



Association of
Title IX Administrators

Day 1
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2020 Title IX Regulations Refresher

The Ohio State University

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Understanding the Regulations

Understanding the Title IX Regulations

- Issued May 6, 2020, effective August 14, 2020
 - Located at 34 C.F.R. 106
- Regulations have the force and effect of law
 - They provide a prescriptive set of requirements that act as the **floor**, not the ceiling
 - Federal regulations preempt state laws if they conflict
- The Preamble explains the regulations but does not have the same force of law as the regulations
 - 409 pages of 423 pages of the Title IX Regulations tri-column PDF are Preamble
 - Persuasive authority
- **Note:** The online C.F.R. still has the 2024 Regulations posted
 - Use the “Go to Date” function to access the 2020 regulations
 - Select any date prior to 8/1/24

Key Regulatory Sections

- Section 106.8 Designation of coordinator; dissemination of policy
- Section 106.30 Definitions
- Section 106.44 Recipient's response to sexual harassment
- Section 106.45 Grievance process
- Section 106.71 Retaliation

Title IX Scope and Definitions

Limited Scope

- Title IX is broad, but Title IX Regulations apply to a narrow slice of Title IX
 - Only applies to a handful of behaviors the regulations define as “Title IX Sexual Harassment”
 - Any other types of behavior (e.g., sex discrimination) fall outside of the regulations
 - More flexibility to respond
 - May be influenced by state law, federal court decisions, CBAs, etc.



Title IX Scope

Title IX

Sex Discrimination

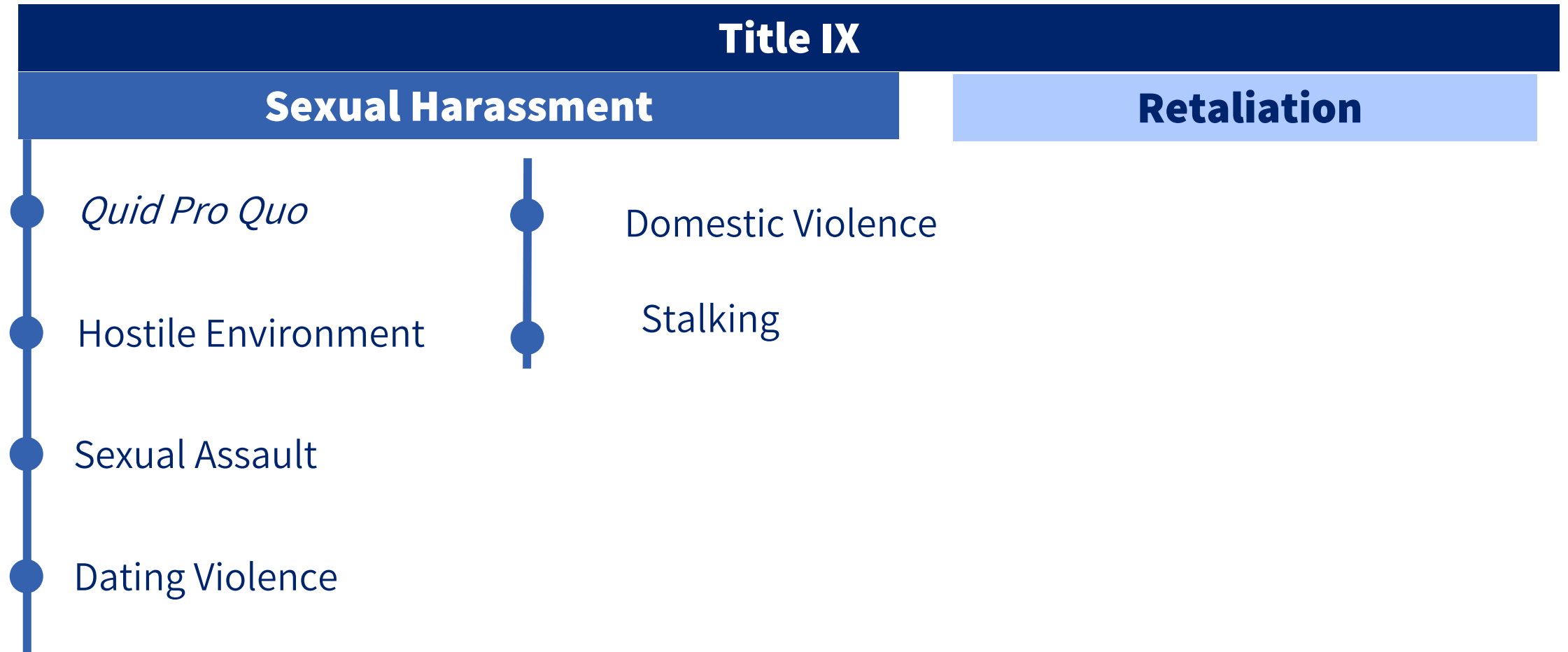
- Disparate Treatment
- Disparate Impact

Retaliation

Sexual Harassment

- *Quid Pro Quo*
- Hostile Environment
- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking

Title IX Scope Under 2020 Regs



§ 106.30 Definitions

Sexual Harassment

- Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:
 1. An employee of the Recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
 2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the Recipient's education program or activity; or
 3. "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30)

Quid Pro Quo

- An **employee** of the Recipient
- Conditioning the provision of an aid, benefit, or service of the Recipient
- On an individual's participation in unwelcome sexual conduct



Sexual Harassment*

- Unwelcome conduct
- determined by a reasonable person
- to be so **severe, pervasive, and objectively offensive (SPOO)**
- that it effectively denies a person equal access to the Recipient's education program or activity

*This is the Hostile Environment standard (is not categorized by the Regs however)



Sexual Assault: Rape

- Penetration, no matter how slight,
 - of the vagina or anus with any body part or object, or
- oral penetration of a sex organ of a victim,
- Without the consent of the victim
- Including instances where the victim is incapable of giving consent because of his/her age or because of a temporary or permanent mental or physical incapacity

Sexual Assault: Sodomy and Sexual Assault with an Object

- **Sodomy:**

- Oral or anal sexual intercourse with another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of age or temporary or permanent mental or physical incapacity

- **Sexual Assault with an Object**

- To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because

Fondling

- The intentional touching of the clothed or unclothed genitals, buttocks, groin, breasts, or other body parts of the Complainant by the Respondent
 - Without the consent of the Complainant
 - For the purpose of sexual degradation, sexual gratification, or sexual humiliation
- Or the intentional touching by the Complainant of the Respondent's clothed or unclothed genitals, buttocks, groin, breasts, or other body parts
 - Without consent of the Complainant
 - For the purpose of sexual degradation, sexual gratification, or sexual humiliation

Changes to the Fondling definition

- In 2023, FBI updated NIBRS offense definitions replacing “Fondling” with “Criminal Sexual Contact”
 - These form the bases of Uniform Crime Reporting definitions
 - Clery/VAWA uses UCR/NIBRS definitions for “Sexual Assault,” which includes Fondling
 - TIX Regs incorporate Clery definitions for Sexual Assault, and Clery definitions which come from UCR/NIBRS
- June 23, 2025, FBI updated NIBRS User Manual, replacing verbiage of ‘Fondling’ with “Criminal Sexual Contact,” and provided a new definition.

Major Changes

- NEW:
 - “clothed or unclothed”
 - “sexual degradation” & “sexual humiliation” (sexual gratification remains)
 - Used for both touching and forced touching of respondent
- ADJUSTED
 - “private body parts” → “body parts”
 - “Causing the victim to touch” → “forced touching”

Sexual Assault: Incest and Statutory Rape

- Incest
 - Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law
- Statutory Rape
 - Nonforcible sexual intercourse with a person who is under the statutory age of consent

Dating Violence

- Violence committed by a person
 - Who is in or has been in a social relationship of a romantic or intimate nature with the victim and
 - Where the existence of such a relationship shall be determined based on a consideration of the following factors:
 - The length of the relationship
 - The type of relationship
 - The frequency of interaction between the persons involved in the relationship

Domestic Violence

Title IX Regulations:

- A felony or misdemeanor crime of violence committed by a:
 - Current or former spouse or intimate partner of the victim, or person similarly situated to a spouse of the victim,
 - Person who is cohabitating or has cohabitated with the victim as a spouse or intimate partner,
 - Person who shares a child in common with the victim, or
 - Commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction

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
 - Suffer substantial emotional distress

Collateral Misconduct

- The Regulations permit resolving alleged **collateral misconduct** within the Title IX process
 - Collateral misconduct refers to allegations of misconduct arising out of the same facts or circumstances as the Title IX allegations
 - For practical purposes, resolving all allegations of misconduct in the same process may make sense
 - This is discretionary, but if using another process to resolve collateral misconduct, ensure it is not retaliatory or chilling
 - Eliminates the need to have witnesses and parties go through two or more resolution processes

Retaliation

Retaliation Definition

- No Recipient or other person may intimidate, threaten, coerce, or discriminate against any individual
 - For the purpose of interfering with any right or privilege secured by Title IX or
 - 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
- Intimidation, threats, coercion, or discrimination, **including** charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the **same facts or circumstances** as a report or complaint of sex discrimination, or a report or Formal Complaint of sexual harassment, **for the purpose of interfering** with any right or privilege secured by Title IX or this part, constitutes retaliation

Narrowly Defined

- The Title IX definition of retaliation is typically **not as broad** as what community members may consider to be retaliatory
 - Complaints alleging “retaliation” may not meet the definition
 - Social media gossip **may not** be retaliation if it does not meet the requirements
 - First Amendment concerns



Retaliation Investigations

- 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
 - Not required to use Title IX process
- Consider approach on case-by-case basis:
 - Timing
 - Complexity
 - Necessary supportive measures



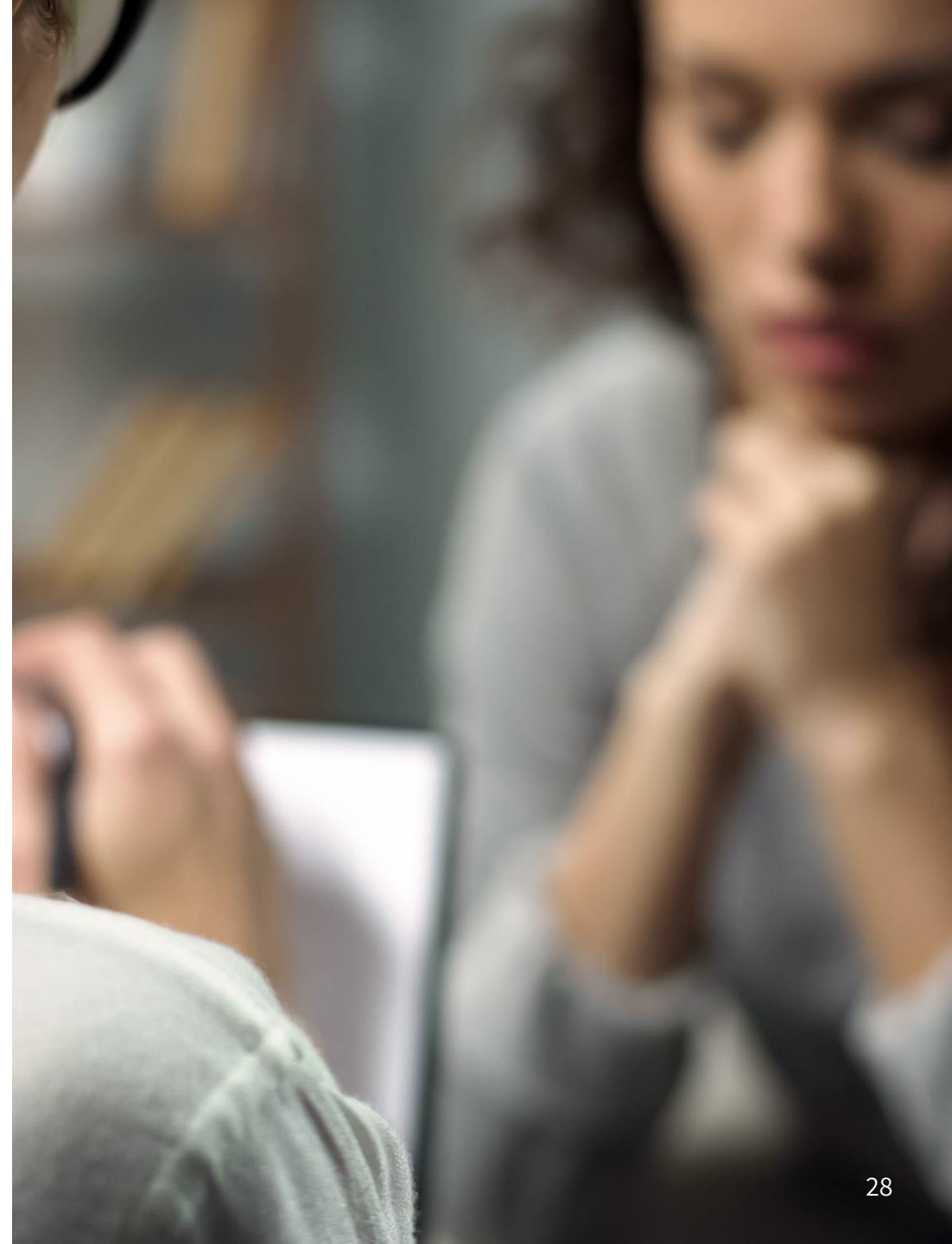
§ 106.44 Reports, Complaints, and Notice

When is the Institution “On Notice?”

The institution is “**on notice**” of sexual harassment when a report is made to:

- **Title IX Coordinator (TIXC)**, or
- An **Official with Authority (OWA)**: any official who has authority to institute corrective measures on behalf of the Recipient
 - ATIXA recommends including OWAs by role in policy

Being “on notice” creates an institutional obligation to respond



Reporting Obligations

- The regulations rely on the “actual knowledge” concept to drive reporting, rather than providing specific reporting requirements
 - Example: If an OWA receives notice, that must be reported to the TIXC for the institution to fulfill its Title IX obligations
- ATIXA recommends that institutions, by policy, designate **all employees** as **mandated reporters** (except for **confidential resources**) under Title IX
- Many employees will also have reporting responsibilities under other state and federal laws or institutional policy

Party and Witness Privacy Concerns

Privacy vs. Confidentiality vs. Privilege

1

PRIVACY

Statutory protection (FERPA) only allows disclosing records to those who need to know, but cannot guarantee confidentiality

2

CONFIDENTIALITY

Information protected by those who need not report to the TIXC because they are designated confidential or have ethical/statutory confidentiality duties (subject to exceptions)

3

PRIVILEGE

The highest legal protection (attorney giving advice to a client or clergy providing pastoral advice); client/patient/parishioner controls the privilege

Report vs. Complaint

A **report** is different than a **formal complaint**:

- **Report**

- Notifies the TIXC of an incident and
- Obligates the TIXC to offer supportive measures and explain the process

- **Formal Complaint (required by the Regs to initiate action)**

- Written request to initiate an investigation
- Physical document or electronic submission from Complainant
 - OR signed by TIXC
- Alleging sexual harassment
- Complainant must be **participating or attempting to participate** (P/ATP) at the time of the formal complaint
 - TIXC can make a complaint P/ATP by signing a formal complaint

Signing a Formal Complaint: PPTVWM

In limited circumstances, a TIXC should sign a formal complaint even if the Complainant declines to do so

Factors that likely indicate an ongoing risk of harm include:

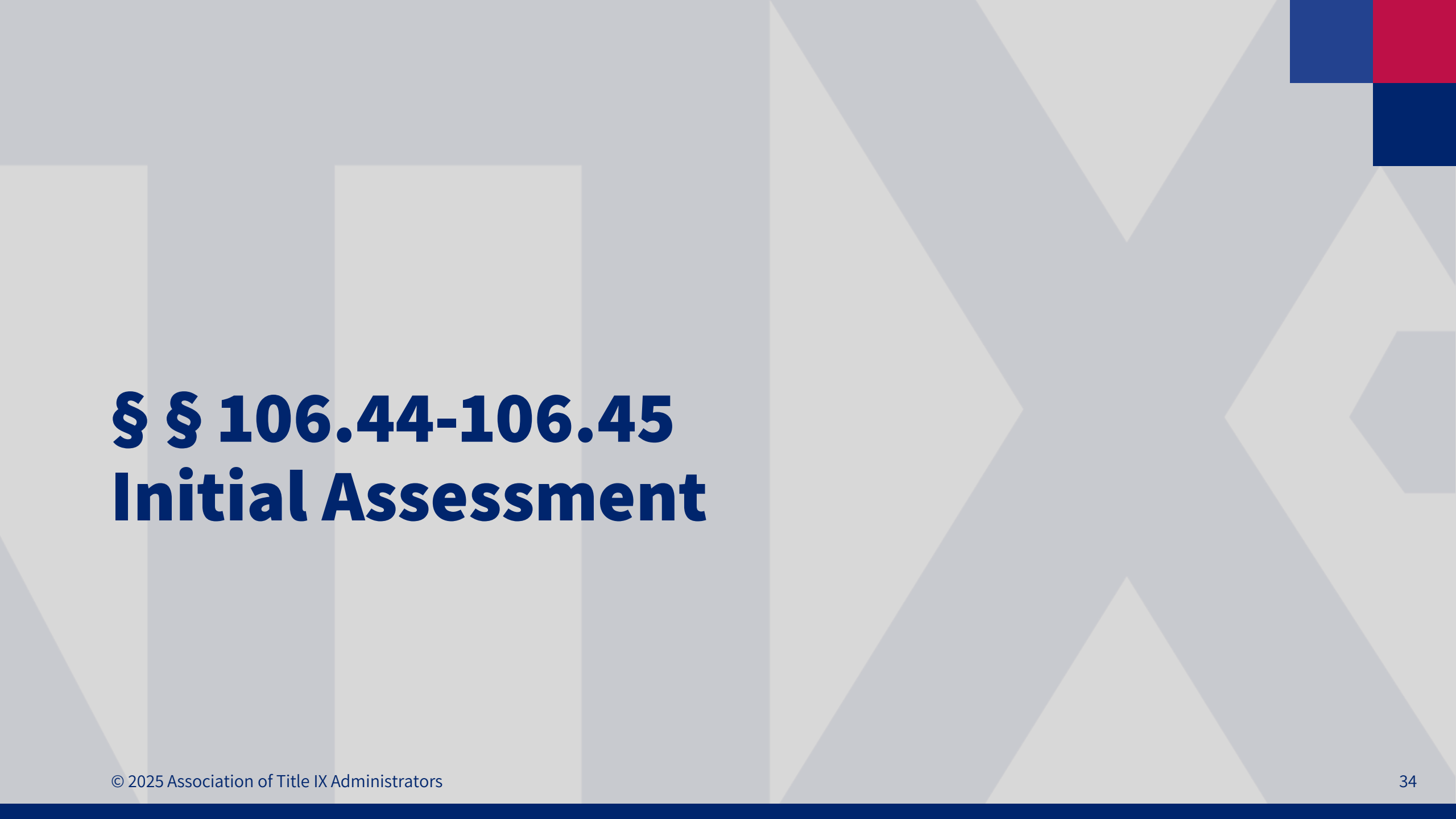
- **P**attern
- **P**redation
- **T**hreat
- **V**iolence
- **W**eapons
- **M**inors

Other Considerations for TIXC Signing a Formal Complaint

- Employee Respondent
- Complainant who is not P/ATP

§ § 106.44-106.45

Formal Grievance Process Overview



§ § 106.44-106.45 Initial Assessment

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



Outreach and Intake

- After receiving a report, TIXC (or designee), must reach out to the Complainant
- **Outreach** includes:
 - Introduction to Title IX and staff
 - 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
 - Follow up in writing with resources and information

Mandatory Dismissal

TIXC or designee **must** dismiss the complaint at any time prior to a determination, if:

1. The conduct alleged in the Formal Complaint would not constitute sexual harassment as defined in the 2020 Title IX Regulations even if proved, and/or
2. The conduct did not occur in the Recipient's education program or activity, or
 - No control over the context
3. The conduct did not occur against a person in the United States, or
4. At the time of filing a Formal Complaint, the Complainant is not P/ATP
 - **AND** the TIXC determines they do not need to sign a Formal Complaint

Discretionary Dismissal

The TIXC pr designee **may** dismiss the complaint (or a portion of it) at any time prior to a determination, if:

1. Complainant notifies the TIXC in writing that they would like to withdraw the Formal Complaint or any portion thereof; **or**
2. Recipient no longer employs or enrolls Respondent; **or**
3. Specific circumstances prevent the Recipient from gathering sufficient evidence for a determination

Dismissal Appeal

- Promptly notify parties of the dismissal
- Notify parties that a dismissal may be appealed and include appeal information
 - Appeals grounds from § 106.45 apply to both dismissals and final determinations
 - Dismissal Appeal Decision-maker(s) must be trained
 - Must not have been involved in the complaint so far
 - Cannot also serve as the Appeal Decision-maker for final determination



Supportive Measures

- Provided to parties throughout the process:
 - At no cost to the party
 - Individualized
 - Non-disciplinary, non-punitive
 - Protect safety of parties or environment, or deter sexual harassment
 - Restore or preserve equal access
 - Without unreasonably burdening other party
- Publish the range of supportive measures
- Avoid unnecessary disclosures about supportive measures
- Consult with disability services when appropriate
- If not provided, document the rationale for refusal

Emergency Removal

- Imposed upon Respondents on an emergency basis only
- Individualized safety and risk analysis
 - Immediate threat exists to the physical health or safety of any student or other individual
 - The threat arises from the allegations of sexual harassment
- Respondent entitled to immediate notice and opportunity to challenge



Administrative Leave

- May remove an employee Respondent using existing administrative leave procedures
- A lower bar than emergency removal



Informal Resolution

- Title IX permits **voluntary** Informal Resolution (IR)
- Not available for employee-on-student harassment
- IR is not defined by the Title IX Regulations
- At discretion of TIXC, at any time prior to a final determination
 - Likelihood of resolution
 - Power dynamics
 - Goals and motivation of the parties to participate
 - Complexity and timing of the complaint
- IR Facilitators must receive training, be free of bias or conflicts

Informal Resolution Procedural Requirements

- Procedural requirements:
 - Formal Complaint
 - Parties must receive written notice of the allegations, IR procedures, records created, and potential consequences
 - Parties' voluntary, written consent
 - Must still stop, prevent, remedy
- May withdraw from IR to start or resume Formal Grievance Process at any time



§ 106.45 Investigation

Notice of Investigation and Allegations

- Notice of Investigation and Allegations (NOIA) letter
 - Sent to all parties, simultaneously
 - Must be sent prior to interviewing any party (may provide an "information/process discussion")
- **The NOIA includes:**
 - Notice of the allegations and known details, such as identities of the parties
 - A description of the alleged conduct and relevant policy provisions
 - The date and location of the alleged conduct
 - Information about grievance procedures
 - Any Informal Resolution options
 - Parties' Rights

Notice of Investigation and Allegations, Cont.

The NOIA must outline the parties' right to:

- Present witnesses, including expert witnesses
- Present inculpatory and exculpatory evidence
- Freely discuss the allegations
- Be accompanied by an Advisor of their choice
- Receive written notice of all details and purpose, with sufficient time to prepare, of any investigation interview or other meeting they are requested to attend
- Review all relevant and directly related evidence before the investigation report is finalized

Notice of Investigation and Allegations, Cont.

The NOIA must also include:

- Presumption that Respondent is not responsible
- A statement that retaliation is not permitted
- Reference to any code of conduct provisions (student or employee) regarding consequences for knowingly providing false statements
- The NOIA must be updated if additional allegations arise during the course of the investigation
- Include or reference current policy and procedures

Understanding Evidence

- Duty to collect **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
 - Inculpatory and exculpatory evidence
 - Some evidence may only be relevant to assessing credibility
- Collect **all** relevant and reasonably available evidence
- Relevant evidence forms the basis of the investigation report



Directly Related Evidence

- Connected to the complaint but neither inculpatory nor exculpatory and will not be relied upon by the Decision-maker (DM)
- Must be provided to the parties and their Advisors for review
- Decision-maker(s) ultimately determine what is relevant, directly related, or neither



Specific Evidence Issues

- 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**
 - If offered to prove consent with respect to prior consent with the Respondent
- Even if admitted/introduced by the Complainant
- Does **not** apply to Respondent's prior sexual behavior or predisposition

Privileged and Medical Information

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

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



Parties' and Advisors' Review of Report and Evidence File

- Draft report summarizing all Relevant Evidence
- Directly Related evidence file must:
 - Be sent to each party and Advisor in an electronic format or hard copy
 - Include evidence upon which the Recipient does not intend to rely
 - Include exculpatory and inculpatory evidence
- 10 (+) 10 rule
 - Investigator must:
 - Allow **minimum** of 10 days for written response
 - Consider parties' feedback and incorporate where appropriate
 - Investigator sends the final investigation report to the parties and Advisors for review **minimum** of 10 days prior to the hearing

Drafting, Reviewing, and Finalizing the Investigation Report





§ 106.45

Decision-Making and Appeals

Decision-Making

- All postsecondary institutions must hold a **live hearing** to address Title IX sexual harassment allegations, unless resolved by IR
 - Decision-maker (DM) can ask relevant questions
 - Advisors can ask relevant questions on behalf of Parties
- TIXC and Investigator may not serve as DM



Live Hearings

- Questions must be asked by the parties' Advisors and/or DM(s)
 - If the party does not have an Advisor, the institution **must** provide an Advisor for the purpose of asking questions during the hearing, if the party wishes to ask questions
 - DM must determine whether a proposed question is relevant and permissible
- Hearing can be in one location or virtually through technology
 - DM and parties must be able to simultaneously see a party or witness when they are speaking/communicating
- Must create an audio or video recording or transcript and make it available to parties to inspect and review
- May impose reasonable decorum rules

Relevance Determinations

- The regulations establish a questioning protocol during hearings
 - A Hearing Board member (other than the Chair), or Advisor poses a question to a party or witness
 - Party/witness pauses while the DM considers the relevance of every question and decides whether to permit the question
 - Party may answer if DM deems question relevant
 - The DM must explain to the individual proposing the questions any decision to exclude a question as not relevant
 - The regulations are silent on whether the DM can instruct other options beyond excluding a question, such as rephrasing or asking the Advisor to reframe (ATIXA recommends permitting rephrasing or reframing)
- Regulations leave open the question of whether Advisor can/should make a showing of relevance to the DM (ATIXA recommends permitting it)

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

Sanctions and Remedies

Sanctions

- Only implemented after a determination of responsibility
- Nexus between sanctions and misconduct
- Goal: stop, prevent, and remedy
- TIXC or designee does not issue sanctions but oversees the process
- TIXC or designee assures sanction compliance
 - Failure to comply could lead to discipline

Remedies

- May be implemented before or after a determination
- TIXC or designee determines remedies that are fair and not clearly unreasonable given the circumstances
- Goal: preserve or restore access to education program and activity
- TIXC or designee ensures remedies are implemented

Appeal Grounds

Must offer appeals on the following grounds:

- 1** Procedural irregularity that affected the outcome of the matter
- 2** New evidence that was not reasonably available at the time of the determination that could affect the outcome of the matter
- 3** Conflict of interest or bias by the TIXC, Investigator, DM that affected the outcome of the matter

Institutions have the discretion to add additional appeal grounds

Recordkeeping

Recordkeeping

- Recipient must maintain records for **seven** years:
 - Sexual harassment Formal Complaints, including determination and discipline/remedies
 - Appeals and results
 - Rationales for all determinations and appeals
 - Informal Resolution
 - Supportive measures
 - Measures taken to preserve/restore access
 - All training materials (see next slide)
- Document how response was **not** deliberately indifferent



Training Records

- Institutions must make all materials used to train TIXC, Investigators, DM, and IR Facilitators publicly available on the Recipient's website
 - Post the most recent materials used to train the Title IX Team
 - But keep electronic copies of seven (7) years of training materials
- If the Recipient does not maintain a website, the Recipient must make these materials available upon request for inspection by members of the public

Additional Compliance Requirements

Compliance Checklist (§ 106.8)

- ☐ Designate a Title IX Coordinator
- ☐ Publish the Title IX Coordinator's name and contact information
 - ☐ Notify all applicants for admission or employment, students, employees, and all unions or other CBA professional organizations of contact information
 - ☐ Notify how to make a report to the Title IX Coordinator
- ☐ Publish non-discrimination statement, including that the institution does not discriminate on the basis of sex in its education program and activities
- ☐ Publish policy and grievance procedures reflect the regulatory requirements



Association of
Title IX Administrators

Questions?

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