



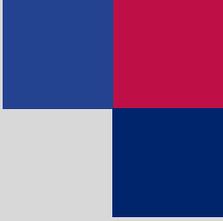
Association of
Title IX Administrators

Title IX Annual Update Ohio State University December 13, 2023

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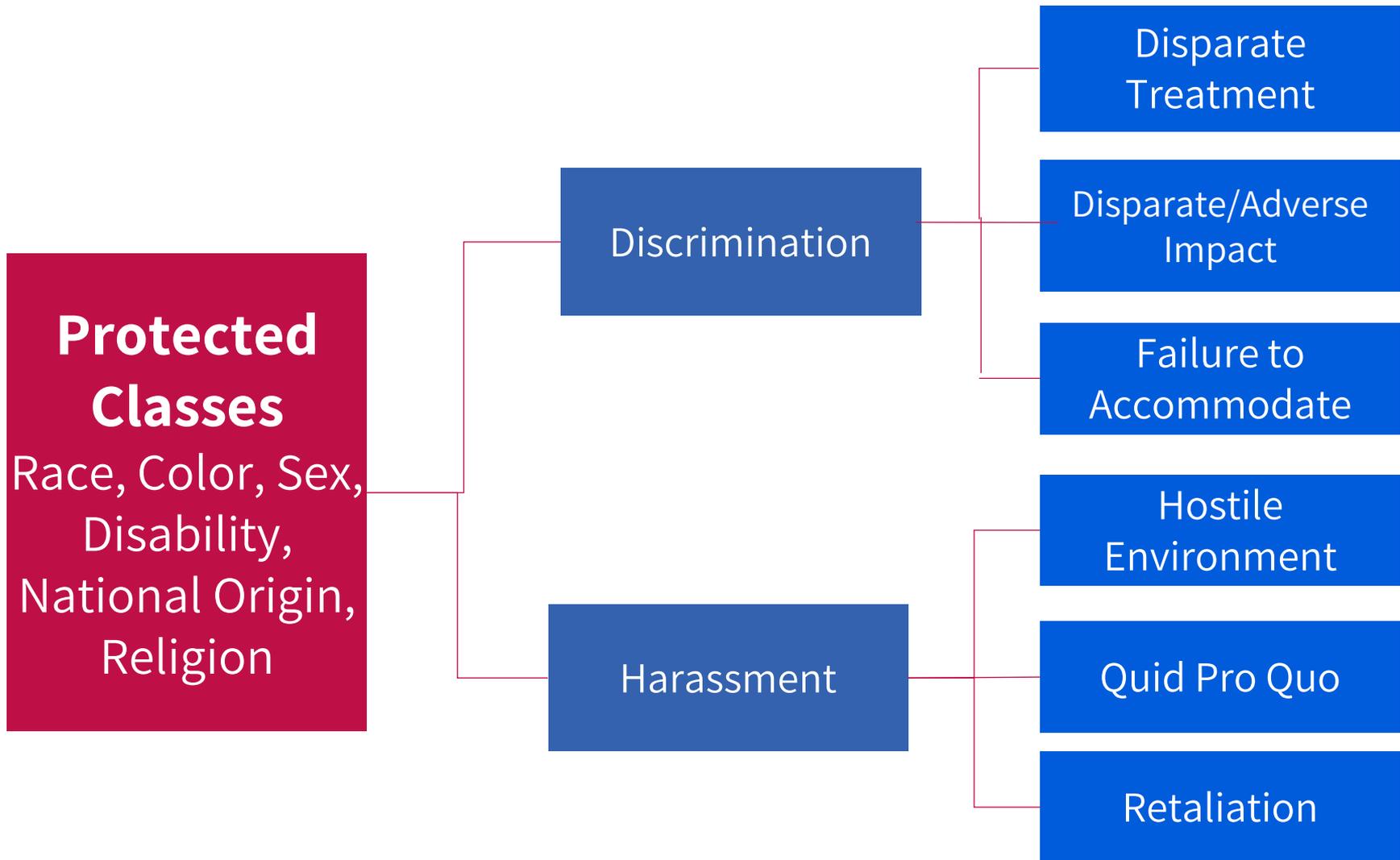
CONTEXT

- The information in this presentation includes a combination of legal requirements as well as Best Practices suggested by ATIXA.
- Best practices are merely suggestive and do not set the standard for legal assessment. Best practices represent aspirational elements for policy and process as reflected in implementation at other institutions, and shared by the presenter and may not be appropriate for Ohio State but are important to share and discuss.
- Throughout the training the presenter will identify those elements that are required by law and distinguish those elements that represent best practices.



FEDERAL CIVIL RIGHTS LAWS

WHAT IS COVERED?



TITLE VI OF THE CIVIL RIGHTS ACT

- 42 U.S.C. § 2000e-2(a)

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

TITLE VII OF THE CIVIL RIGHTS ACT

- 42 U.S.C. § 2000e-2(a)

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

DISABILITY LAWS

Section 504 of the
Rehabilitation Act

Fair Housing Act

Americans with
Disabilities Act

State Laws

SECTION 504 OF THE REHABILITATION ACT (1973)

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

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

Title I

Prohibits
discrimination on
the basis of
disability in
employment

Enforced by the EEOC.

Title II

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

Enforced by DOJ and OCR.

Title III

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

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

HOW IS SEC. 504 DIFFERENT FROM THE ADA?

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

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

TITLE IX

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

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



SEX BASED DISCRIMINATION

Applies to Sex, Gender, Gender Identity, Gender Expression

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

SEXUAL HARASSMENT

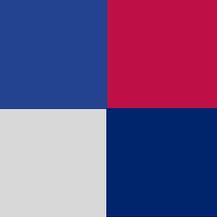
- Hostile Environment
- Stalking
- Domestic Violence
- Dating Violence
- Sexual Assault
- Sexual Violence
- Sexual Exploitation
- Sexual Intimidation
- Sexual Misconduct
- Retaliation

WHAT CONDUCT FALLS UNDER CURRENT TITLE IX REGULATORY STANDARDS? (106.45)?

Sexual Harassment is conduct on the basis of sex meeting one of the following conditions:

- An employee of the Institution conditioning the provision of an aid, benefit, or service of the Institution on an individual's participation in unwelcome sexual conduct;
- 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 Institution's education program or activity; or
- **“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)
“Stalking” as defined in 34 U.S.C. 12291(a)(30)

What about the rest of the sex/gender based conduct listed?



WHEN DOES TITLE IX APPLY UNDER THE CURRENT REGULATIONS?

1. WHO IS THE COMPLAINANT?

- At the time of filing a formal complaint, a Complainant must be **participating in or attempting to participate** in the education program or activity of the University with which the formal complaint is filed
 - OCR adopts in the discussion a fairly broad definition of what could constitute “attempting to participate”

2. WHO IS THE RESPONDENT?

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

3. DEFINITION OF SEXUAL HARASSMENT

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

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

Retaliation is also prohibited.

4. PROGRAM OR ACTIVITY?

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

LIMITATIONS ON WHEN TITLE IX APPLIES

- Limitations:
 - Actions/conduct/speech protected by academic freedom
 - Pedagogically appropriate and germane to the subject matter of course that instructor hired to teach/research
 - Actions/conduct/speech protected by the First Amendment
 - Merely offensive conduct cannot be disciplined at a public school
 - Must be severe, pervasive, and objectively offensive

MANDATORY DISMISSAL OF A FORMAL COMPLAINT

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

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

DISCRETIONARY OR PERMISSIVE DISMISSAL OF A FORMAL COMPLAINT

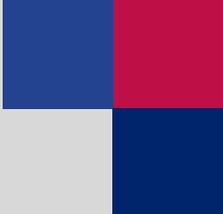
The TIX Coordinator MAY dismiss a formal complaint if at any time prior to a determination:

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

MANDATORY OR PERMISSIVE DISMISSAL OF A FORMAL COMPLAINT

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

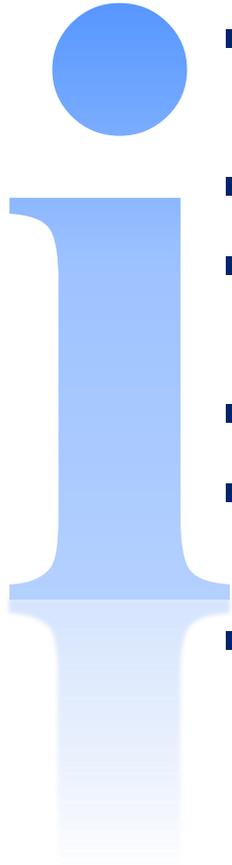
Upon dismissal under the Title IX Regulatory framework (§106.45) the University may institute action under another policy



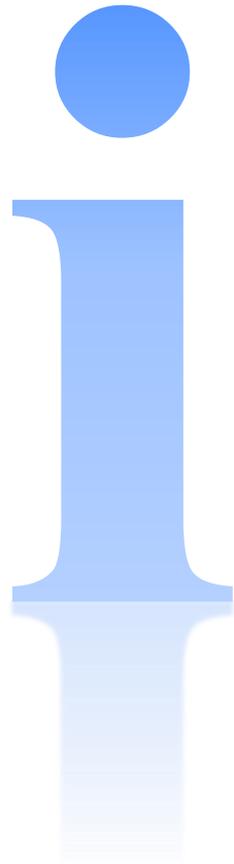
DETAILS OF THE PROCESS

INITIAL ASSESSMENT IN SUMMARY

- The initial assessment is used to determine the following:
 - Does the allegation meet the Title IX regulatory standard for response?
 - Does jurisdiction exist?
 - Does the TIXC need to sign/initiate a formal complaint?
 - Mandatory/Discretionary dismissal considerations.
 - If dismissed, should an alternate policy/ process begin?
 - Should this move forward under a VII rubric?



INITIAL ASSESSMENT



If proceeding under Title IX:

- Establish basis of investigation:
 - Incident or pattern, and/or climate/culture
- Establish a preliminary timeline for the investigation
- If no formal action, document how University's response was not deliberately indifferent
- Responding to anonymous reports:
 - Determine if a trend or pattern may be apparent
 - Can you identify parties?
 - Duty to attempt some form of remedial response, even to an anonymous report

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

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

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

PPTVWM (CONT.)

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

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

PPTVWM (CONT.)

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

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

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

NOTICE TO THE PARTIES

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

EMERGENCY REMOVAL

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

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

EMPLOYEE ADMINISTRATIVE LEAVE

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

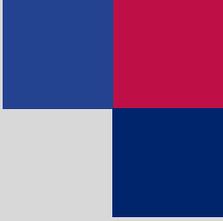
INFORMAL RESOLUTION

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

INFORMAL RESOLUTION ASSESSMENT

The Title IX Coordinator or designee may look to the following factors to assess whether Informal Resolution is appropriate, or which form of Informal Resolution may be most successful for the parties:

- Amenability of the parties to Informal Resolution
- Likelihood of potential resolution, taking into account any power dynamics between the parties
- Motivation of the parties to participate
- Civility of the parties
- Cleared violence risk assessment/ongoing risk analysis
- Whether an emergency removal is needed



INVESTIGATION LOGISTICS

STEPS OF A TITLE IX INVESTIGATION

- Establish basis for investigation (Incident, Pattern, and/or Culture/Climate)
- Determine policy(ies) alleged to have been violated, if meets Title IX Regulatory Standards proceed using this process, if it does not and involves faculty or staff follow OIE process
- Send Notice of Investigation/Notice of Formal Allegation(s) to Parties (NOIA)
- Identify Issues and establish investigation strategy
- Formal comprehensive investigation
 - Witness interviews
 - Evidence gathering
- Draft investigation report
 - Gather evidence
 - Assess credibility and evidence
 - Synthesize areas of dispute/agreement and all questions asked

UPON COMPLETION OF DRAFT TITLE IX INVESTIGATION REPORT

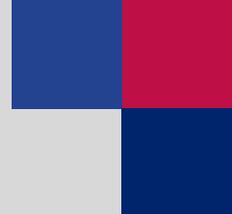
- Investigator meet with Title IX Coordinator (and/or designated individual) to review draft report and evidence
- Provide draft report along with all evidence directly related to the allegations to parties and their Advisors for inspection and review with 10 days for response
- Revise (as needed) and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

STEPS OF AN OIE INVESTIGATION

- Receive Notice/Complaint
 - Title IX allegations requires “actual notice” to trigger complaint before initiating investigation
 - Title VII allegations only require “knew or should have known” to trigger investigation (no formal complaint required)
 - Both Title IX and Title VII allegations require remedial response (supportive measures)
- Conduct Initial Assessment and Jurisdiction Determination
- If does not meet Title IX standards but is based on a protected class, including sex/gender and involves a student respondent the process will generally follow the Title IX Investigation standard. If an employee respondent, the case will be addressed through OIE process for employees

STEPS OF AN OIE INVESTIGATION

- Notice of Investigation to Parties/Notice of Formal Allegation(NOIA) (“Charge”).
- Establish investigation strategy
- Formal comprehensive investigation.
 - Witness interviews
 - Evidence gathering.
- Draft report
- Provide report including all evidence directly related to the allegations to parties and their advisors for inspection and review
- Complete final report.
 - Synthesize and analyze relevant evidence, provide a finding to appropriate source



THE INVESTIGATION REPORT

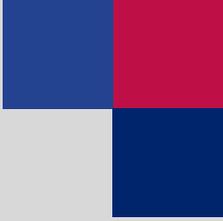
THE INVESTIGATION REPORT

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

G.A.S. FRAMEWORK

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

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



OVERVIEW OF EVIDENCE

WEIGHTING EVIDENCE

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

Documentary Evidence

e.g., supportive writings or documents

Electronic Evidence

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

Real Evidence

i.e., physical objects

Direct or Testimonial Evidence

e.g., personal observation or experience

Circumstantial Evidence

i.e., not eyewitness, but compelling

Hearsay Evidence

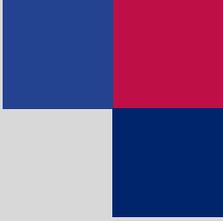
e.g., statement made outside the hearing but presented as important information

Character Evidence

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

DETAILS OF ANALYSIS OF EVIDENCE

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



CREDIBILITY

CREDIBILITY OVERVIEW

Corroboration

- Aligned testimony and/or physical evidence.

Inherent Plausibility

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

Motive to Falsify

- Do they have a reason to lie?

Past Record

- Is there a history of similar behavior?

Demeanor

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

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

EEOC (1999)

FACTORS TO CONSIDER FOR CREDIBILITY

Corroborating Evidence

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

FACTORS TO CONSIDER FOR CREDIBILITY

Corroborating Evidence (Cont.)

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

FACTORS TO CONSIDER FOR CREDIBILITY

Inherent Plausibility

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

FACTORS TO CONSIDER FOR CREDIBILITY

Inherent Plausibility (Cont.)

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

FACTORS TO CONSIDER FOR CREDIBILITY

Motive to Falsify

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

FACTORS TO CONSIDER FOR CREDIBILITY

Past Record

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

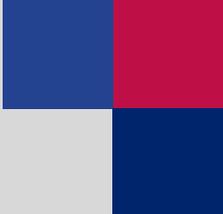
FACTORS TO CONSIDER FOR CREDIBILITY

Demeanor

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

CREDIBILITY ASSESSMENTS IN INVESTIGATION REPORTS

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



HEARINGS, SANCTIONING & WRITTEN DETERMINATIONS

LIVE HEARING

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

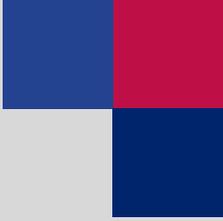
WRITTEN DETERMINATIONS

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

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

WRITTEN DETERMINATIONS

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



APPEALS

FINALITY OF DETERMINATION

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

APPEAL PROCESS

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

APPEAL PROCESS

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

APPEAL PROCESS

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

APPEAL PROCESS

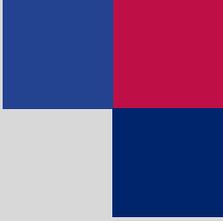
- Where the Appeal Officer does not find that one of the bases is clearly articulated, they will deny the appeal. In such instances, the findings will stand, and the appeal will be retained in the investigation file.
- Note: A party must provide specific information to articulate that one or more of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

APPEAL DISPOSITIONS

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

ADDITIONAL APPEAL INFORMATION

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



FREE SPEECH TENSIONS

COMMON CHALLENGES ON COLLEGE CAMPUSES

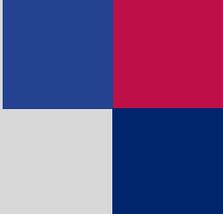
- Controversial speakers and challenging messages, often sparking violent responses
- Clashes between protected expression and Academic Freedom in the classroom
- Offensive organizational theme parties
- Social media challenges
- Offensive speech or expression directed toward an individual or about a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

BIAS INCIDENTS v HATE CRIMES

- Bias incidents involve action directed toward an individual or group based on their protected class or on their political beliefs.
 - These incidents are often motivated by prejudice
- Hate Crimes occur when an action was taken that otherwise constitutes a crime or criminal offense against another based on the perpetrator's bias against the victim

THE CONFLICT OF VALUES

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



HERE'S WHAT WE LEARNED ABOUT STUDENT ATTITUDES

BROOKINGS INSTITUTE STUDY RESULTS

A Fellow at the Brookings Institute conducted a study of students' beliefs and opinions about the First Amendment

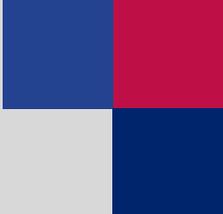
Some interesting results:

- 39% of students surveyed believe that the First Amendment protects “hate speech”
- 51% thought it is appropriate for students to disrupt a controversial speaker
- More than 20% consider it reasonable to use violence to stop offensive speech
- 53% support prohibiting certain speech or expression of viewpoints that are offensive or biased against certain groups of student to create a positive learning environment for all students

BROOKINGS INSTITUTE RESULTS (CON'T)

- Across all categories, the majority of students appeared to prefer an environment in which their institution is expected to create an environment that shelters them from offensive views

Brookings Institute Study: Views Among College Students Regarding the First Amendment: Results from a New Survey (John Villasenor, September, 2017)



WHAT ABOUT OPPOSING VIEWS? CAN YOU DISRUPT A PRESENTATION?

PORTLAND STATE UNIVERSITY

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

Was this the protester's right?

HECKLER'S VETO

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

Is this OK?

HECKLER'S VETO (CONT.)

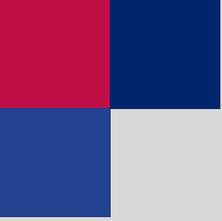
- Generally, no, because the Constitution requires the government to control the crowd in order to defend the communication of ideas, rather than to suppress them.
- But when the opposition moves from counter speech to violence the government may step in and is expected to protect the speaker and others.

SO WHAT CAN WE DO?

WHAT CAN THE COLLEGE DO?

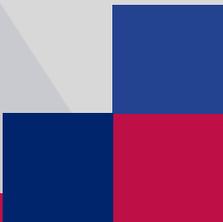
- Given the legal nuances and Supreme Court decisions over the years, campuses are limited in what we can do in responding to hurtful expression unless it violates a policy
- Students who are impacted by hateful and hurtful speech of others generally do not want to hear what we cannot do or that something is "protected speech" and we can't take action
- BUT, some suggestions include:
 - A campus can censor or punish speech that meets the legal standards for harassment, true threats, or other expression not protected by the First Amendment
 - A campus can impose reasonable time, place and manner restrictions to support the educational environment or protect the safety of students
 - A campus can provide support and resources for the student harmed by another person's offensive or hurtful expression

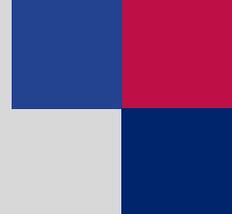
- A campus should expect university administrators to speak out against especially egregious speech acts and, most importantly, encourage the university community to make its own decisions about what speech acts deserve praise or condemnation.



Association of
Title IX Administrators

Questions?





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