



Association of
Title IX Administrators

Day 2
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Title IX Issues
The Ohio State University

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AGENDA

- 1 Initial Assessment and Intake
- 2 Investigating Sex Discrimination
- 3 Retaliation
- 4 Rationale Writing Guidelines
- 5 Decision Maker Guidelines

Intake: Regulations and Guidelines

Initial Assessment Regulation Standards

Jurisdiction

- TIXC or designee is responsible for conducting an initial assessment to determine Title IX jurisdiction:
 - Does the alleged conduct, if proven, meet one of the definitions of Title IX sexual harassment?
 - Who is the Complainant? Were they P/ATP at the time of filing the Formal Complaint?
 - Did the alleged misconduct occur in the institution's education program or activity? (e.g., does the institution have control over the context of the alleged harassment?)
 - Does the institution have control over the Respondent?
 - Did the behavior occur in the United States?

Jurisdiction

- **Yes, or Arguable:** move forward with Title IX Grievance Process
- **No:** determine whether an alternate policy or process applies
 - Dismiss the complaint under Title IX
 - Document the rationale
 - Refer to other process
- Dismissal analysis can occur throughout the process



Intake

Referral - Outreach and Intake

- After receiving a report from mandatory reporter or through on-line report form, TIXC (or designee), must reach out to the Complainant,
- **Outreach** to a referred Complainant or one who does on-line report includes:
 - Introduction to yourself and acknowledgement of source of report
 - Reason for the outreach
 - Offer to meet/speak over the phone; include right to Advisor
 - Available resources and resolution options, including how to file Formal Complaint
 - Discuss supportive measures and resources
 - Explain options to report to law enforcement

Walk-In Intake

- If Complainant is a **walk-in** you will need to:
 - Determine the general issue
 - Determine if you have jurisdiction or if the matter should be referred at the outset (different from dismissal)
 - Discuss differences in process based on issue presented, reporting v. formal complaint if TIX
 - Discuss available resources, supportive measures, resolution options
 - Explain option to report to law enforcement (If appropriate)

Supportive Measures

Overview

- Supportive measures must be offered for all reports of sex-based discrimination and pregnancy, regardless of whether a formal complaint is filed
- Parties may:
 - Request supportive measures at any time
 - Decline the offer of supportive measures
 - Ask for supportive measures after initially declining them
 - Seek modifications to supportive measures at any time
- Complainant(s) and Respondent(s) have the right to supportive measures

Supportive Measures

Provided to parties throughout the process:

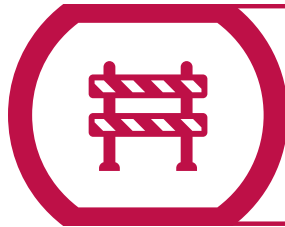
- Non-disciplinary, non-punitive
- Individualized
- Restore or preserve equal access
- Without unreasonably burdening other party
- Protect safety of parties or environment, or deter sex discrimination
- At no cost to the party



Unreasonable Burden

- Supportive measures cannot unreasonably burden the other party
 - May not deny due process
 - May not deny a cognizable right
- A party can voluntarily agree to something that may otherwise be considered an unreasonable burden
 - Switching course sections
 - Not attending student organization meetings/events
 - Resigning from a committee

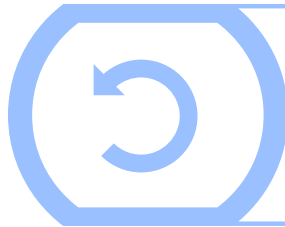
Key Questions



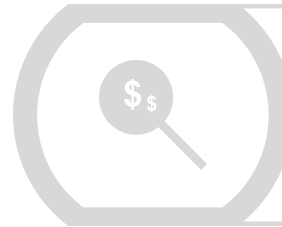
**WHAT NEEDS AND
BARRIERS EXIST?**



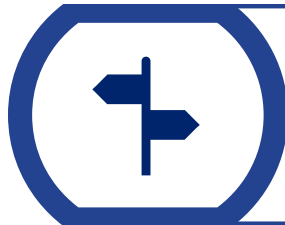
WHAT IS REASONABLE?



**HOW CAN ACCESS BE
MAINTAINED OR
RESTORED?**



IS THERE A COST?

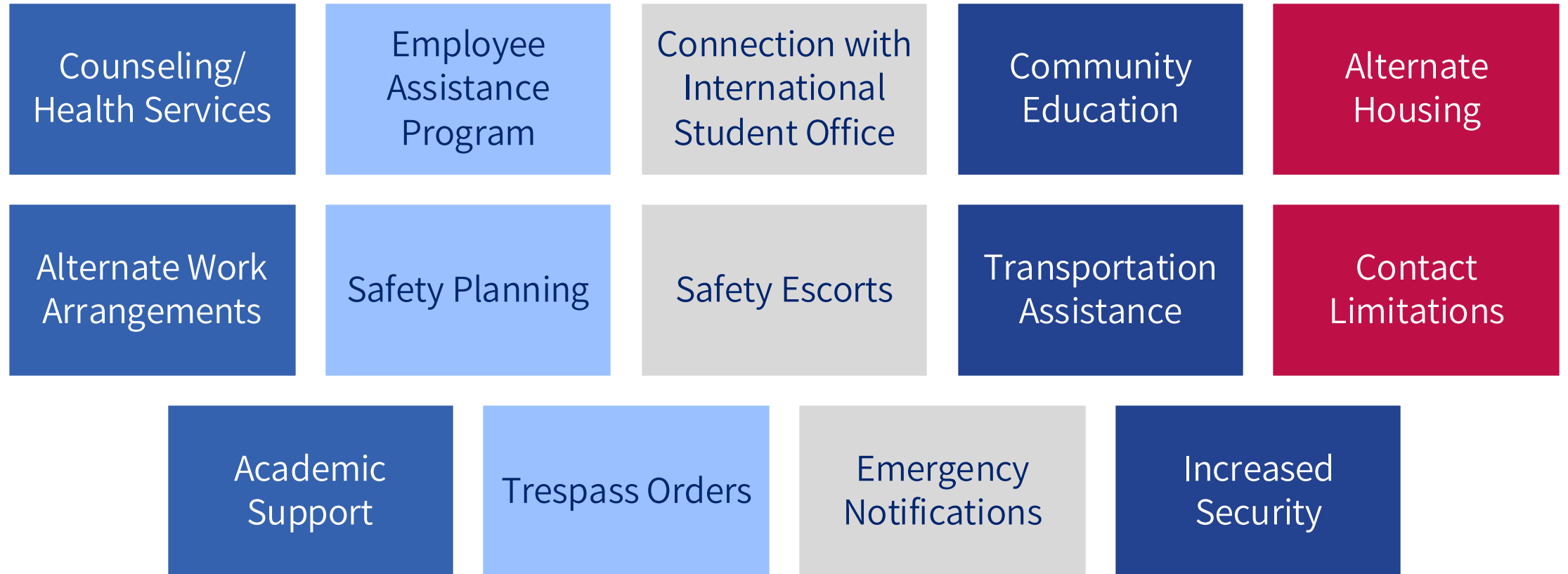


WHAT OPTIONS EXIST?



**WHAT IS EQUITABLE
IN CONSIDERATION
OF THE
CIRCUMSTANCES?**

Supportive Measure Examples



Creating your Spiel

At the beginning.....

- Greeting – first opportunity to establish rapport and tone (beginning of the “Spiel”):
 - Thank them for coming in. Explain your role in the process.
 - If Complainant isn’t accompanied by an advisor, discuss their right to an advisor and that they must have an advisor for a hearing if there is a formal complaint
 - Give Complainant an opportunity to pause the meeting if they want to get an advisor



Setting the Table.....

- Outline the purpose of the intake meeting to ensure the Complainant (and their Advisor) understands the intended goals and purpose.
 - Explain that you are going to share a lot of information about their options and that you may ask them to share more information about the report.
 - Remind Complainant the intake meeting is not an investigative interview
- Discuss the process
 - Go through all steps and what happens in each.
 - How long this may take.
 - Use your flow chart if you have one
 - Discuss privacy, confidentiality
- Discuss interim actions, supportive measures whether or not they want to file a formal complaint. Discuss what that means.

Information to include in the Interview

- Discuss what happens next if they wish to file a formal complaint
 - Meeting with investigator.
 - Other options they have (criminal, other processes, etc.).
 - Discuss options (formal complaint, informal resolution)
- Explain others' roles in the process.
 - Decision-makers
 - Advisors (for all parties).
- Seek clarification of issues
- Identify collateral issues – determine if you need to refer
- Be aware of your body language and non-verbal communication

Focus on.....

- You are looking for enough information to determine if Title IX jurisdiction is present and which policies may apply.
- Ask questions designed to elicit the necessary details, rather than inviting the Complainant to provide a prolonged narrative response. However, if the Complainant provides a longer response, document it accurately and share it with the Investigator(s) when assigning the investigation.
- Determine the critical information you need to share with the Complainant at intake and the depth to which you discuss each topic.
 - Policies, procedures, resolution processes: This is likely to be an overwhelming amount of information for many Complainants.
 - Balance sharing enough critical information without overloading the Complainant's ability to process the information you are sharing.

Supportive Measures

- **Supportive Measures:** Discuss available supportive measures, including common options like No-Contact Directives, faculty/supervisor communication, or academic/housing adjustments.
 - This should be an iterative conversation to help the Complainant identify their needs and whether supportive measures could be helpful.
 - The Complainant may need time to determine the types of support that would be beneficial for them. Revisiting this conversation during a follow-up meeting or email may be appropriate, but if they have a sense of the measures they would like, note those and implement those that are reasonable and available accordingly.
 - Explain the option to contact law enforcement (if applicable) and offer to assist the Complainant in contacting law enforcement in the applicable jurisdiction, if desired.
- If the Complainant would like support in making any notifications (such as telling family what happened), explore options for such support

Wrapping-Up.....

- Determine if there are witnesses that should be interviewed that has not been identified in the discussion
- **Retaliation:** Discuss the institution's prohibition on retaliation to aid the Complainant in recognizing, avoiding engaging in, and reporting any retaliatory behavior.
- Remind about confidentiality of process

Language Considerations

- English may not be a participant's first language and translation services may be needed for meaningful participation
- Even when speaking the same language there are often easy misunderstandings, so ensure accurate understanding





Activity: Intake Practicing Your Spiel

Activity Instructions

- Create groups of 3 or 4
- One person is the Intake Officer, one the Complainant the other(s) are observers for feedback
- Conduct intake, including discussion of supportive measures
- Provide feedback of intake, provide suggestions and ask questions
- Discuss supportive measures as a group
- As the Intake Officer, would you change your original supportive measures following the group discussion?

Full Group Discussion

- Each group will read their scenario to the full group and discuss:
 - What recommendations were discussed?
 - What Charges resulted from intake information?
 - What supportive measures were provided?
- Full group will discuss the case (issues, concerns, jurisdiction, other challenges presented, etc.,)
 - Full group discuss appropriate supportive measures
- Full group identify what the appropriate charges would be based on information shared
 - Any collateral conduct referrals? If so, what and to which office?

Additional Discussion

- How do you address the initially involved then reluctant Complainant?
- How do you address the reluctant Respondent?
- What do you identify as reasonable boundaries with the Parties?
- What suggestions do you have for the “interfering” or very vocal advisor during the intake or investigation interviews?
- What are suggestions for working with faculty when a Party needs academic intervention support?
- Share examples of “unreasonable requests” you’ve received

Investigating Sex Discrimination

Step One: Complaint

Step 1: Does the complaint satisfy the required elements for a disparate treatment complaint?



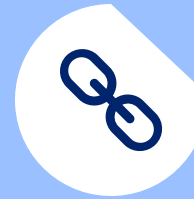
1(a)

Does the complaint
implicate a protected
characteristic?



1(b)

Does the complaint
identify an adverse
action?



1(c)

Does the complaint
assert that the protected
characteristic status
caused the adverse
action?

Step One: Initial Allegation Assessment

- When receiving a report or complaint of disparate treatment:
 - Determine whether the allegations, if proven, have all three elements
 - If not, conduct an evaluation or “small i” investigation
- Cannot disregard because the Complainant’s initial report does not “check all the boxes”

Intake

- Disparate treatment complaints require very specific elements
 - May need to tweak intake approach to elicit key information to fill in the blanks
 - Who is alleged to have done what, precisely?
 - Be transparent with the Complainant about the reasons for your questions
 - Intake meeting is usually **not** an interview, but can help to flesh out the Step One allegation elements
 - Intake meeting can also help to set expectations about the investigation
 - Explain the process and the Disparate Treatment construct

Step One: Examples

“The College of Engineering hates women!”

- No specific discriminatory treatment alleged
- Meet with the Complainant to get additional information; may not ultimately result in an investigation

“I’m not getting paid enough because the College of Engineering hates women!”

- Discriminatory treatment alleged, but need additional information
- Meet with the Complainant, possibly request human resources records about relevant salaries to get started

Step One: Examples

“The College of Engineering denied my tenure application because I am a woman. All male candidates who applied, even those who had less experience and had worse evaluations, were promoted. All the female candidates were denied.”

- Complaint identifies a protected characteristic, an adverse action, and points to comparators to connect the tenure decisions to the alleged disparate treatment
- Establishes all three required elements of disparate treatment for Step One

Step One: Initial Allegation Assessment

Some evidence must connect the adverse action to the protected characteristic

- Examples:
 - “Similarly situated individuals” outside the protected characteristic group are treated differently than those in the protected group
 - Any individual is “**similarly situated**” if it is reasonable to expect that they would receive the same treatment as the Complainant, within context
 - Fact-specific analysis
 - Direct evidence of a connection
 - Documents or witnesses who have evidence of discriminatory intent/animus
 - Can also be circumstantial or indirect evidence
 - Satisfactory job performance data or academic performance data

Similarly Situated Individuals

- **“Similarly situated”** is not precisely defined
- Individuals may be similarly situated in one context but not another
- Investigators must determine which individuals, in the same context as the Complainant, should receive the same treatment as the Complainant
- Consider the scope of the complaint
 - If a student is reporting an individual faculty member, similarly situated students may be the other students in that course and students in the faculty member’s other courses
 - If an employee is reporting a vice president’s bias in hiring/promotion, similarly situated employees may be other divisional employees

Similarly Situated Individuals

- If there are no individuals in the same position as the Complainant, the Investigator should consider other individuals in the most similar situations
 - Make the **most relevant comparisons possible** based on the available evidence
 - Do not force a comparison where there really is no comparator
- Generally, the similarly situated comparison is most useful if the similarly situated individuals **are not** part of the Complainant's protected group

Gathering Evidence

- Similarly situated does not mean identically situated
 - **Most relevant** comparisons based on the available evidence
 - Evidence of differential treatment of similarly situated individuals creates an inference of the presence of a discriminatory motive
- It is the responsibility of the institution to gather relevant evidence once an initial showing of disparate treatment has been made



Statistical Evidence

Statistical evidence could be important for an alleged pattern or practice of discrimination

- Example: A professor alleges his department chair implemented a hiring process that is biased against males
 - Consider the identities of the department chair's hires against the overall applicant pools in those hiring cycles
 - 75% of applicants are male identifying but comprise only 25% of hires



Addressing the Complaint

- If the initial assessment in Step One **does not** establish the required complaint elements, end the inquiry
 - Consider appropriateness for referral to a different process or office
- If an initial showing of disparate treatment is made, the complaint moves forward
 - Follow institutional policy to initiate a complaint and the Resolution Process
 - Step Two and Step Three roughly correspond to the investigation phase



Step Two: Non-Discriminatory Reason

- Interview the Respondent about the allegations to elicit an explanation:
 - Ask about the **why** behind the adverse action or disparate treatment
 - “Why didn’t Sally get tenure?”
 - “Why did John get tenure when Sally didn’t?”
 - Gather any evidence that supports the stated reason(s)
- Investigator should seek corroboration of any offered non-discriminatory reason(s)
 - Analyze the Respondent’s offered reason in light of relevant evidence
 - Statistical evidence may also be used to rebut a discriminatory motive

Common Rebuttal Arguments

Respondent may provide evidence that:

- Complainant's allegations are **factually incorrect**
 - Ex: A Complainant's pay disparity allegations are based on inaccurate compensation information
 - Ex: Complainant, a transgender student, was offered housing with private bathrooms at no additional cost and chose their room with community bathrooms
- Complainant has been **improperly compared** to individuals not similarly situated
 - Ex: A Complainant alleges student conduct outcome disparities, but Complainant had previous violations, while comparators did not
- Complainant was compared to **some**, but not **all**, similarly situated individuals

Common Rebuttal Arguments

Respondent may offer evidence that:

- A Complainant was qualified for a position but asserts that another person was selected because that person was **better qualified or a better fit**
 - This type of argument requires close examination
 - Respondents should articulate why the other person was more qualified than the Complainant
 - An expert witness may be helpful in these situations
 - Qualifications can be multifaceted and subjective

Mixed motives for adverse actions are possible

- If any one of the motives is discriminatory, even if other motives are non-discriminatory, a policy violation occurred

Techniques for Assessing Motive

- Investigator should look for direct evidence of a motive
 - Respondent statements or statements made on Respondent's behalf indicating bias
 - Can include evidence that Respondent failed to take appropriate corrective actions to resolve known discriminatory practices or policies
 - Documentary evidence
 - Emails, performance reviews, text messages, grading patterns, etc.
 - Testimonial evidence
 - Party statements, witness statements
- Discriminatory motive may be inferred from similarly situated individuals who do not identify with the protected characteristic being treated differently
- Previous satisfactory job performance can also support an inference of discrimination

Step Three: Pretext Analysis

- If the Respondent offers a non-discriminatory reason for the adverse action, the Investigator must then seek relevant evidence to determine if that reason is “legitimate”
 - Is the Respondent’s stated reason just pretext for discrimination?
 - **Pretext** occurs when an adverse action occurred for discriminatory reasons, but an individual nonetheless asserts that there was a legitimate reason for the action
- Provide the Complainant with an opportunity to respond to the Respondent’s reasoning
 - Use follow-up interview to identify any evidence to rebut the Respondent’s reasoning
 - Direct evidence
 - Other witnesses or documents
- Consider other sources to thoroughly investigate whether the reasoning is pretextual

Techniques for Assessing Pretext

- Always provide the Complainant with the **opportunity to respond**
 - Complainant may have evidence or be able to suggest evidence to rebut Respondent's position as **pretext**
 - Investigator's responsibility to investigate pretext
- When a conflict between Respondent's position and Complainant's position arises, seek corroborating evidence
 - Coworkers or other students may be able to verify
 - Documents or testimony of senior officials may verify a policy or practice
- Perform a credibility analysis of all parties' positions and their respective arguments concerning the allegations

Assessing Rationale

- Investigator should ask the Respondent for any rationale for their actions
 - Seek corroborating evidence from other sources
 - Look for evidentiary consistency
 - Consider pre-existing relationships among parties and witnesses
 - Be mindful that decisions may have more than one reason
- Similar to assessing credibility in other contexts



Discussion: Michelle & Tim

- Michelle, a Black woman currently employed at Some University (SU), applied for the new Chief Information Officer (CIO) role at SU
- The job posting required experience with a specific student information software, as well as a minimum of three years of supervising other IT professionals
 - Michelle met all the requirements for the position but was not hired
 - The institution hired Tim, a Black male
 - Tim previously worked at the institution before Michelle arrived and left for a tech start-up in the finance sector
 - Tim had no experience with the specific student information software and hadn't yet supervised other IT professionals
 - Michelle initiated a complaint, arguing she was discriminated against on the basis of sex

Did she allege all the elements of a disparate treatment complaint?

Michelle & Tim

- Tyrone, who supervises the CIO role, asserts that he offered Tim the job because they're friends from when Tyrone was SU's AVP for administration and Tim worked in the IT office
 - Tyrone never worked directly with Michelle and opted to hire his friend because he's comfortable with his style

Has Tyrone provided a
non-discriminatory reason
for not hiring Michelle?



Michelle & Tim

- Tyrone claimed his decision was based on favoritism for Tim and his knowledge about how Tim works
- Michelle responds that Tyrone's argument is pretext
- Michelle offers two coworkers as witnesses to Tyrone's statements about how he does not trust women in IT roles because his mother is completely inept when it comes to technology
 - Tyrone counters that these comments were made in jest
 - Witnesses provide evidence that Tyrone made such comments more than once

Does the evidence suggest that Tyrone's offered reason was pretext?

Comparative Evidence

Investigators may use a variety of tools to obtain comparative evidence from similarly situated individuals

- Surveys
- Focus groups
- Policy reviews
- Performance reviews/other evaluations
- Previous complaints
- Grading records/reviews
- Expert witnesses to analyze complex cases such as compensation/experience



Retaliation

Ohio State Policy on Retaliation

- Intimidation, threats, coercion, or discrimination against any individual for the purpose of interfering with any right or privilege secured by this policy, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this policy.
- Intimidation, threats, coercion, or discrimination, including charges against an individual for policy violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by this policy, constitutes retaliation.

Retaliation Examples

- Examples of retaliation include: discrimination or harassment, job termination, adjustment in pay or responsibilities, or any other action that has a materially adverse effect on the working environment of an employee, that hinders or prevents an employee from effectively carrying out their university duties, or that has a materially adverse impact on the academic or living environment of a student.
- Any person or group within the scope of this policy who engages in retaliation is subject to a separate complaint of retaliation under this policy. A good faith pursuit by a party of civil, criminal or other legal action, internal or external to the university, does not constitute retaliation.

Retaliation Analysis

Retaliation Best Practices

- The adverse action need not:
 - Be sex-based, if the protected activity was
 - Create a hostile environment or meet the disparate treatment standard
- The Title IX Regulations allow the use of any fair process to address retaliation; Recipients are not required to use §106.45 procedures to do so, though many do
- Retaliation can thus be a collateral misconduct charge
- To find retaliation, it is often necessary to establish the facts of the underlying charges
 - Example: a Respondent claims that a Complainant retaliated by spreading rumors that the Respondent physically abused the Complainant
 - The institution would have to first determine the truth of the allegation related to the physical abuse
 - If true, telling people about it is not retaliatory

Timing and Retaliation Complaints

- Retaliation allegations often arise during an ongoing grievance process
- May address in a consolidated investigation with the original allegations
 - Always update Notice of Investigation and Allegations (NOIA)
- May address separately at the end of the original grievance process
- Consider approach on case-by-case basis:
 - Timing
 - Complexity



Step 1(a): Protected Activity

- Engaging in **protected activity** is a required element of all retaliation claims
 - Without the protected activity, being mistreated is not enough for retaliation
- Examples of a protected activity:
 - Making a Title IX report
 - Initiating a discrimination complaint
 - Assisting someone reporting discrimination or filing a complaint
 - Participating in the process (e.g., investigation, meetings, hearings)
 - Protesting discrimination (including contemplating making a complaint)

Step 1(b): Adverse Action

- If there is protected activity, move on to the next step:
 - **Did an adverse action occur?**
- An **adverse action**:
 - Significantly disadvantages or restricts
 - An individual in their status as a student/employee, **or**
 - Their ability to gain the benefits or opportunities of Recipient's program
 - Could deter a reasonable person from future protected activity (e.g., bringing a complaint or supporting allegations of discrimination)
- Very broad definition
 - Could be based on action or non-action

Step 1(c): Causation Element

- If there is protected activity and adverse action, move on to the next step:
 - **Does a causal connection exist between the two?**
- While causation is required, **direct** evidence of motive or intent is not required
 - Often only indirect evidence is available
 - Consider whether the individual taking the adverse action knew of the protected activity
- Direct evidence
 - Supervisor told a peer, “I want to teach Davey a lesson about complaining”
- Indirect evidence
 - Close timing between protected activity and adverse action
 - A Respondent posting “lol got him” after Complainant’s car was keyed

Step Two: Non-Retaliatory Reason

- Interview the Respondent about the allegations:
 - Ask about the **why** behind the adverse action
 - “What led to the decision to deny Sally’s tenure application?”
 - “Describe what led to the student receiving a C+ in your class”
 - Gather any evidence that supports their rationale
 - Respondent may need to direct the Investigator to potential sources for that evidence, rather than providing it themselves
- Investigator should seek corroboration of any offered non-retaliatory reason(s)
 - Analyze the Respondent’s reason(s) in light of relevant evidence

Step Three: Pretext Analysis

- **Pretext:** When the Respondent asserts that there was a legitimate reason/justification for the adverse action, but the real reason is actually retaliation
- When determining whether an alternative explanation for the adverse action is pretextual, consider whether:
 - The explanation makes sense
 - Other actions taken are inconsistent with the explanation
 - The explanation is inconsistent with past policy or practice
 - There is evidence of other individuals being treated differently in similar situations
 - There is witness testimony, including experts
 - The timeline of events aligns

Techniques for Assessing Pretext

- Always provide the Complainant with the **opportunity to respond** to the Respondent's non-retaliatory reason
 - Complainant may have evidence or be able to suggest evidence to rebut Respondent's position as **pretext**
 - It is the Investigator's responsibility to investigate pretext
- When a conflict between Respondent's position and Complainant's position arises, seek corroborating evidence
 - Coworkers or other students may be able to verify
 - Documents or testimony of senior officials may verify a policy or practice
- Analyze credibility of all parties' positions and the evidence they provided

Common Non-Retaliatory Reasons

Any reason that is not based on discrimination, including:

- Budget cuts or hiring freezes
- Does not qualify for requested accommodation or adjustment
- Evidence of misconduct and/or history of misconduct
- Inadequate qualifications for role or position
- Insubordination
- Other candidates are better qualified
- Poor academic or work performance

Case Studies

Case Study: Scottie and Byron

- Scottie is a graduate student employee in the Department of Athletics and Recreation
- Byron is an Assistant Athletic Director and a friend of Scottie's supervisor, Sherie
- Byron often stops by Scottie's workspace after hanging out in Sherie's office
 - Byron will often flirt with Scottie and has asked Scottie for drinks several times
 - About a month ago, Byron approached Scottie from behind and began massaging Scottie's shoulders and again asked Scottie to come have a drink with him at his apartment
 - Scottie filed a report with Title IX and HR for sexual harassment
- Two weeks later, Scottie received a "below expectations" annual evaluation and started receiving undesirable work assignments from Sherie

Could this qualify as retaliation?

Case Study, Part 2: Scottie and Byron

- Sherie provides the following explanations for her decisions to provide Scottie a “below expectations” rating and shift in assignments:
 - Byron publicly flirts with a lot of graduate students all of whom rebuff his advances and Sherie doesn’t do anything after learning about it
 - All the graduate students rotate through the undesirable assignments, and it is Scottie’s turn
 - Sherie is jealous of the attention Scottie is getting from Byron
 - Sherie did not know about Scottie’s complaint until after annual evaluations

Which of the above could be considered a valid, non-retaliatory reason?

Case Study, Part 3: Scottie and Byron

The following could be evidence of pretext:

- **Reason:** All the graduate students rotate through the undesirable assignments, and it is Scottie's turn
 - **Evidence of pretext:** Scottie has already received this assignment twice and others in the rotation have yet to receive the assignment once
- **Reason:** Sherie is jealous of the attention Scottie is getting from Byron
 - **Evidence of pretext:** Multiple witnesses state that Sherie has repeatedly said that Byron is a good friend but can be very creepy when he likes someone
- **Reason:** Sherie did not know about the complaint until after annual evaluations
 - **Evidence of pretext:** An email shows that Sherie knew about the complaint three days prior to the annual evaluation meeting

Case Study: Raj and Nicholas

- Raj and Nicholas dated for about six months but broke up recently
- Raj reported that Nicholas had been showing intimate and nude photos of Raj to others
 - The photos were consensual when taken but sharing was not consensual
- Raj confronted Nicholas about it and Nicholas responded by telling other students that Raj had given Nicholas an STI during their relationship, which Raj says is untrue
- Raj wants to move forward with a formal complaint for sexual harassment
- Upon receiving notice of the complaint, Nicholas asked to file a formal complaint regarding dating violence allegations
- Raj contends Nicholas's STI comments, and the counter complaint, are retaliatory

Do either of these qualify as retaliation? How would you respond?

Rationale Writing Guidelines

Rationale Purpose

- Rationales should clearly identify what information was used in reaching a decision
- Can be a standalone document or part of a larger document
- When part of a final determination, there are other required elements or disclosures



Defining Terms

- The **rationale** is the basis for a decision
 - Can include the explanation of the basis for the finding, the final determination, and any sanctions imposed
- A **finding** is a determination of the facts that occurred, by the standard of evidence
 - What happened?
- A **final determination** is made by applying relevant evidence to the policy and determining whether a policy violation has occurred, based on the standard of evidence:
 - Did what happened violate policy?
 - Also referred to as a **decision** or **outcome**
 - Yes or no question for each alleged policy violation
 - May result from a decision/hearing process and/or an appeal

Determination Letter

- Summarize allegation(s)
- Include all policies potentially violated
- Review evidence, noting which evidence was relied upon and which was not:
 - If relying upon evidence to make a determination, cite it in the rationale
 - If it is not written down, the analysis did not happen
 - Credit will not be given for the thoughtfulness of the analysis
 - Analysis may be incomplete
 - If not relying on something, say so, and state why

Best Practice Tips

- Write in active voice and third person
- Write a separate rationale for each Respondent if more than one is involved in the complaint
- When there are multiple alleged violations, the rationale should address each allegation on its own merits
 - Findings on specific violations (e.g., sexual assault) can greatly inform findings for broader violations, such as dating violence or hostile environment sexual harassment
 - Include a rationale for each alleged policy violation
- Ensure that the DM(s) arrive at the rationale independently and impartially:
 - TIXC or designee acts as "guardrails for the process"

Decision Maker Guidelines

Decision-Maker Responsibilities

- DMs have **no side**, other than the **integrity of the process**
- DM must have a thorough understanding of:
 - Institutional policy and procedures, including the investigation process
 - Whether the determination is for an alleged incident(s), a pattern, or a culture/climate complaint, and what findings are necessary based on that footing
 - Best practices for asking relevant questions
 - Decision-making procedures and management
 - How to weigh and apply evidence to policy by the standard of evidence
 - How to analyze credibility
 - How to make determinations, decide sanctions/remedies, and write a rationale

Understanding Evidence

DM must evaluate all relevant evidence

- **Evidence** is any kind of information presented to help determine what occurred
- **Relevant evidence** is evidence that tends to prove or disprove the underlying allegations
 - Included in the investigation report
- **Directly related evidence** is connected to the complaint, but is neither inculpatory nor exculpatory
 - Included in the evidence file



A Deeper Dive into Relevant Evidence

- Evidence is generally considered **relevant** when it helps determine:
 - Whether the Respondent violated policy, and/or
 - The credibility of any evidence, including a party or witness statement
- The Investigator initially evaluates relevance, but the DM ultimately decides
- All relevant evidence must be objectively evaluated and considered
 - **Inculpatory:** tending to suggest a finding of responsible
 - **Exculpatory:** tending to suggest a finding of not responsible
- In the decision-making phase parties may dispute the Investigator's initial relevance determinations

Types of Relevant Evidence

Documentary Evidence	Supportive writings or documents
Electronic Evidence	Photos, text messages, and videos
Real Evidence	Physical objects
Direct or Testimonial Evidence	Personal observation or experience
Circumstantial Evidence	Not eyewitness, but compelling
Hearsay Evidence	Statement from outside the interview presented as truthful
Character Evidence	Evidence of a person's character or character traits

Relevant Evidence Exclusions

- Evidence of the **Complainant's sexual predisposition** is never relevant
- Evidence of the **Complainant's prior sexual behavior** is not relevant except:
 - If offered to prove that someone other than the Respondent committed the alleged conduct; or
 - Specific incidents of the Complainant's prior sexual behavior with respect to the Respondent offered to prove consent
- Exclusions apply even if admitted/introduced by the Complainant
- Exclusions do **not** apply to Respondent's prior sexual behavior or predisposition, which are admissible if relevant

Privileged and Medical Information

A party must provide permission to obtain and/or include:

- Evidence protected under a legally recognized privilege
- Records made or maintained by:
 - Physician
 - Psychiatrist
 - Psychologist



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Skills: Credibility Assessment

Credibility Considerations

- Assessing and determining credibility is an important DM role
- Credibility is often a function of **corroboration and consistency**
- Credibility does **not** necessarily equate to honesty or truthfulness:
 - Believability does not equal truthfulness
- Credibility impacts the **reliability of evidence and its weight**
- Specific credibility issues that a DM may consider:
 - Relationships between the parties and witnesses
 - Whether a witness was exposed to information (e.g., in the case of a parent/guardian, Advisor) that may have influenced their testimony

Credibility Factors

Corroboration

- Aligned testimony and/or physical evidence

Inherent Plausibility

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





Skills: Making Findings, the Final Determination, and Sanctioning

Finding vs. Determination

Finding

Whether the conduct occurred, by the standard of evidence

Final Determination

Whether the conduct that is proven to have occurred violates policy

Written Determination Standards

- Cogent explanation of facts
- Evidence relied upon/not relied upon and why
- Evidence that was unavailable and why
- Whether presumption of innocence was overcome
- Credibility assessment and explanation
- Rationale explains how DM got from the allegation to the final determination, and also offers rationale for any sanctions implemented

Determination Process Overview

- Anticipate having to concretely articulate the rationale for and evidence supporting all conclusions
- Parse the policy again; review the elements that comprise each allegation
- Determine credibility of evidence and assess statements as factual, opinion-based, or circumstantial
- Determine whether it is more likely than not that policy has been violated
 - Or use school/district standard of evidence
- Ensure an impartial decision

Withhold judgment until all the evidence has been considered

Making a Finding and Final Determination

- Finding(s) must be based upon information gathered during the investigation and decision-making phases only
 - No outside information should influence decision-making
- Separate the **determination** from the **sanction**:
 - Do not use impact-based rationales for policy violation findings and determinations
 - Use impact-based rationales for sanctions only
 - Impact is **not** relevant to the policy violation question
 - Same with prior misconduct, unless a pattern is alleged/proven
- Institutions can identify a separate individual to determine sanctions **OR** permit the DM to determine sanctions, if any

Written Determinations

- **Written Determination**

- Authored by DM(s)
- Communicated to the parties simultaneously in writing

- **Finality**

- On the date the institution provides a written appeal determination
 - **OR** the date when an appeal would no longer be timely

Written Determination Elements

- Applicable policy
- Procedural steps from complaint through determination
- Statement of and rationale for the result of each specific allegation
- Sanctions imposed (if any) and rationale for chosen sanctions or deviation from precedent
- Whether remedies will be provided to Complainant
- Procedures and bases for appeal



Association of
Title IX Administrators

Questions?

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