



Title IX Investigator Training

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Agenda

Introductions (name, title, investigation experience?), then...

▶ **Title IX Overview**

- ▶ Definition
- ▶ Who it covers and how
- ▶ Team players
- ▶ Definitions

Agenda continued

▶ **The Process**

- ▶ Steps of the TIX process *What happens before the investigator gets the case*
- ▶ Legal process vs. Administrative process
- ▶ Intersection between Title VII and Title IX *Plays a role in possible charges, sanctions, and investigator structure*

Agenda continued

▶ The Investigation

- ▶ Steps of the investigation *Who investigates; Should there be a team*
- ▶ Formulating a plan
- ▶ Formulating questions
- ▶ Questioning parties
- ▶ Gathering evidence *Standard of proof; Burden of proof*
- ▶ Drafting the report
- ▶ Getting feedback
- ▶ Sending the report to parties *Initial review and final report*

Agenda continued

▶ **Wrapping the process**

- ▶ The hearing
- ▶ The appeal
- ▶ Record keeping

Title IX

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance.”

20 U.S.C. § 1681 & 34 C.F.R. Part 106 (1972)

Who's Covered?

Title IX covers students, employees, third parties – including visitors and contractors

Caveat – If the third parties are Complainants and the Respondents are members of the institution's community (and all other factors are met), we have substantial control and an obligation to respond.

If the third parties are Respondents and the Complainants are members of the institution's community, we have to consider several factors.

- _Are they a contractor and part of a union?*
- _Have they been made aware of our policies?*
- _Does their employer have specific polices on sexual misconduct?*

If any covered party files a complaint...

Under Title IX, we must:

1. Ensure a Prompt, Effective, and Equitable process. When necessary, we must investigate.
2. Those investigations must be Fair, Thorough, Reliable, and Impartial.
3. Develop remedies by acting reasonably in effort to stop the discrimination, work to prevent any recurrence, and remedy any effects of the discrimination, in an **equitable** manner.

Equality vs. Equity

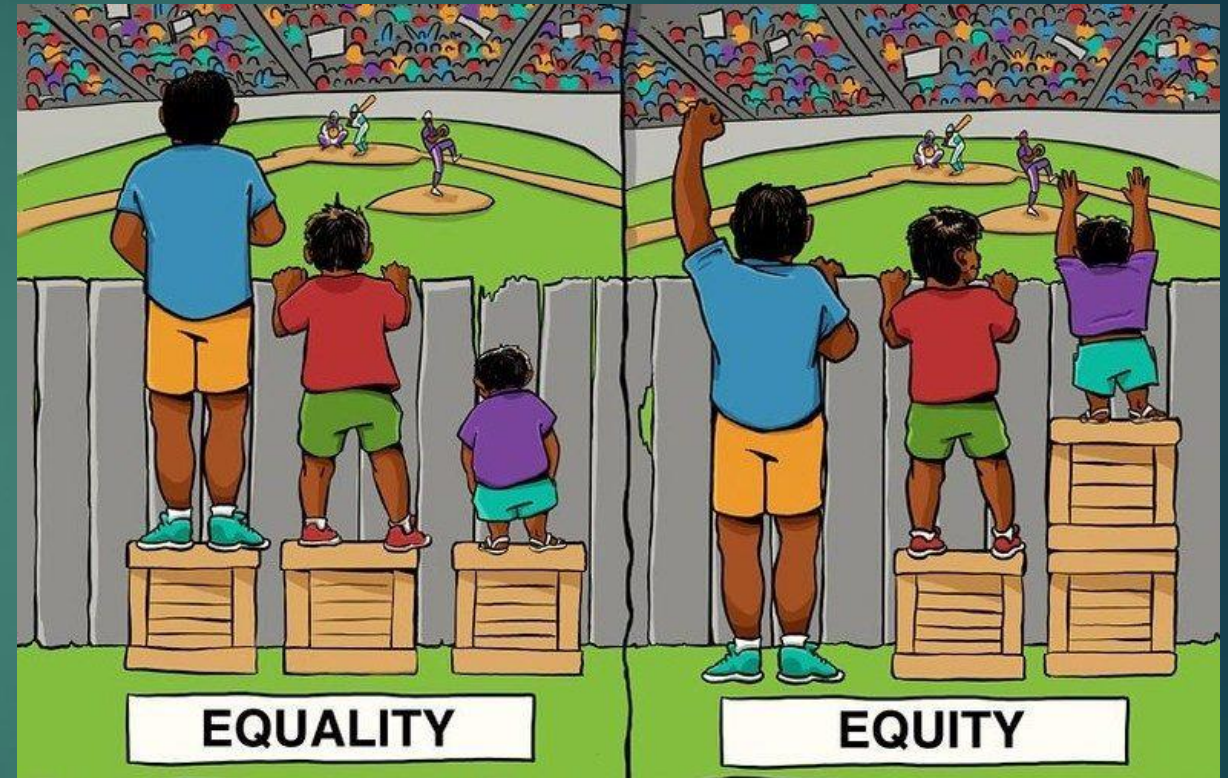
Equality –

Requires a playing field that is not yet level, be leveled

It eliminates any systemic barriers

Equity –

Employs targeted fixes for acknowledged systemic impediments




So, to remedy the effects of discrimination in an equitable manner, we have to know how those affected were impacted ..hence, Investigating

When do we investigate?

- ▶ Receiving a report does not = automatic investigation prior to the 2020 regulations yes; currently, no

A formal complainant has to be signed by the complainant in a case, giving actual notice of alleged harassment. Or, the Title IX Coordinator can sign a formal complaint – but the complainant always remains the complainant.

Why might a TIX Coordinator sign a complaint if the complainant is reluctant?



Having actual notice of alleged harassment obligates the institution to determine if they have the authority to institute corrective measures to remedy or resolve the harassment, and if so, must respond adequately to that harassment, without deliberate indifference (intentional disregard of substantial safety or harm).

Failure to respond (i.e. investigate or offer supportive measures) = TIX violation

As an Investigator -

- ▶ You are a neutral fact finder - hear and document the facts and circumstances of alleged policy violations
- ▶ Communicate findings in a clear and concise manner via an investigative report (we'll review later)
- ▶ You DO NOT determine whether or not the evidence supports a charge of a policy violation....that is determined by decision makers

Decision makers?? One of many in the process

All the team players

- ▶ Title IX Coordinator
- ▶ Deputy Coordinators
- ▶ Investigators
- ▶ Informal resolution facilitators
- ▶ Advisors
- ▶ Hearing officers
- ▶ Decision makers (panel/single and appeals)

Words to Know

USG Policy Definitions

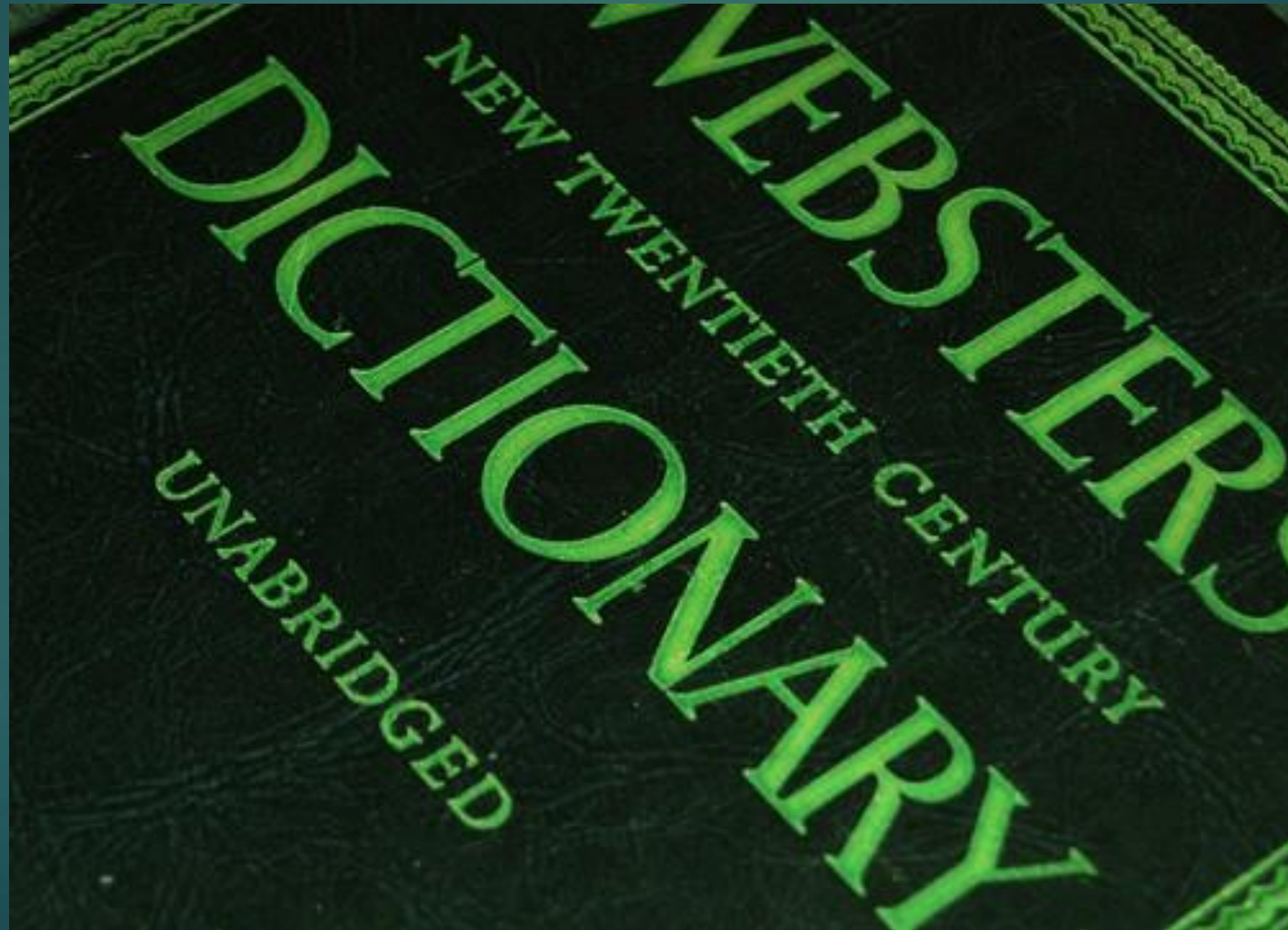
- ▶ Complainant
- ▶ Respondent
- ▶ Privileged employees
- ▶ Responsible employees
- ▶ Reasonable person
- ▶ Reporter
- ▶ Consent (more later)
- ▶ Incapacitation (more later)

continued...

Categories of prohibited conduct...

- ▶ Dating violence
- ▶ Domestic violence
- ▶ Sexual Exploitation
- ▶ Sexual harassment
- ▶ Stalking
- ▶ Nonconsensual sexual contact
- ▶ Nonconsensual sexual penetration

Definitions



Complainant

An individual who is alleged to have experienced conduct that violates policy

Respondent

An individual who is alleged to have engaged in conduct that violates this Policy.

Privileged employees

Individuals employed by the institution to whom a complainant or alleged victim may talk in confidence, as provided by law. Disclosure to these employees will not automatically trigger an investigation against the complainant's or alleged victim's wishes. Privileged Employees include those providing counseling, advocacy, health, mental health, or sexual-assault related services (e.g., sexual assault resource centers, campus health centers, pastoral counselors, and campus mental health centers) or as otherwise provided by applicable law. Exceptions to confidentiality exist where the conduct involves suspected abuse of a minor (in Georgia, under the age of 18) or otherwise provided by law, such as imminent threat of serious harm.

Responsible employees

Those employees who must promptly and fully report complaints of or information regarding sexual misconduct to the Coordinator. Responsible Employees include any administrator, supervisor, faculty member, or other person in a position of authority who is not a Confidential Employee or Privileged Employee. Student employees who serve in a supervisory, advisory, or managerial role are in a position of authority for purposes of this Policy (e.g., teaching assistants, residential assistants, student managers, orientation leaders).

Reasonable person

An individual who is objectively reasonable under similar circumstances and with similar identities to the person being evaluated by the institution.

Reporter

An individual who reports an allegation of conduct that may violate this Policy but who is not a party to the complaint.

Consent

- ▶ Words or actions that show a knowing and voluntary willingness to engage in mutually agreed-upon sexual activity. Consent cannot be gained by force, intimidation or coercion; by ignoring or acting in spite of objections of another; or by taking advantage of the incapacitation of another where the respondent knows or reasonably should have known of such incapacitation. Minors under the age of 16 cannot legally consent under Georgia law.
- ▶ Consent is also absent when the activity in question exceeds the scope of consent previously given. Past consent does not imply present or future consent. Silence or an absence of resistance does not imply consent.
- ▶ Consent can be withdrawn at any time by a party by using clear words or actions.

Incapacitation

The physical and/or mental inability to make informed, rational judgments. It can result from mental disability, sleep or any state of unconsciousness, involuntary physical restraint, status as a minor under the age of 16, or from intentional or unintentional taking of alcohol and/or other drugs. Whether someone is incapacitated is to be judged from the perspective of an objectively reasonable person.

Prohibited conduct definitions



Dating violence

- ▶ Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the alleged victim. The existence of such relationship shall be determined based on the totality of the circumstances including, without limitation to: (1) the length of the relationship; (2) the type of relationship; and (3) the frequency of interaction between the persons involved in the relationship.
- ▶ Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse. Dating violence does not include acts covered under the definition of Domestic Violence.

Domestic violence

Violence committed by a current or former spouse or intimate partner of the alleged victim; by a person with whom the alleged victim shares a child in common; by a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner, or by a person similarly situated to a spouse of the alleged victim.

Sexual exploitation

Taking non-consensual or abusive sexual advantage of another for one's own advantage or benefit, or for the benefit or advantage of anyone other than the one being exploited.

Examples of sexual exploitation may include, but are not limited to, the following:

- ▶ Invasion of sexual privacy;
- ▶ Prostituting another individual;
- ▶ Non-consensual photos, video, or audio of sexual activity;
- ▶ Non-consensual distribution of photo, video, or audio of sexual activity, even if the sexual activity or capturing of the activity was consensual;
- ▶ Intentional observation of nonconsenting individuals who are partially undressed, naked, or engaged in sexual acts;
- ▶ Knowingly transmitting an STD or HIV to another individual through sexual activity;
- ▶ Intentionally and inappropriately exposing one's breasts, buttocks, groin, or genitals in non-consensual circumstances; and/or
- ▶ Sexually-based bullying.

Sexual harassment

▶ **Sexual Harassment (Student on Student):**

Unwelcome verbal, nonverbal, or physical conduct based on sex (including gender stereotypes), determined by a Reasonable Person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to participate in or to benefit from an institutional education program or activity.



Sexual Harassment (Other Than Student on Student):

Unwelcome verbal, nonverbal, or physical conduct, based on sex (including gender stereotypes), that may be any of the following:

1. Implicitly or explicitly a term or condition of employment or status in a course, program, or activity;
2. A basis for employment or educational decisions; or
3. Is sufficiently severe, persistent, or pervasive to interfere with one's work or educational performance creating an intimidating, hostile, or offensive work or learning environment, or interfering with or limiting one's ability to participate in or to benefit from an institutional program or activity.

The USG also prohibits unwelcome conduct determined by a Reasonable Person to be so severe, pervasive and objectively offensive that it effectively denies a person equal access to a USG education program or activity in violation of Title IX.

Stalking

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for their safety or the safety of others or suffer substantial emotional distress.

For the purposes of this definition:

- ▶ Course of conduct means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with person's property.
- ▶ Substantial emotional distress means significant mental suffering or anguish that may but does not necessarily, require medical or other professional treatment or counseling.

Nonconsensual sexual contact

Any physical contact with another person of a sexual nature without the person's consent. It includes but is not limited to the touching of a person's intimate parts (for example, genitalia, groin, breasts, or buttocks); touching a person with one's own intimate parts; or forcing a person to touch his or her own or another person's intimate parts. This provision also includes "Fondling" as defined by the Clery Act.

Nonconsensual sexual penetration

Any penetration of the vagina, anus, or mouth by a penis, object, tongue, finger, or other body part; or contact between the mouth of one person and the genitals or anus of another person. This provision also includes “Rape, Incest, and Statutory Rape” as defined by the Clery Act.

Connecting Consent and Incapacitation

The Force, Incapacity, Consent Construct – Overview

1. Was force used by the Respondent to engage in sexual activity?
2. Was the Complainant incapacitated?
 - Did the Respondent know?
 - Should the Respondent have known?
3. What clear words and/or actions by the Complainant indicated to the Respondent that the sexual activity was mutually agreed upon?
4. Did the Complainant withdraw consent at anytime during the sexual activity?

Returning to the definition of Consent

Words or actions that show a knowing and voluntary willingness to engage in a mutually agreed upon sexual activity

We have to understand that:

- Past consent does not equal present consent *We've done it before*
- The scope of consent does matter *I agreed to oral, not anal*
- Consent can be invalidated by force, intimidation, incapacitation, coercion, or withdrawal of consent by clear words and/or actions
- No means no, but silence and passivity also means no
- Consent must be given immediately prior to, or contemporaneously with, sexual activity

Force – how does it factor?

- ▶ Was force used by the respondent to engage in sexual activity?

If so, there was not consent; consent must be given voluntarily and not obtained through force

Types of force -

--Physical violence (hitting, restraining, etc.)

--Actual threats (saying or doing something that cause a person to do something they would not have otherwise done)

--Intimidation (implied threat that causes reasonable fear)

--Coercion (application of an unreasonable amount of pressure)

Another look at Incapacitation

- ▶ Incapacitation goes beyond intoxication or drunkenness
- ▶ Incapacitation prevents the ability to make informed rational judgments
 - Could the complainant appreciate the situation and engage consciously? Could they make reasonable decisions?
- ▶ Forms of incapacity
 - Alcohol or other drugs
 - Mental or cognitive impairment
 - Injury
 - Sleep

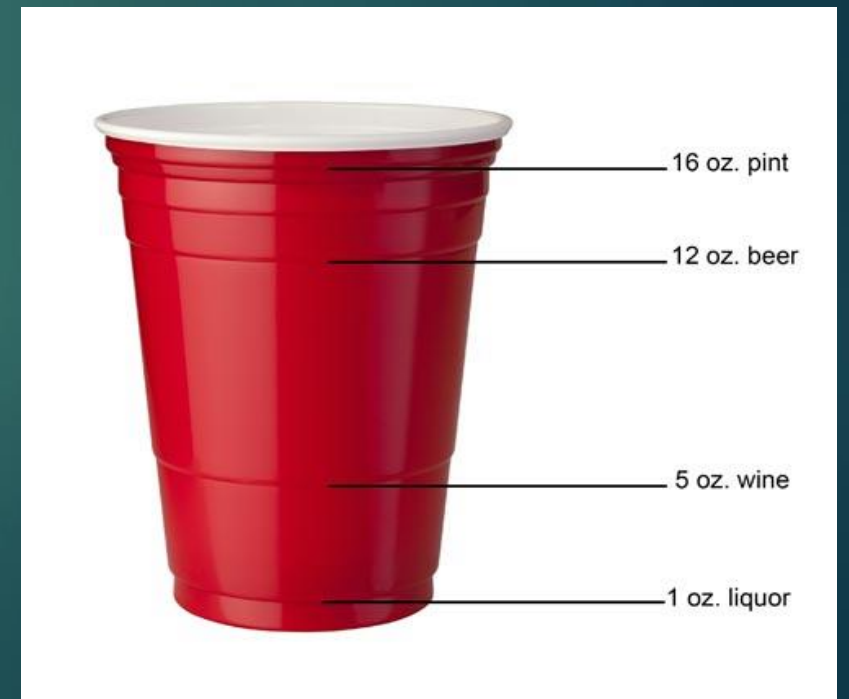
Possible signs of incapacitation

- ▶ Total or intermittent unconsciousness
- ▶ Incoherent attempts at communicating
- ▶ Lack of awareness or surroundings
- ▶ Inability to stand, walk, or dress etc. without assistance

Parties may use the term incapacitated, but how can we determine if that was likely the case?

Consider...

- ▶ What did they eat?
 - ▶ When did they eat?
 - ▶ What did they drink?
 - ▶ How much did they drink?
 - ▶ What was the strength of the drink(s)?
 - ▶ Did they take any drugs, prescription or otherwise?
 - ▶ Do they drink or take drugs often?
 - ▶ What is their body type?
 - ▶ How much do they weigh?
- ▶ What is their gender?
 - ▶ Were they fatigued?
 - ▶ Were they dehydrated?



Why are those considerations necessary?

- ▶ It helps in determining whether or not a reasonable person might have known that a complainant was incapacitated.
- ▶ If there is no reason that a person would have or should have known of another's incapacitation, and they engage in what they say was consensual sex, was a policy violated?
- ▶ If the respondent is intoxicated, is there a policy violation?

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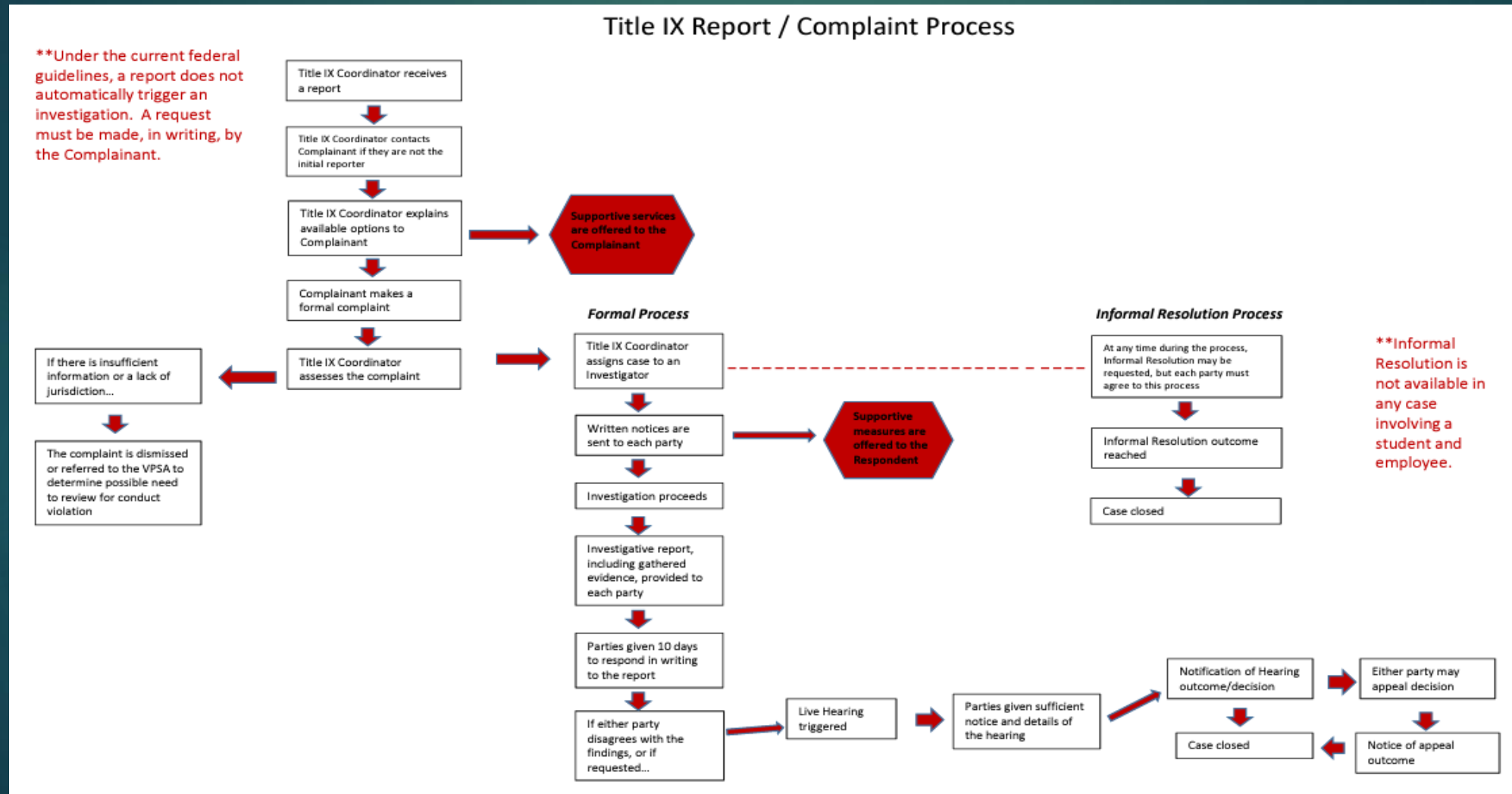
IX

- ❑ Outlining the Title IX Process
- ❑ Legal vs. Administrative
- ❑ Intersection between Title VII and Title IX
- ❑ Role of the Investigator
- ❑ The Investigation
- ❑ Wrapping the Process

Steps of the Title IX Process

We have 120 days to complete the process from start to finish.

What starts the process? What marks the end of the process?



Interim Measures

- ▶ Title IX Coordinator can implement them at any point, and must be implemented in an equitable manner, protecting involved parties and the institution – cannot be punitive
- ▶ Examples include:
 - Changes to housing
 - No contact orders (directives, issued to all involved parties)
 - Change in classes
 - Change in class format
 - Change in work schedule or location
 - For employees – administrative leave
 - For students -- Interim suspension *only with approval from the system director*

Legal vs. Administrative

- ▶ Title IX is a legal, federally regulated act. However, the process we follow is often referred to as an administrative process. Title IX Coordinators must be familiar with various laws, but there is no requirement for a specific degree type for anyone involved in the process (though they must understand university policies).
 - Universities cannot hold court proceedings
 - The university cannot impose jail time.
- ▶ Legal process – *a formalized procedure by which civil or criminal proceedings are instituted against a person or persons accused of wrongdoing*
 - Involves a judge
 - Involves law enforcement
 - Involves legal representation
 - Hefty fines and/or jail time can result

Intersection between Title VII and Title IX (and its ties to Title VI)

- ▶ *Title VI – protects people from discrimination based on race, color, or national origin in programs or activities that receive federal financial assistance*
- ▶ *Title VII – protects employees and job applicants from employment discrimination based on race, color, religion, sex and national origin*
- ▶ Standards established under Title VII generally guide how Title IX violations are established
- ▶ Both statutes can be used to pursue the same violations
- ▶ Title IX prohibits sex-based discrimination in all activities related to recruiting, evaluating, classifying, pay, retention, or treatment of employees; it offers extensive due process to employees accused of sex based misconduct

Effects of this intersection

- ▶ Regulation of the sexual harassment definition
- ▶ Coordination of remedies and/or sanctions when employees are involved
- ▶ What if the student involved is also employed by the institution?
- ▶ Can allow for coordinated efforts in investigation between Human Resource and Title IX professionals

Role of the Investigator

- Provide a timely, fair and unbiased review of cases (in report form)
- Remain a fact finder
- Understand, interpret when necessary, and follow policy
 - Adhere to our standard of proof *Preponderance of the Evidence*
 - Remember the burden of proof is on the institution – never shift the burden*
- Recognize and avoid your own bias (we all have them)
 - Do you have issue with those who use alcohol? Is alcohol a factor in the case?*
 - Do you have issue with specific ethnicities? What is the ethnicity of those you are interviewing?*
 - Do you have unwavering religious beliefs? Are those you are working with clearly of a different faith? Have they said something during the interview that completely goes against your beliefs?*

The Investigation—*You've been assigned a case. Now what?*

- ▶ Develop a plan
- ▶ Review available information, specifically the NOIA and initial intake
- ▶ Review the policy
- ▶ Review any relevant investigation procedures
- ▶ Determine the order of interviews; send out meeting requests
- ▶ Develop preliminary questions
- ▶ Gather preliminary evidence

Interview Strategies

- ▶ Set the tone – professional and non-accusatory – from the very beginning
- ▶ Introduce yourself and explain your role
- ▶ Acknowledge what emotions they might be feeling
- ▶ Discuss confidentiality
- ▶ Review the amnesty and retaliation policies
- ▶ Explain your expectation of truthfulness
- ▶ Remind them of their right to an advisor of their choice
- ▶ Inform them that there may be follow-up interviews

Keep in mind that a lack of response from the named Respondent = general denial

Retaliation and Amnesty Policies

▶ Anti-Retaliation Policy

- Applies to students and employees equally
- Individuals involved in the investigation should be free from any adverse action due to their participation

▶ Amnesty Policy

- Only applies to students
- Designed to foster candor during investigations
- Personal usage of drugs or alcohol will not be held against them in disciplinary matters

Questioning parties effectively

-- Questions should be used to determine:

- Who
- What
- When
- Where
- How



Be mindful of how a question could be perceived and develop them with caution

questioning continued...

▶ What are your goals?

- Learn the facts
- Establish a timeline
- Help decision makers determine what is more likely than not to have occurred [if possible]

▶ What are **NOT** your goals?

- Satisfying your curiosity
- Answering every unknown to get the “Truth”

Tips for questioning and interviewing

- Prepare preliminary/guiding questions in advance
- Ask open-ended questions to start the conversation—*What are you able to remember about...?—Tell me more about...—Help me understand your thoughts when....*
- LISTEN, ask follow-up questions at the end—Targeted and specific questions
- If you get stuck, recap
- Don't be afraid of silence
- Don't be afraid to ask for clarification
- Take breaks if necessary
- Maintain your professionalism at all times

You may have to deal with...

▶ A Challenging/Reluctant Participant

- Address their concerns
- Remain calm and professional
 - Explain the advantages of cooperating

▶ A Lying Participant

- Ask them to reconcile inconsistent statements
- Try to determine motivation for lying [fearful, protecting a friend, embarrassed etc.]

Taking notes

- ▶ Include the date and names of all those present
- ▶ You can hand write notes or type them – *just know they are subject to open records*
- ▶ You can record your interviews
- ▶ Tip...
 - Schedule time after an interview to review and type narrative summary and send to the interviewee to review and edit

Gathering evidence

- Think of all the places and sources of information
 - Involved parties, witnesses, physical locations, social media etc.
 - Be timely
- Document who provided what and when
- Verifying the evidence provided when possible—Phone numbers, social media accounts, etc.

Types of evidence

- Documentary evidence (supportive writings or documents)
- Electronic evidence (photos, text messages, videos)
- Real evidence (physical object)
- Director testimonial evidence (personal observation or experience)
 - Circumstantial Evidence (not eyewitness, but compelling)
 - Hearsay Evidence (statement made outside the hearing, but presented as important information)
- Character Evidence (generally of little value or relevance)

Understanding the evidence

- Formal rules of evidence do not apply. If the information is considered relevant to prove or disprove a fact at issue, it should be admitted. If credible, it should be considered
- Evidence is any kind of information presented with the intent to prove what took place
- Certain types of evidence may be relevant to the credibility of the witness, but not to the charges

Weighing the evidence

- ▶ There are impact factors to consider when weighing evidence:

Relevance

–Must relate to the incident at issue and be of sufficient value in the overall determination–Must be offered by an individual with actual knowledge of the event

Irrelevant

--Questions and information regarding the Complainant's sexual history or sexual predisposition unless to prove –Someone else other than the Respondent committed the alleged misconduct –Consent between the parties

Reliability

- Information that can be trusted
- Comes from individuals who are able to have assumed the role they claimed to have or those with actual training or experience to support their claim of expertise

Persuasiveness

- Induces others to believe through understanding; tries to convince
- Must be believable, consistent, and establishes a dependable narrative
- Note: be mindful of the rehearsed narrative

Bias

- Understand who the person is and their relationship to the parties and incident at issue
- Bias can manifest in multiple ways:
 - Towards the parties
 - Towards the incident
 - Towards the process

Avoid common pitfalls

- Interview each party and witness separately*
- Apply the correct policy
- Maintain your sensibilities and professionalism
 - Difficult parties
 - Attorneys

Wrapping the Process

- ▶ The hearing
- ▶ The appeal
- ▶ Record keeping