

# Welcome

## UT Systemwide Title IX Annual Training

The University of Texas System  
Presented by Littler Mendelson  
August 4-5, 2021



## Presenter Introductions



## Darren Gibson, J.D.



### Focus Areas:

- Higher Education
- Investigations
- Litigation & Trials
- Discrimination & Harassment
- Corporate Compliance & Ethics
- Whistleblowing & Retaliation

## Jacqueline Phipps Polito, J.D.



### Focus Areas:

- Higher Education
- Investigations
- Litigation & Trials
- Discrimination & Harassment
- Class Actions
- Healthcare

## Erin A. McNamara, J.D.



### Focus Areas:

- Discrimination & Harassment
- Litigation & Trials
- Whistleblowing & Retaliation
- Leaves of Absence & Disability Accommodation
- Business Recruiting and M&A

## Tara Param, J.D.



### Focus Areas:

- Labor & Employment
- Litigation & Trials
- Class Actions
- Family Law

## What to Expect

1. **Accessibility:** Auto-Caption feature is available; users can self-activate this feature (located at the bottom).
2. **Questions:** Please use the Chat feature to submit questions to the presenters (panelists) or host(s).
3. **Breaks:** Please take as needed; scheduled breaks will occur throughout each day.
4. This will be a **live training only**; there will be no audio/video recording. A Zoom transcript of the training will not be activated.
5. **Training Materials:** PPT slides will be made available to all Attendees.



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## Attendance

1. **Attendance Form:** Complete one time using the link in Chat.
2. Attendees will receive an **attendance confirmation** after the training.
3. **Attorneys Only:**
  - Texas CLE's will be available.
  - Since you'll need to submit the **total hours attended** on the Attendance Form, you may want to hold off and submit your Attendance Form **at the end of Day 2 (August 5)**.



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## UT System Training Opportunities: Fall 2021

### Open session topics that will be offered:

- SHSM Prevention & Response Tools
- Case Management Introduction (Part 1)
- Case Management Scenarios (Parts 2-3)
- Crisis Management & Threat Assessment
- Investigations
- Informal Resolutions
- Sexual Assault, Consent & Incapacitation
- Hearing Officer Role
- Advisor Role
- University Rep Role in Hearings
- Appellate Officer Role



# UT System Title IX Training

## Title IX Basics

Presenters:

Jacqueline Phipps Polito

Tara Param

August 4, 2021

**Littler**



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THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

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## Agenda

- ✓ Overview and Scope of Title IX
- ✓ Key definitions
- ✓ Initial Report and Supportive Measures
- ✓ Formal Complaint Process
- ✓ Investigation
- ✓ Grievance Process
- ✓ Appeal
- ✓ The Future of Title IX

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## Title IX of the Education Amendments of 1972

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, *et seq.*

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## Scope of Title IX

- Applies to Title IX sexual misconduct where:
  - Complainant (alleged victim) or Respondent (alleged perpetrator) is enrolled in classes or employed by the institution and
  - The conduct allegedly occurred in an education program or activity and
  - Against a person in the United States.

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## Scope of Title IX: “Education Program or Activity”

- Any location, event, or circumstance over which the recipient exercises substantial control over both the respondent and the context in which the sexual harassment occurs.
- Includes all education programs or activities, whether occurring on or off-campus, and any building owned or controlled by a student organization that is officially recognized by a postsecondary institution (such as a fraternity or sorority house).

34 CFR § 106.44(a)

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## Alternative Processes Still Available

- Other misconduct procedures continue to be available to students and employees for matters that are not required to be addressed by Title IX.
- “[Mandatory dismissal of a Formal Complaint] does not preclude action under another provision of the recipient’s code of conduct.” 34 CFR§106.45(b)(3).
- However, “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 of sexual misconduct] for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation.” 34 CFR§106.71(a).

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## Key Definitions – 34 CFR § 106.30

- **Complainant.** An individual who is alleged to be the victim of conduct that could constitute sexual harassment.
- **Respondent.** An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.
- **Formal Complaint.** Document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. **As used in this definition, a “document filed by a complainant”** means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.

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## Key Definitions

### •*Education Program or Activity* –

- locations, events, or circumstances over which the Institution exercises substantial control over both the Respondent and the context in which the harassment occurs,
- any building owned or controlled by a student organization that is officially recognized by the Institution, and
- all of the operations of the Institution.

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## Key Definitions – cont.

- **Advisor.**

- (1) an individual chosen by a Complainant or Respondent, at the Complainant's or Respondent's own expense, to provide support during any meetings or hearings related to the investigation and/or adjudication of a reported violation of this Policy and in accordance with the terms and restrictions in this Policy, or
- (2) if a Complainant or Respondent does not choose an Advisor, an individual provided by the College to the Complainant or Respondent for the sole purpose of cross-examining, as necessary, the other party or witnesses in a Live Hearing.

## Definition of Sexual Harassment Under the Policy

- The complaint procedures described in this administrative regulation shall be used to address any complaint governed by Title IX of the Education Amendments of 1972 alleging that a student was subjected to one or more of the following forms of sexual harassment:
  - (a) Quid pro quo: An employee of the institution conditioning the provision of an aid, benefit, or service of the University on an individual's participation in unwelcome sexual conduct;
  - (b) 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 University's education program or activity; or
  - (a) "Sexual assault," "dating violence," "domestic violence," or "stalking" as defined in the University's Policy.

## Roles and Responsibilities

- **Title IX Coordinator** monitors compliance with Title IX Policy, including training, education, prevention efforts, communication with stakeholders, and oversight of investigation and adjudication procedures for all reported policy violations.
- **Investigator** is neutral and impartial fact-finders, and gather evidence during the investigation. Investigators are responsible for completing an investigation report at the conclusion of the investigation.
- **Hearing Officer** is responsible for conducting the hearing in an orderly manner, controlling the conduct of all participants and attendees of the hearing, and rendering a written determination regarding responsibility of the Respondent's an impartial, neutral, and objective manner.
- **Appellate Officer** will make a final determination on appeals.

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## Additional Key Provisions of Amended Regulations

- Formal Complaint, Actual Knowledge, and Deliberate Indifference
- Supportive Measures (even if no Formal Complaint filed)
- Uniform evidentiary standard and grievance process for students, staff, and faculty
- Mandatory dismissal where allegations do not rise to heightened standard of sexual harassment
- Investigation, notice, parties' rights during investigation, and equitable treatment
- Rights of parties to inspect and review evidence

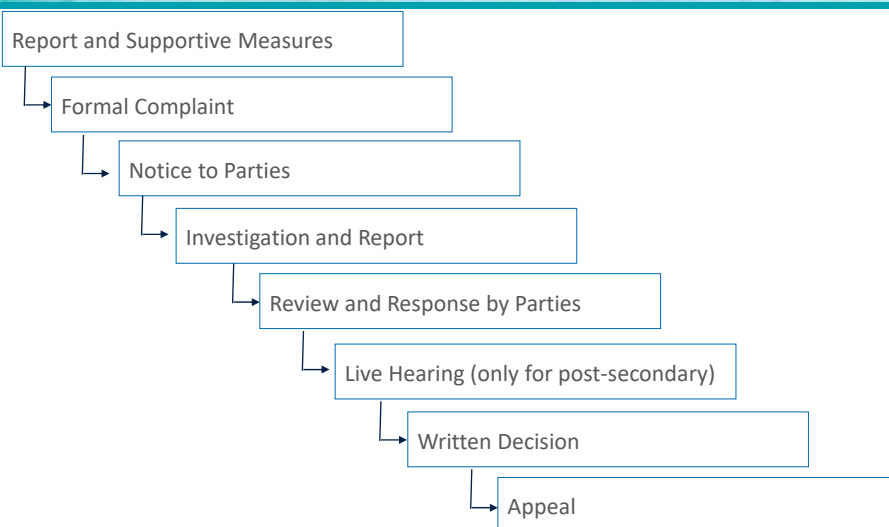
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## Additional Key Provisions of Amended Regulations – *Continued*

- Live hearing with cross examination by Advisors
- Exclusion of statements from non-testifying party/witness
- Independent Decision-Maker(s)
- Mandatory appeal process provided
- Retaliation included within Title IX policy and can result in violation
- Informal resolution – discretionary
- Record keeping

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## Title IX Sexual Harassment Complaint Procedures



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## Where to Report Title IX Harassment?



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## Where and How to Report Title IX Sexual Harassment

- A report of sexual harassment shall be submitted directly to or forwarded to the Title IX Coordinator
- Upon receiving report, Title IX Coordinator shall inform the complainant of the process for filing a formal complaint.
- A formal complaint, with the complainant's physical or digital signature, may be filed with the Title IX Coordinator in person, by email, or by any other method authorized by the institution.
- The Formal Complaint should include:
  - Complainant's name and contact information;
  - Respondent's name;
  - Detailed description of the alleged conduct or event that is the basis of the alleged violation;
  - Date(s) and location(s) of the alleged occurrence(s); and
  - Names of any witnesses and the resolution sought

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## Duty of Confidentiality – Who is Covered?

The confidentiality provisions protect:

- Reporting Party;
- Complainant;
- Individual who was reported to be perpetrator;
- Respondent; and
- Witness.

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34 CFR§106.71(a)

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## Supportive Measures



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## Supportive Measures

Supportive Measures offered to **parties**:

- may be offered before or after the filing of a Formal Complaint or where no Formal Complaint has been filed;
- designed to restore or preserve **equal access** to the Education Program or Activity; and
- maintained as confidential to the extent that maintaining such confidentiality would not impair the ability to provide the supportive measures.

Title IX Coordinator shall consider the complainant's wishes with respect to supportive measures.

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## Scope of Available Supportive Measures

Supportive Measures can include:

- Extensions of deadlines,
- Modifications of work schedules,
- Mutual restrictions on contact,
- Changes in work locations,
- Leaves of absence,
- Increased security, and
- Monitoring of certain work sites.

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## Administrative Leave and Emergency Removal

- For students, must conduct individualized safety and risk analysis to determine if individual poses immediate threat.
- If so, may remove Respondent to protect safety of community.
- Must provide notice and immediate opportunity to challenge the removal.
- Employee may be placed on administrative leave during pendency of formal complaint process.



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## Title IX Sexual Harassment Complaint Procedures – Formal Complaint

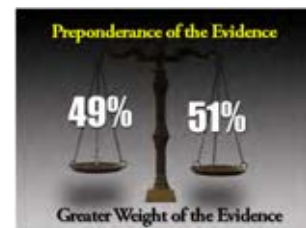
- Formal Complaint required to initiate Complaint Procedures.
- Upon receiving report (or if Actual Knowledge of the alleged Title IX Sexual Harassment), Title IX Coordinator will promptly contact Complainant to:
  - (1) discuss the availability of Supportive Measures, which are available with or without Formal Complaint, and
  - (2) explain the process of filing a Formal Complaint.
- At time of filing Formal Complaint, Complainant must be participating in or attempting to participate in Education Program or Activity.

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## Title IX Sexual Harassment Complaint Procedures – Presumption of Non-Responsibility and Standard of Evidence

- The standard of evidence is a preponderance of the evidence or clear and convincing evidence.
- Preponderance of Evidence – A determination based on facts that are more likely true than not.
- Clear and Convincing – Having confidence that a conclusion is based on facts that are highly probable to be true.
- Presumption that Respondent is not responsible for the alleged conduct until a determination is made at the conclusion of the formal complaint process.
- Recipient must “apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment.”



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## Initial Review of a Formal Complaint—Mandatory Dismissal

Title IX Coordinator must dismiss a Formal Complaint if:

- the allegation does not describe conduct that would constitute Title IX Sexual Harassment;
- the Title IX Sexual Harassment did not occur in an Education Program or Activity; or
- the Title IX Sexual Harassment did not occur against a person in the United States.

*But such a dismissal does not preclude action under other policies or code of conduct.*



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## Initial Review of a Formal Complaint— Optional Dismissal

Title IX Coordinator may dismiss Formal Complaint if:

- Complainant notifies Title IX Coordinator in writing that they wish to withdraw Formal Complaint;
- Respondent is no longer enrolled in or employed by the institution; or
- circumstances exist that prevent gathering sufficient evidence to reach a determination.



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## Written Notice and Appeal of Dismissal Decision

- If the Title IX Coordinator dismisses a Formal Complaint or any allegations therein, the institution must provide written notice of dismissal and reasons simultaneously to all parties.
- Any party can appeal the dismissal.

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## Right to Consolidate Formal Complaints

- The institution may consolidate Formal Complaints:
  - against more than one Respondent,
  - by more than one Complainant against one or more Respondents, or
  - by one party against the other party, where the allegations of Title IX Sexual Harassment arise out of the same facts or circumstances.

34 CFR§106.45(b)(4)



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## Mandatory Notices to Parties



- The institution must provide initial written notice to both parties on receipt of a Formal Complaint.
- Supplemental notice required if additional allegations later included in scope of investigation.
- Sufficient notice must be given to all parties of hearings, interviews, or meetings. Sufficient notice is defined as a minimum of three calendar days.

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## Initial Notices to Parties

- Initial notice to the parties must include:

- ✓ the identities of the parties involved (if known),
- ✓ a description of the alleged Title IX Sexual Harassment, date and location of the alleged incident(s) (if known),
- ✓ the Policy provisions alleged to have been violated, and information about the complaint process set forth herein,
- ✓ the right of parties to have an advisor of their choice,
- ✓ the right to inspect and review evidence, and
- ✓ that knowingly making false statements or submitting false information may be subject to additional disciplinary action up to and including dismissal or separation.

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## Investigation Process – Gathering Evidence

- Parties must be given an equal opportunity to identify witnesses and submit evidence.
- The institution cannot restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.
- Investigation shall consider all relevant evidence – both inculpatory and exculpatory – and credibility determinations may not be based on person's status as a complainant, respondent, or witness.



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## Complaint Process Requirements – Role of Advisors

- Complainant and Respondent may, but are not required to, have an Advisor of their choosing present during Investigation and any meetings related to the Investigation of a report of Title IX Sexual Harassment.
- The institution may establish restrictions regarding the extent to which the advisor may participate in the proceedings as long as the restrictions apply equally to both parties.



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## Inspection and Review of Relevant Evidence

- Prior to issuing Investigative Report, parties must have opportunity to review and inspect evidence directly related to allegations.
- The institution must provide parties at least 10 days to submit a written response to the evidence.
- Evidence may be redacted as necessary to comply with applicable state or federal confidentiality laws (e.g., HIPAA, FERPA).



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## Investigative Report



- Investigator will prepare a report that fairly summarizes the relevant evidence.
- Report sent to parties and advisors at least 10 days prior to the determination of responsibility or alternative resolution.
- Afford each party the opportunity to submit written, relevant questions that the party wants asked of any party or witness, provide each party with answers, and allow for limited follow-up questions from each party.

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## Live Hearing Procedure

- For post-secondary institutions, there is a live hearing requirement under Title IX.
- Live hearings may be conducted with all parties physically present in the same geographic location or virtually.
- If the hearing is virtual, or with the parties located in separate rooms, the institution must use technology that enables the Decision-Maker, Hearing Officer, and parties, to simultaneously see and hear the party or the witness answering questions.



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## Role of Advisors

- Complainant and Respondent may, but are not required to, have an Advisor of their choosing present during Investigation and any meetings related to the Investigation of a report of Title IX Sexual Harassment.
- The institution may establish restrictions regarding the extent to which the advisor may participate in the proceedings as long as the restrictions apply equally to both parties.
- Must have an advisor during the hearing.



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## Advisors at Live Hearings

- Each party's Advisor asks the other party and witnesses relevant questions, including those challenging credibility.
- Such cross-examination must be conducted directly, orally, and in real time and never by a party personally.
- Hearing Officer must first determine whether the question is relevant and explain to the party's Advisor any decision to exclude a question as not relevant.
- If a Complainant or Respondent does not choose an Advisor, an Advisor will be provided by the institution, free of charge.
- Only the Hearing Officer and the Advisors are permitted to ask the other party or any witnesses relevant questions and follow-up questions.

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## Decorum in Proceedings

- Anyone participating in any proceeding arising out of an alleged violation of the Title IX Sexual Misconduct Procedure is expected to exhibit civility and decorum commensurate with the serious subject matter.
- The institution has the authority and discretion to remove any participant who fails to adhere to this standard of conduct.



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## Decision-Maker and Hearing Officer



- **Decision-Maker.** The Decision-Maker will determine the relevance of questions asked by Advisors during Live Hearings, and will make a written determination regarding responsibility by applying the preponderance of the evidence standard and may impose sanctions as appropriate.
- **Hearing Officer.** The Hearing Officer will conduct the Live Hearing and may perform certain limited tasks, such as maintaining the decorum of the Live Hearing.

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## Relevance – What is Relevant

- According to Federal Rule of Evidence 401, evidence is relevant if:
  - a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
  - b) the fact is of consequence in determining the action.

**RELEVANCE = PROBATIVE + MATERIAL**

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## Specific Information Deemed Not Relevant

- Information that will be deemed not relevant includes:
  - Information protected by a legal recognized privilege;
  - Evidence about Complainant's sexual predisposition or prior sexual behavior
    - Unless offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant, or
    - If evidence concerns specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and is offered to prove consent.
  - Any party's medical, psychological, and similar records (unless the party has given voluntary written consent).

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## Failure to be Subject to Cross Examination

If a party or witness does not submit to cross-examination at the Live Hearing,

- the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility;
- provided, however, that the decision-maker 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.



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## Examples of When to Exclude Witnesses Statements

- ✓ When a witness refuses to submit to cross-examination, even if the witness has already submitted to direct examination.
- ✓ When a witness or party stops responding to cross examination questions.
- ✓ When a witness or party does not appear for the hearing.



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## However...

- On July 28, 2021, a Massachusetts federal judge struck down the provision of the new regulations that prohibits colleges adjudicating sexual misconduct allegations from considering statements not subject to cross-examination, while largely upholding the new regulations
- The provision is sent back to the DOE for further consideration

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

VICTIM RIGHTS LAW CENTER, )  
EQUAL RIGHTS ADVOCATES, )  
LEGAL VOICE, )  
CRISIS ASSISTANCE SERVICES )  
SEXUAL HARASSMENT, )  
JANE DOE, )  
AN INDIVIDUAL BY AND THROUGH )  
Her mother and next friend )  
MELISSA WHITE, )  
KIMMY DOE, )  
MARY DOE, )  
Plaintiffs, )  
v. )  
MICHEL CARDONE, )  
in his official capacity as )  
Secretary of Education, )  
SUSANNE SCHLESER, )  
in her official capacity as )  
Acting Assistant Secretary for )  
Civil Rights, )  
UNITED STATES DEPARTMENT )  
OF EDUCATION, )  
Defendants. )

CIVIL ACTION  
NO. 21-11104-MW

July 28, 2021

DOUG, J.C.

FINDINGS OF FACT, OPINIONS OF  
LAW, AND ORDER FOR JUDGMENT

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## Recordings or Transcript

- The institution will create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review



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## Written Determination Required Components

The Decision-Maker will issue a written determination that includes:

- 1) identification of the allegations;
- 2) description of the procedural steps in Complaint Process;
- 3) findings of fact supporting the determination;
- 4) conclusions regarding application of the institution's Code of Conduct and Ethical Standards and any other relevant rules of conduct to facts;
- 5) a determination and rationale regarding responsibility for each allegation;
- 6) any disciplinary sanctions or other remedies; and
- 7) information concerning parties' ability to appeal.

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## Sanctions

- Possible sanctions and remedies for student respondents include:
  - Educational training;
  - No shared classes or extra-curricular activities;
  - Disciplinary probation;
  - Withholding of grades, official transcript, and/or degree;
  - Bar against readmission, bar against enrollment, drop from one or more classes, and/or withdrawal from the University;
  - Suspension of rights and privileges, including but not limited to participation in athletic or extracurricular activities;
  - Denial of degree;
  - Suspension from the University for a specific period of time. Suspension is noted on the academic transcript with the term "Disciplinary Suspension." The notation can be removed upon the request of the student in accordance with the University's procedures when all conditions of the suspension are met;
  - Expulsion (permanent separation from the University). Expulsion creates a permanent notation on the student's academic transcript;
  - Revocation of degree and withdrawal of diploma; and/or
  - Other sanction(s) or remedies as deemed appropriate under the circumstances.
- Possible sanctions and remedies for employee respondents include:
  - Employment probation;
  - Job demotion or reassignment
  - Suspension with or without pay for a specific period of time;
  - Dismissal or termination;
  - Ineligible for rehire; and/or
  - Other sanction(s) or remedies as deemed appropriate under the circumstances

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## Informal Resolution Process

- Title IX Coordinator may offer the Complainant and Respondent an informal resolution process.
- Parties participate in an unofficial mediation process with the Title IX Coordinator acting as mediator.
- Both parties must agree to this alternate process, and, in doing so, the parties waive their right to investigation and adjudication.
  - **Agreement to proceed with alternative resolution must be in writing, per the regulations.**

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## Appeal

- A recipient must offer both parties the opportunity to appeal a determination regarding responsibility, and dismissal of a formal complaint.
- The written decision on Appeal is final and may not be appealed.
- Either party has the right to file a complaint with the U.S. Department of Education's Civil Rights Office.

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## Filing an Appeal and Response

- A party must file a written appeal within ten (10) days of written determination or dismissal.
- Written appeal must set forth the grounds for the appeal.
- Appeals are not intended for use as a substitute adjudication process, and Complainant and Respondent may not pursue appeals based on mere disagreement with findings or sanctions.
- Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, outcome.

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## Grounds of Appeal & Written Decision

The parties may appeal a determination or a dismissal based on:

- A procedural irregularity that affected the outcome;
- New evidence not previously available; or
- A conflict of interest or bias of the Title IX Coordinator, Investigator, or Decision-Maker.

Except where newly discovered evidence is the basis for the appeal, appeals are limited to a review of the Evidence and written documentation from investigation and determination.

The Appeal Officer must issue a written decision within 20 calendar days to both parties simultaneous.

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## Recordkeeping Obligation

- The institution must maintain the following information for a period of 7 years:
  - Reported cases and Title IX investigations
  - Determinations of responsibility
  - Audio or audiovisual recording and transcript
  - Disciplinary sanctions and remedies
  - Any appeal, informal resolutions, and responses
  - All training materials



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## The future of the new Title IX regulations

- Under the Biden administration, the Department of Education has said it will issue a new rule next May to replace the 2020 regulations.
- “We are reviewing the decision, but the department has already taken several steps to examine the prior administration’s Title IX regulations.”



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# Questions?



# UT System Title IX Training

## Title IX Regulations, Takeaways & Forecasting

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## Agenda

- Refresher on regulations
- Updates on attempts to prevent enforcement
- Legal implications
- Intersection with other laws (Title VII, Clery/VAWA, FERPA)
- Recent OCR Q&A on regs
- Future of Title IX regulations



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## Title IX Regulations



Source: GAO analysis of regulatory authority | GAO-18-436T

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## Sept. 2017 OCR Interim Guidance

- OCR withdraws 2011 DCL and 2014 Q&A.
- OCR issues Q&A on Campus Sexual Misconduct for on equitable process.
- Reaffirms 2001 Revised Sexual Harassment Guidance.
- Expresses intent to initiate rulemaking process leading to Title IX regulations.



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## May 6, 2020 Final Regulations Issued by DOE

- On May 6, 2020, DOE released long-awaited amended Title IX regulations.
- Amended regulations take effect August 14, 2020.
- DOE expressly declined to extend deadline despite requests from higher ed and lawsuit by 18 states.
- Significant changes in definition of sexual misconduct, scope of Title IX, and mandated grievance process.



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## Scope of Title IX: “Education Program or Activity”

- Any location, event, or circumstance over which the recipient exercises substantial control over both the respondent and the context in which the sexual harassment occurs.
- Includes all education programs or activities, whether occurring on or off-campus, and any building owned or controlled by a student organization that is officially recognized by a postsecondary institution (such as a fraternity or sorority house).
- Sexual harassment must be “against a person in the United States.”

34 CFR§106.44(a)

6

## Heightened Standard for Sexual Harassment

1. Any instance of quid pro quo harassment by a recipient's employee;
2. Any unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it denies a person equal educational access; or
3. Any instance of sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA).

34 CFR§106.30

7

## Additional Key Provisions of Amended Regulations

- Formal Complaint, Actual Knowledge, and Deliberate Indifference.
- Supportive Measures (even if no Formal Complaint filed).
- Uniform evidentiary standard and grievance process for students, staff, and faculty.
- Mandatory dismissal where allegations do not rise to heightened standard of sexual harassment.
- Investigation, notice, parties' rights during investigation, and equitable treatment.
- Rights of parties to inspect and review evidence.
- Live Hearing with cross examination by Advisors.
- Exclusion of statements from non-testifying party/witness.
- Independent Decision-Maker(s).
- Mandatory appeal process provided.
- Retaliation included within Title IX policy and can result in violation.
- Informal resolution – discretionary.
- Recording keeping.



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## What Happened To Cases Challenging Title IX Regulations?

*Commonwealth of Pennsylvania, et al. v. DeVos, et al.* (D.D.C. August 12, 2020)

- 17 states and DC allege Title IX Final Rule violated the Administrative Procedure Act (ACA)
- Court denied preliminary injunction preventing implementation.
- Definition of sexual harassment did not contravene Title IX's purpose, and DOE adequately explained its decision.
- August 14, 2020 effective date not arbitrary and capricious given long-standing Notice.
- No immediate irreparable harm because the costs of compliance not sufficiently substantial relative to recipients' overall budgets.



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## What Happened To Cases Challenging Title IX Regulations?

*New York, et al. v. U.S. Dep't of Education, et al.* (S.D.N.Y. August 9, 2020)

- NY sought preliminary injunction under APA and lost.
- DOE did not exceed statutory authority in interpretation of "program or activity" or in requiring grievance procedures.
- Final Rule not arbitrary or capricious by departing from existing guidance.
- Allegations that provisions concerning preemption, retaliation, and permissive dismissal not logical outgrowths of the proposed rule insufficient.
- No immediate irreparable harm because compliance costs were not more than ordinary.
- Final Rule did not require resources to be diverted from COVID-19.

*Know Your IX, et al. v. DeVos* (D. Md. Oct. 20, 2020)

- Dismissed for lack of standing



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## Do Regulations Apply Retroactively?

Office for Civil Rights Blog: The Title IX Rule is Effective on August 14, 2020 and is Not Retroactive (August 5, 2020)

- DOE blog post: only prospective application.
- Doesn't apply to allegations of sexual harassment prior to 8/14/20.

*Doe v. Rensselaer Polytechnic Inst.* (N.D.N.Y. Oct. 16, 2020)

- Alleged sexual misconduct based on January 2020 incident.
- Court granted retroactive application of policy despite OCR guidance.
- Described prospective application as "disregard for the inevitable administrative headaches of a multi-procedure approach" and conscious effort to "afford [plaintiff] a lesser standard of due process protections."
- Prospective application amounted to gender bias, leading to inference of sex discrimination.

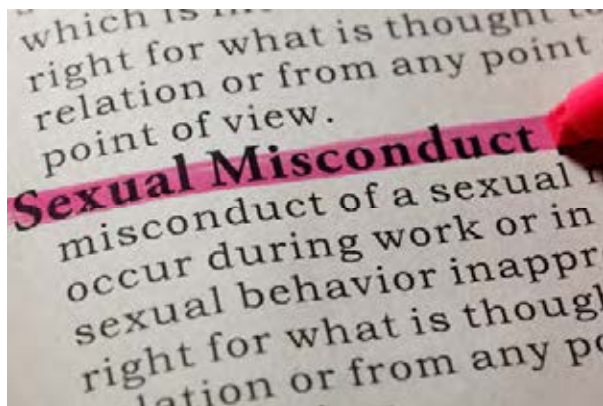
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## Title IX Versus Title VII/State Law – Different Definition of Sexual Harassment

- Title VII case law defines sexual harassment as “severe or pervasive” not “severe, pervasive, and objectively offensive.”
- Title VII “knew or should have known” versus “actual knowledge”
- Title VII vicarious liability for acts of supervisors, no exception when the supervisor is the one engaging in the harassment.
- Until amendments to regulations or some court action, 2020 regulations apply to employees.

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## Obligation to Address Less Severe Sexual Misconduct



- Obligation to address less severe forms of sexual harassment under Title VII.
- Obligations under SB 212 and HB 1735.
- Obligation to address other forms of sex discrimination under prior Title IX regulations, including investigation and prompt and equitable response.
- **See July 2021 Q&A Questions 64-65**

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## Mandatory Reporting Obligations Apply Regardless

- Employees must report both sexual misconduct, whether defined as Title IX Sexual Misconduct or less severe forms of sexual misconduct.
- A failure to promptly report is a violation of Texas law, SB 212.
- A knowingly false report is also a violation of Texas law.



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## ADA and Equal Access Under HB 1735

- Institutions shall
  - Ensure equal access for disabled employees and students
  - Make reasonable efforts to consult with the disability services office of the institution and/or advocacy groups to ensure access for disabled students and employees.
- Institutions should ensure websites, policies, and forms are accessible to disabled employees and students.



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## Title IX Regulations and Clery/VAWA

- Title IX does not affect ongoing obligations under Clery Act and campus security
- Clery/VAWA offenses adopted into Title IX response obligations, regardless of severity, pervasiveness, offensiveness.
  - Sexual assault, dating violence, domestic violence, and stalking.
- Preamble:
  - “Incorporating these four Clery Act/VAWA offenses clarifies that sexual harassment includes a single instance of sexual assault, dating violence, domestic violence, or stalking.”
  - “These final regulations do not, however, alter the regulations implemented under the Clery Act or an institution of higher education’s obligations, if any, under regulations implementing the Clery Act.”

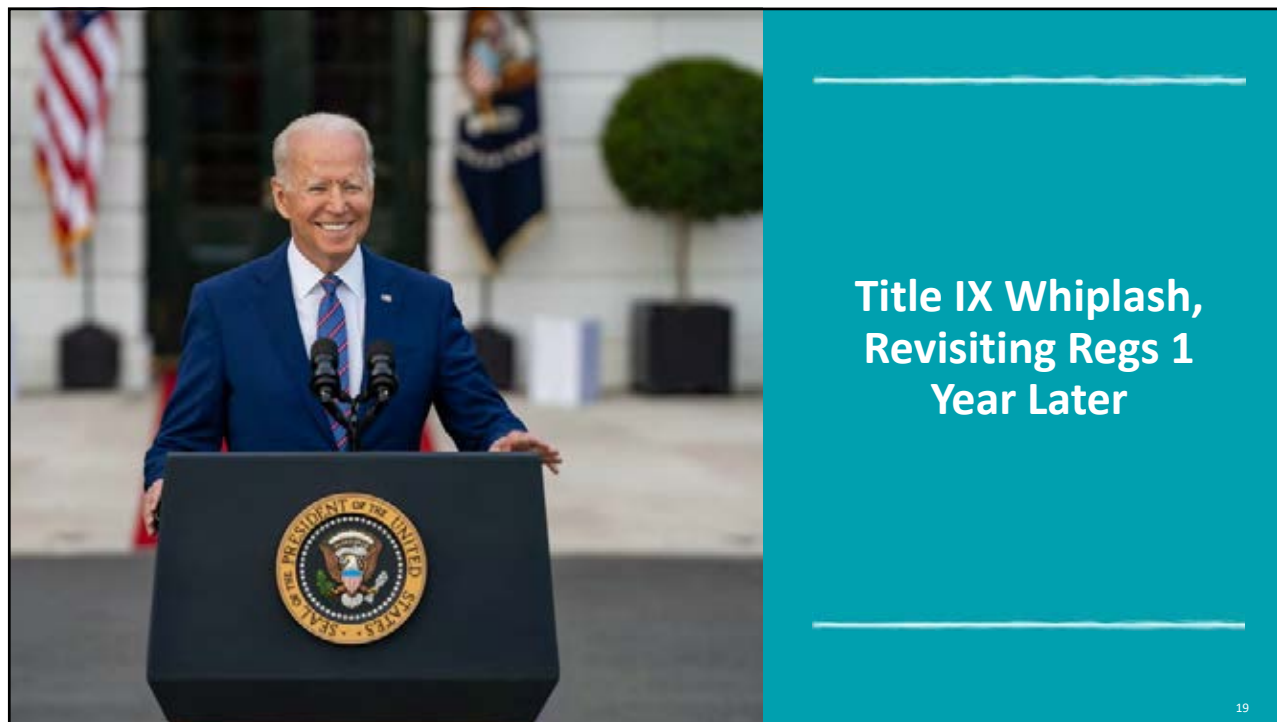
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## Title IX Regulations and Clery/VAWA—Reporting Obligations



- Title IX regulations regarding notice sufficient to trigger response obligations do not modify obligations under Clery/VAWA or state law
- Institutional officials with significant responsibility for campus and student activities are referred to in the Clery Act as a Campus Security Authority (CSA).
- CSA’s have reporting obligations to report Clery crimes under the Clery Act.
- All employees also still required to report under SB 212.

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## Title IX Whiplash, Revisiting Regs 1 Year Later

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## Biden Administration and Title IX

- 03/08/21 Executive Order from Biden re revisiting Title IX regulations
- 04/06/21 DOE Letter re hearings on TIX regulations and anticipated NPRM
- 05/13/21 DOE Q&A on Civil Rights and School Reopening in COVID-19
  - See Section 3 and Section 4.
- 05/20/21 OCR Notice of Public Hearing
- 06/7-11/21 OCR Public Hearing on Title IX
- 06/24/21 OCR Dear Educator Letter (focus on protecting LGBTQI+ students and employees post-*Bostock*)

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## Predicting Outcome of NPRM – An Example Perspective

### American Council on Education, Letter to OCR re: Comments on the 2020 Amendments to the Title IX Regulations (June 10, 2021)

- Letter from ACE and 43 other higher ed
- Regulations “transform[] institutional disciplinary processes into complex and expensive prosecutorial proceedings that . . . undermin[e] the goals of Title IX”
- Urges for a more flexible process that is less “court-like” and more consistent with the educational nature and objectives of the campus student disciplinary process.
- Inappropriate to extent process to employee harassment, where sexual harassment addressed by Title VII. Makes it more difficult to discipline employees for sexual harassment.
- Also addresses inconsistent state laws and judicial precedent, informal resolution, and the escalating cost and burden of compliance.
- Encourages DOE to keep “long game” in mind and look for solutions with broad support.

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## Predicting Outcome of NPRM?

### Respondent advocate, Eric Rosenberg:

- Reiterate importance of live hearings with cross-examination.
- Advocates for allowing prior statements against interest exception.
- Advocates for off-campus conduct by students from same university be addressed under 2020 regulations.

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Where does that  
leave us now?

23

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## 07/21/21 OCR Q&A – Key Points, Definitions

- Institutions can go beyond requirements of regs so long as no conflict.
- Notes differences between K-12 and higher ed, including live hearing requirement and actual notice requirements (any person in K-12; more limited higher ed)
- Summarizes source of definition of sexual harassment under the regs, including:
  - Quid pro quo harassment
  - Sexual harassment (student-student) as defined in Davis v. Monroe County
  - Sexual assault, domestic violence, dating violence, and stalking, as defined in Clery Act/VAWA
- No mandated definition of consent

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## 07/21/21 OCR Q&A – Key Points, Scope and Jurisdiction

- Universities may respond to conduct that does not rise to level of Title IX sexual harassment.
- Illustrative examples of what constitutes effectively “denied equal access to education program or activity”
- Illustrative examples of settings / locations where Title IX applies
- Reaffirming no retroactive application
- Clarification of “officials with authority” for purpose of notice in higher education setting



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## 07/21/21 OCR Q&A – Key Points, Response to Formal Complaint



- Does reporter have to be a member of University community (No)
- Universities may impose mandatory reporting obligations on employees (SB 212), but not create constructive notice under Title IX.
- While a prompt response and supportive measures are required, no particular remedy is required.
- Illustrative examples of persons “attempting to participate in education program.”
- Guidance on what constitutes a Formal Complaint, including where complainants who are no longer enrolled and TIX Coordinator’s role (and potential obligation) in signing Formal Complaints
- Handling situations where party or witness unavailable

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## 07/21/21 OCR Q&A – Misc. Points

- Guidance on supportive measures and emergency removal.
- Reaffirmation of presumption of no responsibility.
- Prompt timeframes are context specific. Schools may still adopt 60-day timeframe.
- Guidance on conducting live hearings, rules of decorum, and limits on harassing, intimidating, or abusive questioning.
- Guidance on failure to participate in hearing and cross examination.
- Guidance on consideration of other evidence during hearings.
- Guidance on standards of proof, informal resolution, and retaliation.

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## Title IX and FERPA / Public Information Act

*Cincinnati Enquirer v. Univ. of Cincinnati* (Ohio Ct. Cl. Sept. 17, 2020)

- Cincinnati Enquirer made public records request seeking records regarding any reports or Title IX investigations regarding certain student.
- Court held that while request overly broad, imbedded request for public files created by the Title IX coordinator for a specific case not ambiguous or overly broad.
- **Court found that the requested police reports and Title IX investigative case files are not “education records,” as defined in the FERPA statute and regulations**
- **So they were not exempted from public records requests.**



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## Is Right to Cross Examination Limited to Title IX?

*Doe v. Baum* (6th Cir. 2018):

- “(1) [I]f a student is accused of misconduct, the university must hold some sort of hearing before imposing a sanction as serious as expulsion or suspension, and (2) when the university’s determination turns on the credibility of the accuser, the accused, or witnesses, that hearing must include an opportunity for cross-examination.”

*Walsh v. Hodge* (5th Cir. 2020):

- “Due process in the university disciplinary setting requires some opportunity for real-time cross-examination of the complaining witness, even if only through a hearing panel.”

*Williams v. Pa. State Univ., et al.* (M.D. Pa. Sept. 4, 2020)

- Plaintiff adequately stated due process claims because:
  - Case hinged on witness credibility and
  - University did not provide opportunity to cross-examine witnesses.

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## Right to Cross Examine – How Far Does It Go?

- Faculty grievance hearings?
- Non-Title IX discrimination grievance proceedings?
- Student misconduct?
- Grade appeals?
- ADA accommodation hearings?



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# Questions?



# UT System Title IX Training

## Case Law Update

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1

## Agenda

- Allegedly biased investigation and grievance process
- Changing outcomes and alleged outside pressure
- Cross allegations and multiple guilty parties
- What constitutes “severe, pervasive, and objectionably offensive” and retaliation?
- What constitutes a denial of an educational opportunity?
- What constitutes deliberate indifference?
- Academic dismissal vs. Title IX
- Intersection of Title IX and Employment Law (in Texas)
- Scope of Title IX: transfer students, independent contractors, and off-campus



2

## Challenges to 2020 Final Rule on Title IX

### *Victim Rights Law Center et al. v. DeVos et al.* (D. Mass. July 28, 2021)

- Held final version of the rule issued under former Education Secretary Betsy DeVos did not violate the equal protection clause, **but struck down a key provision prohibiting consideration of statements not subject to cross-examination.**
- Victim advocates argued provision prevents statements from police officers, nurses or other witnesses from being considered if individual unable to attend hearing; and accused's admissions could not be used if they chose not to testify.
- Judge ruled the department failed to adequately consider such outcomes, and the provision was arbitrary and capricious.
- "Under a plain reading of the Final Rule's hearing provisions, a respondent may work with the school to schedule the live hearing, and nothing in the Final Rule or administrative record prevents him or her from doing so to further a disruptive agenda -- e.g., at an inopportune time for third-party witnesses."

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## Risks Of Allegedly Biased Investigation And Grievance Process

### *Doe v. Univ. of Denver* (10th Cir. June 15, 2021).

- Plaintiff expelled for engaging in non-consensual sexual activity with another student.
- Plaintiff showed evidence of differential conduct that plausibly was on the basis of his sex (e.g., inconsistencies in the complainant's story, the school's consideration of testimony of more of complainant's witnesses, and ignoring potentially exculpatory medical records).
- Plaintiff also produced evidence showing the school declined to formally investigate any of the sexual-misconduct complaints brought by men.
- Appellate court reversed summary judgment for school because reasonable jury could conclude Plaintiff's disciplinary proceeding tainted by sex bias.



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## Risks Of Allegedly Biased Investigation And Grievance Process

### *Schwake v. Ariz. Bd. of Regents* (9th Cir. July 29, 2020)

- Without any hearing or appeal, school restricted Plaintiff from certain buildings and prohibited him from holding campus positions for three years.
- Plaintiff alleged school faced pressure to favor accusing female students over male respondents because of a DOE investigation.
- Professor's statements implying Plaintiff responsible for criminal behavior showed atmosphere of bias, because the professor was a "pertinent university official" even though he was not a decisionmaker.
- Associate Dean's refusal to allow Plaintiff to appeal or file a harassment complaint against the complainant also probative of gender bias.
- Appellate court reversed dismissal of Title IX claims and provided guidance on what allegations suffice to state a Title IX claim.



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## Risks Of Allegedly Biased Investigation And Grievance Process

### *Doe v. Wash. & Lee Univ.* (W.D. Va. April 17, 2021).

- Plaintiff brought Title IX action against school after hearing panel found him responsible for sexual misconduct.
- Drawing all inferences in Plaintiff's favor, court determined it was plausible the hearing board was biased towards female students.
  - Evidenced by their decision to credit the complainant's "personal rule" that she "only has full sexual intercourse with partners if she is interested in a relationship," while discrediting a similar remark offered by Plaintiff's about his own sexual boundaries.
  - Plaintiff also pointed to alleged procedural flaws, such as improper consideration of a doctor's opinion, as evidence of gender bias.
- On retaliation claim, Plaintiff failed to show the school denied his request for readmission because his counsel sent a letter to the school.



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## Risks Of Allegedly Biased Investigation And Grievance Process

### *Doe v. Montana State University* (D. Mont. Dec. 21, 2020)

- Plaintiff alleged university officials exhibited deliberate indifference in responding to her report of sexual assault, in violation of Title IX.
- Plaintiff alleged school promised to conduct an investigation within 3 months after a new Office of Institutional Equity investigator underwent appropriate training, but never initiated or completed an investigation.
- Plaintiff also alleged the school discouraged her from filing a formal complaint.
- Finding that general allegations of discriminatory intent were sufficient and the cumulative weight of direct and circumstantial evidence supported an inference of discriminatory animus, school's motion to dismiss was denied.



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## Technical Glitches as a Basis for a Claim

### *Doe v. N.Y. Univ.* (S.D.N.Y. March 31, 2021)

- Plaintiff expelled for sexual misconduct, despite assurances otherwise from university appointed advisor.
- Tech glitches in Zoom hearing impaired plaintiff's ability to participate fairly and meaningfully.
- Plaintiff also alleged evidentiary weaknesses and a minimal plausible inference of gender bias.
- Erroneous outcome claim survived motion to dismiss.
- Selective enforcement claim also survived based on plaintiff's inability to file stalking and other Title IX charges against complainant.



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## Risk of Changing Outcomes and Outside Pressure

### *Doe v. Univ. of Ark., et al.* (8th Cir. Sept. 4, 2020)

- Plaintiff alleged school and several individuals violated Title IX and due process rights by initially finding him not responsible for sexual misconduct, but later reversing that decision and sanctioning him.
- Plaintiff claimed school faced public pressure due to investigations by state legislature and DOE, his accuser's media statements, and campus-wide protests.
- Appellate court found Plaintiff stated a Title IX erroneous outcome claim, his allegations supported an inference that the school's decision was contrary to the substantial weight of the evidence and sex discrimination was plausible.
- Plaintiff's due process claims failed because he did not identify any material flaw in his proceeding, and the preponderance of the evidence standard was a sufficient standard of proof.



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## Risk of Changing Outcomes and Outside Pressure

### *Doe v. Coastal Carolina Univ.* (D.S.C. Mar. 1, 2021)

- Plaintiff alleged school violated Title IX by reaching an erroneous outcome when it found him responsible and dismissed him.
- First hearing panel found Plaintiff not responsible, but on appeal, a second hearing found plaintiff responsible.
- Court denied school's motion for summary judgment and found Plaintiff established fact issues regarding accuracy of his disciplinary proceedings based solely on outcome of first panel.
- Plaintiff also raised fact issues regarding whether his gender caused the allegedly erroneous outcome, as Plaintiff alleged data in sexual misconduct cases showed a pattern of bias against male respondents.



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## Cross Allegations and Multiple Guilty Parties

### *Jane Doe v. Loyola Univ. Md.* (D. Md. Mar. 29, 2021)

- Cross claims of sexual misconduct, with John Doe initially reporting misconduct and Plaintiff Jane Doe later alleging reporting student had assaulted her. School pursued parallel investigations where each student was named as a complainant and a respondent.
- Both students found responsible for conduct infractions, and identical sanctions of 1-year suspensions imposed.
- Jane Doe brought a lawsuit against school, alleging erroneous outcome under Title IX, negligence, and breach of contract.
- Court granted school's motion to dismiss, finding the school carefully followed its policies and record did not support an erroneous outcome.
- Plaintiff failed to allege facts amounting to gender bias, which was also fatal to her erroneous outcome claim.



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## What Constitutes “Severe, Pervasive, and Objectionably Offensive” and What Constitutes Retaliation?

### *Dahmer v. W. Ky. Univ.* (W.D. Ky. Mar. 2, 2021)

- Former student and president of SGA alleged school deliberately indifferent to harassment.
- Alleged school and individual defendants violated her equal protection rights and retaliated against her by denying her letter of recommendation from its president.
- Title IX claim failed because she reported harassment only to the SGA faculty advisor, who was not an “appropriate person” with authority to implement corrective measures.
- To the extent school did have actual knowledge of later incidents (e.g. a parody Twitter account mocking plaintiff), those incidents were not sufficiently specific or severe.
- Retaliation claim failed because failing to receive a letter of recommendation from the school's president was not a sufficiently severe adverse action.



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## What Constitutes “Severe, Pervasive, and Objectionably Offensive” and What Constitutes Retaliation?

### ***Cunning v. W. Chester Univ.*** (E.D. Pa. Feb. 25, 2021)

- Plaintiff alleged school exhibited deliberate indifference after she reported sexual assault by graduate assistant, school negligent in preventing the assault, and that school retaliated against her for filing a Title IX complaint.
- Plaintiff’s Title IX deliberate indifference and hostile environment claims failed because she did not plausibly allege the school’s action or inaction caused her to be subjected to additional harassment after the alleged assault.
- However, plaintiff stated a Title IX retaliation claim because she alleged the school filed dishonesty charges against her after she filed her Title IX complaint.



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## What Constitutes “Severe, Pervasive, and Objectionably Offensive” and What Constitutes Retaliation?

### ***Du Bois v. Bd. of Regents of the Univ. of Minn.*** (8th Cir. Feb. 16, 2021)

- Plaintiff was a member of track and field team.
- After supporting her coach amidst sexual harassment allegations, Plaintiff alleged school retaliating against her, permitted male athletes to redshirt but denied opportunity to female athletes, and inadequately funded female cross-country and track and field teams.
- Court concluded that plaintiff failed to allege that she engaged in protected conduct. Under Title IX, “opposition to discrimination” is protected conduct; support for the accused is not. Even if it were deemed a protected activity, no causal connection between the activity and any alleged adverse action.
  - *Note that this holding did not adopt broader definition of retaliation in 2020 regulations.*
- Plaintiff’s sex discrimination claims regarding school’s redshirt practices and athletics funding failed because she made only conclusory allegations.



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## What Constitutes “Severe, Pervasive, and Objectionably Offensive” and What Constitutes Retaliation?

*Davis v. Univ. of N.C. at Greensboro* (M.D.N.C. Sept. 29, 2020)

- Plaintiff, who has ADHD and former nursing student, alleged school violated the ADA and Title IX by discriminating against her based on disability, fostered a sexually hostile environment, and dismissed her in retaliation for reporting sexual harassment.
- Plaintiff adequately stated a Title IX sexual harassment claim because she alleged harassment occurred repeatedly and included physical touching.
- Additionally, she alleged the school had actual knowledge because she twice reported the nurse’s conduct to her supervisor, who was also in charge of plaintiff’s program.
- Even though she was dismissed two years after last complaint, plaintiff alleged program administrators consistently tried to expel plaintiff and made specific comments about trying to “get rid of [plaintiff].”
- Court found that she adequately alleged a Title IX retaliation claim.



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## What Constitutes Denial of Educational Program or Opportunity?

*Doe v. Univ. of Ky.* (6th Cir. Aug. 19, 2020)

- Community college student lived in UK student housing and participated in UK student activities.
- Respondent held responsible for sexual misconduct after three hearings, but each was overturned on appeal for procedural deficiencies. At the fourth hearing, UK found the respondent not responsible.
- Plaintiff alleged university deliberately indifferent to alleged sexual misconduct.
- Trial court granted summary judgment because plaintiff not a UK student or participating in any of its educational programs.
- Appellate court reversed, holding that fact dispute regarding whether plaintiff denied the benefit of an education program or activity because she was paying UK directly for much of her educational experience, and there was a close academic relationship between UK and community college.



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## What Constitutes Denial of Educational Program or Opportunity?

### *Doe v. Bd. of Trs. of Neb. State Colls.* (D. Neb. June 10, 2021)

- Plaintiff brought Title IX deliberate indifference action against the Board of Trustees, based on allegations that school inadequately responded to report that fellow student sexually assaulted plaintiff twice.
- School found the respondent responsible for sexual assault and imposed sanctions of a mutual “no contact” order, counseling, and behavioral probation – which plaintiff alleged did not shield her from campus encounters with her assailant.
- Evidence of repeated encounters, coupled with plaintiff’s allegation that school enrolled her in online courses without her consent, were sufficient to survive defendant’s motion for judgment on the pleadings.
- Court also felt the jury was best suited to determine whether school’s response subjected plaintiff to a heightened risk or vulnerability to sexual harassment.



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## What Constitutes Denial of Educational Program or Opportunity?

### *Zulauf v. Marshall Univ. Bd. of Governors* (S.D. W.Va. May 27, 2021)

- Plaintiff brought Title IX claim against Board of Governors based on allegations of deliberate indifference in aftermath of plaintiff’s sexual assault.
- As a preliminary matter, the court found complaint was filed within the limitations period, which began running when plaintiff acquired knowledge of deliberate indifference (not when assault occurred).
- Court denied defendant’s motion to dismiss.
- Plaintiff stated sufficient allegations that she and respondent attended cross country practices and the same class after a no contact order was issued, and that school improperly found in respondent’s favor after issuing a draft report to the contrary, among other things.



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## What Constitutes Denial of Educational Program or Opportunity?

### *Shank v. Carleton Coll.* (8th Cir. April 2, 2021)

- Plaintiff brought Title IX deliberate indifference action against school alleging that it mishandled its obligations after she reported two sexual assaults.
- The first assailant, a member of the track and field team, was featured on promotional banners around campus that traumatized plaintiff.
- Plaintiff was admitted to hospital but did not disclose her assailant's identity until he was later offered a position as resident assistant. Plaintiff did not file report, but the school investigated and found the assailant responsible for sexual misconduct and levying sanctions of disciplinary probation and imposition of a no contact order.
- Appellate court affirmed summary judgment for the school, dismissing plaintiff's deliberate indifference claim because none of the alleged deficiencies was "clearly unreasonable." School's delay in removing promotional posters and moving Plaintiff to a different residence hall could not support a finding of deliberate indifference.



## What Constitutes Deliberate Indifference?

### *Kesterson v. Kent State Univ.*, et al. (6th Cir. July 23, 2020)

- Plaintiff, former student-athlete, reported to her coach and other employees that coach's son sexually assaulted her, but neither coach nor other mandatory reporters notified the Title IX office.
- Two years later, plaintiff reported sexual misconduct to Title IX office, resulting in an investigation and resignation of coach.
- Plaintiff alleged deliberate indifference and retaliation under the First Amendment.
- School did not act with deliberate indifference because coach and other employees were not "appropriate persons" under Title IX. While coach and employees were obligated to report, their failure to do so was not deliberate indifference by school.



## Academic Dismissal vs. Title IX

### *Mulla v. Univ. of Minn.* (D. Minn. Feb. 16, 2021)

- After receiving complaints regarding medical student's professionalism that could constitute sexual harassment, school suspended plaintiff, investigated his conduct, and ultimately dismissed for deficient professionalism (an academic requirement).
- Plaintiff alleged school violated his rights under Title IX, the First Amendment, and due process clause by inadequately investigating and adjudicating the reports.
- Title IX did not apply to medical school's academic dismissal proceeding, and University made clear that it dismissed plaintiff due to academic professionalism concerns, not violations of sexual harassment policy.



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## Intersection of Title IX, Employment Law, and the Constitution (in Texas)

\*Note circuits split on whether employees can bring private right of action under Title IX, or whether Title VII preempts Title IX in employment.

### *Trudeau v. University of North Texas* (5th Cir. July 9, 2021)

- Plaintiff, a tenured associate professor, brought Title IX retaliation, First Amendment, and due process claims against the school and several individual defendants after he was sanctioned for sexual harassment.
- Fifth Circuit held the district court properly dismissed plaintiff's Title IX retaliation claim because plaintiff failed to allege the school sanctioned him because of his participation in the Title IX investigation or for any other protected activity.
- Plaintiff also failed to state a First Amendment claim because he neither alleged that assigned reading on eroticism was the reason for his discipline, nor that his comments about students' sex lives, in-class nudity, or other similar topics involved matters of public concern.



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## Intersection of Title IX, Employment Law, and the Constitution (in Texas)

\*Note circuits split on whether employees can bring private right of action under Title IX, or whether Title VII preempts Title IX in employment.

### ***Boles v. Navarro Coll.*** (N.D. Tex. Oct. 26, 2020)

- Plaintiff, former professor, alleged school violated Title IX and abridged his rights under the Fourteenth Amendment due process and equal protection clauses when it placed him on administrative leave pending an investigation.
- School investigated and found no evidence to support the allegations of sexual misconduct, but it decided not to renew Plaintiff's teaching contract.
- Court granted-in-part and denied-in-part school's motion to dismiss.
- Court dismissed plaintiff's Title IX employment discrimination claim because remedy found exclusively in Title VII.
- Plaintiff's procedural and substantive due process claims also failed because he had no protected property interest in continued employment and because he did not allege the school made his Title IX charges public so as to implicate a liberty interest.



## Title IX and Transfer Students

### ***Barlow v. Washington*** (W.D. Wash. May 21, 2021)

- Plaintiff brought negligence and "pre-assault" Title IX action after school found a student responsible for groping and then allowed him to transfer to different campus, where student sexually assaulted Plaintiff at off-campus location.
- Court granted school's motion for summary judgment.
- School's transfer policies, as applied to respondent's transfer, not clearly unreasonable or deliberately indifferent as a matter of law.
  - Not deliberately indifferent to allow a student to transfer per policy.
- Court could not say school maintained a policy of deliberate indifference to reports of sexual misconduct where timely launched investigation and sanctioned student.
  - The Court "should refrain from second-guessing the disciplinary decisions made by school administrators."



## Does Title IX Apply to Independent Contractors?

### *Conviser v. DePaul Univ.* (N.D. Ill. 2021)

- Plaintiffs, sports psychologist and LLC she worked for, alleged school retaliated for reporting women's head softball coach had abused players and coaching staff.
- After she reported various incidents, the school declined to refer patients to plaintiff and prematurely terminated contract with LLC.
- Court granted school's motion to dismiss.
- Characterizing the instant case as "the first to deal with Title IX statutory standing of independent contractors," and concluding that Title IX only protects 2 classes of plaintiffs—employees and non-employees who are denied access to an education program or activity.
- Plaintiffs were independent contractors, not employees, and did not allege that they had been subjected to discrimination under any education program or benefit.



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## Does Title IX Apply Off Campus?

### *Doe v. University of Scranton* (M.D. Pa. Oct. 9, 2020)

- Plaintiff alleged that he was harassed and attacked by his roommate due to his sexual orientation, and the school was deliberately indifferent to his reports.
- Plaintiff alleged the harassment took place in his off-campus apartment.
- Court granted school's motion to dismiss.
- Plaintiff's Title IX claim failed because despite school's actual knowledge, Plaintiff did not allege substantial control over the alleged harasser and the context in which the harassment occurred.



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# Questions?


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## Miscellaneous Sports Cases

- ***Doe v. Regents of Univ. of Minn.*** (8th Cir. June 1, 2021)
  - Plaintiffs, football players, brought Title IX claims (among others) against the school based on adverse findings in a sexual misconduct proceeding.
  - Applying its recently-adopted standard that Title IX litigants need only allege that the school disciplined an aggrieved individual based on sex (as opposed to pleading the full elements of an erroneous outcome claim), the appellate court allowed plaintiffs' Title IX claims to proceed.
  - Court dismissed Title IX retaliation claim because plaintiffs' request for a hearing was not a protected activity and public statements do not amount to adverse actions.
- ***Posso v. Niagara Univ.*** (W.D.N.Y. Feb. 10, 2021)
  - Plaintiffs are current or former female students (most were on the women's swimming team) who alleged sexual misconduct by members of the men's swimming and diving team.
  - Court found that school had actual knowledge of widespread discrimination within the swimming program, including verbal abuse and physical violence, as was reported to coaches, administrators, and the Title IX office as early as 2016.
  - Plaintiffs adequately stated pre-assault claims because they alleged the culture of severe degradation, sexualization, and objectivation of women within the swimming team made the risk of sexual assault against one of the plaintiffs foreseeable.
  - A jury could find school was deliberately indifferent to that discrimination by failing to adequately respond to plaintiffs' reports.
- ***Lazor v. Univ. of Conn.*** (D. Conn. May 26, 2021)
  - In this Title IX action, plaintiffs, members of the women's rowing team, moved for a TRO to enjoin the University from eliminating the women's rowing team.
  - Court granted TRO because Plaintiffs showed a likelihood of success on the merits.
  - Court determined that participation gaps of 34 female athletes for the 2019-20 academic year, and 20 female athletes for the 2020-21 academic year, reflected that UConn could have supported an additional female athletic team.
  - Court rejected school's argument that a viable team should be calculated based on the average size of female teams (28 athletes for the 2020-21 academic year).
  - Plaintiffs further established they would suffer irreparable harm by losing the opportunity to compete, absent injunctive relief.
  - Court found that a balance of the equities favors plaintiffs and that public interest lies in vindicating plaintiffs' civil rights under Title IX.




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# UT System Title IX Training

## State Law Update

*Presenters:*  
*Darren Gibson*  
*Erin McNamara*

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1



## Part I: New Laws (87th Legislative Session)

SB 45 – “an act relating to the prohibition against sexual harassment in the workplace”

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## SB 45 Amends Chapter 21

- Chapter 21 of the Texas Labor Code – generally prohibits employment discrimination (implicitly including sexual harassment)
- SB 45 amends Chapter 21 to expressly prohibit sexual harassment and creates a cause of action for plaintiffs.
- SB 45 takes effect September 1, 2021 – only applies to conduct arising on or after that date



3

## SB 45 Claim for Sexual Harassment (Labor Code § 21.142)

- An “employer” commits an unlawful employment practice if sexual harassment of an employee occurs and if the employer or the employer’s agents or supervisors:
  - (1) know or should have known that the conduct was occurring and
  - (2) failed to take immediate and appropriate corrective action.
- See Title VII regulations – 29 CFR § 1064.11(d):
  - “(d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.”

4



## SB 45 Definition of "Employer" (Labor Code § 21.141)

- (1) "Employer" means a person who:
  - (A) employs one or more employees; or
  - (B) acts directly in the interests of an employer in relation to an employee.
- See FLSA – 29 USC § 203:
  - (d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.



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## Chapter 21 Definition of Employer (Section 21.002(8))

- (8) "Employer" means:
  - (A) a person who is engaged in an industry affecting commerce and who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year;
  - (B) an agent of a person described by Paragraph (A);
  - (C) an individual elected to public office in this state or a political subdivision of this state; or
  - (D) a county, municipality, state agency, or state instrumentality, regardless of the number of individuals employed.
- See Title VII – 42 USC § 2000e:
  - (b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia...

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## SB 45 and Chapter 21 - Different Definitions of Employer



- SB 45 applies to employers of 1 or more employees, **BUT** does not include government units.
  - Adopts definition from FLSA.
- Chapter 21 specifically names governmental units as employers, so there is a clear waiver of sovereign immunity.
  - Adopts definition from Title VII.
- This change suggests that statute now carves out state employers from liability for sexual harassment claims without express waiver of immunity.
- Issue will have to be decided in the courts.

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## SB 45 Definition of “Sexual Harassment”

“(2) “Sexual harassment” means an unwelcome sexual advance, a request for a sexual favor, or any other verbal or physical conduct of a sexual nature if:

- (A) submission to the advance, request, or conduct is made a term or condition of an individual's employment, either explicitly or implicitly;
- (B) submission to or rejection of the advance, request, or conduct by an individual is used as the basis for a decision affecting the individual's employment;
- (C) the advance, request, or conduct has the purpose or effect of unreasonably interfering with an individual's work performance; or
- (D) the advance, request, or conduct has the purpose or effect of creating an intimidating, hostile, or offensive working environment.”

*Compare* Title VII regulations – 29 CFR § 1064.11(a): Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when

- (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment,
- (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or
- (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

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## SB 45 Broadly Defines “Sexual Harassment”

- Prohibits quid pro quo sexual harassment
- Includes “any other verbal or physical conduct of a sexual nature” if it:
  - Has the “purpose or effect of unreasonably interfering with an individual’s work performance”
  - Submission is used as the basis for “a decision affecting the individual’s employment”
  - Creates an “intimidating, hostile, or offensive working environment.”
- No words like “severe” or “pervasive,” but that has been adopted by caselaw for Title VII and previously for Chapter 21.
- Courts historically apply a “reasonable person” standard in determining whether conduct is sufficiently hostile or unwelcome to alter the terms and conditions of employment.
  - See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993).
  - A court must find both that the conduct was in fact subjectively hostile or abusive to the plaintiff, and that it would have been objectively hostile or abusive to a reasonable person.

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## Practical Implications of SB 45

- More private employees/supervisors may be named individually.
- Small employers will be subject to sexual harassment claims.
- Argument that SB 45 specifically defined “employer” in a way that eliminated government units for purposes of sexual harassment claims.



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## HB 21 – Statute of Limitations for Sexual Harassment Claims

- Amends Section 21.201(g) of the Texas Labor Code.
- New statute of limitations for sexual harassment claims – now 300 days after the date of alleged sexual harassment to file charge.
- For claims based on any other protected class (*e.g.*, race, color, age, etc.), the 180-day limitations period continues to apply.
- Becomes effective September 1, 2021.

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## SB 282 - Settlement of Sexual Harassment Claims

- Adds Section 576.0001 to Texas Government Code and Section 180.008 to Local Government Code, and amends Section 12.1058(a) of Texas Education Code.
- Prohibits state agency/political subdivision from using appropriated funds to settle or otherwise pay a sexual harassment claim against:
  - Elected member of the executive, legislative, or judicial branch;
  - Person appointed by the governor within state government;
  - Person who serves as “staff” for a person described above.
- “Political subdivision” defined as “county, municipality, school district, other special district, or other subdivision of state government,” including open-enrollment charter schools.
- Does not appear to apply to higher education institutions.

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## Part II: Lessons Learned (86th Legislative Session)

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## SB 212 Refresher, Texas Education Code Chapter 51, Subchapter E-2

- Effective January 1, 2020
- Imposes mandatory reporting requirement on any university employee who (see Sec. 51.252):
  - in the course and scope of employment
  - witnesses or receives information regarding an incident
  - reasonably believed to constitute sexual harassment, sexual assault, dating violence, or stalking
  - alleged to have been committed by or against a student or employee
- Mandatory termination and potential criminal penalties for violation
- Mandatory reporting obligations for Title IX Coordinator and Chief Executive
- Potential \$2 million fine from THECB for non-compliance

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## SB 212 – Mandatory Reporting for University Employees

- Sanctions under SB 212 are serious and severe.
- Higher ed institutions in Texas are terminating individuals based on SB 212 violations, and there are examples of arrests and prosecutions.
- News coverage of arrest of former Texas A&M University Central Texas police officer arrested for failing to report under SB 212.



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## SB 212 / Section 51. 252 – Reporting Requirements

- “(a) An employee of a postsecondary educational institution who, in the course and scope of employment, witnesses or receives information regarding the occurrence of an incident that the employee reasonably believes constitutes sexual harassment, sexual assault, dating violence, or stalking and is alleged to have been committed by or against a person who was a student enrolled at or an employee of the institution at the time of the incident shall promptly report the incident to the institution's Title IX coordinator or deputy Title IX coordinator.”

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## SB 212 and 19 Tex. Admin. Code § 3.5



- Regulations adopted by THECB regarding reporting requirements
- Repeats statutory requirements with a few important deviations

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## 19 Tex. Admin. Code § 3.5 – Additions to 51.252(a)

- “(1) The employee's duty to report an incident begins on the effective date of these regulations or January 1, 2020, whichever is later;
- (2) The employee is required to report an incident regardless of when or where the incident occurred; and
- (3) Institutions may establish additional reporting avenues to comply with this section provided that the reports are promptly routed to the Title IX coordinator or deputy Title IX coordinator.”



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## SB 212 / Section 51. 252 – Existing Exceptions



- “(d) Notwithstanding Subsection (a), a person is not required to make a report under this section concerning:
  - (1) an incident in which the person was a victim of sexual harassment, sexual assault, dating violence, or stalking; or
  - (2) an incident of which the person received information due to a disclosure made at a sexual harassment, sexual assault, dating violence, or stalking public awareness event sponsored by a postsecondary educational institution or by a student organization affiliated with the institution.”

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## 19 Tex. Admin. Code § 3.5 – Adds Exception (d)(3)

- “(3) a sexual harassment, sexual assault, dating violence, or stalking incident in which the person has either learned of the incident during the course of their institution's review or process or has confirmed with the person or office overseeing the review or process, that the incident has been previously reported.”



*This exception has serious implications for how to handle complaints that become known by multiple parties within institution – e.g., a report is submitted to a departmental email account, a report is shared during a meeting with multiple participants, or a recipient shares a report with a supervisor.*

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## HB 1735 Refresher, Texas Educ. Code Chapter 51, Subchapter E-3

- Effective August 1, 2020
- Requires universities to adopt “a policy on sexual harassment, sexual assault, dating violence, and stalking applicable to each student enrolled at and each employee of the institution” (see Sec. 51.282):
- Amnesty for reporting students
- Confidentiality and request not to investigate
- Continuation of investigation upon withdrawal
- Potential THECB administrative penalty up to \$2 million for non-compliance.



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## HB 1735 Policy Requirements (Sec. 51.282(a)(1))

- Policy must include:
  - (A) definitions of prohibited behavior;
  - (B) sanctions for violations;
  - (C) the protocol for reporting and responding to reports of sexual harassment, sexual assault, dating violence, and stalking [must include electronic reporting option, per 19 Tex. Admin. Code § 3.7]
  - (D) interim measures to protect victims of sexual harassment, sexual assault, dating violence, or stalking during the pendency of the institution's disciplinary process, including protection from retaliation, and any other accommodations available to those victims at the institution; and

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## HB 1735 Additional Required Statements (Sec. 51.282(a)(1))

- E) a statement regarding:
  - (i) the importance of a victim of sexual harassment, sexual assault, dating violence, or stalking going to a hospital for treatment and preservation of evidence, if applicable, as soon as practicable after the incident;
  - (ii) the right of a victim of sexual harassment, sexual assault, dating violence, or stalking to report the incident to the institution and to receive a prompt and equitable resolution of the report; and
  - (iii) the right of a victim of a crime to choose whether to report the crime to law enforcement, to be assisted by the institution in reporting the crime to law enforcement, or to decline to report the crime to law enforcement;



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## HB 1735 – Availability of Policy

- Must make the policy available to students, faculty, and staff members by:
  - Including it in the institution's student and employee handbooks
  - Maintaining a web page dedicated solely to the policy that is easily accessible through a clearly identifiable link on the institution's home page.
- Must require each freshman/undergraduate transfer student to attend an orientation on the policy during the student's first semester (may be provided online)

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## Electronic Reporting Requirement – Sec. 51.283 and 19 Tex. Admin. Code § 3.7

- Each postsecondary educational institution shall provide an option for a student enrolled at or an employee of the institution to electronically report to the institution an allegation of sexual harassment, sexual assault, dating violence, or stalking committed against or witnessed by the student or employee, regardless of the location at which the alleged offense occurred.
- The electronic reporting option must:
  - (1) Allow for anonymous reporting; and
  - (2) Be easily accessible via a clearly identifiable link on the institution's website home page.



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## Texas Education Code Sec. 51.285 - Request not to investigate

- If an alleged victim of an incident of sexual harassment, sexual assault, dating violence, or stalking requests the institution not to investigate, the institution may investigate in a manner that complies with the confidentiality requirements under Section 51.291 (Confidentiality)
- In determining whether to investigate, school must consider:
  - Seriousness of incident
  - Other reports of sexual misconduct by same perpetrator
  - Risk of harm to others
  - Other factors as relevant
- School must take steps to protect community if no investigation
- Must inform alleged victim who requests no investigation about decision whether to investigate

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## Texas Education Code Sec. 51.287 - Withdrawal or graduation during investigation

- If a student respondent withdraws or graduates, school may not end the disciplinary process or issue a transcript until the school makes a final determination of responsibility
- School must expedite the disciplinary process as necessary
- Upon request by another postsecondary institution, school must provide information relating to a determination that the student violated the institution's code of conduct by committing sexual harassment, sexual assault, dating violence, or stalking.

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## HB 449/Texas Education Code Sec. 51.9364 - mandatory notations on transcripts

- For student ineligible for reenrollment, school must include transcript notation stating the student is ineligible to reenroll in the institution for a reason other than an academic or financial reason.
- If student withdraws pending disciplinary charges that may make them ineligible, school may not end disciplinary process until after a final determination of responsibility (and must include transcript notation described above if determined ineligible through disciplinary process)
- Upon student request, school may remove transcript notation if:
  - Student is eligible to reenroll
  - School determines that good cause exists to remove the notation

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# Questions?

# UT System Title IX Training

## Supportive Measures and Confidentiality

Presenters:

Jacqueline Phipps Polito

August 4, 2021

**Littler**



THE UNIVERSITY of TEXAS SYSTEM  
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

## Agenda

- Supportive Measures Under Title IX
- Federal and State Confidentiality Provisions
- Reasonably Available Options
- Role Of The Title IX Advisor



## Supportive Measures Under Title IX

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### Supportive Measures

- Duty for school to offer supportive measures
- Title IX and the Clery Act, as amended by VAWA, require equal access
- Burden for school (not party) to arrange and enforce supportive measures
- No liability under Title IX when parties decline to pursue supportive measures

## Supportive Measures Defined (34 CFR § 106.30(a))

- Non-disciplinary
- Non-punitive
- Individualized services
- Offered as appropriate, and as reasonably available, and
- Without fee or charge, to *the complainant or the respondent*, before or after the filing of a formal complaint
- Or where no formal complaint has been filed.

## Supportive Measures Defined (34 CFR § 106.30(a))

- Such measures are designed to:
  - restore or preserve equal access to the recipient's education program or activity
  - without unreasonably burdening the other party,
  - including measures designed to protect the safety of all parties or the recipient's educational environment or deter sexual harassment.





## Supportive Measures Defined (34 CFR § 106.30(a))

- Supportive measures may include:
  - counseling
  - extensions of deadlines or other course-related adjustments
  - modifications of work or class schedules
  - campus escort services
  - mutual restrictions on contact between the parties
  - changes in work or housing locations
  - leaves of absence
  - increased security and monitoring of certain areas of the campus
  - other similar measures.

## Reasonable Accommodations?

- Obligation to remedy discrimination by offering reasonable accommodations.
- An institution may be liable under Title IX if a reporting individual requests measures, but the institution does nothing.
- *Moore v. Regents of the Univ. of California*, 2016 WL 2961984 (N.D. Cal. 2016)
  - An institution does not act in deliberate indifference to a student's needs where the student declines offered service.
  - It is not plainly unreasonable for an institution to leave the ball in the reporting individual's court; the institution's duty is to offer counseling and instruct the reporting individual on the process for obtaining accommodations.



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## Federal and State Confidentiality Provisions

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### Title IX Confidentiality Requirement

- Must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the educational entity to provide the supportive measures.
- *See* 34 CFR § 106.30(a)

## VAWA Confidentiality Requirement

- 2012 Violence Against Women Act (“VAWA”) amendments to the Clery Act (34 CFR § 668.46(b)(11)(iv-v))
- Protection communications – communications between student and institutional officials about interim protective measures are not part of the disciplinary proceeding.
- No requirement to disclose these communications to respondent.

## State Confidentiality Requirements

- Texas Education Code § 51.256: (a) Unless waived in writing by the alleged victim, the identity of an alleged victim of an incident reported under Section 51.252 (Reporting Required for Certain Incidents):
  - (1) is confidential and not subject to disclosure under Chapter 552 (Public Information), Government Code; and
  - (2) may be disclosed only to:
    - (A) persons employed by or under contract with the postsecondary educational institution to which the report is made who are necessary to conduct an investigation of the report or any related hearings;
    - (B) a law enforcement officer as necessary to conduct a criminal investigation of the report;
    - (C) the person or persons alleged to have perpetrated the incident, to the extent required by other law; or
    - (D) potential witnesses to the incident as necessary to conduct an investigation of the report.

# Confidentiality of Supportive Measures

- Any supportive measures implemented must be kept as confidential as possible.
- Complainant should be able to obtain supportive measures while keeping identity anonymous (unless disclosure is necessary, e.g. for no-contact order)



Reasonably Available  
Options

## Supportive Measures Must Be Offered to Complainant

- Must be offered to every complainant promptly upon receipt of actual notice (34 CFR § 106.44(a); 85 FR 30180)
  - “Section 106.44 obligates a recipient to offer supportive measures to every complainant . . . .” 85 FR 30266
  - If you do not provide supportive measures to the Complainant, you must document why that response was not clearly unreasonable in light of the known circumstances (e.g. because complainant did not wish to receive supportive measures or refused to discuss measures with the Title IX Coordinator”) 85 FR 30266

## Supportive Measures May Be Offered to Respondent

- “There is no corresponding obligation to offer supportive measures to respondents [at reporting], rather, recipients *may* provide supportive measures to respondents.” 85 FR 30266
- *Permitted* before or after a formal complaint is filed. 85 FR 30185
  - Discuss after formal complaint
  - Respondent may request supportive measures at any time

## After Report is Filed: Supportive Measures for Both Parties

- Common “supportive measures” include:
  - Counseling, social worker visits
  - Deadline extensions
  - Schedule, class, transportation modifications
  - Regular check-ins; escorts
  - Increased security/monitoring
  - Mutual contact restrictions



## More Examples of Supportive Measures

- Facilitating access to counseling and medical services;
- Guidance in obtaining a sexual assault forensic examination;
- Assistance in arranging rescheduling of exams and assignments and extensions of deadlines;
- Academic supports;
- Assistance in requesting accommodations through the appropriate office, if the Complainant or Respondent qualifies as an individual with a disability;
- Changes in the Complainant’s or Respondent’s class schedule (including the ability to transfer course sections or withdraw from a course), work schedule, or job assignment, including teaching, research, and service responsibilities;
- Change in the Complainant’s or Respondent’s campus housing;
- Escort and other safety planning steps;
- Imposition of a "no contact order," an administrative remedy designed to curtail contact and communications between two or more individuals;
- Voluntary leave of absence;
- Referral to resources to assist in obtaining a protective order;
- Referral to resources to assist with any financial aid, visa, or immigration concerns; or
- Any other Supportive Measure that does not unreasonably interfere with either party’s access to education or employment opportunities can be used to achieve the goals of this policy.
- Measures not listed in Final Rule can be offered on equal terms to the parties

# Emergency Removal

- School may remove a Respondent entirely or partially under certain circumstances.
- Requires:
  - Individualized safety and risk analysis
  - An immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment
  - Respondent has notice and an opportunity to challenge the decision immediately following the removal
  - Must comply with IDEA, Section 504 and the Americans with Disabilities Act
- Implement the least restrictive emergency actions possible in light of the circumstances and safety concerns.

# Examples Of Accommodations

- Where student had ADHD, college provided following accommodations:
  - He was allotted extra time to review the report and submit a response;
  - At the hearing, he was offered the following:
    - All topics for the hearing were arranged to be presented together in a single grouping;
    - He was allowed additional time to process each topic and questions;
    - He was given extra breaks to ease his cognitive load.

## What To Do If Parties are in the Same Residence Hall?

- Poll: If the complainant requests that a respondent be removed from the hall, would you grant it?



## What To Do If Parties are in the Same Residence Hall?

- The regulations do not prohibit imposing a reasonable burden on the other party.
  - Respondent may be moved both in a residence hall and dining hall. 85 FR 30026, 30231
  - Keep in mind that if the Complainant is requesting no contact, it might be reasonable and appropriate to move the Complainant into an alternative housing assignment. 85 FR 30184



## Does A Student Have A Property Interest In Residence Hall?



- Courts have held that there is no protected property interest in a residence hall.
- *See Doe v. Devonshire*, 181 F.Supp.3d 146 (D. Mass 2016).
- However, make sure if a move is made that it is designated as an administrative move and NOT a sanction.

## What About Changing Courses for a Student?

- Obligation to provide reasonable accommodations to complete coursework.
- In today's virtual world –more options available.
- PTSD Accommodations:
  - Switch classes
  - Allow for incomplete
  - Remote classes
  - Drop classes – with removal of notations





## Role of the Title IX Advisor

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## Implementing Supportive Measures

- Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.
- Must promptly contact complainant to discuss availability.
- Consider complainant's wishes – but not required to grant them.
- Inform of availability irrespective of filing formal complaint.

## Required Protocols By Title IX Officer

- Title IX Coordinator must engage in “dialogue.”
- Institution offers measures “designed” to provide equal access.
- Title IX Coordinator must maintain neutral role.
- Title IX Coordinator must document in writing the supportive measures offered/provided or why no supportive measures were offered/provided.

## Disability Services

- Institutions have a Title IX responsibility to provide equal access to disability accommodations to the complainant and respondent.
- There is no constructive notice even if the student has received academic accommodations in the past.
- The obligation remains on the student to inform the Title IX coordinator of the need for the accommodation.

## Key Takeaways



- Provide supportive measures to ALL parties in a disciplinary proceeding arising from sexual violence.
- Equal measures
- May accommodate only one person over the other but cannot make decision based on gender.
- Make sure any actions taken are not sanctions but rather administrative measures in response to a request for an accommodation.

# Questions?

# UT System Title IX Training

## Unique Situations

Presenter:

Darren Gibson

August 4, 2021

Littler



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1

## Agenda

- Cases involving multiple complainants / respondents
- Cases involving multiple institutions
- Unique aspects of investigations in health institutions
- Title IX versus toxic managers
- Allegations against the Title IX office
- Complaints and investigations involving campus law enforcement
- *Garrity* warnings in Title IX investigations



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## Hypothetical Scenario – How is this case handled?

- Noah, Ben, Henry, and Oliver are students at the University, and they are all part of the LGBTQ student group. Noah, Ben, and Henry are freshmen, and Oliver is a senior. During the course of that year, Noah, Ben, and Henry all go out on dates with Oliver. Oliver graduates, and the next year, Noah, Ben, and Henry room together. At some point, the three talk about their dating histories, and they find out they all went on a date with Oliver. Each shares a similar story of going out to dinner, then to a bar, and then not remembering what happened afterwards. Each had vague and hazy memories of possible sexual contact with Oliver, but they didn't really remember the details and said it was not consensual. However, each woke up on Oliver's couch in their underwear the next morning, with Oliver telling them they had gotten drunk and he brought them back to his apartment to sleep it off. All three determined that they had been drugged and sexually assaulted by Oliver, but only Ben reports to Title IX.

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## Cases involving multiple complainants / respondents

- Final regulations allow institution to issue a single report in cases involving multiple complainants, respondents, or both. 34 CFR 106.45(b)(4).
  - “A recipient 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.”
- Final regulations removed mandated formal complaint by Title IX coordinator in situations involving multiple complaints against single respondent.



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## Cases involving multiple complainants / respondents

### Consolidating Complaints:

- Preamble: “The requirement for the same facts and circumstances means that the multiple complainants’ allegations are so intertwined that their allegations directly relate to all the parties.”
- Preamble: “If a recipient consolidates formal complaints, a recipient must issue the same written determination regarding responsibility to all parties because the allegations of sexual harassment must arise out of the same facts or circumstances such that the written determination directly relates to all the parties.”
- Regulations do not allow combining multiple allegations that arise out of different incidents.

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## Multiple “Unrelated” Incidents

- What to do with multiple, unrelated complaints against the same respondent?
  - Example : Three complainants make similar allegations against same respondent.
- Regulations do not allow consolidation into a single grievance process.
- Does that mean that evidence of other allegations is necessary excluded?



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## Evidence Of Prior Bad Acts – What Does Preamble Say?

- “A recipient may, for example, adopt a rule regarding the weight or credibility (but not the admissibility) that a decision-maker should assign to evidence of a party’s prior bad acts, so long as such a rule applied equally to the prior bad acts of complainants and the prior bad acts of respondents.”
- Such a rule should be reflected in training materials.
- “A recipient may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence.”
- “The Department reiterates that the rape shield language in this provision does not pertain to the sexual predisposition or sexual behavior of respondents, so evidence of a pattern of inappropriate behavior by an alleged harasser must be judged for relevance as any other evidence must be.”

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## Hypothetical Scenario – How Is This Case Handled?

- Emma is a medical student at UT Rio Grande Valley. Her fiancé, James, is a graduate student at UT Dallas. James is spending the summer at UT Austin doing research with a faculty member on a joint research project. Last weekend, Emma drove up to Austin to visit James for the weekend. Upon returning to UTRGV, Emma goes to the Title IX office and reports that while visiting James’ lab at UT Austin, the couple got into a fight and James hit her and knocked her to the ground, resulting in bruising, a sprained wrist, and knocking a tooth out. Emma, who had never been to Austin before and didn’t know anyone else in the area, waited until she returned to the Valley to report the incident to her family and friends, who encouraged her to report it to the UTRGV Title IX office.

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## Cases Involving Multiple Institutions

- Joint degree programs.
- Student enrolled at multiple institutions.
- Visiting faculty.
- Shared housing.
- High school students taking college courses for dual credit.
- Medical residents from other institution doing a rotation.



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## Who Has Jurisdiction?

- Under 2020 regs, complainant's home institution has Title IX jurisdiction.
  - “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.”
- Does not address joint affiliation (*e.g.*, joint degree program, dual credit)
- Does not necessarily alleviate obligation of other institution to protect its community, particularly as it pertains to employees and Title VII legal obligations.

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## Cases Involving Multiple Institutions

### Considerations and Options:

- Joint investigation or multiple investigations.
  - If separate, risks of different outcomes.
  - If joint, need to agree whether than applies to investigation or entire grievance process.
- Deferring to investigation of another institution – plusses and minuses.
- Who has authority over sanctions?
- Are these issues addressed in agreements regarding joint programs, visiting students / faculty, housing agreements?



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## Unique Aspects of Investigations in Health Institutions

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## Unique Aspects Of Investigations In Health And Research Institutions

- Dual nature of educational and employment roles among participants.
- Imbalance of power between faculty and graduate / medical students, post-docs, and residents.
  - Reluctance of individuals to participate.
- Risk of “retaliation” with a little “r”, particularly given parties’ rights of access to evidence.

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## Unique Aspects Of Investigations In Health And Research Institutions

- Likelihood that well-paid faculty will be represented by counsel during process.
- Involvement of partner institutions—*e.g.*, non-UT teaching hospitals, clinical settings.
  - How does that complicate investigation?
  - Does partner institution have a right to know outcome of investigation?

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## Climate Issues In Programs Or Departments

- Claims that mix sexual harassment and general toxic work environment allegations.
- How to address under Title IX regulations?
  - If don't rise to level of sexual harassment, mandatory dismissal under Title IX regs. 34 CFR 106.45(b)(3)
  - However, institution not precluded from addressing under policies and procedures.



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## Climate Issues In Programs Or Departments

- Institution continues to investigate and not required to follow mandated Title IX grievance process.
- **HOWEVER**, consider whether policies clearly address such behavior and what your institution can do even if allegations of "toxic work environment" substantiated.
  - Do your policies define "toxic work environment" or unprofessional behavior?
  - Do policies provide clear authority to take action based on such conduct?
  - Do policies differ between employees and faculty?

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## Complaints and Investigations Involving Campus Law Enforcement

- Many law enforcement agencies have their own policies or “general orders” governing how complaints are handled internally.
- *HOWEVER*, 2020 Title IX regulations and SB 212 mandate that reports and complaints be handled in certain ways.
- Be cautious of internally-focused investigations that do not go through Title IX Coordinator or standard Title IX process.
- Ensure that general orders are consistent with Title IX policy and SB 212 mandatory reporting obligations.

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## Allegations Against Title IX Office

- Failure to address allegations can provide complainant basis for legal action.
- Potential for conflict of interest or bias likely preclude Title IX office from handling matter.
- Ways to mitigate conflicts of interest or bias allegations:
  - Name proxy Title IX Coordinator for purposes of handling particular complaint against Title IX Office.
  - Hire outside investigator to conduct investigation (or investigator from other part of institution).
  - Treat Title IX office respondents the same as you would in any other investigation (notice, formal interviews, same rights as other parties, etc.).
  - Carefully follow processes and procedures to ensure fair and equitable treatment of all parties.

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## Garrity Warnings in Title IX Investigations

- *Garrity v. New Jersey* and its progeny outline boundaries for public employers when conducting employee witness interviews in internal investigations that raise potential criminal liability.
- *Garrity* rights protect public employees from being compelled to incriminate themselves during investigatory interviews conducted by their employers.
- “The protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic.”

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## Garrity Warnings in Title IX Investigations

- In practice, *Garrity* prohibits public employers from *both* (1) requiring employees to cooperate with internal investigations by threat of job loss *and* (2) requiring the employee surrender her Fifth Amendment rights against self-incrimination by allowing information from such interviews to be used in criminal proceedings.

Two options: the employer can either:

1. Require the employee to answer questions and terminate employment if the employee fails to do so, while also providing adequate immunity from the use of such testimony in criminal proceedings, or
2. Make it clear that the employee’s participation in the questioning is voluntary, that the employee will not be disciplined for failing to answer questions, but any answers may be used in criminal proceedings.

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## Garrity Warnings in Title IX Investigations

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2. Make it clear that the employee's participation in the questioning is voluntary, that the employee will not be disciplined for failing to answer questions, but any answers may be used in criminal proceedings.

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## Garrity Warnings in Title IX Investigations

- Employer cannot draw an adverse inference with respect to the underlying conduct to justify termination merely based on the failure to testify alone.
- However, employer can draw an adverse inference to support an adverse employment action where probative evidence of guilt is not otherwise addressed by the employee.
- There is precedent for suits against state actors who violate employees' *Garrity* rights in internal investigations when such violations result in improper use of statements in criminal proceedings, resulting in a constitutional injury.
- Requests by law enforcement for documents and witness statements created in the course of an internal investigation nevertheless raise *Garrity* concerns.
  - Be cautious about sharing interview notes with criminal authorities. Consult with attorneys.

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# Questions?







# UT System Title IX Training

## Trauma Informed Investigations

Presenter:  
Erin McNamara  
August 4, 2021



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## Need for Training on Trauma-Informed Approach

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## What Is A Trauma Informed Investigation?

- Considers the potential neurobiological effects of trauma
- Goal: objective and impartial investigation that minimizes reliance on sex stereotypes and generalizations



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## Why Conduct Trauma-informed Credibility Assessments?

- Safety: Avoid re-traumatizing interviewees and perpetuating a hostile environment
- Accountability: Conduct better investigations
- Required by state law for university peace officers. TEC §51.288 (HB 1735).



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## Why Conduct Trauma-informed Credibility Assessments? (cont.)

- Because OCR says so (or at least they used to) ...
  - See, e.g., OCR’s Questions and Answers about Title IX and Sexual Violence (April 14, 2014), University of Virginia Resolution Agreement, OCR Docket No. 11-11-6001 (Sep. 17, 2015)
  - Requiring annual training of panel members on “potential impact of trauma on the behavior of victims of sexual harassment or sexual violence, including how it may impact participation in the investigative process and the hearing by the Review Panel.”
- DOE under prior administration concerned about trauma-informed approach may result in misapplication of sex stereotypes or presumption of responsibility.
  - OCR’s “Q&A on Campus Sexual Misconduct” (Sept. 22, 2017): “Training materials or investigative techniques and approaches that apply sex stereotypes or generalizations may violate Title IX and should be avoided so that the investigation proceeds objectively and impartially.”

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## Trauma Informed Approach in the New Title IX Regulations

- Preamble to Regulations
  - “While the final regulations do not use the term ‘trauma-informed,’ nothing in the final regulations precludes a recipient from applying trauma-informed techniques, practices, or approaches so long as such practices are consistent with the requirements of § 106.45(b)(1)(iii) and other requirements in § 106.45.”
  - “[R]ecipients have discretion to include trauma-informed approaches in the training provided to Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolutions so long as the training complies with the requirements of § 106.45(b)(1)(iii) and other requirements in § 106.45, and nothing in the final regulations impedes a recipient’s ability to disseminate educational information about trauma to students and employees. As attorneys and consultants with expertise in Title IX grievance proceedings have noted, trauma-informed practices can be implemented as part of an impartial, unbiased system that does not rely on sex stereotypes, but doing so requires taking care not to permit general information about the neurobiology of trauma to lead Title IX personnel to apply generalizations to allegations in specific cases...”
- See also OCR’s “Q&A on the Title IX Regulations on Sexual Harassment” (July 20, 2021) : “A school may use trauma-informed approaches to respond to a formal complaint of sexual harassment.”

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## Training Requirements in Title IX regulations (34 CFR § 106.45(b)(1)(iii))

- “Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.”
- “Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment;”

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## Potential Effects of Trauma

- Scientists have proposed that neurobiological effects of trauma result in brain chemistry interfering with the brain function in encoding of memory.
- Theory is that individuals who experience trauma may be unable to recall events in chronological order; may not recall some details at all; ability to recall details may improve over time; and affect may initially seem evasive or counterintuitive.
- Response to trauma may include fighting, fleeing, or freezing.
- See, e.g., Rebecca Campbell, Ph.D., “The Neurobiology of Sexual Assault” (National Institute for Justice Research for the Real World Seminar, Dec. 3, 2012); Harvey Simon, M.D., “Stress & Anxiety – The Body’s Response” (N.Y. Times Jan. 30, 2013); James W. Hopper, “Why Many Rape Victims Don’t Fight or Yell” (Washington Post, June, 23, 2015).

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## What is Trauma?

- Psychological trauma is the unique individual experience of an event or enduring conditions, in which:
- The individual’s ability to integrate his/her emotional experience is overwhelmed, or
- The individual experiences (subjectively) a threat to life, bodily integrity, or sanity.
- Esther Giller, Sidran Institute. [What is Psychological Trauma?](#) (1999)
  - “[T]rauma is defined by the *experience of the survivor*. Two people could undergo the same noxious event and one person might be traumatized while the other person remained relatively unscathed.”



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## The Impact of Trauma

### Factors That Tend to Increase Traumatic Impact of Event:

- Severity
- If it is interpersonal (as opposed to non-interpersonal, such as accidents and natural disasters)
  - Interpersonal traumas may impact interviewee’s views regarding safety, intimacy, and trustworthiness of others.
- When it is chronic or repeated
  - Persistent traumas may leave the survivor feeling overwhelmed, helpless, and with a sense that the trauma is inescapable.

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## Critique Of Trauma-informed Theory

- September 2017, “The Bad Science Behind Campus Response to Sexual Assault,” The Atlantic.
- Argues trauma-informed, neurobiology-focused approach is based on “bad science.”
- Presents alternative views by scientists that “[h]igh levels of emotional stress enhance explicit, declarative memory for the trauma itself; they do not impair it.”
- Article elicited response from yet other scientists arguing in favor of psychological effects on trauma.
- See Emily Yoffe, “The Bad Science Behind Campus Response to Sexual Assault,” The Atlantic (Sept. 8, 2017); Jim Hopper, “Sexual Assault and Neuroscience: Alarmist Claims vs. Facts,” Psychology Today (posted January 22, 2018).

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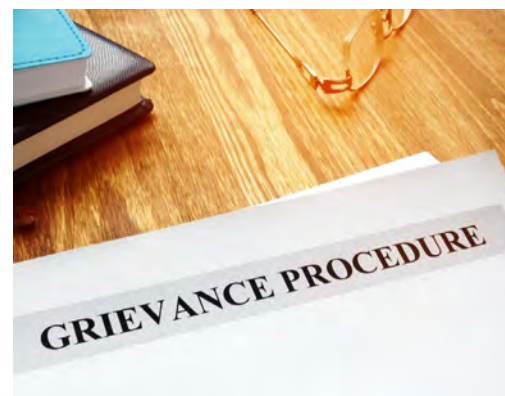
## Conducting Trauma-Informed Investigations

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## Trauma-Informed Grievance Procedures

- Campus investigators and adjudicators need not determine precisely what effects trauma may or may not have in the case.
- They need to understand the potential effects of trauma and check personal biases regarding potential impact.
- Avoid assumption that individuals are necessarily “lying” if they cannot recall every detail in chronological manner.
- However, if investigation shows behaviors that may be related to trauma, that doesn’t equate to policy violation.
- Fact-finders should not accept everything complainant recalls as absolutely “true,” or to fail to examine inconsistencies.
- Avoid assumptions of truthfulness or responsibility based on assumptions of “victim” and “perpetrator”.



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## Counterintuitive Interviewee Behavior

- Why didn't she scream?
- Why didn't she try to run away?
- Why didn't he fight back?
- How can it be rape if she didn't say "no"?



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## Behavior During Interviews



- Some interviewees' behavior during interviews may appear odd.
- Remember that they may continue to be affected by trauma when recalling a traumatic event
- Various "normal" responses include:
  - Emotional, crying, hysterical
  - Flat affect – seeming numb
  - Laughing, light-heartedness, inappropriate
  - Cycling of emotions

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## Trauma And Memory

- She can't get her story straight...
- How could she not remember something as significant as that?
- He is obviously making it up as he goes along...



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## Trauma And Memory

- Explicit Memory: can be consciously and intentionally recalled
  - Facts, general knowledge, autobiographical (placing self in space & time)
- Implicit Memory: Remember unconsciously and effortlessly
  - Emotional responses, body sensations, reflexive actions

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## Trauma And Memory

- Under extreme stress, the initial sorting of explicit and implicit layers continues, but processing is interrupted.

Memories of a Traumatic Event	Memories of a Non-Traumatic Event
<ul style="list-style-type: none"> <li>Stored in amygdala (“implicit”)</li> <li>Non-linear recall of events</li> <li>Poor recall of contextual information (like the layout of a room)</li> <li>Details are fuzzy</li> <li>Focus may be on what someone did to survive event; what are perceived as important details to interviewee may seem odd to investigator</li> </ul>	<ul style="list-style-type: none"> <li>Stored in hippocampus (“explicit”)</li> <li>Linear recall of events</li> <li>Specific details</li> <li>“Significant details” make sense to investigator</li> </ul>

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## When To Conduct An Initial Interview

- There is evidence that waiting two days (two full sleep cycles) to interview an interviewee may result in more coherent, detailed information.
- The brain will have had a chance to recover and consolidate memories during that period



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## Trauma-informed Interview Tips



- Think about presentation and atmosphere.
- Be mindful of first impressions (in writing, on the phone, or in person).
  - Where is the interview taking place?
  - Consider privacy, light, noise, accessibility, etc.
  - How do you present yourself?
  - Allow for variety of reactions to trauma

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## Investigation Triage

- Intake and formal complaint
  - Be mindful of potential effects of trauma in conducting intake and assessing formal complaint
  - Do not impose expectations of “typical” victim behavior or necessarily require perfect chronological memory of every detail.
  - Be prepared to conduct multiple intakes, if necessary
- Supportive measures
  - Consider potential effects of trauma in providing supportive measures and resources
- Informal resolutions
  - Design process that minimizes possibility for re-traumatization
- Dismissals
  - Plan for potential impact of a dismissal on parties, as event can be traumatization moment for complainant
  - Ensure resources also available to respondent, particularly when adverse finding may lead to emotional response
- Other types of developments

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## Summary

- In closing – Making the credibility assessment
  - Remember what you’ve learned about trauma and the body’s responses to trauma.
  - Assess the interviewee’s statement with that information in mind.
  - One who has been subjected to trauma may not “act” as expected, and that memory will be affected.



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# Questions?

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# UT System Title IX Training

## Free Speech and Retaliation

Presenters:

Darren Gibson

Kelli Fuqua

Littler



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## Agenda

- Free Speech on campus – What is the law?
- Why is the First Amendment relevant to Title IX?
- Code of conduct and First Amendment concerns.
- Potential landmines associated with First Amendment.
- Retaliation claims under Title IX.
- Best practices for avoiding retaliation claims.



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## Free Speech Legal Summary – Employment

To establish a claim for retaliation under the First Amendment, an employee must show:

- (1) she suffered an adverse employment action;
- (2) she spoke as a citizen on a matter of public concern;
- (3) her interest in the speech outweighs the employer's interest in efficient provision of public services; and
- (4) the speech precipitated the adverse employment action.



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## Free Speech Legal Summary (cont.)

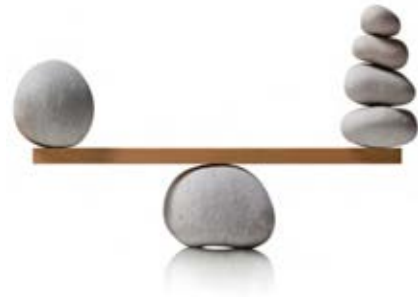
*Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006)

- *Garcetti* instructs to “first decide whether the plaintiff was speaking as a citizen disassociated with his public duties, or whether the plaintiff was speaking in furtherance of the duties of his or her public employment.”
- When public employees engage in speech pursuant to their official duties, they “are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”
- Speech involves matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.

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## First Amendment and Employees – *Pickering* Balance Test

*Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968): Even if a public employee speaks as a private citizen on a matter of public concern, her speech is not protected unless the employee's interest in expressing herself on the matter outweighs the government's interest in promoting the efficiency of its public services.



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## First Amendment and Employees – *Pickering* Balance Test

- In applying *Pickering* balance test, Courts considers, among other things:
  - (1) the degree to which the employee's activity involved a matter of public concern;
  - (2) the time, place, and manner of the employee's activity;
  - (3) whether close working relationships are essential to fulfilling the employee's public responsibilities and the potential effect of the employee's activity on those relationships;
  - (4) whether the employee's activity may be characterized as hostile, abusive, or insubordinate; and
  - (5) whether the activity impairs discipline by superiors or harmony among coworkers.

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## First Amendment and Students

- Courts must apply the First Amendment “in light of the special characteristics of the school environment.”
- SCOTUS: three specific categories of student speech that schools may regulate in certain circumstances -
  - (1) “indecent,” “lewd,” or “vulgar” speech uttered during a school assembly on school grounds
  - (2) speech, uttered during a class trip, that promotes “illegal drug use”
  - (3) speech that others may reasonably perceive as “bear[ing] the imprimatur of the school,” such as that appearing in a school-sponsored newspaper
- Additionally, schools have a special interest in regulating speech that “materially disrupts classwork or involves substantial disorder or invasion of the rights of others.”

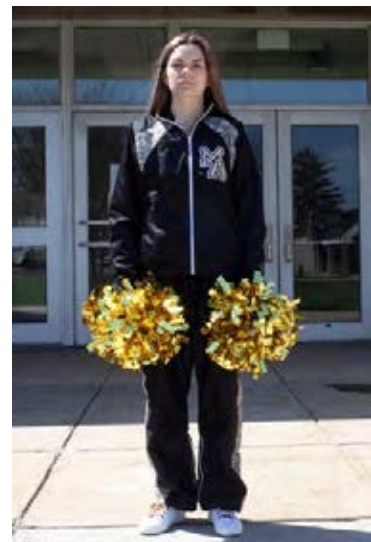
*Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503 (1969)

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## Recent SCOTUS Cheerleader Case

*Mahanoy Area School District v. B.L.*, 594 U.S. \_\_\_\_, (June 23, 2021)

- SCOTUS held former cheerleader's Snapchat F-bombs about her school is protected speech under the First Amendment
- Then 14-year-old cheerleader failed to win spot on varsity cheerleading team at her Pennsylvania school; posted a photo of herself and friend flipping off the camera, along with a message that said, "F\*\*\* the school. ... F\*\*\* cheer, F\*\*\* everything."
- School suspended her from junior varsity team for disruptive behavior .
- “[S]tudents do not ‘shed their constitutional rights to freedom of speech or expression,’ even ‘at the schoolhouse gate.’”



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## Recent SCOTUS Cheerleader Case

- Three features of off-campus speech that often differ from schools' efforts to regulate on-campus speech, "and that diminish the strength of the unique educational characteristics that might call for special First Amendment leeway," are:
  - School, in relation to off-campus speech, will rarely stand in loco parentis;
  - From the student speaker's perspective, regulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day, which means courts must be more skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all;
  - School itself has an interest in protecting student's unpopular expression, especially when the expression takes place off campus, as part of the "marketplace of ideas."

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## Why is the First Amendment relevant to Title IX?

- Regulations expressly state that they do not restrict any rights otherwise protected by the First Amendment (section 106.6).
- "Harassing" speech could potentially be covered by the First Amendment.
- Regulations expressly protect speech protected by the First Amendment; cannot constitute retaliation (section 106.67 b).
- Supportive measures limiting party's speech could potentially violate the First Amendment.
- Others?

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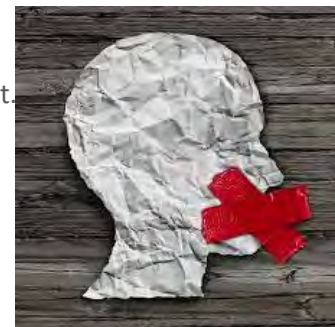
## Why is the First Amendment Relevant to Title IX – Preamble to Regulations

- Title IX is intended to protect individuals from sex discrimination, not to regulate the content of speech.
- Offensiveness of a particular expression as perceived by some individuals, standing alone, is not a legally sufficient basis to establish a sexually hostile environment under Title IX.
- “[A]pplying the same definition of actionable sexual harassment under Title VII to Title IX may continue to cause recipients to chill and infringe upon the First Amendment freedoms of students, teachers, and faculty by broadening the scope of prohibited speech and expression.”
- “The § 106.30 definition captures categories of misconduct likely to impede educational access while avoiding a chill on free speech and academic freedom.”
  - quid pro quo harassment by any recipient employee (first prong)
  - unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to education (second prong)
  - and sexual assault, dating violence, domestic violence, or stalking (third prong)

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## Code of Conduct

- Codes of Conduct that regulate speech may conflict with First Amendment.
- *Speech First, Inc. v. Fenves*, 979 F.3d 319 (5th Cir. 2020), as revised (Oct. 30, 2020)
  - Alleged UT’s speech codes unconstitutionally “vague and overbroad prohibitions on student speech” in violation of 1<sup>st</sup> and 14<sup>th</sup> Amendments.
  - Among other things, definition of prohibited “Verbal harassment” included “hostile or *offensive speech*” that would allegedly limit protected speech.
  - “Terms like ‘harassment,’ ‘intimidation,’ ‘rude,’ ‘incivility,’ and ‘bias’ beg for clarification.”
  - Despite UT’s amendments to policy to narrow definitions, Fifth Circuit held *Speech First* had standing based on “chilling effect of allegedly vague regulations, coupled with a range of penalties for violating the regulations ...”



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## Takeaways

- Institutions should proceed with caution when adopting Codes of Conduct or Community Standards that seek to regulate speech.
- Any such policies and rules should governing on-campus speech be considered in light of First Amendment protections.
- Regulation of off-campus speech (including online speech) by students should be viewed critically in light of *Mahoney*.
  - Interest in regulating off-campus speech likely applies with even greater force to higher education institutions.
- Regulation of speech by employees should comply with *Garcetti* and *Pinkerling* balancing test.

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## Title IX Retaliation – What is the Law?

- Title IX also prohibits retaliation for filing an OCR complaint or for advocating for a right protected by Title IX and discrimination in employment which is based on sex. See *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005)
- Title IX retaliation complaints require proof of three elements:
  1. Protected activity
  2. Adverse action
  3. Causation

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## Title IX Retaliation – Title IX Regulations and SB 212

- Senate Bill 212 (SB 212) requires all employees to report and prohibits retaliation for good faith reports.
- While Title IX regulations exempt speech protected by First Amendment, they do prohibit retaliation, which is defined broadly:
  - “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 this part, 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 part. 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.”
- Thus, reports in good faith, testifying as a witness, assisting an investigation, and *refusing to participate in an Title IX proceeding*, can all be forms of protected activity.

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## Retaliation Against Employees – Exception To Title VII Preemption

- *Lakoski v. James*, 66 F.3d 751 (5th Cir. 1995): “Title VII provides the exclusive remedy for individuals alleging employment discrimination on the basis of sex in federally funded educational institutions.”
- *Lowery v. Tex. A&M Univ. Sys.*, 117 F.3d 242 (5th Cir. 1997): Title VII preempts a Title IX retaliation claim when the alleged retaliation occurs as a consequence of the claimant's participation in complaints and investigations challenging alleged employment discrimination. However, Title VII does not preempt a Title IX retaliation claim when the alleged retaliation occurs as a consequence of the claimant's participation in complaints and investigations challenging alleged violations of Title IX.
- *See also Wilkerson v. Univ. of N. Tex.*, 4:15-CV-00540, 2018 WL 6331686 (E.D. Tex. Dec. 4, 2018); *Slabisak v. Univ. of Tex. Health Sci. Ctr. at Tyler*, 4:17-CV-597, 2018 WL 1072511 (E.D. Tex. Feb. 27, 2018)

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## Intersection Between Retaliation And Reports / Testimony In Bad Faith

- Title IX Regulations:
  - “The written notice must inform the parties of any provision in the recipient’s code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.”
  - “Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.”
- It is also a violation of SB 212 to knowingly make a false report “with the intent to harm or deceive.”

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## Taking Action for False Reports / Bad Faith

- Proceed with caution.
- Simply because allegations not substantiated insufficient to support allegation of materially false statement or report in bad faith or with intent to harm or deceive.
- For purposes of Title IX, is there clear evidence that person was aware that report / statement was false and in bad faith at the time it was made?
- For purposes of SB 212, is there clear evidence of a knowingly false report with an intent to harm or deceive?



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## Scenario One

- Graduate student alleged she was subject to unwelcome sexual harassment in 2017 by the lab manager. Text message evidence indicated consensual romantic relationship and allegations unsubstantiated. In 2019, graduate student brought complaint against another grad student in the lab for sexual harassment, sexual assault, dating violence, and stalking. Text message evidence clearly showed a consensual relationship and consensual sexual conduct contrary to allegations.
- Second respondent brought counter complaint alleging false statements during investigation, harassment and bullying.
- What is the appropriate response?
- Allegations were investigated and substantiated. What is appropriate sanction?
- Graduate student was dismissed from program.

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## Best Practices For Avoiding Retaliation And Related Litigation

- Treat all parties equally.
- Be cautious before imposing liability or sanctions against parties for reports, defenses, or testimony.
- During the course of the investigation, advise parties, managers, supervisors, witnesses, etc. that retaliation will not be tolerated.
  - Put it in your standard notice to the parties.
  - Be on the lookout for differential treatment after the fact.
- If a supervisor / faculty advisor want to take adverse action after protected activity, ask: “Have we punished others for this same type of offense in the same manner? If so, who and when?”

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# Questions?

# UT System Title IX Training

## Scope and Jurisdiction

Presenters:

Jacqueline Phipps Polito

Tara Param

August 4, 2021

**Littler**



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## Agenda

- ✓ Title IX v. Title VII
- ✓ When does Title IX apply?
- ✓ Where does Title IX apply?
- ✓ To whom does Title IX apply?
- ✓ Matters outside the scope of Title IX

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## Title VII vs. Title IX



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## Title IX of the Education Amendments of 1972

- Title IX prohibits sex discrimination in education by staff and students in any educational institution or program that receives federal funding.

20 U.S.C. § 1681, *et seq.*

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## Title VII of the Civil Rights Act

- Title VII prohibits discrimination in employment on the basis of race, color, national origin, and religion, in addition to sex.

42 U.S.C. § 2000e et seq

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## Title VII v. Title IX

### TITLE VII

- Only applies in the employment context
- Protects against discrimination on the basis of race, color, religion, national origin, as well as sex
- Enforced by the EEOC
- Must exhaust administrative remedies before filing suit

### TITLE IX

- Applies to students and employees of educational institutions or programs
- Enforced by the DOE's Office of Civil Rights
- No administrative prerequisites before filing suit

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## However...

- Both laws are used to combat discrimination
- Both protect employees against workplace discrimination



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## Scope of Title IX

- Title IX applies to sexual misconduct that occurs where:
  - Complainant (alleged victim) or Respondent (alleged perpetrator) is enrolled in classes or employed by the institution and
  - The conduct allegedly occurred in an education program or activity and
  - Against a person in the United States.



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## When Does Title IX Apply?

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## Jurisdiction – Triggering Event

- DOE's OCR will consider whether:
  - The institution had actual knowledge
  - Alleged conduct constitutes actionable sexual harassment
  - Institution's response demonstrated deliberate indifference



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## No Formal Complaint Required

“No Formal Complaint Required: [A] recipient may have actual knowledge of sexual harassment even where no person has reported or filed a formal complaint about the sexual harassment.”

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## Actual Knowledge

“Actual knowledge means notice of sexual harassment or allegations of sexual harassment a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient....”

- The student informed the Title IX Coordinator, or
- Any official with authority to institute corrective measures on behalf of the institution has knowledge of the complaint



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## Official with Authority

- Gebser/Davis – Actual knowledge requires notice to an official with authority
- Title IX Coordinator, elementary and secondary school employees, and other officials
- Anyone who can institute corrective measures
- Depends on the specific facts relating to the institution's administrative structure and the roles and duties held by officials



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## Where does Title IX Apply?

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## Education Program or Activity

- Any location, event, or circumstance over which the recipient exercises *substantial control* over both the respondent and the context in which the sexual harassment occurs.
- Includes all education programs or activities, whether occurring on or off-campus, and any building owned or controlled by a student organization that is officially recognized by a postsecondary institution (such as a fraternity or sorority house).

34 CFR § 106.44(a)

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## Online Harassment? Guidance in Preamble.

- Regulations “apply to sexual harassment perpetrated through use of cell phones or the internet if sexual harassment occurred in the recipient’s education program or activity.”
- “ ‘Operations’ may certainly include computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of, the recipient.”
- “For example, a student using a personal device to perpetrate online sexual harassment during class time may constitute a circumstance over which the recipient exercises substantial control.”
- Regulations “appropriately address electronic, digital, or online sexual harassment by not making sexually harassing conduct contingent on the *method* by which the conduct is perpetrated.”



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## Scope of Title IX – Location

- Applies to conduct that occurs:
  - In the United States
  - On campus or campus-owned buildings
  - University sponsored events or programs
  - Fraternity or sorority houses



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## To Whom Does Title IX Apply?

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## Who is the Complainant?



- Student, employee or patient (medical center)
- Participating in, or attempting to participate in, the education program or activity
- Includes applicants and students on leave

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## Who is the Respondent?

- Any individual, including students, professors, faculty members, employees of the institution, and any other individual
- Respondent can be visitors, contractors, or other third parties.



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## Matters Outside the Scope of Title IX

- Off campus conduct (where there is lack of substantial control)
- Conduct outside the U.S.
- Examples of matters outside scope:
  - Domestic violence between two employees that occurs at a private residence off campus.
  - Sexual assault of student during study abroad.
  - Sexual assault of post-doc at conference where respondent from another institution.
  - Stalking of faculty member off campus by person not connected to university.



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## Training

- Title IX Coordinator, investigator, decision-maker, those who facilitate informal resolution must be trained on “the scope of the recipient’s education program or activity”



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# Questions?

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# UT System Title IX Training

## Common Issues in the Grievance Process

Presenters:

Darren Gibson, Littler Mendelson P.C.  
Josh Hurwit, St. John's University

August 5, 2021

Littler



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## Agenda

- Title IX Coordinator signing a Formal Complaint
- Non-participating parties and equal opportunity to participate
- Making evidence available to parties
- Mandatory and permissive dismissal
- Virtual investigations and hearings
- Conflicts of interest and bias



2

## Title IX Coordinator Signing a Formal Complaint

- Recognized as option in definition of Formal Complaint, 34 CFR 106.30:
  - “*Formal complaint* means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment.”
  - “Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party under this part or under § 106.45, and must comply with the requirements of this part, including § 106.45(b)(1)(iii). “
- Regulations do not provide guidance as to when a Title IX Coordinator should sign a Formal Complaint.



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## Title IX Coordinator Signing a Formal Complaint

- Regulations provide little guidance as to when a Title IX Coordinator should sign a Formal Complaint. Preamble defers to discretion.
- Potential factors to consider:
  - Seriousness of the alleged incident;
  - Whether University has received other reports of sexual misconduct committed by the respondent or indications of serial predation;
  - Whether alleged incident poses a risk of harm to others;
  - Whether allegations involved violence, use of weapons, or other similar factors; and
  - Any other factors University determines relevant.

*See Preamble p. 702; H.B. 1735, TEC 51.285(a).*

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## Things To Consider Before Signing Formal Complaint

- Is complainant willing to participate?
- Does an investigation go against the wishes of a complainant?
  - If so, is investigation nevertheless justified?
- Will investigator be able to gather evidence sufficient to for decision-maker to make a determination?
- Does conduct, even if true, rise to the level of Title IX Sexual Harassment?
- Are there other means to address reports without invoking Title IX grievance process?



5

## Whether to Investigate – H.B. 1735

- H.B. 1735 includes requirements for when complainant requests not to investigate.
- Must comply with confidentiality obligations of H.B. 1735
- Consider factors described above for Title IX Coordinator signing Formal Complaint.
- If no investigation, “the institution shall take any steps the institution determines necessary to protect the health and safety of the institution's community in relation to the alleged incident.”
- Shall inform complainant of decision not to investigate.



6

## Hypothetical Example for Title IX Coordinator

- Employee A (Admin Asst. to Department Chair) comes to Title IX office and reports being subject to quid pro quo sexual harassment by Department Chair in the form of unwanted touching and groping, explicit text messages, and requests for sexual favors. Employee A has been in position only six months.
- Upon being informed of the grievance process, including live hearing with cross examination, Employee A states that they do not wish to proceed or participate in investigation. Employee A, a single parent, states they cannot risk the job by reporting and asks report to be kept confidential.
- You offer limited supportive measures in light of confidentiality request (*e.g.*, EAP, other external resources).
- Do you file a Formal Complaint as the Title IX Coordinator?

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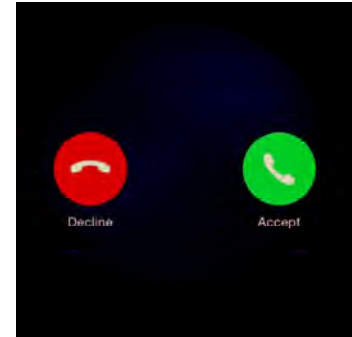
## Hypothetical Example for Title IX Coordinator – Part 2

- Employee B also reports Department Chair's conduct towards Employee A. Employee B also states that a former employee in the same position recounted similar conduct by the Department Chair before quitting six months ago and moving to California.
- Do you file a Formal Complaint?
- In addition, Employee B reports rumors that Department Chair has a history of having affairs with his own students in violation of the University's consensual relationship policy. Employee B does not know if relationships were consensual or coerced in any way. Employee B does not know the names of students, only rumors.
- Do you file a Formal Complaint?

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## Non-Participating Parties

- Non-participating complainants can make it very difficult to gather evidence.
- Proceeding with investigation may put complainants in a very difficult position with respect to friends, colleagues, job.
- Parties may not wish to be subject to cross examination in a live hearing.
- Parties may no longer be affiliated with the institution and may see little benefit in participating.



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## Non-Participating Parties Right to Participate

- Per Preamble, non-participating parties are expected to be provided same notice and other rights, including equal rights to participate.
  - “Nothing in the final regulations precludes a recipient from communicating to a non-participating complainant that the recipient is required under these final regulations to send the complainant notices throughout the grievance process and that such a requirement is intended to preserve the complainant’s right to choose to participate, not to pressure the complainant into participating.”
  - “If the recipient has commenced a § 106.45 grievance process without a cooperating complainant, the recipient must still obtain evidence about the allegations, and the complainant and respondent must have an opportunity to inspect, review, and respond to such evidence.”

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## Making Evidence Available to Parties – 106.45(b)(5)(vi)

- “Prior to completion of the investigative report, the recipient must send to each party and the party’s advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report.”
- HB 1735, TEC 51.286 (limited to students):
  - Ensure that both the student and the alleged victim have reasonable and equitable access to all evidence relevant to the alleged violation in the institution’s possession, including any statements made by the alleged victim or by other persons, information stored electronically, written or electronic communications, social media posts, or physical evidence, redacted as necessary to comply with any applicable federal or state law regarding confidentiality.



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## Making Evidence Available to Parties – Is Access Sufficient?

- Title IX regulations state that evidence must be sent to each party and advisor “in an electronic format or a hard copy,” whereas HB 1735 only contemplates equitable access.
- Preamble: “recipients are neither required nor prohibited from using a file sharing platform that restricts parties and advisors from downloading or copying the evidence.”
- Recipients may require parties and advisors from disseminating evidence by requiring non-disclosure agreement.
- May redact information not directly related to allegations.



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## Mandatory Dismissals – 106.45(b)(3)

### Mandatory Dismissal

- Conduct alleged would not constitute sexual harassment as defined in § 106.30 even if proved
- Did not occur in recipient's education program or activity (including lack of substantial control)
- Did not occur against a person in the U.S.
- But, "such a dismissal does not preclude action under another provision of the recipient's code of conduct."



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## Permissive Dismissals – 106.45(b)(3)

### Permissive Dismissal

- Complainant withdraws formal complaint or any allegations therein
- Respondent no longer enrolled or employed by institution
- Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination



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## Examples of Allegations Subject to Potential Title IX Dismissal

Description	Dismissal?
Two faculty members married to each other. One accuses other of domestic violence occurring in off-campus, personal settings. None of the alleged domestic violence occurs on campus or during University-related events.	Mandatory
During the course of the investigation, employee respondent resigns.	Permissive
During the course of the investigation, student complainant graduates.	N/A
After submission of the complaint of verbal sexual harassment, but prior to the investigation, complainant commits suicide. No known evidence of allegations other than complainant's formal complaint.	Permissive
Alleged sexual assault of graduate student by University post-doc at conference in Toronto.	Mandatory
Alleged sexual assault of graduate student by University post-doc at conference in Chicago.	N/A
Alleged sexual assault of graduate student by post-doc from a different institution (with no connection to University) at conference in Chicago.	Mandatory

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## Deliberate Indifference Standard Still Applies

- Preamble: "Even where a formal investigation is not required (because neither the complainant nor the Title IX Coordinator has filed or signed a formal complaint, or because a complainant is not participating in or attempting to participate in the recipient's education program or activity at the time of filing), the deliberate indifference standard requires that a recipient's response is not clearly unreasonable in light of known circumstances."
- Example: Alleged dating violence by student in dorm against non-student visiting campus for weekend.
  - Is there an obligation to formally investigate? No, because complainant not participating in education program or activity.
  - Is there nevertheless an obligation to respond? Yes under Clery. Likely yes under Title IX.

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## Remember ...

- “As to misconduct that falls outside the ambit of Title IX, nothing in the final regulations precludes recipients from vigorously addressing misconduct (sexual or otherwise) that occurs outside the scope of Title IX or from offering supportive measures to students and individuals impacted by misconduct or trauma even when Title IX and its implementing regulations do not require such actions.”

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## Virtual Investigations and Hearings

### Poll:

- How many of you have conducted most of your sexual misconduct investigations virtually over the past 14 months?
- How many of you have conducted virtual hearings?

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## Virtual Investigations and Hearings

- Virtual investigations and hearings, the new normal?
- Possible benefits
  - Efficiency, cost savings
  - Ability to access witnesses who are not on campus
  - Protection of witnesses
- Potential negatives
  - Loss of personal connections
  - Credibility assessment may be affected
  - Parties want to be heard



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## Conflicts of Interest and Bias

- Regulations require that Title IX Coordinator, investigator, decision-maker, or facilitator of informal resolution process must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. 106.45(b)(1)(iii).
- Conflict of interest and bias undefined.
- Recipients own employees can serve as investigators and decision-makers.
- “Department declines to define certain employment relationships or administrative hierarchy arrangements as *per se* prohibited conflicts of interest”

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## Conflicts of Interest and Bias – Preamble Guidance

- Whether bias exists requires examination of the particular facts of a situation.
- Department encourages recipients to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person is biased.
- Caution not to apply generalizations that might unreasonably conclude that bias exists, for example assuming:
  - That all self-professed feminists, or self-described survivors, are biased against men, or
  - That a male is incapable of being sensitive to women, or
  - That prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents

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## Conflicts of Interest Where Coordinator Signs Formal Complaint?

- No.
- Preamble: “We do not believe that signing a formal complaint that initiates a grievance process inherently creates a conflict of interest between the Title IX Coordinator and the respondent; in such a situation, the Title IX Coordinator is not advocating for or against the complainant or respondent, and is not subscribing to the truth of the allegations, but is rather instituting a grievance process (on behalf of the recipient, not on behalf of the complainant) based on reported sexual harassment so that the recipient may factually determine, through a fair and impartial grievance process, whether or not sexual harassment occurred in the recipient’s education program or activity.”

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# Questions?

# Interviewing & Investigative Techniques

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Conducting  
Lawful Investigations

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# Taking Notes

- Be Prepared:
  - Written outline of allegations
  - Written list of basic questions organized by allegation
  - Space for “parking lot” issues
  - Acknowledge what you are doing and why



# Interviews: What to Document

## Do

- Write objectively
- Summarize knowledge
- Give specific responses to key questions and documents
- Use quotes
- Close the funnel
- Use relevant facts regarding credibility



## Don't

- Make conclusions as to the facts and credibility
- Use shorthand for quotes
- Stick unwaveringly to script



## A Final Note About Your Notes

- Drafts and final?
- Handwritten or typed?
- Creating a single, definitive and legible draft of notes or just the draft?
- Include the date, live/video, attendees



## The Interview

The following is a suggested outline for the beginning and closing of each interview.

*You are free to rearrange these items in a way that flows logically and is comfortable for you.*



# Opening the Interview

- Introduction
  - Tell the interviewee your name and title.
  - Explain your role at the institution.
  - Give the interviewee a short statement about why the meeting is happening, which can be tailored depending on whether you are talking to a complainant, witness or subject.
- Explain the Process
  - This is a neutral review process.
  - The goal of the meeting is to have an open and candid conversation; the interviewee should feel comfortable sharing what he/she knows to help the institution.

# Opening the Interview

- Answer Process Questions
  - Ask the interviewee to tell you when your question is not clear or when the interviewee does not understand the question; offer to clarify your question if needed.
  - Ask if the interviewee has any questions and answer them before moving forward with the interview.
  - Confirm they are not recording the interview.

## Ask the Right Questions:

### Use “Funneled” Questioning



- Open-ended phase
- Clarification phase
- Pinning down phase (i.e., closing the door)

## Ask the Right Questions:

- Use “Funneled” Questioning
- Open-ended questions
- Aim for all relevant evidence
- Make sure the witness answers the questions fully
- Ask, “Do you remember anything else?”
- Summarize so witness can offer facts that were left out
- Identify other ways to refresh witness’s memory
- Encircle knowledge with wrap-up question



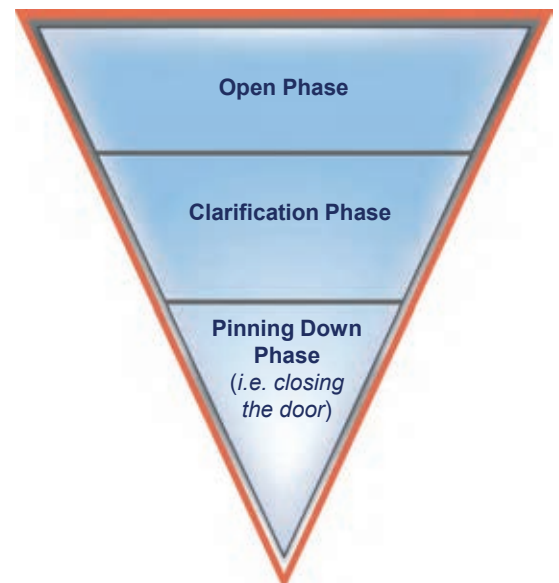
# Ask the Right Questions:

- Use “Funneled” Questioning
  - What? Who? Where? When?
  - Don’t disrupt train of thought
  - Use active listening:
    - Don’t be wed to your outline
    - Listen to subtle changes and clarify
  - Follow up on cues
    - Watch for eye contact
    - Gestures
    - Body language



## 2. Clarification Phase

- Now get clarification for details
- Who?
- What?
- Where?
- Why?
- Tell me in detail
- How do you know? (starts to get at document issues)



## 3. Closing Off

- Get the final answers
  - Anyone else present?
  - Anyone else know about the details?
  - Who?
- Listen to the witness
- Exhaust the subject
- **Recap and ask,**  
**“Is there anything else?”**



## Closing the Interview

Thank the Interviewee

*“Thank you for your time in this serious and important process. Your participation helps to support our continued efforts to maintain a compliance environment that best reflects our values.”*

# Interviewing the Complainant

- Get as much detailed information from the complainant as possible.
- Emphasize complaint will be taken seriously.
- Listen impartially without committing yourself.
- Ask open-ended questions.
- Evaluate the complaint from the complainant's perspective.



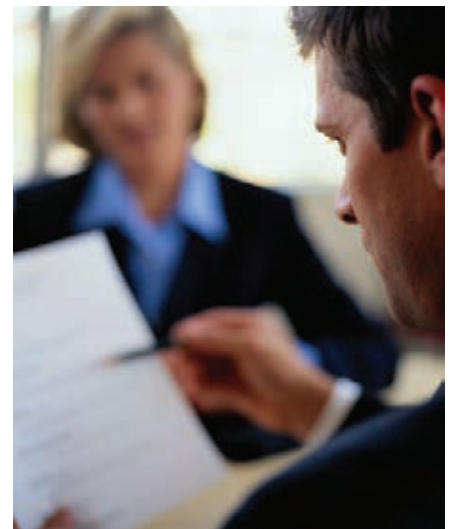
## Avoiding Common Mistakes of an Investigator

- Assume you are being recorded
- Take off your HR hat
- Be an impartial fact-finder (no biases) and take out the emotion
- Be a good listener
- Gather and collect evidence
- Attention to detail



## Allegations Are Not Facts

- Don't accept the Complainant's allegations at face value.
- Analyze the facts you are offered and make your own determination.
- The report from the person who made the allegation is just a report.
- Offer no opinions to the Complainant.

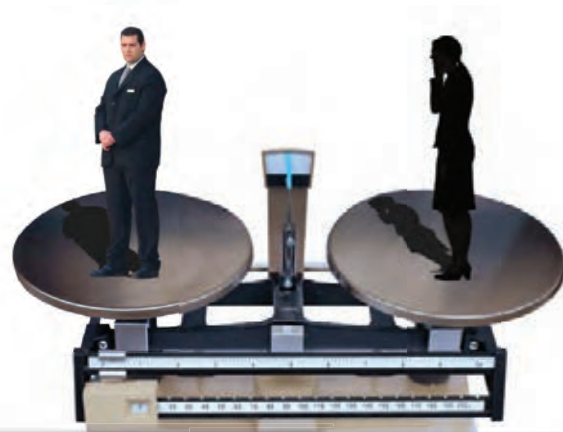




# Interviewing the Respondent

Two goals:

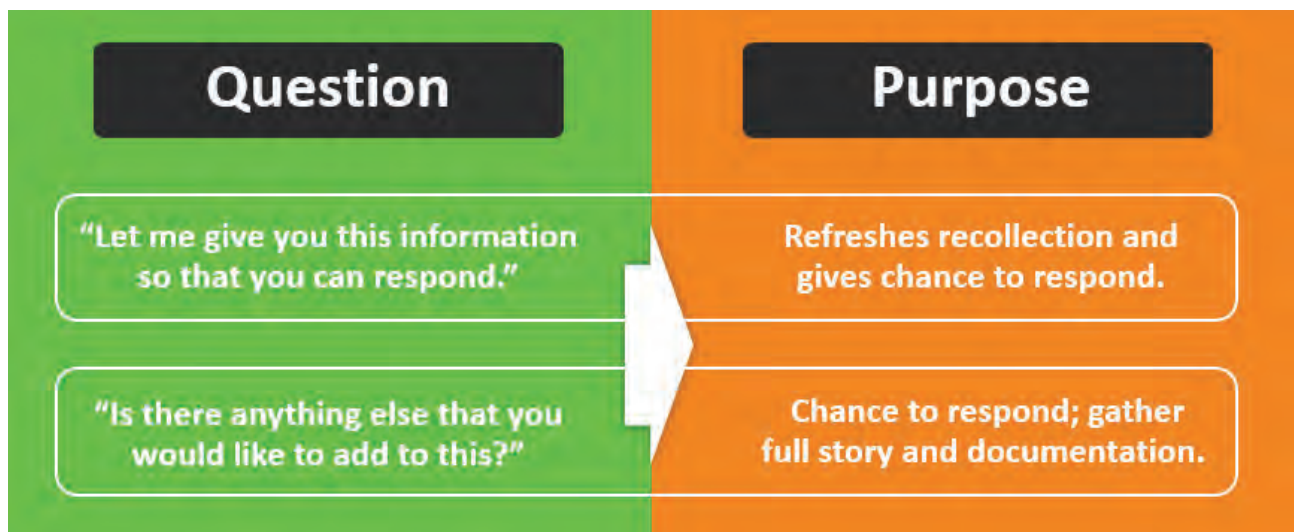
- Information gathering
- Fair opportunity to respond
- Equal opportunity to present evidence and identify witnesses



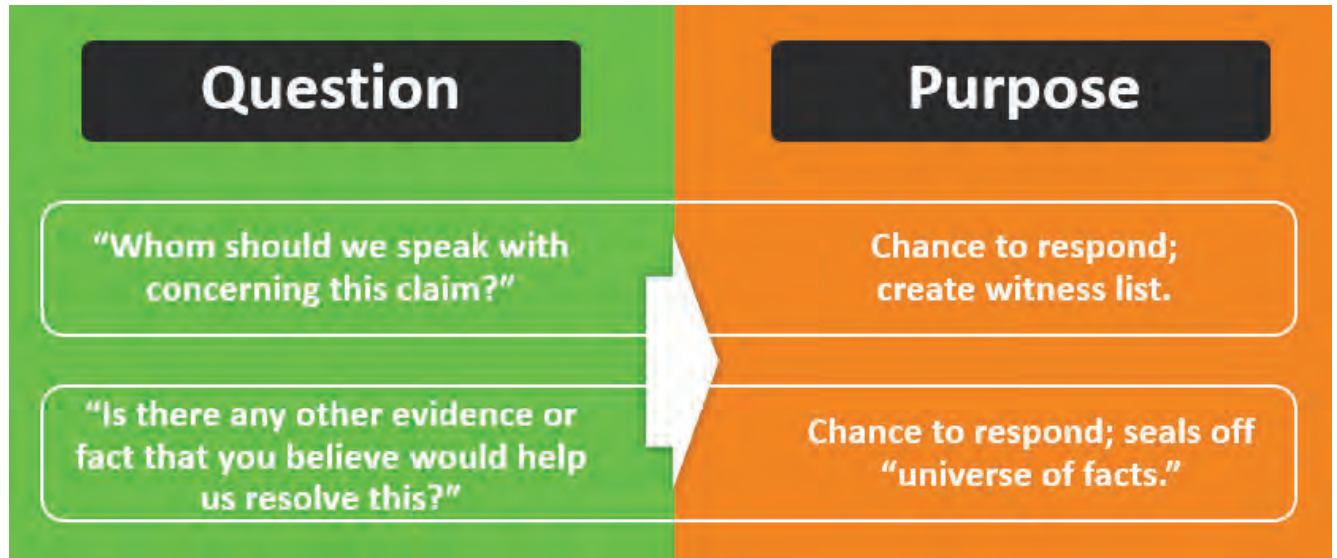
*Fair Opportunity  
to Respond*

*Confidentiality*

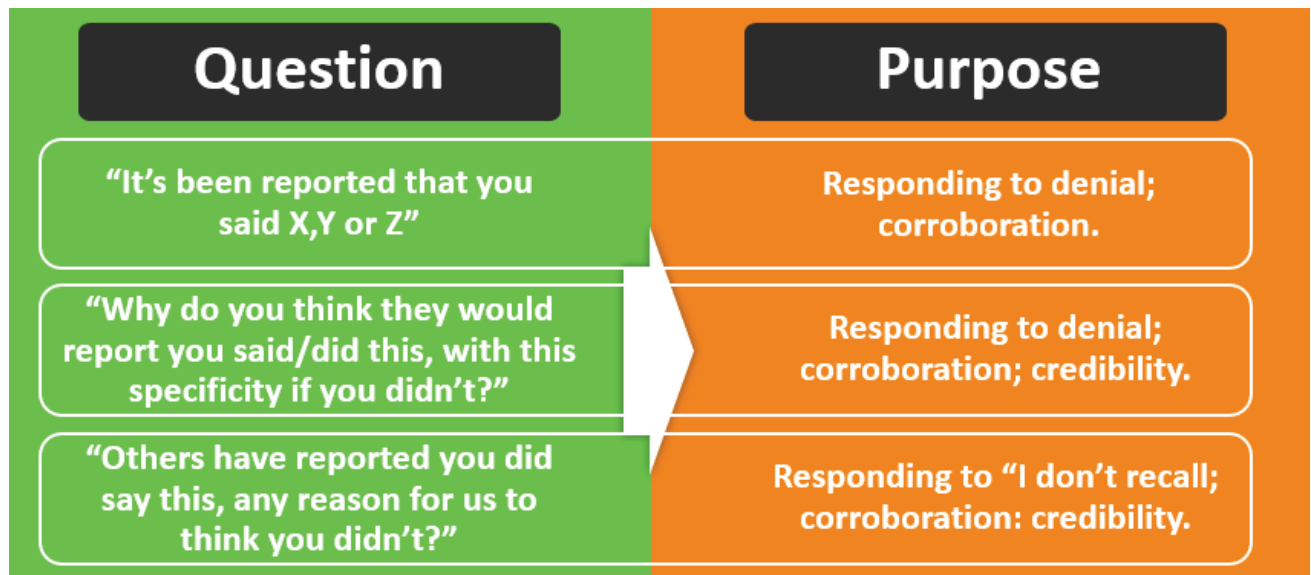
# Useful Questions



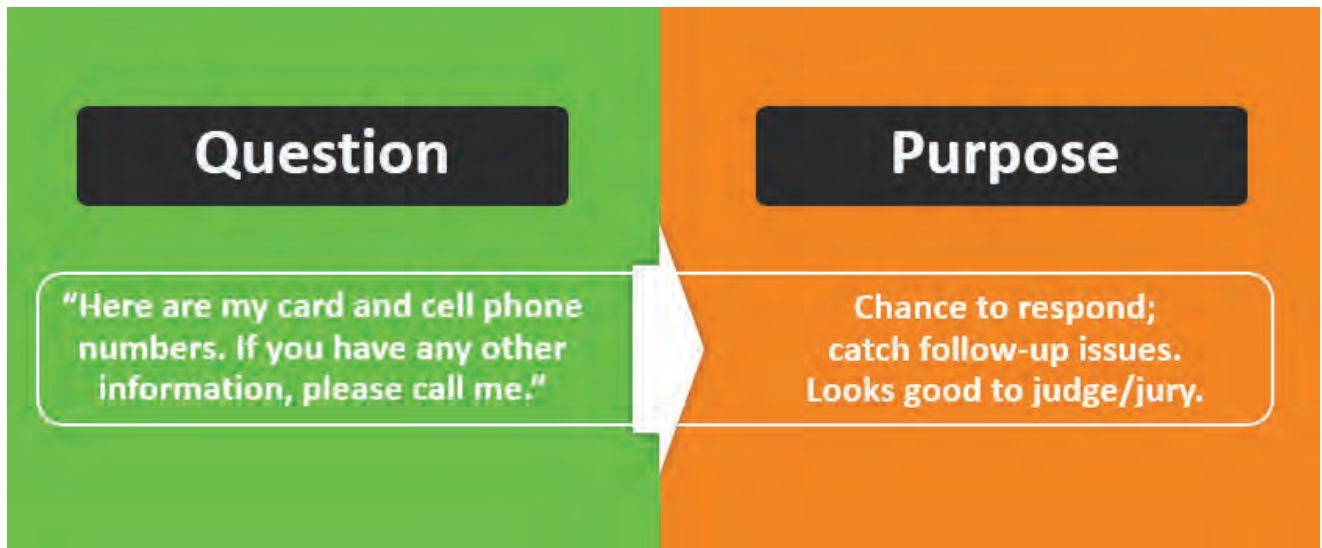
# Useful Questions



# Useful Questions



# Useful Questions



# In "He Said/She Said" Allegations, Credibility and Corroboration Are Key

- Memory
  - Ask specific questions to assess the witness' memory.
- Corroboration/Lack of Corroboration
  - Did you ask open-ended questions to find out if any corroboration exists?
- Veracity
  - Does the person look like he or she is telling the truth?
  - What is his or her demeanor like?



# Making Credibility Determinations

- Bias
  - What else is going on in the educational environment / workplace?
  - Are there feuds, hate relationships or sour grapes?
- Consistency of Account
  - Does the story remain the same over time with totally different people?



## Handling the Curveballs

# Handling the Curveballs

- What about “demand” for help?
- Right to be represented?
- What if someone refuses an interview?
- The uncooperative witness
- The evasive witness
- The hostile witness
- The too-talkative witness
- The scared witness... and things in between





## *How Would You Respond?*

*“I refuse to be interviewed unless I can bring my coworker, Jamie, into the interview with me.”*

- Don't be defensive: nobody is perfect
- Stay calm
- Remain focused on the investigation

*“Would you prefer to have my supervisor finish the interview?”*

# Questions?

# UT System Title IX Training

## Live Hearings – Lessons Learned

Presenters:

Darren Gibson  
Tara Param

August 5, 2021

**Littler**



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## Agenda

- Purpose of live hearings (per DOE)
- Roles of the participants
- Investigator as witness
- Rules of decorum and enforcement
- Cross examination
- Objections, relevance, and exclusion of evidence
- Best practices



2





## Purpose of Live Hearings (per DOE)

*The Department agrees that a live hearing gives both parties the most meaningful, transparent opportunity to present their views of the case to the decision-maker, reducing the likelihood of biased decisions, improving the accuracy of outcomes, and increasing party and public confidence in the fairness and reliability of outcomes of Title IX adjudications.*

2020 Regulations Preamble

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## Roles of Participants

- Parties:
  - Opening / closing statements
  - Testify and be subject to cross examination
- Advisors:
  - Conduct cross examination
- Witnesses, including investigator and expert:
  - Testify and be subject to cross examination
- Title IX Coordinator.
  - No clear role under Title IX regulations
  - Not prohibited from attending / observing
  - “recipient remains impartial and neutral toward both parties throughout the entirety of the grievance process.”



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## Roles of Participants – continued

- Hearing Officer:
  - Manage process of hearing
  - Enforce rules of decorum
  - Determine relevancy of questions
- Hearing Panel / Decision Maker (if different than hearing officer)
  - Consider evidence presented by parties
  - Question witnesses



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## Investigator as a Witness

- Role of investigator is limited to summarizing evidence in report and serving as a witness
- Subject to being called as a witness and questioned by decision-maker and parties' advisors
- Not allowed to ask questions of witnesses during hearing



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## Rules of Decorum

*A recipient may, for instance, adopt rules that instruct party advisors to conduct questioning in a respectful, non-abusive manner, decide whether the parties may offer opening or closing statements, specify a process for making objections to the relevance of questions and evidence, place reasonable time limitations on a hearing, and so forth.*

2020 Regulations Preamble

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## Cross Examination and Rules of Decorum

- In Preamble, DOE recognizes that cross-examination for victims can feel like “emotional beating” by skilled defense lawyer, including questioning survivor’s experience, victim shaming, and character aspersions.
- “Essential function of cross-examination is not to embarrass, blame, humiliate, or emotionally berate a party, but rather to ask questions that probe a party’s narrative in order to give the decision-maker the fullest view possible of the evidence relevant to the allegations at issue.”
- “The Department purposefully designed these final regulations to allow recipients to retain flexibility to adopt rules of decorum that prohibit any party advisor or decision-maker from questioning witnesses in an abusive, intimidating, or disrespectful manner.”

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## Cross Examination – How to Protect Witnesses and the Process?

- Consider reasonable time limits for total cross examination, including per witness limits.
- Include such limitations in the rules of decorum.
- Empower hearing officers to enforce such limits.
- Do not tolerate courtroom style cross – “You can’t handle the truth!”
  - Require hearing officer to affirmatively state whether each cross exam question is relevant, as allowed by the regulations.
  - Enforce rule against duplicative questioning, which can be abusive.
  - Make it clear that witnesses can take breaks during questioning, if needed.



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## Enforcing Rules of Decorum

- “If a party’s advisor of choice refuses to comply with a recipient’s rules of decorum (for example, by insisting on yelling at the other party), the recipient may require the Party to use a different advisor.
- Similarly, if an advisor that the recipient provides refuses to comply with a recipient’s rules of decorum, the recipient may provide that party with a different advisor to conduct cross-examination on behalf of that party.”



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## Relevance, and Exclusion of Evidence

- Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.
- If a witness refuses to submit to cross-examination, then the decisionmaker cannot consider their statements in making a determination regarding responsibility



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## However...

- On July 28, 2021, a Massachusetts federal judge struck down the provision of the new regulations that prohibits colleges adjudicating sexual misconduct allegations from considering statements not subject to cross-examination, while largely upholding the new regulations.
- The provision is sent back to the DOE for further consideration



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## Questions About Complainant's Sexual Predisposition

- Questions and evidence about the complainant's sexual predisposition are never relevant, and questions and evidence about a complainant's prior sexual behavior are not relevant unless such questions and evidence are offered to
  - (1) prove that someone other than the respondent committed the conduct alleged by the complainant, or
  - (2) if 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.



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## History of Prior Allegations



- Where a cross-examination question or piece of evidence is relevant, but concerns a party's character or prior bad acts, the decision-maker cannot exclude or refuse to consider the relevant evidence, but may proceed to objectively evaluate that relevant evidence by analyzing whether that evidence warrants a high or low level of weight or credibility.
- But, such a consideration must apply to both parties equally.

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## Expert Witnesses

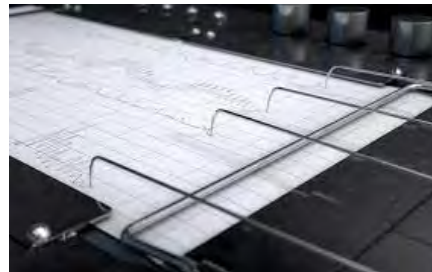
- Parties' ability to introduce expert witnesses expressly allowed by regulations.
  - 34 CFR 106.45(b)(5)(ii)
- Recipient also has the right to present expert witnesses.
  - Preamble: "The recipient, and the parties, have equal opportunity (and, for the recipient, the obligation) to gather and present relevant evidence including fact and expert witnesses, ..."
- Can an institution choose to exclude expert evidence on the basis of relevance?
  - Can the decision-maker?
  - What about reliability under legal standards (*Daubert*)?



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## Exclusion of Evidence – Possible Scenarios

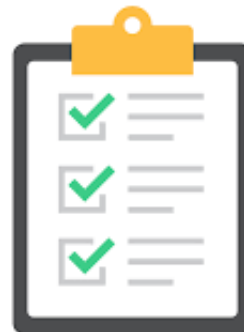
- Introduction of polygraph
  - Are you going to have the person who prepared the report attend the hearing?
  - If not, is the polygraph report admissible?
- Expert report on reliability of polygraph
- Expert report on reliability



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## Best Practices

- Remind all participants of roles prior to hearing in writing.
- Set forth expectations and limitations very clearly in rules of decorum.
- Require signed acknowledgements where participants agree abide by rules of decorum.
  - Set forth clear process for enforcement.
  - Include sanctions for both parties and advisors.
- Be prepared for objections from advisors.
- Enforce rules of decorum fairly and evenly.



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## Best Practices – continued

- Remember decision makers do not know the case.
- Include a short, clear timeline as an appendix in the report for reference by decision-makers.
- Consider order of witnesses to assist decision-makers better understand relevant evidence.
  - May be helpful for investigator to go first before parties to answer any questions the decision-makers have about the timeline, report, and record.
- If any concerns regarding overly aggressive advisors or complex relevancy determinations, consider having an outside hearing officer.

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# Questions?

# UT System Title IX Training

## Technical Writing – Drafting Investigation Reports and Written Determinations

Presenter:  
Erin McNamara

August 5, 2021

**Littler**



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## Agenda

- Investigation Report
  - Objectives
  - Sections and Contents
  - Evidentiary Considerations
- Written Determination Following Hearing
  - Required Contents
- Written Determination Following Appeal
  - Appeals Process
  - Required Contents



## Investigation Report

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## Purposes of Investigation Report

- Record of investigation steps and evidence collected
- Writing process can clarify analysis and uncover additional questions
- Likely to justify action (*e.g.* dismissal, reprimand, etc.) based on findings
- May be cited in legal proceeding, OCR investigation, or other related proceeding.



## Critical Tasks of an Investigation Report



- Third party must be able to understand full picture without outside explanation.
- Must document factual findings objectively and accurately.
- Provide decision makers with enough information to make a determination.

## Title IX Requirements for Investigation Report

- (ii) Require an objective evaluation of all relevant evidence — including both inculpatory and exculpatory evidence — and provide the credibility determinations may not be based on a person's status as a complainant, respondent, or witness (34 CFR § 106.45(b)(1)(ii))
- Investigator cannot be decision-maker under new regulations.
- Parties must be given opportunity to inspect and review evidence directly related to allegations and be given opportunity to respond prior to investigation's conclusion (34 CFR § 106.45(b)(5)).
- Must send report to each party and their advisor at least 10 days before hearing and provide opportunity for written response (34 CFR § 106.45(b)(5)).

# Policy Requirements for Investigation Report

- Check institution-specific policy requirements for report contents
- *See, e.g.,* UT System model policy
  - Section 6.5(G): Completed Investigation Report. The completed investigation report will outline each of the allegations that potentially constitutes prohibited conduct under this Policy, provide the timeline (e.g. procedural steps) of the investigation, and fairly summarize relevant evidence, participant statements, and responses to questions.
  - The investigator will provide a completed investigation report concurrently to both parties and each party’s advisor, if any, upon a party’s signed information release for their advisor of choice at least 10 days prior to the date of the scheduled hearing to review and provide a written response at the hearing.
  - A copy of the completed investigation report will be issued to the Title IX Coordinator, and to the hearing officer assigned for the hearing.

# Sections of Title IX Investigation Report

- **Introduction and Executive Summary**
- **Scope of Investigation and Applicable Policies**
  - Summary of Allegations Potentially Constituting Title IX Sexual Misconduct
  - Applicable University Policies
- **Investigation Process**
  - Including Persons Interviewed
  - Evidence Reviewed
- **Summary of Relevant Evidence**
- **Conclusions**



## Introduction and Executive Summary

- High level summary setting forth complainant, respondent, date of complaint, and date and location of alleged misconduct
- Describe complainant's allegations and respondent's response
- Identify investigator and relevant policy under which investigation is being conducted
- Summarize evidence and investigation's factual findings

## Scope of Investigation and Applicable Policies

- Summary of Allegations Potentially Constituting Title IX Sexual Misconduct
  - Identify the specific concerns raised by complainant for the investigation
  - Accused's response to each allegation
- Applicable University Policies
  - Specific Title IX misconduct (e.g., quid pro quo, sexual assault, stalking) and any other policies may be implicated.
  - Definition of prohibited conduct and related definitions.
  - Description of required investigation process.

# Investigation Process

- Date investigation began and notice provided to parties (and copies of same)
- Identify witnesses interviewed
- Itemize evidence reviewed
  - Include policies, interview summaries, and electronic/physical evidence relating to the allegations
  - Must include all evidence, inculpatory or exculpatory, regardless of whether you intend to rely on it
- Disclaimer
  - The investigation included review and consideration of all of the evidence and information listed above. The following summary refers to portions of this evidence relevant to the Complaint. This report does not seek to summarize every piece of evidence that was reviewed during the investigation.

# Summary of Relevant Evidence

- Chronological organization recommended
- Use subheadings to guide the reader
- Cite to exhibits wherever possible
- Avoid passive tense
- Consider providing a 1-2 page timeline of relevant events to guide reader and decision-maker through evidence and investigation process



# Drafting Considerations

- State facts, *i.e.*, information about who, what, where, when, and why
- Be clear about the source of information
  - Who provided the information? A witness, document, or observed by investigator?
  - Did a witness personally observe or hear from a third party?
- State any evidence that supports or undermines disputed facts
- Recognize evidence provided by parties (e.g., experts)
- Report should be neutral and should include all relevant incriminating or mitigating facts
  - Word choice is critical to maintaining objective tone
  - Use quotation marks carefully

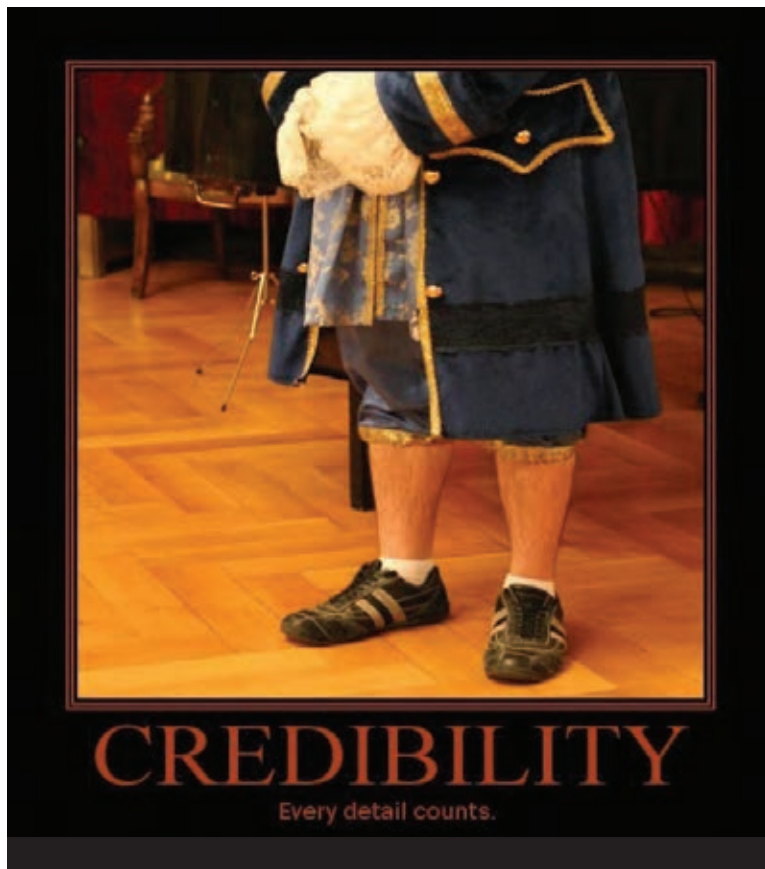
# What Evidence is “Relevant?”

- Federal Rule of Evidence 401 has a low threshold for admissibility
- Evidence is relevant if:
  - it has any tendency to make a fact more or less probable than it would be without the evidence; and
  - the fact is of consequence in determining the action.
- **RELEVANCE = PROBATIVE + MATERIAL**



# Complainant's Prior Sexual Behavior Irrelevant (Limited Exceptions)

- 34 CFR § 106.45(b)(6)(i): Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless:
  - such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
  - if 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.



Credibility  
Determinations

## Credibility Assessments

- Investigator may make credibility recommendations in investigation report
- Not binding for decision-maker but may set forth recommendations
- Credibility factors (*see* EEOC Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors)
  - Inherent plausibility: Is the testimony believable on its face? Does it make sense?
  - Demeanor: Did the person seem to be telling the truth or lying?
  - Motive to falsify: Did the person have a reason to lie?
  - Corroboration: Is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?
  - Past record: Did the alleged harasser have a history of similar behavior in the past?

## Credibility Assessments

- Go through applicable credibility factors in report when making credibility determinations.
- Apply factors to specific statements and/or witnesses.
- Be clear as to why one party / witness is deemed more credible than another.

# Standard of Evidence

- Institution policy required to specify standard of evidence
  - Preponderance of the evidence
  - Clear and convincing evidence
- Same standard must be used for all formal complaints
- *See, e.g.,* UT System Model Policy
  - Section 6.6: Standard of Evidence & Presumption of Not Responsible. All Grievance Processes will use the preponderance of the evidence standard, as defined in this Policy. By law, it is presumed that the Respondent is not responsible for the alleged conduct unless that determination regarding responsibility is made at the conclusion of the Grievance Process.
  - **Preponderance of the Evidence** – The greater weight of the credible evidence. Preponderance of the evidence is the standard for determining allegations of prohibited conduct under this Policy. This standard is satisfied if the action is deemed more likely to have occurred than not.



Written  
Determinations After  
Hearing or Appeal

## Title IX Requirements for Written Determination after Hearing

- Decisionmaker must issue a written determination regarding responsibility using the standard of evidence selected by the college (34 CFR § 106.45(b)(7))
- Regulations specify required contents for the determination of responsibility (incorporated into policy – *see next slide*)

## Policy Requirements for Written Determination after Hearing

- Check institution-specific policy requirements for written determination contents
- *See, e.g.*, UT System model policy, Section 6.7(k), Hearing Officer Determination:
  - The allegations that potentially constitutes prohibited conduct under this Policy;
  - A description of all of the procedural steps of the Grievance Process under this Policy (from receipt of a Formal Complaint to the determination regarding responsibility of the Respondent, including any notifications of the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held);
  - The findings of fact supporting the hearing officer’s determination;
  - The conclusion(s) and a rationale as to whether the Respondent is responsible for each allegation;
  - The disciplinary sanctions, if applicable;
  - The remedies, if applicable, designed to restore the Complainant’s access to the education program or activity; and
  - The institution’s procedures and permissible bases for the parties to appeal, if applicable

## Issuing Written Determinations

- Decision-maker should write the written determination.
- Provide to both parties simultaneously.
- If no appeal, determination becomes final on the date when appeal would no longer be timely.
- If appealed, determination becomes final when written determination of the appeal is provided to the parties.



## Title IX Requirements for Appellate Determination

- Title IX bases for appeal
  - Procedural irregularity affecting the outcome
  - New evidence that was not reasonably available when determination made
  - Conflict of interest/bias that effected the outcome
  - \*School may offer other bases for appeal, so long as it is equally available to both parties
- The appellate decisionmaker may not be the Title IX coordinator, the investigator, or the decisionmaker responsible for the determination regarding responsibility or dismissal
- The decisionmaker must issue a written decision addressing the result of the appeal and justification of the result (34 CFR § 106.45(b)(8))

# Policy Requirements for Appellate Determination

- Check institution-specific policy requirements for appellate determination
- *See, e.g.,* UT System model policy
  - Section 6.9: The appellate officer will release a written decision within 21 days from the date of the appeal to:
    - Affirm the hearing officer’s determination regarding the Respondent’s responsibility and affirm the disciplinary sanctions and remedies, if applicable;
    - Affirm the hearing officer’s determination regarding the Respondent’s responsibility and amend the disciplinary sanctions and remedies, if applicable;
    - Remand the process back to the hearing stage for the hearing officer to remedy any procedural irregularity or consider any new evidence;
    - Reverse the hearing officer’s determination of the Respondent’s responsibility and amend the disciplinary sanctions and remedies, if applicable; or
    - Affirm or amend the sanctions and/or remedies outlined in the administrative disposition issued under Section 6.12 of this Policy.

# Considerations for Appellate Determination

- Must notify other party of appeal and implement procedures equally for all parties
- Give parties equal opportunity to submit statement supporting or challenging the hearing outcome
- Appeal likely document-based and recording review – not *de novo*
- Deference to hearing authority as appropriate



# Questions?

# UT System Title IX Training

## Clery Act, Prevention, & Campus Safety 101

Presenter:  
Darren Gibson

August 5, 2021




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THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

1

## Agenda

- Clery Act and VAWA 101
- Emergency response and threat assessments
- Warning signs of IPV and sexual violence
- Emergency removals



2



## Purpose of Clery Act and VAWA Amendments

- Clery Act:
  - Requires all postsecondary institutions participating in Title IV student financial assistance programs disclose campus crime statistics and other security information to students and the public.
  - Requires institutions to develop and implement specific campus safety and crime prevention policies and procedures.
- VAWA amendments added requirements that institutions disclose statistics, policies and programs related to dating violence, domestic violence, sexual assault, and stalking, among other changes.

3

## Clery Act, The Basics

<b>Clery Act Requirements – The Basics</b>	
<ul style="list-style-type: none"> <li>• Collect, classify, and count crime reports and statistics</li> </ul>	
<ul style="list-style-type: none"> <li>• Issue campus alerts and warning notices</li> </ul>	<ul style="list-style-type: none"> <li>• Publish an Annual Security Report (Due date: October 1)</li> </ul>
<ul style="list-style-type: none"> <li>• Disclose missing student notification procedures, when applicable</li> </ul>	<ul style="list-style-type: none"> <li>• Submit crime and fire statistics to the Department, when applicable</li> </ul>
<ul style="list-style-type: none"> <li>• Disclose procedures for institutional disciplinary actions</li> </ul>	<ul style="list-style-type: none"> <li>• Provide educational programs and campaigns</li> </ul>
<ul style="list-style-type: none"> <li>• Keep a daily crime log, when applicable</li> </ul>	<ul style="list-style-type: none"> <li>• Disclose fire safety information, when applicable</li> </ul>

Source: 2021 Clery Appendix

4

## Clery Act and VAWA 101

- 1990, Congress passes The Student Right to Know and Campus Security Act (CACSA)
- 1998, CACSA amended and renamed Clery Act (after Jeanne Clery)
- 2011, Handbook for Campus Safety and Reporting
- 2013, Congress passes Violence Against Women Reauthorization Act, which amended Clery
- 2016, Handbook for Campus Safety and Reporting
- 2021, 2016 Handbook rescinded and replaced with Clery Act appendix to FSA Handbook



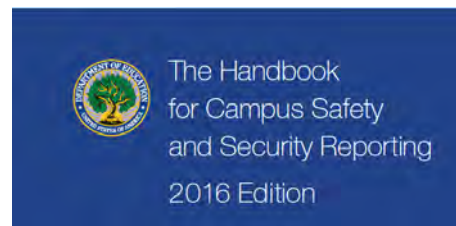
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## 2016 Clery Handbook – 265 pages of guidance on compliance

- Clery geography
- Classifying crimes and crime statistics
- Collection of crime statistics
- Daily crime log
- Emergency notifications
- Campus security policies
- Annual Security Report
- Missing Students



- Fire Safety Disclosures
- Fire Logs
- Fire Statistics
- Annual Fire Safety Report

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## 2021, DOE Replaces 2016 Handbook with Clery Appendix

- Previous guidance “created additional requirements or expanded the scope beyond what is strictly required by statute or regulation. “
- “Institutions felt pressured to satisfy requirements found in the guidance or risk serious financial and reputational consequences.”
- “Simple, plain-language explanations of Clery Act requirements found in, and adherent to, relevant statutory and regulatory authority.”
- Other than statutory and regulatory requirements, “the contents of this guidance do not have the force and effect of law and are not meant to bind the public.”



Source: 2021 Clery Appendix

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## Clery Crimes and Reporting Requirements

- Report to the Department and disclose in ASR statistics for three most recently completed calendar years.
- Submit crime statistics to the Department as part of the annual data collection and survey, including the number of each of the Clery and VAWA crimes that occurred on or within its Clery Geography and that are reported to local police agencies or to campus security authority (CSA).
- Clery Act reporting does not require institution initiate investigation or disclose personally identifiable information (PII) about the victim.

Source: 34 CFR 668.46(c); 2021 Clery Appendix

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## Clery Crimes and Sources for Definitions

Clery Crime Definitions by Source:					
<u>Summary Reporting System User Manual:</u>			<u>National Incident-Based Reporting System User Manual:</u>		
Criminal Homicide	Rape	Fondling	Incest	Statutory Rape	
Robbery	Aggravated Assault	<u>Uniform Crime Reporting Hate Crime Data Collection Guidelines and Training Manual:</u>			
Burglary	Motor Vehicle Theft	All Hate Crimes			
Arson	Drug Law Violations	<u>Violence Against Women Act of 1994:</u>			
Liquor Law Violations	Illegal Weapons Possession	Domestic Violence		Dating Violence	
<b>Note:</b> The FBI has announced that it will retire the SRS and transition to using only the NIBRS in January 2021.			Stalking		Sexual Assault

Source: 2021 Clery Appendix

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## Campus Security Authorities: 34 CFR 668.46(a)

- i. Campus police or security department personnel;
- ii. Individuals with security-related responsibilities; and
- iii. Individuals or organizations identified in institutional security policies as an individual or organization to which students and employees should report criminal offenses.
  - Also includes official “who has significant responsibility for student and campus activities, including, but not limited to, student housing, student discipline, and campus judicial proceedings.”
  - Department will defer to institution’s designation of CSAs as authoritative and regulations do not require employee with minimal responsibilities for student and campus activities *necessarily* be considered CSAs.

Source: 2021 Clery Appendix

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## Clery Geography

### Three Categories of Locations

- On-Campus
- Noncampus Buildings or Property
- Public Property

### Purpose:

- Clery Geography requirements intended to inform campus community of crimes so that community aware of safety issues and may take steps to protect their own safety.
- In the past, institutions struggled with complexities of Clery Geography, resulting in different approaches to the reporting requirement.
- When in doubt, apply the plain meaning of regulatory and statutory requirements.

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## Campus Defined, 34 CFR 668.46(a)

- i. Any building or property owned or controlled by an institution within the same reasonably contiguous geographic area and used by the institution in direct support of, or in a manner related to, the institution's educational purposes, including residence halls; and
- ii. Any building or property that is within or reasonably contiguous to the area identified in paragraph (i) of this definition, that is owned by the institution but controlled by another person, is frequently used by students, and supports institutional purposes (such as a food or other retail vendor).

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## Noncampus Building or Property Defined, 34 CFR 668.46(a)

- i. Any building or property owned or controlled by a student organization officially recognized by the institution; or
- ii. Any building or property owned or controlled by an institution that is used in direct support of, or in relation to, the institution's educational purposes, is frequently used by students, and is not within the same reasonably contiguous geographic area of the institution.

Examples: Sanctioned fraternity and sorority houses, off-campus housing owned / leased by institution, off-campus athletics facilities.

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## Public Property Definition

- “All public property that is within the same reasonably contiguous geographic area of the institution, such as a sidewalk, a street, other thoroughfare, or parking facility, and is adjacent to a facility owned or controlled by the institution if the facility is used by the institution in direct support of, or in a manner related to the institution’s educational purposes.”
- Property in question must satisfy all three conditions: 1) public (e.g., publicly-owned); 2) within or immediately adjacent to campus; and 3) accessible from campus.
- Excludes any private property.



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## Clery and Title IX

- Institution's obligation to address sexual harassment in "education program or activity" is separate from institution's Clery Act obligations.
- Conduct that occurs off campus and outside of Clery Act geography may invoke institution's Title IX obligations depending on whether the institution:

*"exercised substantial control over both the respondent and the context in which the sexual harassment occurs."*

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## Clery and Title IX -- Hypothetical

- **Hypothetical:** Undergraduate student reports being a victim of a sexual assault by a graduate student that allegedly occurred during a summer research field work while camping in remote parts of Alaska to look for fossils.
- **Questions:**
  - Would that be within the institution's Clery geography to give rise to Clery reporting obligations?
  - Would the allegations be within the scope of Title IX and mandated grievance process under 2020 regulations?

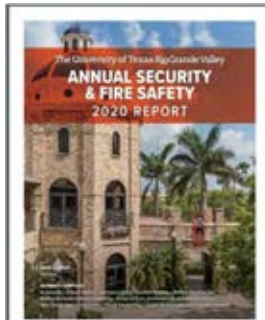


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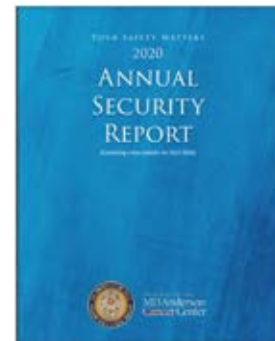
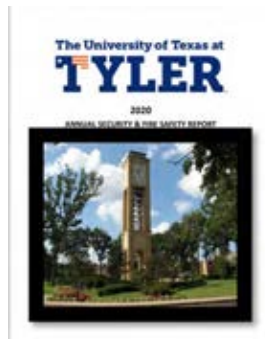


## Reporting, Procedures, Policy, and Notification Requirements

- ASR required to be published by October 1<sup>st</sup> of each year.
- Institutions must submit crime statistics to the Campus Safety and Security Survey website.
- Institutions with on-campus student housing must submit Fire Safety Report.



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## Annual Security Report Contents, 34 CFR 668.46(b)

- List of titles of each person or organization to whom students and employees should report Clery Act crimes
- Institutional policies or procedures for victims or witnesses to report Clery Act crimes.
- Current policies concerning the security of, and access to, campus facilities and residencies, as well as security considerations in the maintenance of campus facilities.
- Clear policy statement that addresses procedures for disciplinary action in cases of alleged dating violence, domestic violence, sexual assault, or stalking.

See 2021 Clery Appendix for more detailed discussion of required contents of ASR.

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## Additional Clery Reporting Requirements

Additional Clery requirements covered in 2021 Clery Appendix

- Daily Crime Log
- Annual Fire Safety Report
- Fire Log
- Missing Persons policies and procedures
- Notice of ASR and Annual Fire Safety Report to current and prospective students and employees

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## VAWA Crimes and Statement of Policy

- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking

### Statement of policy

- Programs to prevent domestic violence, dating violence, sexual assault, and stalking
- Procedures to follow once a report has been made
- Educational programs to promote awareness of rape, acquaintance rape, domestic violence, dating violence, sexual assault, and stalking
- All possible sanctions or protective measures the institution may impose following final determination

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## Emergency Response, Evacuation Notifications, and Timely Warnings: 34 CFR 668.46(g)

- Procedures to immediately notify the campus community upon the confirmation of a significant emergency or dangerous situation involving an immediate threat to the health or safety of students or employees occurring on the campus.
  1. Confirm significant emergencies or dangerous situations;
  2. Determine the appropriate community to notify and the content of the notification, including the withholding as confidential the names and other identifying information of victims; and
  3. Initiate the notification system.
- Compile list of persons or organizations responsible for these activities.
- Test procedures on an annual basis.

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## Emergency Response, Evacuation Notifications, and Timely Warnings: 34 CFR 668.46(g)

- Institution must, without delay and accounting for the safety of the community, determine the content of the notification and initiate the notification system, unless such notification will compromise efforts to assist a victim or contain, respond to, or mitigate the emergency.
- Institution must develop procedures to immediately notify the campus community upon the confirmation of a significant emergency or dangerous situation involving an immediate threat to the health or safety of students or employees occurring on the campus.
- Institutions are required to provide emergency notifications or timely warnings based upon the circumstances.

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## Emergency Notification versus Timely Warnings

- Emergency notifications – provide immediate notification upon confirmation of a significant emergency or dangerous situation occurring on campus that involves immediate threat to the health or safety of students or employees.
- Timely warnings –required for Clery Act crimes on Clery Geography reported to CSAs or local police agencies and considered to represent a serious or continuing threat to students and employees.



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## Emergency Notification versus Timely Warnings

	<b>Emergency Notifications</b>	<b>Timely Warnings</b>
Scope	Significant emergency or dangerous situation	Clery crimes, reported to CSAs
Triggered by?	Event that is currently occurring on or imminently threatening campus	Crimes that occurred and represent an ongoing threat
Where event occurs?	Only on campus	Anywhere on Clery Geography
How soon to issue?	Immediately upon confirmation of situation	As soon as information is available

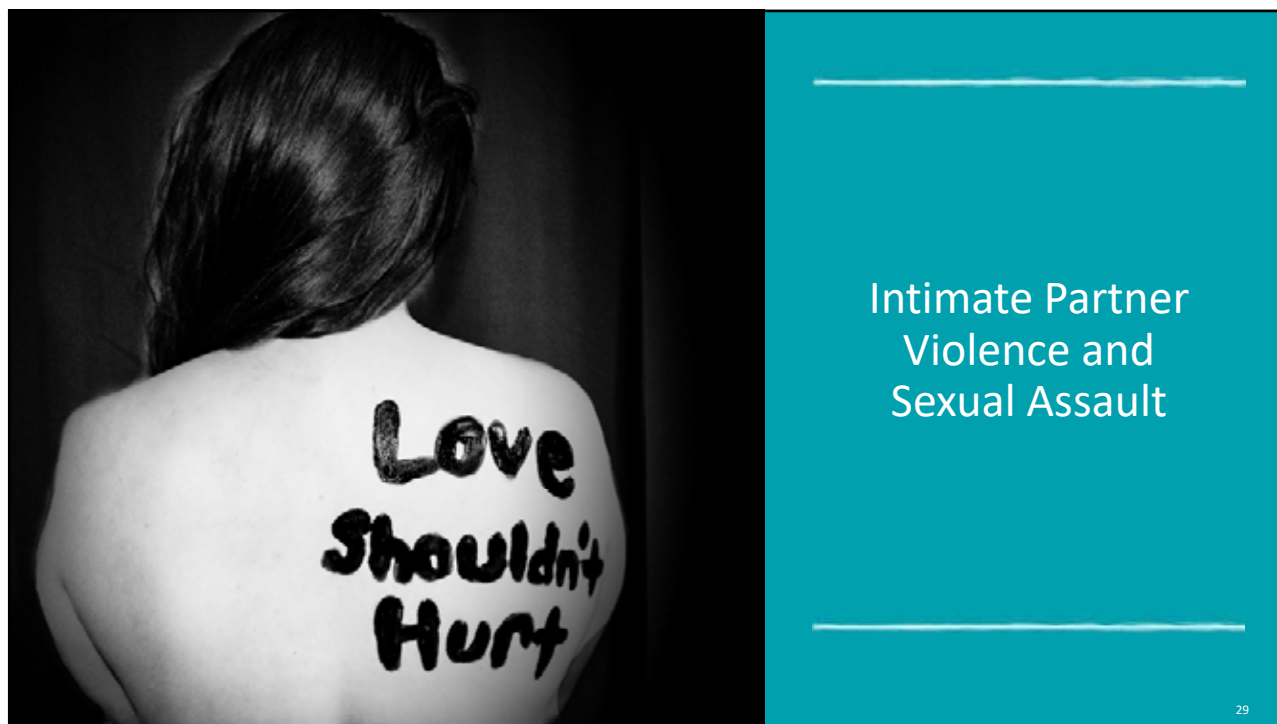
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## Emergency Notifications – Examples

- Tornado, hurricane, extreme weather
- Flooding
- Terrorist incident
- Active shooter
- Bomb threat
- Civil unrest / rioting
- Fire / explosion
- Gas leak



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## Intimate Partner Violence – Warning Signs

- Isolation from friends, family, hobbies.
- Control over finances, time and who you see.
- Extreme, irrational jealousy and suspicion.
- Shaming in front of others.
- Blame shifting, never at fault, and says behavior caused by love.
- Constant monitoring, anger when unavailable.
- Fatalistic and possessive: “I can’t live without you.” “If I can’t have you no one can.”



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## Sexual Assault – Warning Signs

- Depression (sadness, lack of energy, withdrawal).
- Self-harming behaviors.
- Anxiety about situations not present in past.
- Avoiding specific situations or places.
- Failing grades, withdrawing from classes.
- Increased drug or alcohol use.
- Sexually transmitted infections.



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Emergency Removal  
and Self Harm

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## Emergency Removal – 2020 Title IX Regulations

- Section 106.44(c) authorizes emergency removal of students.
- If after individualized safety and risk analysis, institution “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.”
- Must provide respondent with notice and opportunity to challenge emergency removal decision immediately following removal.
- May put non-student employee on admin leave during pendency of grievance process.
- Provisions do not modify rights under Section 504 or ADA.

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## Emergency Removal – Preamble Guidance

- Not a substitute for reaching a determination of responsibility.
- OCR declined to adopt mandated process (e.g., licensed medical evaluation).
  - “Department desires to leave as much flexibility as possible for recipients to address any immediate threat to the physical health or safety of any student or other individual.”
- Declined to limit emergency removals only to alleged sexual assault or rape, or to prohibit emergency removals in allegations of verbal harassment.
- Examples of respondent behavior that could justify emergency removal:
  - Threats of physical violence to complainant in response to allegations.
  - Threatening physical self-harm in response to allegations.

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## Students at Risk of Self Harm – OCR guidance Jan. 26, 2018

- Offer mental health services and reasonable accommodations
- Be cautious in addressing self-harming students through discipline system without first considering accommodations.
- Involuntary leave of absence permissible as last resort
- Qualified personnel should be involved in reviewing medical information.
- Institution may consider how behavior has impacted campus community.
- Process must be reasonable and fair (e.g., notice, opportunity for student to be heard, careful consideration of information)



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# Questions?

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## Consent, Coercion & Incapacitation

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## Sexual Assault in College

- More than 90% of sexual assault victims on college campuses do not report the assault (Cullen, F., Fisher, B., & Turner, M., 2000)
- About 1 in 3 women and 1 in 6 men have been the victim of a contact sexual assault (CDC NIPSVS, 2011)
- In 8 out of 10 cases of rape, the victim knew the perpetrator (Miller, T. R., Cohen, M. A., & Wiersema, B., 1996)
- More than 25% of transgender individuals had been sexually assaulted after the age of 13



2

## Sexual Assault in College –cont.

- Many victims do not characterize their experience as a crime due to:
  - Embarrassment;
  - Lack of understanding of the legal definition of rape;
  - Sympathy for the rapist; and
  - Self-blame
- The most common reason for not reporting incidents of sexual assault and sexual misconduct was that it was not considered serious enough. Other reasons included because they were **“embarrassed, ashamed or that it would be too emotionally difficult,”** and because they **“did not think anything would be done about it.”**

(AAU Campus Climate Survey on Sexual Misconduct, 2015)

3

## Affirmative Consent

Participants provided with a definition of affirmative consent will be more likely to:

- Assign more responsibility and endorse greater consequences for the perpetrator
- Perceive a higher degree of victim suffering
- Be willing to intervene and provide victim support
- Report consent was not granted and label the encounter as a sexual assault
- These effects will be greater for those who read a vignette in which consent is less ambiguous



4

## What is Consent?

- **Affirmative consent/Consent** means (**affirmative, conscious, and voluntary agreement/agreement**) to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that he or she has the (**affirmative consent/consent**) of the other or others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent. Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time. The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of consent.

Consensual sexual activity happens when each partner willingly and affirmatively chooses to participate.

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## “Tea Consent”

# CONSENT

IT'S SIMPLE AS TEA



Let's take a look...



6



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7

**“2 Minutes Will Change the Way You Think About Consent”**

Let's take a look...

A white play button icon centered within a white-bordered rectangle. Below the rectangle is a white progress bar with a white circle at the beginning, indicating the start of the video.

8

8



9

# CONSENT



- Freely Given
- Reversible
- Informed
- Enthusiastic
- Specific

10

## Consent

- Indications that consent is not present include:
  - Physical force is used or there is a reasonable belief of the threat of physical force; when duress is present;
  - When one person overcomes the physical limitations of another person; and
  - When a person is incapable of making an intentional decision to participate in a sexual act, which could include instances in which the person is in a state of incapacitation.



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## Consent: Important Points

- Consent to one act does not constitute consent to another act.
- Consent on a prior occasion does not constitute consent on a subsequent occasion.
- The existence of a prior or current relationship does not, in itself, constitute consent.
- Consent can be withdrawn or modified at any time.
- Consent is not implicit in a person's manner of dress.



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## Consent: Important Points cont.

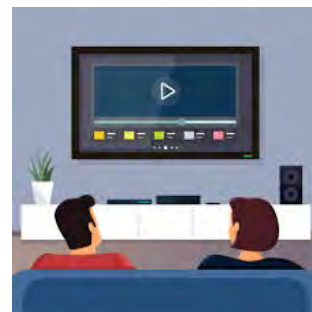
- Accepting a meal, a gift, or an invitation for a date does not imply or constitute consent.
- Silence, passivity, or lack of resistance does not necessarily constitute consent.
- Initiation by someone who a reasonable person knows or should have known to be deemed incapacitated is not consent.
- Consent is voluntary. It must be given without coercion, force, threats, or intimidation. Consent is an expression of free will.
- Consent cannot be given when a person is incapacitated.

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## Example

Mike and Laura sat on the sofa and started watching television. Mike then began kissing Laura and touching her breasts. To begin with Laura kissed back, until Mike started kissing her harder. At this point, Laura said wasn't sure she want to go any further, but Laura said nothing, and Mike proceeded to have sex with her.

- Physical Force: *pinned her arms and legs down*
- Verbal Coercion: *verbally pressured her*
- Ambiguous: *kept kissing her*



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## What is Incapacitation

- The state in which a person cannot make rational decisions as to whether or not to engage in sexual activity because the person lacks the ability to give knowing Consent (i.e., to understand the "who, what, when, where, why, or how" of the sexual interaction).
- Incapacitation is determined through consideration of all relevant indicators of an individual's state and is not synonymous with intoxication, impairment, blackout, and/or being drunk
- The inability, temporarily or permanently, to give consent, because the individual is mentally and/or physically helpless due to drug or alcohol consumption, either voluntarily or involuntarily, or the individual is unconscious, asleep or otherwise unaware that the sexual activity is occurring.

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## What Is Incapacitation Cont

- In addition, an individual is incapacitated if he/she/they demonstrate that they are unaware of where they are, how they got there, or why or how they became engaged in a sexual interaction. Where alcohol is involved, incapacitation is a state beyond drunkenness or intoxication.



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## Indicators Of Incapacitation

- Lack of control over physical movements,
- Lack of awareness of circumstances or surroundings, or
- The inability to communicate for any reason.

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## Indicators Of Incapacitation

- An individual may experience a blackout state in which he/she/they appear to be giving consent, but do not actually have conscious awareness or the ability to consent. It is especially important, therefore, that anyone engaging in sexual activity be aware of the other person's level of intoxication. The relevant standard that will be applied is whether the Respondent knew, or a sober reasonable person in the same position should have known, that the other party was incapacitated and therefore could not consent to the sexual activity.



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## No: How it sounds and What it looks Like\*

### No

- I'd rather be alone right now
- Stop
- Don't touch me
- I'm not ready
- Let's just go to sleep
- I changed my mind
- I really like to but
- Not now
- I don't feel like it
- Maybe later



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## No: How it sounds and What it looks Like\*

- Pushing away
- Crying
- Turning away
- Lying there in fear
- Passed out
- Silence
- Screaming
- Pushing away
- I have a boyfriend/girlfriend/someone

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# Questions?

# UT System Title IX Training

## Title IX Enforcement

Presenter:

Darren Gibson  
Erin McNamara

August 5, 2021

**Littler**



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## Agenda

- Methods of enforcement of Title IX
- Department of Education, Office of Civil Rights
- Private litigation
- Texas Higher Education Coordinating Board
- Best practices for preparing for enforcement action



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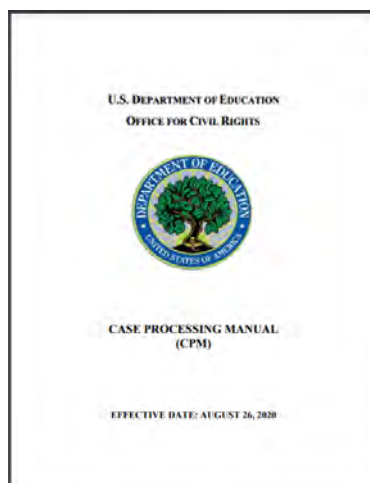
## Department of Education Office of Civil Rights

- “OCR vigorously enforces Title IX to ensure that institutions that receive federal financial assistance from the Department comply with the law.”
- “OCR evaluates, investigates, and resolves complaints alleging sex discrimination.”
- “OCR also conducts proactive investigations, through directed investigations or compliance reviews, to examine potential systemic violations based on sources of information other than complaints.”
- Although federal funding theoretically at risk, not aware of any institution sanctioned with loss of federal funding.



3

## What Happens When OCR Gets a Complaint?



- OCR case process manual is a good place to start.
- OCR first evaluates complaint to examine for jurisdiction, timeliness (180 days), and possible dismissal (numerous grounds, such as transfer to another agency, e.g. EEOC).
- Conducts investigation (request documents, conduct interviews) and consider resolution, if requested by recipient.
- Reach findings (insufficient evidence vs. non-compliance determination)
- Negotiate resolution agreement

4

## Investigations

- Obligations on institution in OCR investigations are similar to discovery in litigation.
- Detailed requests for documents and information.
- Formal interviews conducted by OCR investigators, possibly on-site.
- Can involve a substantial amount of time and resources of Title IX Office, Legal Affairs, and related staff.



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## Resolution Agreements

- Recipient may negotiate resolution prior to final findings.
- With non-compliance or mixed finding, OCR will issue proposed resolution agreement, and recipient has 90 days to reach an agreement.
- Resolution agreement may include (examples):
  - Modified policies and procedures
  - Conduct mandated training
  - Fund additional resources (e.g., employee positions, materials, websites)
  - Develop and implement communication and marketing plans
  - Mandated data management and recordkeeping
  - Reimbursement to individual complainants
  - Monitoring, reports and documentation to OCR



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## Referral to Department of Justice

- If no resolution is reached, OCR may refer case to Department of Justice to sue recipient in federal court.
- Most recent cases involving DOJ involve school districts, not universities.
- DOJ can also intervene in private Title IX cases, including numerous recent LGBTQ cases.
- DOJ also files “statements of interest” in private Title IX cases regarding application of law.
  - DOJ files to such statements in two Kansas state cases in 2016 regarding application of Title IX to off-campus, school-recognized fraternities.



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## Private Litigation

- Students can sue under various theories of liability
  - Official policy / archaic assumptions (more common in sports equity claims)
  - Deliberate indifference to sexual harassment
  - Selective enforcement based on gender bias
  - Erroneous outcome
  - Retaliation
- In the Fifth Circuit, employee Title IX claims preempted by Title VII.
  - Circuit split, ripe to be decided by SCOTUS.
  - Employees can still bring claims of Title IX retaliation based on Title IX protected activity.
- No administrative exhaustion requirement under Title IX.
- 2 year statute of limitations.

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## Private Litigation – Primary Causes of Action

- Deliberate indifference:
  - To establish a claim of sexual harassment, a plaintiff must show that: (1) the sexual harassment was “so severe, pervasive, and objectively offensive that it can be said to deprive the victim[ ] of access to the educational opportunities or benefits provided by the school;” (2) the school district had actual knowledge of the sexual harassment; and (3) it acted with deliberate indifference to the harassment.” *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999).
- Selective enforcement:
  - “Either punishment or the decision to initiate enforcement proceedings was motivated by gender bias.” *Klocke v. Univ. of Tex. at Arlington*, 938 F.3d 204 (2019).
- Erroneous outcome
  - “A plaintiff alleging an erroneous outcome must point to ‘particular facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding’—for instance, ‘a motive to lie on the part of a complainant or witnesses, [or] particularized strengths of the [disciplined student’s] defense.’ ... The plaintiff must also demonstrate a “causal connection between the flawed outcome and gender bias.” *Klocke v. Univ. of Tex. at Arlington*, 938 F.3d 204 (2019).

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## Damages in Title IX Litigation

- Successful plaintiff may be entitled to compensatory damages, injunctive relief, and attorney’s fees.
- Intentional discrimination required to recover monetary compensatory damages (e.g., lost tuition, wages, emotional pain and suffering).
  - *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992); *Mercer v. Duke University*, 401 F. 3d 199, 203 (4th Cir. 2004).
- Punitive damages are not available.
  - *Barnes v. Gorman*, 536 U.S. 181 (2002).



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## Texas Higher Education Coordinating Board

- Responsible for compliance oversight per SB 212 and HB 1735.
- Institutions must provide annual reports to THECB regarding compliance with SB 212 and HB 1735
- If THECB determines institution “not in substantial compliance,” may assess administrative penalty up to \$2 million, which cannot be paid using “state or federal money.”
  - See TEC 51.258 (SB 212), 51.292 (HB 1735).



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How to Be Prepared  
for Enforcement  
Actions

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## Preparation Before Any Complaint or Claim

- Regularly update policies and procedures
- Ensure Title IX staff qualified and trained
- Continue to take required trainings (like the one today)
- Have well-functioning systems in place for managing Title IX compliance process
  - Case intake methods and processes (including electronic intake)
  - Case tracking and monitoring during investigation and grievance process
  - Checklists and approved forms for all stages of investigation and grievance process
  - Reporting mechanisms for completed cases in compliance with state and federal mandates
- Have robust community education and outreach programs to both comply with various legal mandates

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## Preparation During Investigation and Grievance Process

- Follow your policies during each stage of investigation and grievance process
- Treat all parties equitably and do not make presumptions
- Be transparent with parties regarding process (e.g., notices, updates)
- Don't allow feelings about advisor / attorney affect treatment of party
- Document process (letters and emails to parties, with copies to the file)
- Document evidence, including requests, source, and when received
- Prepare reports that are self-explanatory and stand on their own
- Presume everything you write will be seen by OCR, a judge, and a jury (draft reports, emails to colleagues, etc.)

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## Preparation After Grievance Process Complete

- Ensure that cases are identified as closed and all required steps have been taken.
- Document and calendar any follow-up on sanctions to ensure purpose of sanctions achieved.
- Ensure case file complete, reflects all steps of process, and reflects final outcome, remedies, sanctions, follow-up, etc.
- Ensure case outcome reflected in case tracking systems and compliance reports.
- Document lessons learned and any proposed changes to policies and/or processes based on particular matters.
- Continue ongoing, iterative efforts with respect to overall program improvement.



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# Questions?

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# Title IX Panel Discussion

Moderated by Darren Gibson, Littler Mendelson



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## Title IX Panelists & Roles

Area of Expertise	Name	UT Institution
Title IX Coordinator	Margaret McNeese, M.D. & Suzanne Patrick	UT Health – Houston & UT San Antonio
Deputy Title IX Coordinator	Deana Moylan	UT Health - Houston
Victim Advocate	Arely Hernandez & Cynthia Jones	UT El Paso & UT Rio Grande Valley
Advisor Role	Ashley Jones, Ph.D.	UT Austin
Hearing Officer Role	Blake Barker, M.D.	UT Southwestern
BIT/Threat Assessment	Matt Crouse & Kelly Soucy	UT El Paso & UT Austin
Law Enforcement	Vicki King	UT Health - Houston
Legal Affairs	Shelby Boseman & Sean Flammer	UT Arlington & UT System



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