2020 Title IX Regulations Refresher for Higher Education

Training and Certification Course

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Any advice or opinion provided during this training, either privately or to the entire group, is **never** to be construed as legal advice or an assurance of compliance. Always consult with your legal counsel to ensure you are receiving advice that considers existing case law in your jurisdiction, any applicable state or local laws, and evolving federal guidance.

Content Advisory

The content and discussion in this course will necessarily engage with sexual harassment, sex discrimination, violence, and associated sensitive topics that can evoke strong emotional responses.

ATIXA faculty members may offer examples that emulate the language and vocabulary that Title IX practitioners may encounter in their roles including slang, profanity, and other graphic or offensive language. It is not used gratuitously, and no offense is intended.

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Introduction

The primary focus of this course is to fortify participants' understanding of compliance obligations under the 2020 Regulations.

Title IX practitioners must understand the requirements facing their institutions and review their policies, procedures, and practices.

Our goal is to provide examples, best practices, and in-depth discussion to help navigate the evolving Title IX regulatory environment.

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Title IX Updates

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2024 Title IX Regulations Vacated

- **All federal funding recipients are now subject to the 2020 Title IX Regulations**
  - **January 9, 2025:** a federal district court in Kentucky vacated the 2024 Title IX Regulations in their entirety; other federal courts have followed suit
    - The 2024 Title IX Regulations are now vacated (null and void) and **not** in effect for **any** state, institution, or school/district
  - Institutions must revert to **2020-compliant** policies and procedures for Title IX cases
    - Ensure compliance with all 1975 and 2020 regulatory requirements
    - Revisit any complaints decided under 2024 Regulations to ensure compliance

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Department of Education Updates

- Department changes include:
  - Significant staffing reductions, but increased enforcement in some areas
  - Closure of 7 of 12 OCR regional offices
  - Federal funding and oversight shifts
- Executive Order (EO): *Improving Education Outcomes by Empowering Parents, States, and Communities* (3/20/25)
  - Directed the Secretary of Education to "facilitate closure of the Department" and "return authority to the States and local communities"
- Civil Rights enforcement remains in Department of Education's Office for Civil Rights (OCR), but other agencies (e.g., Health and Human Services (HHS) and Department of Justice (DOJ)) appear to be ramping up enforcement in certain areas
- Increased focus on Title VI

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Dear Colleague Letter 02/04/25

ED released a Title IX-focused Dear Colleague Letter (DCL) on 02/04/25

- OCR will enforce the 2020 Regulations, not 2024
- Institutions must immediately shift open investigations to use 2020 Regulations
- OCR will enforce *Defending Women from Gender Ideology* EO
  - Quoting the EO, OCR will:
    - "'enforce all sex-protective laws to promote [the] reality' that there are 'two sexes, male and female,' and that '[t]hese sexes are not changeable and are grounded in fundamental and incontrovertible reality.'"
- Relying on non-factual information as a proxy violates the law, too
- FAQ About Racial Preference and Stereotypes: February 28, 2025

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Executive Order re: Sex and Gender

***Defending Women from Gender Ideology Extremism and restoring Biological Truth to the Federal Government* (01/20/25)**

- Defines sex as a binary concept – man or woman
- All agencies must ensure that intimate spaces are designated by sex, not gender identity
- Limited *Bostock v. Clayton County*'s holding, says it only applies to Title VII
  - Dept of Justice issued guidance on 02/12/25 that *Bostock* does not apply to Title IX
- Prohibits federal funds and grants from promoting gender ideology
- Revokes all Biden administration EOs addressing gender identity
- Directs OCR to prioritize investigations/litigation to enforce rights and freedoms based on the binary nature of sex
- Does not address sexual orientation
- Courts initially paused enforcement, but the EO is now in full effect

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Defining Sex

Can institutions implement the EO's definition of biological sex definition?

- Likely depends on state law, and court rulings in jurisdiction
- Considerations:
  - *Bostock* applies an expansive definition of sex in employment; schools/districts are employers
- This question is not framed only by Title IX; for public schools/institutions, Equal Protection also matters
- According to some federal court cases, sex includes sex discrimination that implicates sex stereotypes and sex characteristics, thus taking an expansive view of what sex is

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Executive Order re: Gender and Athletics

***Keeping Men Out of Women's Sports* (02/05/25)**

- Prohibits transgender women from playing women's sports
  - Cited as necessary for "safety, fairness, dignity, and truth"
- Applies definitions from *Defending Women from Gender Ideology* EO
- Threatens withdrawal of federal funds
- Will use Title IX to enforce on a prioritized basis
- Seeks to eliminate Olympic competition based on gender identity or testosterone reduction
- Does not prohibit transgender men from participation
- Subject of active and rapid enforcement by Federal government

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Rescinded Prior Guidance

Rescinds all guidance documents inconsistent with the EO or subsequent guidance including:

- White House Toolkit on Transgender Equality
- 2024 Title IX Regulations: Pointers for Implementation
- ED Toolkit: Creating Inclusive & Nondiscriminatory School Environments for LGBTQ Students
- Supporting Intersex Students
- Supporting Transgender Youth in School
- Letter of Educators on Title IX's 49th Anniversary
- Confronting LGBTQ Harassment in Schools
- Enforcement of Title IX - Based on Sexual Orientation and Gender Identity in light of *Bostock v. Clayton County*
- AG's memorandum "Application of *Bostock v. Clayton County* to Title IX"
- EEOC's "Enforcement Guidance on Harassment in the Workplace"

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Understanding the Regulations

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Understanding the Title IX Regulations

- Issued May 6, 2020, effective August 14, 2020
  - Located at 34 C.F.R. 106
- Regulations have the force and effect of law
  - They provide a prescriptive set of requirements that act as the **floor**, not the ceiling
  - Federal regulations preempt state laws if they conflict
- The Preamble explains the regulations but does not have the same force of law as the regulations
  - 409 pages of 423 pages of the Title IX Regulations tri-column PDF are Preamble
  - Persuasive authority
- **Note:** The online C.F.R. still has the 2024 Regulations posted
  - Use the "Go to Date" function to access the 2020 regulations
    - Select any date prior to 8/1/24

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Key Regulatory Sections

- Section 106.8 Designation of coordinator; dissemination of policy
- Section 106.30 Definitions
- Section 106.44 Recipient's response to sexual harassment
- Section 106.45 Grievance process
- Section 106.71 Retaliation

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Title IX Statute and Scope

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Title IX

"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 & 34 C.F.R. Part 106 (1972)

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Limited Scope

- Title IX is broad, but Title IX Regulations apply to a narrow slice of Title IX
  - Only applies to a handful of behaviors the regulations define as “Title IX Sexual Harassment”
  - Any other types of behavior (e.g., sex discrimination) fall outside of the regulations
    - More flexibility to respond
    - May be influenced by state law, federal court decisions, CBAs, etc.

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Title IX Scope

Title IX

Sex Discrimination

- Disparate Treatment
- Disparate Impact

Retaliation

Sexual Harassment*

- Quid Pro Quo
- Hostile Environment
- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking

* 2020 Regulations only apply to Sexual Harassment

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ATIXA Model Policy (1P2P)

- ATIXA designed a model policy to address behavior that falls within Title IX **and** outside Title IX
- **One Policy, Two Procedures Model**
  - "Process A" (§ 106.45 Title IX Grievance Process for sexual harassment)
  - "Process B"
    - Non-Title IX Resolution Process for other complaints of discrimination, harassment, or retaliation
      - Non-Title IX sexual harassment allegations or Title IX sex discrimination allegations that are not sexual harassment
    - Retains most due process protections from Title IX Process; less formal
  - Model definitions have slight deviations to promote comprehensive and usability

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§ 106.30 Definitions

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Definitions

- This section provides both the regulatory definition and ATIXA's Model Policy definitions
  - Sometimes, they are identical or virtually so
  - Other times, they are different
    - Differences are marked in **bold, red font** for ease of comparison

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Sexual Harassment

Title IX Regulations:

- Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:
    1. An employee of the Recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
    2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the Recipient's education program or activity; or
    3. "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30)

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Quid Pro Quo

Title IX Regulations and ATIXA Model Definition:

- An **employee** of the Recipient
- Conditioning the provision of an aid, benefit, or service of the Recipient
- On an individual's participation in unwelcome sexual conduct

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Hostile Environment Sexual Harassment

Title IX Regulations and ATIXA Model Definition:

- Unwelcome conduct
- determined by a reasonable person
- to be so **severe**, **pervasive**, and **objectively offensive (SPOO)**
- that it effectively denies a person equal access to the Recipient's education program or activity

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Sexual Assault: Rape

Title IX Regulations:

- Penetration, no matter how slight,
  - of the vagina or anus with any body part or object, or
- oral penetration by a sex organ of victim,
- Without the consent of the victim
- Including instances where the victim is incapable of giving consent because of his/her age or because of a temporary or permanent mental or physical incapacity

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Sexual Assault: Rape

ATIXA Model Definition:

- Penetration, no matter how slight,
  - of the vagina or anus of a person,
  - with any body part or object, OR
- **Oral penetration**
  - **Of a sex organ of the Complainant, or**
  - **by the Respondent's sex organ**
- Without the consent of the Complainant,
- Including instances where the Complainant is incapable of giving consent because of **their** age or because of a temporary or permanent mental or physical incapacity

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Sexual Assault: Sodomy and Sexual Assault with an Object

Title IX Regulations:

- Sodomy:
  - Oral or anal sexual intercourse with another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of age or temporary or permanent mental or physical incapacity
- Sexual Assault with an Object
  - To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because

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Sodomy and Sexual Assault with an Object

ATIXA Recommendation:

- Do **not** include these terms in the institution's policy
  - These terms are not in the Clery Act, are outdated, and are repetitive with the rape definition, which already addresses any form of penetration
- OCR endorsed this approach in the past, though the current OCR's approach is unknown

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Sexual Assault: Fondling

Title IX Regulations:

- The touching of the private body parts of another person
- for the purpose of sexual gratification
- without the consent of the victim
- including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity

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Sexual Assault: Fondling

ATIXA Model Definition:

- The touching of the private body parts **(breasts, groin, buttocks)** of the Complainant by the Respondent, or
- **The Respondent's private body parts touching the Complainant, or**
- **The Respondent causing the Complainant to touch the Respondent's or their own private body parts,**
  - For the purpose of sexual gratification,
  - Without the consent of the Complainant,
  - Including instances where the Complainant is incapable of giving consent because of their age or because of temporary or permanent mental incapacity

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*Note: Also includes attempts.

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Fondling: Sexual Gratification

ATIXA Model Definition:

- Contact with private body parts is considered to be done for the purpose of sexual gratification unless the contact:
  - Can be proven inadvertent
  - Is for a legitimate medical (or other privileged) purpose and thus is conduct for which consent should have been sought and obtained by the provider
  - Involves a Respondent who cannot developmentally (due to maturity/age or disability) understand sexual contact or that their contact is sexual, or
  - Is something like butt-slapping on a team and is both minimal and unlikely to have sexual motivation or purpose, as shown by the context of the act(s)*
- **Note:** There is **no** definition of sexual gratification in the regulations

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Sexual Assault: Incest and Statutory Rape

Title IX Regulations:

- Incest
  - Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law
- Statutory Rape
  - Nonforcible sexual intercourse with a person who is under the statutory age of consent

ATIXA Model Definition:

- Incest
  - ~~**Nonforcible**~~ Sexual intercourse, between persons who are related to each other, within the degrees wherein marriage is prohibited by state law
- Statutory Rape
  - ~~**Nonforcible**~~ Sexual intercourse, with a person who is under the statutory age of consent

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Dating Violence

Title IX Regulations:

- Violence committed by a person
  - Who is in or has been in a social relationship of a romantic or intimate nature with the victim and
  - Where the existence of such a relationship shall be determined based on a consideration of the following factors:
    - The length of the relationship
    - The type of relationship
    - The frequency of interaction between the persons involved in the relationship

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Dating Violence

ATIXA Model Definition:

- Violence,
- **committed by a Respondent,**
- who is in 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. For the purposes of this definition—
    - **Dating Violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse**
    - **Does not include acts covered under the definition of Domestic Violence**

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Domestic Violence

Title IX Regulations:

- A felony or misdemeanor crime of violence committed by a:
  - Current or former spouse or intimate partner of the victim, or person similarly situated to a spouse of the victim,
  - Person who is cohabitating or has cohabitated with the victim as a spouse or intimate partner,
  - Person who shares a child in common with the victim, or
  - Commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction

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Domestic Violence

ATIXA Model Definition:

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

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Definition of Violence

ATIXA Model Definition:

- Violence includes situations where the Respondent **intentionally or recklessly** causes the Complainant serious physical, emotional, or psychological harm
  - Intent is evidenced when a reasonable person would be more likely to act with the purpose of causing serious harm rather than for any other reason
  - Recklessness is evidenced by a disregard of obvious risk to the safety of the Complainant
  - Violence in self-defense is not chargeable under the Policy if the purpose is **safety**, not harm
  - Consensual use of violence, such as in kink relationships, would not meet this definition
  - Threats to seriously harm the Complainant or people they care about may be chargeable under this definition if doing so causes serious emotional or psychological harm
  - Threats to harm oneself, even if made to cause emotional or psychological harm, are not considered violence under this definition (but may be addressable under a threat policy)
- **Note:** There is **no** definition of violence in the regulations

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Stalking

Title IX Regulations:

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to
  - Fear or their safety or the safety of others
  - Suffer substantial emotional distress

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Stalking

ATIXA Model Definition:

- **A Respondent** engaging in a course of conduct,
- **On the basis of sex,**
- Directed at **the Complainant**, that
  - would cause a reasonable person to fear for that person's safety, or the safety of others, or
  - suffer substantial emotional distress
- **For the purposes of this definition—**
  - **Course of conduct means two or more acts, including, but not limited to acts in which the Respondent 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**
  - **Substantial emotional distress means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling**

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Consent: ATIXA Model Definition

- Consent is **not defined** by the Title IX Regulations, but institutions are required by law to provide a definition (some states prescribe a definition applicable in that state)
- **ATIXA's Definition:**
  - Informed, knowing, and voluntary (freely given)
  - Active (not passive)
  - Creates mutually understandable permission regarding the conditions of sexual activity
  - No means no, but nothing also means no; silence and passivity do not equal consent
  - To be valid, consent must be given immediately prior to or contemporaneously with the sexual or intimate activity
  - Consent can be withdrawn at any time, so long as it is clearly communicated verbally or non-verbally
  - Consent to one form of sexual activity does not necessarily imply consent to other forms of sexual activity

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§ 106.71 Retaliation

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Retaliation Definition

- No Recipient or other person may intimidate, threaten, coerce, or discriminate against any individual
  - For the purpose of interfering with any right or privilege secured by Title IX or
  - Because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing
- 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

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Retaliation: ATIXA Model Definition

- Recipient, or any member of Recipient's community,
  - Taking or attempting take materially adverse action,
  - By intimidating, threatening, coercing, harassing, or discriminating against any individual,
    - For the purpose of interfering with any right or privilege secured by law or Policy, **or**
    - Because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this Policy and Procedure

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Narrowly Defined

- The Title IX definition of retaliation is typically **not as broad** as what community members may consider to be retaliatory
  - Complaints alleging “retaliation” may not meet the definition
  - Social media gossip **may not** be retaliation if it does not meet the requirements
    - First Amendment concerns

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§ 106.44 Reports, Complaints, and Notice

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When is the Institution “On Notice?”

The institution is **“on notice”** of sexual harassment when a report is made to:

- **Title IX Coordinator** (TIXC), or
- An **Official with Authority (OWA)**: any official who has authority to institute corrective measures on behalf of the Recipient
  - ATIXA recommends including OWAs by role in policy
- The regulations refer to ”on notice” as the institution having “actual knowledge”

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Having “actual knowledge” creates an institutional obligation to respond

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Reporting Obligations

- ATIXA recommends that institutions, by policy, designate **all employees** as **mandated reporters** (except for **confidential resources**) under Title IX
- The regulations rely on the "actual knowledge" concept to drive reporting, rather than providing specific reporting requirements
  - Example: If an OWA receives notice, that must be reported to the TIXC for the institution to fulfill its Title IX obligations
- Many employees will also have reporting responsibilities under other state and federal laws or institutional policy

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Party and Witness Privacy Concerns

Privacy vs. **Confidentiality** vs. **Privilege**

1

PRIVACY

Statutory protection (FERPA) only allows disclosing records to those who need to know, but cannot guarantee confidentiality

2

CONFIDENTIALITY

Information protected by those who need not report to the TIXC because they are designated confidential or have ethical/statutory confidentiality duties (subject to exceptions)

3

PRIVILEGE

The highest legal protection (attorney giving advice to a client or clergy providing pastoral advice); client/ patient/parishioner controls the privilege

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Report vs. Complaint

- A **report** is different than a **Formal Complaint**
- **Report**
  - Notifies the TIXC of an incident and
  - Obligates the TIXC to offer supportive measures and explain the process
- **Formal Complaint**
  - Written request to the TIXC to initiate an investigation
  - Physical document or electronic submission from Complainant
    - OR signed by TIXC
  - Alleging sexual harassment
  - Complainant must be **participating or attempting to participate** (P/ATP) at the time of the Formal Complaint
    - TIXC can make a complaint P/ATP by signing a Formal Complaint

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TIXC Signing a Formal Complaint

- The regulations permit Title IX Coordinators to sign Formal Complaints even if the Complainant does not wish to do so
- The regulations do **not** provide any explanation to guide Title IX Coordinators in determining when it is appropriate to sign a Formal Complaint
- ATIXA provides the following factors to consider:
  - **P**attern
  - **P**redation
  - **T**hreat
  - **V**iolence
  - **W**eapons
  - **M**inors

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§ § 106.44-106.45
Formal Grievance Process Overview

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§ § 106.44-106.45 Initial Assessment

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Jurisdiction

- TIXC is responsible for conducting an initial assessment to determine Title IX jurisdiction:
  - Does the alleged conduct, if proven, meet one of the definitions of Title IX sexual harassment?
  - Who is the Complainant? Were they P/ATP at the time of filing the Formal Complaint?
  - Did the alleged misconduct occur in the institution's education program or activity? (e.g., does the institution have control over the context of the alleged harassment?)
  - Does the institution have control over the Respondent?
  - Did the behavior occur in the United States?

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Jurisdiction

- **Yes, or Arguable:** move forward with Title IX Grievance Process
- **No:** determine whether an alternate policy or process applies
  - Dismiss the complaint under Title IX
  - Document the rationale
  - Refer to other process
- Dismissal analysis can occur throughout the process

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Outreach and Intake

- After receiving a report, TIXC (or designee), must reach out to the Complainant
- **Outreach** includes:
  - Introduction to Title IX and staff
  - Reason for the outreach
  - Offer to meet/speak over the phone; include right to Advisor
  - Available resources and resolution options, including how to file Formal Complaint
  - Discuss supportive measures and resources
  - Explain options to report to law enforcement
  - Follow up in writing with resources and information

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Mandatory Dismissal

TIXC **must** dismiss the complaint at any time prior to a determination, if:

1. The conduct alleged in the Formal Complaint would not constitute sexual harassment as defined in the 2020 Title IX Regulations even if proved, and/or
2. The conduct did not occur in the Recipient's education program or activity, or
   - No control over the context
3. The conduct did not occur against a person in the United States, or
4. At the time of filing a Formal Complaint, the Complainant is not P/ATP
   - **AND** the TIXC determines they do not need to sign a Formal Complaint

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Discretionary Dismissal

The TIXC **may** dismiss the complaint (or a portion of it) at any time prior to a determination, if:

1. Complainant notifies the TIXC in writing that they would like to withdraw the Formal Complaint or any portion thereof; **or**
2. Recipient no longer employs or enrolls Respondent; **or**
3. Specific circumstances prevent the Recipient from gathering sufficient evidence for a determination

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Dismissal Appeal

- Promptly notify parties of the dismissal
- Notify parties that a dismissal may be appealed and include appeal information
  - Appeals grounds from § 106.45 apply to both dismissals and final determinations
  - Dismissal Appeal Decision-maker(s) must be trained
    - Must not have been involved in the complaint so far
    - Cannot also serve as the Appeal Decision-maker for final determination

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Supportive Measures

- Provided to parties throughout the process:
  - At no cost to the party
  - Individualized
  - Non-disciplinary, non-punitive
  - Protect safety of parties or environment, or deter sexual harassment
  - Restore or preserve equal access
  - Without unreasonably burdening other party
- Publish the range of supportive measures
- Avoid unnecessary disclosures about supportive measures
- Consult with disability services when appropriate
- If not provided, document the rationale for refusal

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Supportive Measure Examples

- Counseling/ Health Services
- Employee Assistance Program
- Visa and Immigration Assistance
- Community Education
- Alternate Housing
- Alternate Work Arrangements
- Safety Planning
- Safety Escorts
- Transportation Assistance
- Contact Limitations
- Academic Support
- Trespass Orders
- Emergency Notifications
- Increased Security

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Emergency Removal

- Imposed upon Respondents on an emergency basis only
- Individualized safety and risk analysis
  - Immediate threat exists to the physical health or safety of any student or other individual
  - The threat arises from the allegations of sexual harassment
- Respondent entitled to immediate notice and opportunity to challenge

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Administrative Leave

- May remove an employee Respondent using existing administrative leave procedures
- A lower bar than emergency removal

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Informal Resolution

- Title IX permits **voluntary** Informal Resolution (IR)
- Not available for employee-on-student harassment
- IR is not defined by the Title IX Regulations
- At discretion of TIXC, at any time prior to a final determination
  - Likelihood of resolution
  - Power dynamics
  - Goals and motivation of the parties to participate
  - Complexity and timing of the complaint
- IR Facilitators must receive training, be free of bias or conflicts
  - ATIXA recommends IR Facilitators not serve in any other process roles

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Informal Resolution, Cont.

- Procedural requirements:
  - Formal Complaint
  - Parties must receive written notice of the allegations, IR procedures, records created, and potential consequences
  - Parties' voluntary, written consent
  - Must still stop, prevent, remedy
- May withdraw from IR to start or resume Formal Grievance Process at any time

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§ 106.45 Investigation

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Notice of Investigation and Allegations

- Notice of Investigation and Allegations (NOIA) letter
  - Sent to all parties, simultaneously
  - Must be sent prior to interviewing any party
- **The NOIA includes:**
  - Notice of the allegations and known details, such as identities of the parties
  - A description of the alleged conduct and relevant policy provisions
  - The date and location of the alleged conduct
  - Information about grievance procedures
  - Any Informal Resolution options
  - Parties' Rights

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Notice of Investigation and Allegations, Cont.

The NOIA must outline the parties' right to:

- Present witnesses, including expert witnesses
- Present inculpatory and exculpatory evidence
- Freely discuss the allegations
- Be accompanied by an Advisor of their choice
- Receive written notice of all details and purpose, with sufficient time to prepare, of any investigation interview or other meeting they are requested to attend
- Review all relevant and directly related evidence before the investigation report is finalized

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Notice of Investigation and Allegations, Cont.

The NOIA must also include:

- Presumption that Respondent is not responsible
- A statement that retaliation is not permitted
- Reference to any code of conduct provisions (student or employee) regarding consequences for knowingly providing false statements
- The NOIA must be updated if additional allegations arise during the course of the investigation
- Include or reference current policy and procedures

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Understanding Evidence

- Duty to collect **relevant** evidence
  - Evidence is any kind of information presented to help determine what occurred
  - Relevant evidence is evidence that tends to prove or disprove the underlying allegations
    - Inculpatory and exculpatory evidence
  - Some evidence may only be relevant to assessing credibility
- Collect **all** relevant and reasonably available evidence
- Relevant evidence forms the basis of the investigation report

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Directly Related Evidence

- Connected to the complaint but neither inculpatory nor exculpatory and will not be relied upon by the Decision-maker (DM)
- Must be provided to the parties and their Advisors for review
  - ATIXA recommends providing an organized directly related evidence file
- Decision-maker(s) ultimately determine what is relevant, directly related, or neither

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Specific Evidence Issues

- Evidence of the **Complainant's sexual predisposition** is never relevant
- Evidence of the **Complainant's prior sexual behavior** is not relevant except:
  - If offered to prove that someone other than the Respondent committed the alleged conduct; **or**
  - If offered to prove consent with respect to prior consent with the Respondent
- Even if admitted/introduced by the Complainant
- Does **not** apply to Respondent's prior sexual behavior or predisposition

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Privileged and Medical Information

The party must provide permission to obtain and/or include:

- Evidence protected under a legally recognized privilege
- Records made or maintained by:
  - Physician
  - Psychiatrist
  - Psychologist

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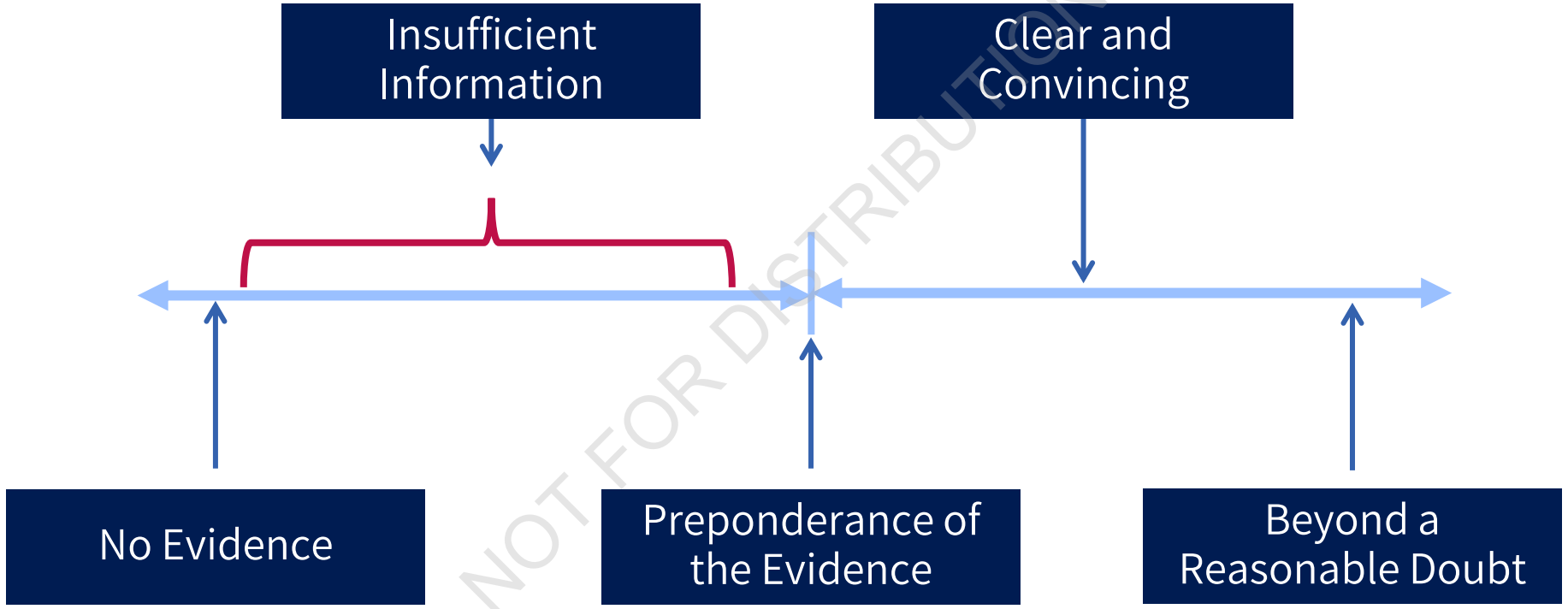
Standard of Evidence



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- **Preponderance of the Evidence** is the most common standard
- Standard of Evidence must be consistent for **all** Formal Complaints of sexual harassment

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Parties' and Advisors' Review of Report and Evidence File

- Draft report summarizing all Relevant Evidence
- Directly Related evidence file must:
  - Be sent to each party and Advisor in an electronic format or hard copy
  - Include evidence upon which the Recipient does not intend to rely
  - Include exculpatory and inculpatory evidence
- 10 (+) 10 rule
  - Investigator must:
    - Allow **minimum** of 10 days for written response
    - Consider parties' feedback and incorporate where appropriate
  - Investigator sends the final investigation report to the parties and Advisors for review **minimum** of 10 days prior to the hearing

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Drafting, Reviewing, and Finalizing the Investigation Report

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§ 106.45
Decision-Making and Appeals

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Decision-Making

- All postsecondary institutions must hold a **live hearing** to address Title IX sexual harassment allegations, unless resolved by IR
  - Decision-maker (DM) can ask relevant questions
  - Advisors can ask relevant questions on behalf of Parties
- TIXC and Investigator may not serve as DM

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Live Hearings

- Questions must be asked by the parties' Advisors and/or DM(s)
  - If the party does not have an Advisor, the institution **must** provide an Advisor for the purpose of asking questions during the hearing, if the party wishes to ask questions
  - DM must determine whether a proposed question is relevant and permissible
- Hearing can be in one location or virtually through technology
  - DM and parties must be able to simultaneously see a party or witness when they are speaking/communicating
- Must create an audio or video recording or transcript and make it available to parties to inspect and review
- May impose reasonable decorum rules

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Relevance Determinations

- The regulations establish a questioning protocol during hearings
  - A Hearing Board member (other than the Chair), or Advisor poses a question to a party or witness
    - Party/witness pauses while the DM considers the relevance of every question and decides whether to permit the question
    - Party may answer if DM deems question relevant
  - The DM must explain to the individual proposing the questions any decision to exclude a question as not relevant
  - The regulations are silent on whether the DM can instruct other options beyond excluding a question, such as rephrasing or asking the Advisor to reframe (ATIXA recommends permitting rephrasing or reframing)
- Regulations leave open the question of whether Advisor can/should make a showing of relevance to the DM (ATIXA recommends permitting it)

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Written Determinations

- **Written Determination**
  - Authored by DM(s)
  - Communicated to the parties simultaneously in writing
- **Finality**
  - On the date the institution provides a written appeal determination
    - **OR** the date when an appeal would no longer be timely

Written Determination Elements

- Applicable policy
- Procedural steps from complaint through determination
- Statement of and rationale for the result of each specific allegation
- Sanctions imposed (if any) and rationale for chosen sanctions or deviation from precedent
- Whether remedies will be provided to Complainant
- Procedures and bases for appeal

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Sanctions and Remedies

Sanctions

- Only implemented after a determination of responsibility
- Nexus between sanctions and misconduct
- Goal: stop, prevent, and remedy
- TIXC does not issue sanctions but oversees the process
- TIXC assures sanction compliance
  - Failure to comply could lead to discipline

Remedies

- May be implemented before or after a determination
- TIXC determines remedies that are fair and not clearly unreasonable given the circumstances
- Goal: preserve or restore access to education program and activity
- TIXC ensures remedies are implemented

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Appeal Grounds

Must offer appeals on the following grounds:

1. Procedural irregularity that affected the outcome of the matter
2. New evidence that was not reasonably available at the time of the determination that could affect the outcome of the matter
3. Conflict of interest or bias by the TIXC, Investigator, DM that affected the outcome of the matter

Institutions have the discretion to add additional appeal grounds

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Recordkeeping

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Recordkeeping

- Recipient must maintain records for **seven** years:
  - Sexual harassment Formal Complaints, including determination and discipline/remedies
  - Appeals and results
  - Rationales for all determinations and appeals
  - Informal Resolution
  - Supportive measures
  - Measures taken to preserve/restore access
  - All training materials (see next slide)
- Document how response was **not** deliberately indifferent

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Training Records

- Institutions must make all materials used to train TIXC, Investigators, DM, and IR Facilitators publicly available on the Recipient's website
  - Post the most recent materials used to train the Title IX Team
  - But keep electronic copies of seven (7) years of training materials
- If the Recipient does not maintain a website, the Recipient must make these materials available upon request for inspection by members of the public

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Additional Compliance Requirements

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Compliance Checklist (§ 106.8)

- ❑ Designate a Title IX Coordinator
- ❑ Publish the Title IX Coordinator's name and contact information
  - ❑ Notify all applicants for admission or employment, students, employees, and all unions or other CBA professional organizations of contact information
  - ❑ Notify how to make a report to the Title IX Coordinator
- ❑ Publish non-discrimination statement, including that the institution does not discriminate on the basis of sex in its education program and activities
- ❑ Publish policy and grievance procedures reflect the regulatory requirements

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Questions?

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