Required for Informal Resolution Facilitators



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

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Required for Decision-makers:

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



Other Training Topics

Investigator	Decision-maker
Questioning	Managing the process
Institutional policies	Hearing protocol
Responsibility for proposed findings and conclusions	Institutional policiesQuestioning
 Redacting privileged information Coordinating investigation with supportive measures 	Preparing findings and conclusions

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Training Transparency

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

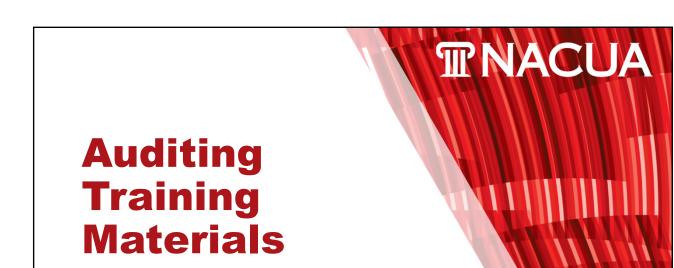






How to Be Fair to All

Benefits	Perils	
 May help those interviewed retrieve memories 	May be perceived to favor Complainants	
 May help those interviewed stick with the process. 	May be perceived as less intense questioning or cross-	
 May prevent re-traumatizing witnesses 	examination of witnessesMay be misused by untrained questioners	



When & What to Audit

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





Managing the Policies

Developing policies	Monitoring policies	
Existing institutional policies	Changes in law, regulations,	
Existing laws, agreements &	guidance or institutional needs	
practices	Changes in related laws or	
Identify conflicts and	guidance, e.g. FERPA, state APA	
concurrences and harmonize or change	Effectiveness	
	Include stakeholders	
 Include stakeholders 		



Notification and Dissemination

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



Adopt & Publish

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

Notice

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

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



Policy Decision Point: Framework

All-in-One Policy

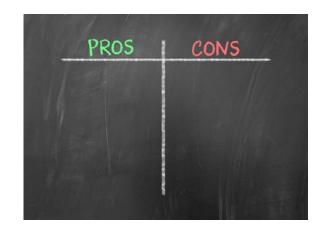
- 1. Treat all the Same; or
- 2. Decision Trees

Two Policies: If not TIX, then ...

- 1. Title IX Regulation+
- 2. Everything Else

Three plus:

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



Policy Definitions:

- Actual Knowledge
- Complainant/Respondent
- Supportive Measures
- Formal Complaint
- Prohibited Conduct
 - Sexual Harassment
 - Sexual Assault
 - · Dating Violence
 - Domestic Violence
 - Stalking
- Consent

- Title IX Coordinator
- Officials with Authority
- · Other Reporters, if any.
- · Confidential Resources
- · Standard of Review
- Evidence
 - · Directly Related
 - Relevant
 - Weight
- · Deliberate Indifference
- · Education Program or Activity
- · Informal Resolution
- · Emergency Removal

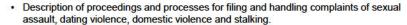




Please Note:

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

Don't Forget Clery ... Annual Security Report Policies



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

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Record Retention 7 Years



· For formal complaints:

- Investigation
- · Determination of responsibility
- · Transcripts or recordings of hearings
- · Sanctions, if any
- · Remedies to Complainant, if any
- · Appeal, if any, and result
- · Informal resolution and result, if any

· For all reports, regardless of whether there is a formal complaint:

- Actions taken and supportive measures, if any, provided in response to a formal complaint.
- · Basis for a determination that the institution was not deliberately indifferent.
- Measures to restore or preserve equal access or reasons why not providing support was not clearly unreasonable under the circumstances.
- · All training materials for Title IX personnel

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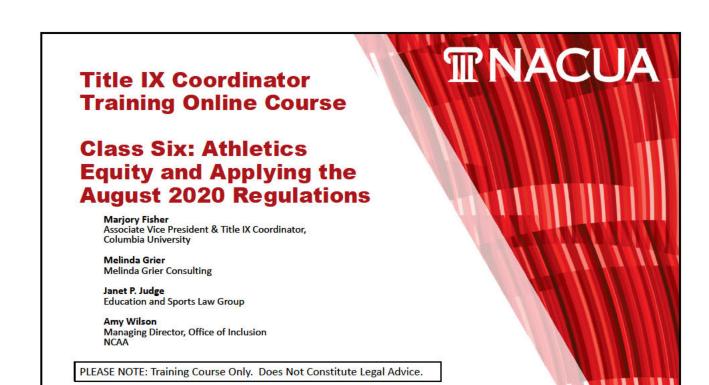
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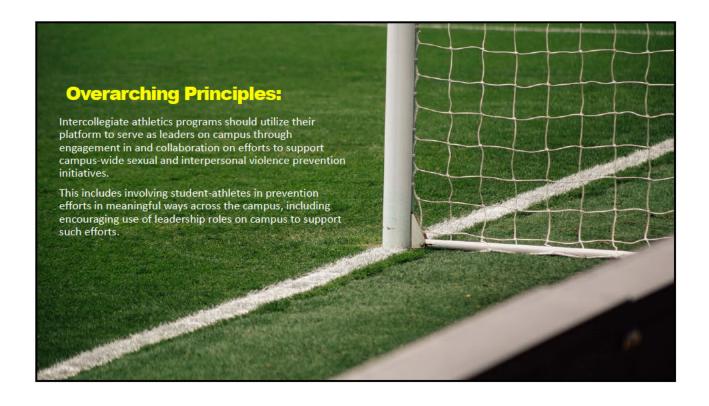
Class Overview

- Athletic Equity
- Pay Equity
- The Regs
- Trans Athletes
- NCAA Board of Governor's Policy on Campus Sexual Violence



Role of the NCAA:

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



Complying with NCAA Requirements: Policy and Attestation

- All incoming, continuing and transfer student-athletes must complete an annual disclosure related to their conduct that resulted
 in discipline through a Title IX proceeding or in a criminal conviction for sexual, interpersonal or other acts of violence.
- · Transfer student-athletes must disclose whether a Title IX proceeding was incomplete at the time of transfer.
- Failure to make a full and accurate disclosure could result in penalties, including loss of eligibility to participate in athletics as determined by the member institution.
- Institutions must take reasonable steps to confirm whether incoming, continuing and transfer student-athletes have been disciplined through a Title IX proceeding or criminally convicted of sexual, interpersonal or other acts of violence.
- In a manner consistent with federal and state law, all NCAA member institutions must share relevant discipline information and incomplete Title IX proceedings as a result of transfer with other member institutions when a student-athlete attempts to enroll in a new college or university.
- An institution choosing to recruit an incoming student-athlete or accept a transfer student- athlete must have a written procedure
 that directs its staff to gather information that reasonably yields information from the former institution(s) to put the recruiting
 institutional leadership on notice that the student left the institution with an incomplete Title IX proceeding, was disciplined
 through a Title IX proceeding or has a criminal conviction for sexual, interpersonal or other acts of violence.
- · Failure to have it written and to gather information consistent with that procedure could result in penalties.

Attestation: Prez, AD, TIX



- Requires annual attestations signed by the Director of Athletics, Title IX, and President (CEO).
- BOG revisions to the Policy expanded its reach and attestation content, effective Spring 2022-2023.
- Policy and FAQ are on the NCAA Website
- How are schools approaching this?
 - Discussions with Title IX, General Counsel, and others on campus.
 - · Explore compliance position.
 - · Check state law.
 - Consider intersection with the 2020 Regs around Permissive Dismissals and Confidentiality.

FAQs:

- What type of education meets the expectations of the policy? The policy allows member schools to determine the
 types and manner of education provided. The NCAA Sexual Violence Prevention Tool Kit can assist member schools
 in this effort. The tool kit provides checklists for campus collaboration and educational resources created
 specifically for student-athletes. Those resources include the online curriculum myPlaybook, which includes a
 course on sexual violence prevention.
- What happens after the deadline? A list of schools that have and have not attested to the requirements of the
 policy will be presented in a report to the Board of Governors at their August meeting each year. Once approved,
 the lists will be published on ncaa.org.
- Which athletics staff members are expected to complete the education requirement? While the policy does not
 provide a specific definition of staff for purposes of the educational prong and provides institutions the discretion
 to determine how far to extend their educational efforts (e.g. whether to include temporary workers, consultants
 or contractors), there is an expectation that all education will meet the requirements of local, state and federal law.
 All coaches including part-time, volunteer and assistant coaches, as well as athletics administrators full-time and
 temporary, and participating student-athletes are expected to complete the education.
- If I have additional questions about the policy where should I go? Questions may be sent to <u>questions@ncaa.org</u>.
 This inbox will only answer questions related to the policy and attestation process.

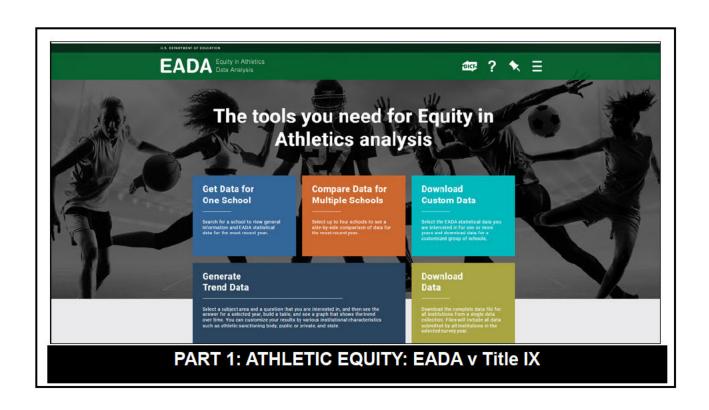
Training:

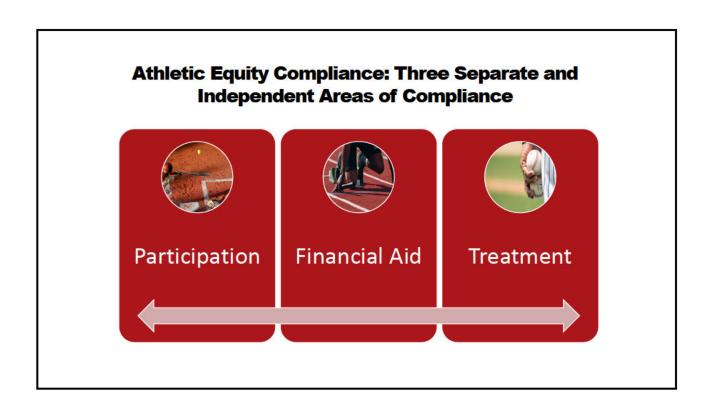
- · Annual Per NCAA Requirements
- All Staff
 - Administration
 - Team Doctors/ATC
 - Support Staff
 - Coaches
 - · GAs and Paid Student Workers
- · Student-Athletes
- · Cross Campus Engagement
- Reporting Protocols
- Complaint Avenues

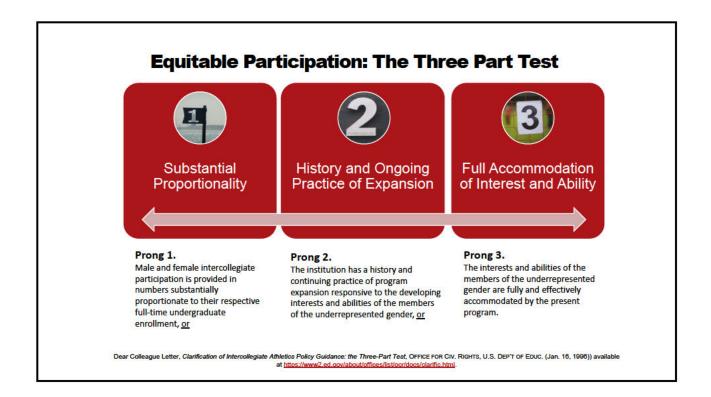
- In Person and Safe
- · Protocols for Outside Speakers
- Importance of Face Time
- · Retention/Time of Day/Time of Year
- Sport Examples
 - · Consider Student Involvement/Investment
- Culture of Sport/Supervisor
- · Confidential Resources
- · Support for Complainants and Respondents
- · Spotlight/Speed/Updates/Engagement
- · Head Coach Culture of Compliance

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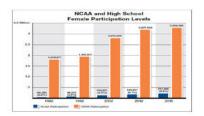




Sport Cuts that Involve the Underrepresented Sex: Typically Require Prong 1 Compliance Post Program Elimination







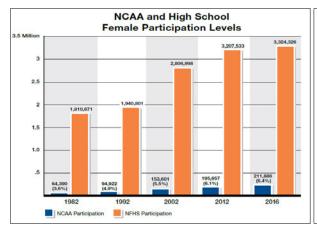
ENFORCEMENT -

OCR: Investigation. Letter of Findings. 302 Resolution Agreement. Referral to DOJ.
Court: Injunctive Relief. Class Actions. Attorneys Fees, No Administrative Exhaustion. No Cap on Damages.

OCR Substantial Proportionality

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





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

What is the underrepresented sex?

Is there:

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

How much interest/ability/competition is enough? What is the relevant pool to be assessed?

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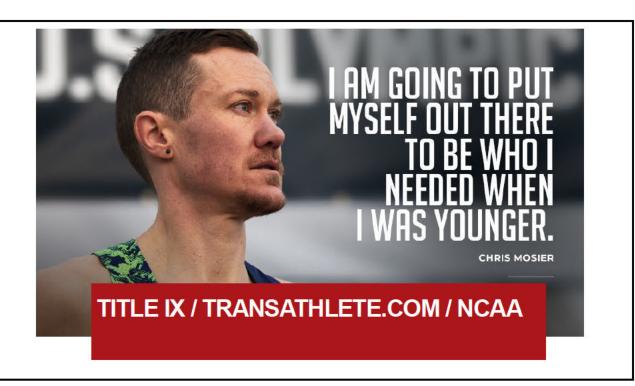
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Final Participation Question: Are there Equitable Levels of Competition?

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



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



NCAA Transgender Student-Athlete Participation

- NCAA <u>Summit</u> on Gender Identity and Student-Athlete Participation (Oct. 2020)
- NCAA Policy Updated and Approved by Board of Governors in January 2022

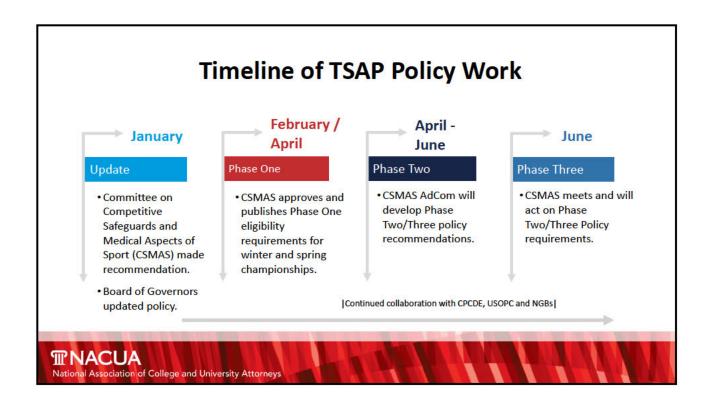


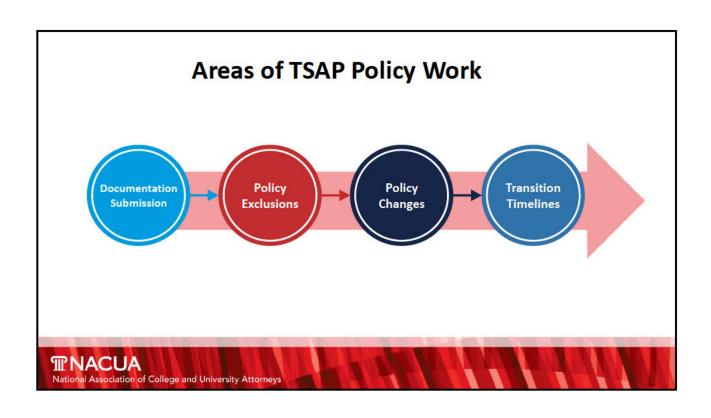
2022 Update to NCAA Policy

Alignment with Olympic Movement to balance fairness, inclusion and safety.

January 2022: Board of Governors (BOG) adopts policy as recommended by the Committee on Competitive Safeguards and Medical Aspects of Sport (CSMAS).

- 1. Trans student-athletes must continue to meet 2010 NCAA policy; and
- Meet sport-specific policies that are <u>reviewed and approved by CSMAS</u>, in each case to be informed by national governing body policy (or international federation policy or 2015 IOC policy).
- 3. Implemented over three phases.







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



Are the Disparities Significant? OCR v Judicial Review



Difference, on the Basis of Sex

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

Disparity:

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

Disparities that are not Substantial...

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

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

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Retaliation Prohibited

- Retaliation is intentional discrimination on the basis of sex.
- One who witnesses and complains about discrimination is protected from adverse action they encounter <u>because</u> of the complaints.
- Recognition that coaches, teachers, administrators and students are in the best position to witness and alert schools

See, e.g., <u>Jackson v. Birmingham Bd. of Educ.</u>, 544 U.S. 167 (2005)







Application (per the preamble):

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

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





Athletics:

Supportive Measures

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



Emergency Removals

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

Findings, Sanctions, & Appeals



What are the Potential Roles of the Title IX Office Around Athletics?



- · Oversight for Title IX
- Oversight for NCAA Policy
- Policy Oversight, Training, and Attestation
- Outside Title IX Speaker Review and Approval
- Evaluation of Equity and Sexual Misconduct Complaints
- Support and Emergency Removals
- EADA Report Review
- Equity Committee Membership

Infusing Equity: Consider a Supplemental Policy

Sample Language:

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

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

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

No Retaliation Policy:

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

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



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