



Association of
Title IX Administrators

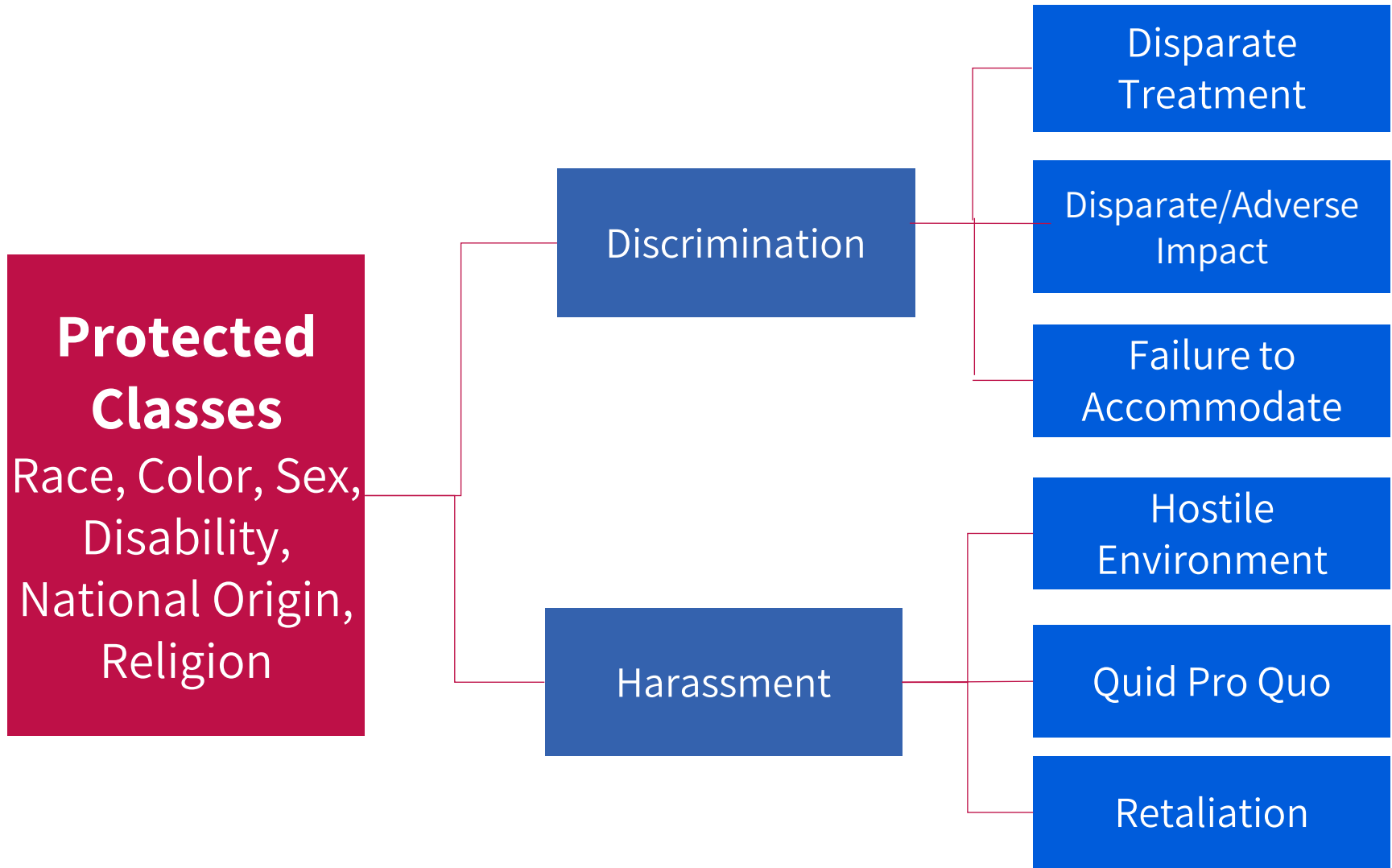
Title IX Annual Update

SAUNDRA K. SCHUSTER, ESQ.
PARTNER, TNG CONSULTING , LLC
sandra.schuster@tngconsulting.com



FEDERAL CIVIL RIGHTS LAWS

WHAT IS COVERED?



TITLE VI OF THE CIVIL RIGHTS ACT

- 42 U.S.C. § 2000e-2(a)

“No person in the United States shall, on the ground of **race, color, or national origin**, be **excluded from participation in, be denied the benefits of, or be subjected to discrimination** under any **program or activity receiving Federal financial assistance.**”

TITLE VII OF THE CIVIL RIGHTS ACT

- 42 U.S.C. § 2000e-2(a)

“It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to **discriminate against any individual with respect to their compensation, terms, conditions, or privileges of employment, because of** such individual’s **race, color, religion, sex, or national origin**; or (2) to limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect their status as an employee, because of such individual’s race, color, religion, sex, or national origin.”

DISABILITY LAWS

Section 504 of the
Rehabilitation Act

Fair Housing Act

Americans with
Disabilities Act

State Laws

UNDERSTANDING DIFFERENT LAWS

- Laws apply differently to housing than to the campus in general, including classrooms and dining facilities
- Laws apply different definitions and standards related to service vs. assistance/emotional support animals (ESAs)
- Laws may impose different standards or response protocols

SECTION 504

“No otherwise qualified individual with a disability in the United States, as defined in Sec. 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

Section 704(a) Promulgation of nondiscriminatory rules and regulations

SECTION 504 OF THE REHABILITATION ACT (1973)

- **Prohibits discrimination** on the basis of disability in **all programs or activities** that receive federal financial assistance
- Forbids institutions from excluding or denying individuals with disabilities an **equal opportunity** to receive program benefits and services
- Enforced by the U.S. Dept. of Education, Office for Civil Rights
- Codified at 29 U.S.C. § 701

TITLE I, TITLE II & TITLE III OF THE ADA (1990)

Title I

Prohibits discrimination on the basis of disability in **employment**

Enforced by the EEOC.

Title II

Prohibits discrimination on the basis of disability by **public entities, including state colleges and universities**, regardless of whether they receive federal financial assistance

Enforced by DOJ and OCR.

Title III

Prohibits discrimination on the basis of disability in **private education facilities and in the activities of places of public accommodation**

The language of the ADA tracks Section 504 and explains that the remedies, procedures, and rights under the ADA are the same as under the Rehabilitation Act.

HOW IS SEC. 504 DIFFERENT FROM THE ADA?

Section 504 and the ADA are both civil rights laws; however:

- Section 504 was created to protect individuals with disabilities from discrimination for reasons related to their disabilities
- The ADA Titles I, II, & III add to the strength of Section 504 by requiring accommodations for individuals with qualified disabilities
- Between the two laws, all government-funded programs are covered

ACCOMMODATION GUIDELINES

- Once a disability has been verified, the Disability Services staff will engage in the interactive process to work with the student or employee to identify the functional limitations of the educational or work environment and determine the necessary auxiliary aids, services, academic adjustments, and educational assistance classes to provide an equal opportunity to be successful
- The faculty member or supervisor is required to implement the designated accommodation unless it would fall under one of the exceptions.

THE ACCOMMODATION PROCESS EXCEPTIONS

- An accommodation or modification is **not required when it would:**
 - **Result in a fundamental alteration** of the nature of the program, service, or job function
(28 C.F.R. § 35.130(b)(7))
 - **Create an undue financial or administrative burden**
 - Whether a particular accommodation will be an undue financial or administrative burden will depend on the facts and circumstances of the individual situation

TITLE IX

20 U.S.C. § 1681 & 34 C.F.R. Part 106 (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 educational program or activity receiving federal financial assistance.”



TO WHOM DOES TITLE IX APPLY?

- Federal Law enacted in 1972
- Intended to end sex discrimination in all areas of education, including in employment
- Made non-discrimination based on sex/gender a condition of participation in all federally funded education programs for both public and private institutions
- It applies to educational program equity, such as in athletics, and also to sexual harassment and sexual misconduct and violence as well as employment
- Compliance with the law is overseen by the U.S. Dept. of Education, Office of Civil Rights

SEX BASED DISCRIMINATION

Applies to Sex, Gender, Gender Identity, Gender Expression

- Program Equity
- Recruitment, Admissions and Access
- Pregnancy
- Athletics
- Employment, Recruitment and Hiring
- Extra-curricular activities
- Housing
- Access to Course Offerings
- Salaries and Benefits
- Financial Assistance
- Facilities
- Funding

SEXUAL HARASSMENT

- Hostile Environment
- Stalking
- Domestic Violence
- Dating Violence
- Sexual Assault
- Sexual Violence
- Sexual Exploitation
- Sexual Intimidation
- Sexual Misconduct
- Retaliation

HOW MAY A STUDENT OR EMPLOYEE TAKE EXTERNAL ACTION?

Lawsuit

- File in federal court.
- Monetary damages, injunction.
- Requires:
 - Actual notice.
 - Employee with authority to take action.
 - Deliberate Indifference.

Administrative Action*

- Initiated through OCR or DOJ
- Agency seeks voluntary compliance or renders findings.
- Requires:
 - Actual OR constructive notice (“knew or should have known”).
 - Investigate.
 - End harassment.
 - Remedy impact.
 - Prevent recurrence.

*Based on the Proposed Regs, these standards will likely align much more moving forward.



APPLICATION OF CURRENT TITLE IX REGULATIONS

CREATING AND IMPLEMENTING POLICY DEFINITIONS

- Students and employees should **know policy exists, how it works, and how to file a complaint**
 - Ensure that policy and procedures are published and posted widely
 - e.g., In the publications and information sources that are most read and used — and can be easily located
 - Must be included on website and all handbooks/catalogs given to applicants for admission and employment, students, employees, and unions



WHEN DOES TITLE IX APPLY UNDER THE CURRENT REGULATIONS?

1. WHO IS THE COMPLAINANT?

- 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 University with which the formal complaint is filed
 - OCR adopts in the discussion a fairly broad definition of what could constitute “attempting to participate”

2. WHO IS THE RESPONDENT?

- If Respondent is **not** affiliated with the University in any way, the University **lacks authority** to take disciplinary action. Examples include:
 - Employee of an outside company (e.g., vendor, construction worker, etc.)
 - Guest or invitee
 - Prospective student
 - Former student
 - Former employee
 - Student from another institution
- May still remedy the harassment, but not provide a basis to run a formal grievance process as contemplated in the Title IX regulations.

3. MEETS DEFINITION OF SEXUAL HARASSMENT (§ 106.30)



Conduct on the basis of sex that satisfies one or more of the following:

- Hostile environment sexual harassment
 - Severe, pervasive, **and** objectively offensive
- Quid pro quo harassment
- Sexual assault
- Domestic violence
- Dating violence
- Stalking

Retaliation is also prohibited.

4. PROGRAM OR ACTIVITY?

- There is NO expectation that you exercise jurisdiction over off-site incidents UNLESS
 - The property is owned or controlled by the school **OR**
 - The property is being used for a program or event sponsored by the school or an organization recognized by the school **OR**
 - The property is owned or controlled by an organization recognized by the school
- All programs run by a federal funding University
- All programs using facilities of the funding University
 - e.g., Camps using fields/stadium

MANDATORY DISMISSAL OF A FORMAL COMPLAINT

The TIX Coordinator MUST dismiss a formal complaint at any time if the alleged conduct:

- Would not constitute sexual harassment as defined (six offenses in § 106.30), even if proved
- Did not occur in the University's education program or activity
 - This includes having disciplinary control over the alleged Respondent
- Did not occur against a person in the United States
- The Complainant is not participating or attempting to participate in University's program at time of complaint

DISCRETIONARY OR PERMISSIVE DISMISSAL OF A FORMAL COMPLAINT

The TIX Coordinator MAY dismiss a formal complaint if at any time prior to a determination:

- Complainant notifies the Title IX Coordinator in writing that the Complainant would like to withdraw the formal complaint or any allegations
- Respondent is no longer enrolled or employed by University
- Specific circumstances prevent the University from gathering evidence sufficient to reach a determination as to the formal complaint or any allegations

MANDATORY OR PERMISSIVE DISMISSAL OF A FORMAL COMPLAINT

- Written notice of dismissal to parties required
 - Dismissal (or non-dismissal) of formal complaint may be appealed

Upon dismissal under the Title IX Regulatory framework (§106.45) the University may institute action under another policy

FOR EXAMPLE, IF TIX JURISDICTION IS NOT PRESENT

Behavior may still violate:

- University's Discrimination, Harassment, Sexual Misconduct Policy
- Student Handbook/Conduct policies
- Technology/Acceptable Use policies
- Employee Handbook/Policies
- Professionalism standards

IF TIX JURISDICTION IS NOT PRESENT (CONT.)

University should still take steps to:

- Provide support and resources to the Complainant and institutional community
 - Address any “downstream effects” that occur within the campus environment
- Determine if there are patterns or institutional variables that contributed to the alleged incident
- Take what action it can (e.g., trespass the person)
- Recognize that while Title IX action requires an “actual notice standard”, Title VII applies a “knew or should have known standard” that does not require a complaint
- Both laws require that we take action to Stop – Prevent and Remedy



INTAKE/ISSUES EARLY IN THE PROCESS

- Intake: Report v. Complaint
- Formal complaints
- Jurisdictional issues
- Dismissal issues

REPORT v. COMPLAINT – TIX REGULATIONS

- Distinguish between a “report” or “notice” and a “complaint”
- Upon receiving a “report” (either from the would-be Complainant or a third party):
 - Promptly reach out
 - Offer and provide supportive measures to the person alleged to have experienced the harassment. May also offer to would-be Respondent.
 - Explain process to file a formal complaint.
- Conduct initial assessment to determine if jurisdiction is appropriate and if conduct would fall under TIX Regulations or other policy violations (this impacts the rest of the process)

FORMAL COMPLAINT – TIX REGULATIONS

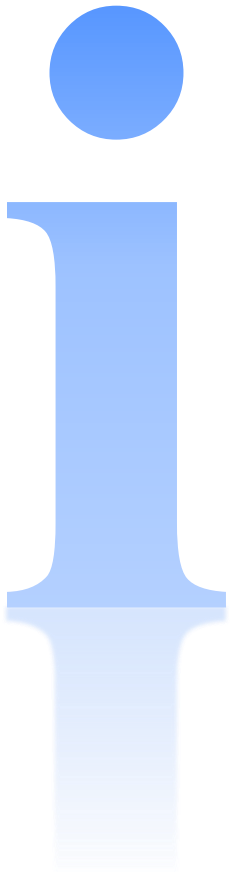
Formal Complaint

- Filed as a document or electronic submission
- Filed by Complainant (or parent/guardian) or signed by TIX Coordinator
 - TIXC does not become a party to the complaint
- Alleging Sexual Harassment or other harassment/discrimination conduct
- Requesting an investigation
- Must meet other jurisdictional requirements for Title IX
- If formal complaint meets TIX standards then eligible for informal resolution



INITIAL ASSESSMENT

INITIAL ASSESSMENT IN SUMMARY



- The initial assessment is conducted by the Title IX Office who will determine the following:
 - Does the allegation meet the Title IX regulatory standard for response?
 - Does jurisdiction exist?
 - Does the TIXC need to sign/initiate a formal complaint?
 - Mandatory/Discretionary dismissal considerations.
 - If dismissed, should an alternate policy/ process begin?
 - Should this move forward under a VII rubric?
 - Can/should University remedy informally or without discipline?

SUPPORTIVE MEASURES

- Provided to all parties throughout the process:
 - Non-disciplinary, non-punitive
 - Individualized
 - Restore or preserve equal access
 - Without unreasonably burdening other party
 - Protect safety of parties or environment, or deter sexual harassment
- If supportive measures not provided, document why not

ATIXA RUBRIC FOR EVALUATING WHETHER TO HAVE TIXC SIGN FORMAL COMPLAINT: PPTVWM

Title IX Coordinator may need to file a formal complaint if any of the following are present:

- **Pattern**
- **Predation**
- **Threat**
- **Violence/Weapon**
- **Minors**

PPTVWM (CONT.)

Pattern, Predation, Threat, Violence, Weapon, or Minors

- Additional complaints of sexual violence involving the same Respondent
- Whether the sexual violence was committed by multiple individuals
- Whether the Respondent has a prior history of violence
- Whether the report reveals a pattern of behavior at a given location or by a particular group
- Whether the Respondent threatened further sexual violence or violence against the Complainant or others

PPTVWM (CONT.)

Pattern, Predation, Threat, Violence, Weapon, or Minors

- Whether a weapon facilitated the sexual violence
- Age of the Complainant
- Whether the school possesses other means to obtain relevant evidence (e.g., security cameras or personnel, or physical evidence)

If school proceeds, it should notify the Complainant and utilize appropriate supportive measures to protect them.

NOTICE TO THE PARTIES

- Upon receipt of a formal complaint, a University must provide **written notice** to the parties who are known that includes:
 - Notice of the grievance process, including any informal resolution process
 - Notice of the allegations with sufficient time to prepare a response before any initial interview and sufficient details known at the time, including:
 - Identities of the parties involved in the incident, if known
 - Description of conduct
 - Date and location, if known

EMERGENCY REMOVAL

The University may remove a student Respondent from the education program or activity on an emergency basis, only after:

1. Undertaking an individualized safety and risk analysis
2. Determining if an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal
3. Providing the Respondent with notice and an opportunity to challenge the decision immediately following the removal while respecting all rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act, as applicable.

EMPLOYEE ADMINISTRATIVE LEAVE

- A University may place a non-student employee Respondent on administrative leave during the pendency of a grievance process under existing procedures, without modifying any rights provided under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act
- What is the appropriate action for student employees?

INFORMAL RESOLUTION

- The Title IX regulations include a provision that encourages informal resolution, and it is a worthy practice, when voluntary.
 - Following formal complaint
 - Allowed at any time prior to a final determination at discretion of TIXC
 - Voluntary, written consent of the parties and their parent/guardian
 - OCR regs preclude informal resolution of allegations that an employee harassed a student
 - Must still stop, prevent, remedy, and document response

INFORMAL RESOLUTION

- The Title IX Coordinator or designee may look to the following factors to assess whether Informal Resolution is appropriate, or which form of Informal Resolution may be most successful for the parties:
 - Amenability of the parties to Informal Resolution
 - Likelihood of potential resolution, taking into account any power dynamics between the parties
 - Motivation of the parties to participate
 - Civility of the parties
 - Cleared violence risk assessment/ongoing risk analysis
 - Whether an emergency removal is needed



INVESTIGATION LOGISTICS

- Recording and Recordkeeping
- Who is in attendance?
- Preparation considerations
- Timing considerations

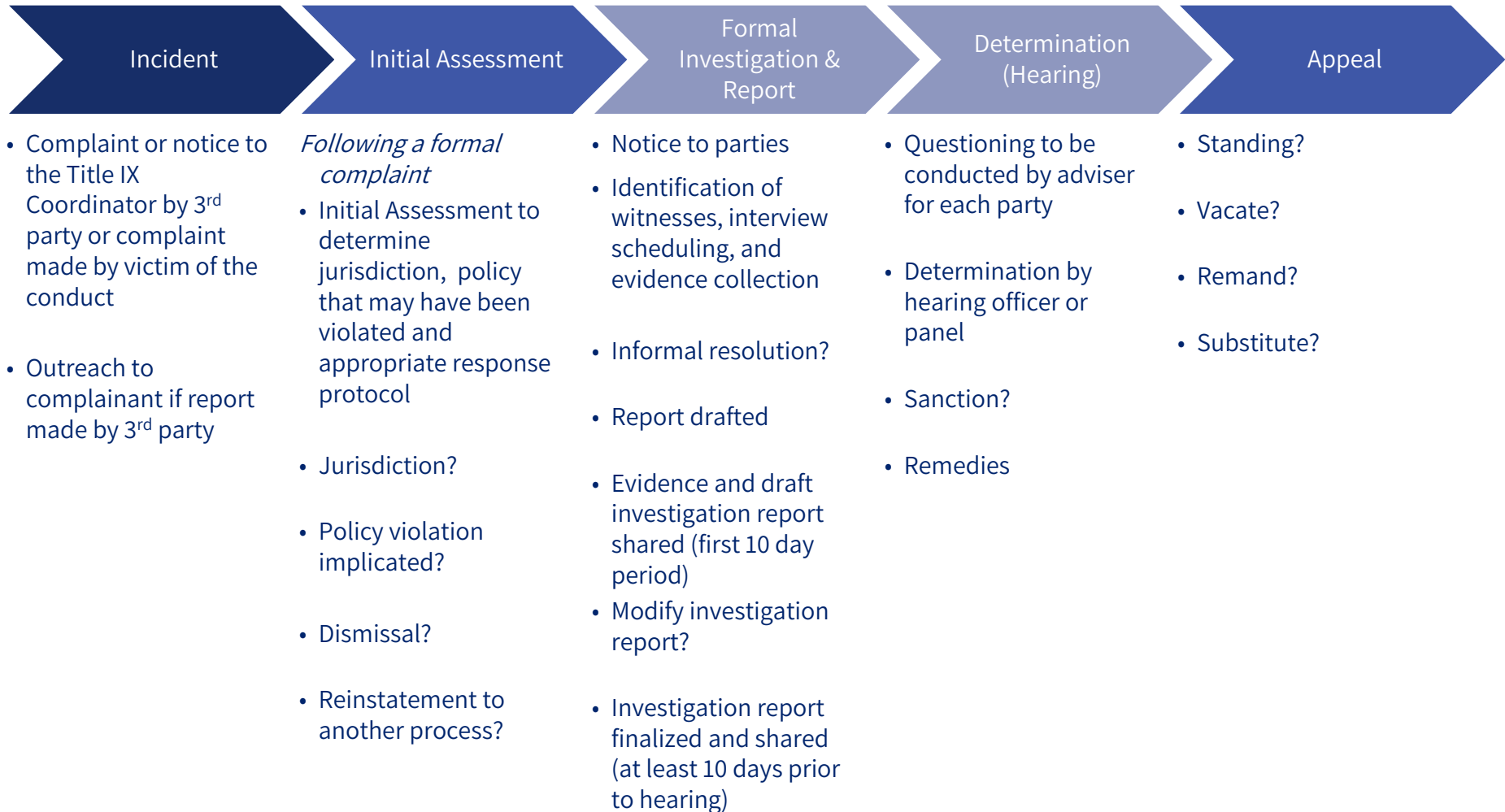
STEPS OF A TITLE IX INVESTIGATION

- Establish basis for investigation
- Determine policy(ies) alleged to have been violated, if meets Title IX Regulatory Standards proceed using this process, if it does not, then follow your alternative process (“Process B”)
- Send Notice of Investigation/Notice of Formal Allegation(s) to Parties (NOIA)
- Engage in “issue spotting”
- Establish investigation strategy
- Conduct formal comprehensive investigation
 - Witness interviews
 - Evidence gathering
- Create draft investigation report
 - All evidence that is relevant to the determination
 - Assess credibility and evidence
 - Synthesize areas of dispute/agreement

STEPS OF A TITLE IX INVESTIGATION

- Investigator meet with Title IX Coordinator (and/or legal counsel) to review draft report and evidence
- Provide all evidence directly related to the allegations to parties and their Advisors for inspection and review with 10 days for response
- Revise (as needed) and finalize the investigation report
 - Gather, assess, and synthesize relevant evidence
- Meet with Title IX Coordinator (and/or legal counsel) to review final investigation report
- Send final report to Decision-maker and parties/Advisors at least 10 days prior to hearing

THE PROCESS





THE INVESTIGATION REPORT

G.A.S. Framework

Sharing the Evidence & Report

THE INVESTIGATION REPORT

- The investigation report is the one comprehensive document summarizing the investigation, including:
 - Results of interviews with parties and witnesses
 - Results of interviews with experts (if any)
 - Summary of other information collected (i.e., information from police reports, video surveillance and photographs, copies of text, email and social networking messages, etc.)
 - Highlights the relationships between different pieces of evidence
 - Identifies contradictory, corroborating, (in)consistencies, etc.
 - The Investigator's opinion is not controlling, but they want to point the Decision-makers toward decisive or corroborating evidence without telling them how to interpret it

THE INVESTIGATION REPORT

- Under the 2020 Title IX regulations, investigators may or may not assess credibility with or without rendering conclusions or making findings related to credibility, but will help to roadmap where Decision-makers should look for information critical to a determination
 - ATIXA advises that Investigators make credibility analysis instead of credibility determinations
- The regulations also allow Investigators to include a recommended finding of responsibility in the investigation report
 - ATIXA advises against Investigators including a recommended finding in the investigation report

G.A.S. FRAMEWORK

To draw a clear line between investigation and decision-making functions, Investigators should follow the G.A.S. Framework for investigations and reports:

- **Gather** evidence
- **Assess** credibility and evidence
- **Synthesize** areas of dispute/agreement and all questions asked



OVERVIEW OF EVIDENCE

- Relevant
- Directly Related, but Not Relevant
- Not Directly Related or Relevant
- Weighting Evidence

WEIGHTING EVIDENCE

- Investigator or Resolutions Officer may consider and assign weight to different types of evidence, when relevant and credible (see next slide)

Documentary Evidence

e.g., supportive writings or documents

Electronic Evidence

e.g., photos, text messages, and videos

Real Evidence

i.e., physical objects

Direct or Testimonial Evidence

e.g., personal observation or experience

Circumstantial Evidence

i.e., not eyewitness, but compelling

Hearsay Evidence

e.g., statement made outside the hearing but presented as important information

Character Evidence

subject to relevance determination; often not probative of the underlying allegation

DETAILS OF ANALYSIS OF EVIDENCE

1. Assess evidence carefully. For each piece of information you have as a result of your analysis and matching process you need to assess its evidentiary value:
 - What are the facts? They carry the most evidentiary weight.
 - What is the circumstantial evidence?
 - What are the opinions or hearsay information? They're less valuable than facts but are probably the bulk of what you're being told. Potentially are valuable when witnesses share similar opinions. Not worthless, but only suggestive rather than probative (proving).
2. How does the evidence add up?



CREDIBILITY

CREDIBILITY OVERVIEW

Corroboration

- Aligned testimony and/or physical evidence.

Inherent Plausibility

- “Does this make sense?”
- Be careful of bias influencing sense of “logical.”

Motive to Falsify

- Do they have a reason to lie?

Past Record

- Is there a history of similar behavior?

Demeanor

- Do they seem to be lying or telling the truth?

*Enforcement Guidance
on Vicarious Employer
Liability for Unlawful
Harassment by
Supervisors*

EEOC (1999)

FACTORS TO CONSIDER FOR CREDIBILITY

Corroborating Evidence

- Strongest indicator of credibility
- Independent, objective authentication
 - Party says they were in class, teacher confirms
 - Party describes text conversation, provides screenshots
- Not simply alignment with friendly witnesses

FACTORS TO CONSIDER FOR CREDIBILITY

Corroborating Evidence (Cont.)

- Can include contemporaneous witness accounts
 - More “separate” the witness, greater the credibility boost
- Outcry witnesses
 - Does what party said then line up with what they say now?
- Pay attention to allegiances
 - Friends, teammates, group membership
 - This can work both directions (ex. honest teammate)

FACTORS TO CONSIDER FOR CREDIBILITY

Inherent Plausibility

- Does what the party described make sense?
 - Consideration of environmental factors, trauma, relationships
- Is it believable on its face?
- “Plausibility” is a function of “likelihood”
 - Would a reasonable person in the same scenario do the same things? Why or why not?
 - Are there more likely alternatives based on the evidence?

FACTORS TO CONSIDER FOR CREDIBILITY

Inherent Plausibility (Cont.)

- Is the party's statement consistent with the evidence?
- Is their physical location or proximity reasonable?
 - Could they have heard what they said they heard?
 - Were there other impediments? (darkness, obstructions)
- How good is their memory?
 - Temporal proximity based on age of allegations
 - “I think,” “I’m pretty sure,” “It would make sense”

FACTORS TO CONSIDER FOR CREDIBILITY

Motive to Falsify

- Does the party have a reason to lie?
- What's at stake if the allegations are true?
 - Think academic or career implications
 - Personal or relationship consequences
- What if the allegations are false?
 - Other pressures on the Complainant– failing grades, dramatic changes in social/personal life, other academic implications
- Reliance on written document during testimony

FACTORS TO CONSIDER FOR CREDIBILITY

Past Record

- Is there evidence or records of past misconduct?
- Are there determinations of responsibility for substantially similar misconduct?
- Check record for past allegations
 - Even if found “not responsible,” may evidence pattern or proclivity
- Written/verbal statements, pre-existing relationship

FACTORS TO CONSIDER FOR CREDIBILITY

Demeanor

- Is the interviewee uncomfortable, uncooperative, resistant?
- Certain lines of questioning – agitated, argumentative
- BE VERY CAREFUL
 - Humans are excellent at picking up non-verbal cues
 - Human are terrible at spotting liars (roughly equivalent to polygraph)
- Look for indications of discomfort or resistance
- Make a note to dive deeper, discover source

CREDIBILITY ASSESSMENTS IN INVESTIGATION REPORTS

- Indicate where to focus for the Decision-maker without rendering conclusions or making findings related to credibility
- NOT GOOD
~~“The Decision-maker should find Mark to be unbelievable in his testimony about having received consent for the following reasons...”~~
- GOOD
“Mark’s testimony about X contrasts with Mariana’s testimony about X, and the accounts of Witness 1 and Witness 7 aligned with Mariana’s testimony, not Mark’s, during the investigation.”



SHARING EVIDENCE & THE INVESTIGATION REPORT

EVIDENCE AND REPORT REVIEW BY PARTIES, PART 1

Prior to the completion of the Investigation Report:

- Evidence directly related to allegations must:
 - Be sent to each party and Advisor
 - Be in an electronic format or hard copy
 - Include evidence upon which the University does not intend to rely
 - Include exculpatory and inculpatory evidence
 - Be made available at any hearing
- **Best practice:** Provide the draft investigation report at the same time.
- After sending the evidence, the investigator must:
 - Allow 10 days for written response
 - Consider response prior to completion of report

EVIDENCE AND REPORT REVIEW BY PARTIES, PART 2

At least 10 days prior to making a determination regarding responsibility:

- The final Investigation Report summarizing relevant evidence must be sent:
 - To each party and Advisor
 - In an electronic format or hard copy
 - For the parties' review
- **Best Practice:** Provide the investigation report to the TIXC and/or legal counsel to review for completeness prior to being shared with the parties



HEARINGS, SANCTIONING & WRITTEN DETERMINATIONS

LIVE HEARING

- Regulations mandate live hearing for all Title IX cases and student cases (that will change with the new regulations)
 - Virtual hearings are permitted
- Must create audio/audiovisual recording, or transcript of hearing and make it available to the parties for inspection and review.
- Must allow live cross-examination to be conducted exclusively by each party's Advisor in Title IX cases
- In Title IX cases, questions come from Advisors and Decision Maker/Hearing Panel
- In non-Title IX cases involving students, the parties may engage in directly questioning the other and the witnesses.

SANCTIONING FOR STUDENTS

- Sanctions should be commensurate with the determined violation(s). When imposing the sanction(s), the sanctioning body should account for any mitigating and/or aggravating factors including, but not limited to:
 - The facts and circumstances of the underlying conduct,
 - Past misconduct by the student,
 - Failure of the student to comply fully with previous sanctions,
 - Actual and potential harm caused by the violation,
 - Degree of intent and motivation of the student in committing the violation,
 - The severity and pervasiveness of the conduct that constituted the violation.
 - Impairment resulting from voluntary use of alcohol or drugs (i.e., other than medically necessary) will also be considered an aggravating, and not a mitigating, factor.

WRITTEN DETERMINATIONS

Decision Maker issues a detailed, written determination regarding responsibility that includes the following:

- Policies alleged to have been violated
- A description of the procedural steps taken from the receipt of the formal complaint through the determination including:
 - Any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held
- Statement of and rationale for the finding as to each specific allegation.
 - Should include findings of fact and conclusions

WRITTEN DETERMINATIONS

- Sanctions imposed on Respondent (if any)
- Whether remedies designed to restore or preserve equal access to the education program or activity will be provided by the University to the Complainant
- Procedures and bases for any appeal
- The Decision Maker should author the written determination.
- May follow a template provided by the Title IX Coordinator

WRITTEN DETERMINATIONS

- The determination becomes final either on the date that the University provides the parties with the written determination of the result of the appeal, or if an appeal is not filed, the date on which an appeal would no longer be considered timely
- The written determination must be a single document that addresses the finding and the sanction accompanied by rationale for each.
- If there are separate bodies for the two elements, their determinations must be combined for the final letter.
- The written determination should be provided to the parties simultaneously –
 - How will you do this?



APPEALS

- Appeal Bases
- Appeal Process

FINALITY OF DETERMINATION

- If an appeal is filed, the determination regarding responsibility becomes final on the date that the University provides the parties with the written determination of the results of the appeal.
- If an appeal is not filed, the determination regarding responsibility becomes final on the date on which an appeal would no longer be considered timely.

APPEAL PROCESS

- Both parties may appeal a determination regarding responsibility and a dismissal of a complaint or any allegations on the following bases:
 - Procedural irregularity that affected the outcome of the matter;
 - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter;
 - The Investigators or Resolutions Officer or designee(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent specifically that affected the outcome of the matter
- The party requesting the appeal must clearly articulate that their request falls within one of the bases for appeal. Any individual may serve as the gatekeeper for this so long as that person is not involved in the case as the assigned investigator or resolutions officer, will perform an initial review of the appeal.

APPEAL PROCESS

- If the Gatekeeper for the appeal request finds that at least one of the bases argued is clearly articulated, the appeal will proceed through the appeals process, which includes:
 - Assigning an appeals officer who is adequately trained to review appeals in cases of alleged discrimination, harassment, or sexual misconduct, is familiar with applicable policies and procedures, and who does not have a conflict of interest or bias for or against either party or bias for or against complainants and respondents generally;
 - Notifying the other party in writing when an appeal is filed and implementing appeal procedures equally for both parties;
 - Giving both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
 - Issuing a written decision describing the result of the appeal and the rationale for the result; and
 - Providing the written decision simultaneously to both parties.

APPEAL PROCESS

- The appeal is not intended to re-hear or re-argue the same case and is limited to the specific grounds outlined in the appeal procedures above. The appeal must state the specific grounds for the appeal and should include all supporting documentation.
- Appeals must be submitted in writing within a limited number of (generally 3-5) business days after the notice of finding or outcome is issued.
 - Any extensions to the appeal date may be made at the discretion of the Title IX Coordinator or designee.
 - Whenever an appeal is submitted, the other party will have the opportunity to respond, and their response will be due there to five business days after notification is received.
 - The appeal officer will decide the appeal based upon a review of the record and supporting documents (e.g. prior disciplinary history).
 - All appeals are documentary reviews, no interviews or meetings are conducted.

APPEAL PROCESS

- Where the Appeal Officer does not find that one of the bases is clearly articulated, they will deny the appeal. In such instances, the findings will stand, and the appeal will be retained in the investigation file.
- Note: A party must provide specific information to articulate that one or more of the grounds of appeal could be met. Vague or blanket assertions or assertions unsupported by specific facts or information will be denied.

APPEAL DISPOSITIONS

- Possible dispositions by the appeal officer. The appeal officer may, after a review of the record:
 - Uphold the original decision and/or sanction(s) or corrective action;
 - Dismiss the case or individual finding against the respondent and vacate any portion or all of the sanction(s)/corrective action;
 - Remand the case for investigation;
 - Remand the case to the original hearing body or refer the case to a new resolutions officer to be reheard. Cases may be remanded for the purpose of considering a specific issue(s) or for a new hearing.

ADDITIONAL APPEAL INFORMATION

- If a case is remanded for rehearing and the respondent is found in violation, the sanction/corrective action imposed can be greater or lesser than that imposed at the original hearing.
- The appeal procedures also apply to the outcome of a remanded investigation and/or hearing.
- Each party shall be limited to one appeal of a decision and/or a dismissal of a complaint.
- Neither party is required to respond to an appeal. Not responding to an appeal does not imply agreement with the appeal.
- A complaint that is resolved by informal resolution is not subject to appeal unless the right of appeal is included as a specific part of the informal resolution.
- A respondent who has accepted responsibility for violating the Non-Discrimination, Harassment, and Sexual Misconduct Policy waives the right to appeal
- The decision of the appeal officer is final, additional procedures may apply for matters involving a faculty member.



IMPORTANT INFORMATION ABOUT THE UPCOMING REGULATIONS

NPRM OVERVIEW

- The Department of Education (ED) released a 701-page Notice of Proposed Rulemaking (NPRM) on June 23, 2022 – the 50th Anniversary of Title IX
- Published in the Federal Register on July 12
 - 60-day comment period ran until September 12
 - ED received over 210,000 comments
 - ED must now respond to all comments as part of the rulemaking process
- Final version likely will differ from NPRM
 - Less deviation expected than in the 2018 NPRM versus 2020 Regulations

NPRM, GENERALLY

- Broader than the 2020 Regulations
 - Includes the behavior covered by the 2020 Regulations
 - Expands to provide procedures to respond to other forms of sex discrimination
- Elements of both Obama-era and Trump-era guidance/regulations
- Adds in greater flexibility
- Return to Stop, Prevent, Remedy,



SCOPE & APPLICABILITY

SCOPE (§ 106.10)

- NPRM is broader than the 2020 Regulations
- Discrimination on the basis of sex includes
 - Sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity
- Sex discrimination includes **sex-based harassment**
 - Replaces “**sexual harassment**” and includes
 - Quid pro quo, Hostile Environment, Sexual Assault, Dating Violence, Domestic Violence, and Stalking
- ED has announced a proposed rule regarding athletic eligibility based on gender may come later

HOSTILE ENVIRONMENT

- Hostile Environment Harassment (pg. 657-58)
 - Unwelcome sex-based conduct that is
 - Sufficiently severe **OR** pervasive, that, based on the totality of the circumstances **AND**
 - Evaluated subjectively and objectively
 - Denies or limits a person's ability to participate in or benefit from the University's education program or activity

SPOO VS. SORP

SPOO (2020 Regulations)

Severe **AND** Pervasive **AND** Objectively Offensive

SORP (2022 NPRM)

Sufficiently Severe **OR** Pervasive **AND** Evaluated Objectively
AND Subjectively

HOSTILE ENVIRONMENT (CONT.)

- OCR's proposed definition also provides factors for evaluating whether a hostile environment exists including:
 - Complainant's ability to access the education program or activity
 - The type, frequency, and duration of the conduct
 - The parties' ages, roles, and previous interaction(s)
 - The location and context of the conduct
 - The control the University has over the Respondent
- Potential intersection with First Amendment

APPLICABILITY

- **Education program or activity**
 - Broadly interpreted to include:
 - Academic, extracurricular, and athletic programs
 - Activities on school network, bus, class, or facilities
- De Minimis Harm
 - Policy or practice preventing participation in a program or activity consistent with gender identity “subjects a person to more than de minimis harm on the basis of sex”

§ 106.31; NPRM pg. 668

APPLICABILITY (CONT.)

- **Jurisdiction** includes:
 - Conduct subject to University's disciplinary authority,
 - Conduct in a building owned or controlled by a student organization officially recognized by a postsecondary institution
- Removes geographical restrictions
 - Conduct outside the United States may need to be addressed under Title IX
 - Downstream (in-program) effects
 - Charging decisions may become more complicated

§ 106.11; NPRM pg. 666
§ 106.31; NPRM pg. 668

IF THE CONDUCT...

Occurred in your program
or activity

AND/OR

Is subject to your
disciplinary authority

AND/OR

Has led to a hostile
environment within your
program or activity

AND would meet Title IX, if proven...

YOU LIKELY HAVE JURISDICTION

OTHER POLICIES & LAWS

- The proposed regulations will likely overlap with existing policies and laws
 - Title VII
 - Fair Housing Act
 - Violence Against Women Act Amendments to the Clery Act
 - State statutory definitions of sexual harassment applicable to students and/or employees
 - State or jurisdiction requirements for sexual harassment investigations and/or reporting requirements
- Work with your legal counsel to figure out the best way to ensure all institutional policies co-exist cohesively



Decision Point:
What other laws and policies does your institution need to consider?



REPORTING & RESPONSE REQUIREMENTS

- Reporting & Response Requirements
- Reporting Categories
- Exceptions
- Additional Requirements

REPORTING & RESPONSE TO DISCLOSURES REQUIREMENTS (§ 106.44)

EMPLOYEE ROLE	DISCLOSURE FROM	NOTIFY TITLE IX COORDINATOR	PROVIDE TIXC INFO
Confidential Employees	<ul style="list-style-type: none"> • Student • Employee 	NO	YES
Employees with the authority to institute corrective measures	<ul style="list-style-type: none"> • Student • Employee 	YES	YES
Employees with responsibility for administrative leadership, teaching, and advising	• Student	YES	YES
	• Employee	CHOOSE ONE OR THE OTHER	
All other employees who are not confidential employees	<ul style="list-style-type: none"> • Student • Employee 	CHOOSE ONE OR THE OTHER	

REPORTING CATEGORIES

- Four Types of Employee Roles (pg. 674-75)
 - Does not replace Title VII, Clery Act, or state law reporting obligations
- **Confidential Employees** (pg. 651)
 - Can be designated by the University
 - Institution must notify all employees and students of the identity of confidential employees
 - Confidential employees must explain confidential status and provide Title IX Coordinator (TIXC) information



Decision Point:
**Who will be designated as a
confidential employee?**

REPORTING EXCEPTIONS

- No self-reporting requirement for employee Complainants
- Postsecondary public awareness events (§ 106.44(e))
 - Institution not obligated to respond to information provided during public event, including on online platforms
 - Unless information reveals an immediate and serious threat to the health or safety of students or other persons in the postsecondary institution's community, institution must respond
 - Must incorporate information/trends revealed at public awareness events into prevention education

§ 106.44; NPRM pg. 674-675

TRAINING REQUIREMENTS (§ 106.8)

- Various training requirements for:
 - All employees
 - Investigators, Decision-makers, and others responsible for implementing grievance procedures or modifying/terminating supportive measures
 - Informal Resolution Facilitators
 - Title IX Coordinator
 - No training requirement for students under NPRM
- All training materials must be made available on institution's website



**Decision Point:
Training frequency and
modalities**

NPRM pg. 662-665



BEST PRACTICES

Provide process, policy, and reporting training on a recurring basis.

Train Title IX team members on supportive measures.

Offer training to University-provided Advisors, if any.

Offer prevention education for employees and students.

Ensure training and prevention education programs meet all federal and state audience and content requirements.



INTAKE & EVALUATION

- Notice & Complaints
- Intake & Initial Evaluation
- Dismissals
- Supportive Measures
- Removals
- Informal Resolution

NOTICE & COMPLAINTS

- “Complaint” replaces “Formal Complaint”
- Notice (and complaints) can be verbal or written
 - Complaints **do not** have to be submitted to Title IX Coordinator/Title IX Team Member
- Complaints can be made by a Complainant or the TIXC
 - If a parent, guardian, or other authorized legal representation has the authority to act on behalf of a person, then that person can also file a complaint
- For allegations of sex discrimination, other than sex-based harassment, any student, employee, or third party may make a complaint

§ 106.2; NPRM pg. 651

§ 106.6; NPRM pg. 665

§ 106.45; NPRM pg. 682

INTAKE & INITIAL EVALUATION

- Upon notification of sex discrimination allegations, TIXC must:
 - Treat parties equitably
 - Notify Complainant of procedures and, in the event of a complaint, prepare to notify the Respondent
 - Offer and coordinate supportive measures
 - Initiate grievance procedures or informal resolution as requested
- Initial Evaluation
 - Provides TIXC with greater latitude to collect information before formal grievance process begins

§ 106.44(f); NPRM pg. 675-76

DISMISSALS (§ 106.45)

All dismissals are discretionary, but can occur when:

- The Respondent is unable to be identified *after reasonable steps to do so*
- The Respondent is no longer participating in the educational program or employed by the University
- The Complainant withdraws all or a portion of the complaint and any remaining conduct ≠ discrimination under Title IX
- It is determined that the conduct, even if proven, would ≠ discrimination under Title IX
 - *Prior to dismissing the complaint, the University must take reasonable efforts to clarify the allegations with Complainant*

DISMISSALS (§ 106.45) (CONT.)

Upon dismissing a complaint:

- A University must notify the Complainant of the basis for the dismissal
- Supportive measures should still be offered to the Complainant
- Must notify the Respondent of the dismissal and offer supportive measures if the Respondent has already been notified of the complaint
- All parties have a right to appeal the dismissal
 - What's Unclear?
 - Whether an unaware Respondent has this right



**Decision Point:
Who will hear dismissal
appeals?**

NPRM pg. 686-87

SUPPORTIVE MEASURES (§ 106.44)

- Should restore or preserve the party's access
 - May not impose burdensome measures for punitive or disciplinary reasons, but permits burdening Respondent for other reasons during the grievance process
- Supportive measures may be continued, modified, or terminated at the end of the grievance process or IR
- Must provide an opportunity to seek modification or reversal of supportive measure (or lack thereof)
 - An impartial employee, not involved with the initial decision, must have authority to modify or reverse

 **Decision Point:
Who has authority to modify/
reverse supportive measures?**

NPRM pg. 676-77

REMOVALS (§ 106.44)

- **Administrative Leave**

- Institutions may place **employee** Respondents on administrative leave during grievance process

- **Emergency Removal**

- Institutions may remove **student** Respondents, on an emergency basis, if an individualized safety and risk analysis determines:
 - An immediate and serious threat exists and arises from the allegations
- Removes the “physical” threat requirement from the 2020 Regulations



**Decision Point:
Who will conduct the safety
and risk analysis?**

REMOVALS (§ 106.44) (CONT).

- Following an emergency removal
 - A University must provide the Respondent notice and an opportunity to challenge the removal
- What's Unclear?
 - Whether supportive measures that burden a student Respondent constitute a “partial removal” that can only be implemented after an individualize safety and risk analysis
 - Whether a “partial removal” can be implemented as a supportive measure to preserve Complainant’s access without an individualized safety and risk analysis



Decision Point:
**Who will hear Emergency
Removal challenges?**

NPRM pg. 679

INFORMAL RESOLUTION (§ 106.44)

- Informal Resolution Requirements:
 - Voluntary by parties
 - TIXC must agree
 - Provide notice to parties in advance (detailed requirements)
 - Facilitator may not be Investigator or Decision-maker
 - Not permitted in complaints with a student Complainant and an employee Respondent
- Informal Resolution can occur **without** a formal complaint
 - Can look like a supportive measures only response
- Information and records from the Informal Resolution cannot be used in the grievance process if the Informal Resolution is unsuccessful



**Decision Point:
Who will facilitate
Informal Resolutions?**



GRIEVANCE PROCEDURES

- Investigating
- Decision-making
- Appeals
- Advisors
- Evidence

WHICH GRIEVANCE PROCEDURES TO USE?

	§ 106.45	§ 106.46
K-12	Everything	N/A
Higher Education	<p>Sex discrimination complaints that are NOT sex-based harassment</p> <p>Sex-based harassment complaints that do not involve a student</p>	<p>All sex-based harassment complaints involving a student Complainant or Respondent, including:</p> <ul style="list-style-type: none"> ▪ Student-on-student ▪ Student-on-employee ▪ Employee-on-student

§ 106.45 VS. § 106.46

- Section 106.45 is a bare-bones civil rights process
 - Section 106.46 is a more robust process that incorporates all of the elements of § 106.45 and retains many features from the 2020 regulations
- Two separate policies are permitted, but not required



Decision Point:
How many policies and procedures will your institution adopt?



Offer a streamlined, § 106.46-compliant, process to provide for a consistent response to stop, prevent, and remedy all forms of discrimination, including:

- Written Notice
- Right to an Advisor of choice
- Comprehensive, written investigation report
- Opportunity for report review and response
- Separation between investigator and decision-maker
- Cross examination
- Written determination
- One level of appeal

GRIEVANCE PROCEDURES

- Section 106.45 outlines a list of requirements for written grievance procedures that generally apply to both § 106.45 and § 106.46.
- Prohibits conflicts of interest or bias
- Allows for single-investigator model
 - No requirement for a separate Decision-maker
 - Permissible for the Investigator to serve as the Decision-maker
 - Permissible for the TIXC to serve as the Investigator (and/or DM)



**Decision Point:
Who will serve as an
investigator? As Decision-
maker?**

NPRM pg. 682-90

GRIEVANCE PROCEDURES (CONT.)

- Reasonably prompt timeframe for major process stages
 - Evaluation, Investigation, Determination, Appeal
- Reasonable steps to protect privacy without restricting a party's ability to obtain and present evidence
 - Section 106.46 specifies that expert witnesses may be allowed if the right is offered to all parties
- Objective evaluation of permissible relevant evidence
- Allows for additional provisions, so long as they are applied equally to the parties



Decision Point:

Will expert witnesses be permitted?

Will you add other provisions?

NPRM pg. 682-690

GRIEVANCE PROCEDURES (CONT.)

- Notice must be provided to parties at the beginning of an investigation

§ 106.45

- Notice does not have to be written
- No waiting period between notice and interview

§ 106.46

- Written notice required
- Sufficient time to prepare before an interview required
- May be accompanied by an Advisor of choice
- Presumption of non-responsibility
- Prohibition against false statements, if any



Decision Point:
Do you have policies prohibiting false statements? If not, will you add them?

GRIEVANCE PROCEDURES (CONT.)

- Complaints can be consolidated in some situations
- The burden to conduct an investigation and gather sufficient information to make a determination is on the University
- For sex-based harassment complaints only, the grievance procedures must:
 - Describe the range of supportive measures available
 - Describe the range of possible disciplinary sanctions and remedies that could be imposed



Decision Point:
What are the range of sanctions and remedies for students? For Employees?



Decision Point:
What supportive measures are available?

NPRM pg. 682-90

INVESTIGATING

- Adequate, reliable, and impartial investigations of complaints
- Equal opportunity for parties to present inculpatory and exculpatory evidence
- Investigators must collect evidence and determine relevance

§ 106.45

- Written or verbal description of relevant evidence
- Reasonable opportunity for parties to respond

§ 106.46

- Equitable access to all relevant evidence **or** to an investigation report that summarizes the evidence
- Reasonable opportunity to review and respond
- Review must take place before the hearing, if any

DECISION-MAKING

	§ 106.45	§ 106.46
Second 10-day period	<ul style="list-style-type: none"> • Not required 	<ul style="list-style-type: none"> • Not required
Credibility Assessment	<ul style="list-style-type: none"> • Decision-maker is required to assess credibility • Does not have to occur during a hearing or live questioning 	<ul style="list-style-type: none"> • Decision-maker(s) required to assess credibility through live questioning during a live hearing or through individual meetings
Live Hearing	<ul style="list-style-type: none"> • Not required 	<ul style="list-style-type: none"> • Permissible • Required in some jurisdictions

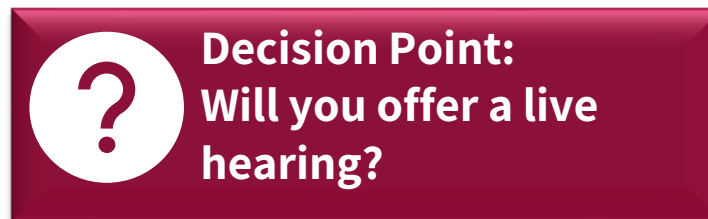
NPRM pg. 682-90

DECISION-MAKING (CONT.)

	§ 106.45	§ 106.46
Cross-examination	<ul style="list-style-type: none"> • Not required 	<ul style="list-style-type: none"> • Required • Can occur through the Decision-maker or through party Advisors (during a live hearing)
Written Outcome	<ul style="list-style-type: none"> • Permitted but not required 	<ul style="list-style-type: none"> • Required
Appeal	<ul style="list-style-type: none"> • Permitted but not required • May be otherwise required 	<ul style="list-style-type: none"> • Required

LIVE HEARINGS

- Under § 106.46 if a University conducts live hearings:
 - Decision-makers must be allowed to pose their own relevant questions and relevant questions from the parties, **OR**
 - Each party's Advisor must be allowed to ask **any party** and any witnesses all relevant questions
- Can include questions going to credibility
- Parties can never ask questions directly



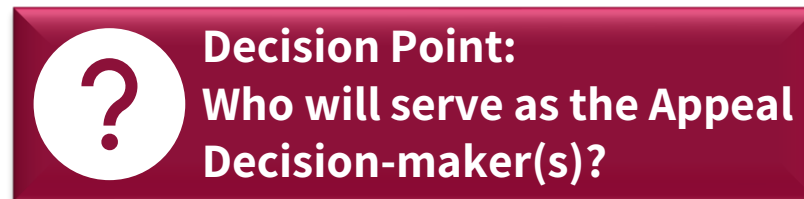
§ 106.46(f); NPRM pg. 694

OUTCOME DETERMINATION

- After making a determination as to whether the sex-based harassment occurred, the University must provide that determination to the parties
 - Under § 106.45
 - Does not have to be in writing
 - Under § 106.46
 - **Written** determination must include:
 - Description of alleged sex-based harassment
 - Information about policies and procedures
 - Decision-maker's evaluation of credible evidence and determination
 - Disciplinary sanctions and/or remedies, as appropriate
 - Appeal procedures

APPEALS

- Under § 106.46 institutions are required to offer an opportunity to request an appeal after a final determination
 - Outcome becomes final on the date the University provides a written determination of an appeal, or if an appeal is not filed, the date on which appeal would no longer be timely
- Appeal Decision-maker(s) cannot be the Investigator or Decision-Maker





Provide a written outcome notification including the determination, any sanctions or remedies, and any opportunities for appeal.

Offer one level of appeal and ensure comparable procedures for complaints other than sex discrimination also offer one level of appeal.

STANDARD OF PROOF

- Standard of Proof
 - Language shift from “burden of proof” or “standard of evidence”
- Must use preponderance of the evidence *unless*
 - Clear and convincing is used in all other **comparable proceedings, including other discrimination complaints (Title VII, Title VI)**
 - Employee Respondent vs. Student Respondent complaints are not comparable



Decision Point:
Which standard of proof will be used for employees? Students?

§ 106.6(g); NPRM pg. 688

ADVISORS

- Under § 106.45, Universities are not required to permit Advisors
 - Universities are not prohibited from doing so, as long as all parties are treated equitably
 - Advisors may otherwise be required
 - VAWA
 - Union/CBA Agreements
- Under § 106.46, all parties have the right to be accompanied by an Advisor of choice
 - An Advisor is not required unless an institution has chosen to implement live hearings with Advisor-led cross-examination
 - If a party does not have an Advisor, the University must provide an Advisor at no cost

§ 106.46(e)(2); NPRM pg. 692



PREGNANCY & RELATED CONDITIONS

- Pregnancy Discrimination
- Reasonable Modifications
- Pregnancy Leave
- Lactation Space

PREGNANCY DISCRIMINATION

- Pregnancy or related conditions:
 - 1) Pregnancy, childbirth, termination of pregnancy, or lactation
 - 2) Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation
 - 3) Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or their related medical conditions
- Nondiscrimination
 - Cannot adopt policies, practices, or procedures
 - To treat a student **OR** employee differently based on current, potential, or past pregnancy related conditions

§ 106.2; NPRM pg. 655
§ 106.21; NPRM pg. 667

PREGNANCY DISCRIMINATION (CONT.)

- Admissions/Enrollment
 - No pre-admission or enrollment inquiries regarding marital status
 - Including asking “Miss or Mrs.”
 - Self-identification of sex is permissible if required from all applicants
- What’s Unclear?
 - Non-birthing parents
 - Scope of parental protections

§ 106.40; NPRM pg. 669-72
§ 106.57; NPRM pg. 698-99

RESPONSE TO PREGNANCY

- Providing Information
 - When an employee acquires knowledge of a student's pregnancy or related conditions by the student...the employee must inform that person of Title IX support
- TIXC required response:
 - Prohibit sex discrimination
 - Reasonable modifications (document it!)
 - Allow voluntary access to separate and comparable program, if desired
 - Voluntary leave of absence
 - Availability of lactation space
 - Grievance procedures for sex discrimination complaints

§ 106.40; NPRM pg. 669-72

REASONABLE MODIFICATIONS

- Reasonable modifications may include:
 - Breaks to attend health needs
 - Breaks for breastfeeding or expressing breast milk
 - Absences for medical appointments
 - Access to online or homebound education
 - Changes in sequence or schedule of courses
 - Extensions or rescheduling examinations
 - Counseling
 - Elevator access

§ 106.40; NPRM pg. 669-72

PREGNANCY-RELATED LEAVE

- Pregnancy or related conditions serve as a justification for a reasonable, voluntary leave of absence
 - Can be unpaid
 - Applies to employees and students
 - Even if there is no policy **or** the person does not qualify under the policy
- Upon return, the person should be reinstated to their prior or a comparable status
 - For employees, there should be no decrease in compensation
 - For students, this includes academic and extracurricular status

§ 106.40; NPRM pg. 670
§ 106.57; NPRM pg. 699

LACTATION TIME & SPACE

- Employees and students must be provided reasonable break times for breastfeeding or expressing breast milk
- Lactation Space
 - Not a bathroom
 - Clean, shielded from intrusion
 - Can be used by a student or employee, as needed

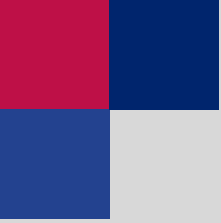


Decision Point:
**How many lactation spaces
are needed to reasonably
accommodate both student
and employee populations?**

§ 106.40; NPRM pg. 669-72
§ 106.57; NPRM pg. 699

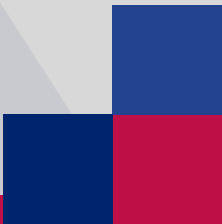
THINGS TO DO BEFORE IMPLEMENTATION

- Review today's decision points
- Prepare to expedite policy revisions at your institution
- Educate community about future changes
 - The final changes may be different from the NPRM
- Review current policies, practices, publications, and websites
 - Create a checklist of changes that will need to be made to each
- Work with your legal counsel to determine how the proposed regulations intersect with other policies and governing laws
- **KEEP FOLLOWING THE 2020 REGULATIONS!**



Association of
Title IX Administrators

Questions?



DAY 2 AFTERNOON DISCUSSION



SPECIAL TOPICS



CONSENT CONSTRUCT



ELEMENTS OF VALID CONSENT:

- There must be mutual understanding about what sexual activity will occur or not occur
- Consent requires that the person initiating the sexual activity get permission to do so, and that permission does not exist in the absence of resistance.
- No means no, but nothing also means no. Silence and passivity do not equal consent.
- To be valid, consent must be given immediately prior to or contemporaneously with the sexual or intimate activity
- Consent does not have to be verbal but must be clearly communicated, not ambiguous or assumed

CONSENT MUST ALSO BE.....

- Consent is in doubt when a party to a sexual interaction is making assumptions about what their partner does or does not want.
- Absence of clear signals means no consent, not try it and see if they like it or objects.
- You can place any conditions you want on your willingness to consent.
- Consent can be withdrawn at any time, so long as it is clearly communicated verbally or non-verbally by either partner

CONSENT

- The definition of consent does not vary based upon a participant's sex, sexual orientation, gender identity, or gender expression.

WHAT ABOUT WHEN CONSENT IS GIVEN BUT NOT WILLINGLY OR KNOWINGLY?

- There are circumstances where even when consent is given, it is not valid.
- Consent would be invalid when a person does not willingly consent
- Consent, even if given, is not valid if it is a result of intentional actions that overcome someone's free will through force, such as:
 - Physical force
 - Threats
 - Intimidation
 - Coercion

FORCE ANALYSIS

Was force used by the Respondent to obtain sexual or intimate access?

- Because consent must be voluntary (an act of free will), consent cannot be obtained through use of force

Types of force to consider:

- **Physical violence:** hitting, restraint, pushing, kicking, etc.
 - This may also involve alleged violations of other policies (e.g., harms to persons, violation of law, etc.)
- **Threats:** anything that gets someone to do something they wouldn't ordinarily have done absent the threat
 - This requires an analysis as to the viability of the threat and whether a reasonable person would believe the Respondent could or would carry out the threat

FORCE (CONT.)

Types of force to consider:

- **Intimidation:** an implied threat that menaces and/or causes reasonable fear.
 - This requires the same threat analysis as above
- **Coercion** – the application of an unreasonable amount of pressure for sexual access
 - Consider isolation, frequency, intensity, and duration

CONSENT IS ALSO NOT VALID WHEN IT IS NOT KNOWINGLY GIVEN

When the non-initiator of sex is incapable of understanding their situation sufficient to make a decision, AND the initiator of sex knew the other person was incapacitated or reasonably should have known any consent given is not valid

- Incapacity is not the same as impaired, drunk, intoxicated, or under the influence.
- Incapacitation is a state where an individual cannot make rational, reasonable decisions because they **lack the capacity** to give knowing consent
- Assessing incapacitation is very fact-dependent
- Incapacitation is a determination that will be made after the incident **in light of all the facts available**

BEHAVIOR CUES OF INCAPACITY

- Evidence of incapacity will come from context clues, such as:
 - The accused knows how much the other party has consumed
 - Slurred speech
 - The smell of alcohol on the breath in combination with other factors
 - Shaky equilibrium; stumbling
 - Outrageous or unusual behavior (not making sense, appearing drunk)
 - Falling asleep
 - Throwing up
 - Disoriented or incoherent
 - Unconsciousness (including Blackout)
 - Although memory is absent in a blackout verbal and motor skills are still functioning.

INCAPACITY (CONT.)

Blackouts are frequently identified with incapacitation

- But being blacked out is not automatically incapacitation
- A Blackout is no working (form of short-term) memory for a consistent period
 - A person can be experiencing blackout/memory gaps for a number of reasons but may still be making rational decisions during the blackout, just not remembering them
- Although memory is absent in a blackout, verbal and motor skills are often still functioning

How can a person be incapacitated?

- Alcohol or other drugs (prescription or non-prescription)
- Mental/cognitive impairment
- Injury
- Asleep or unconscious

UNDERSTANDING INCAPACITATION

- To better understand and determine the relationship between the use of alcohol and capacity to knowingly consent. It's important to understand there are multiple levels of effect of alcohol, along a continuum
 - The lowest level is impairment, which occurs with the ingestion of any alcohol. A synonym for impairment is “under the influence”
 - The next level is intoxication, also called drunkenness, similar to the state's drunk driving limit
 - A person can be drunk but still have the capacity to give consent

UNDERSTANDING INCAPACITY

- Incapacity is a higher level of alcohol consumption in which an individual is incapable of understanding information presented, appreciating the consequences of acting or not acting on that information and making an informed choice
 - Incapacitation is a state beyond drunkenness or intoxication, where decision-making faculties are dysfunctional.

UNDERSTANDING INCAPACITATION

- In order to consent effectively to sexual activity, you must be able to understand Who, What, When, Where, Why *and* How with respect to that sexual activity.
- Any time sexual activity takes place where the complainant did not understand any one of these six conditions, incapacity is at issue.
- This is another way of stating the law's expectation that consent must be knowing or informed, and any time it is not, consent cannot be effective.
- To be more precise, an incapacitated person cannot give a *valid* consent.

INCAPACITY ANALYSIS

- If the Complainant **was not** incapacitated, then apply the Consent Standard. We can assume they could assess the situation
- If the Complainant **was** incapacitated, but:
 - The Respondent did not know it, or reasonably should have known it = policy not automatically violated. Again, apply the Consent Analysis.
- If the Complainant **was** incapacitated, and:
 - The Respondent **knew it or caused it, re reasonably should have known it**, it's a policy violation.



CREATING TIMELINES

Timeline Construct

CREATE A TIMELINE

First evaluate if the Complainant was incapacitated

- This inquiry may be triggered by statements such as:
 - “The next thing I remember was . . .”
 - “I woke up and . . .”
 - “I don’t remember anything after . . .”
- This is your cue to start a timeline of the events during the incident to collect the evidence to assist the Decision-maker(s) in making their analysis as to whether the Complainant was incapacitated

TIMELINE CONSTRUCT

Next, start the timeline

- Begin the timeline at the time the incident began, starting at the time the Complainant began using alcohol/drugs
- Ask (but perhaps in a different way):
 - What were you drinking (e.g., wine, beer, or hard liquor)?
 - Quantity? (e.g., shot glass, large Solo cup, 12 oz. can)
 - How many drinks did you have?
 - Were you using any drugs?
 - When did you eat? What did you eat?
 - Are you taking any medications?
 - Functional tolerance questions

TIMELINE CONSTRUCT (CONT.)

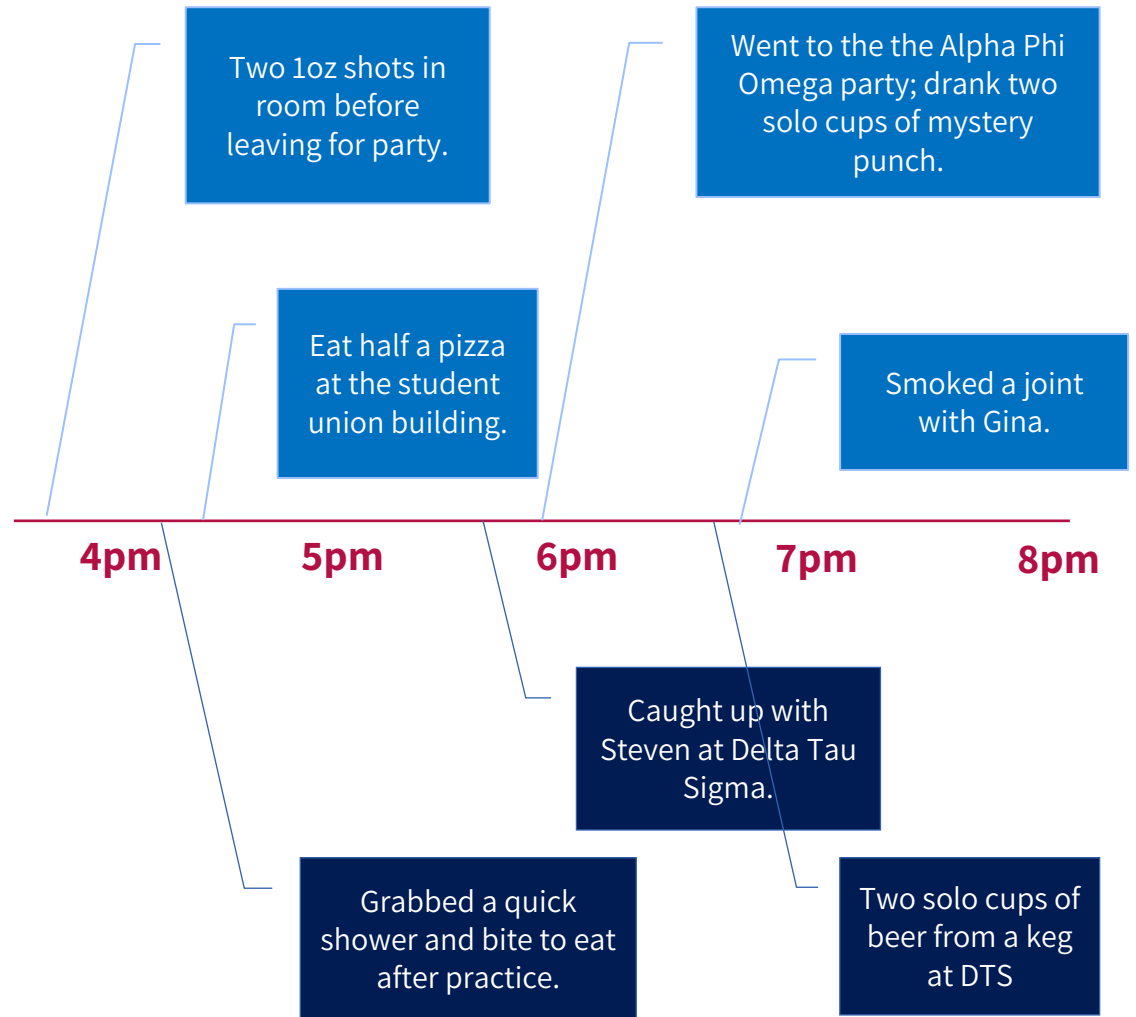
- If Complainant did not have anything to drink, or only had a small amount, you need to consider if the individual was drugged. You will need to ask:
 - Where were you when you were drinking?
 - Did you leave your drink at any time then resume consuming?
 - Did anyone provide drinks for you?

TIMELINE CONSTRUCT (CONT.)

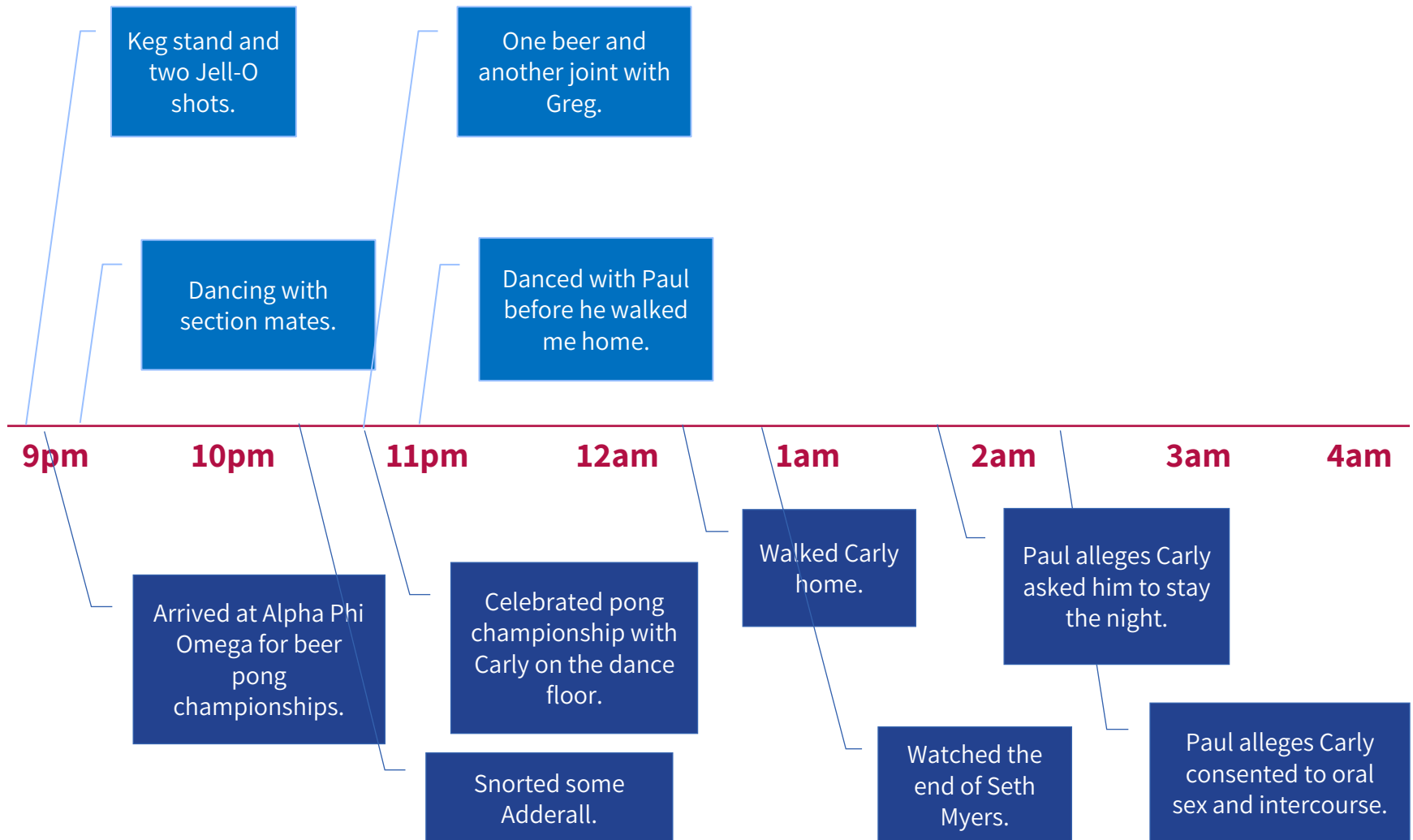
- The Decision-maker will need to make an assessment if, based on the standard of evidence, the Complainant was incapacitated
- If the answer is “No,” proceed to the Consent analysis
- If the answer is “Yes,” move to part two of the Incapacity analysis
- Conduct the same timeline for the Respondent, superimposed on the Complainant’s timeline

CREATING A TIMELINE EXAMPLE

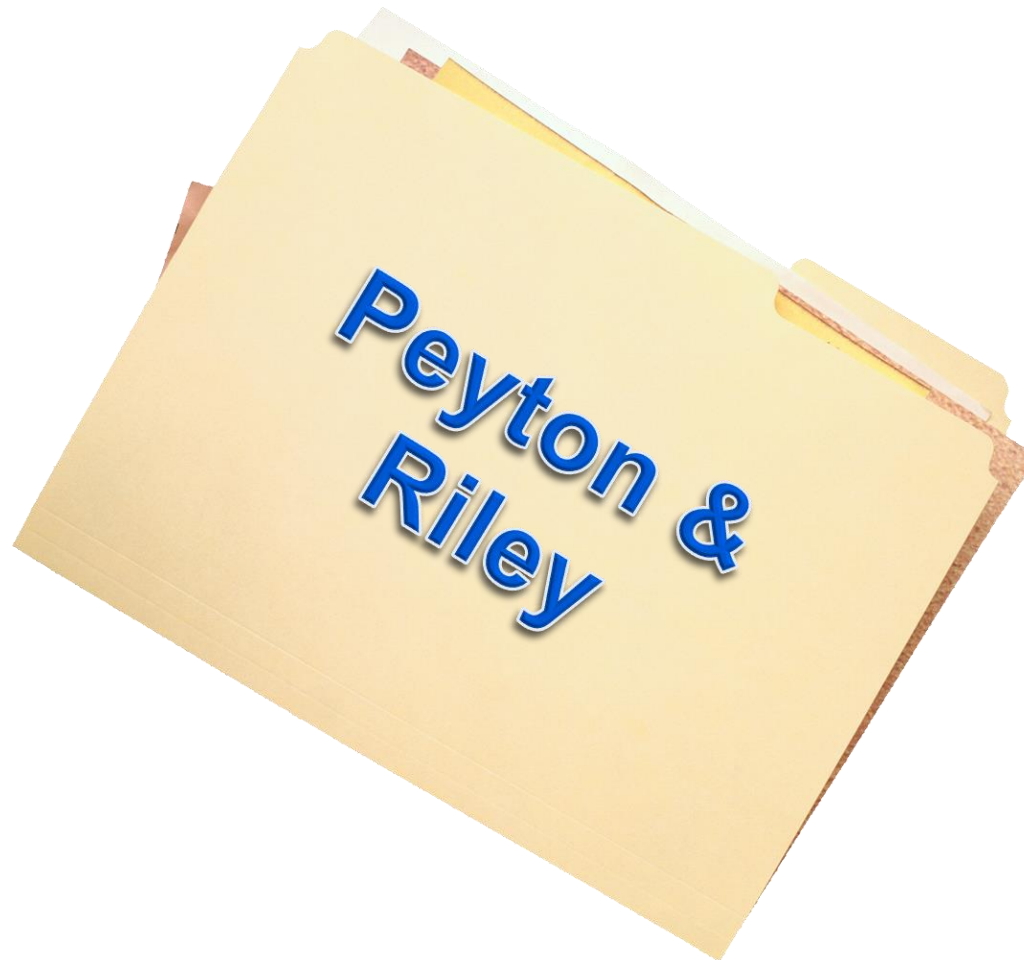
- Use documentary evidence (e.g., texts) to establish where, why, when, how, and who
- Match up as many times and locations as possible
- What did the other party observe?



CREATING A TIMELINE EXAMPLE (CONT.)



QUESTIONING EXERCISE



Peyton & Riley

- Peyton O’Neil, the Complainant/Reporting Party, a first-year student;
- Riley Thompson, the Respondent/Responding Party, a second-year student;

Peyton O'Neil's Statement

It was Friday night and it had been a long week. I was invited to an off-campus party and was ready to blow off steam. My adjustment to college has been a challenging one. Frankly, I'm struggling with how casually intimate and open it is here and it's a bit weird to me. I just wanted to forget all the stress of school and my personal life and have a good time.

I was dancing and doing some drinking and Riley came up to me and started dancing. I'd seen Riley on campus and thought Riley was really good looking. No one seemed to be pairing off so it didn't feel awkward.

Peyton O'Neil's Statement

Over the next couple hours I had a blast, Riley got me some more beers and then they started passing out Jello shots. I'd never had them before and they were great. I think I had a bunch.

I started feeling really nauseous and went to the bathroom because I thought I was going to be sick. I got sick and decided it was time to head home. I only made it as far as the outside door and got sick again, right there in the bushes. I didn't realize anyone was around, but Riley came up to me and asked if I needed help. I was so glad for someone to help me get back home.

Peyton O'Neil's Statement

I remember us coming in my room and I remember hugging Riley (I don't know why-I think I was just so glad to be back). Then I think I got sick again, but I know I went to the bathroom. Riley was still there when I came back from the bathroom and encouraged me to lay down. I must have. The rest of the night is a blur. I remember someone rubbing my back, it must have been Riley.

Peyton O'Neil's Statement

When I woke up I was naked and had a terrible hangover and then I saw a note from Riley with a phone number and saying what a “sexy” person I am and what pleasure I give! was so confused and didn't know what had happened. I called Riley to find out just what went on last night and Riley asked me out! I'm so upset! What did I do? What did Riley do? I don't know if I want to find out, but I know it's bad. Riley did this to me and needs to be held responsible. This whole thing is messing with my mind.

Riley Thompson's Statement

On the night of Friday, September 13th, I went to an off-campus party. There was a small band, and a lot of alcohol. I got to the party at about 11:00 pm, and slammed about three beers in the first hour I was there. It was very crowded, and people were dancing. A lot of people already seemed to be drunk. I hung out around the dance floor with my friend Jami Warren for a while, until I noticed Peyton dancing. Peyton is pretty hot, and I had noticed Peyton on campus a few times. I went up to Peyton and we started talking

Riley Thompson's Statement

Peyton seemed a little tipsy and pretty loose. We talked for a while, and Peyton asked me if I wanted more to drink – I think we got about two beers over the next hour or so.

I didn't have anything more to drink after that because the three beers I slammed at first were starting to kick in. Around 1:00 am, somebody started passing out Jell-O shots spiked with grain alcohol. I didn't want to mix beer and liquor, but Peyton had a few shots.

We danced a bit, and I think Peyton had another Jell-O shot. Peyton left to go to the bathroom, and after that I couldn't find Peyton, and that made me a little bummed. I waited around to see if Peyton would show up again, but Peyton didn't. I took off and started to walk back to my apartment.

Riley Thompson's Statement

As I left the party, I heard some noise over in the bushes. I looked over and saw Peyton standing near the the bushes. I couldn't tell what Peyton was doing, but it might have been throwing up or just spitting up. I went over to see what was up, and Peyton said "I'm ok, I just need go home." I offered to take Peyton home, and Peyton told me where the apartment was. It was close enough to walk, so we did, and Peyton hooked arms with me on the walk home and leaned on me. When we got to the apartment, I helped Peyton inside, and Peyton immediately went to the bathroom. Peyton was in there for a bit, and and I was about to leave, but Peyton came out asked me to come up to the bedroom, saying "just to make sure I (Peyton) got there without falling down." We went upstairs, and I opened the door and we went in.

Riley Thompson's Statement

Peyton asked me if I wanted some water and I said yes. Peyton asked if I would go down to kitchen and get us water. I did. I brought them upstairs (I drank mine on the way up), gave Peyton the glass and started to leave again, but Peyton asked me not to go. When I turned around, Peyton hugged me. We hugged for a while, and Peyton kissed me on on neck and then my mouth. Peyton said “Wait here for a sec,” and then went to the bathroom. When Peyton came out, Peyton said “All better, but I am a bit tired.” I said I was too, and Peyton asked me if I wanted to lay down on the couch in the room.

Riley Thompson's Statement

We laid on the bed and then started kissing. I started to massage Peyton's back. I started to fall asleep, but Peyton woke up about 20 minutes later, and started to kiss me and fondle me. Peyton took off my shirt, and I took off Peyton's: eventually we were both naked. I started to perform oral sex on Peyton for a little bit. I asked "Is this was okay" or "Are you okay with this?" or something like that and Peyton said "yes." When I stopped after a little bit, Peyton said "I need to rest" so I laid down to sleep too. Peyton woke up after about 20-30 minutes I guess, and I suggested that we just go to sleep. But, Peyton said "I feel better" and then started to give me oral sex.

Riley Thompson's Statement

We had great mutual sex. We laid there for a bit and fell asleep, but I was having trouble sleeping comfortably though. I got up and got dressed and got ready to leave and I wrote Peyton a note and my number and left. The next day, Peyton called me to ask me why my name and number was on the note by the sofa. I told Peyton that I was hoping that we could go out again. Peyton asked me what exactly had happened the night before and I told Peyton we hooked up. Peyton seemed to get upset, and said "I remember meeting at the party, and us getting back to the apartment but almost nothing else." I asked if we could go out sometime, and Peyton said "I don't do things like this!" and hung up on me. Two days later, I was notified by the Title IX Coordinator that Peyton filed a complaint against me, and here I am.

Group Discussion

- What are the issues here?
- If you believe Peyton was incapacitated, do you believe Riley actually knew (or planned it) or reasonably should have known?
 - State your reasoning.
- What do you want to ask Peyton?
- What do you want to ask Riley?
- Who else do you want to talk to?
- What other information should you look for?



Association of
Title IX Administrators

First Amendment Review



THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

1791



FREE SPEECH TENSIONS



COMMON CHALLENGES ON COLLEGE CAMPUSES

- Controversial speakers and challenging messages, often sparking violent responses
- Clashes between protected expression and Academic Freedom in the classroom
- Offensive organizational theme parties
- Social media challenges
- Offensive speech or expression directed toward an individual or about a group
- “Bias incidents” – “hate speech”

THE CONFLICT OF VALUES

- Colleges and Universities strive to create and sustain a learning environment that promotes diversity, maintains civility, and establishes an atmosphere of mutual respect.
- At the same time, they want to support and promote exploration of new and often controversial ideas.
- These important goals can create conflict when the expression of an individual's opinion is articulated in such a way that it offends, embarrasses or denigrates another, or when it's directed at an individual or group based on their protected status.
- This challenge is a complex one for public institutions who must uphold the First Amendment rights of students, faculty and staff while maintaining the value of civility.



UNPROTECTED SPEECH

- ✦ Fighting Words
- ✦ Obscenity
- ✦ Incitement of Imminent Lawless Action
- ✦ True Threat
- ✦ Defamation
- ✦ Hate Speech

SEMINAL CASES

- **FIGHTING WORDS**
 - **Chaplinsky v. New Hampshire**, 315 U.S. 568 (1942)
- **OBSCENITY**
 - **Miller v. California**, 413 U.S. 15 (1973)
- **INCITEMENT OF IMMINENT LAWLESS ACTION**
 - **Brandenburg v. Ohio**, 39 U.S. 444 (1969)
- **TRUE THREAT**
 - **Virginia v. Black**, 538 U.S. 343 (2003)
- **DEFAMATION**
 - **Milkovich v. Lorain Journal Co.**, 497 U.S. 1 (1993)
 - **Hustler Magazine v. Falwell**, 485 U.S. 46 (1988)

FIGHTING WORDS

CHAPLINKSY V. NEW HAMPSHIRE, 315 U.S. 568 (1942)

- Chaplinsky was convicted under a state statute for verbally attacking the City Marshall by calling him a “damned racketeer” and a “damned Fascist”
- This case took place during WWII, at a time in which accusations of racketeering or fascism were taken quite seriously
- The Court held that Chaplinsky’s epithets were “fighting words” which were “likely to provoke the average person to retaliation, and thereby cause a breach of the peace”
- There have been no other holdings on fighting words since 1942

Do you think there are words that would rise to that level today?

OBSCENITY

MILLER V. CALIFORNIA, 413 U.S. 15 (1973)

- Marvin Miller sent advertisements for adult books and films he had for sale through a mass mailing campaign which depicted sexual acts.
- Recipients who received the mail did not willingly request or grant permission to receive the mailed advertisements.
- The Court ruled in favor of the State of California, saying Miller engaged in obscenity.

OBSCENITY (CONT.)

MILLER V. CALIFORNIA, 413 U.S. 15 (1973)

- The court found obscenity was determined by:
 - Whether the average person, applying contemporary standards of the community, would find that the work only appeals to the prurient interest of others
 - Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law
 - Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value

INCITEMENT OF IMMINENT LAWLESS ACTION

BRANDENBURG V. OHIO, 39 U.S. 444 (1969)

- The leader of the Ku Klux Klan was convicted under the Ohio statute for threatening that “if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengeance [sic] taken”
- The Court found in favor of the Klan, stating “**speech that merely advocates rather than actually incites violence shall be protected by the First Amendment**”
- The Court stated that a governmental entity may not forbid or proscribe advocacy of the use of force or law violations except where such advocacy incites or produces imminent lawless action and is likely to produce such action

TRUE THREAT

VIRGINIA V. BLACK, 538 U.S. 343 (2003)

- Barry Black and others were convicted of violating a Virginia statute that makes it a felony “for any person..., with the intent of intimidating any person or group..., to burn...a cross on the property of another, a highway or other public place,” and specifies that “any such burning...shall be prima facie evidence of an intent to intimidate a person or group”
- The Court held that while a State, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate, treating any cross burning as prima facie evidence of intent to intimidate renders the statute unconstitutional

DEFAMATION

MILKOVICH V. LORAIN JOURNAL CO., 497 U.S. 1 (1993)

- Milkovich, Maple Heights High School’s wrestling coach, testified at a hearing concerning a physical altercation at a recent wrestling meet
- After the hearing, Theodore Daidium published an article in the local newspaper saying that anyone at the wrestling meet “knows in their heart” that Milkovich lied at the hearing
- Milkovich sued Daidium and the paper for defamation, alleging that the article accused him of perjury, damaged his occupation, and constituted libel
- The Supreme Court found against the newspaper, stating that Milkovich was not a public figure and the defamatory statements were factual assertions, not constitutionally-protected opinions

BUT...SEE ANOTHER CASE

HUSTLER MAGAZINE V. FALWELL, 485 U.S. 46 (1988)

- Jerry Falwell, a world-famous minister, brought a lawsuit against Hustler magazine for defamation for portraying him in a cartoon parody which suggested he had an incestuous relationship with his mother and preached only when he was drunk
- The Court found the parody to be protected speech, saying public figures like Falwell, and public officials, may not have a defamation claim without showing actual malice by the author, because such a standard is necessary to give adequate breathing space to the First Amendment



THE IMPORTANCE OF ANALYZING THE ACTIVITY BEFORE TAKING ACTION

- ✦ Considerations
- ✦ Three-Step Analysis

CONSIDERATIONS

- Free expression in public schools does not guarantee unfettered access to property simply because it is owned or controlled by a government entity
- Public schools have the right to impose reasonable regulations compatible with the educational mission by carefully applying the type of expression to the location of the expression and using a viewpoint neutral time, place and manner approach based on the location
- Not all locations on campus have the same type of standards on restricting expression

THREE-STEP ANALYSIS

STEP 1: Are there 1st Amendment implications in the activity presented?

- Does it include any components of “expression” (not conduct)
 - Consider: not just speech, but leafleting, signs, bulletin boards, chalking, clothing, etc.
- Does it have a religious component?
- Does it involve a campus newspaper, radio, TV station?
- Does it involve a group activity on school property, i.e., demonstration, protest, walkout, rally?
- Is there a request for meeting room space in one of the classrooms?



THREE-STEP ANALYSIS (CONT.)

STEP 2: Are there any clear exceptions to the 1st Amendment at issue?

- Each potential exception requires a separate analysis to the specific set of facts presented
- Courts will apply exceptions very narrowly
- Must be applied with extreme caution

THREE-STEP ANALYSIS (CONT.)

STEP 3: Analysis of facts identified in Steps 1 & 2 in consideration of the location on campus (the “forum”)

- Any restriction based solely on the message to be delivered will always be prohibited (unless it’s one of the exceptions)
- The school can apply a content (message) neutral “time, place, and manner” limitation, but it must do so with careful consideration of the facts and the location and document the decision



**WHAT ABOUT OPPOSING VIEWS?
CAN YOU DISRUPT A PRESENTATION?**

PORTLAND STATE UNIVERSITY

- In March 2019, the Portland State University College Republicans student organization hosted Michael Strickland to discuss his appeal from a conviction for brandishing a firearm during a demonstration.
- The police took no action when a protester disrupted Mr. Strickland's talk for over an hour by ringing a cowbell and standing in front of the projector.

Was this the protester's right?

HECKLER'S VETO

- What the protester engaged in is called the “Heckler’s Veto”
 - Occurs in circumstances when opponents to a message block the delivery of that message by direct action or shouting down a speaker through protest
 - Also occurs when a representative of the public entity accepts limits or restrictions on speech that overrides another speaker, or when the public entity restricts or cancels a speech based on anticipated or actual reactions of the opponents of the speech

Is this OK?

HECKLER'S VETO (CONT.)

- Generally, no, because the Constitution requires the government to control the crowd in order to defend the communication of ideas, rather than to suppress them.
- But when the opposition moves from counter speech to violence the government may step in and is expected to protect the speaker and others.



CASE STUDY DISCUSSIONS

CASE STUDY: SASHA



CASE STUDY: SASHA

- Sasha is a sophomore theatre major and just found out she is pregnant. Sasha is having a very rough first trimester and is having to miss a lot of rehearsal time for a play in which she was recently cast as the lead role.
- Professor Alexa, Sasha's Acting II instructor and the director of the production Sasha is in, has a very strict attendance policy when it comes to missing rehearsals.
- Professor Alexa's policy is, if a student misses more than two rehearsals, they are removed from their role. Sasha has now missed her third rehearsal and is removed from the lead role and the play altogether.

CASE STUDY: SASHA

- Sasha is mad that she has been removed from the cast of the show and reports to you that she is being discriminated against based upon her sex and pregnancy status.
- Professor Alexa states that Sasha's removal has nothing to do with her sex or pregnancy status and has everything to do with the attendance policy which is applied equally to all students in productions.
- Furthermore, according to the national theatre accrediting body, each production must include a minimum of twenty rehearsal hours for each actor prior to the first full dress rehearsal in order for the play to be considered of educational quality, and for it to count towards the student's degree requirements.

CASE STUDY DISCUSSION: SASHA

- Rehearsals take place one day per week for six hours each session. Missing one rehearsal is the equivalent of missing three weeks of course material.
- Sasha's three absences have significantly impacted the others involved in the productions, including other students not having the ability to rehearse scenes with her, which has in turn decreased their total number of rehearsal hours.
- Sasha tells you that she has been rehearsing during the weekends with her scene partners and knows her lines despite missing the three class periods.

What do you do as Title IX Coordinator?

CASE STUDY: PROFESSOR JONES



CASE STUDY – PROF. JONES

- Frank, a trans male student, comes to you to complain that Professor Jones, his (tenured) English professor, has made comments in class that make Frank “feel unsafe.”
- Specifically, he alleges that Prof. Jones made the following comments:
 - After the transgender letter was repealed by the Trump administration, Prof. Jones brought it up in class and said, “Finally, some common sense from Washington – you are either a man or a woman. Period.”

CASE STUDY – PROF. JONES

- When a student wore a gay pride shirt to class, Prof. Jones said, “I get not being ashamed of who you are having sex with, but is ‘proud’ really the word you should use?”
- He assigned all the students in class to write their persuasive essays on “trying to convince me that people should be able to use whatever bathroom they want to.”

CASE STUDY – PROF. JONES

- There are about 26 students in the class, and Frank brought with him Georgina, Haley, Isaiah, Jeremy and Ken. He tells you that all the students will back him up and that he has heard that Jones is not liked in the department as well.
- He also says he knows a student who is trans female. He says she is not comfortable even going to the English department offices because she also feels “unsafe.”

CASE STUDY – PROF. JONES

- Do these statements and actions constitute a policy violation? Why or why not?
- If you start to look into the allegation(s), can Frank remain anonymous?
- What supportive measures might be taken?
- Frank requests that you assist him in withdrawing from Jones' class, as do the other 5 students.

CASE STUDY – PROF. JONES

- Further, Frank shares with you that a month ago, while walking across campus with Ken, he heard another student use the word “faggot.” He can not identify the other student, but thinks he is in student government.
- He also heard from Georgina that, at a recent social function, a group of students made fun of the LBGTQ group on campus. As a result of this, he says that he feels even more “unsafe.”

CASE STUDY: DEB



CASE STUDY: DEB

Deb is a faculty member working with a small team of seven student research assistants who meet each morning to check-in with each other and the status of their grant projects in the university lab. May is a student team-member who has recently announced that she is pregnant.

One morning, May texted Deb that she was going to miss the morning meeting. Deb announced to the group that they should get started because May wouldn't be joining the meeting that day. A third student researcher, Paulie, responded with a snort, and said, "I bet she has morning sickness. Too bad, her breasts are getting to be GINORMOUS and I was looking forward to having a peek this morning." Several team members laughed hard at this joke, while a couple of others chuckled uncomfortably.

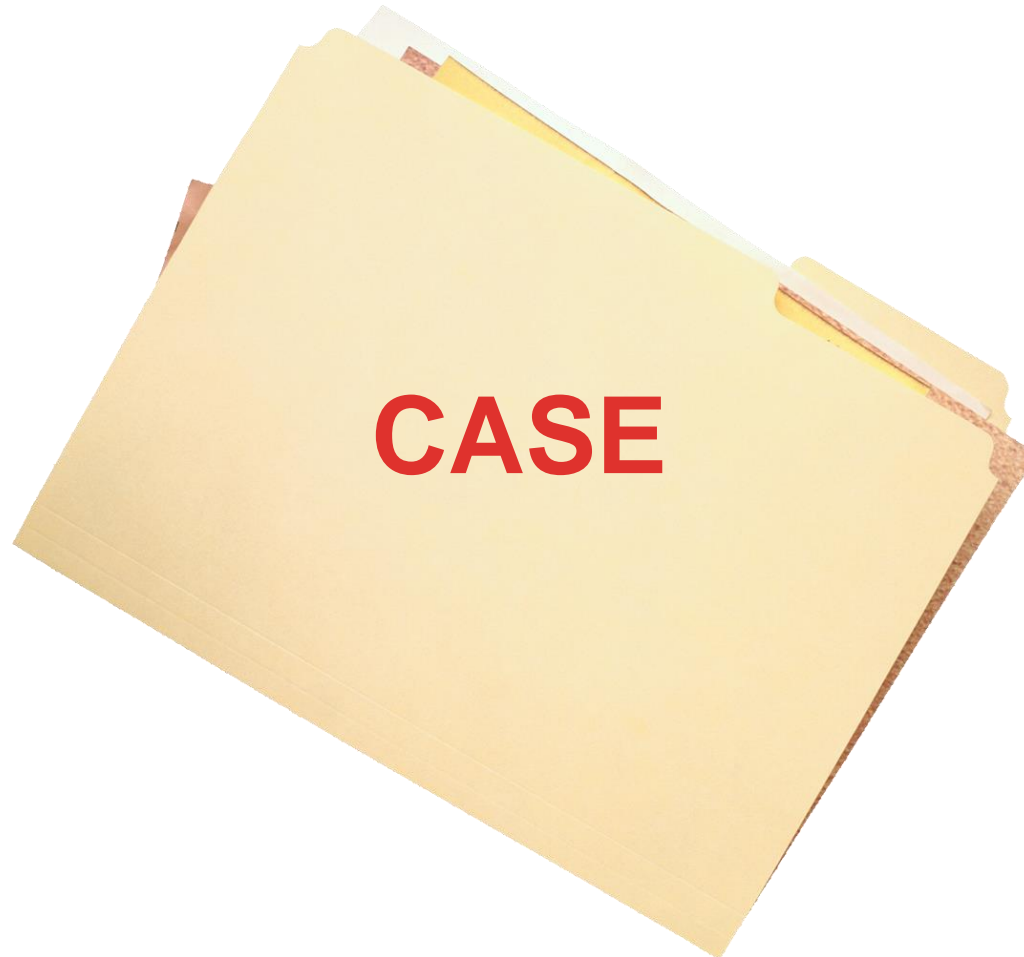
CASE STUDY: DEB

Deb was livid, and immediately began to wonder how she could work with a team of people who objectify women like this. After the meeting she stormed into the Title IX office to complain about Paulie's conduct. She explained how uncomfortable she felt by the incident, how she no longer could work with Paulie, stating that he should be terminated from the grant-funded position and that the other students who laughed should be put on probation.

CASE STUDY: DEB

- Discuss the steps you will take to address this
- What will you recommend to Deb?
- Will you suggest involving the class?

HOSTILE ENVIRONMENT EXERCISE: Maria Torres



THE CASE OF MARIA

Maria Torres is a second year student at your institution. She transferred to your school this year from a two-year college near her hometown in Texas. She selected your school because of the institution's values and mission and creative culture.

Maria is a first-generation college student and she is under a lot of pressure to make her family proud of her. She is working as a research assistant for a couple of professors to earn money for school and trying to become involved at the institution while keeping her grades up.

THE CASE OF MARIA

- Following class last month her professor asked her if she was fluent in Spanish. Maria responded, “Si”, laughingly. Her professor said he wanted to hire a student to accompany a study abroad group from the institution to provide interpretation services for the participants and he thinks she would be perfect. He told her she would have all her travel expenses paid and earn a stipend as well. Maria was thrilled.

THE CASE OF MARIA

- Bob, another student in the class, overheard the conversation between Maria and her professor. He was angry because, as a Spanish major, he had hoped to be selected as the group interpreter.
- Bob stopped Maria outside the classroom. He said the only reason the professor offered her the job was because she was “hot”. He said, “I’m going to start calling you the “hot tamale”.
- Bob’s nickname for Maria caught on across campus and she would frequently hear people call out “Hey Hot Tamale”. Maria was very embarrassed, but was determined to ignore the taunts.
- Then last week at the volleyball game (Maria is on the women’s team), a group of male students sat on the sidelines wearing large sombreros and holding signs. The various signs said:

THE CASE OF MARIA

- “I like it hot”
- “Hot tamales are the best tamales”
- “Aren’t you on the wrong side of the Rio Grande?”
- “Don’t come here and take our jobs”
- Maria was devastated and left the floor in the middle of the game.
- She came to the Equity Compliance Office to make a complaint.
- Is this a Title IX matter?
- Why/why not?



CONTACT INFORMATION

Sandra K. Schuster, Esq.

sandra.schuster@tngconsulting.com



Association of
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