

Annual Training for Advanced Title IX Coordinators and Deputy Coordinators Under the 2020 Title IX Regulations

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1

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2

Agenda


1. Legal Overview
2. Defining Sexual Misconduct
3. Role of the Title IX Coordinator
4. Responding to a Report
5. Informal Resolution
6. Formal Resolution Process
7. Case Studies

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3


Terminology


- ED = Department of Education
- Recipient = Institutions Covered by Title IX
- OCR = Department of Education's Office for Civil Rights
- VAWA = Violence Against Women Reauthorization Act
- FERPA = Family Educational Rights and Privacy Act
- CSA = Campus Security Authority
- Investigation/Grievance Procedures/Complaint Procedures
- Adjudicator/Decisionmaker
- Complainant/Reporting Party/Accuser/Victim/Survivor
- Respondent/Responding Party/Accused/Alleged Perpetrator

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4

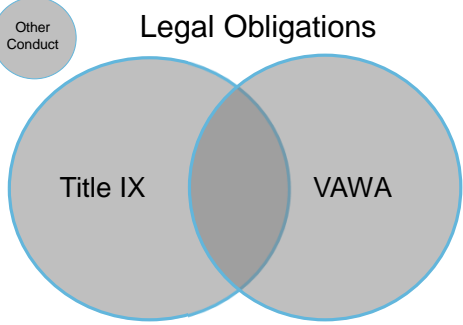
Legal Overview



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5


Legal Obligations



Other Conduct

Title IX

VAWA



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6

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 educational program or activity receiving Federal financial assistance”

20 U.S.C. § 1681







7

7

Who Must Comply With Title IX?

- Institutions that receive federal funds
 - Students
 - Employees
 - Third Parties
 - Visitors
 - Vendors







8

8

Discrimination “on the Basis of Sex”

- Includes:
 - Sexual harassment
 - Differential treatment





9

9

When an Institution Must Respond

- Institution has actual knowledge of
- Sexual harassment
- In an education program or activity of the institution
- Against a person in the United States



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10

When an Institution Must Respond

- Actual knowledge
 - Notice of sexual harassment or allegations of sexual harassment to the Title IX Coordinator or an official who has authority to institute corrective measures on behalf of the institution
 - Notice includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator
 - Vicarious liability and constructive notice are insufficient
 - Standard not met if the only official with actual knowledge is the respondent

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11

When Institutions Must Respond Under Title IX

- Actual knowledge (cont.)
 - The following does not qualify an individual as having the authority to institute corrective measures
 - Mere ability or obligation to report sexual harassment
 - Ability or obligation to inform a student about how to report
 - Being trained in how to report

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12

When an Institution Must Respond

- Education program or activity
 - Locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs
 - Includes all incidents of sexual harassment occurring on an institution's campus
 - Also includes off-campus conduct if
 - Occurs as part of the institution's "operations"
 - Institution exercised substantial control over the respondent and the context of alleged sexual harassment
 - Occurs at an off-campus building owned or controlled by a student organization officially recognized by the postsecondary institution (e.g., fraternities and sororities)

13


When an Institution Must Respond

- Education program or activity (cont.)
 - Consider whether recipient funded, promoted, or sponsored the event or circumstance
 - No single factor is determinative
 - Clery Act geography is not co-extensive with scope of education program or activity

14

How an Institution Must Respond

- Must respond promptly in a manner that is not deliberately indifferent
- Deliberately indifferent = response is clearly unreasonable in light of the known circumstances
- Follow grievance process outlined in the regulations



15

The Legal Landscape

- All schools receiving federal funds must:
 - Publish Notice of Nondiscrimination
 - Designate a Title IX Coordinator
 - Disseminate policy prohibiting sex discrimination
 - Adopt and publish fair and equitable grievance procedures
 - Offer supportive measures to a complainant and respondent
 - Follow a legally compliant grievance process
 - Train individuals with heightened responsibilities
 - Train students and employees







16

16

OCR's Enforcement and Guidance

- OCR's Role:
 - Issue guidance
 - Compliance reviews
 - Resolution agreements




17

17

Clery Act

- Provide accurate, timely, and complete information
- Regarding certain types of crimes/incidents
- Occurring on or adjacent to campus
- To promote campus safety and consumer protection

- Fine for each Clery Act violation is \$69,733

18

18

Interaction Between Title IX & Clery

The diagram consists of two overlapping circles. The left circle is labeled 'Clery Act' and the right circle is labeled 'Title IX'. The overlapping area in the center represents the intersection of the two.

- Clery is about the reporting of crimes (broader than sexual misconduct), regardless of investigation
- Title IX is about the investigation of reports of sexual harassment, including sexual assault and VAWA crimes

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19

Violence Against Women Reauthorization Act (VAWA)

- Extends Clery crimes to include VAWA crimes: domestic violence, dating violence, and stalking
- Requires discipline procedures for addressing sexual assault and VAWA crimes
- Requires education programs to promote awareness
- Codified parts of 2011 Dear Colleague Letter on Title IX

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20

VAWA Regulations

- Requires policy addressing:
 - Procedures complainants should follow
 - Disciplinary procedures
 - Confidentiality
 - Notifications to students, employees, and complainants
 - Right to advisor of choice (including attorney)
 - Right to have notice of meetings with parties
 - Right to have access to information used in formal/informal disciplinary meetings
 - Rationale must be included in Notice of Determination
 - Training for individuals with heightened responsibilities
 - Training for students and employees

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21

Interaction Between Title IX & VAWA

- Title IX
 - Sexual harassment (as defined by regulations)
 - In an education program or activity
 - Against a person in the United States
- VAWA
 - Allegations of sexual assault, domestic violence, dating violence, or stalking
 - Applies regardless of location of alleged conduct (on or off campus; in or out of the education program of activity; in or out of the U.S.)

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22

Relationship Between Parties and Institution

- Education program or activity
 - Locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs
- Formal complaint
 - At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed
- Permissive dismissal
 - Discretionary dismissal of formal complaint if respondent is no longer enrolled or employed by the institution
 - Also have discretion if respondent was never enrolled or employed by institution

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23

Relationship Between Parties and Institution

Complainant
Third Party

Respondent
Member of Community

- Title IX (if within scope of Title IX)
 - Provide supportive measures
 - May not be required to comply with Title IX grievance process
- VAWA (if allegation of sexual assault or VAWA crime)
 - No requirement to provide written explanation of rights and options (but still recommended)
 - Disciplinary process that complies with VAWA

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24

Relationship Between Parties and Institution

Complainant
Member of Community

Respondent
Third Party

- Title IX (if within scope of Title IX)
 - Provide supportive measures
 - Generally not required to comply with Title IX grievance process
- VAWA (if allegation of sexual assault or VAWA crime)
 - Provide a written explanation of student or employee's rights and options
 - Could take action (no trespass) without disciplinary process
 - If engaging in a disciplinary process, comply with VAWA requirements

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25

Non-Title IX and Non-VAWA Cases

- Flexibility to determine whether and how to respond to alleged conduct
- Factors to consider
 - State law
 - Expectations of community
 - Due process considerations (public institutions)

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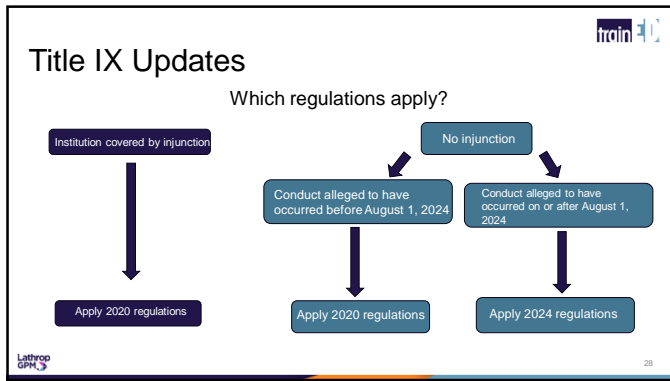
26

Title IX Updates

- 2020 regulations effective August 14, 2020
- New regulations effective August 1, 2024
 - Injunctions in place in:
 - Statewide: Alaska, Arkansas, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, North Dakota, Ohio, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wyoming, and
 - Institution Specific : any institution attended by members of Young America's Foundation and Female Athletes United, and children of members of Moms for Liberty (impacts nearly 700 institutions)

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27



28

- ### VAWA Reauthorized
- Reauthorized in March 2022 (effective October 1, 2022)
 - Revised domestic violence definition
 - Online survey tool for campus safety
 - Task Force on sexual violence in education
 - Includes assessing DOE's ability to levy fines for Title IX noncompliance
 - Special Grants for Prevention Programs
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29

Defining Sexual Misconduct

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30

Title IX—Sexual Harassment

- Conduct *on the basis of sex* that satisfies one or more of the following:
 - Quid pro quo
 - Hostile environment
 - Sexual assault and VAWA crimes

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31

Title IX—Sexual Harassment

- Quid pro quo:
 - Employee conditions aid, benefit, or service of the institution on an individual's participation in unwelcome sexual conduct
- Examples:
 - Supervisor conditioning promotion on participation in sexual advance
 - Professor conditioning grade on participation in sexual advance

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32

Title IX – Sexual Harassment

- Hostile Environment:
 - Unwelcome conduct (on the basis of sex) determined by a reasonable person to be so *severe, pervasive, and objectively offensive* that it effectively denies a person equal access to the institution's education program or activity

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33

Title IX—Sexual Harassment

- Hostile environment harassment
 - Reasonable person: perspective of a reasonable person in the shoes of the complainant
 - Consider ages, abilities, and relative positions of authority of the individuals involved
 - Effectively denies a person equal access
 - Equal access has been denied – not that a person’s total or entire educational access has been denied
 - No specific type of reaction is necessary to conclude that severe, pervasive, objectively offensive sexual harassment has denied a complainant “equal access”
 - Analysis is whether a reasonable person in the complainant’s position would be effectively denied *equal* access to education compared to a similarly situated person who is not suffering the alleged sexual harassment

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34

Title IX – Sexual Harassment

- Examples: Multiple incidents of the following conduct may constitute hostile environment sexual harassment
 - Unwelcome sexual flirtations, advances, or propositions
 - Requests for sexual favors
 - Verbal abuse of a sexual nature, obscene language, off-color jokes, sexual innuendo, and gossip about sexual relations
 - The display of derogatory or sexually suggestive posters, cartoons, drawings, objects, notes, letters, photos, emails, or text messages
 - Visual conduct such as leering or making gestures
 - Sexually suggestive comments about an individual’s body or body parts, or sexually degrading words to describe an individual

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35

Title IX – Sexual Harassment

- Examples: Multiple incidents of the following conduct may constitute hostile environment sexual harassment
 - Unwelcome touching of a sexual nature such as patting, caressing, pinching, or brushing against another’s body
 - Unwelcome verbal or physical conduct against an individual related to the individual’s gender identity or the individual’s conformity or failure to conform to gender stereotypes
 - Cyber harassment, including but not limited to disseminating information, photos, or videos of a sexual nature without consent
 - Videotaping or taking photographs of a sexual nature without consent

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36

Title IX—Sexual Harassment

- Sexual Assault
- VAWA Crimes
 - Dating violence
 - Domestic violence
 - Stalking
- As defined in Clery

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37

Title IX—Sexual Harassment

- **VAWA Crimes—Sexual Assault:**
 - **Rape:** The carnal knowledge of a person, 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.
 - **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 his/her age or because of his/her 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 of his/her temporary or permanent mental or physical incapacity.

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38

Title IX—Sexual Harassment

- **VAWA Crimes—Sexual Assault:**
 - **Fondling:** 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.
 - **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.

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39

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Consent

- No particular definition of consent with respect to sexual assault is required by Title IX or VAWA


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40

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Title IX—Sexual Harassment

- VAWA Crimes
 - **Domestic Violence:** a felony or misdemeanor crime committed by current/former spouse or intimate partner of the victim under domestic or family violence laws of the jurisdiction
 - **Dating Violence:** person with whom victim has/had a social relationship of a romantic or intimate nature (determined by reporting party's perspective and length, type, and frequency of interaction)
 - **Stalking:** course of conduct directed at a specific person that would cause fear for safety or substantial emotional distress



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41

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Title IX – Sexual Harassment

- Male/Female
- Female/Male
- Female/Female
- Male/Male
- Gender Identity

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42

Determining Title IX vs. Non-Title IX Matters

- Factors to consider
 - Type of alleged conduct – sexual harassment?
 - Location and context of alleged conduct
 - within education program or activity?
 - against a person in the United States?
 - Relationship between parties and institution

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43

Interaction Between Title IX & VAWA*

Other conduct

Title IX
 Quid pro quo harassment that occurs in an education program or activity against a person in the United States
 Hostile environment (as defined by Title IX) in an education program or activity against a person in the United States

VAWA
 Sexual assault or VAWA crime that occurs outside an education program or activity
 Sexual assault or VAWA crime that occurs against a person outside of the United States

Title IX & VAWA
 Sexual assault or VAWA crime that occurs in an education program or activity against a person in the United States

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44

Other conduct

- Quid pro quo harassment by a student
- Hostile environment harassment that occurs outside a program or activity
- Hostile environment harassment that occurs against a person outside of the United States
- Sexual harassment that is not sufficiently severe, pervasive, and objectively offensive that it effectively denies a person equal access to education program or activity (caution!)

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45

Interaction with Other Laws


- FERPA: Family Educational Rights and Privacy Act
 - Limits disclosure of student education records
 - Several exceptions permit disclosure to both parties
 - In Title IX cases, exception permits school to disclose to both parties all directly related evidence, all information in the investigation report and attachments that goes to the decision-maker, and statement of, and rationale for, the final results of any disciplinary proceedings or appeals, including sanctions and whether remedies will be provided
 - Required by Title IX
 - Does not include what the remedies are
 - In cases involving sexual assault/VAWA crime, exception permits school to disclose to the parties any information provided to the decision-makers and the final results of the disciplinary proceedings, including *all* sanctions

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46

Interaction with Other Laws

- Mandatory reporting laws: state-specific laws requiring school employees to report child abuse
 - Mandatory reporters may include teachers, coaches, administrators, or others who interact with minors or who supervise those who interact with minors
 - Must report if know or reasonably suspect abuse or neglect of a child
 - Report to police or county department




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47

Interaction with Other Laws

- Title VII/State anti-discrimination laws
- State student safety laws





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48

Interaction with Other Laws

- Accommodations
 - Provide reasonable accommodations to an individual with a disability who requests an accommodation necessary to ensure an equal opportunity to participate in the complaint resolution process.







49

49

Risks of Non-Compliance

- OCR enforcement
- Clery Act enforcement
- Lawsuits
 - Private right of action under Title IX, breach of contract, interference with contract, negligence, negligence *per se*, negligent supervision, intentional infliction of emotional distress, defamation, violation of right to due process at public schools, invasion of privacy/violation of confidentiality
- Public relations







50

50

Lessons Learned From Litigation

- In August 2023, a court denied Haverford College's motion to dismiss the plaintiff's breach of contract claim in which he argued that his coach removed him from his athletic team and refused to reinstate him due to sexual assault allegations.
 - After rumors surfaced that the plaintiff engaged in sexual misconduct, his coach directed him to step away from the team until it was resolved.
 - No complaint was filed against the plaintiff and there was no investigation.
 - The coach refused to allow the plaintiff to rejoin the team.
- Lesson learned: Carefully consider any disciplinary action taken outside of the complaint resolution process.

51

51

Lessons Learned From Litigation

- In April 2024, a court denied Hamilton College’s motion for summary judgment regarding the plaintiff’s Title IX and breach of contract claims. The plaintiff had been found responsible for sexual assault in the College’s complaint resolution process.
- Court found anti-male bias possible in part due to procedural irregularities including potential conflict with hearing officer
- Also new witness permitted to testify during the hearing, despite policy language requiring “extraordinary circumstances”
- Lessons learned: Avoid conflicts and perceived conflicts when possible; follow your institution’s policy

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52

Training Requirements

- Train Title IX Coordinator, investigator, decision-maker, facilitator of informal resolution process, and individuals responsible for appeals on
 - Definition of sexual harassment
 - Scope of the institution’s education program or activity
 - How to conduct investigation and grievance process, including hearings, appeals, and informal resolution processes, and how to serve impartially, including by avoiding prejudgment of the facts at interest, conflicts of interest, and bias
 - Issues related to sexual assault, domestic violence, dating violence, and stalking (annually)
 - How to conduct an investigation and hearing that protects the safety of complainants and promotes accountability (effects of trauma) (annually)
 - Institution’s policies and procedures

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53

Training Requirements



- Decision-makers must also receive training on:
 - Technology to be used at a live hearing
 - Issues of relevance of questions and evidence, including when questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant

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54

Training Requirements




- Investigators must also receive training on
 - Issues of relevance to create an investigative report that fairly summarizes relevant evidence
- Training materials must not rely on sex stereotypes and must promote impartial investigations and adjudications
- Training materials must be publicly available on institution's website

55

Recordkeeping



- For 7 years, must maintain:
 - Investigation and adjudication
 - Any determination regarding responsibility
 - Any audio or audiovisual recording or transcript of the hearing
 - Any disciplinary sanctions imposed
 - Any remedies provided to complainant
 - Any appeal and result
 - Any informal resolution and the result
 - Training materials for investigators, decision-makers, coordinators, and persons designated to facilitate informal resolution process

56

Recordkeeping

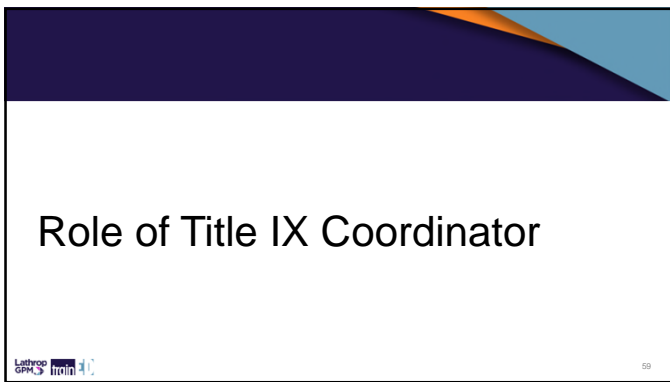
- For 7 years, must maintain (cont.):
 - Any actions taken (including supportive measures) in response to a report of sexual harassment
 - Basis for conclusion that response was not deliberately indifferent
 - Measures were designed to restore or preserve equal access to educational programs and activities
 - If supportive measures were not provided, document the reasons why such a response was not clearly unreasonable in light of known circumstances
 - Recordkeeping does not prevent inclusion of additional details or explanations later

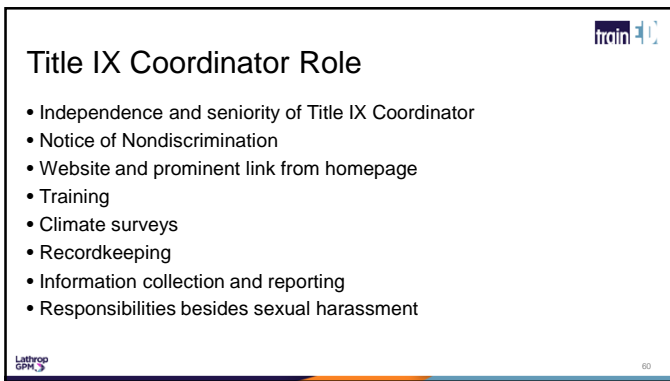
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58





59



60

Title IX Coordinator Role

- Areas of responsibility besides sexual harassment:
 - Recruitment, admissions, and counseling
 - Financial assistance
 - Athletics
 - Student interests and abilities
 - Athletic benefits and opportunities
 - Athletic financial assistance
 - Pregnant and parenting students
 - Discipline
 - Employment







61

61

Role of Title IX Team

- Serve impartially
 - Avoid prejudgment of the facts
 - Presumption of non-responsibility
 - Avoid/disclose conflicts of interest/bias
 - For or against complainants or respondents individually or generally
 - Make determination of responsibility at the conclusion of the grievance process








62

62

Serving Impartially

- Set boundaries
 - Make neutral role clear up front
 - Not counseling or advocacy services
 - Know how to respond when coming close to line
 - Point to resources on campus
- Document all communications, including phone calls
- Use sensitive and informed tone and content, both to the parties and among team members

63

63

Dual Roles

- Title IX requires independent decision-maker
 - Title IX Coordinator and decision-maker must be different individuals
 - Investigator and decision-maker must be different individuals
 - Title IX Coordinator and investigator may offer recommendations regarding findings and/or conclusions on responsibility, but decision-maker has independent obligation to objectively evaluate relevant evidence and cannot simply defer to recommendations
- Title IX Coordinator may act as investigator

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64

Q & A



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65


Responding to a Report

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66

When an Institution Must Respond

- Institution has actual knowledge of
- Sexual harassment
- In an education program or activity of the institution
- Against a person in the United States



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67

Case Study

- A financial aid counselor, Mark Matthews, sometimes has lunch with John Johnson, an academic advisor. During one lunch, Mark shares with John that Mark's coworker, Silvia, has been making him uncomfortable with frequent text messages and Teams messages. Mark tells John that Silvia has also started touching him, including touching his hand when they got coffee with colleagues and kissing him on the cheek when he ran into her over a weekend. Mark says things escalated recently when they were out celebrating a colleague's birthday and Silvia asked him to come over for some "fun" afterward. Mark tells John he has tried to figure out a polite way to tell Silvia to back off, but so far Silvia has not gotten the hint.
- Does John have an obligation to report this information?
- If John is not sure, what should he do?

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68

Case Study

- A student, Ellie, reports to her Resident Director that another student, Grant, sexually assaulted her at a party last week.
- Does the Resident Director have an obligation to report this information?

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69



70

Responding to a Report

- Types of report recipients:
 - Title IX Coordinator and officials with authority to institute corrective measures on behalf of the institution
 - Confidential Resources
 - Professional and pastoral counselors
 - Others with state-law privilege
 - Not required to report any information*
 - Other Employees: Institution may designate reporting obligation:
 - Designate semi-confidential resources?
 - Designate employees who are required to report
 - Designate employees who are not required to report?

**NOTE: These individuals may have other reporting requirements under Clery Act and/or state law*

71

Case Study

- The employee, Mark, also shared his concerns about his colleague with Jenny, a counselor in the University's counseling center. Mark has been seeing Jenny for counseling for the past six months.
- Does Jenny have an obligation to report this information?
- How should Jenny respond to what Mark shared?

72

Duties of Confidential Resources

- Discuss reporting options and rights - Title IX Coordinator, law enforcement, campus security
 - Offer to assist with reporting
 - Discuss school's prevention of and response to retaliation
- Discuss/offer support services and interim measures
- Disclose institution's limited ability to respond if request for confidentiality
- Discuss the importance of preserving evidence
- State law may require reporting of non-identifying information

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73

Duties of Other Employees Who Are Required to Report

- If possible, before information revealed disclose:
 - Additional reporting requirement
 - Option to report to school and request confidentiality (school will consider but not guarantee)
 - Option for complainant to disclose to a confidential resource
- Only share information with individuals responsible for handling the institution's response (e.g., Title IX Coordinator, Deputy)

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74

Duties of Employees Who Are Not Required to Report



- Ask person reporting if they want the information shared with the Title IX Coordinator
- Only share information with individuals responsible for handling the institution's response (e.g., Title IX Coordinator, Deputy)

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75

Responding to a Report

- Title IX: Must promptly respond when
 - Institution has actual knowledge of
 - Sexual harassment
 - In an education program or activity of the institution
 - Against a person in the United States
- VAWA:
 - Allegations of sexual assault, domestic violence, dating violence, or stalking
 - Applies regardless of location of alleged conduct (on or off campus; in or out of the education program of activity; in or out of the U.S.)






76

76

Responding to a Report

- Response must treat complainant and respondent equitably by
 - Offering supportive measures to a complainant (with or without formal complaint)
 - Following a grievance process that complies with the regulations before imposing any disciplinary sanctions or other actions that are not supportive measures against a respondent







77

77

Responding to a Report

- Title IX Coordinator must promptly contact complainant (with or without formal complaint)
 - Inform complainant of the availability of supportive/interim measures with or without the filing of a formal complaint
 - Consider complainant's wishes with respect to supportive measures
 - Explain the process for filing a formal complaint
 - Notify complainant of right to report to law enforcement and offer help with report (VAWA)
 - Provide complainant with written notification of rights (VAWA)

78

78

Supportive Measures

- Offered to complainant and respondent
- Must be non-disciplinary, non-punitive
- Must be without fee or charge to the complainant or respondent
- Available before or after the filing of a formal complaint or where no formal complaint is filed
- Designed to restore or preserve equal access to recipient's education program or activity without unreasonably burdening the other party
- Including measures designed to protect safety of all parties or the educational environment, or deter sexual harassment
- Must maintain as confidential as long as confidentiality does not impair ability of the institution to provide measures

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79

Supportive Measures

- Examples:
 - Mutual restrictions on contact between the parties
 - Change academic or extracurricular activities, living, transportation, dining, and working situations
 - Access to resources, such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, legal assistance, visa and immigration assistance, campus escort services, increased security, and student financial aid
- If school does not offer these services, enter into MOU with local victim services provider, if possible

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80

Case Study

- Following a report of a potential sexual assault, you implement a mutual no contact directive between two students. The directive includes that each party may not enter the other party's residence hall. The respondent reaches out to you and asks you to amend the directive. Respondent says that he sometimes meets with classmates on the complainant's floor for a study group.
- How do you respond?

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81

Case Study

- The complaint resolution process involving the allegation of sexual assault concludes and respondent is found not responsible.
- Do you leave the no contact directive in place?

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82

Emergency Removal

- Institution may remove a respondent from the education program or activity on an emergency basis if institution:
 - Undertakes an individualized safety and risk analysis;
 - Determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal; and
 - Provides the respondent with notice and an opportunity to challenge the decision immediately following the removal
- Non-student employees may be placed on administrative leave during grievance process
- Provision does not modify any rights under the IDEA, Section 504 of the Rehabilitation Act, or the ADA

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83

**Supportive Measures—
Student Employee Leave**

- Requirements:
 - Must be paid/include no monetary loss
 - Must be non-disciplinary, non-punitive
 - Must not be unreasonably burdensome on respondent
 - Must be designed to restore or preserve equal access to recipient's education program or activity, including measures designed to protect safety of all parties or the educational environment, or deter sexual harassment
 - (Consider impact on educational benefits and opportunities)
- Alternatives:
 - Reassignment
 - Monitoring/supervising student employee
 - Emergency Removal (after risk analysis, can terminate)

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84

Case Study

- Would you consider emergency removal of the respondent in the following situations?
 - Two complainants have reported that respondent sexually assaulted them in separate incidents. Each complainant stated that they were acquaintances with the respondent and hung out with him at a party before going back to his apartment. One complainant stated that she had been drinking and would not have consented to sexual contact if she had been sober. The other complainant stated that she was okay with making out with respondent, but he just kept progressing things and she did not know how to say no.
 - Complainant reports that her ex-boyfriend will not leave her alone. She provides numerous screenshots of text messages where he asks where she is and tells her to meet him in various places. Complainant spoke to Respondent's RA and the RA told Respondent to stop contacting Complainant. Respondent went to Complainant's dorm the next day and yelled at her to open the door until she called campus safety.

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85

Case Study


- Would you consider emergency removal of the respondent in the following situation?
 - Complainant, a student, reports that a faculty member asked her if she would want to go out with him after the Complainant graduated.

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86


Responding to a Report

- Other obligations:
 - Notify campus security, if necessary
 - Clery report, if necessary




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87

Responding to a Report—Written Notification of Rights 

- Written notification to complainants about—
 - Options for, available assistance in, and how to request changes to academic, living, transportation, and working situations, if so requested by the complainant and if such accommodations are reasonably available, regardless of whether the complainant chooses to report the crime to campus police or local law enforcement




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88


Responding to a Report—Written Notification of Rights 

- Written notification to complainants about (cont.)—
 - Possible sanctions and protective measures
 - Procedures individual should follow
 - Disciplinary procedures
 - Confidentiality
 - Existing resources for counseling, etc.
 - Supportive/interim measures




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89

Responding to a Report—Written Notification of Rights 

- Inform complainants that school officials will take steps to prevent all forms of retaliation and take strong responsive action if it occurs



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90

Case Study

- John (the academic advisor) reports what Mark shared about his colleague, Silvia.
- You meet with Mark to discuss the report. Mark says that Silvia has been making him more and more uncomfortable. Mark says that Silvia also asked him to review a new dating profile she put together for an online dating site and asked whether he'd be interested in the profile. Mark says that he does not want Silvia to become his supervisor.
- You discuss Mark's right to bring a complaint but he says he does not want to go through a "big process." Mark tells you he just wants Silvia to leave him alone and does not want Silvia to get the promotion to supervisor.
- What are the options for next steps?

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91

Responding to a Report—Requests for Confidentiality or No Action

- Recommended Approach:
 - Factors to consider
 - Seriousness of the alleged harassment
 - Increased risk of additional violence by the respondent
 - Other complaints about the same respondent
 - History of violence from arrests/records from prior school
 - Respondent threatened further violence
 - Increased risk of additional violence under similar circumstances
 - Pattern of perpetration at a given location or with a certain group
 - Whether sexual violence was perpetrated with a weapon
 - Age of the complainant

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92

Responding to a Report—Requests for Confidentiality or No Action

- Recommended Approach:
 - Factors to consider (cont.)
 - Whether school has other means to obtain evidence (security footage, eyewitness or physical evidence)
 - Notice will still need to identify parties involved
 - Rights of the respondent to receive information about the complainant and the allegations if a formal proceeding with sanctions may result
 - Whether the report alleges sexual harassment by an employee against a student
 - Whether the respondent is in a position of authority

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93

Responding to a Report—Requests for Confidentiality or No Action

- Recommended Approach:
 - If the school determines it *can* honor the request for confidentiality/no action
 - Continue to offer supportive measures
 - If the school determines it *cannot* honor the request for confidentiality/no action
 - Inform the complainant prior to proceeding
 - Continue to offer supportive measures
 - Title IX Coordinator signs formal complaint and begins process

94

Report vs. Formal Complaint

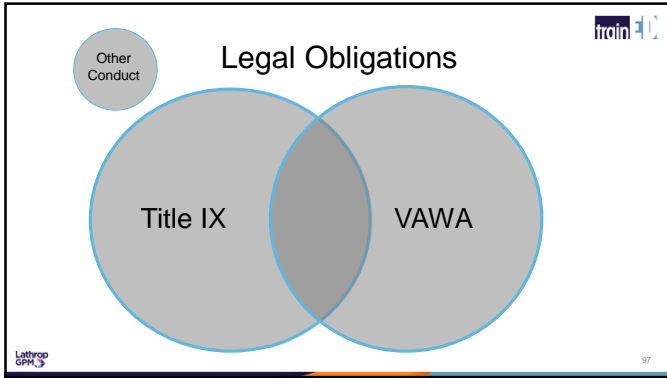
- Report
 - Initiates obligation to respond, including offering supportive measures
 - Complainant's identity may be kept confidential from respondent
- Formal complaint
 - Initiates grievance process
 - Cannot be filed anonymously
 - Requires complainant's physical or digital signature or otherwise indicates that the complainant is the person filing the complaint
 - Title IX Coordinator can sign a complaint
 - Grievance process requires that complainant's identity be disclosed to respondent, if known

95

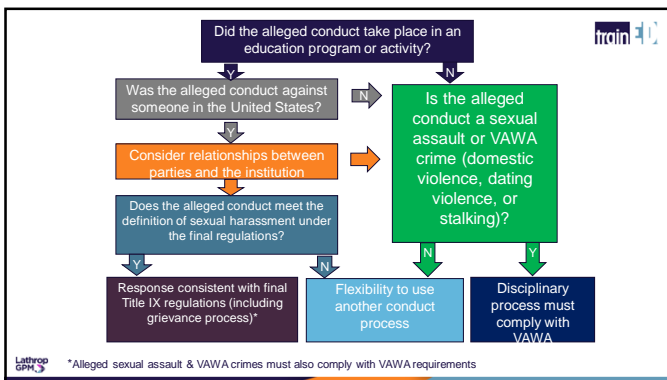
Determining Title IX vs. Non-Title IX Matters

- Factors to consider
 - Type of alleged conduct – sexual harassment?
 - Location and context of alleged conduct
 - within education program or activity?
 - against a person in the United States?
 - Relationship between parties and institution

96



97



98

Case Study

- What legal obligations apply to the following matters?
 - A student alleges that another student sexually assaulted him at a party in a privately owned apartment off campus
 - A student alleges another student has engaged in conduct that is scaring her, including sending her multiple messages on social media, which she received while she was in class, and parking his car in front of her parents' house off campus
 - An employee reports that her supervisor has been pressuring her to go on a date with him
 - A student reports that another student took a picture of him as he was getting out of the shower

99

Q & A




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100

100

Informal Resolution


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101

101

Informal Resolution

- When should an institution offer an informal resolution process?
 - Factors to consider
 - Nature of alleged incident
 - Other allegations against same respondent
 - What sanctions would be necessary if the allegation is true
 - Whether complainant is willing to fully participate in a formal process
 - Whether institution could proceed with a formal process without complainant
 - Reminder: Cannot offer if complainant is a student and respondent is an employee
 - Institution is never required to offer informal resolution

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102

102

Informal Resolution

- Legal requirements
 - VAWA: No specific requirement
 - Title IX:
 - Any time prior to determination, may facilitate informal resolution process, such as mediation, if certain requirements are met

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103

Informal Resolution

- Title IX legal requirements
 - Prior to informal resolution, provide parties with written notice of the allegations

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104

Informal Resolution Process

- Title IX legal requirements
 - Prior to informal resolution, provide parties with written notice of
 - Requirements of the informal resolution process including circumstances when it precludes the parties from resuming a formal complaint for the same allegations
 - Provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint
 - Consequences resulting from participating in the informal resolution process, including records that are maintained and could be shared
 - Obtain parties' voluntary written consent to informal process

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105

Informal Resolution

- Title IX legal requirements
 - May not offer informal resolution unless a formal complaint is filed
 - May never require the parties to participate in an informal resolution process
 - May not condition enrollment/continuing enrollment, employment/continuing employment, or enjoyment of any other right on waiver of the right to an investigation and adjudication of formal complaint
 - May not offer or facilitate informal resolution to resolve allegations that an employee sexually harassed a student

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106

Structuring an Informal Resolution Process

- Who facilitates an informal resolution process?
 - Title IX Coordinator? Deputy Title IX Coordinator?
 - Another member of the Title IX team?
- If someone other than Title IX Coordinator, consider limited role for Title IX Coordinator to ensure consistency across different cases
- Legal requirements
 - Appropriately trained
 - Free from conflict of interest and bias
 - Impartial

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107

Structuring an Informal Resolution Process

- What is an informal resolution process?
 - No particular process required under Title IX
 - Recommended practice
 - Facilitator meets with each party to determine what they are looking for and what they will agree to as part of an informal resolution
 - Communicate options between the parties
 - Institution should have a role in determining whether particular matter is appropriate for informal resolution and what the appropriate resolution will be

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108

Structuring an Informal Resolution Process

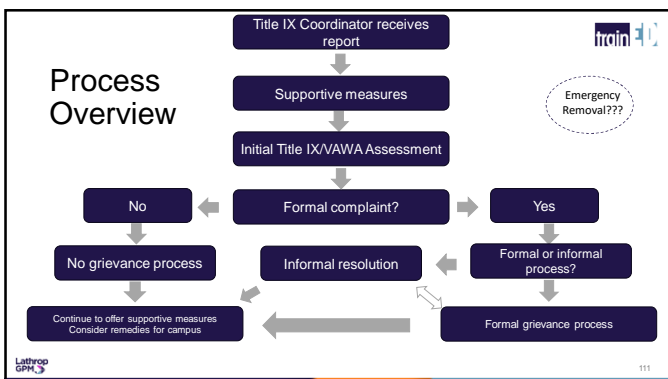
- Factors to consider when using informal resolution process
 - Is there an admission from the respondent?
 - Will this be a final resolution?
 - What information will be shared during the informal process?
 - Can the resolution be used in future discipline decisions?
 - What records will be maintained and could be shared?
 - What action is necessary to stop the harassment, prevent its recurrence, and address its effects?

109

Structuring an Informal Resolution Process

- What does the outcome of the informal resolution process look like?
 - Possible terms
 - No contact directive (mutual or one-sided)
 - Required training/education
 - Required counseling
 - Probation
 - Temporary prohibition on leadership positions/awards
 - Leave of absence from institution
 - Apology letter?
 - Other

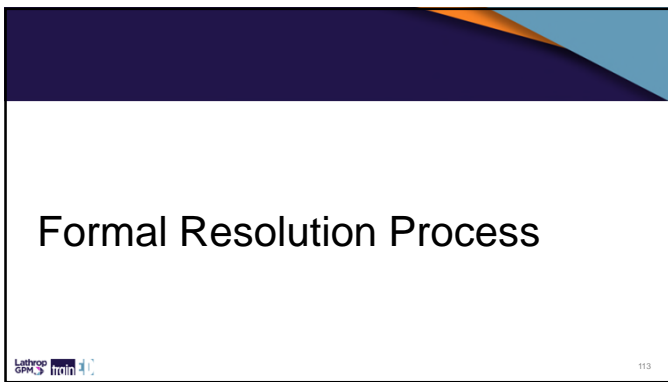
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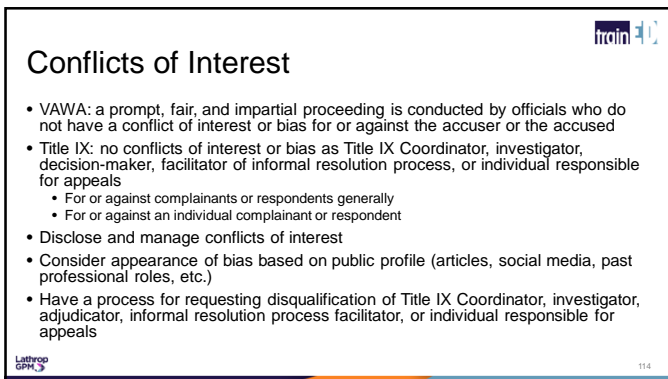
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112



113



114

Structuring the Complaint Resolution Process

- Process options
 - One process: Use the same procedures for all sexual misconduct cases (including live hearings)
 - Hybrid: Use the same procedures for all Title IX and VAWA cases (including live hearings) and a separate process for non-Title IX/non-VAWA cases
 - Separate processes: Create separate procedures for Title IX, VAWA, and non-Title IX/non-VAWA cases

115

Same Procedures for Title IX and VAWA

- Pros
 - Clarity on the process that applies to allegations of sexual misconduct
 - Less risk of due process litigation
- Cons
 - Chilling effect of live hearing in all cases
 - Cost of additional procedural requirements, including hearings
 - Cannot explain hearing process as legally required in all cases
 - Potential FERPA issues with information sharing in non-Title IX cases
 - Less flexibility

116

Separate Procedures for Title IX and VAWA

- Pros
 - Fewer hearings (less chilling effect; less administrative burden/cost)
 - Clear FERPA exceptions for each process
 - Can rely on legal requirements for each process (not requiring additional process beyond legal obligations)
- Cons
 - More analysis needed to determine what process will apply
 - Complications when additional facts arise and in cases with multiple allegations
 - Confusing for parties
 - Risk of due process litigation seeking a hearing requirement

117

Other Considerations

- If using a non-hearing process for sexual misconduct cases that do not fall within Title IX, consider discontinuing the use of hearings in other student conduct matters that involve two parties

Lathrop GPM 3 118

118

Determining Which Process Applies

- Analyze when report or complaint is received and throughout the process
- Who determines which process applies
 - Title IX Coordinator (with assistance from investigator)
 - Another individual?
- If separate Title IX and VAWA procedures, follow same investigation process regardless of Title IX or VAWA up until information sharing stage
 - Title IX: Hard copy or electronic format of directly related evidence
 - VAWA: Access to evidence that will be shared with the decision-maker
- When in doubt, err on side of following Title IX process

Lathrop GPM 3 119

119

Notice of Allegations

- Upon formal complaint, provide written notice to known parties, including:
 - Notice of grievance process, including any informal resolution process
 - Notice of the allegations, including sufficient details known at the time and with sufficient time to prepare response before initial interview
 - Identities of the parties involved, if known
 - Conduct allegedly constituting sexual harassment
 - Date and location of the alleged incident, if known

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120

Notice of Allegations

- Upon formal complaint, provide written notice to both parties, including statements that:
 - Respondent is presumed not responsible
 - Determination of responsibility is made at conclusion of grievance process
 - Right to advisor of choice who may be but is not required to be an attorney
 - Parties may inspect and review evidence *as permitted in sexual misconduct policy*
 - Inform parties of any policy provision that prohibits knowingly making false statements or knowingly submitting false information during the grievance process
- Provide notice of *additional* allegations about the complainant or respondent that arise during process

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121

Dismissal of Formal Complaint

- **Mandatory Dismissal under Title IX**
 - Must dismiss formal complaint if alleged conduct
 - even if proved, would not constitute sexual harassment
 - did not occur in the institution's education program or activity or
 - did not occur against a person in the United States
 - Such dismissal does not preclude action under another provision of institution's code of conduct

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122

Dismissal of Formal Complaint

- **Discretionary Dismissal under Title IX**
 - May dismiss formal complaint if at any time during the investigation or hearing
 - complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations, therein
 - respondent is no longer enrolled or employed by the recipient or
 - specific circumstances prevent the recipient from gathering sufficient evidence to reach a determination as to the formal complaint or allegations therein

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123

Dismissal of Formal Complaint

- Notice of Dismissal: Upon dismissal (mandatory or discretionary), institution must promptly send written notice of dismissal and reasons for the dismissal simultaneously to the parties

Lathrop GPM 3 124

124

Case Study

- Mary made a complaint alleging that Shawn sexually assaulted her in September of 2024. After the investigator has interviewed both parties, Shawn emails you to say that he is withdrawing from the University. Shawn asks you if the University plans to continue the process and whether there is any way to resolve this.
- What are your options?
- What factors should you consider?

Lathrop GPM 3 125

125

Case Study

- Tristan, a freshman student, made a complaint regarding his RA, Joey, who is a junior. Tristan alleged that Joey would frequently share information about his own sexual history and encourage Tristan to do the same. Tristan says that he tries to change the subject, but Joey is persistent in bringing up sexual topics. When he makes his complaint, Tristan attached screenshots of multiple text messages Joey sent him, including among others:
 - "Saw that blonde leaving your room last night! How far did you get?"
 - "Stuck out last night. Blue balls are gonna kill me."
- Tristan also provided a copy of an email Joey sent him with a link to a porn site.

Lathrop GPM 3 126

126

Case Study

- As you are drafting the notice of allegations for Tristan's complaint, he emails you as follows:
 I want to withdraw my complaint. I've thought about this more and do not want Joey to find out.
- What are your options?

Lathrop GPM 127

127

Consolidation of Formal Complaints

- Title IX: An institution may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the *allegations of sexual harassment arise out of the same facts or circumstances*
- VAWA: No specific guidance

Lathrop GPM 128

128

Notice of Meetings

- Title IX: Written notice to the party whose participation is invited or expected of the
 - Date
 - Time
 - Location
 - Participants
 - Purpose
 of all hearings, investigative interviews, or other meetings with a party, with sufficient time for the party to prepare to participate
- VAWA: Timely notice to the other party of meetings that are part of the disciplinary process

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129

Notice of Delay

- Reasonably prompt timeframes
 - Including timeframes for filing and resolving appeals and informal resolution processes
- Temporary delay or extension of timeframes for good cause, which may include
 - Absence of parties, a party's advisor, or witnesses
 - Concurrent law enforcement activity
 - Need for language assistance or accommodations of disability
- Must provide written notice to parties of the delay or extension and the reason for it
 - DOE guidance: also include anticipated length of delay
- Some timeframes are set by the regulations (Title IX)

Lathrop GPM 130

130

Case Study

- Mark (the Financial Aid Counselor) ultimately brings a formal complaint against Silvia. You issue a notice of allegations based on Mark's complaint, including an allegation of Title IX Hostile Environment Sexual Harassment.
- After Mark's initial interview with the investigator, the investigator sends you the following email:
 - I just wanted to make you aware that Mark stated that on September 12, 2024, when he walked into the Academic Center, Silvia told him she liked his new pants and said "you should wear slim-fit pants more often."
- What are your next steps?

Lathrop GPM 131

131

Case Study


- There is another complaint resolution process ongoing involving Ellie Ellison's complaint against Grant Grayson. Ellie alleged that on September 20, 2024, in Grant's University owned off-campus apartment, Grant engaged in sexual intercourse with Ellie when Ellie was incapacitated due to consumption of alcohol.
- The investigator calls you during her interview with Ellie. The investigator is interviewing Ellie via Zoom and Ellie told the investigator that her mom is also present. The investigator asks you how to proceed.
- How do you respond?

Lathrop GPM 132

132

Advisors

- VAWA requires:
 - Proceeding must “provide the accuser and the accused with the same opportunities to have others present during any institutional disciplinary proceeding, including the **opportunity to be accompanied to any related meeting** or proceeding by the advisor of their choice”
- Title IX requires:
 - Allow advisor of choice, who may be but is not required to be an attorney
 - May establish equal restrictions on advisors’ participation



Lathrop GPM 133

133

Advisors

- Advisors, particularly attorney advisors, have become increasingly common participants
- Tips for addressing disruptive advisors:
 - Inform parties about restrictions on advisors in advance
 - “Potted plant”
 - No direct communication (orally or in writing) with Title IX Coordinator, Deputy Coordinator(s), Investigator(s) Adjudicator(s), Appeal Officer(s)
 - Must keep information confidential
 - Rules at the hearing
 - Signed advisor agreements – acknowledge role and restrictions
 - Be prepared to enforce the agreement parameters
 - Hold the party responsible for the advisor’s actions
 - Don’t be afraid to consider pausing the process if the advisor continues to be disruptive
 - Institutions may remove or dismiss advisors who become disruptive or who do not abide by the restrictions on their participation
 - Be consistent

Lathrop GPM 134

134

Case Study

- The investigator updates you that she was unable to complete Ellie’s initial interview during their original meeting. The investigator has scheduled another interview with Ellie for the next day. The investigator forwards you an email she received from Ellie’s mom stating:
 - Under the new Title IX rules, my daughter is entitled to have an additional person present in addition to an advisor. I will be attending Ellie’s interview tomorrow along with our family attorney.
- How do you respond?

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135

Case Study

- Returning to Mark's complaint against Silvia (the Financial Aid Office matter), that case is also being investigated. The investigator sends you the below update:

Hi Coordinator,
 I was scheduled to meet with Silvia tomorrow, but she just stopped by my office. She said she was really stressed about this and just wanted to get some things off her chest. She denied a lot of what Mark alleges and said they are just friends. Just wondering if and how I should document that meeting. Also should I still meet with Silvia tomorrow?
 Thanks,
 Investigator

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136

Case Study

- There is another ongoing complaint resolution process involving a complaint from a student against her mechanical engineering professor. The student alleges the professor made sexual comments in class.

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137

Case Study

- During the investigation into the student's complaint, you receive an email from the Mechanical Engineering Department Chair. The email states:
 - I'm writing on behalf of the entire Mechanical Engineering Department. We are very concerned by the false allegations against our esteemed colleague, Robert Robinson. Many of us have personally observed Professor Robinson teaching his courses and have never witnessed anything remotely inappropriate. This process has caused significant stress and anguish for Professor Robinson and we call upon the University to dismiss these allegations and restore Professor Robinson's well deserved reputation.
- What are your next steps?

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138

Case Study

- The investigators in the Ellie/Grant matter (student sexual assault complaint) and the Mark/Silvia matter (employee hostile environment complaint) are both nearing completion of their interviews.
- What is the next step in each matter?

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139

Provide “Directly Related” Evidence to Parties*


- *Prior to completion of investigation report, must provide equal opportunity to inspect and review any evidence obtained that is directly related to the allegations*
 - Includes evidence upon which the institution does not intend to rely in reaching a determination and inculpatory or exculpatory evidence whether obtained from a party or other source
 - Must send to party and party’s advisor in hard copy or electronic format
 - May use a file sharing platform that restricts downloading or copying
 - May prohibit photographing/copying
 - May require signing a non-disclosure agreement
 - May not limit time for review (besides the 10 days)
 - May not require supervision
 - Party must be given at least 10 days to submit a written response
- Investigator must consider that written response before completing investigation report
- Must make all that evidence available at any hearing

Lathrop GPM *Title IX Only 140

140

Provide “Directly Related” Evidence to Parties*

- Types of evidence that must be provided to parties:
 - Documents collected from the parties
 - Text messages
 - Emails
 - Social media posts and messages
 - Photos and videos
 - Other evidence
 - Police reports
 - Security footage
 - Wifi access point records
 - Party and witness interviews



Lathrop GPM *Title IX Only 141

141

Provide “Directly Related” Evidence to Parties*

- Sexual history = include if directly related
 - Protections related to complainant’s prior sexual history do not apply at this stage
 - Still analyze whether such evidence is “directly related to the allegations”
- Privileged information = only with waiver of privilege
- Treatment records = only with written consent

Lathrop GPM 3 *Title IX Only 142

142

Provide “Directly Related” Evidence to Parties*

- Privileged information
 - Do not require, allow, rely upon, otherwise use questions or evidence that constitute or seek disclosure of, information protected under a legally recognized privilege, unless person holding such privilege has waived the privilege
- Treatment records
 - Institution cannot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the school obtains that party’s voluntary, written consent to do so.

Lathrop GPM 3 *Title IX Only 143

143

Provide “Directly Related” Evidence to Parties*


- May not categorically prohibit certain types of evidence if directly related (and later if relevant):
 - Lie detector test results
 - Character evidence/witnesses
 - Expert reports/witnesses
 - Prior bad acts (e.g., prior policy violation by respondent)
 - Allegations of similar misconduct
- But can have policy for how much weight and credibility decision-makers will give these types of evidence

Lathrop GPM 3 *Title IX Only 144

144

Provide “Directly Related” Evidence to Parties*


- May permit or require the investigator to redact information that is not directly related to the allegations (or that is otherwise barred from use under the final regulations)
 - Redactions are limited to information not directly related or that is otherwise specifically barred
 - May not redact other information, such as confidential, sensitive, or prejudicial information, if it is directly related to the allegations

Lathrop GPM  *Title IX Only 145

145

Provide “Directly Related” Evidence to Parties*


- Maintain records of any information withheld and the rationale for doing so
- Investigator and Title IX Coordinator should both be involved in determination of what is directly related

Lathrop GPM  *Title IX Only 146

146

Provide “Directly Related” Evidence to Parties*

- Ensuring privacy
 - May require parties and advisors to:
 - Use the evidence (and investigation report) only for purposes of the grievance process and
 - Require them not to further disseminate or disclose these materials
 - May use a non-disclosure agreement
 - May use digital encryption or other practices to address privacy concerns

Lathrop GPM  *Title IX Only 147

147

Prior Sexual History

- Complainant's sexual behavior or predisposition are not relevant unless:
 - Such questions and evidence are offered to prove someone other than respondent committed the alleged conduct or
 - The questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent

Lathrop GPM 148

148

Provide "Directly Related" Evidence to Parties*

- Steps following parties' review
 - Review parties' responses
 - Consult with investigator to decide whether any additional action is needed
 - Investigator should consider parties' viewpoints about whether the evidence directly related to the allegations is relevant and therefore whether to include it in the investigation report
 - May provide a copy of each party's written response to the other party, but that is not required

Lathrop GPM *Title IX Only 149

149

Investigation Report

- Must create investigative report that fairly summarizes **relevant** evidence
- Complainant's sexual behavior or predisposition are **not relevant unless**:
 - Such questions and evidence are offered to prove someone other than respondent committed the alleged conduct or
 - The questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent
- Investigator should not include any information about the complainant's sexual history in the investigation report, unless it falls under one of these exceptions.

Lathrop GPM 150

150

Investigation Report

- Parties must be provided:
 - VAWA: information used in the decision-making process – access required
- Title IX :
 - Investigation report:
 - Must send hard copy or electronic format to parties and advisors
 - May use a file sharing platform that restricts downloading or copying
 - May prohibit photographing/copying
 - May require signing a non-disclosure agreement
 - May not limit time for review
 - May not require supervision
 - Must be provided at least 10 days prior to live hearing
 - Opportunity to submit written response

151

Live Hearing

- General requirements under Title IX
 - Must provide live hearing
 - Permit each party's advisor to ask the other party and witnesses "all relevant questions and follow-up questions"
 - If party does not have an advisor, institution must provide one for cross-examination
 - If a party or witness does not submit to cross-examination at hearing, their statements cannot be considered by decision-maker(s)

152

Decision-Maker(s)

- May have single decision-maker or a panel of decision-makers
- If a panel of decision-makers, may appoint one decision-maker to make relevancy determinations at the hearing
- May appoint Title IX Coordinator or another individual who is not a decision-maker to enforce procedural rules at the hearing
 - Decision-maker(s) must still determine relevancy issues

153

Preparation for Hearing

- Determine hearing format and arrange technology
 - May conduct with all parties physically present in the same location
 - At the request of either party, institution must provide for live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party or witness answering questions
 - Witness cannot demand to be in a separate room, unless that witness alleges they are also a victim of respondent (institution can permit witness to be in a separate room upon request)
 - May conduct virtually (for all parties, witnesses, and other participants), with technology enabling participants simultaneously to see and hear each other
 - Video is required; phone is insufficient

Lathrop GPM 154

154

Preparation for Hearing

- Decision-maker(s) should review adjudication file
- Decision-maker(s) identify ultimate questions that will need to be decided
 - Consider questions or topics that may come up and any anticipated relevancy issues
- Decision-maker(s) determine whether any additional information is needed to make the decision
 - Identify witnesses to request if additional information is needed or if credibility is at issue
 - **CAUTION:** Don't base credibility on demeanor
- Parties identify additional witnesses
 - Request that these witnesses make themselves available for the hearing

Lathrop GPM 155

155

Attendance at Hearing

- Parties may be accompanied only by their advisors and other persons for reasons "required by law"
 - Institution must keep confidential the complainant, respondent, and any witness except as may be permitted by FERPA, as required by law, or to carry out the grievance process
 - Limits institution's ability to authorize the parties to be accompanied to the hearing by individuals other than their advisors
 - A person assisting a party with a disability, or a language interpreter, may attend because presence is required by law and/or necessary to conduct the hearing

Lathrop GPM 156

156

Hearing: School-Appointed Advisors

- Can request that the parties inform school in advance whether they have an advisor
 - If party does not have an advisor at the hearing, still required to provide an advisor even if party stated that they would have one
 - May want to have an advisor for each party on standby so that delaying the hearing is not necessary
- School-appointed advisor
 - Role is limited to relaying a party's questions
 - No particular skills, qualifications, or training is required
 - Does not need to be neutral or avoid conflicts of interest
 - If a party refuses to work with an assigned advisor – the party forfeits his or her right to cross-examination

Lathrop GPM 157

157

Hearing: Relevancy Determinations

- Decision-maker may hear arguments regarding relevancy of a question on the spot or may tell parties to reserve arguments for appeal (incorrect relevancy determination could be an alleged procedural error on appeal)
- Must allow question if relevant, even if misleading or assumes facts not in evidence
- Can establish rule that duplicative questions are not relevant
- Exclude questions with caution

Lathrop GPM 158

158

Hearing: Cross-Examination

- Party or witness who does not appear at the hearing or refuses to answer questions at the hearing
 - Decision-maker(s) may still rely on previous statements from party/witness who is absent or refuses to answer one or more questions
 - Consider weight to be given to statements (put in policy)
 - Consider allowing party or advisor to share questions they would have asked a party or witness who is absent or will not submit to cross-examination
 - Decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions

Lathrop GPM 159

159

Hearing: Cross-Examination

- Party or witness who does not appear at the hearing
 - Advisor may conduct cross-examination on behalf of party even if party is not present
- If one party does something to wrongfully procure absence of a party or witness, that is likely retaliation and the school must remedy
- School also cannot coerce unwilling participant
 - Be careful with any requirement that a student or employee cooperate with grievance process
 - Discipline for not attending hearing may constitute retaliation

Lathrop GPM 3 160

160

Hearing: Other Procedural Rules

- May establish additional rules that apply equally to both parties
 - Cross-examination must be respectful, non-abusive, not intimidating
 - Limit evidence at hearing to evidence that was gathered or presented as part of the investigation (or otherwise prior to the hearing)
 - Whether investigator may be called as a witness
 - Process for making objections to the relevance of questions and evidence
- Other procedures at the hearing
 - Opening statements by parties or advisors
 - Closing statements by parties or advisors
- Reasonable time limitations on hearings

Lathrop GPM 3 161

161

Hearing: Other Procedural Rules



- Some procedural rules are prohibited
 - Cannot prohibit a party from conferring with his or her advisor during the hearing
 - Likely can prohibit conferring when a question is pending
 - Could also discourage from conferring when a question is pending by warning that such conduct will be considered when weighing the party's credibility
 - Cannot prohibit character evidence, lie detector test results, evidence that is unduly prejudicial, or evidence of prior bad acts
 - Decision-maker may determine how much weight to give such evidence

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162

Case Study

- During the live hearing in the Ellie/Grant matter, Ellie’s attorney-advisor tells the Hearing Officer that during the hearing, she received a response to a records request she made to law enforcement. Ellie’s advisor states that she received a police report including a statement from a witness, Sarah. Ellie’s advisor says that Sarah is a part time Uber driver and drove Ellie and Grant from a party to Grant’s apartment the night of the alleged incident and can speak to Ellie’s intoxication level. The investigator did not speak with Sarah during the investigation. The Hearing Officer pauses the live hearing and calls you.
- What are the next steps?







163

163

Sanctions and Remedies

- Consider who will decide the sanctions and how
 - Consider limited role of Title IX Coordinator
- Policy must list *all* possible sanctions
 - The list of sanctions must be specific, including the type and length of suspensions and any requirements that must be met for reinstatement
- Policy must describe the range of remedies
 - Title IX Coordinator is responsible for effective implementation of any remedies
 - Remedies must be designed to restore or preserve equal access to the institution’s education program or activity
 - May include the same individualized services as “supportive measures”
 - Do not need to be “non-disciplinary” or “non-punitive” and do not need to avoid burdening the respondent
 - Consider remedies for broader student population







164

164

Notice of Determination

- Identification of the allegations potentially constituting sexual harassment
- Procedural steps since complaint
 - Notices to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, hearings held
- Findings of fact
- Conclusion regarding application of code of conduct to the facts
- Statement of and rationale for the result as to each allegation
 - Determination of responsibility
 - Any disciplinary sanctions imposed on respondent
 - Whether remedies will be provided to complainant
- Appeal information
- Simultaneous delivery to the parties

165

165

Notice of Determination

- Becomes final either the date the parties receive the written determination of the appeal or the date on which an appeal would no longer be timely
- Sanctions may not be imposed until determination is final

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166

Appeals Under Title IX

- Must be offered to both parties
 - From a determination regarding responsibility
 - From a recipient's dismissal of a formal complaint or any allegations therein
- Required bases:
 - Procedural irregularity that affected the outcome of the matter;
 - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter;
 - The Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter;
- May offer an appeal equally to both parties on additional bases.

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167

Appeals Under Title IX

- Requirements
 - Notify other party in writing when an appeal is filed
 - Appeal officer is different than Title IX Coordinator, investigator and decision-maker at hearing
 - No conflict of interest or bias
 - Individuals responsible for appeal must receive training
 - Give both parties reasonable, equal opportunity to submit written statement in support of, or challenging, the outcome
 - Written decision describing result of appeal and rationale
 - Simultaneous delivery of result to parties

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168

Appeals Under VAWA

- Not required, but if offered, must do so equally
- Transparency, equality, notice requirements from main process will apply to appeals
- Examples include:
 - Right to advisor
 - Notice of meetings
 - Access to information used by appeals panel/individual
 - Simultaneous notice of outcome

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169

Additional Required Post-Determination Notices

- For sexual assault and VAWA crimes, your institution must provide simultaneous notice to both parties of—
 - Any change to the results that occurs prior to the time that such results become final
 - When such results become final
- For Title IX, your institution must provide concurrent written notice of—
 - The outcome of any appeal

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170

Case Study

- The decisionmaker finds Silvia responsible for hostile environment harassment. Silvia appeals alleging that the decisionmaker should not have considered conduct that occurred off campus and outside of work hours. Silvia also alleges that the investigator intentionally delayed the investigation, which led to key witnesses being unavailable.
- Does Silvia’s appeal state a permissible ground for appeal?
- If so, what information might you provide to the appeal officer?

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171

Role of Title IX Coordinator During Complaint Process

- Conduct intake meeting
- Assess report/complaint
- Determine which process applies (if multiple)
- Determine who will provide ongoing communication with the parties throughout the complaint process
 - Notify parties of delays and reason for delays
 - Notify parties of their own and other party's meetings
- Ensure that parties receive adequate notice of any new allegations
- Ensure advisor agreements are signed (if any)
- Ensure non-disclosure agreements are signed by parties and advisors (if any)
- Conduct informal resolution?

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172


Role of Title IX Coordinator During Complaint Process

- Oversee process to ensure compliance with policy and designated time frames
- Investigate?
 - Beware of conflicts when filling multiple roles
- Review investigation report, party responses, and rebuttals
 - Redact impermissible content
 - Evaluate whether further investigation is necessary
- Cannot adjudicate or decide appeal (Title IX)

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173

Case Study



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174

Case Study

- One of your investigators has been working on an investigation involving an allegation of Title IX hostile environment harassment by a student. The investigator met with each party and three witnesses. The investigator then unexpectedly quits his employment.
- How do you proceed?

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175

Case Study

- As you review the information gathered by the former investigator, you discover that the investigator met with a witness but there is no audio recording of that interview.
- How do you proceed?

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176

Case Study

- You receive a new complaint from a nurse in the institution's health center, Michael. Michael alleges the following:
 - His supervisor has made several comments indicating that women are better suited to the nursing profession, especially in higher education.
 - His supervisor has made racially insensitive comments about Michael.
 - His supervisor has denied multiple vacation requests but has granted similar requests for his colleagues.
 - His supervisor frequently comments on his body and the appearance of his coworkers, including telling him he "looks sexy" in certain outfits
- How do you proceed?

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177

Case Study

- You receive a report via the institution's online report form stating:
You have a predator attending your school next year. Jimmy Johnson raped me last year. Please take immediate action to protect your students.
- You confirm that Jimmy Johnson is an admitted student who will be attending the institution when the fall semester begins in two weeks.
- How do you proceed?

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178

Q & A



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179

Upcoming Trainings

- Title IX/VAWA Investigator Training Under the 2020 Title IX Regulations on August 1, 2024
- Confidential Resources, First Responder, and Campus Safety Training on August 7, 2024
- Conducting an Informal Resolution Under Title IX/VAWA on August 28, 2024
- Non-Hearing Adjudicator Training Under Title IX/VAWA on September 9, 2024
- Supplemental Decisionmaker Training on Live Hearings on September 23, 2024
- Conducting a Live Hearing Under Title IX/VAWA on September 24, 2024
- Title IX/VAWA Appeal Officer Training on October 10, 2024

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180
