Title IX Coordinator-
Combined Tiers 1&2
(AICUP)

November 2023

Presented by DSA Associates:

Adrienne Murray

D. Stafford & Associates, LLC
179 Rehoboth Avenue, #1121
Rehoboth Beach, DE 19971
302-344-5809
Dolores@DStaffordandAssociates.com
www.dstaffordandassociates.com

©All rights reserved by DSA

(Limited permission is granted to each attendee of this class to make training materials available per the requirements outlined in the Title IX Regulations published on May 19, 2020)
Combined Course
Tier 1 Topics: Title IX Coordinator – Law and Policy

• The Law
• Title IX Regulations
• Title IX Grievance Procedures
• VAWA Procedural Requirements
• Addressing “Non-Title IX” Cases

Tier 2 Topics: Title IX Coordinator – Sex Discrimination Response

• Intake and Notice
• Informal Resolutions
• Investigation Stage
• Formal Resolutions
• Institution Integrity and Training
Adrienne Meador Murray, Vice President, Equity Compliance and Civil Rights Services

In January 2014, Adrienne Meador Murray joined D. Stafford & Associates where she currently serves as the Vice President, Equity Compliance and Civil Rights Services after having been affiliated with D. Stafford & Associates as a part-time Associate since 2012 and the National Association of Clery Compliance Officers & Professionals (NACCOP) where she currently serves as Director of Training and Compliance Activities. Murray began her career in municipal law enforcement as a civilian employee with the City of Richmond Police Department (Virginia). She graduated from the Virginia Commonwealth University Police Training Academy and began her career as a sworn police officer for the University of Richmond (UR) Police Department (Virginia). At UR, Murray progressed through the ranks from a night shift patrol officer to Operations Lieutenant (overseeing criminal investigations, crime prevention and patrol) over the span of a decade before becoming the Chief of Police at Davidson College in North Carolina. Most recently, Murray served as Chief of Police at Trinity Washington University (in Washington, D.C.).

As the Executive Director, Equity Compliance and Civil Rights Services for DSA, Murray builds on her 17-year career in law enforcement in which she became a nationally recognized expert in the field of best practice postsecondary institutional response to the sexual victimization of college women in the United States and in Canada. She is also a trained civil rights investigator and is well respected throughout the country for her ability to aid institutions in understating how to do best practice criminal and civil rights investigations concurrently. She is well known for her work in having provided support, advocacy and criminal investigative services for victims of sexual assault, stalking and intimate partner violence and is a sought-out speaker and investigator. She has expertise in the construction of best practice law enforcement standard operating procedures and training police officers to respond in best practice and trauma-informed ways to victims of sexual assault and intimate partner violence. In her current role, Murray coordinates curriculum development and instruction for national classes, including basic and advanced sexual misconduct investigation classes; an investigation of dating violence, domestic violence and stalking class; and a Title IX Coordinator/Investigator class offered through D. Stafford & Associates. To date, Murray has trained more than 3,500 criminal and civil rights investigators throughout the U.S.

Drawing on her experiences as a trained criminal and civil rights investigator, Murray also oversees independent investigations of complex sexual misconduct cases; conducts audits of Title IX/VAWA
Compliance; drafts institutional sexual misconduct policies and procedures; and conducts campus-based trainings pertaining to the resolution of sexual misconduct offenses on college and university campuses. Murray frequently presents at regional and national conferences on topics such as the *Sexual Victimization of College Women, Understanding Consent and Incapacitation, and Responding to Sexual Assault on Campus: Clery Act and Title IX Implications*. Murray also conducts provincially specific sexual misconduct trainings throughout Canada.

Murray is a graduate of the University of Richmond, where she received her Bachelor's Degree in Applied Studies in Human Resource Management and of New England College, where she received her Master’s Degree in Campus Public Safety Administration. Murray is also a graduate of the 235th session of the prestigious FBI National Academy where she was awarded a graduate certificate in Criminal Justice from the University of Virginia. She has authored numerous journal articles.
INVESTIGATION CLASS ACRONYMS

ASR: Annual Security Report (often used as a reference to the Annual Security Report and/or the Annual Security and Fire Safety Report) that must be published by each institution of higher education.

CSA: Campus Security Authority—Individuals on each campus who have been identified by the Department of Education as persons who are required to report crimes that they become aware of to the Reporting Structure at each institution.

DCL: Dear Colleague Letter—this is a formal name of the method of communication from the Department of Education to college campuses. It is like naming their official “memo” to campuses.

FERPA: Family Educational Rights and Privacy Act—governs the confidentiality of student records.

FNE: Forensic Nurse Examiners

GO: General Order—some departments describe their operating procedures as general orders

HEOA: Higher Education Opportunity Act—the broader law that contains the Clery Act language and the fire safety and missing person language that is in the law but not contained within the “Clery Act” portion of the law.

HIPAA: Health Insurance and Privacy and Portability Act—governs privacy of medical records.

MOU: Memorandum of Understanding—an official agreement developed between agencies.

NIBRS: National Incident-Based Reporting System. 1 of 2 crime reporting systems developed by the FBI, but not the system that you are required to use for Clery Reporting—the only portion of this system that is used for Clery Act purposes are the 4 forcible and 2 non-forcible sex offense definitions.

OCR: Office of Civil Rights—the unit of the Department of Education that oversees Title IX Compliance.

PD: Police Department

PS: Public Safety

PNG: Persona-non-Grata—process used by some campuses not keep students from entering certain areas of the campus or the entire campus (administrative process) versus legal bar notice or trespass warning.

SACC: Sexual Assault Crisis Center, also known as Women’s Center.

SANE: Sexual Assault Nurse Examiner
**SART:** Sexual Assault Response Team

**SOP:** Standard Operating Procedures—some departments describe their operating procedures as Standard Operating Procedures. Some call them General Orders, etc...

**SWA:** Senior Women’s Administrator (Athletics)

**TWN:** Timely Warning Notice

**UCR:** Uniformed Crime Report. This is 1 of 2 crime statistics reporting systems developed by the FBI. Institutions are required to use UCR Standards for counting and classifying crimes for reporting the Clery statistics.

**VAWA:** Violence Against Women Act
TITLE IX

Copyright

(Limited permission is granted to each attendee of this class to make training materials available per the requirements outlined in the Title IX Regulations published on May 19, 2020)

These materials are copyright of D. Stafford & Associates, LLC © 2023 D. STAFFORD & ASSOCIATES. All rights reserved.

Any distribution or reproduction of part or all of the contents in any form is prohibited other than the following:

- As required by 34 C.F.R. § 106.45(b)(1)(iii) and § 106.45(B)(10)(i)(D), this material in its entirety may be posted to the website of the institution in which you were associated with at the time in which you were enrolled in this training.
- Public inspection upon request.

You may not, except with our express written permission, distribute or commercially exploit the content. Nor may you transmit it or store it in any other website or other form of electronic retrieval system.
ISSUANCE OF CERTIFICATES FOR COMPLETION

To receive a certificate, attendees must attend the majority of the class and have paid class invoice in full. This applies to both in-person classes and virtual classes. We understand that attendees may need to miss class for a legitimate reason for longer periods of time or may need to leave the room during a class for a few minutes to take a phone call or attend to other business. If an attendee misses a significant amount of the class (depending on the length of the class) or they miss an attendance poll, they will not be issued a certificate of completion for the class.

Attendees should report each absence using the online form provided (each class has its own unique form that is sent to all attendees via email prior to class). Attendees should complete the form twice for each absence: once to record their departure, and again to record their return. Attendees should complete the form immediately before leaving class and as soon as practicable upon their return. If an attendee signs out but does not sign back in, they will be marked absent for the remainder of the day.

The criteria for receiving a certificate is determined based on missed class time and participation in the Attendance Polls that will be launched throughout each day of class. Attendance polls are left up for approximately 5 minutes and the instructor notifies the attendees that a poll is being launched to ensure that everyone who is present can respond to the poll. If an attendee is unable to respond to the attendance poll, the attendee would need to immediately post “I am here” in the chat feature within the Zoom platform. That way we can give the attendee credit for being in attendance for that specific poll. Notifying us after the attendance poll has been closed will not allow us to give the attendee credit for being in class during the poll.

Some of our classes may qualify for credit toward a Master’s Degree at New England College (and regardless if you decide to seek credit or not, accreditation requirements mandate that we follow the same standards for all class attendees), so we have strict attendance standards that we follow for issuance of a certificate. For DSA & NACCOP, issuance of a Certificate of Completion is verification of attendance.
Title IX Bibliography


National Sexual Violence Resource Center and Pennsylvania Coalition Against Rape. (2012). *Sexual Violence & Individuals Who Identify as LGBTQ*. NSVRC_Research-Brief_Sexual-Violence-


Threat Assessment Bibliography


Carlisle, N. (2018, October 25). Man who killed Utah student Lauren McCluskey had a history of sex assault that was downplayed in the criminal justice system. *Salt Lake Tribune*.


Contrera, J. (2019, January 25). ‘Why did you do this?’ His brother confessed to gunning down 17 people in Parkland. But he’s the only family Zach Cruz has left. *The Washington Post*.


Snyder, R. L. (2020). *No visible bruises: what we don’t know about domestic violence can kill us*. Scribe Publications.


AGENDA-DAY ONE

The Law
• Title IX Regulations
• Title IX Grievance Procedures
• Clery Act (VAWA) Procedural Requirements
• Addressing “Non-Title IX” Cases
• Recent Audits and Insights

AGENDA-DAY TWO

The Process
• Intake and Notice
• Informal Resolutions
• Investigation Stage
• Formal Resolutions
• Institution Integrity and Training

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 education program or activity receiving Federal financial assistance.

§ 1681(a) - EXCEPTIONS

- Admission policies
- Institutions changing from single-sex status
- Religious institutions
- Military services or merchant marines
- Public traditional single-sex institutions
- Social fraternities or sororities
- Voluntary youth organizations
- Boy or girl conferences
- Father-son/mother-daughter activities
- "Beauty" pageants

§ 1681(c) - "EDUCATIONAL INSTITUTION"

Any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.
REGULATORY GUIDANCE ("TITLE IX REGULATIONS")

1975: Department of Health, Education and Welfare issued regulations
2020: New regulations implemented
2022: Amendments to regulations proposed

REGULATORY PROCESS

Pre-rulemaking and initiation of rulemaking
Drafting of the proposed rule
Notice and comment period
Finalization
Post-finalization
CASE LAW

WHEN CASE LAW DECISIONS IMPACT YOU

- Supreme Court
  - Publics: Yes
  - Privates: Maybe

- Your Circuit
  - Publics: Yes
  - Privates: Maybe

- Not Your Circuit
  - No
34 C.F.R. § 106 - SUBPARTS

Subpart A: Introduction (106.1 – 106.9)
Subpart B: Coverage (106.11 – 106.18)
Subpart C: Admission and Recruitment (106.21 – 106.24)
Subpart D: Education Programs/Activities (106.31 – 106.46)
Subpart E: Employment (106.51 – 106.62)
Subpart F: Retaliation (106.71 – 106.72)
Subpart G: Procedures (106.81 – 106.82)

TITLE IX REGULATIONS OVERVIEW

Applies to Higher Education and K-12
Covers wide range of sex discrimination

SUBPART A: INTRODUCTION
SUBPART A: A FEW FYI'S...

§ 106.2 Definitions
§ 106.3 Remedial Action
§ 106.3 Affirmative Action
§ 106.6 Preservation of rights

§ 106.8(a) - DESIGNATION OF COORDINATOR

Designate: Designate at least one person
Notify: Notify people of name and contact information
Receive: Receive reports in person, by mail, by phone, by email, or other
Accept: Accept reports during non-business hours

§ 106.8(b)(1) - NOTIFICATION OF POLICY

Who:
• Applicants - admission
• Applicants - employment
• Students
• Employees
• Unions, etc.

What:
• Does not discriminate
• Required by Title IX
• Includes admission & employment
• Inquiries to Title IX or OCR
• Grievance procedures & process
• How to report or file complaint of discrimination
• How to report or file complaint of harassment
• How the school will respond
§ 106.8(b)(2) – PUBLICATIONS

What
• Contact information
• Policy

Where
• Website
• Handbook and/or Catalogs

§ 106.8(c) - ADOPTION OF GRIEVANCE PROCEDURES

“grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part and a grievance process that complies with § 106.45 for formal complaints as defined in § 106.30.”

§ 106.8(d)
Applies only to sex discrimination occurring against a person in the United States
§ 106.12 - EDUCATIONAL INSTITUTIONS CONTROLLED BY RELIGIOUS ORGANIZATIONS

- May submit in writing seeking assurance of the exemption
- Must identify the provision and explain how it conflicts with a specific tenet
- Not required to seek assurance
- May raise its exemption at any time

§ 106.15 ADMISSIONS (EXCEPTIONS AND COVERAGE)

Appplies to:
- Vocational education
- Professional education
- Graduate higher education
- Public undergraduate education

Does not apply to:
- Public schools with traditionally one sex
SUBPART C: ADMISSION & RECRUITMENT

DISCRIMINATION AND ADMISSIONS
Subpart B (Exceptions): Private institutions CAN discriminate in admissions
Subpart C (Admissions): Everyone else cannot discriminate in admissions
Subpart D (Programs or Activities): Once they are in, discrimination is prohibited

§ 106.21 ADMISSION & § 106.23 RECRUITMENT
- Limits or proportions
- Ranking separately
- Testing
- Pregnancy
- Parenting or marital status
- Recruitments from single-sex high schools
- Can ask gender but...
SUBPART D: EDUCATIONAL PROGRAMS OR ACTIVITIES

§ 106.31 EDUCATIONAL PROGRAMS OR ACTIVITIES

Aid, Benefit, or Service
Requirement or Condition
Right or privilege
Advantage or opportunity

Academic
Extracurricular
Research
Discipline
Treatment
Externships

§ 106.37 FINANCIAL ASSISTANCE

§ 106.37(a) – Can't discriminate in financial assistance
§ 106.37(b) – Exceptions to rule that can't have single-sex scholarships
§ 106.37(c) – Athletic scholarships allocated proportionally based on participation numbers
§ 106.31(B)(4) EQUITY IN DISCIPLINE

Rules of Behavior
Sanctions

§ 106.32 - HOUSING

A recipient shall not, on the basis of sex, apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing, except as provided in this section (including housing provided only to married students).

§ 106.33 - COMPARABLE FACILITIES

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.
§ 106.40 MARITAL OR PARENTAL STATUS

Reminder: Can’t discriminate in admissions on basis of pregnancy...
§ 106.21(c)

No rules concerning actual or potential parental, family, or marital status on the basis of sex
§ 106.40(a)

No discrimination on the basis of pregnancy, childbirth, false pregnancy, termination or recovery
§ 106.40(b)

PREGNANCY: INSTITUTIONAL RESPONSIBILITIES

Must Allow or Provide
- Continued participation in programs/activities
- Reasonable adjustments
- Excuse absences
- Leave of absence
- Return status
- Temporary medical condition
- Protects against harassment
- Policies and procedures
- Breastfeeding

Cannot . . .
- Require doctor’s note ONLY for pregnancy
- List pregnancy as an infraction
- Exclude from programs/activities
- Remove financial aid

§ 106.41(a) - ATHLETICS

No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.
Applies to intercollegiate, club, & intramural

Separate Teams are permitted

§ 106.41(c) - EQUAL OPPORTUNITY
1. Accommodate the interests
2. Equipment and supplies
3. Scheduling (games and practice)
4. Travel and per diem
5. Coaching and tutoring
6. Assignment and compensation for above
7. Locker room and other facilities
8. Medical and training services
9. Housing and dining services
10. Publicity

WAIT FOR IT…ALSO IN SUBPART D (COMING SOON!)

§106.30 DEFINITIONS (FOR THIS SUBPART)  §106.44 RESPONSE TO SEXUAL HARASSMENT  §106.45 GRIEVANCE PROCESS
Oversight for Sex Discrimination Issues

SUBPART E: EMPLOYMENT

KEY TAKEAWAY

Title IX common rule applies its prohibition against sex-based discrimination to the full range of activities related to the recruitment, evaluation, classification, payment, assignment, retention, or treatment of employees. The Title IX common rule addresses various areas including the treatment of pregnancy as a temporary disability, pre-employment inquiries regarding marital or parental status, imposition of employment criteria or testing devices having a disproportionate impact, recruitment, and compensation and benefits.

The Department of Justice, Title IX Legal Manual
§ 106.7 Effect of employment opportunities
§ 106.51 Employment
§ 106.52 Employment criteria
§ 106.53 Recruitment
§ 106.54 Compensation
§ 106.55 Job classification and structure
§ 106.56 Fringe benefits
§ 106.57 Marital or parental status
§ 106.58 Effect of other laws
§ 106.59 Advertising
§ 106.60 Pre-employment inquiries
§ 106.61 Sex as a bona fide occupational qualification

**§ 106.71 RETALIATION**

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 this part, 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 part...
§ 106.71 RETALIATION

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.

Must keep confidential the identity of parties and witnesses
May use sex discrimination grievance procedures
Exercised of First Amendment does not constitute retaliation
Discipline for "materially false statement in bad faith" is not retaliation
But determination of responsibility alone does not mean a person provided a false statement.
BEFORE WE BEGIN…

Sex Discrimination
§ 106.8(c)
- "grievance procedures that provide for the prompt and equitable resolution of student and employee complaints."
- Any person may report sex discrimination to the Title IX Coordinator
- Must publish grievance procedures to address sex discrimination
- No requirement other than "prompt" and "equitable"

Sexual Harassment
§ 106.44 and § 106.45

Other Behaviors
Conduct codes

MORE REMINDERS

• Applies to K-12
• Incorporates the Clery Act
• Lots of guidance: 500+ pages of preamble plus more recent Q&As
• (This section is not in order of regulations)
§ 106.30(a) - DEFINITIONS

Complainant
• An individual who is alleged to be the victim of conduct that could constitute sexual harassment

Respondent
• An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment

TITLE IX PERSONNEL

Title IX Coordinator  Investigator  Decision-maker  Informal Resolution Facilitator
DUTIES OF THE TITLE IX COORDINATOR

• § 106.8(a) Must be referred to as the “Title IX Coordinator”
• § 106.8(a) Coordinate efforts to comply
• § 106.44(a) Receive reports and promptly contact the complainant
• § 106.30 Sign formal complaints
• § 106.30 Responsible for coordinating the effective implementation of supportive measures

§ 106.45(b)(1)(iii) - TRAINING

All Title IX Personnel
• Definition of sexual harassment
• Scope of the recipient’s education program or activity
• How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable
• How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias

Decision-makers
• Technology to be used at a live hearing
• Issues of relevance of questions and evidence, including when questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant

Investigators
• Issues of relevance to create an investigative report that fairly summarizes relevant evidence
ADVISOR OF CHOICE

May be but is not required to be an attorney
May accompany to any meeting or proceeding
Institution may restrict participation (except at hearing)
Receives the draft and final reports
Conducts cross-examination at hearing

SEXUAL HARASSMENT DEFINITIONS

§ 106.30(a) - 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;

PRONG 1: 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

§ 106.30(a)

QUID PRO QUO (FROM THE PREAMBLE)

“This for that” harassment

Must be an employee respondent (not volunteer, visitor, student)

“Unwelcome” is subjective element (submission vs. consent)

Does not need to meet pervasiveness element

Limited need to show impact - single instance could jeopardize access

PRONG 2: HOSTILE ENVIRONMENT+ (THE DAVIS STANDARD)

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

§ 106.30(a)
§ 106.30(a) - HOSTILE ENVIRONMENT+

Referred to in preamble as “The Davis Standard”
Not the same Title VII “hostile environment” or 2001 Guidance
First Amendment protections
Must show the “effectively denies” to reach the bar

PRONG 3: THE VAWA OFFENSES


THE VAWA OFFENSES

Severity, pervasiveness, and offensiveness are not elements
Denial of equal access not an element - it is assumed
Includes multiple offenses
§ 106.30(a) - THE VAWA OFFENSES

Sexual Assault
- Rape
- Fondling
- Incest
- Statutory Rape

Intimate Partner Violence
- Dating Violence
- Domestic Violence

Stalking

SEXUAL ASSAULT

OPTION 1: SEXUAL ASSAULT - RAPE (FROM SRS)

Rape - The penetration, no matter how slight, of the vagina or anus, with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim. This offense includes the rape of both males and females.

OPTION 2: SEXUAL ASSAULT - RAPE (FROM NIBRS)

Sex Offenses, Forcible - Any sexual act directed against another person, without the consent of the victim including instances where the victim is incapable of giving consent.

Forcible Rape - (Except Statutory Rape) The carnal knowledge of a person, forcibly and/or against that person's will or not forcibly or against the person's will in instances where the victim is incapable of giving consent because of his/her temporary or permanent mental or physical incapacity.

Forcible Sodomy - Oral or anal sexual intercourse with another person, forcibly and/or against that person's will or not forcibly or against the person's will in instances where the victim is incapable of giving consent because of his/her youth or because of his/her 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, forcibly and/or against that person's will or not forcibly or against the person's will in instances where the victim is incapable of giving consent because of his/her temporary or permanent mental or physical incapacity.
**SEXUAL ASSAULT - FONDLING**

**Fondling** - The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of age or because of temporary or permanent mental incapacity.

---

**§ 106.30(a) - CONSENT**

The Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault.

---

**SEXUAL ASSAULT DEFINITION CONSIDERATIONS**

- Includes attempts
- Can broaden based on “consent” definition
- Can specify which body parts are “private” and whether touching is over or under clothes
- “Severity” of rape vs. fondling
- Naming the offense in the policy
SEXUAL ASSAULT - INCEST & STATUTORY RAPE

**Incest** - Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

**Statutory Rape** - Sexual intercourse with a person who is under the statutory age of consent.

INCEST AND STATUTORY RAPE CONSIDERATIONS

State law definitions  Complainant as a non-student  Conduct codes

INTIMATE PARTNER VIOLENCE

“dating violence” as defined in 34 U.S.C. 12291(a)(10),
“domestic violence” as defined in 34 U.S.C. 12291(a)(8)
**THE BREADCRUMBS**

Title IX Regulations


Title IX

- VAWA Statute
  - 34 U.S. Code § 12291
  - Definitions and grant provisions

CLERY

- Clery Act Regulations
  - 34 CFR § 668.46(a)
  - Expanded Definitions of Dating Violence

**DATING VIOLENCE - 34 U.S.C. 12291(A)(10)**

The term “dating violence” means violence committed by a person—

(A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and

(B) where the existence of such a relationship shall be determined based on a consideration of the following factors:

(i) The length of the relationship.

(ii) The type of relationship.

(iii) The frequency of interaction between the persons involved in the relationship.

**DATING VIOLENCE - CLERY REGULATION ADDITIONS**

(ii) For the purposes of this definition -

(A) Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.

(B) Dating violence does not include acts covered under the definition of domestic violence.
DOMESTIC VIOLENCE - 34 U.S.C. 12291(A)(8)

The term "domestic violence" includes felony or misdemeanor crimes of violence committed by:

- a current or former spouse or intimate partner of the victim,
- by a person with whom the victim shares a child in common,
- a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner,
- by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or
- by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction.

INTIMATE PARTNER VIOLENCE CONSIDERATIONS

Consistency in assigning violations

Severity, pervasiveness, and offensiveness not elements

Denial of equal access is not an element

STALKING

“stalking” as defined in 34 U.S.C. 12291(a)(30)
STALKING - 34 U.S.C. 12291(A)(30)

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to—

• Fear for the person’s safety or the safety of others; or
• Suffer substantial emotional distress.

STALKING - CLERY REGULATION ADDITIONS

(ii) For the purposes of this definition:

(A) Course of conduct means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person’s property.

(B) Reasonable person means a reasonable person under similar circumstances and with similar identities to the victim.

(C) Substantial emotional distress means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

TITLE IX JURISDICTION - PERSON

“At the time of filing a formal complaint… the complainant must be participating in or attempting to participate in the education program or activity.” (§106.30(a))

The recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs.
“ATTEMPTING TO PARTICIPATE”

- Has withdrawn due to alleged harassment and has desire to re-enroll
- Has graduated but intends to apply to new program or participate in alumni programs
- Is on a leave of absence and still enrolled or intends to re-apply
- Has applied for admission

SIDEBAR: NON-STUDENT OR NON-EMPLOYEE COMPLAINANTS (Q&A)

There are circumstances when a Title IX Coordinator may need to sign a formal complaint that obligates the school to initiate an investigation regardless of the complainant’s relationship with the school or interest in participating in the Title IX grievance process:

- Examples:
  - Perpetrator in a position of authority
  - Potential for harm to other students

TITLE IX JURISDICTION – CONTEXT OF EDUCATIONAL PROGRAMS OR ACTIVITIES

Locations, events or circumstances in which the institution has control over the respondent AND context

- Any building owned or controlled by a student organization that is officially recognized
- Occurred in the United States
OFF-CAMPUS JURISDICTION

- Hotel: On field trip
- Home: While tutoring
- Bus: For athletic travel
- Virtual: During class
- Business: At internship

RECEIVING REPORTS

§ 106.44(a) - GENERAL RESPONSE TO SEXUAL HARASSMENT

- Prompt
- Not Deliberately Indifferent
  - i.e., clearly unreasonable in light of the known circumstances
- Equitable
  - Offer supportive measures to complainant
  - Follow grievance process before imposing sanctions
§ 106.30(a) - ACTUAL KNOWLEDGE

Title IX Coordinator

Official with Authority

NO ACTUAL KNOWLEDGE § 106.30(a)

Not constructive notice

Not vicarious liability

Not when respondent only has notice

Not just ability, obligation, or training to report

WHO MAY REPORT (FROM THE Q&A)

“A school may receive actual knowledge of sexual harassment from any person. There is no requirement that the person be participating in or attempting to participate in a school program or activity to report sexual harassment.”

• Complainant
• Friend
• Parent
• Witness
RESPONSE TO A REPORT

The Title IX Coordinator must promptly:
- Contact the complainant
- Offer supportive measures
- Explain the process for filing a formal complaint

§ 106.30(a) - SUPPORTIVE MEASURES

Such measures are designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment, or deter sexual harassment.

SUPPORTIVE MEASURES

- Non-disciplinary and non-punitive
- Individualized
- Offered as appropriate
- Reasonably available
- Without fee or charge
- Complainant or the respondent
- Before or after the filing of a formal complaint or where no formal complaint has been filed
- Must keep confidential
**SUPPORTIVE MEASURE EXAMPLES § 106.30(a)**

- Counseling
- Extensions of deadlines or other course-related adjustments
- Modifications of work or class schedules
- Campus escort services
- Mutual restrictions on contact between the parties
- Changes in work or housing locations
- Leaves of absence
- Increased security and monitoring of certain areas of the campus
- Other similar measures

---

**WHAT COULD “UNREASONABLY BURDEN”?**

- Change in class schedule
- Housing adjustment
- Sports team membership
- Student government position
- Extracurricular activity participation
- Suspension
- Expulsion

---

**LEAVE OPTIONS**

- Emergency removal
- Administrative leave
§ 106.44(c) - EMERGENCY REMOVAL

Immediate threat to physical health or safety
Must arise from the allegations
Provide notice and opportunity to challenge

SUPPORTIVE MEASURES FROM GUIDANCE

• Fact-specific determinations of supportive measures
• If considered as a potential sanction, it is a burden
• Emergency removal can remove from all or part of educational program
• No contact orders do not have to be mutual
• Student workers straddle both removal options

§ 106.30(a) - FORMAL COMPLAINT

filed by a complainant
signed by the Title IX Coordinator
§ 106.45 - GRIEVANCE PROCESS FOR FORMAL COMPLAINTS OF SEXUAL HARASSMENT

§ 106.45(a) - RECIPIENT'S TREATMENT OF PARTIES

A recipient’s treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under Title IX.

§106.45 (b)(1)(i-iii) - GRIEVANCE PROCESS

- Equitable
- Objective Evaluation (inculpatory and exculpatory)
- No conflict of interest or bias
§ 106.45(b)(1)(iv-x) - GRIEVANCE PROCESS

- Presumption of not responsible
- Prompt time frames
- Range of sanctions
- Standard of evidence
- Appeal Procedures
- Range of supportive measures
- Limits on privileged evidence

§ 106.45(b)(2) - NOTICE OF ALLEGATIONS

- Grievance process
- Sufficient details and sufficient time to prepare
- Identities of the parties, alleged conduct
- Date and location of incident
- Presumed not responsible
- Advisor of choice
- False statements

§ 106.45(b)(2)(ii) - Additional Allegations

An amended notice must be sent to the parties when additional allegations will be investigated that were not in the original notice letter.
§ 106.45(b)(3) - DISMISSAL OF FORMAL COMPLAINT

**Must Dismiss**
- If the conduct alleged in the formal complaint would not constitute sexual harassment
- Did not occur in the educational program or activity
- Did not occur in the United States

**May Dismiss**
- Complainant withdraws the formal complaint
- Respondent is no longer enrolled/employed
- Insufficient evidence

§ 106.45(b)(4) - CONSOLIDATION OF COMPLAINTS

- Multiple respondents
- More than one complainant against one or more respondent
- One party against other party

§ 106.45(b)(9) - INFORMAL RESOLUTION

- Notice
- Voluntary
- Not allowed for Employee/student
§ 106.45(b)(5) - INVESTIGATION OF A FORMAL COMPLAINT

**Burden of proof is on the institution**

**Equal opportunity to present witnesses and facts**

**No restriction on discussing allegations**

Advisor of choice

Notice of meetings

Right to inspect evidence and respond

Receive investigative report and may respond
§ 106.45(b)(6)(i) - CROSS-EXAMINATION

BY ADVISOR OF CHOICE

- Directly, orally, and in real time by the party’s advisor of choice
- If a party does not have an advisor, the recipient must provide without fee or charge to that party, an advisor of the recipient’s choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.
§ 106.45(b)(6)(i) - RELEVANCY DETERMINATION

Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.

§ 106.45(b)(6)(i) - RELEVANCY - SEXUAL PREDISPOSITION AND HISTORY

Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, unless

• offered to prove that someone other than the respondent committed the conduct, or
• if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.

§ 106.45(b)(6)(i) - “PHYSICALLY PRESENT”
§ 106.45(b)(6)(i) - HEARING RECORDING

Audio  Video  Transcript

§ 106.45 (b)(7)(i) - DETERMINATION REGARDING RESPONSIBILITY

Made by the decision-maker  Decision-maker can have no other role  Applying the standard of evidence

§ 106.45 (b)(7)(ii) - DETERMINATION REGARDING RESPONSIBILITY

Allegations  Procedural steps  Findings of fact  Conclusion/application  Rationale  Appeal procedures
Sanctions and Remedies

Sanctions:
Disciplinary/punitive

Remedies:
Restore or preserve access

§ 106.45(b)(8) - APPEALS

• Mandatory grounds
  • Procedural irregularity that affected the outcome
  • New evidence that was not reasonably available when the determination of responsibility was made that could affect the outcome
  • The Title IX Coordinator, investigator, or decision-maker had a general or specific conflict of interest or bias against the complainant or respondent that affected the outcome
• Additional grounds are permitted
§ 106.45(b)(8)(iii) - APPEALS

- Notification to both parties of an appeal submission
- Appeal officer cannot be the hearing decision-maker
- Appeal officer must be trained and be without bias/conflict
- Give both parties an opportunity to respond
- Notification of decision to both parties

§ 106.45(b)(10) - RECORDKEEPING

- Case Materials
- Training materials

Discussion
§ 668.46 - RESPONSE REQUIREMENTS FOR VAWA OFFENSES

Procedures victims of VAWA Offenses should follow

Procedures an institution will follow when offense reported

and make sure it is all in WRITING.

§ 668.46(b)(11)(vii) - WRITTEN EXPLANATION OF STUDENT OR EMPLOYEE’S RIGHTS

When a student or employee reports to the institution that the student or employee has been a victim of dating violence, domestic violence, sexual assault, or stalking, whether the offense occurred on or off campus, the institution will provide the student or employee a written explanation of the student’s or employee’s rights and options, as described in paragraphs (b)(11)(ii) through (vi) of this section . . .

§ 668.46(b)(11)(ii) - WRITTEN EXPLANATION OF RIGHTS AND OPTIONS

1. The importance of preserving evidence that may assist in proving that the alleged criminal offense occurred or may be helpful in obtaining a protection order
   • Not required but recommended: Where to obtain forensic exams, contact info, does not require police report and can have exam now, decide later

2. How and to whom the alleged offense should be reported
   • List any person or organization that can assist the victim
   • Recommended: Also include community organizations
§ 668.46(b)(11)(ii) - WRITTEN EXPLANATION OF RIGHTS AND OPTIONS

3. Notification of the victim’s option to
   • Notify proper law enforcement authorities, including on-campus and local police
   • Be assisted by campus authorities in notifying law enforcement authorities if the victim so chooses
   • Decline to notify such authorities

4. The rights of victims and the institution’s responsibilities for
   • Orders of protection
   • “No contact” orders
   • Restraining orders
   • Similar lawful orders issued by a criminal, civil, tribal, or institutional authorities

5. To students AND employees about existing
   • Counseling, health, mental health services
   • Victim Advocacy
   • Legal Assistance
   • Visa and Immigration Assistance
   • Student Financial Aid
   • Other services available for victims

6. Options for, available assistance in, and how to request changes to (if requested and reasonably available)
   • Academic, living, transportation, working

7. Confidentiality
   • Publicly available recordkeeping has no personally identifying information about the victim (not required for respondent but best practice in most cases)
   • Accommodations and protective measures are confidential (to the extent they can be without impairing the ability to provide them)

8. Disciplinary Procedures
   • An explanation of the procedures for institutional disciplinary action in cases of alleged dating violence, domestic violence, sexual assault, or stalking, as required
RESPONSE TO “ACTUAL KNOWLEDGE”

Title IX
• Contact the complainant
• Offer and/or implement supportive measures
• Explain the process for filing a formal complaint

Clery Act
• Written explanation of victim’s rights and options
• Assess for Timely Warning Notice OR Emergency Notification

CLERY ACT REQUIREMENTS FOR DISCIPLINARY PROCEEDINGS

Anticipated timelines (“reasonably prompt”)
Decision-making process
How to and options for filing a school complaint (with contact info)
How school determines which process to use
Who makes decisions
Include employee procedures
Use procedures regardless of Clery geography

§ 686.46(k)(2)(iii-iv)- ADVISORS

• Provide the accuser and the accused with the same opportunities to have others present during any institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice
• Not limit the choice of advisor or presence for either the accuser or the accused in any meeting or institutional disciplinary proceeding; however, the institution may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties
INFORMAL RESOLUTIONS

Title IX
• Can offer, but may not require
• Not allowed for “employee on student” sexual harassment
• Party may withdraw up to a point

Clery Act
• Written information about procedures the institution will follow for VAWA offenses (does not differentiate between formal vs informal)

FORMAL COMPLAINT RIGHTS

Title IX
• Treat equitably with goal to restore/preserve access to education; due process for respondent
• Reasonably prompt time-frames

Clery Act
• Prompt, fair and impartial investigation and resolution
• Anticipated timeframes
• List all possible sanctions for each offense (employees and students)
• Consistent with policy and transparent
• Not required to list all protective measures

WRITTEN DETERMINATION

Title IX
• Identification of the allegations
• Procedural steps taken from receipt through determination
• Findings of fact supporting the determination
• Conclusions regarding the application of code of conduct to the facts
• Result (responsibility, rationale, sanctions, remedies for each allegation)
• Appeals procedures
• When results become final (post appeal)

Clery Act
• Result (include any sanctions and rationale for results and sanction)
• Appeals procedures
• Any change to the result
• When such results become final
§ 668.46(k)(2)(iii-iv) - BIAS FREE AND TRAINING FOR "OFFICIALS"

Annual training on the issues related to dating violence, domestic violence, sexual assault and stalking and on how to conduct an investigation and hearing process that protects the safety of the victims and promotes accountability.

APPEALS

Title IX
- Must offer both parties an appeal
- Based on specific grounds

Clery Act
- Not required (but must provide notice if allowed along with appeal procedures)
- Simultaneous written decision describing result, sanction, any changes to the result, when it becomes final

Discussion
ADDRESSING “NON-TITLE IX” CASES

EXAMPLE BEHAVIORS OUTSIDE THE TITLE IX DEFINITIONS

- Administering a date rape drug
- Touching non-private body part with perpetrator’s private body part

“Title IX is not the exclusive remedy for sexual misconduct or traumatic events that affect students. A school has discretion to respond appropriately to reports of sexual misconduct that do not fit within the scope of conduct covered by the Title IX grievance process.” (85 Fed. Reg. at 30,199)
LOCATIONS OUTSIDE THE DEFINITION

- Outside an education program or activity
- Outside the U.S.

Wrap Up!

Sex Discrimination Response
INTAKE

DISCUSSION: RECEIPT OF THE REPORT

Sandoos A University
Title IX Referral Form
Submitted on January 9, 2023 at 10:58:47 am EST

Nature: Normal
Incident Date and Time: 2023-10-31 12:06 AM
Incident Location: Alcott Residence Hall Room 3A

Reported by
Name: Randy Dannevan
Title: Resident Director
Email: rd@essa.edu
Phone: 555-555-5551
Address:

Involved Parties
Complainant: uc@rbsa.edu 3A Alcott Hall
Rishi Reynolds (1349)
Respondent: r@rbsa.edu 3A Alcott Hall
Witnesses: Wendy White (1354) 555-555-5554

CASE STUDY: NEXT STEPS

What are your steps after receiving the report?

- Additional reports
- Video
- Notification requirements
- Review for Emergency Notification or Timely Warning
MEETING WITH THE COMPLAINANT

TITLE IX ASSESSMENT

BE PREPARED

READ THE REPORT
- Real-time in-person reports?

Learn about the party
- Year, major, grades, department, organization, etc.
- Discipline history?

Set the Space
- Accessible?
- Table or behind a desk?
- Tissues
- Fidget toys
The Formal Complaint

FORMAL COMPLAINT

1. How do you make this transition to asking them about the Formal Complaint?
2. Do you have them sign right there or give time? What does this look like?
3. Would you sign on the initial report? What information would you need to make that decision?

WHAT HAPPENS WHEN THE TITLE IX COORDINATORS SIGNS?

1. You do not become the complainant – but what does that mean?
2. How do you notify the Complainant that you are moving forward?
3. Do you keep the Complainant updated throughout the process?
4. Does the Complainant continue to have rights if they do not participate?
5. Should you also investigate if you signed the complaint?
6. How do you extend supportive measures?
**WHAT CAN THE TITLE IX COORDINATOR CLARIFY?**

- What information would be helpful to know at this point? What about during the investigation?
  - Was she in a relationship with Rich? (Is there possible DV?)
  - How much did she drink? How do you approach this?
  - Other known witnesses?
  - Why is clarification important?
Meeting with the Respondent

How Does this Meeting Differ?

RESPONDENT CHECKLIST

- Policy and Procedures
- Preserving evidence
- Supportive measures
- On-off campus resources
- Mutual no-contact orders
- Right to an advisor
CASE STUDY: UNRING A BELL?

During the meeting with the Respondent, he tells you that the behaviors were completely consensual and that this is the second time that they have had sex.

The Respondent stated that he really enjoys where he is living, and he cannot change any of his classes due to his work schedule.

MAKE IT CLEAR IN OUTREACH THAT IT IS NOT INVESTIGATORY IN NATURE

How much information should the Title IX Coordinator be asking for?
How does the Title IX Coordinator communicate this behavior?
Are they now a witness?
REMEMBER!

Information about preserving evidence and immediate resources should not only be in your first notice letter. Do your first responders (police, residential life, etc.) have written information available to provide to individuals identifying as victims?

WHOSE JOB IS IT?

COMPLAINANT

Notice of Report/Request for Intake
• Report may be from complainant or third party
• May follow an initial phone call to inform the complainant
• Set up a meeting to discuss supportive measures and options; right to an advisor; provide explanation of rights and options; refer to policy

Notice of Case Closure
• Complainant has declined to sign a formal complaint
• Complainant has not responded to outreach
CASE STUDY: WHAT IS MISSING?

This is an acknowledgement that the University is in receipt of a signed formal complaint of the Title IX Policy. A copy of the Policy is attached to this letter.
Specifically, it is alleged that you experienced a violation of this policy on October 31, 2021, while in your room.
CASE STUDY: LESSONS LEARNED

This is an acknowledgement that the University is in receipt of a signed formal complaint of the Title IX Policy. A copy of the Policy is attached to this letter. Specifically, you identified the following violations:
- Non-consensual touching

Specifically, in the Formal Complaint, it is alleged:
“On Halloween night, me and Wendy were hanging out in our room getting ready for the Halloween Party at Ziggy’s. We drank some shots. We then went to Rich’s room to get him and walk to the party. Rich and I were hanging out. We were dancing and I drank a couple more drinks. Me and Rich left and went back to my room. I am not sure what happened when we got back as I only have flashes of things. I remember Rich putting on a condom and being having sex with me. I was not ready. The next morning and there was vomit and a used condom in the trash by my bed. Rich was not there. I sent him a Snapchat asking what happened. He said not to worry about anything. I don’t have the messages saved. We have not talked since.”

OTHER PITFALLS

- Dates
- Too specific
- Dating violence
- Typos
- Grammar
See note

Ann Todd, 2022-10-10T14:09:48.599
Notice of Preliminary Report (sharing of evidence)

- All evidence directly related to the allegation(s)
- Sent prior to completion of investigative report
- Parties have at least 10 days to submit a written response for consideration by the investigator(s)

Notice of Final Report and Hearing

- Fairly summarizes relevant evidence
- Sent at least 10 days prior to the hearing
- Date, time, location, participants, and purpose of hearing
- Option to request separate rooms with appropriate technology
- Explanation of cross-examination including providing an advisor if none

Notice of Written Determination

- Allegations potentially constituting sexual harassment
- Procedural steps
- Findings of fact supporting the determination
- Conclusions regarding the application of policy
- Statement of and rationale for the result of each allegation
- Sanctions and/or remedies
- Appeal procedures
- Determination becomes final after appeal decision or if no appeal is filed
Notice of Appeal Submission
- Notification to both parties that an appeal has been submitted
- Give both parties a reasonable, equal opportunity to submit a written statement in support of or challenging the outcome

Notice of Appeal Decision
- Result of the appeal and the rationale for the result

Notice of No Appeal Submitted
- No appeals have been filed and decision is final

Notice of Informal Resolution
- Allegations
- Requirements for informal resolution including the right to withdraw from the informal resolution process prior to agreeing to the resolution
- Any consequences
- Obtain voluntary, written consent

Notice of Dismissal of Formal Complaint
- Not fall under Title IX
- Complainant withdraws from the process
- Indicate if it is referred elsewhere

Notice of Additional Allegations
- Notification of additional allegations based on new information
- Include previous information included in notice of allegation

Notice of Temporary Delay
- Explanation as to why the case is delayed (e.g., volume of witnesses)
- Anticipated timeline
**WITNESS**

**Notice of Investigation**
- Identified as a witness
- Date and location of incident, parties involved
- Date, time, and location of meeting
- Policy information
- Accommodation requests

**Notice of Hearing**
- Date, time, and location of hearing
- Notification that they are subject to questioning by the advisors and decisionmaker(s)

**OTHER POSSIBLE NOTICES**
- Case updates
- No contact letters
- Supportive measures
- Conflict of interest
- Consolidation

**PARTY RIGHTS**
GROUP ACTIVITY

- You are a party in a sexual harassment - hostile environment case. What rights do you want to have? What would it take for you to trust a process?
- Do not limit yourself to Title IX or policy requirements. Think of it through a personal lens.
- Your group will be assigned a role (Complainant or Respondent).
Advisors

SUPPORTIVE MEASURES

DETERMINATIONS OF RESPONSIBILITY
CASE STUDY: PARTY RIGHTS

How and when do you communicate these rights to the complainant and respondent?

SUPPORTIVE MEASURES

- Counseling
- Extensions of deadlines or other course-related adjustments
- Modifications of work or class schedules
- Campus escort services
- Mutual restrictions on contact between the parties
- Changes in work or housing locations
- Leaves of absence
- Increased security and monitoring
CASE STUDY: SUPPORTIVE MEASURES

The report indicates that the Complainant and Respondent live in the same residence hall and are also in one of the same classes.

- What are the potential supportive measures that are available?
- What are the potential conflicts or issues?
- How do you facilitate implementation?
CASE STUDY: PATTERNS

During an investigation alleging non-consensual sexual contact, a witness states that the respondent also inappropriately touched them. They provide you with additional names of people who have also been touched by the respondent.

CASE STUDY: CROSS CLAIMS

The complainant reports an incapacitated sexual assault—he states he was too drunk to consent but does have memories of the night. The respondent states that he was blacked out and has no memories of the night. The respondent states that they would like to file a formal complaint against the complainant.

CASE STUDY: ARE THEY THE SAME?

Two students have filed formal complaints against the same respondent. One complainant alleges sexual assault. The other complainant alleges stalking and dating violence.
DISMISSAL

Must

• Does not constitute sexual harassment
• Not in educational program or activity
• Not in the United States

May

• Complainant withdraws complaint
• Respondent no longer enrolled
• Prevented from gathering evidence

EXAMPLES OF APPEALS BASED ON DISMISSAL

1. Complainant reengages in the process
2. Incorrect jurisdictional determinations
3. Dismissal due to incorrect facts
4. Recipient determines evidence does not meet burden of proof
WHEN DOES DISMISSAL OCCUR?

Intake  Investigation  Hearing

NOTIFICATION OF DISMISSAL

Written Notice  Reason(s) for Dismissal  Simultaneous to the Parties

APPEAL OF DISMISSAL

Procedural Irregularity  New Evidence  Bias or Conflict of Interest
CASE STUDY: OFF-CAMPUS

You are the Title IX Coordinator and receive a report involving a student who reported being sexually assaulted off-campus by multiple members of the debate team. The names of the members of the team are not included in the report.

What are your next steps?

CASE STUDY: SEXUAL HARASSMENT?

You are the Title IX Coordinator and receive a report alleging that Professor Blum is making comments of a sexual nature in class. The report contains a student’s name but indicates that they do not want to file a formal complaint, they just want to “put it on your radar.” This is the third report you have received about Professor Blum. You have dismissed the other two reports as they were anonymous reports.

What are your next steps?
CASE STUDY: BRICK WALL

You are the Title IX Coordinator and receive a call from your investigators who tell you that “they have hit a brick wall” and have only been able to interview the Complainant. The Complainant does not have any memory of the night and is not sure if any sexual behaviors took place.

What are your next steps?

INFORMAL RESOLUTIONS

TYPES
### INFORMAL RESOLUTION

- Mediation
- Arbitration
- Restorative Justice
- Administrative Conference Agreements
- Educational Efforts

### MEDIATION

- Mediator facilitates resolution
- Mediator does not recommend outcome
- Parties create agreement
- Mediator may finalize
- Typically, non-binding

### ARBITRATION

- Neutral person given power to resolve dispute
- Binding or non-binding
- Collective Bargaining Agreements may provide language
RESTORATIVE JUSTICE

- Repair harm
- Both parties are involved in the process
- Parties work together to determine how to repair harm
- Opportunities for communication (directly and indirectly)
- Collaborative, not coercive
- Community involvement

RESTORATIVE JUSTICE V. MEDIATION

<table>
<thead>
<tr>
<th>Focus</th>
<th>Restorative Justice</th>
<th>Mediation</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Repairing harm</td>
<td>Problem-solving</td>
</tr>
<tr>
<td></td>
<td>Making things right</td>
<td>Decision-making</td>
</tr>
<tr>
<td>Preparation</td>
<td>Pre-conference meetings with all impacted parties</td>
<td>No pre-conference meetings</td>
</tr>
<tr>
<td>Requirements</td>
<td>Voluntary</td>
<td>Voluntary</td>
</tr>
<tr>
<td></td>
<td>Responsible party accepts responsibility for behavior</td>
<td></td>
</tr>
</tbody>
</table>

ADMINISTRATIVE CONFERENCE AGREEMENT

- No facts in dispute
- Both parties must agree
- Acceptance of responsibility
- Remedies
EDUCATIONAL EFFORTS
- Permanent supportive measures
- Directive to cease behavior
- Messaging to campus community
- Events and trainings
- Referrals and collaborations

RESTORATIVE JUSTICE

RESTORATIVE JUSTICE V. RESTORATIVE PRACTICE
- Umbrella terms
- Multiple functions
- Community building
WHERE DOES IT FIT INTO PROCESS?

Informal Resolution  Sanction

INFUSION INTO PROCESS

Current activities  Program examples

BENEFITS

Harmed party Complainant  Responsible party Respondent  Community
USES OUTSIDE OF HIGHER ED

Community  Workplace  Courts

RESTORATIVE CONFERENCING/FACILITATED DIALOGUE
- Structured and facilitated
- Harmed party/responsible party
- Parties determine steps
- Examples:
  - Apology
  - Education
  - Mentoring
  - Voluntary leave

RESTORATIVE CIRCLE
- Similar to Conference
- Multiple people
- Turn-taking
- Examples:
  - Groups
  - Culture
SURROGATE PARTICIPATION

- Similar to conference/circle
- Complainant has a “stand-in”

INDIRECT FACILITATION
("SHUTTLE DIPLOMACY")

- Facilitator takes lead
- Back-and-forth between parties
- Does not require face-to-face

IMPLEMENTATION

Culture  Buy-in  Preparation
Policy  Training
Process and Additional Considerations

Image by Pexels from Pixabay

© D. Stafford & Associates

265

WHO IS RESPONSIBLE?

Student Affairs  Title IX Coordinator  Human Resources

© D. Stafford & Associates

267
WHAT IS THE TITLE IX COORDINATOR’S ROLE?

- Oversee
- Determinations
- Facilitate
- Training

TRAINING FOR FACILITATORS

- What is RJ?
- Techniques
- Sexual violence
- Parties
- Preparation

WHEN IS IT APPROPRIATE?

- Additional complaints
- Sexual harassment
- Dating violence
- Sexual assault
- Intersecting behaviors
POLICY CONSIDERATIONS

Options  | Goal  | Voluntary  | Guidelines  | Timelines  
Cases  | Participation expectations  | Binding or non-binding  | Sanctions and remedies

WHAT IF...

The parties cannot reach an agreement  | The institution does not support the agreement  | The complainant does not participate  | The respondent did not complete necessary requirement(s)

Records subject to subpoena  | What happens if it becomes a formal resolution?  | Impact of incomplete requirements  | Required record keeping  | Student and employee conduct files

© D. Stafford & Associates
CASE STUDY: CAN WE?

While meeting with the Complainant, she told you that she had reservations about the formal process as she did not want the Respondent to “get kicked out” and only wants him to move. Your policy does not allow for informal resolution for cases of sexual assault.

What can you do?

CASE STUDY: WHAT NOW?

During the informal resolution process, the Respondent admitted that she “caused the Complainant harm” but will not take responsibility for a policy violation.

- Can this be considered an agreement?
- If not, can the investigators use the information that was discovered during the informal resolution process? Why/why not?

CASE STUDY: UNFULFILLED REQUIREMENTS?

After an agreement has been signed, the Complainant contacts your office and asks if the Respondent has fulfilled all the requirements of the agreement. You check and they have not.

- How do you monitor requirements?
- What happens if they are not fulfilled?
INVESTIGATION STAGE

WHAT IS YOUR ROLE DURING THIS STAGE?

- Who sends notice?
- Who schedules?
- How are steps documented?
- Who collects institutional evidence?
- Who sends evidence/report?
- Review before dissemination
- Who determines deadlines?

INVESTIGATION ROADMAP

- Investigative strategy
- Research and initial evidence collection
- Interviews
- Additional evidence collection
- Report writing
EXPECTATIONS OF GREAT INVESTIGATORS

TITLE IX INVESTIGATIONS

INVESTIGATIONS IN THE REGULATIONS

Fact witnesses
Expert witnesses
Inculpatory evidence
Exculpatory evidence
TYPES OF EVIDENCE

- Real evidence
- Demonstrative
- Documentary
- Testimonial

STATEMENTS

- Investigator Interviews
- Written Statements
- Formal Complaint
- Other
WHAT DOES RELEVANCY MEAN?

Evidence is relevant if:

a. It has any tendency to make a fact more or less probable than it would be without the evidence; and

b. the fact is of consequence in determining the action.

OTHER WAYS TO PUT IT...

- The evidence does not need to be conclusive
- The evidence constitutes a link in the chain of proof
- The evidence, in connection with other evidence, helps "a little"

WHAT IS NOT RELEVANT?
NOT RELEVANT (FROM THE REGULATIONS)

RELATED BUT NOT RELEVANT
Past Sexual Behavior
- Complainant's sexual predisposition/prior sex unless...
- Offered to prove that someone other than the respondent committed the conduct alleged or
- Complainant's prior sexual behavior with respect to the respondent and are offered to prove consent

ALWAYS OUT
Privileged Information
- Physician, psychiatrist, psychologist records in connection with the provision of treatment to the party
- Unless voluntary, written consent

MAJOR CASE DOCUMENTS

Pre-Investigation  Investigation  Decision
Formal Complaint  Notice of Investigation  Evidence Review  Investigative Report  Written Determination
EVIDENCE REVIEW

“provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation”

INVESTIGATIVE REPORT

“Create an investigative report that fairly summarizes relevant evidence”

DSA - VERSIONS OF THE REPORT

- Preliminary Report
  - Scope
  - Methodology
  - Evidence Obtained

- Final Report
  - Scope
  - Methodology (edited)
  - Evidence Obtained
  - Summary of Evidence

- Written Determination
  - Scope
  - Methodology (edited)
  - Summary of Evidence (edited)
  - Results (including rationale, sanctions, remedies)
Evidence Obtained
Scope
Methodology

Everything Collected
Directly Related
Relevant

Preliminary Report

OPTIONAL COMPONENTS

Scope
Alleged behavior
Alleged policy violation(s)

Methodology
Procedural steps (Notifications, interviews, methods used to gather evidence)
CASE STUDY: ONE MORE THING

During the course of the investigation, the investigators learn that the complainant and the respondent had been in a “on and off again” dating relationship for the past few months.

- How is the Title IX Coordinator notified? When?
- Are there additional violations as a result?
- How would this be communicated to the parties?

CASE STUDY: YOU'RE LATE!

The investigator contacts you to let you know that they need “a little more time” to conduct the interviews as they have had a family emergency and will be out for the next “few days.”

- What are your next steps?

NON-TITLE IX INVESTIGATIONS
OTHER TYPES OF INVESTIGATIONS

OTHER TYPES OF INVESTIGATIONS

VAWA offenses not under Title IX

Other conduct based on identity

Sexual misconduct not under Title IX

Intersecting policies

POSSIBLE DIFFERENCES

POSSIBLE DIFFERENCES

Jurisdiction

Definitions

Policy

Adjudication Process

Report

Timeline

LIKELY SIMILARITIES

LIKELY SIMILARITIES

INTERVIEWS

EVIDENCE COLLECTION

ADVISORS
THE CHAIR

Board Chair
- Manages the agenda
- Determines relevancy of questions
- Coordinates decision

Procedural Chair
- Logistics
- Has no role in decisions, including relevancy

CHAIR-RELATED TASKS

- Recording
- Introductions
- Order of Questioning
- Witness Management
- Enforcing Rules of Decorum
**PRE-HEARING TASKS**

- Attendance Confirmation
- Scheduling
- Action Items

**PREPARING THE PARTIES**

**DECISION-MAKER PRE-WORK**

- Review report
- Review allegations
- Review policy
- Draft relevant questions
What are the roles of the participants at the hearing?

- General Counsel
  - Advise on process?
- Stenographer
  - Only needed if not recording
- Accommodation
  - Interpreter or mandated support person
- 2nd Advisor
  - Is a support person allowed? Union rep?

Mandatory Components

- Complainant Cross-Examination
- Respondent Cross-Examination
- Witness Cross-Examination
OPTIONAL COMPONENTS

Introductions
Reading Allegation
Review of Rights and Rules
Opening/Closing Statements
Decision-maker Questions

IMPARTIAL HEARINGS

Consistent application
Ask clarifying questions
Avoid bias

QUESTIONING BY THE ADVISORS

Question
• By Advisor

Relevancy Determination
• By Decision-maker

Answer
• By party or witness
ORDER OF QUESTIONING/STATEMENTS

- Fairness
- Equality
- Logic
- Common Sense

RELEVANCY AND ADMISSIBILITY DETERMINATIONS

- Past sexual history
- Privileged information
- Repetitive question
- New information
- Not probative of material fact

REASON FOR RELEVANCY DETERMINATION

- Not a lengthy or complicated explanation
- Logic and common sense
- Shows neutrality
- May trigger appeal ("procedural irregularity")
What do we need to meet our due process requirements?

MAKING A FINDING

FORMAL RESOLUTION – MAKING A FINDING

- Policy language - Alleged violations
- Weighing the evidence
- Determined behaviors
- Standard of evidence
ELEMENTS OF THE POLICY VIOLATIONS

- Sex Act
- Relationship
- Consent
- Act of Violence
- Conduct
- Impact
- Location

FACT CONSIDERATIONS

- Weight
- Credibility

WEIGHT/RELEVANCE

- Character
- Prior bad acts
- Pre/post behavior
- Hearsay
- Opinion
- New evidence
BEHAVIORS

Based on the information available, what behaviors occurred?

STANDARD OF EVIDENCE

- More likely than not
- Clear and convincing

DISCIPLINARY SANCTIONS AND REMEDIES

- Sanctions
- Remedies
APPEALS

Other Decision-Maker

Key Points of Appeals
ROLE OF APPELLATE DECISION-MAKER

- Follow the Appellate Basis
- Not A Substitute of Judgement
- Respect the Credibility of Previous Decision-maker

WHO IS THE APPEALS OFFICER?

- Separate role
- Trained
- Conflict of interest or bias

APPEAL OF RESULT

- Either party may appeal
- Review for sufficient grounds
- Not met - Appeal is denied
- Met - Appeal is granted
- Follow what is stated in your process
- Both parties are notified of decision
BASIS OF APPEAL

Procedural irregularity that affected outcome
New evidence that could affect the outcome
Conflict of interest or bias that affected the outcome
Additional Grounds are permitted (must be in policy)

EXAMPLES OF APPEALS BASED ON FINDINGS

- Erroneous relevancy determinations regarding evidence
- The hearing was not recorded or transcribed
- Advisors were not permitted to ask relevant questions
- The board members were biased against a party
- The written determination relied on statements from parties who did not participate
- The decision was erroneous, and the board members were negligent in making their determination

STATING THE APPROPRIATE GROUND

- Does it state an appropriate ground?
- Who makes this determination?
MEETING THE GROUNDS

What information is provided?

Did it or could it “affect the outcome?”

APPEAL DETERMINATIONS

Does the appeal state appropriate grounds?

Does the information in the appeal meet grounds?

What is the institution’s response?

RESPONSE TO THE APPEAL

Denied
• No further process

Granted
• Procedural irregularity – what is the process to remedy error?
• New Evidence – does the case return to decision-maker?
• Conflict of interest or bias – what is the process to remedy error?
WRITTEN DETERMINATION REQUIREMENTS

The result  Rationale  Simultaneous notification

ARTICULATING THE DECISION

State what the appeal asserted  Explain your analysis and rationale  Describe the action to be taken

CASE STUDY: NO SHOW

At the start of the hearing, you get a call from the Decision-makers that the Complainant’s advisor did not show up for the hearing.

What do you do?
CASE STUDY: STOP RIGHT THERE

You are attending the hearing to assist in its facilitation—breakout rooms, calling witnesses, etc. During the hearing, the decision-makers are not making relevancy determinations for the Respondent but are for the Complainant.

What do you do?
TRAINING

Prejudgment of facts
Conflict of Interest
Bias

AVOIDING PREJUDGMENT OF FACTS

Open mind
Listen
Objective
Neutral

CONFLICT OF INTEREST

External
Internal
IDENTITY BIAS

Bias, Data, Impact

Gender Identity  Sexual Orientation  BIPOC  National Origin  Individuals with disabilities

REPESENTATION MATTERS

TYPES OF BIAS

Confirmation Bias  Confirmed preconceived opinion
Availability Bias  Most important in the memory immediately recalled
Hindsight Bias  An event is more predictable than it seems
Foresight Bias  Ability to predict future events
Identity Bias  More likely to believe one group over another
Personal Experience Bias  Inherently similar experience (or disadvantage the document)
Organizational Integrity is the term we use to describe the foundational value that is the engine behind getting things done in the organization. It is the collective version of individual integrity where ‘I will do what I say I will do’ becomes ‘We will do what we say we will do.’

- Partners in Leadership, 2009.
Organizational Integrity

- Clear Procedures
- Competent Personnel

Strong Policy

Credibility

FOLLOW YOUR PROCESS

STAY IN YOUR LANE
MANAGE THE “NOISE”

Photo by C D-X on Unsplash

LEAD WITH MORAL COURAGE


FINAL NOTE

1. Run a fair, thorough, and impartial process
2. Let your morale compass guide you
3. Do what your policy says you will do
4. Do what the regulations tell you to do
ADVISORS

NO REQUIREMENT

SHOULD YOU

TRAINING MATERIALS

Can't rely on sex stereotypes

Address implicit and unconscious bias

TRAINING MATERIAL RECORDKEEPING

7 YEARS

ALL MATERIALS

AVAILABLE ON WEBSITE