Association of
Title IX Administrators

Addressing Inappropriate Employee Behaviors

20-Minutes-to… *Trained*

Please note that this video module and some of the supplemental materials were created prior to the 2020 Title IX regulations, thus the information contained within may not coincide perfectly with current regulations, as it was filmed in 2019. Any deviation is minor.

Table of Contents

Learning Outcomes

- Participants will identify common challenges in addressing inappropriate employee behavior.
- Participants will explain the importance of empowering employees to inform others when behavior is unwelcome.
- Participants will consider the impact of evolving culture surrounding expectations for accountability in the workplace, including reputational harm for delayed or inadequate response.
- Participants will examine the ways in which clearly defined behavior expectations are or are not communicated to their employees.

Discussion Questions

- Who sets the standards for employee behavior expectations at your institution?
- How are employee behavior expectations communicated?
- Does your institution engage in any ineffective practices regarding addressing inappropriate employee behavior (e.g., reassigning employees, allowing for early retirement, etc.)?
- Is there a clearly identified resource employees can contact to proactively inquire about potential inappropriate behavior before a complaint?
- What do you consider key indicators in evaluating effective response to complaints of retaliation?

Case Studies

Cameron

Cameron is an employee who has come to file a complaint about David, another employee who is in the same department as Cameron. Cameron reports that they had been in an intimate relationship over the last year. The relationship ended recently, and David is now attempting to "sabotage" Cameron's career by talking negatively about Cameron to their supervisor, Ed.

- What are the next steps?
- What supportive measures (if any) might be provided?
- Is this a policy violation?

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Professor Weber

As the Title IX Coordinator at a community college, you were recently notified that a sociology faculty member, Professor Weber, had written a somewhat inflammatory memo regarding pregnancy and wage discrimination and circulated it throughout the department. Professor Weber, an older, outspoken, and staunchly conservative lifelong academic, is known for engaging his colleagues in often spirited (and sometimes public) debates on issues of race and gender-based discrimination, but this is the first time he's ever put it in writing and attempted to reach such a broad audience.

The memo – an arguably well-written, four-page op-ed of sorts – argues that there is extensive research demonstrating that women who decide to take a year or two off from either school or their jobs have a correlative drop in their earning potential. The memo asserts that women knowingly make the decision to have kids, accepting the temporary hold it places on their academic or professional careers, but then "whine" about wage discrimination when their male colleagues, who he emphasizes do not take such leaves, end up making more than they do.

Though conceding that malicious wage-discrimination does exist in the workforce, he argues that such incidents are "anomalous," with the "vast majority of gender-based wage discrimination claims being propagated by women who are simply dissatisfied with the biological obligations of their sex and the corresponding vocational sacrifice associated with the decision to start a family." Professor Weber calls the typical college campus a "bastion of liberalism," which he argues "unwittingly encourages women to declare victim-status" rather than "being accountable for the decisions they, themselves, make," ultimately equating the decision to have children to "any other decision with career implications, such as leaving a management position at a large corporation to work for a promising startup."

He concludes by acknowledging his unconventional approach of sending out a seemingly unprompted internal memo to his colleagues, but remarks that, as the self-proclaimed "island of conservativism in a sea of liberalism" and given the multiple discussions he has had with his female colleagues on the topic, he is tired of feeling pressured into silence as the minority viewpoint and felt it his moral obligation to present the opposing side.

After several intra-departmental female faculty members angrily forwarded the memo to other faculty members outside of the department, the memo rapidly became the prevailing gossip on campus. Students quickly learned of the memo, many from other faculty members who mentioned it during their lectures in vents of frustration. Within a few days, social media had erupted with calls for Professor Weber's termination – from students, faculty, and staff alike. The school newspaper ran several editorials addressing the situation and several student organizations became highly vocal as well, setting up shop in the free speech area of campus and calling for a sit-in at the president's office.

Multiple faculty members have contacted you directly, insisting that Professor Weber's memo "clearly created a hostile educational environment in violation of College policy." The faculty members pointed to the palpable unrest on campus, the notable distraction the whole situation has caused, and the message it sends to the campus community if at least something is not done in response to something so clearly averse to the College's mission. One of the faculty members, with whom you've partnered on several occasions for outreach and prevention initiatives, asked you point blank how this could not meet the definition of hostile environment sexual harassment, given that it was "objectively offensive,

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sex-based, written behavior that is so pervasive that you would be hard pressed to find a member of the community who didn't know about it."

In your initial meeting with Professor Weber, he told you that he was stunned by the community response to his memo, insisting that not only was the memo never intended for anyone outside of his department, but that he was simply offering a differing viewpoint on a topic and never intended to offend anyone. He added that it was exactly this type of thin-skinned, overreaction that he was referring to in his memo and that undermines the free exchange of ideas.
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Case Study Questions & Answers

Cameron

In order to make informed decisions about potential supportive measures or policy violations, it is important to get more specific information from Cameron regarding the allegations of "sabotage" against David. It is unlikely that David's actions violate the institution's Title IX policy; however, there may be policy violations for other employee conduct policies. Supportive measures should aim to ensure that both Cameron and David can complete their job responsibilities without interference from the other.

Scenario A

Assume that David and Ed are buddies. They go out socially, their families are friends and they have known each other for a long time. Cameron knows Ed socially too, but not as long as David has. Since the split, Ed has been less than receptive to Cameron's social invites, but is still close with David – they go to lunch together, etc.

- Is this retaliatory?
- Is this a violation of any other policy?
- What behaviors – by Ed – could make it possibly retaliatory or possibly in violation of policy?

In order for behavior to be retaliatory, (1) the individual alleging retaliation must be engaged in a protected activity, (2) the individual alleging retaliation must be subject to adverse employment action, and (3) the circumstances must suggest a connection between the protected activity and the adverse action. Reporting an alleged policy violation is considered a protected activity. This scenario does not demonstrate an adverse employment action against Cameron, thus Ed's behavior is not retaliatory. However, this situation highlights the complexity of maintaining social relationships with professional colleagues, especially those who are either supervisors or supervisees. If Ed's behavior impacted Cameron's employment, the behavior may be considered retaliatory.

Scenario B

Now assume that Ed and David are friends, but so are Ed and Cameron. When Cameron and David broke up, they both came to Ed (socially, not at work), to tell him. He tried to get them back together because he "thinks they are meant for each other." It didn't work. Cameron then came to Ed and told him that she was worried that David was going to try to sabotage her career. Ed knew that David was telling him unkind things about Cameron, but he was ignoring it, because he "doesn't think it is a big deal anyway."

- What are the next steps?
- What supportive measures (if any) might be provided?
- Is this a policy violation?

In order to make informed decisions about potential supportive measures or policy violations, it is important to get more specific information from Cameron regarding the allegations of "sabotage" against David as well as what the "unkind things" David has said to Ed are. It is unlikely that David's actions violate the institution's Title IX policy; however, there may be policy violations for other employee conduct policies. Supportive measures should aim to ensure that both Cameron and David

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can complete their job responsibilities without interference from the other. Ed should also be coached to not engage in conversations about personal matters between employees beyond providing employment-related supports to limit the impact of the issue on the workplace.

Scenario C

Now assume that Ed and David are friends, but so are Ed and Cameron. When Cameron and Dave broke up, they both came to Ed to tell him. He was relieved because he knew that the relationship was unhealthy. In fact, he suspected that Cameron was physically abusive to David, but David was too ashamed to tell anyone. Cameron then came to Ed and told him that she was worried that David was going to try to sabotage her career. She said she was worried because David was getting some opportunities that she was not. Ed shares with you that he was giving David these professional opportunities, but it was to allow him (David) the chance to get out of there and away from Cameron.

- ! Is this a policy violation?
- ! If so, which one and what are the next steps?

Ed's behavior may be considered retaliatory. In order for behavior to be retaliatory, (1) the individual alleging retaliation must be engaged in a protected activity, (2) the individual alleging retaliation must be subject to adverse employment action, and (3) the circumstances must suggest a connection between the protected activity and the adverse action. Reporting an alleged policy violation is considered a protected activity. More information is needed regarding the specifics of the opportunities that David has been given and Cameron was not. If not being given similar opportunities substantiates adverse employment action against Cameron, and it can be demonstrated that such action is related to Cameron's complaint--not just the termination of Cameron and David's relationship--a retaliation violation may exist.

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Professor Weber

Discussion!

- First, let's visualize how this would play out on our own campuses. What are the politics you would likely have to manage in responding to this situation?
- How would you manage this situation? Would you investigate this, and what would that investigation look like?
- Assess the facts here against your institution's sexual harassment policy: unwelcome conduct on the basis of sex that is determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the Recipient's education program or activity. Is this a violation? Why or why not?

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Supplemental Materials

U.S. Equal Employment Opportunity Commission (EEOC) Enforcement Guidance on Retaliation and Related Issues

Please view the EEOC Enforcement Guidance on Retaliation and Related Issues here:
https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues

A Brief User Guide to the Title IX Process

Introduction

If you've tried to read the college's new procedures for addressing sexual offenses, we can't blame you if it's been a challenge to understand some of their complexity. This brief guide is intended to help explain the changes and make the new resolution process more transparent to you.

A Brief History

In 2011, the Obama-era Department of Education (ED) perceived that colleges needed to be more victim-centered in addressing sexual violence and should have more transparent and accessible policies and procedures for addressing complaints. At the instigation of then Vice-President Joe Biden, ED issued a set of guidelines for colleges under Title IX in what is known as the Dear Colleague Letter. That letter resulted in investigation-centered approaches that were trauma-informed, confidential, and relatively informal. Almost immediately, accused students and employees began to sue colleges for violations of their due process rights. By 2017, ED under the Trump administration had taken a different perspective and withdrew the 2011 Dear Colleague Letter while also announcing that new Title IX regulations were needed to better safeguard the due process rights of accused individuals. The regulatory process took two years, with new regulations published in May 2020 that took effect on August 14, 2020.

New Policies and Procedures

The 2020 Title IX regulations required all colleges to revise or rewrite their policies and procedures for addressing sex offenses, including sexual harassment, sexual assault, domestic violence, dating violence, and stalking. The college has worked diligently to ensure that its newly revised policies and procedures are now compliant with these regulations. This was not an easy process. The regulations include fifteen pages of new requirements, and more than 2,000 pages of explanation of the provisions within those fifteen pages. They are complex and legalistic. Just trying to explain parts of this new process to you here requires a document that is seven pages long. The bottom line is that the college's policies are not all that different than before – the same types of offenses are still against college policy – but the procedures for resolution of complaints are substantially changed.

To summarize:

- Title IX protects students and employees who are impacted by sexual harassment, sexual assault, domestic violence, dating violence, and stalking. When these behaviors occur, and a formal complaint is made, the college is obligated to address and remedy them and ensure that no one is denied effective access to the educational program of the college.
- Colleges have jurisdiction requirements that they must follow to determine whether a complaint falls within Title IX or is to be addressed within other college policies and procedures.
- Complainants are well-protected by the regulations in terms of supportive measures that are offered by colleges to try to address the impact of sex offenses.
- Complainants and respondents are each entitled to an advisor of their choosing (who can be an attorney) throughout the resolution process, and the college can provide this advisor to each party, if needed.

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- ! The regulations have now created options for informal resolution that were discouraged by the Dear Colleague Letter.
- ! To protect the due process rights of respondents, colleges are required to use a formal grievance process for certain types of allegations. That formal process includes an investigation, a live hearing, questioning of the parties through their advisors, a determination by an objective decision-maker, and an appeal.

As a result of these changes, the college has worked hard to balance the rights of all parties, and to create a process that is fair, transparent, and compliant. However, it isn't an ideal process and isn't particularly user-friendly, and we acknowledge this. This may not be the policy or process the college would have created if we had the flexibility to define misconduct and the process to respond, but the government has intervened, and the college must comply. To offset the more complex aspects of the process, the college is training a pool of advisors to help parties through every step of the process. They can guide and advise all parties on how to best protect your rights to educational access. We've also created guides like this, and the flowchart below, to help make the process more accessible and understandable.

One last key point to understand is that Title IX isn't the only governing law here. The college must also comply with [state laws that address sex offenses, as well as] a federal law called the Violence Against Women Act (VAWA), Section 304, which also protects college community members when they experience sex offenses.

Navigating the new Rules Together

When the college receives a complaint, there are four possibilities that you should be aware of because they govern how the college will proceed:

1. ! The complaint falls within Title IX AND is covered by the 2020 Title IX regulations
2. ! The complaint falls within Title IX but is not covered by the 2020 Title IX regulations
3. ! The complaint falls within VAWA Section 304[1]
4. ! The complaint does not fall within Title IX or VAWA Section 304

Depending on which of these four possibilities the complaint falls within, the college must apply different policies and/or procedures, accordingly. As shorthand, we call the procedures that comply with the 2020 Title IX regulations (36 CFR Part 106.45) "Process A" and the alternate process to resolve complaints outside of Process A we term "Process B." Like Process A, Process B is a civil rights-based process that is compliant with Title IX and VAWA Section 304 but is less formal because it is outside the jurisdiction requirements of the regulations.

Processes A and B cannot both be simultaneously applied by the college. The regulations mandate that if both can apply, Process A must be applied, not B. Thus, if A applies, B cannot. Further the regulations specify that Process B cannot be used a make an end-run to avoid Process A if Process A

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[1] This could be an overlay with 1 or 2, above, or a stand-alone status.

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applies, regardless of what process each party might prefer. For a college to choose Process B when Process A applies would be considered a form of retaliation against the respondent.
Let's take each in turn to better explain this.

1. **The complaint falls within Title IX AND is covered by the 2020 Title IX regulations**

The complaint will fall in this category when it alleges sexual harassment, sexual assault, domestic violence, dating violence, and/or stalking (as defined by college policy, if proven) AND the conduct:

- Happened in the United States;
- Occurred where the college controls the context of the incident (a college program or property, typically);
- The school has jurisdiction over the respondent as a student or employee; and
- Happened to a complainant who at the time of the complaint was participating in or attempting to participate in the college's educational program.

These jurisdictional requirements are spelled out by the 2020 Title IX regulations and are rigid. If any of these requirements fails to be met, the college is required to "technically" dismiss the complaint. More in a bit on what happens if there is a technical dismissal, because that is not the end of the process. If these requirements are met, the resolution process will be the Formal Grievance Process described in Process A.

2. **The complaint falls within Title IX but is not covered by the 2020 Title IX regulations**

The complaint will fall in this category if it does not involve sexual harassment, sexual assault, domestic violence, dating violence, and/or stalking, but the allegations pertain to sex discrimination more broadly, such as:

- disparate treatment, e.g., discrimination against a pregnant student; denial of access to a program; inequitable funding on the basis of sex);
- forms of sexual orientation discrimination;
- forms of gender identity/expression discrimination [based on sex stereotypes].

When a complaint is filed under Title IX, the regulations require these types of allegations to be technically dismissed. The college will then address them under Process B. If there is no formal complaint made, they can be addressed using Process B without needing to go through a dismissal first with respect to Process A.

3. **The complaint falls within VAWA Section 304 (this could be an overlay with 1 or 2, above, or a stand-alone status)**

The complaint will fall in this category if it is not within the Title IX jurisdiction above (see four bullet points), but still involves sexual violence, dating violence, domestic violence, or stalking. In this case, the college must address the conduct under procedures that comply with VAWA Section 304, and the complaint can be then addressed under Process B. If there is no formal complaint made, the allegations can be addressed using Process B without needing to go through a dismissal first with respect to Process A.

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4. The complaint does not fall within Title IX or VAWA Section 304

Finally, where the complaint falls within neither Title IX nor VAWA Section 304, the college is not required by law to act on the complaint. However, the college will act with discretionary jurisdiction, meaning that it still thinks it is important to address the allegations even if law does not require it. The complaint can be then addressed under Process B. If there is no formal complaint made, the allegation can be addressed using Process B without needing to go through a technical dismissal first with respect to Process A.

Hopefully, what you now understand from this section is that the incidents that fall within Process A occur within a narrow range. They must fit the description of sexual harassment, sexual assault, domestic violence, dating violence, or stalking (as defined by college policy, if proven) in the United States, where the college controls the context of the incident and has control over the respondent and the complainant is participating in or attempting to participate in the college's educational program. Outside of that, all sex offenses or sex discrimination complaints will fall within Process B, including those, for example, that happen between two students, off-campus, on private property.
The last part of jurisdiction to understand is dismissal. As noted above, the college is mandated to and must dismiss a formal complaint or any allegations therein if, at any time during the Process A investigation or hearing, it is determined that:

- The conduct alleged in the formal complaint would not constitute sexual harassment, sexual assault, dating violence, domestic violence or stalking as defined in policy, even if proved; and/or
- The conduct did not occur in an educational program or activity controlled by the school (including buildings or property controlled by recognized student organizations), and/or the school does not have control of the respondent; and/or
- The conduct did not occur against a person in the United States; and/or
- At the time of filing a formal complaint, a complainant was not participating in or attempting to participate in the education program or activity of the recipient.[2]

Then there are three permissive dismissal provisions. The college may dismiss a formal complaint or any allegations therein if, at any time during the investigation or hearing:

- A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; or
- The respondent is no longer enrolled in or employed by the recipient; or
- Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

Upon any dismissal, the college will send written notice of the dismissal and the rationale for doing so simultaneously to the parties. This dismissal decision is appealable by any party under the college's procedures for appeal. The effect of a dismissal (permissive or mandated) is either that the complaint is done, or that the school reinstates it, usually within Process B. Even if a complaint is done, supportive measures are still made available to the parties. Understanding these mechanisms

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[2] Unless this complaint is one initiated by the Title IX Coordinator themselves because of some serious risk to the campus community.

can be helpful, but we know they're complex, so don't hesitate to call on the Title IX Coordinator for further explanation.

College-provided advisors may be called on to help determine if a someone wants a complaint to be reinstated, or even under what process it should be filed in the first place. Where dismissed, advisors will be able to advise the parties on whether they want to appeal (for example, a complainant may be pleased by a Process A dismissal if they would prefer Process B, whereas the respondent may feel the opposite) and what the effect of dismissal/reinstatement may be.

Live Hearings

We'll conclude with a short section about live hearings under Process A. The live hearing component has received a lot of attention, so we wanted to take a moment to clarify some important details and hope they will help anyone making a decision about whether to file a formal Title IX complaint. The college has designed the process to be as humane and non-adversarial as possible, while assuring fairness to all participants.

- There are informal resolution options offered by the college. The college cannot and will not force or coerce any student or employee into an informal resolution. Although it is true that a formal complaint must first be filed, that does not mean a live hearing must occur. A formal complaint can also lead to an informal resolution process and should an informal resolution fail, a formal grievance process is always still available.
- Live hearings do not have to happen with all parties in the same room. Any or all parties can opt for virtual participation at any time. Even with a virtual hearing, all participants will be able to see and hear each other throughout the hearing.
- Although there is "cross-examination" during the hearing, it may not work the way you think. The parties cannot question each other directly, at all. The advisors to the parties ask the questions, and before they do, the Chair of the hearing rules on each question first. So, there is really only indirect questioning, not "cross-examination" like you might find in a courtroom.
- Even though advisors get to ask questions of parties and witnesses, you may find that most of the questions are posed by the neutral decision-makers. Once those questions are posed, they cannot be asked again by the advisors, so in most cases, the questions come to the parties from the decision-makers, not from the other party's advisor.
- A written decision is issued, based on the preponderance of the evidence standard (whether a policy violation is more likely than not), and offers a clear rationale for the decision.
- The decision is appealable by all parties.
- The hearing process is kept confidential by the college.

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The college has designed the process to be as humane and non-adversarial as possible, while meeting our obligations under this new law and assuring fairness to all participants. For questions or confidential discussion about any options and college processes, please contact your Title IX Office.

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Disciplining Employee Speech Grid

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The First Amendment and Employer Regulation of Employee Speech
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WHO IS SPEAKING?	ABOUT WHAT?	CAN EMPLOYER IMPOSE DISCIPLINE?
1.! Employee of Private Employer	Anything	Yes, First Amendment does not apply, unless concerted action speech of union(izing) employees, which has greater protections
2.! Employee of Public Employer	Speaking pursuant to official duties as an employee (part of the normal performance of the duties within their job description)	Yes, employers may impose some control over the speech of employees in official capacities, but academic freedom may provide a limit on employer disciplinary actions in educational settings
3.! Employee of Public Employer speaking as a private citizen	Touching on a matter of public concern (art, education, politics, corruption, crime, morals, etc.)	No, because the public employer would not typically have an adequate justification for treating the employee differently from any other member of the general public. If they did, courts might open the door to some discipline as a limited exception.
4.! Employee of Public Employer speaking as a private citizen	Touching on a matter that is not of public concern	Yes. The employer may impose discipline on this employee, whose speech is likely outside the protections of the First Amendment, unless an argument for academic freedom can be legitimately applied.

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2013 Office for Civil Rights Dear Colleague Letter on Retaliation

OFFICE FOR CIVIL RIGHTS
THE ASSISTANT SECRETARY

April 24, 2013

Dear Colleague:

The Office for Civil Rights (OCR) in the United States Department of Education (Department) is responsible for enforcing Federal civil rights laws that prohibit discrimination based on race, color, national origin, sex, disability, or age by recipients of Federal financial assistance (recipient(s)) from the Department.1 Although a significant portion of the complaints filed with OCR in recent years have included retaliation claims, OCR has never before issued public guidance on this important subject. The purpose of this letter is to remind school districts, postsecondary institutions, and other recipients that retaliation is also a violation of Federal law.2 This letter seeks to clarify the basic principles of retaliation law and to describe OCR's methods of enforcement.

The ability of individuals to oppose discriminatory practices, and to participate in OCR investigations and other proceedings, is critical to ensuring equal educational opportunity in accordance with Federal civil rights laws. Discriminatory practices are often only raised and remedied when students, parents, teachers, coaches, and others can report such practices to school administrators without the fear of retaliation. Individuals should be commended when they raise concerns about compliance with the Federal civil rights laws, not punished for doing so.

The Federal civil rights laws make it unlawful to retaliate against an individual for the purpose of interfering with any right or privilege secured by these laws.3 If, for example, an individual brings concerns about possible civil rights problems to a school's attention, it is unlawful for the school to retaliate against that individual for doing so. It is also unlawful to retaliate against an individual because he or she made a complaint, testified, or participated in any manner in an OCR investigation or proceeding. Thus, once a student, parent, teacher, coach, or other individual complains formally or informally to a school about a potential civil rights violation or participates in an OCR investigation or proceeding, the recipient is prohibited from retaliating (including intimidating, threatening, coercing, or in any way discriminating against the individual) because of the individual's complaint or participation. OCR will continue to vigorously enforce this prohibition against retaliation.

If OCR finds that a recipient retaliated in violation of the civil rights laws, OCR will seek the recipient's voluntary commitments through a resolution agreement to take specific measures to remedy the identified noncompliance.4 Such a resolution agreement must be designed both to ensure that the

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individual who was retaliated against receives redress and to ensure that the recipient complies with the prohibition against retaliation in the future. OCR will determine which remedies, including monetary relief, are appropriate based on the facts presented in each specific case.

Steps OCR could require a recipient to take to ensure compliance in the future include, but are not limited to:

- training for employees about the prohibition against retaliation and ways to avoid engaging in retaliation;
- adopting a communications strategy for ensuring that information concerning retaliation is continually being conveyed to employees, which may include incorporating the prohibition against retaliation into relevant policies and procedures; and
- implementing a public outreach strategy to reassure the public that the recipient is committed to complying with the prohibition against retaliation.

If OCR finds that a recipient engaged in retaliation and the recipient refuses to voluntarily resolve the identified area(s) of noncompliance or fails to live up to its commitments in a resolution agreement, OCR will take appropriate enforcement action. The enforcement actions available to OCR include initiating administrative proceedings to suspend, terminate, or refuse to grant or continue financial assistance made available through the Department to the recipient; or referring the case to the U.S. Department of Justice for judicial proceedings.5
OCR is available to provide technical assistance to entities that request assistance in complying with the prohibition against retaliation or any other aspect of the civil rights laws OCR enforces.

Thank you for your help in ensuring that America's educational institutions are free from retaliation so that concerns about equal educational opportunity can be openly raised and addressed.

Sincerely,

/s/
Seth M. Galanter
Acting Assistant Secretary for Civil Rights

2020 Position Statement: Compliance with the 2020 Title IX Regulations Will Require a Formalized and Expanded Title IX Team

In the past decade, full-time Title IX Coordinators and Title IX offices have become more common for schools, colleges, and universities. Having pools of Title IX-trained personnel has even grown in popularity, both within and across organizations. With the 2020 Title IX regulations, the formation and operation of Title IX teams has become a necessity for recipients to achieve compliance.

Although ATIXA usually directs its position statements to Title IX personnel, this statement is directed to senior-level campus, school, and district leaders. It is vital for you to understand the complexity and challenges ahead under Title IX.

As a foundation, recall that compliance with Title IX of the Education Amendments of 1972 is mandatory for all recipients of federal financial assistance, and that a failure to comply can result in investigation and accountability from Offices for Civil Rights within government agencies and costly lawsuits, in addition to negative publicity and reputational damage.

What Do Senior-Level Leaders and Stakeholders Need to Know?

First, we encourage our Title IX administrator members to share this Position Statement with key school, campus, and district stakeholders and leaders. To these leaders, Title IX is now likely one of the most complex regulatory compliance obligations your institution or district is facing.

The U.S. Department of Education (ED) needed 2,068 pages to explain 15 pages of new federal regulations. ATIXA's Regs Comprehensive Implementation Guide needed 130 pages more to explain those 15 pages and translate them into operational precepts for the field.

ED, through these new regulatory requirements, promotes a new and/or expanded bureaucracy of Title IX personnel, operating under a complex set of rules for dramatically expanded due process protections, transparent sharing of all evidence collected during an investigation, formal live hearings, advisors[3], sophisticated rules of questioning and evidence, and mandated appeals.

ED is turning your educational hearings into mini-courtrooms and expanding employee rights that may not have previously existed, with live hearings, cross-examination, and appeal requirements.

[3] Many of whom will be and will need to be attorneys, but also others including friends and family members who are chosen by the parties, are untrained, and perhaps unqualified.

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If you will be presiding over these "courtrooms" in any way, perhaps as a hearing decision-maker or chair, the new regulations also create extensive training requirements for those roles. Those serving as appeals officers face similar, extensive training requirements.

It is also worthy of note that these regulations, for all their page-girth, are actually fairly narrow in the overall scope of Title IX's protections. They address only the "Big Five" offenses of sexual harassment, sexual assault, dating violence, domestic violence, and stalking. Many of the other obligations of the Title IX office, including climate, program equity, athletics, pregnancy and parenting, LGBTQIA+ protections, etc. are not covered by these regulations, but still fall within the existing original 1975 Title IX regulations, and must be addressed by your Title IX office.

This Is Not a Time to Cut Title IX Budgets

Compliance with these new rules will cost every school and college far more than what ED has estimated in its published regulatory cost estimate. When your Title IX Coordinator comes to you with budget requests, they are not simply leveraging the new regulations to fight for their fair share of the budget pie, they are telling you that you will need to allocate a larger slice of that pie to Title IX, or your compliance program will fail.

Please, take them seriously.

We know resources are scarce, especially offset against the financial burdens caused by the COVID-19 pandemic, but budgets will need to be reconfigured to accommodate new and expanded requirements. Ideally, budgets will expand in terms of resources for required and effective training, but we also can expect substantial needed new resources in the form of:

- Key staffing roles
- Support staff
- Training the Title IX Team
- Technology (databases/records management, secure document transfer, virtual hearing equipment, recording equipment)
- Stipends for new Title IX Team members
- Fees for external assistance in the form of attorneys/consultants
- Policy development and consulting expertise, and
- Expanded access to legal review and counsel

Please Appreciate the Compliance Challenge Ahead and Meet it with Appropriate Resources

It is no exaggeration to say that your Title IX Coordinator is facing the heaviest lift of their professional career. Getting your institution or district to full compliance by August 14, 2020, is a herculean task, compounded by having only remote access to key stakeholders for the significant policy and procedural changes that must be made this summer.

There are barriers to getting policy approved and implemented on such a short timeline, especially if there are multiple layers of approval required, and many cabinets and boards of trustees have limited meetings for the summer and in light of the pandemic.

Then, the hard work of operating within the new ED Title IX regime really begins. As just one example, consider how will you address your first case of alleged transmission of COVID-19 that occurs during a sexual assault? Or, who will serve to chair your hearings with the skill to manage the new complex questioning rules and evidentiary restrictions that must be ruled on in real time, on the spot?

Might the Regulations Just Go Away Soon?

Some of you may have been told to wait it out, in the hopes that these regulations will be shot down by the courts, or rescinded next year by a Biden administration. We do not think this is sound advice. One thousand Title IX administrators attended ATIXA's certification courses this June to learn how to implement the new regulations. They do not think that we are going to get relief from the regulations any time soon, and we agree with them.

Even if the regulations are enjoined by a federal judge, a partial injunction, which would affect only some parts of implementation, is much more likely than a full injunction. And, in conversations with a number of potential future Biden political appointees to ED, they think it will easily be a year or more after Biden might take office before any significant action is taken with respect to replacing the regulations.[4]

Until then, the courts are making significant new due process rulings with enough frequency to acknowledge that the regulations are not the only source of pressure to adopt new and more formal models of resolution.

Survivors' Rights Matter

At the same time, you may face demands from student activists and protestors in the fall, who see these regulations as socially unjust. While the due process protections that are incorporated into the regulations are important, they swing the pendulum too far, and will likely compromise rights that Title IX was meant to protect.

Compliance is not just a task now, it has the potential to deepen oppositional stances between those who identify with the rights of survivors and those who identify with the rights of respondents. The decisions you as leaders make about policy may pit students against employees, including faculty, in a battle over the evidentiary standard of proof you apply to cases that fall under Title IX. Choose your standard of proof carefully.

Narrow your campus roster of mandated reporters at your own peril, as many students may see such a retreat – while permitted by the regulations – as a loss of safe venues for seeking support and resources.

[4] And, should the current administration remain in place, expect full enforcement of the regulations they spent two years putting into effect.

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The Formal and the Informal Both Demand Your Focus

As you move to revise and refine your formal grievance process(es), you're likely going to face sharply increased demand for informal and alternative resolution options from Complainants and Respondents.

Be open to informal resolution mechanisms, but not at the cost of starving your formal process of the staffing and training it will need to operate proficiently. Do not cut corners on compliance or you will increase your institution's risk of lawsuits. The formal grievance process, including its staffing and training mandates, is the industry standard by which you will now be measured. Students and employees can easily sue if you do not accord them the full panoply of rights required by these new regulations. Your most contentious and complicated complaints are unlikely to result in a completed informal resolution, and your formal resolution process must be ready to go at the outset or in the event of a failed alternative resolution.

With respect to reinvigorating, starting, or expanding informal resolution programs, expect a need to invest in staffing and/or further training.

The way we see it, the new regulations likely require recipients to develop a new resolution apparatus for formal grievances, an informal resolution process, and a stand-alone semi-formal resolution process for those complaints that are dismissed under, or fall outside of, Title IX. All by August 14.

The Title IX Team

So, what does the Title IX Team look like? With doubling up of some roles, we think 10-15 people will be a common team size for smaller schools and districts, if they have smaller caseloads. On the high-end, teams of 35-40 will be in range, though again, de-centralized K-12 districts may add at least one team member per building.

Our estimates are based on the number of roles delineated by the regulations, and the ways that the regulations do or do not permit overlap between those roles. You do not have to hire to fill these roles, necessarily, as they may be filled by existing personnel, but any assumption that you are not adding substantially to any existing employee's portfolio is unrealistic.

The regulations without doubt will have a significant institutional cost in terms of your staff productivity and potential burnout. Title IX work carries an emotional load, as well. Many institutions and organizations will find that they need full-time Coordinators and some will need full-time investigators.

Here is what a breakdown looks like to us. You are going to need:

- ! A (full-time) Title Coordinator or maybe more than one. = 1-2 people

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- ! A staff[5] of deputy coordinators[6] = 3-6 people
- ! A hearing chair and at least one spare[7] = 1-2 people
- ! Hearing panelists (2+the chair) – these are optional, but recommended[8] = 2-4 people
- ! Advisors[9] (you will now be appointing or hiring advisors for the parties) = 4-12 people
- ! A Hearing Facilitator (could be a coordinator or deputy) = 1-2 people
- ! Appeal Officers (1 for dismissals[10], 1 for appeals of hearings, 1 spare) = 3-6[11] people

You also will want to assess the need for Title IX support staff, administrators to manage emergency removal decisions (could be a coordinator or deputy), dismissal decisions (could be a coordinator or deputy), threat/risk assessments (existing BIT or TAT?[12]), and administrators to run alternate processes outside of Title IX. Hopefully, you have these positions filled already.

You might also need a pair of investigators, or more. The regulations permit Coordinators to investigate, but then they should serve as hearing facilitators and should not be involved in dismissal or emergency removal decisions.

You will probably need 1-10 investigators, depending on your caseload, but we have not added them to the official tally above on the assumption that you may be able to double some up with your Coordinator and/or deputies, or use external investigation firms.

Within K-12 environments, Title IX staffing is all over the map, and it really is too early to know how staffing models will eventually evolve. Right now, schools are trying to figure out minimum coverage, but they will likely vastly underestimate the time allocations needed, based on the similar ED activism on Title IX we saw directed toward higher education with the 2011 Dear Colleague Letter.

We are seeing some logical movement toward the building-based deputy model, so school districts with 100 school buildings may appoint a Title IX Team with more than 100 representatives, but they may quickly figure out there are few vice principals with the bandwidth to take on substantial compliance or investigation roles under Title IX, given their other responsibilities.

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[5] It is important to keep in mind that there is a whole realm of Title IX compliance outside of these regulations (which cover only sexual harassment, sexual assault, domestic violence, dating violence, and stalking). You will need deputies or other equity/equal opportunity staff to address these additional, and equally important, Title IX requirements, such as climate surveys, pregnant and parenting students, athletics equity, program equity, single-sex program access, LGBTQIA+ protections, advocacy, training/education, prevention, etc.

[6] Representing student services, HR, athletics, prevention, academic affairs, etc.

[7] In case of illness, conflicts, multiple cases, etc.

[8] And, you'll need alternates if any panelists are disqualified or unavailable.

[9] How many you need, and at what cost, will depend on case volume and number of parties.

[10] Dismissals are both permitted and required under the new regulations under certain circumstances.

[11] Unless you offer an appeal panel, in which case, add three more.

[12] The regulations require a violence risk assessment, which often should be performed by a Behavioral Intervention Team or Threat Assessment Team, if the campus, school, or district has such a capacity available. !

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What Will Happen if You Don't Prioritize Title IX Compliance, Staffing, and Training?

Each of the roles described above, except for advisors, has an attached training requirement per the regulations. The roles are all complex, sophisticated, and multifaceted. As noted above, many of the skills may exist in-house already for some institutions and organizations, but many others will need to build and expand capacity. And although there is no training mandate for advisors in the regulations, most institutions will likely want to provide institution-appointed advisors with information or training about the process and their role in it, at the very least.

What are the risks? Losing the confidence of your community. Reputation. Investigation and accountability from Offices for Civil Rights within government agencies. Lawsuits that allege breach of contract, negligence, Title IX claims, Section 1983 actions, and more.

We are concerned that the scope of changes in the new regulations present a real risk of systemic failure for institutions also facing severe economic pressures if leaders underestimate what is being added to the compliance requirements, and what levels of your support will be essential to meet them.

We hope you will also bring creativity to your staffing needs. We are seeing schools located within systems developing cooperative agreements for shared resources. We are seeing the same with state-based coalitions, or schools located within similar geographic areas. Local advisor pools may also make a lot of sense. We are also seeing more and more schools engage external investigators, and now, hearing chairs and decision-makers. That may represent a cost savings only when compared to hiring full-time personnel to fulfill the same roles. Fortunately, the regulations create a uniformity of policy and procedure that has never existed between recipients previously. That means that one school can loan an investigator to another, or share coordinators, in a way that will be more likely to translate from school to school. Maybe you won't have the caseload to support a full-time chair who is an attorney, but sharing that position between 3-4 campuses might make sense. Training may vary, but the policies and procedures will be more alike than different, which will greatly facilitate shared employees, or a pooled approach to coverage across institutions, where Title IX Team members can be loaned to cooperating schools as needed. There will be some need to address insurance and clear role definition for borrowed personnel, but smaller and more resource-strapped schools will find these approaches essential.

For campus, school, and district leaders, we hope this Position Statement is valuable to you in accurately planning for and implementing meaningful actions to enhance your Title IX infrastructure to meet these new demands while doing right by your community. ATIXA will be here, helping you. Best of luck!

Addressing Inappropriate Employee Behaviors

20-Minutes-to…*Trained*

1

YOUR FACULTY

W. Scott Lewis, J.D., Managing Partner, TNG & Advisory Board Member, ATIXA

Joseph Vincent, M.L.S., Senior Associate, TNG & Advisory Board Member, ATIXA

2

POTENTIAL CHALLENGES

- Evolving ideas of appropriate/acceptable interaction
- Notions re: sex/gender (stereotypes/conformity)
- Power imbalances
- Consensual relationships
- Unwanted vs. unwelcome conduct
- Social media/attention on misconduct in institutional setting

3

#METOO TAKEAWAYS

- Employees are increasingly empowered
- Address liabilities promptly and effectively
- Insulating bad actors:
  - Costly
  - Requires heightened energy/attention
  - Long-term reputational harm

4

TRAIN THE POLICY(S)

- Make sure parameters of prohibited conduct are clear
- Nondiscrimination, Title VII, Title IX
- Other policies potentially implicated
  - Code of Ethics/Conduct, Behavioral Standards, Employee Handbook

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POWER IMBALANCES

- Concern re: potential implications
- Communicating "unwelcome" – concern re: retaliation
- "That's just the way they are"
  - Dismissal, by employee and/or institution, due to
    - Tenure
    - Age
    - Status
    - Past practice

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COMMON PROBLEMATIC AREAS

- Blurring personal and professional lives
- Social settings (especially involving alcohol)
- Crossing physical boundaries
- Explicit humor
- Discussing sexual experiences
- Social media
- "Consensual" relationships

 7

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EMPOWERING ACTION

- Encourage reporting & demonstrate responsiveness
  - Promptness & willingness to resolve
  - If belief that reporting is ineffective → won't report
- Take retaliation seriously
  - Steps to prevent
  - Investigate reports promptly & thoroughly
  - Commitment to discipline if appropriate
- Establish behavioral expectations throughout community
  - Bystander engagement
  - Institutional buy-in starting at top
- Regular assessments of the environment

 8

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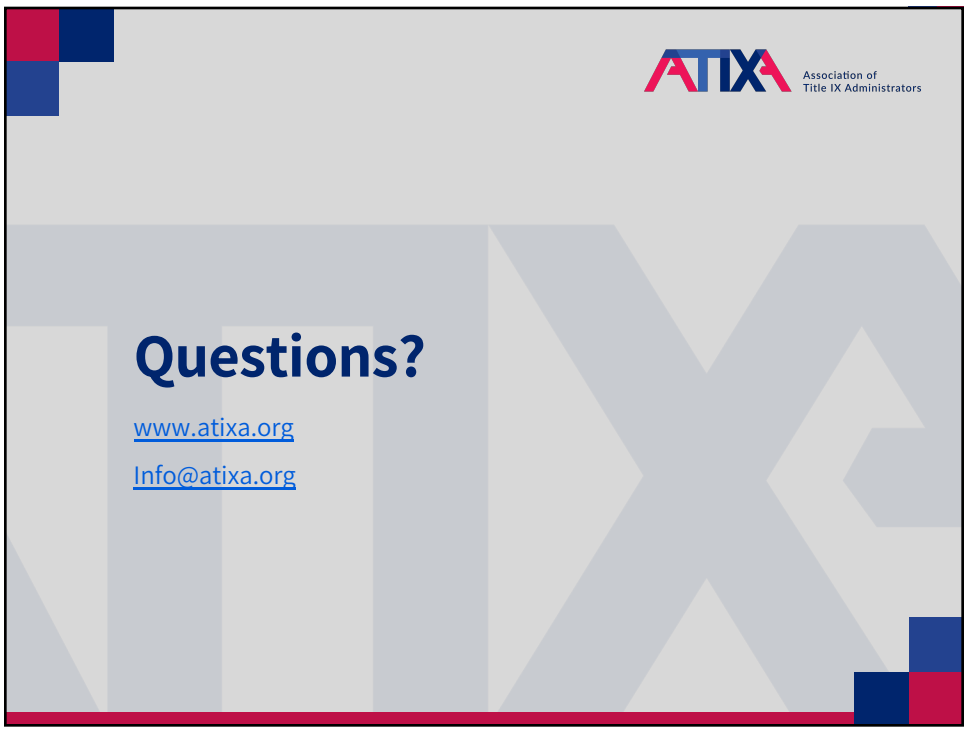
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Title IX Administrators
Questions?
www.atixa.org
Info@atixa.org

9


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10