



UT Systemwide Title IX Annual Training Welcome – August 5-6, 2026 Day 1

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August 5, 2026



UT System Title IX Training

Title IX Enforcement

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Agenda

- ✓ **OCR Under the Current Administration**
- ☐ OCR Oversight and Investigations
- ☐ Examples of Recent OCR investigations and Outcomes
- ☐ Preparation for Enforcement Actions

The Office of Civil Rights Under the Current Administration

- Significantly downsized.
- Focused on aggressive enforcement of Title VI and Title IX consistent with the administration's agenda and goals.
 - Numerous Title IX investigations initiated into policies permitting athletic participation based on gender identity rather than biological sex.
- On June 16, 2026, DOE entered into an interagency agreement with DOJ to shift a large portion of its civil rights investigation and enforcement activities to the DOJ's Civil Rights Division ("CRT").
 - CRT will investigate, evaluate, and attempt to resolve civil rights matters OCR refers to it under Title VI, Title IX, and other federal civil rights statutes.
 - OCR retains authority over final enforcement determinations, policy and guidance development, mediation and settlement negotiations, and all statutory functions assigned to DOE's Assistant Secretary for Civil Rights.
 - OCR retains exclusive authority over final decisions regarding administrative or judicial enforcement referrals.

The Office of Civil Rights Under the Current Administration

July 1, 2026 DOE Title IX Enforcement Press Release and Stated Accomplishments:

- Opened nine new investigations into schools and education agencies in North Carolina, Michigan, and Maryland over allegations that they allowed males to compete in girls' sports or access girls' intimate facilities.
- After issuing a final warning letter, took action against Jefferson County Public Schools in Colorado for allowing male students to participate in female sports, occupy female bathrooms and locker rooms, and even share overnight accommodations with females.
- Celebrated the U.S. Supreme Court's decision in *West Virginia v. B.P.J.*, which affirms the right of states to prohibit men from competing in women's sports and reinforces the Administration's efforts to restore sex-based protections under Title IX.

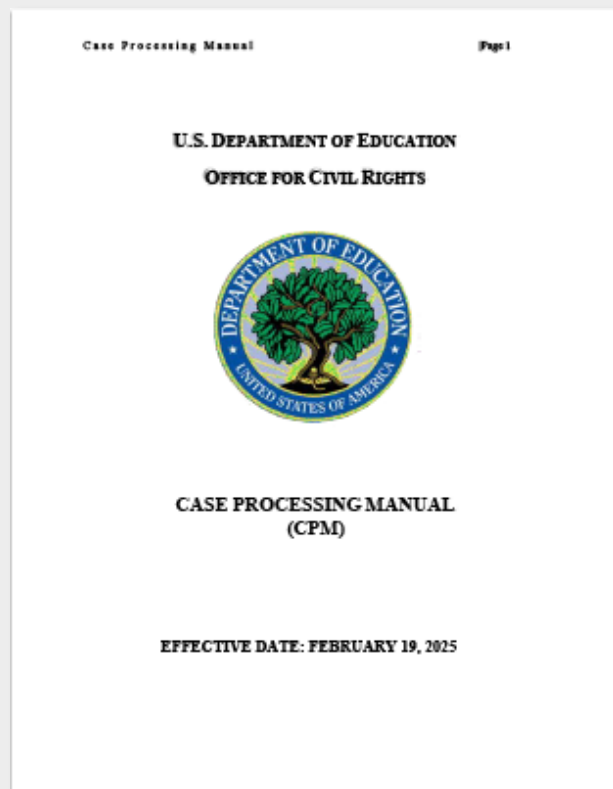
[U.S. Department of Education Marks End of Second Annual Title IX Month with Major Enforcement Recap | U.S. Department of Education](#)

Department of Education Office of Civil Rights

- “OCR vigorously enforces Title IX to ensure that institutions that receive federal financial assistance from the Department comply with the law.”
- “OCR evaluates, investigates, and resolves complaints alleging sex discrimination.”
- “OCR also conducts proactive investigations, through directed investigations or compliance reviews, to examine potential systemic violations based on sources of information other than complaints.”
- Although federal funding theoretically at risk, not aware of any institution sanctioned with loss of federal funding.



What Happens When OCR Gets a Complaint?



- OCR case process manual is a good place to start.
- Updated Feb. 19, 2025.
- OCR first evaluates whether information received is subject to further processing (categories generally not processed: anonymous, courtesy copies, solely advice requests, oral only)
- New Section 109: OCR will interpret and act consistent with First Amendment principles and will not construe statutes/regulations to impinge protected rights-
- Options for dismissal, rapid response, investigation, mediation, and resolution.
- Investigation may include requesting documents and conducting interviews.
- Reach findings (insufficient evidence, non-compliance, mixed determination).
- Resolution agreement to be signed within 90 days.

Investigations

- Obligations on institution in OCR investigations are similar to discovery in litigation.
- Detailed requests for documents and information.
- Formal interviews conducted by OCR investigators, possibly on-site.
- Can involve a substantial amount of time and resources of Title IX Office, Legal Affairs, and related staff.



Resolution Agreements

- Allegations may be resolved at any time prior to the issuance of a final determination when the recipient expresses an interest and OCR determines it is appropriate.
- With non-compliance or mixed finding, OCR will issue proposed resolution agreement, and recipient has 90 days to reach a final agreement.

Resolution Agreements Contd.

- Resolution agreement may include (examples):
 - Modified policies and procedures
 - Conduct mandated training
 - Fund additional resources (e.g., employee positions, materials, websites)
 - Develop and implement communication and marketing plans
 - Mandated data management and recordkeeping
 - Reimbursement to individual complainants
 - Monitoring, reports, and documentation to OCR



Administrative Proceeding or Referral to DOJ

- If no resolution is reached, OCR may:
 - Refer case initiate administrative proceedings or refer to DOJ.
 - Initiate administrative proceedings to suspend, terminate, or refuse to grant or continue federal financial assistance.
- OCR may refer to DOJ for denial of access to OCR or failure to comply with OCR agreement.
- DOJ can also intervene in private Title IX cases.
- DOJ also files “statements of interest” in private Title IX cases regarding application of law.



Article VI: Initiation of Enforcement Action

Agenda

- ☐ OCR Under the Current Administration
- ☐ OCR Oversight and Investigations
- ✓ **Examples of Recent OCR investigations and Outcomes**
- ☐ Preparation for Enforcement Actions

Examples of Recent OCR Investigations and Outcomes

- San Jose State University (March 2026) – Investigation into San Jose State University under Title IX
 - “In January, the Department found that SJSU’s policies allowing males to compete in women’s sports and access female-only facilities deny women equal educational opportunities and benefits.”
 - “SJSU has 10 calendar days to come into compliance or face enforcement action, including referral to the U.S. Department of Justice (DOJ) and risk of termination of SJSU’s federal funding.”
- Jefferson County Public Schools in Colorado (June 2026) – OCR announces warning letter to for violating Title IX for “by allowing male students to participate in female sports, occupy female bathrooms and locker rooms, and even share overnight accommodations with females based on their ‘gender identity.’”
 - “A review of Jefferson County’s athletic rosters found the District allowed male students to occupy roster spots on girls’ sports teams, displacing girls from the athletic programs designed for female students.”
 - “Today’s letter of impasse notifies the District that OCR will prepare for impending enforcement, which, following OCR’s regulatory procedures, could ultimately result in termination of the District’s federal education funding.”

Examples of Recent OCR Investigations and Outcomes Contd.

- Smith College (May 2026) – OCR announced investigation of Smith College, prominent all-women’s college, “for admitting biological men and granting them access to women-only spaces, including dormitories, bathrooms, locker rooms, and athletic teams.”
 - “Title IX contains a single-sex exception that allows colleges to enroll all-male or all-female student bodies—but the exception applies on the basis of biological sex difference, not subjective gender identity. An all-girls college that enrolls male students professing a female identity would cease to qualify as single sex under Title IX.”
- Wagner College (Aug. 2025) – result of a directed investigation concerning sex discrimination into the college for allegedly allowing males to compete in women’s sports.
 - Includes revisions to athletic policy, issuance of a public statement about its compliance with Title IX (including information such as Wagner not allowing male students to complete in female athletic programs or occupying female intimate facilities)
- University of Pennsylvania (July 2025) – result of OCR’s investigation that found UPenn violated Title IX by allowing a male to compete in female athletic programs and occupy female-only intimate facilities.
 - Includes restoration of swimming records and titles misappropriated to male athletes, issuance of a public statement about compliance with Title IX (including information such as UPenn not allowing male students to compete in female athletic programs or occupying female intimate spaces)

Investigations at Department of Education (as of 07/29/26)

- Over 100 open shared ancestry investigations under Title VI.
 - Two pending investigations of universities in Texas.
- Since January 20, 2025, OCR has entered into approximately 83 resolutions agreements with higher educational institutions.
 - 31 of those resolution agreements related to the PhD Project under Title VI.
 - Other resolution agreements range in topics, from posting Title IX training materials to sex-based scholarships excluding male students and service animal policies.
 - 2 resolution agreements with Texas universities re PhD Project.
 - No other Texas universities resolution agreements under current administration.
- DOJ is handling many current investigations, including investigations relating to Texas higher education institutions.
 - E.g., see DOJ investigations of race-based admissions in medical schools.

Agenda

- ☐ OCR Under the Current Administration
- ☐ OCR Oversight and Investigations
- ☐ Examples of Recent OCR investigations and Outcomes
- ✓ **Preparation for Enforcement Actions**

Preparation Before Any Complaint or Claim

- Regularly update policies and procedures
- Ensure Title IX staff qualified and trained
- Continue to take required trainings (like the one today)
- Have well-functioning systems in place for managing Title IX compliance process
 - Case intake methods and processes (including electronic intake)
 - Case tracking and monitoring during investigation and grievance process
 - Checklists and approved forms for all stages of investigation and grievance process
 - Reporting mechanisms for completed cases in compliance with state and federal mandates
- Have robust community education and outreach programs to both comply with various legal mandates

Preparation During Investigation and Grievance Process

- Follow your policies during each stage of investigation and grievance process
- Treat all parties equitably and do not make presumptions
- Be transparent with parties regarding process (e.g., notices, updates)
- Don't allow feelings about advisor / attorney affect treatment of party
- Document process (letters and emails to parties, with copies to the file)
- Document evidence, including requests, source, and when received
- Prepare reports that are self-explanatory and stand on their own
- Presume everything you write will be seen by OCR, a judge, and a jury (draft reports, emails to colleagues, etc.)

Preparation After Grievance Process Complete

- Ensure that cases are identified as closed and all required steps have been taken.
- Document and calendar any follow-up on sanctions to ensure purpose of sanctions achieved.
- Ensure case file complete, reflects all steps of process, and reflects final outcome and sanctions.
- Ensure case outcome reflected in case tracking systems and compliance reports.
- Document lessons learned and any proposed changes to policies and/or processes based on particular matters.
- Continue ongoing, iterative efforts with respect to overall program improvement.



Questions?



Break





UT System Title IX Training

Case Law and Executive Order Update

Darren G. Gibson, Partner
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August 5, 2026

Agenda

- ✓ **Private litigation**
- ☐ Recent Case Law
- ☐ Status of Employee Actions under Title IX
- ☐ Executive Order Updates

Private Litigation – Overview

- Students can sue under various theories of liability
 - Official policy / archaic assumptions (more common in sports equity claims)
 - Deliberate indifference to sexual harassment
 - Selective enforcement based on gender bias
 - Erroneous outcome
 - Retaliation
- No administrative exhaustion requirement under Title IX.
- 2 year statute of limitations.

Private Litigation – Primary Causes of Action

- Deliberate indifference:
 - To establish a claim of sexual harassment, a plaintiff must show that: (1) the sexual harassment was “so severe, pervasive, and objectively offensive that it can be said to deprive the victim[] of access to the educational opportunities or benefits provided by the school;” (2) the school district had actual knowledge of the sexual harassment; and (3) it acted with deliberate indifference to the harassment.” *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999).
- Selective enforcement:
 - “Either punishment or the decision to initiate enforcement proceedings was motivated by gender bias.” *Klocke v. Univ. of Tex. at Arlington*, 938 F.3d 204 (2019).
- Erroneous outcome
 - “A plaintiff alleging an erroneous outcome must point to ‘particular facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding’—for instance, ‘a motive to lie on the part of a complainant or witnesses, [or] particularized strengths of the [disciplined student’s] defense.’ ... The plaintiff must also demonstrate a “causal connection between the flawed outcome and gender bias.” *Klocke v. Univ. of Tex. at Arlington*, 938 F.3d 204 (2019).

Damages in Title IX Litigation

Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562 (2022).

- Emotional distress damages are not recoverable under Spending Clause antidiscrimination statutes (Title IX, Title VI, Rehabilitation Act).
- Relying on a contract-law analogy, the Court reasoned that funding recipients consent to conditions in exchange for federal funds and are only on notice for remedies traditionally available in contract.
- Does not affect Title VII claims where Congress expressly authorized emotional distress damages.
- Punitive damages are not available.
 - *Barnes v. Gorman*, 536 U.S. 181 (2002).



Agenda

- ☐ Private Litigation
- ✓ **Recent Case Law**
- ☐ Status of Employee Actions under Title IX
- ☐ Executive Order Updates

***Bonds v. Central Michigan University* (E.D. Mich May 18, 2026)**

- Plaintiff, a DI student-athlete, sued CMU, Rochester University, and several university officials, alleging violations of his procedural due process and Title IX rights after Rochester sanctioned him for student-conduct violations and CMU later expelled him for providing false information about that disciplinary history on his transfer application.
- The court granted summary judgment for all defendants on all claims.
- Regarding the due process claims, the court held that CMU afforded the plaintiff all the process due before expelling him, after providing notice and a hearing at which he admitted the facts underlying the charge.
- Regarding the Title IX claims, the court held that the plaintiff failed to establish that the challenged disciplinary decisions were motivated by gender bias, finding insufficient evidence to connect the alleged procedural flaws or disciplinary outcomes to the plaintiff's sex.
- *Source: NACUA case summaries.*

Recent Cases

Ortegel v. Va. Polytechnic Inst. & State Univ. (W.D. Va. Apr. 16, 2026)

- Plaintiff, a former student at Virginia Tech, brought Title IX, equal protection, and due process claims against university and multiple officials after he was disciplined for sexual assault.
- Court denied summary judgment on plaintiff's Title IX sex discrimination claim against the university, concluding that a reasonable jury could find that sex was a but-for cause of the disciplinary outcome based on evidence that a hearing officer made social media statements about "holding men accountable," expressed views during his deposition about patriarchy and men's difficulties understanding consent, and imposed a sanction requiring plaintiff to read *Man Enough: Undefined My Masculinity*.
- However, court granted summary judgment on plaintiff's equal protection claim against the hearing officer, finding plaintiff failed to identify similarly situated female comparators.
- Court also granted summary judgment on the equal protection and due process claims against the university's Title IX coordinator because, in her official capacity, she lacked authority to expunge plaintiff's disciplinary record.
- *Source: NACUA case summaries.*

Recent Cases

***Poe v. Lowe* (M.D. Tenn. May 5, 2026)**

- Plaintiff, a former student at Vanderbilt, sued university for breach of contract, Title IX selective enforcement, and other claims after university suspended him based on social media posts accusing another student of sexual misconduct.
- Court denied summary judgment, finding genuine disputes of fact as to whether university provided plaintiff access to information used in the disciplinary proceeding, afforded plaintiff a meaningful opportunity to call witnesses, and conducted an unbiased appellate review process.
- On Title IX selective enforcement claim, court denied summary judgment, concluding that a reasonable jury could find the university treated a female student who made similar social media posts about the same student more favorably, when it imposed a lesser sanction.
- Court also denied summary judgment on plaintiff's negligence claims, concluding that genuine issues of material fact remained regarding foreseeability of plaintiff's suicide attempt, including the university's awareness of concerns about self-harm related to the disciplinary outcome and its decision to proceed with the outcome call after learning the student's mother was not present.
- *Source: NACUA case summaries.*

***Doe v. Univ. of Maryland, College Park, et al.* (D. Md. Sep. 26, 2025)**

- Plaintiff, a male student at Maryland, brought a Title IX reverse discrimination and retaliation claim against the university following a months-long public campaign by a female student “to brand [plaintiff] as a rapist” and remove him from the Club Lacrosse team after a university disciplinary process found plaintiff not responsible for sexually assaulting her.
- Court denied the university’s motion for summary judgment on Title IX discrimination claim, finding sufficient evidence for a jury to conclude (1) the persistent public pronouncements that plaintiff is a “rapist,” a “sexual predator” and “dangerous to girls on campus,” constituted harassment “on the basis of [plaintiff’s] sex”; (2) the removal of plaintiff from the Club Lacrosse team amounted to a deprivation of an education benefit; and (3) that the university was deliberately indifferent when it failed to respond to plaintiff’s second complaint to the university and summarily dismissed it a month later.
- However, court granted summary judgment in favor of the university on Title IX retaliation claim, finding that plaintiff’s “mere participation as the accused in a Title IX process” was insufficient to constitute Title IX protected activity, and even if it did, there was no evidence that “the hostility [plaintiff] later faced was because of that participation.”
- *Source: NACUA case summaries.*

Private Litigation – Defer to Decision Makers

Jane Doe v. Loyola University Maryland (D. Md. 2021)

- **Allegations**

- Male Student and Female Student lodged competing claims of sexual misconduct against each other over the same occurrence. Both claim non-consensual sex. Both alleged sexual violence. Both received identical sanctions of a one-semester suspension, no contact order, and a substance education requirement. Female Student filed suit against University challenging the University's process and its decision.
- University denied and filed a Motion to Dismiss.

- **The Court's Title IX Findings**

- It is neither the province of the court to re-try plaintiff's disciplinary proceeding nor to require a particular outcome of a disciplinary proceeding.
- Loyola carefully followed its well-crafted and gender-neutral policies and the record did not support a conclusion that an erroneous outcome had been reached.
- Plaintiff also failed to allege any facts that would amount to gender bias, which was also fatal to her erroneous outcome claim.

Private Litigation – Defer to Decision Makers

Garrett v. University of South Florida Board of Trustees (11th Cir. 2020)

- **Allegations**

- Plaintiff was a former doctoral student at the University of South Florida, who alleged the University inadequately responded to her report of sexual misconduct (non-consensual sexual touching) by a fellow student when they issued a deferred suspension and a no-contact order. Plaintiff alleged the University subjected her to additional sexual harassment by failing to issue harsher sanctions.

- **The Court's Title IX Findings**

- There was no genuine issue of material fact regarding whether USF was deliberately indifferent to plaintiff's report of sexual misconduct.
 - USF assigned plaintiff a victim advocate and opened a formal inquiry into her report.
 - It also was not clearly unreasonable for USF to offer the respondent a deferred suspension and no-contact order when he accepted responsibility.

Recommendations for Avoiding Sanctions Landmines

- ✓ Process should allow for communication of Respondent's prior misconduct history to Component Administrator for purposes of determining sanctions.
- ✓ Consider "other sanction(s) or remedies as deemed appropriate under the circumstances."
- ✓ Provide Decision Maker / Component Administrator with sanctions matrix based on type of violation with example aggravating and mitigating factors for each.
- ✓ Document and calendar any follow-up on sanctions to ensure purpose of sanctions achieved (e.g., ensuring training completed).
- ✓ Consider privileged sanctions audit to establish guardrails for setting similar sanctions for similar violations.

Agenda

- ☐ Private Litigation
- ☐ Recent Case Law
- ☒ **Status of Employee Actions under Title IX**
- ☐ Executive Order Updates

Status of Employee Actions Under Title IX

- Circuit split that will be decided by SCOTUS.
 - 2, 3, 6, 9, & 10 Circuits = employees may initiate employment-related Title IX discrimination claims
 - 5, 7, & 11 = employees do not have private right of action under Title IX.
- In the Fifth Circuit, employee Title IX claims preempted by Title VII.
 - Employees can still bring claims of Title IX retaliation based on Title IX protected activity.
- *Crowther v. Board of Regents of the University System of Georgia*
 - Petition granted May 18, 2026.
 - Arguments will occur during the October 2026 term.
 - Decision expected by summer 2027.

Crowther v. Board of Regents of the University System of Georgia

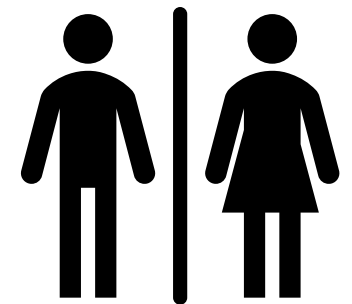
- Two employees sued alleging sex discrimination under Title IX.
- Their cases were consolidated, and the Eleventh Circuit held that Title IX does not grant employees a private right of action to sue for sex discrimination.
- Facts:
 - Former basketball coach (Joseph) claimed she was fired in retaliation for complaining to the university's Title IX office that the men's basketball program received more funding and resources than the women's. She was terminated after an investigation into her treatment of staff and athletes.
 - Professor (Crowther), taught at Augusta University, in the Spring of 2020, students complained that he sexually harassed them which resulted in a Title IX investigation. The decisionmaker concluded he violated the University's sexual harassment policy resulting in his suspension for a semester, declined to renew his contract while his appeal was pending, and effectively terminated him.
 - Both individuals sued their institutions alleging violations of Title IX.
- Eleventh Circuit Holding:
 - Title IX does not provide a private right of action for sex discrimination and does not provide protection from retaliation for employees who are the subject of a Title IX investigation.

Agenda

- ☐ Private Litigation
- ☐ Recent Case Law
- ☐ Status of Employee Actions under Title IX
- ☒ **Executive Order Updates**

EO 14168, Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government

- Defines “sex” to mean biological sex and excludes gender identity from the definition.
- Requires government-issued IDs, including passports, reflect the holder’s sex, as defined by the EO.
- Precludes use of federal funds to promote “gender ideology.”
- Prohibits access to single-sex spaces based on gender identity and prohibits use of federal funds for gender affirming care in federal prisons.
- Order likely to have significant effect on how Dept. of Education interprets and enforces Title IX.
- Order takes the position that the Supreme Court’s *Bostock* decision, which holds that Title VII protections against “sex discrimination” includes discrimination on the basis of sexual orientation and gender identity, does not require gender identity-based access to single-sex spaces.
- Multiple lawsuits regarding EO 14168 still pending.



Trump Administration's Changes to Title IX regulations via 01/25 Dear Colleague Letter

- DCL states the administration will revert back to 2020 regulations, including for pending cases.
- Declines to appeal court decisions holding that the 2024 regulations were unlawful.
- The revised DCL excludes original language stating that Title IX should not be read to include discrimination on the basis of sexual orientation and gender identity within the purview of sex discrimination.
- DCL directs Dept. of Education and OCR to enforce Title IX in accordance with EO 14168.
- Dept. of Education has subsequently rescinded Biden-era Title IX guidance regarding sexual orientation and gender identity.

IX

EO 14201, Keeping Men Out of Women's Sports

- Adopts definitions of male and female in EO 14168.
- Order directs Department of Education to take “all appropriate action” to protect “all-female athletic opportunities and all-female locker rooms” by clearly specifying and clarifying that males cannot compete on female teams.
 - This would preclude transgender athletes who meet EO’s definition of male from competing on female teams.
 - However, EO does not appear to preclude transgender athletes who meet EO’s definition of female from competing on male or female teams.
- NCAA rules modified in response to EO 14201.
 - NCAA allows anyone to participate in male sports, regardless of “sex assigned at birth or gender identity,” subject to medical exception process for banned substances (e.g., testosterone).
 - Only persons who were assigned female at birth may compete on female teams, but trans athletes who are taking testosterone are precluded from such participation.
- Order directs Department of Education and granting agencies to rescind funding to institutions that do not comply with the order.

EO 14322, Saving College Sports

- Describes current landscape as an “out-of-control, rudderless system,” where donors compete for the best players via “bidding wars,” and where states pass laws “in a chaotic race to the bottom.”
- Claims current system will reduce competition by creating “oligarchy of teams” with greatest resources and siphon resources from non-revenue sports, women’s sports, and Olympic sports.
- Includes directives to preserve and expand opportunities in women’s and non-revenue sports. For schools with athletics budget greater than \$125 million (all SEC schools):
 - “Should provide more scholarship opportunities in non-revenue sports than during the 2024-2025 athletic season and should provide the maximum number of roster spots for non-revenue sports permitted under the applicable collegiate athletic rules.”
- “Any revenue-sharing permitted between universities and collegiate athletes should be designed and implemented in a manner that preserves or expands scholarships and collegiate athletic opportunities in women’s and non-revenue sports.”
 - Notably, the EO does not take the position that revenue-sharing funds should be distributed equitably to male and female student athletes, like the Title IX requirements for distribution of scholarship funds.

Questions?



Break





UT System Title IX Training Reporting, Intake, and Response

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Agenda

- ✓ **Report vs. a formal complaint**
- ☐ Employee reporting responsibilities under SB 212
- ☐ Handling intake of reports and complaints

Report vs. Formal Complaint

Reports

- Can be made by anyone
- Does not need to be in writing, signed, or submitted in any particular format
- If the report contains sexual harassment or allegations of sexual harassment and is given to the Title IX Coordinator or an official with authority to institute corrective measures, meets the “actual knowledge” standard
 - Institution must then respond in a manner that is not deliberately indifferent
- Does not trigger the Title IX grievance process
- Does trigger discussion of the availability of supportive measures

Formal Complaints

- “Formal Complaint” is a specifically defined and requires initiation of the grievance process.
 - A document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment.
 - 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 recipient with which the formal complaint is filed.
 - “document filed by a complainant” means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.
 - Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party under this part or under § 106.45, and must comply with the requirements of this part, including § 106.45(b)(1)(iii).

Agenda

- ☐ Report vs. a formal complaint
- ✓ **Employee reporting responsibilities under SB 212**
- ☐ Handling intake of reports and complaints

SB 212 Overview

- Imposes mandatory reporting requirement on any university employee who:
 - in the course and scope of employment
 - witnesses or receives information regarding an incident
 - reasonably believed to constitute sexual harassment, sexual assault, dating violence, or stalking
 - alleged to have been committed by or against a student or employee
- Mandatory termination and potential criminal penalties for violation
- Mandatory reporting obligations for Title IX Coordinator and Chief Executive
- Institutions face a potential \$2 million fine from THECB for non-compliance

Texas Educ. Code § 51.252

SB 212: Reporting Requirements

- “(a) An employee of a postsecondary educational institution who, in the course and scope of employment, witnesses or receives information regarding the occurrence of an incident that the employee reasonably believes constitutes sexual harassment, sexual assault, dating violence, or stalking and is alleged to have been committed by or against a person who was a student enrolled at or an employee of the institution at the time of the incident shall promptly report the incident to the institution's Title IX coordinator or deputy Title IX coordinator.”

Texas Educ. Code § 51.252(a)



- Responsible for compliance oversight per SB 212 and HB 1735.
- Institutions must provide annual reports to THECB regarding compliance with SB 212 and HB 1735
- If THECB determines institution “not in substantial compliance,” may assess administrative penalty up to \$2 million, which cannot be paid using “state or federal money.”
 - See TEC § 51.258 (SB 212), § 51.292 (HB 1735).

- (a) An employee of a postsecondary educational institution who, in the course and scope of employment, witnesses or receives information regarding the occurrence of an incident that the employee reasonably believes constitutes sexual harassment, sexual assault, dating violence, or stalking and is alleged to have been committed by or against a person who was a student enrolled at or an employee of the institution at the time of the incident shall promptly report the incident to the institution's Title IX coordinator or deputy Title IX coordinator.
 - (1) The employee's duty to report an incident begins on the effective date of these regulations or January 1, 2020, whichever is later;
 - (2) The employee is required to report an incident regardless of when or where the incident occurred; and
 - (3) Institutions may establish additional reporting avenues to comply with this section provided that the reports are promptly routed to the Title IX coordinator or deputy Title IX coordinator.

19 Tex. Admin. Code § 3.5

Texas Educ. Code § 51.252(d)

- “(d) Notwithstanding Subsection (a), a person is not required to make a report under this section concerning:
 - (1) an incident in which the person was a victim of sexual harassment, sexual assault, dating violence, or stalking; or
 - (2) an incident of which the person received information due to a disclosure made at a sexual harassment, sexual assault, dating violence, or stalking public awareness event sponsored by a postsecondary educational institution or by a student organization affiliated with the institution.”

19 Tex. Admin Code § 3.5(d)(3)

- “(3) a sexual harassment, sexual assault, dating violence, or stalking incident in which the person has either learned of the incident during the course of their institution’s review or process or has confirmed with the person or office overseeing the review or process, that the incident has been previously reported.”

Sec. 51.255. FAILURE TO REPORT OR FALSE REPORT; OFFENSES.

- (a) A person commits an offense if the person:
 - (1) is required to make a report under Section 51.252 and ***knowingly*** fails to make the report; or
 - (2) with the intent to harm or deceive, knowingly makes a report under Section 51.252 that is false.
- (b) An offense under Subsection (a) is a Class B misdemeanor, except that the offense is a Class A misdemeanor if it is shown on the trial of the offense that the actor intended to conceal the incident that the actor was required to report under Section 51.252.
- (c) A postsecondary educational institution shall terminate the employment of an employee whom the institution determines **in accordance with the institution's disciplinary procedure** to have committed an offense under Subsection (a).

Agenda

- ☐ Report vs. a formal complaint
- ☐ Employee reporting responsibilities under SB 212
- ☒ **Handling intake of reports and complaints**

Title IX: Deliberate Indifference

- When a school has notice of sexual harassment, the school must respond promptly, in a manner that is “not deliberately indifferent,” meaning that the school’s response must not be clearly unreasonable in light of the known circumstances.
 - The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30,
 - consider the complainant's wishes with respect to supportive measures,
 - inform the complainant of the availability of supportive measures with or without the filing of a formal complaint,
 - and explain to the complainant the process for filing a formal complaint.

34 C.F.R. § 106.44

Title IX: Deliberate Indifference Contd.

- A school is required to respond when it has ***actual knowledge*** of sexual harassment.
 - Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures.
 - Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge.
 - This standard is not met when the only official of the recipient with actual knowledge is the respondent.
 - The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient.

34 C.F.R. § 106.30(a)

Immediate Assistance

- Supportive measures
 - Discussed in next session
- Encourage and provide assistance to other services
 - Healthcare
 - Local police
 - Counseling or other services



Key Elements of an Effective Intake Process

- Multiple Reporting Channels: Provide accessible avenues for reporting, including online forms, email, phone, in-person reporting, and reports from third parties.
 - Ensure the non-in-person channels are monitored.
- Prompt Intake and Assessment: Ensure reports are reviewed promptly to identify safety concerns, supportive measure needs, and potential Title IX implications.
- Consistent Documentation Practices: Maintain a standardized process for documenting reports, communications, and intake decisions.
- Jurisdictional Evaluation: Assess whether the reported conduct falls within the institution's Title IX jurisdiction and determine any other applicable policies.
- Communication and Support: Inform involved parties of available supportive measures, resources, reporting options, and next steps in the process.
 - Document communication efforts if the Complainant does not/stops responding.
- Meeting with the Complainant: Promptly schedule an initial meeting, explain how to file a Formal Complaint and the grievance process, explain available supportive measures, discuss any safety concerns, answer the Complainant's questions, discuss the preservation of evidence.

Title IX Coordinator Signing a Formal Complaint

- Recognized as option in definition of Formal Complaint, 34 C.F.R. § 106.30:
 - “Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment.”
 - “Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party under this part or under § 106.45, and must comply with the requirements of this part, including § 106.45(b)(1)(iii).”
- Regulations do not provide guidance as to when a Title IX Coordinator should sign a Formal Complaint.



Title IX Coordinator Signing a Formal Complaint Contd.

Considerations Before Signing a Formal Complaint
Is complainant willing to participate?
Does an investigation go against the wishes of a complainant?
Will investigator be able to gather evidence sufficient to for decision-maker to make a determination?
Does conduct, even if true, rise to the level of Title IX Sexual Harassment?
Are there other means to address reports without invoking Title IX grievance process?

Notice of Allegations

Sent to all known parties upon filing of Formal Complaint. Includes:

- Sufficient details known of the allegation at the time:
 - Party identities
 - Description of alleged misconduct
 - Approximate date and location of misconduct
- Information about the grievance process,
- Availability of informal resolution,
- Respondent's presumption of non-responsibility pending determination at the conclusion of the grievance process,
- Parties' right to an Advisor of their choice,
- Right to inspect and review evidence, and
- False statements prohibition, and
 - Covers verbal and written statements and submission.
- Any policy-specific requirements.

Questions?



Lunch Break





UT System Title IX Training Initial Case Assessment

Darren G. Gibson, Partner
Emi M. Passini, Partner

August 5, 2026

Agenda

- ✓ **Title IX vs. Non-Title IX conduct**
- ☐ Mandatory dismissal
- ☐ Supportive measures
- ☐ Emergency removal and interim actions

Scope of Title IX – Sex Discrimination

An individual cannot be treated differently on the basis of their sex in regard to:

- Recruitment, admissions, and counseling
- Financial assistance
- Athletics
- Sex-based harassment (including sexual misconduct)
- Treatment of pregnant and parenting students
- Discipline
- Single-sex education
- Employment

Scope of Title IX – Sexual Misconduct

- Title IX applies to sexual misconduct that occurs where:
 - Complainant (alleged victim) is enrolled in classes, participating in the institution's activities, employed by the institution, or attempting to participate in the institution's programs or activities; and
 - The alleged conduct occurred in an educational program or activity; and
 - The alleged conduct qualifies as Title IX Sexual Harassment; and
 - The alleged conduct occurred against a person in the United States.

34 C.F.R. § 106.30

Scope of Title IX – Education Program and Activity

- Any location, event, or circumstance over which the recipient exercises substantial control over both the respondent and the context in which the sexual harassment occurs.
- Includes all education programs or activities, whether occurring on or off-campus, and any building owned or controlled by a student organization that is officially recognized by a postsecondary institution (such as a fraternity or sorority house).

34 C.F.R. § 106.44(a)

- UT System Model Policy: “It applies to conduct that occurs on University owned or controlled premises, in an education program or activity including University sponsored or supported events, buildings owned or controlled by student organizations officially recognized by the University, or off campus when the conduct potentially affects a person’s education or employment with the University or potentially poses a risk of harm to members of the University community.”

Matters Outside the Scope of Title IX

- Off-campus conduct (where there is lack of substantial control).
- Conduct outside the U.S.
- Examples of matters outside scope:
 - Domestic violence between two employees that occurs at a private residence off campus
 - Sexual assault of student during study abroad
 - Sexual assault of post-doc at conference where respondent from another institution
 - Stalking of faculty member off campus by person not connected to university

Addressing Matters Outside the Scope of Title IX

- Other misconduct procedures continue to be available to students and employees for matters that are not required to be addressed by Title IX.
- Check your institution's specific policies. In determining the appropriate policy and/or grievance process that applies to the alleged conduct, evaluate:
 - Status of the Complainant
 - Status of the Respondent
 - Where the alleged conduct occurred
 - Whether the complainant was participating or attempting to participate in an education program or activity at the institution
 - The nature of the alleged conduct

Hypothetical – Is the Alleged Conduct Within the Scope of Title IX?

- Jordan and Avery are students at State College and are members of a recognized student organization, the Student Leadership Council (SLC). The SLC organizes an annual leadership retreat, but the event is not sponsored by the College, does not receive College funding, and is held at a privately owned cabin two hours from campus. The SLC promotes the retreat through its College-approved student organization webpage.
- During the retreat, several students gather around a fire pit at the end of the day. Avery consumes alcohol and later alleges that Jordan repeatedly made unwanted sexual comments, touched Avery's leg without consent, and attempted to kiss Avery despite Avery's objections. The next week, Avery reports the incident to the College's Title IX Coordinator. During the intake meeting, the Coordinator learns the following additional facts:
 - The retreat occurred entirely off campus.
 - No College employee attended the retreat.
 - The SLC is officially recognized by the College.
 - The College's name and logo appear on SLC's webpage.
 - The SLC receives limited access to College facilities during the academic year but received no funding for the retreat.
 - Both students continue to interact regularly in student organization meetings held on campus.
 - Avery reports feeling uncomfortable attending organization events and has considered withdrawing from the group.

Agenda

- ☐ Title IX vs. Non-Title IX conduct
- ✓ **Mandatory dismissal**
- ☐ Supportive measures
- ☐ Emergency removal and interim actions

Dismissal

Mandatory Dismissal

- Mandatory dismissal is required if the conduct alleged would not constitute sexual harassment as defined in the Title IX regulations, even if proved
 - If the conduct did not occur in the institution's education program or activity or against a person in the United States.
 - If the alleged conduct would not constitute sexual harassment, even if proved.

Discretionary Dismissal – Title IX

- Discretionary dismissal permitted if the complainant withdraws in writing, the respondent is no longer enrolled/employed, or circumstances prevent gathering sufficient evidence.
- Dismissal for Title IX purposes does not preclude the school from addressing the conduct under another policy.

Dismissal Contd.

- Important reminders:
 - Notify the parties of their appeal rights.
 - Both parties have the right to appeal a dismissal.
 - Dismissal might not be the end of the matter.
 - The underlying conduct may be covered by another policy or procedure.
 - Just because the alleged conduct is outside of Title IX does not mean it may not be a violation of another policy.
 - Discretionary dismissal requires discretion!
 - Document the reasoning with more than a conclusory statement.
 - Don't prematurely terminate supportive measures.

Agenda

- ☐ Title IX vs. Non-Title IX conduct
- ☐ Mandatory dismissal
- ☒ **Supportive measures**
- ☐ Emergency removal and interim actions

Supportive Measures Under Title IX

- Supportive measures means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.
- 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.

34 C.F.R. § 106.30

Supportive Measures Under Title IX Contd.

Examples of Supportive Measures included in the definition:

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 campus
Other similar measures

Supportive Measures Under Title IX Contd.

- The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures.
- The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

34 C.F.R. § 106.30

Obligations: Timing

Does a school have to offer supportive measures to a complainant who has not filed a formal complaint?

- Yes. The 2020 amendments specify that the school must contact the complainant to discuss the availability of, and to offer, supportive measures, regardless of whether a formal complaint is filed. A school must also consider the complainant's wishes with respect to supportive measures.

When to offer supportive measures to a respondent?

- Only after a formal complaint is filed.

What are the
supportive
measures a school
must offer to
parties?

- A school must offer supportive measures that “are designed to restore or preserve equal access to the [school’s] education program or activity. Measures should be “designed to protect the safety of all parties or the [school’s] educational environment, or deter sexual harassment.”

Litigation: Deliberate Indifference and Interim Measures

L.W. v. Roman Catholic Archdiocese of Indianapolis, Inc., (S.D. Ind. June 21, 2022)



- Students on football team videotaped student John Doe's genitals and posted on social media and made fun John Doe, who had physical and mental impairments.
- Defendants knew coach's son had been involved in multiple incidents of misconduct and bullying before the Video Incident but had been deliberately indifferent to those events.
- Dean assisted in deleting the Video and deliberately chose not to watch the Video before it was deleted.
- The student who took the Video received one after-school suspension.
- The student perpetrators were not precluded from participating in any football-related events.
- Defendants took no protections and made no accommodations to ensure John Doe's at school or in the locker room.
- Defendants did not have a Title IX coordinator, and no one contacted John Doe to discuss incident or offer supportive measures.
- Defendants' employees knew John Doe was bullied and sexually assaulted in the locker room during the Video Incident and failed to take any measures to prevent it from happening again.
- John Doe faced further abuse and harassment in retaliation for disclosing the Video Incident.
- Defendants failed to report either the Video Incident or the Retaliation Incident to the police, John Doe's parents, and the Department of Child Services.

Supportive Measures – Best Practices

- Offer promptly and equitably.
 - Inform Complainant of availability at first contact verbally and in writing.
 - Contact Respondent once report is made.
- Keep the process interactive throughout grievance process.
- Consider all possible impacts
 - Fact specific; each case is unique.
 - Neither Party can be unreasonably burdened.
- Maintain confidentiality to the extent possible.
 - Obtain prior written approval if outside parties are informed.
- Document outreach efforts, discussions with parties, and measures taken.

Agenda

- ☐ Title IX vs. Non-Title IX conduct
- ☐ Mandatory dismissal
- ☐ Supportive measures
- ☒ **Emergency removal and interim actions**

Emergency Removal

- Section 106.44(c) authorizes emergency removal of students.
- If, after an individualized safety and risk analysis, the institution “determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal.”
- Must provide respondent with notice and opportunity to challenge emergency removal decision immediately following removal.
- Provisions do not modify rights under Section 504 or ADA.

34 C.F.R. § 106.44(c)



Emergency Removal Contd.

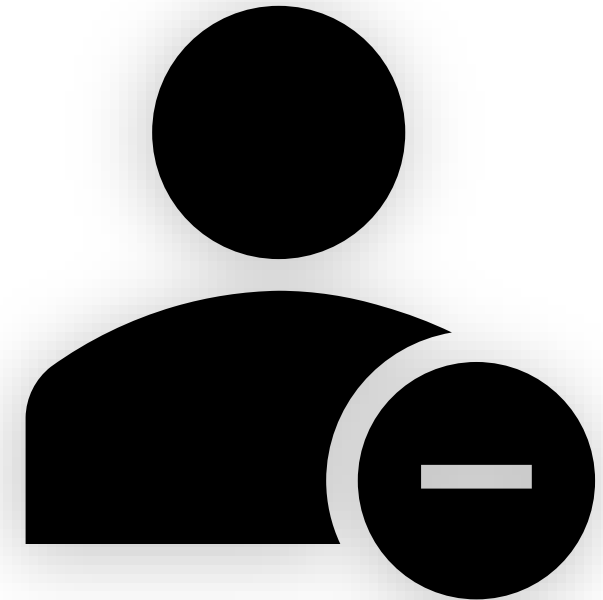
Preamble

- Emergency removal is not a substitute for reaching a determination of responsibility.
- OCR declined to adopt mandated process (e.g., licensed medical evaluation).
 - “Department desires to leave as much flexibility as possible for recipients to address any immediate threat to the physical health or safety of any student or other individual.”
- Declined to limit emergency removals only to alleged sexual assault or rape, or to prohibit emergency removals in allegations of verbal harassment.
- Examples of respondent behavior that could justify emergency removal:
 - Threats of physical violence to complainant in response to allegations.
 - Threatening physical self-harm in response to allegations.

Administrative Removal

- Institutions may place a non-student employee respondent on administrative leave during the pendency of a grievance process.
- This provision also may not be construed to modify any rights under Section 504 of the ADA.

34 C.F.R. § 106.44(d)



Questions?





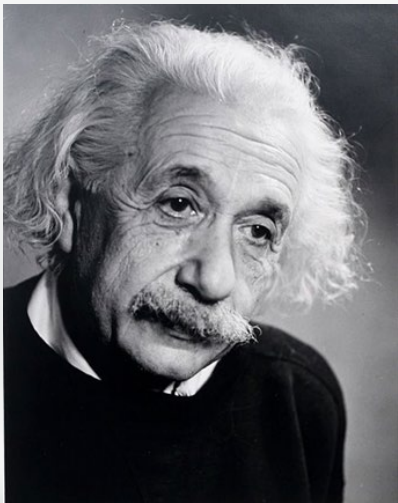
UT System Title IX Training Investigations

Darren G. Gibson, Partner
Emi M. Passini, Partner

August 5, 2025

“Condemnation without investigation is the height of ignorance.”

Albert Einstein



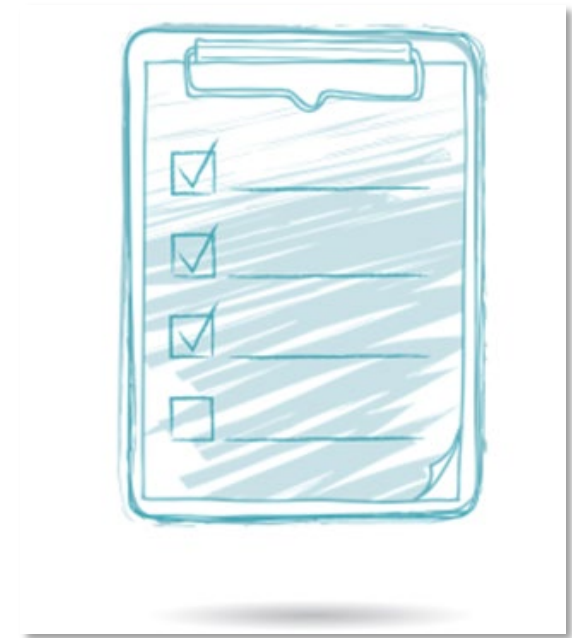
Agenda

- Strategy for planning an investigation
- Documenting the investigation
- Gathering evidence
- Interviews and interviewing techniques
- Handling Special Situations
 - Delicate Subject Matters
 - Emotional Interviews
 - Hostile Parties and/or Advisors



Agenda - Continued

- How to handle hostile witnesses or advisors
- Dealing with Consent, Coercion, and Incapacitation
- Chronology
- Drafting the Report

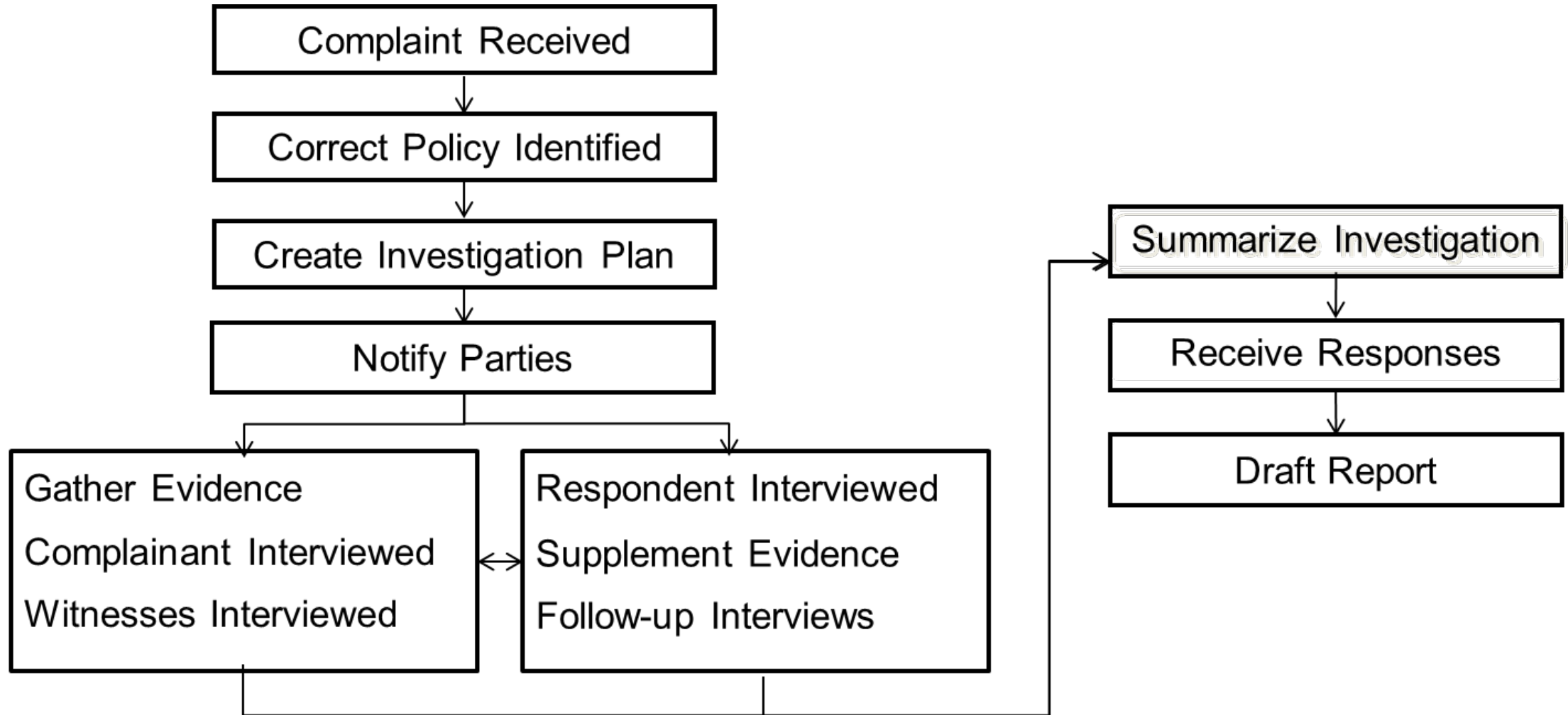


A “Good” Investigation Defined:

- Backed by policy with compliant procedure
- Timely investigation
- Speak with Complainant
- Interview witnesses
- Speak with Respondent
- Documented interviews
- Documents collected and secured
- Thorough report based on objective facts



Visualizing the Investigation Process

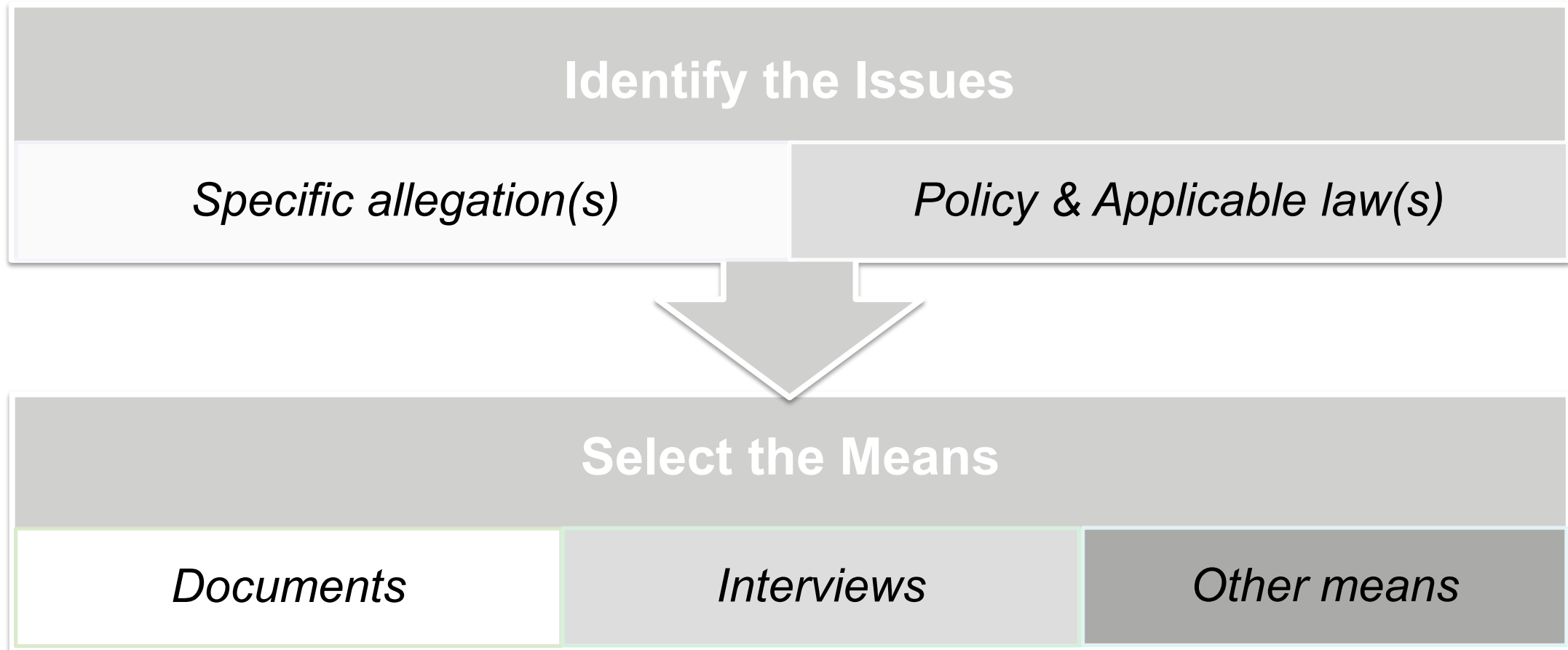


Planning the Investigation: A Written Plan

- Who are the Parties; What is alleged?
 - *E.g.*, Student stalking Student; Teaching Assistant sexually harassed Student; Supervising Faculty retaliates against Staff for opposing Sex Discrimination
- Determine applicable policies and procedures.
 - Is this a Title IX or Non-Title IX Investigation?
- Identify evidence for preservation/collection and relevant custodians.
 - Human Resources, IT Department, Campus Security
- Identify interviewees, set proposed order, and schedule.
 - *E.g.*, Parties, fact witnesses, background witnesses
- Identify required notices, deadlines, and events.



Step 1: Identify the Issues



Step 2: Identify Material Evidence

- Emails on the University email system
- Text messages, photos, social media posts, emails, and documents in possession of parties (if material)
- Personnel files
- Student disciplinary records
- Video surveillance of buildings
- Police and medical records (if available)

Materiality depends on the specific allegations.



Step 3: Identify Material Witnesses for Interviews

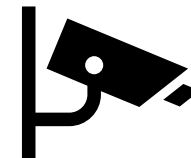
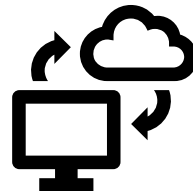
- Complainant
- Respondent
- Witnesses to actual event
- Witnesses to related events before or after the actual event
- Witnessed identified by parties with *material* knowledge
- Persons outside of the University
 - *E.g.*, Police officers, SANE nurse, family
- Experts in specific area
 - *E.g.*, sexual assault, alcohol induced amnesia

Institution bears burden of gathering adequate evidence to reach a determination.

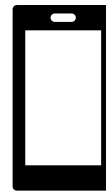
- Gather records from the appropriate custodian;
- Gather records from the Parties;
 - Confidential treatment records require record holder's consent.
- Gather electronic evidence:

• System e-mail	• Video footage
• Stored email	• Social media and photos
• Instant/Text Messages	• Internet searches
• Phone logs	• Voicemail

- If University email is important evidence, work with your IT department to preserve and search emails using search terms and date restrictions.
- Preserve and search other **material** electronic evidence.
 - University document system.
 - University-issued computers and phones.
 - Search history while using University network.
- Work with facilities to determine if relevant video surveillance exists.



- For text messages, request each party provide the entire text conversation for a given period.
- Establish a protocol with your IT department for best practices to provide texts from iMessage or third-party apps to investigators.
 - Develop clear written instructions you can provide to parties and witnesses.
- Establish similar protocols for social media.



Interviews: Preparing for the Interview

Outline the discussion topics with specific questions on key points.

1. Introduction.
 - Context, roles, confidentiality, non-retaliation, recording of interview.
2. Background and connection to parties.
3. General understanding of parties' relationship and history.
4. Timeline and details of specific allegations (and documents)
5. Additional material facts and context.
 - *E.g.*, personal experience with Respondent.
6. Ask if there is anything else?
7. Conclusion.

Identify material documents you need to discuss with the witness and have copies ready.

- Be prepared:
 - Written outline of allegations
 - Written list of basic questions organized by allegation
 - Space for “parking lot” issues
- Prepare interview summary
- Record non-verbal information:
 - Body language
 - Cooperation level
 - Forthcoming or elusive





DO

- Write objectively
- Summarize knowledge
- Use quotes if possible
- Document specific responses to key questions and evidence
- Document material facts about credibility



DON'T

- Make conclusions about facts and credibility
- Use quotes as shorthand

Key Issues in Interview

Who is in the room?

- Have two persons present for Complainant/Respondent interviews in delicate cases such as sexual assault or serious faculty misconduct.
- Interviewer gender diversity helps in M/F sexual harassment or sexual assault cases, particularly for Complainant and Respondent.

Order

- Complainant, Key Witnesses, Respondent, Additional Witnesses, and Follow-up.

Format

- In-person preferred, particularly for Parties, but video okay if necessary.
- Other witnesses by video or telephone, as needed.

Introduction

- Tell interviewee your name, title, and role as a neutral factfinder for the University.
- Provide short statement of meeting' purpose but maintain confidentiality.
- Explain to witness that they are not in trouble.

Address confidentiality

- Address confidentiality in context of investigation and the report.
- Explain witness confidentiality is not guaranteed; Report identifies witnesses.

Address non-retaliation

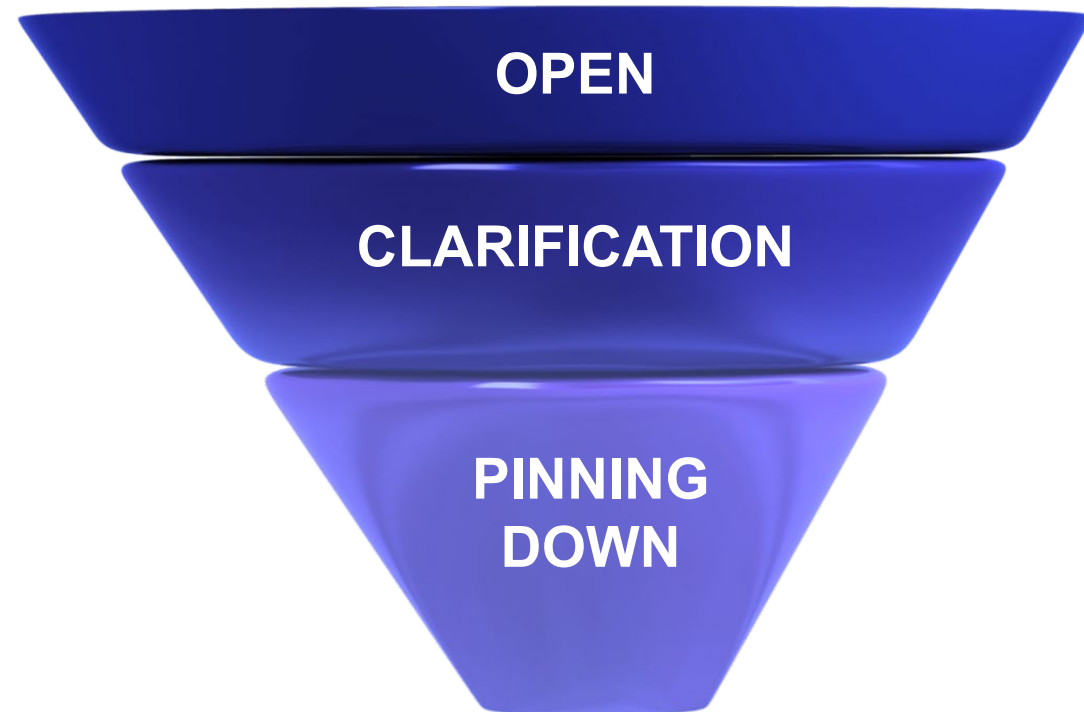
- Explain witnesses protected from retaliation and reporting process.

Questions

- Ask if there are any questions about the process before you get started.

Use “Funneled” Questioning

- Open-ended phase
- Clarification phase
- Pinning-down phase
(*i.e.*, closing the door)



- Ask open-ended questions:
 - “How would you describe your relationship with your supervisor?”
 - “What do you remember about the party?”
- Aim for all ***material*** evidence about allegations.
- Identify ways to refresh witness’ memory:
 - *E.g.*, documents; emails.
- Make sure the witness fully answers questions.



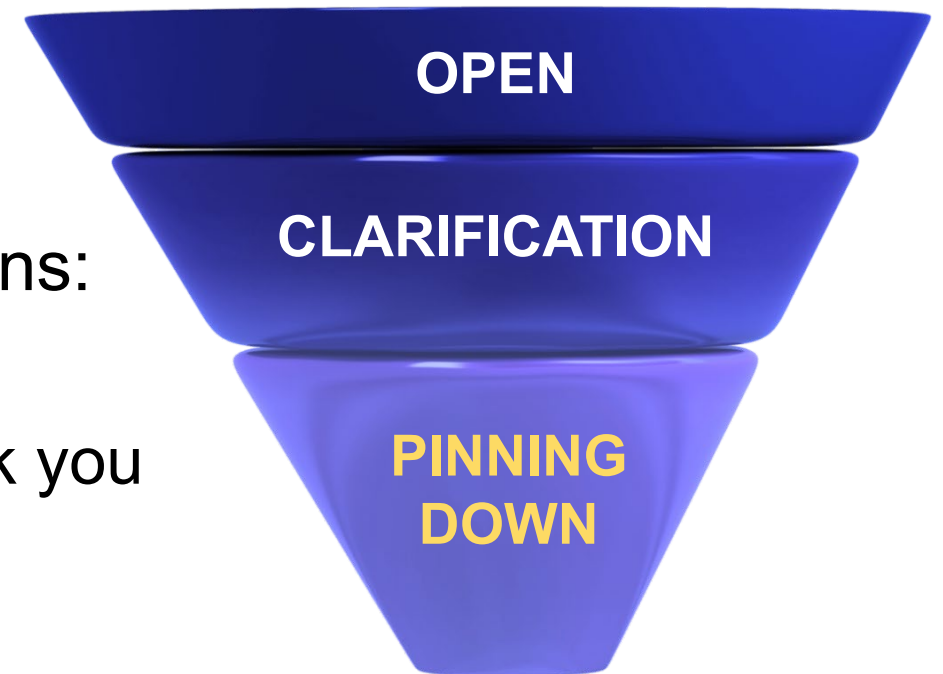
Clarification Questions

- What? Who? Where? When?
- Don't disrupt a train of thought.
- Use active listening:
 - Don't be wed to your outline.
 - Listen for subtle changes to answers and clarify.
- Follow up on cues:
 - Watch for eye contact and body language.
- Summarize so witness can offer facts that were left out.

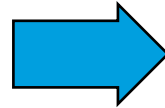


Pinning Down the Interviewee's Statements

- Close the door and exhaust subject.
- Get final answers.
- Ask whether there are any documents supporting witness's testimony.
- Encircle knowledge with wrap-up questions:
 - “Is there anything else?”
 - “Is there anything you thought I would ask you about that we haven't covered?”

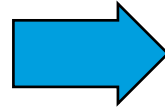


QUESTION



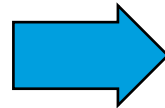
PURPOSE

“Let me give you this information so that you can respond.”



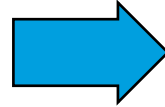
Refreshes recollection and provides a chance to respond.

“Is there anything else that you would like to add to this?”



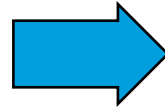
Gather full story, including context and background.

QUESTION



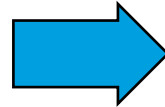
PURPOSE

**“Is there any other evidence
that would support what
you’ve told me?”**



**Uncover documents and
seals off “universe of facts”**

**“Is there anyone else we
should speak with about this?”**



**Chance to provide response
and create witness list**

Thank the Interviewee

- Thank you for your time in this serious and important process.
- Your participation helps support the University's compliance in this area and ensures we address serious allegations promptly and fairly.

Keep Communication Open

- Please feel free to contact me if you recall any other details or information.

Preserve Evidence

- Please remember you are not to destroy or alter documents or information.

Confidentiality and Retaliation Reminder

- You are also protected by the University's non-retaliation policy. Do not hesitate to contact me if you have any concerns in that regard.
- Reminder of the University's confidentiality policy.

- Avoid confrontational or accusatory questions.
- Maintain objectivity: Do not admonish or reprimand even if troubling conduct is revealed.
- Don't agree or disagree with what you're hearing.
 - Instead, use a non-binding, non-committal clause such as "I understand."
- Don't lead witnesses.
 - E.g., "... And then you heard Bud say ..."
- Use silence after a question as a technique to encourage reticent witnesses to start talking; People often feel a need to "fill" silence.

Interview Minefields, Curveballs, and Delicate Situations



Personal Topics, Emotional Interviews, Hostility

- Stay levelheaded and rework your strategy.
- When an Interviewee does not answer a question, ask more:
 - Would you like me to phrase the question another way?
 - What do you think I am asking you?
 - Will you tell me why you do not wish to answer?
 - Do you need a moment to gather your thoughts?
- Remember effects of trauma can impact the interview or the interviewee may be embarrassed.
- Remind disruptive Advisors of their role in the proceedings. End the interview if disruptions persist.

Dealing with Consent, Coercion, and Incapacitation

- More than 90% of sexual assault victims on college campuses do not report the assault.
 - *Cullen, F., Fisher, B., & Turner, M., 2000*
- About 1 in 3 women and 1 in 6 men have been the victim of a contact sexual assault.
 - *CDC NIPSVS, 2011*
- In 8 out of 10 cases of rape, the victim knew the perpetrator.
 - *Miller, T. R., Cohen, M. A., & Wiersema, B., 1996*



- Many victims do not characterize their experience as a crime due to:
 - Embarrassment;
 - Lack of understanding of the legal definition of rape;
 - Sympathy for the rapist; and
 - Self-blame.
- The most common reason for not reporting incidents of sexual assault and sexual misconduct was that it was not considered serious enough.
 - Other reasons included because they were “**embarrassed, ashamed or that it would be too emotionally difficult;**” and because they “**did not think anything would be done about it.**”

What is Consent?

Consent - A voluntary, mutually understandable agreement that clearly indicates a willingness to engage in each instance of sexual activity. Consent to one act does not imply consent to another. Consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another. Consent can be withdrawn at any time. Any expression of an unwillingness to engage in any instance of sexual activity establishes a presumptive lack of consent.

University of Texas System Office of Systemwide Compliance Model Sexual Misconduct Policy, at page 24

Additional Considerations for Consent

- Consent is not effective if it results from:
 - (a) the use of physical force,
 - (b) a threat of physical force,
 - (c) intimidation,
 - (d) coercion,
 - (e) incapacitation or
 - (f) any other factor that would eliminate an individual's ability to exercise his or her own free will to choose whether or not to have sexual activity.
- A current or previous dating or sexual relationship, by itself, is not sufficient to constitute consent. Even in the context of a relationship, there must be a voluntary, mutually understandable agreement that clearly indicates a willingness to engage in each instance of sexual activity.
- The definition of consent for the crime of sexual assault in Texas can be found in Section 22.011(b) of the Texas Penal Code.

University of Texas System Office of Systemwide Compliance Model Sexual Misconduct Policy, at page 24

Indications of a Lack of Consent

- Physical force is used or there is a reasonable belief of the threat of physical force;
- When duress is present;
- When one person overcomes the physical limitations of another person;
or
- When a person is incapable of making an intentional decision to participate in a sexual act, which could include instances of incapacitation.

Incapacitation – Incapacitation is the inability, temporarily or permanently, to give consent because the individual is mentally and/or physically helpless, either voluntarily or involuntarily, or the individual is unconscious, asleep, or otherwise unaware that the sexual activity is occurring. An individual may be incapacitated if they are unaware at the time of the incident of where they are, how they got there, or why or how they became engaged in a sexual interaction.

University of Texas System Office of Systemwide Compliance Model Sexual Misconduct Policy, at page 27

Incapacity and Alcohol/Drugs

- When alcohol is involved, incapacitation is a state beyond drunkenness or intoxication. When drug use is involved, incapacitation is a state beyond being under the influence or impaired by use of the drug. Alcohol and other drugs impact each individual differently, and determining whether an individual is incapacitated requires an individualized determination.
- After establishing that a person is in fact incapacitated, the University asks two questions:
 - (1) Did the person initiating sexual activity know that the other party was incapacitated? and if not,
 - (2) Should a sober, reasonable person in the same situation have known that the other party was incapacitated?
- If the answer to either of these questions is “YES,” consent was absent and the conduct is likely a violation of this Policy.
- A Respondent will be found to have violated policy only if the Respondent knew or should have known that the person was incapacitated.

University of Texas System Office of Systemwide Compliance Model Sexual Misconduct Policy, at page 27

- Incapacitation is determined through consideration of all relevant indicators of an individual's state.
- **NOT** synonymous with intoxication, impairment, blackout, or being drunk.
- Incapacitation is a step beyond drunkenness or intoxication.

Chronologies are extremely useful in investigations.

- Excellent way to:
 - Distill information;
 - Identify critical evidence; and
 - Spot inconsistencies in testimony.
- Simple chart listing date, event, and evidentiary source
- Helps avoid bias by presenting all information on equal footing.
- Helps in drafting report, as the story is in the chronology.

The Investigative Report

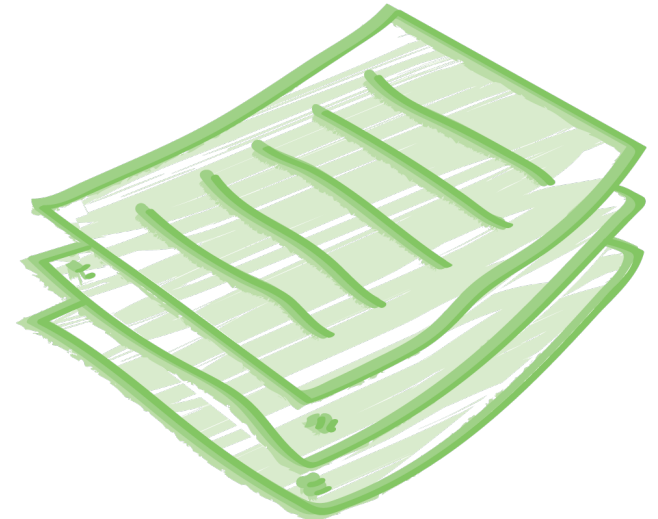
Purpose:

- Record of investigation steps and evidence collected.
- Writing process can clarify analysis and uncover additional questions.
- Likely used to justify action based on findings.
 - *E.g.*, dismissal, reprimand, etc.
- May be cited in legal proceeding, OCR investigation, or other related proceeding.
- Must consider a Party's response to evidence.



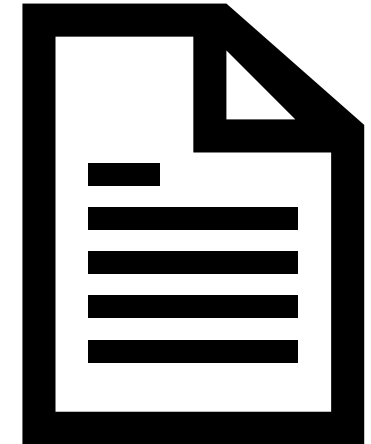
Critical Tasks of an Investigative Report

- Third parties must be able to understand full picture without outside explanation.
- Discuss all allegations raises and applicable policies.
- Document evidence objectively and accurately.
- Avoid unnecessarily controversial commentary.
- Provide enough information for Hearing Officer to make a determination.



Proposed Report Outline

- I. Executive Summary
- II. Summary of Allegations and Applicable Policies
- III. Timeline of Investigation
- IV. List of Witnesses and Evidence
- V. Summary of Witness Interviews and Evidence
 - Includes any credibility assessments
 - Chronology may be part of summary of evidence
- VI. Parties' Response to Evidentiary Record
- VII. Exhibits (documents, photographs, videos, texts)



Drafting the Investigative Report

Basics

- Document investigation timeline: Note interviews conducted, documents reviewed, and evidence examined.

Summary of Evidence

- State facts, not conclusions.
 - Avoid opinions, rumors, hearsay.
 - Give concrete examples.
- Attach key evidence as exhibits; acknowledge conflicting evidence.
- Acknowledge when credibility assessment is required; explain basis.

Conclusions

- None. That is the Hearing Officer's job.



DO

- Use objective language.
- Be as detailed as possible.
- Group together logically.

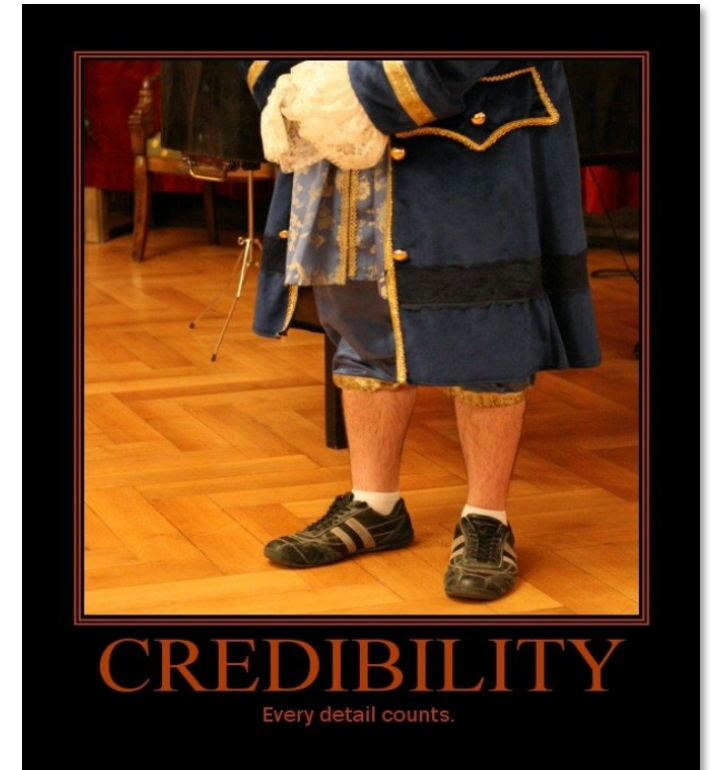


DON'T

- Reach conclusions.
- Put words in a Party's mouth.
- Rely on stereotypes.

- Investigative report may contain Investigator's credibility assessments
 - Go through applicable credibility factors in report when making credibility assessments.

Inherent Plausibility	Demeanor
Motive to Falsify	Corroboration
 - Apply factors to specific statements and/or witnesses.
 - Clearly explain why one party or witness appears more credible than another.
- Hearing Officer not bound by Investigator's assessments.



Insufficient Structure

- Use sections and headings to help guide readers and your own writing.
- Delineate between applicable policies, investigation process, outcome of interviews, and factual findings.

Lack of citations to evidence

- Cite only to key documents that tell the story; attach as exhibits.

Failure to clearly delineate the claims and conclusions

- Identify each specific claim, definition, and relevant facts.

Doesn't show policy was followed in conducting investigation

- Go through process and show compliance with all notice and investigation requirements (with accompanying policy citations).

Failure to recognize both sides

- If there is a dispute in the facts, recognize it and address it.

Credibility determinations are not explained

- Recognize and discuss credibility assessment factors when credibility matters.
 - Citing jury instructions in footnotes provides reliability to credibility assessments.

No narrative or chronology of events

- Reports often merely repeat evidence gathered then make determination.

Recommended Final Steps

Maintain a separate investigative file, to include:

- Copy of the complaint, notices, correspondence with parties / witnesses
- Interview notes
- Relevant policies
- Documentation gathered during the investigation
- Physical and Electronic Evidence
- Investigation report
- Hearing Recording
- Final Written Determination
- Appeal Decisions

Questions?



Break





UT System Title IX Training Live Hearings

Darren G. Gibson, Partner
Emi M. Passini, Partner

August 5, 2026

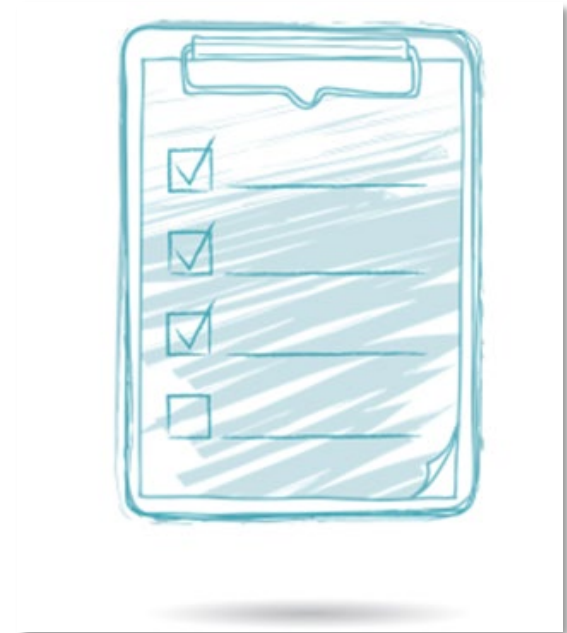
Purpose of Live Hearings (per the DOE)

“The Department agrees that a live hearing gives both parties the most meaningful, transparent opportunity to present their views of the case to the decision-maker, reducing the likelihood of biased decisions, improving the accuracy of outcomes, and increasing party and public confidence in the fairness and reliability of outcomes of Title IX adjudications.”

Preamble to the 2020 Regulations

Agenda

- Role of Hearing Officer, Parties, Advisors, & Witnesses
- Prehearing Matters
- Conducting the Live Hearing
- Hearing Location
- Recording the Hearing
- Rules of Decorum and Enforcement



- Party Statements
- Relevancy Determinations
- Objections
- Hearsay
- Fair & Equitable Treatment of All Parties
- Drafting the Written Decision



Role of Participants

- Parties:
 - Opening/closing statements
 - Present evidence and witnesses
 - Testify and be subject to cross-examination
- Advisors:
 - Conduct cross-examination
 - Provide support, guidance, and/or advice
- Witnesses, including investigator and expert:
 - Testify and be subject to cross examination
- Investigator:
 - Summarizes evidence
 - May answer questions about the investigation



Role of Participants Contd.

- Hearing Officer
 - Manages process of hearing
 - Enforces rules of decorum
 - Can ask questions of any Party or Witness
 - Determines relevancy of questions
 - Issues the Written Determination
- Title IX Coordinator
 - No clear role in the Live Hearing
 - Not prohibited from attending/observing
 - Must remain impartial and neutral towards both parties through the entirety of the grievance process.



- The Investigator sends a copy of the Investigation Report to each Party and their Advisor along with the Notice of Hearing at least 10 days before the Live Hearing.
- The Notice must contain:
 - Date, time, and location, participants, and purpose of the hearing
 - A statement of the alleged conduct charges, and a summary statement of the evidence gathered
 - May also provide a deadline by which the University representative and the parties have an opportunity to disclose witnesses and/or any documents they intend to use at the hearing, if not already included in the investigation report

The Hearing Officer administers the Live Hearing:

- Overseeing the proceeding, including order of parties and witnesses.
- Enforces any rules of decorum, including any time limits
- Issues relevancy determinations
- Asks questions of the Parties and Witnesses
- Evaluates evidence



Possible Hearing Schedule

- Hearing Officer opens the Hearing
 - Explains purpose
 - Affirms any rules of decorum
 - Addresses Standard or Evidence
 - Answers questions about Hearing Procedure
- Opening statements by Parties
- Party Questioning
 - Questioning by Hearing Officer
 - Cross Examination by Opposing Party's Advisor
- Witness Questioning and Cross Examination
- Closing statements by Parties
- Hearing Officer statements regarding process and next steps

Hearing Location

The Live Hearing can be conducted:

- In a single geographic location, with everyone in one room; or
- Virtually

Virtual hearings require technology that enables all participants to simultaneously see and hear the Party or witness speaking.

- Hearing Officers must be trained on Hearing technology prior to Hearing.
 - Unremedied technological glitches during a virtual Title IX hearing that led to Plaintiff's expulsion provided the basis for Plaintiff to survive a Motion to Dismiss in his Erroneous Outcome claim.
 - *Doe v. N.Y. Univ.* (S.D.N.Y. Mar. 31, 2021)

Recording the Hearing

- The Live Hearing will be recorded.
 - The recording may be audio or audiovisual.
- The University will make the recording or a transcript available to the Parties for inspection or review upon request.



University of Texas System Office of Systemwide Compliance Model Sexual Misconduct Policy, at page 16

Consider Whether Rules of Decorum Are Needed

- The University, not Title IX regulations, may establish rules of decorum.
 - Contemplated in the 2020 Regulations Preamble
 - Rules must apply equally and equitably; Must not impair a Party's rights
- Rules should require all participants act to:

– Demonstrate professional conduct	– Preserve the dignity of all Participants
– Treat other with respect	– Not disrupt the Live Hearing
- Rule violations may result in exclusion and/or disciplinary action.
 - Institution obtains new Advisors when present Advisor removed.

Party Statements

- The Complainant and the Respondent may make opening and closing statements if they wish and will have the opportunity to present evidence, answer questions, and conduct cross-examination through their Advisor.
 - Hearing Officer determines the sequence of events for the Hearing.
 - Hearing Officer sets time for Parties' opening and closing statements.
 - Statement time must be equitable between the Parties.

University of Texas System Office of Systemwide Compliance Model Sexual Misconduct Policy, at page 14

Hearing Officer's Questions

The Hearing Officer may ask questions of any Party or Witness

- Questioning allows Hearing Officer to determine relevancy, understand facts, and assess credibility.
- Questioning Techniques:
 - Open-ended questions generate more information.
 - Provide each witness an opportunity to speak directly to the Hearing Officer regarding the alleged incidents.
 - Address inconsistencies:
 - “Earlier I thought you said X, help me understand. . .”



Credibility Questions – Examples

- The other witnesses from the party reported Complainant was very drunk, except for you. Do you have an explanation for these different accounts?
- You initially reported to Title IX that Respondent only kissed you without your consent. During the investigation, you also alleged he groped your breasts. Can you explain why you didn't report the groping originally?
- How long have you known Respondent? Are you close friends?
- You stated that Complainant was sober that night, but you left the party early, correct? You don't have first-hand knowledge of her state when she left with Respondent, do you?
- You reported that you never heard your supervisor and mentor make sexual comments to his secretary. Do you sit near them? Are you able to hear their conversations? Do they ever meet without you present? Thus, you don't necessarily have first-hand knowledge of all of their communications, do you?

“Essential function of cross-examination is not to embarrass, blame, humiliate, or emotionally berate a party, but rather to ask questions that probe a party’s narrative in order to give the decision-maker the fullest view possible of the evidence relevant to the allegations at issue.”

- *2020 Regulations Preamble*
- Conducted directly, orally, and in real time by Party’s Advisor and never by Party personally.

34 C.F.R. § 106.45(b)(6)(i)

Cross Examination – Protecting the Witness and Process

- Consider reasonable time limits for total Cross Examination, including per witness limits.
 - Include such limitations in the rules of decorum.
 - Empower Hearing Officer to enforce such limits.
- Do not tolerate courtroom style cross – “You can’t handle the truth!”
 - Enforce rule against duplicative questioning, which can be abusive.
 - Make it clear that witnesses can take breaks during questioning, if needed.
- Only relevant questions may be asked of Parties or Witnesses.
 - Remember relevancy rules regarding prior sexual history.



Remember:

RELEVANCE = PROBATIVE + MATERIAL

- Probative means may make a fact more or less probable than it would be without the answer.
- Material means the fact is significant in determining the outcome.

Hearing Officer determines if questions are relevant.



Relevancy determinations occur in real time during Live Hearings.

- The question is asked;
- Hearing Officer states whether the question is relevant;
 - Not relevant questions are excluded, and Hearing Officer explains exclusion rationale.
 - Only relevant questions answered by Party or Witness.



Tips for Making Fair and Impartial Relevancy Determinations

- Take your time to consider the applicable rules.
- Ask clarifying questions of the parties / advisors to determine relevance.
- If complex issues arise around documents, consider redactions of irrelevant or prohibited material.
- State on the record the relevancy ruling and why.
 - For example, “I am not allowing the question, as it goes to the Complainant’s prior sexual history and is not offered for one of the two exceptions.”
- Make sure to apply the same rule to both sides. If one side can’t ask questions about a particular issue, the same rule applies to the other.
- Focus on the probative and materiality prongs of relevancy to avoid irrelevant and harassing questions, such as:
 - Do you think your parents would be proud of your behavior? [Not probative or material.]
 - Isn’t it true that you failed out of your first university? [Not material.]
- Enforce presumption of non-responsibility during Live Hearing. Address responsibility only in written decision.

- A Hearing Officer's Live Hearing determinations are final.
 - A Hearing Officer's relevancy and evidentiary exclusions can only be challenged as a procedural defect during appeal.

But

- Allowing the Advisor to ask clarifying questions may cut down on procedural irregularity challenges by allowing the Hearing Officer to more fully develop explanation for exclusion should Advisor have confusion following initial answer. Remain consistent with relevancy determinations between Parties.
- Objections not pertaining to a question's relevance cannot be made by the Advisor.
 - An Advisor is a potted plant unless conducting cross-examination.

Evidence of Prior Bad Acts

- “A recipient may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence.”
 - Where a cross-examination question or piece of evidence is relevant, but concerns a party’s character or prior bad acts, Hearing Officer cannot exclude or refuse to consider the relevant evidence, but may proceed to objectively evaluate that relevant evidence by analyzing whether that evidence warrants a high or low level of weight or credibility.

Preamble to Title IX Regulations

Questions or Evidence about Complainant's Sexual Predisposition

- Questions and evidence about Complainant's sexual predisposition are **never** relevant, and questions and evidence about Complainant's prior sexual behavior are not relevant unless such questions and evidence are offered to:
 - (1) prove someone other than the Respondent committed alleged conduct; or
 - (2) prove consent if the questions and evidence concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent.



This rule only applies to Complainants: “[E]vidence of a pattern of inappropriate behavior by an alleged harasser must be judged for relevance as any other evidence must be.”

*University of Texas System Office of Systemwide Compliance Model Sexual Misconduct Policy, at pages 20-21
34 C.F.R. § 106.45(b)(6)(i); Preamble to Title IX Regulations*

Scenario: Making Relevancy Determinations

Emma accused her then-boyfriend Malik of Sexual Misconduct after they had sex on a night Emma got intoxicated at a frat party and came back to Malik's apartment. Malik asserts it was consensual and Emma asked him to. Emma asserts there is no way it was consensual because she is saving herself for marriage to show her commitment to God. Malik's Advisor wants to ask Emma:

- Did you talk to your roommate about the incident? Your parents?
- Has Malik ever tried to pressure you for sex in the past?
- Were you actually a virgin before the night of the allegation?
- Is it true that you didn't break up with Malik until your sorority sisters found out you slept together?

What is allowed and what is excluded? Why?

Fair and Equitable Treatment of All Parties

- Both Parties must have an Advisor for cross-examination during Hearing's Cross Examination portion.
- Enforce rules of decorum fairly and evenly.
- ✓ - Rules of decorum require participants to remain five feet apart; prohibit yelling.
- ⊘ - Rules of decorum prohibit Respondent from making Complainant "uncomfortable."
- Determinations must be objective.
 - Cannot be based on Party status or anything other than evaluation of relevant evidence.
- Enforce presumption of non-responsibility until written determination issued.

Drafting the Written Decision

- Hearing Officer issues written Determinations after Live Hearings.
 - 21 days under the Model Policy.
- Independent written determination required.
 - Hearing Officer can utilize Investigation Reports, but must draw independent conclusions based on available, relevant evidence and the events of the Live Hearing.



Drafting the Written Decision

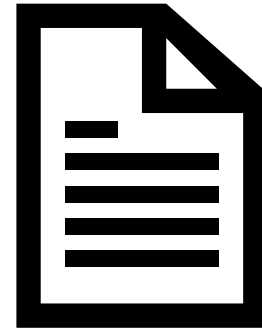
Hearing Officer issues written determinations that includes:

- The allegations;
- A description of all of the procedural steps of the Grievance Process;
- The findings of fact supporting the hearing officer's determination;
- The conclusion(s) and a rationale as to whether the Respondent is responsible for each allegation;
- The disciplinary sanctions, if applicable;
- Whether additional remedies designed to restore or preserve equal access to the education program or activity will be provided to the Complainant; and
- The institution's procedures and permissible bases for the parties to appeal, if applicable

University of Texas System Office of Systemwide Compliance Model Sexual Misconduct Policy, at pages 15-16

Proposed Determination Outline

- I. Executive Summary
- II. Summary of Allegations and Applicable Policies
- III. Description of all Procedural Steps
- IV. Summary of Relevant Evidence
 - A. Witness statements and testimony
 - B. Witness Credibility Determinations
 - C. Other evidence (e.g., documents, videos)
- V. Finding of Facts Supporting Determination
- VI. Determination Applying Facts to the Policy
- VII. Recommendation/Rationale for Sanctions; Remedy Recommendation
- VIII. Appeal Information



Drafting the Written Decision – Focus on Facts

- ✓ Maintain an objective tone.
- ✓ Based on evidence presented to the Hearing Officer in the record and at the Live Hearing.
- ✓ Clearly state the Who, What, Where, When, and Why.
 - Cite to evidence as much as possible; use exhibits.
 - Recognize both inculpatory and exculpatory evidence.
- ✓ Explain evidentiary determinations.
 - Especially if Party disputes relevance determinations for certain evidence.
- ✓ No need to discuss all available evidence or all contradictory, but immaterial facts.

- Investigator credibility assessments do not bind Hearing Officer.
- Assessments:
 - Apply credibility factors to specific statements and witnesses.
 - Be clear about why one Party deemed more/less credible.
- Credibility Factors:
 - Inherent plausibility: Is the testimony believable on its face? Does it make sense?
 - Demeanor: Did the person seem to be telling the truth or lying?
 - Motive to falsify: Did the person have a reason to lie?
 - Corroboration: Is there witness testimony (e.g., eye-witnesses, people who saw person soon after, or people who discussed incident with him/her at the time) or physical evidence (such as written documentation) that corroborates the party's testimony?
 - **Past record: Did the alleged harasser have a history of similar behavior in the past?**

Drafting the Written Decision – Delve into Determinations

- Use clear, direct, statements.
- Based on the appropriate evidentiary standard.
 - Preponderance of the evidence.
- Explain the elements in light of the evidentiary standard.
 - Justify with the record.
- Assume the Written Decision could end up as evidence in further proceedings, such as:
 - Exhibit in a faculty termination proceeding
 - Document produced to the Department of Education OCR
 - Exhibit in a lawsuit

Reminder of the Appropriate Evidentiary Standard

Preponderance of the Evidence – The greater weight of the credible evidence. Preponderance of the evidence is the standard for determining allegations of prohibited conduct under this Policy. This standard is satisfied if the action is deemed more likely to have occurred than not.

University of Texas System Office of Systemwide Compliance Model Sexual Misconduct Policy, at page 28

Scenario: Evaluate the Determination

All relevant evidence was reviewed under a “preponderance of the evidence” standard to determine if it is more likely than not that Ms. Roe violated the Title IX Sexual Misconduct Policy occurred by engaging in Title IX Sexual Harassment of Mr. Smith.

I find that sending 45 unwelcome text messages to Mr. Smith in three weeks violates the Title IX Sexual Misconduct Policy. The 45 messages were all sent during a shared Chemistry I Lab. The messages’ content escalated from comments about Mr. Smith’s physical appearance and attractiveness to name-calling and threats. Ms. Roe increased the frequency and aggression of the messages after Mr. Smith requested the messages stop. The content of the messages was based on Mr. Smith’s sex, unwelcome, and of such a nature and frequency that a reasonable person would find them objectively severe, pervasive, and objectively unreasonable. Mr. Smith was also denied access to the class because he stopped attending as the messages escalated and did not return until interim measures were put in place.

I find Ms. Roe responsible for the violation. Ms. Roe denies sending the messages and claims it must have been her roommate sending them from Ms. Roe’s iPad that she left at home during the lab. I determined Ms. Roe’s statement was not credible because a) Ms. Roe’s lab partner testified to watching Ms. Roe send the messages, 2) video surveillance footage from the Chemistry lab shows Ms. Doe on her phone at the times the messages were sent to Mr. Roe, and 3) Ms. Doe’s roommate denied sending the messages.

Drafting the Written Decision – Sanctions & Remedies

Possible Sanctions, dependent on gravity and nature and of misconduct and role of parties (student vs. employee), including, for example:

Educational training	Employment probation
Disciplinary probation	Job demotion or reassignment;
Denial of degree	Dismissal or termination;
Suspension	Ineligible for rehire

- Sanctions may not be imposed until after appeal deadline. If appealed, Sanctions stayed until appeal concludes (if upheld).
- When discussing Sanctions, the Hearing Officer must also note whether Complainant receives institution-provided remedies designed to restore and preserve equal access to Educational Programs or Activities.

University of Texas System Office of Systemwide Compliance Model Sexual Misconduct Policy, at pages 16-17

Factors for Sanctions

- Severity of conduct
 - Did it involve violence? Repeated acts? Multiple complainants?
- Did Respondent accept responsibility, express remorse?
- Would continued presence of Respondent on campus be a threat to Complainant or University community?
- Respondent's history of other conduct violations.
- History of sanctions in prior similar cases.

Questions?





UT System Title IX Training

Role of Advisors in Investigation and Adjudication of Sexual Misconduct Cases

Darren G. Gibson, Partner
Emi M. Passini, Partner

Agenda

- Role of advisors
- Preparing parties for interviews
- The “Potted Plant” rule
- Inspection and review of evidence and meaningful opportunity to respond
- Live hearings and cross examination



Role of Advisors

- Parties may choose an Advisor at any point and are free to change Advisors.
- Advisors do not need to be attorneys; however, attorneys may serve as Advisors.



University of Texas System Office of Systemwide Compliance Model Sexual Misconduct Policy, at pages 11, 14

- Parties may have an Advisor attend any related interview, meeting, or proceeding in the Grievance Process.
- Advisors are not permitted to submit written responses to the evidence on their own or on behalf of the party they are advising.
- Parties must have an Advisor for a Hearing.
- The University will provide a Party without an Advisor with one at no cost to conduct Cross Examination during the Live Hearing.

Advisors should be aware that:

- Parties cannot be restricted from discussing allegations or gathering and presenting evidence.
- Parties can be required to maintain confidentiality, especially when dealing with an opposing Party's treatment record.
- Prohibiting witness manipulation and intimidation is not a restriction on speech.
 - Punishing retaliation or other Code of Conduct violations permitted.

Prehearing Investigation

- Parties provided equal opportunity to present witnesses, including fact and expert witnesses, and evidence.
- Advisors cannot directly participate in the investigative interview.
 - Permitted to attend as a support person
 - Can assist Party with generating a list of possible witnesses or evidence before interview
 - Can help Party review Policy to understand rights and responsibilities
- While attorneys may be Advisors, the role of Advisor is quite different. Objections and other litigation devices are not allowed.
 - In fact, they can be disruptive and lead to Investigators to end an interview.



“Potted Plants”

- Advisors may attend interviews or meetings during investigation; however, **they may not actively participate in those meetings.**
- The Advisor acts as a “potted plant” during most proceedings and do not have an active role.
 - Except that Advisors conduct cross examination during Live Hearing.



- Prior to issuing Investigative Report, Parties must have opportunity to review and inspect evidence directly related to allegations.
 - Evidence subject to inspection shall be sent to each Party and their advisor.
 - Advisor should carefully review Report to respond and prepare for Hearing.
- Parties entitled to at least 10 calendar days to submit a written response to evidence.
- While an Advisor may assist a Party in reviewing the evidence and preparing a response (if any), Advisors may not submit a response to the evidence.

University of Texas System Office of Systemwide Compliance Model Sexual Misconduct Policy, at page 13



Preparing for the Live Hearing

Reviewing and Responding to Investigation Reports

- Each Party and their Advisor will review the Investigation Report prior to the Live Hearing

Pre-Hearing Submissions

- Identification of witnesses or documents that were not identified in the investigation report
- May challenge the fairness, impartiality, or objectivity of the hearing officer

Separate Rooms

- Virtual Live Hearings must utilize technology enabling the Decision Maker and participants to see and hear the proceedings in real time.
- Parties or witnesses may also appear remotely, so long as it is in real time.



University of Texas System Office of Systemwide Compliance Model Sexual Misconduct Policy, at pages 14

- Cross examination are questions posed to opposing Party or witness to:
 - Advance Party's allegations and/or defenses.
 - Assess credibility of opposing Party.
- Advisors conducts cross-examination of opposing Party or Witness.
 - Parties are not allowed to conduct their own cross-examination.
- Cross-examination must adhere to the Rules of Decorum (if applicable) and not disrespect or violate the dignity of the participant questioned.

- Cross examination occurs live and in real time, but the Hearing Officer determine if a question is relevant before it can be answered.
- Cross examination question procedure:
 - The question is asked;
 - Hearing Officer states whether the question is relevant;
 - Not relevant are excluded, and Hearing Officer explains why.
 - Relevant questions answered by Party or witness.
- Advisors may not object to determinations but may request clarification.



Written Determination and Appeal

- Hearing Officer issues a written determination that includes findings of fact, findings as to alleged policy violations, and sanctions, if any.
- Parties may appeal determinations or dismissals based on:
 - Procedural irregularity affecting the outcome of the matter;
 - New evidence not reasonably available at the time of the determination regarding responsibility that could affect the outcome of the matter; or
 - A conflict of interest or bias of Title IX Coordinator, Investigator, Hearing Officer for or against the parties (generally or specifically in the matter) that affected the outcome.

University of Texas System Office of Systemwide Compliance Model Sexual Misconduct Policy, at pages 17-18

Questions?



End of Day 1



UT Systemwide Title IX Annual Training Welcome – August 5-6, 2026 Day 2

Darren G. Gibson, Partner
Emi M. Passini, Partner



Title IX Training Case Study Discussion

Darren G. Gibson, Partner
Emi M. Passini, Partner

August 6, 2026

Review the University of Texas System Title IX Complaint Form

- Complainant: Haley Doe
- Respondent: John Smith
- Two competing Title IX complaints filed involving the same incident during a basketball trip to the Bahamas.
- December 2, 2025: Haley's complaint alleges assault and sexual misconduct that occurred on or around November 28, 2025, during the Battle 4 Atlantis basketball trip in the Bahamas.
- December 5, 2025: John's complaint alleges stalking and a falsified complaint by Haley.

Interim Measures

- What type of interim measures do you consider?
 - Mutual no-contact order
 - Additional security
 - Suspension from team?
 - Emergency removal?
 - No-trespass the father from campus?
- Do you have protocols for interaction with athletics regarding sexual misconduct matters involving student athletes?

Title IX or Non-Title IX Process

- How many of you have different processes that govern Title IX versus non-Title IX matters?
- Here, underlying alleged sexual assault occurred in Bahamas, so not covered by Title IX.
- However, the alleged stalking occurred both in the Bahamas and on campus, so likely is covered by Title IX.
- Assuming separate policies, how do you resolve from a procedural perspective?

Investigation and Witnesses

- Do you conduct a single investigation of both allegations, or separate investigations?
- Who are your witnesses, in addition to Haley and John?
 - Haley's roommates and other friends who were in the Bahamas
 - John's teammates who were at the pool and his roommate
 - John's brother and his girlfriend from Central State
 - John's mother
 - Haley's father
- Other evidence?
 - Security footage from hotel and from outside gym after practice
 - Communications from attorney to John
 - Is the dad's prior criminal record (if any) relevant?

Text Messages and Chats

- Assume both parties were texting and chatting with their friends while in the Bahamas and afterwards about what occurred.
- What are your protocols for obtaining texts and chats?
- Can your IT department work with students and/or employees to pull full chat history off of a personal cell phone?
- Do you send preservation notices to the other students?

Involvement of Board Members / Boosters

- Assume Haley's father is a major donor to the University. Does that change the way in which you handle the case?
- Assume that a witness reported to you that a booster provided an open bar tab for the players, Haley and her friends while they were hanging out at the pool bar that night.
 - How does that impact your investigation and does it raise any other compliance concerns?
- What if the Respondent is not a student, but a major donor and former university board member who was at the resort with the team and who regularly attends games and other Athletics events?
 - Does that change the way you handle the investigation?

Title IX in the NIL Era

- How does the filing of a complaint affect John's NIL deal?
- Can his NIL contract be terminated based solely on the complaint?
- What about due process concerns? Does Southeastern have to wait until there is a final determination through the hearing process?
- What about potential impact on any third-party NIL deals?
- Let's assume the alleged event occurred during a summer tour and that shortly after the complaint was filed, John announces he is transferring to another school? How does that impact your investigation?

Standard for a Falsified Complaint?

- Has your institution ever substantiated allegations of a falsified complaint of sexual assault?
- What type of evidence is sufficient to support such a finding?
- What type of evidence would be needed in this case?
- What are the risks associated with a finding of falsified complaint of sexual assault?
- Are there specific risks here with respect to a popular student athlete?

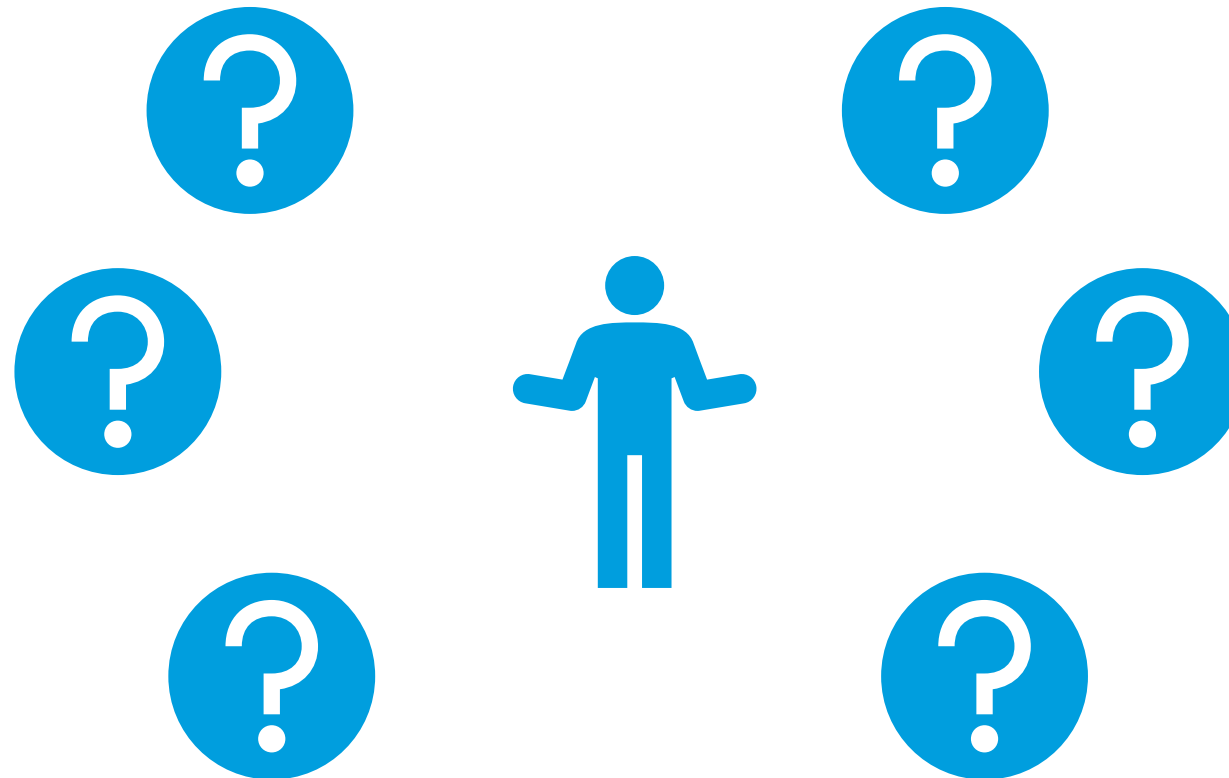
Intersection with Pending Litigation

- While pending criminal investigations common, what about ongoing civil litigation?
- Is evidence from litigation potentially relevant to university's investigation?
- How do you ensure the integrity of your process while respecting parallel civil litigation proceedings?
- Have you ever dealt with defamation claims resulting from sexual misconduct proceedings?
- Does your institution get involved in defamation cases if a student complainant is sued **after** there is a finding of responsibility?

Sanctions

- What would be appropriate range of sanctions if John found responsible?
- What would be appropriate range of sanctions if Haley found responsible?
- What if Haley found not responsible for stalking, but responsible for falsified complaint?

Additional Discussion Points?





UT System Title IX Training

Parenting, Pregnancy, and Lactation

Darren G. Gibson, Partner
Emi M. Passini, Partner

August 6, 2025

- ✓ **Pregnancy Discrimination
under Federal Law**
- ❑ Texas State Law
- ❑ Role of Title IX Coordinator
- ❑ OCR Enforcement / Litigation



Pregnancy Discrimination Under Federal Law

- Title IX statute does not expressly include pregnancy.
- But Title IX regulations make it clear that pregnancy discrimination is a form of sex discrimination prohibited by Title IX for both students and employees.
- Pregnancy discrimination in employment is expressly prohibited under Title VII based on the Pregnancy Discrimination Act of 1978.
- Federal law also includes the Pregnant Workers Fairness Act (PWFA) and the Providing Urgent Maternal Protections (PUMP) for Nursing Mothers Act.

20 U.S.C. § 1681; 34 C.F.R. § 106.21(c), 106.40, 106.51(b), 106.57.

Pregnancy and Title IX Regulations

- 106.21(c) – Prohibits pregnancy discrimination in admission and recruitment.
- 106.40(b)(1) – Prohibits discrimination of students in education program or activities on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom.
- 106.40(b)(4) – Requires institution to treat these conditions similar to other temporary disabilities.
- 106.40(b)(5) & 104.57(d) – Requires institutions to treat these conditions as valid reasons for leave under any student or employee leave of absence policy.
- 106.57 – Prohibits employment discrimination on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom.

34 C.F.R. § 106.21(c), 106.40, 106.51(b), 106.57.

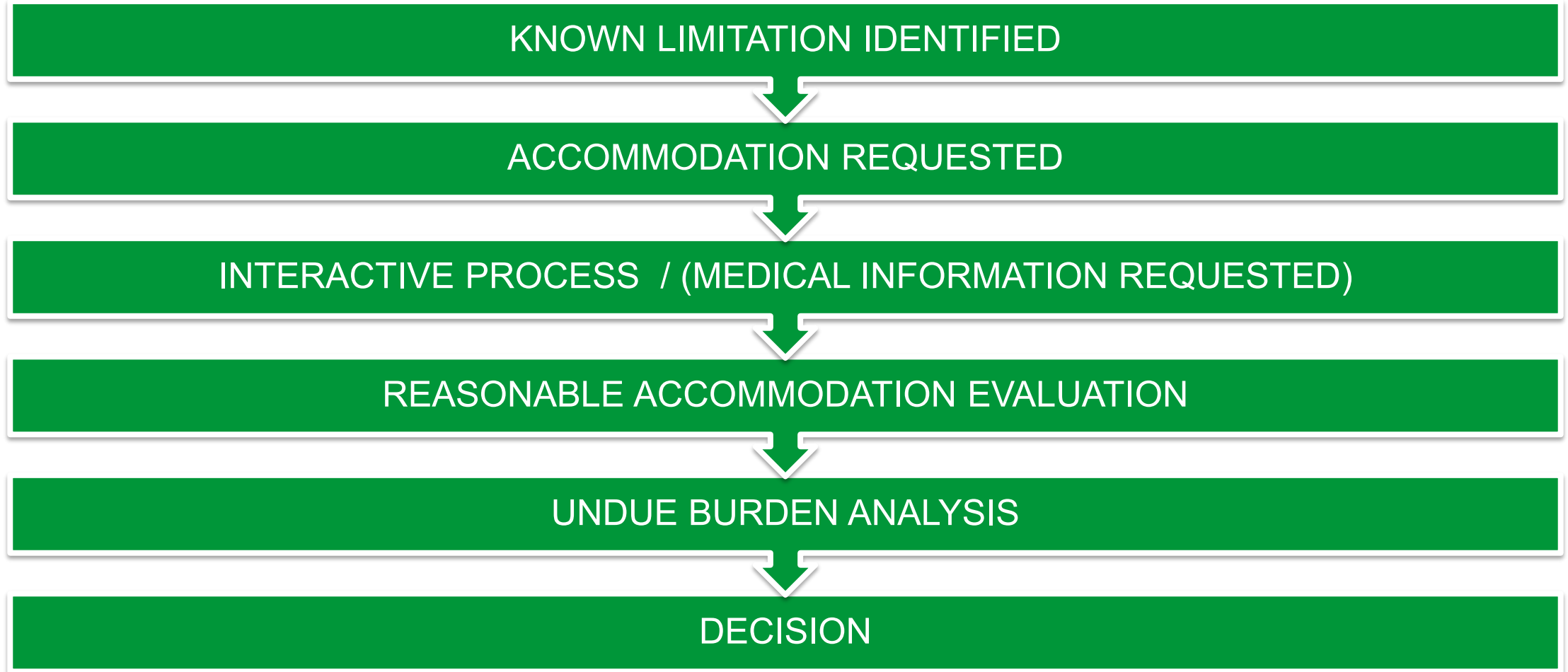


What is the PWFA?

- The Pregnant Workers Fairness Act (PWFA) applies only to accommodations.
- The PWFA requires a covered employer to provide a “reasonable accommodation” to a qualified employee’s or applicant’s known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an “undue hardship.”
- Went into effect on June 27, 2023. EEOC issued its final regulation on April 15, 2024, which went into effect on June 18, 2024.
- On August 15, 2025, Fifth Circuit overturned district court decision enjoining enforcement of the PWFA against Texas state agencies.
 - *State of Texas v. Bondi*: “The House’s proxy-voting rule did not violate anyone’s fundamental rights. There is a reasonable relationship between the rule and the result it seeks—majoritarian rule. And the constitutional text, history, and tradition indicate that the Quorum Clause contains no physical-presence requirement that the House’s rule could have flouted.”
- BUT on January 14, 2026, the Fifth Circuit vacated the August 15 decision, and the panel will rehear the case en banc on May 12, 2025. It is currently deciding whether the U.S. Constitution required congressional lawmakers’ physical presence to vote to pass the PWFA.

What You Should Know About the Pregnant Workers Fairness Act | U.S. Equal Employment Opportunity Commission

PWFA Accommodation Process



- Employee may be eligible for accommodation *even when they are unable to perform the essential functions* if the inability to perform the essential functions is temporary, the essential functions can be performed in the near future, and the inability to perform the essential functions can be reasonably accommodated.
- Presumptive reasonable accommodations:
 - Allowing employee to carry or keep water near, and to drink as needed
 - Allowing employee to take additional restroom breaks, as needed
 - Allowing employee whose work requires standing to sit and vice versa, as needed
 - Allowing employee to take breaks to eat and drink, as needed

ADA v. PWFA Key Differences

	ADA	PWFA
Covered Individual	Qualified individuals (employees and applicants) with disabilities.	Employees and applicants who have known limitations related to pregnancy, childbirth, or related medical conditions.
Medical Documentation	May only ask for medical documentation when disability and/or need for accommodation is not known or obvious.	May only require certification if it is reasonable under the circumstances for the employer as to whether to grant the accommodation.
Knowledge of Limitation	Includes an individual who is perceived by others as having a disability (“regarded as”).	Requires that employee or employee's representative has communicated physical or mental condition to employer.

What is the PUMP Act?

- Providing Urgent Maternal Protections for Nursing Mothers (PUMP) Act, effective December 29, 2022.
- Expands the FLSA to provide protections for breastfeeding parents with main updates to include:
 - protections for employees who were not previously covered, particularly salaried employees; and
 - time spent expressing breast milk must be considered hours worked if the employee is also working.
- Includes updated DOL wage poster.



PUMP Act requirements:

- Private space, other than a bathroom, that is functional for pumping. Must be shielded from view and intrusion from colleagues and the public.
- Reasonable break time of 20 minutes or less (if non-exempt) and without docking of salary (salaried employees).
 - If working on breaktime, must be paid.
 - If paid breaks provided, must include employees who pump during breaks.



Agenda

- ☐ Pregnancy Discrimination under Federal Law
- ✓ **Texas State Law**
- ☐ Role of Title IX Coordinator
- ☐ OCR Enforcement / Litigation



State Law Protections for Pregnant and Parenting Students

- Enacted last legislative session (2023).
- Adds protections for pregnant and parenting students and requires institution to adopt a policy on pregnant and parenting students.
- Institution may not require a pregnant or parenting student to:
 - (1) take a leave of absence or withdraw from the student's degree or certificate program;
 - (2) limit the student's studies;
 - (3) participate in an alternative program;
 - (4) change the student's major, degree, or certificate program; or
 - (5) refrain from joining or cease participating in any course, activity, or program at the institution.
- Requires institution to provide accommodations similar to those provided to students with temporary disability by:
 - (1) excuse the student's absence;
 - (2) allow the student to make up missed assignments or assessments;
 - (3) allow the student additional time for assignments in same manner as students with a temporary medical condition; and
 - (4) provide the student with access to instructional materials and video recordings of lectures for classes to the same extent as any other student with an excused absence.
- Also requires institution to allow student to take a leave of absence and provide early registration for parenting students.

State Law Protections for Pregnant and Parenting Students

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- Also requires institution to allow student to take a leave of absence and provide early registration for parenting students.

Tex. Educ. Code § § 51.982-51.983.

State Law Protections for Pregnant and Parenting Students

- Texas Education Code requires policy on students to identify the “point of contact” for accommodations, and requires institution to designate “a liaison officer for current or incoming students” with children under 18.
- Liaison shall provide students information regarding:
 - (1) resources to access medical and behavioral health coverage and services and public benefit programs;
 - (2) parenting and child care resources;
 - (3) employment assistance;
 - (4) transportation assistance;
 - (5) student academic success strategies; and
 - (6) any other resources developed by the institution to assist the students.

Tex. Educ. Code §§ 51.982, 51.9357

Texas Law re Pregnancy Discrimination in Employment

- Statute makes clear that sex discrimination includes “discrimination because of or on the basis of pregnancy, childbirth, or a related medical condition.”
- “A woman affected by pregnancy, childbirth, or a related medical condition shall be treated for all purposes related to employment, including receipt of a benefit under a fringe benefit program, in the same manner as another individual not affected but similar in the individual's ability or inability to work.”

Tex. Labor Code § 21.106

Texas Law re Right to Express Breast Milk

- Law applies to public employers, including IHEs.
- Law makes it clear that employee has a right to express breast milk at work.
- Employer shall have a policy on expression of breast milk by employees to support practice and “make reasonable accommodations for the needs of employees who express breast milk.”
- Employer shall:
 - (1) provide a reasonable amount of break time for an employee to express breast milk each time the employee has need to express the milk; and
 - (2) provide a place, other than a multiple user bathroom, that is shielded from view and free from intrusion from other employees and the public where the employee can express breast milk.

Tex. Government Code § 619

- Under the new DOE guidance, schools must:
 - Allow class participation with reasonable accommodations like larger desks;
 - Must excuse absences due to pregnancy;
 - Accept late work;
 - Protect students from pregnancy harassment;
 - Implement a policy against harassment;
 - Have specific grievance procedures for harassment claims;
 - Have at least one employee carrying out procedures.

Know Your Rights: Pregnant or Parenting? Title IX Protects You From Discrimination At School |
U.S. Department of Education

Agenda

- ☐ Pregnancy Discrimination under Federal Law
- ☐ Texas State Law
- ✓ **Role of Title IX Coordinator**
- ☐ OCR Enforcement / Litigation



Role of Title IX Coordinator

- While state law requires “contact person” or liaison for student, this is not necessarily the Title IX office or Title IX Coordinator.
 - For example, the contact person at the University of Texas is the Student Parent Liaison in the Title IX Office.
- The 2024 regulations re pregnancy discrimination are not in effect, 2020 regulations include similar requirements.
- However, 2024 regulations’ requirement of mandatory disclosure of pregnancy-related information, break-time for employee lactation, and lactation spaces for students and employees not in effect.
- Assisting with compliance with federal and state law to avoid students making claims to OCR or employees making claims to EEOC.

Role of Title IX Coordinator

- Consider whether complaints of denials of accommodations by students are complaints of sex discrimination (although not sexual harassment) under Title IX.
 - UT System Model Policy: “Sex Discrimination – Occurs when an individual is treated less favorably on the basis of that person’s sex (including gender), which may also include on the basis of sexual orientation, gender identity, or expression, pregnancy or pregnancy-related condition, or a sex stereotype. Sexual harassment, as defined in this Policy, is a form of sex discrimination.”
- Consider providing ways for students to have complaints regarding pregnancy / parenting discrimination heard, including the right to challenge a denial of an accommodation request.

Agenda

- ☐ Pregnancy Discrimination under Federal Law
- ☐ Texas State Laws
- ☐ Role of Title IX
- ☒ **OCR Enforcement / Litigation**



- “Know Your Rights: Pregnant or Parenting? Title IX Protects You From Discrimination At School”
 - <https://www.ed.gov/laws-and-policy/civil-rights-laws/sex-discrimination/know-your-rights-pregnant-or-parenting-title-ix-protects-you-from-discrimination-at-school> (page last reviewed by OCR Feb. 12, 2026).
- Helpful resource directed to students.
- Explains discrimination and exclusion on the basis of pregnancy and parental status.
- Includes guidance on how schools must handle classes and school activities; excused absences and medical leave; harassment; and policies and procedures.
- Tells students how to file a complaint with OCR.

Case Study: VMI Resolution Letter 2014

- Students at VMI alleged broad Title IX violations which included a pregnancy-specific violation.
- Under VMI rules, female cadets who became pregnant were required to resign or be separated, effectively excluding them from enrollment.
- Pregnancy, as a result, was not treated like a temporary medical condition as required by Title IX.
- OCR investigated and found the policy was in violation of Title IX, which led VMI to enter into a resolution agreement and revise their policies.
- For pregnant cadets, the resolution included a requirement that pregnancy be treated the same as other temporary medical conditions, including leave and return rights, as necessary.

[vmi-letter.doc](#)

OCR Investigation of Hinds Community College (MS)

- OCR investigated complaint filed by student alleging:
 - College discriminated against her by not providing academic adjustments during her pregnancy and:
 - College did not respond promptly to her complaint that her instructors and program supervisor subjected her to harassment based on her pregnancy.
- Through Resolution Agreement, College agreed to:
 - (1) review and revise its practices, policies, and procedures for pregnant students;
 - (2) update its website and other areas for disseminating information;
 - (3) train all full-time faculty and relevant staff on the Title IX rights of pregnant students;
 - (4) conduct surveys to assess the effectiveness of trainings;
 - (5) develop a tracking system for pregnancy-related adjustments for students;
 - (6) compile a list of all pregnancy-related requests for adjustments; and
 - (7) reimburse the complainant for tuition and related mandatory costs associated with repeating the final semester of her program.

Source: NACUA Case updates; Hinds Community College

OCR Investigation of Troy University (AL)

- OCR investigated a complaint by a student who alleged the University did not make reasonable adjustments in response to her pregnancy-related requests and that she received lower or failing grades as a result.
- Through the Resolution Agreement, the University agreed to:
 - (1) review and revise its practices, policies, and procedures for pregnant students;
 - (2) update its website and other information dissemination;
 - (3) train all faculty and those staff involved in providing Title IX resources for pregnant students on the students' rights and the University's obligations under Title IX;
 - (4) assess the effectiveness of that training through a survey;
 - (5) develop a tracking system for requests for pregnancy-related adjustments and the University's responses;
 - (6) compile a list of these requests and responses; and
 - (7) provide individual remedies to the complainant, including removing certain grades from her transcript and reimbursing related documented expenses.

Source: NACUA Case updates; [Troy University \(PDF\)](#)

Doe v. The Pennsylvania State University (M.D. Pa. 2023)

- Former employee of the Nittany Lion Inn (owned by Penn State) alleged she became pregnant after she was sexually assaulted by a co-worker, who then harassed her, demanding she terminate the pregnancy.
- Plaintiff reported harassment and requested to work different shifts than her alleged harasser.
- Manager reduced the number of shifts they worked together and offered to transfer her from dishwashing shifts to housekeeping, but plaintiff quit, saying she felt she was being pushed out.
- Court ruled that a reasonable juror could find that the alleged harassment was severe or pervasive.
- Court permitted claim under Title VII to proceed, finding a question as to whether the manager took sufficient measures to end the alleged harassment, but it granted summary judgment Title IX claim, finding no juror could conclude that the manager was deliberately indifferent.

Source: NACUA Case updates

Questions?



Break





UT System Title IX Training

Intersection of Title IX with Other Laws and Protections

Darren G. Gibson, Partner
Emi M. Passini, Partner

August 6, 2026

Agenda

- Title IX vs. Title VI vs. Title VII
- Intersection of free speech and Title IX
- Intersection of religious freedom, religious accommodations, and Title IX
- Intersection with Clery and VAWA

Title IX vs. Title VI vs. Title VII

Title IX	Title VI	Title VII
Conditioned on receipt of federal funding	Same	Covers all employers over 15 employees
Covers students, employees, and others participating in educational program	Same	No, just employees and applicants
Severe, pervasive, and objectively offensive standard	Same	No (severe or pervasive)
Regulations require specific grievance process	Regulations do not require specific process	Regulations do not require specific process
Damages include compensatory / economic damages with no caps, and attorney fees	Same	Back pay and front pay, compensatory and punitive (capped at \$300K), and attorney fees
Does not require complaint with federal agency	Does not require complaint with federal agency	Requires charge and exhaustion with EEOC / state agency
Deference to disparate impact regulations in question	Requires intentional discrimination for private action, per Supreme Court	Claims for both disparate treatment and disparate impact recognized

What is Severe, Pervasive, and Objectively Offensive?

- Title IX's "severe, pervasive, and objectively offensive" standard more demanding than Title VII's "severe or pervasive" standard.
- Nevertheless, courts rely on Title VII cases in employment context to interpret Title IX standard.
- The Fifth Circuit uses a totality of the circumstances test to determine whether the acts are objectively severe, pervasive, and offensive. The Court looks at the:
 - (1) frequency of the acts,
 - (2) severity,
 - (3) physically threatening or humiliating, or mere offensive utterance, and
 - (4) whether it unreasonably interferes with the learning environment.

Conduct that rises to the level of severe, pervasive and objectively offensive

After being allegedly raped by football players at off-campus party, student alleged:

- Classmates called student “whore” and “slut”;
- Classmates asked whether she had sex with multiple people;
- Classmate asked, “How did it feel to be fucked in every single hole of your body?”;
- Classmates excluded her from cheerleading;
- One student asked her the race of the baby she would be having;
- Alleged rapist “wore the pants that he raped [student] in to school, which had [her] blood on them from intercourse, and stood on the lunch table and said, these are the pants that I took [student’s] virginity in.”; and
- Multiple football players called her a liar and told her that she was “going to ruin everything.”

I.F. v. Lewisville Indep. Sch. Dist., 915 F.3d 360 (5th Cir. 2019)

Free Speech on Campus

- Public universities are subject to constitutional limitations when restricting student and employee speech protected by First Amendment.
- Administrators can be personally liable for restrictions that violate students' or employees' constitutional rights.
- However, universities generally can enforce content-neutral time, place, and manner restrictions.
 - For example, noise restrictions during finals, camping bans, approval for outside speakers, approval to use reservable spaces, no blocking of egress to buildings or on roadways.
 - Enforcement should be consistent without regard to the speaker's viewpoint.

Conduct that DIDN'T rises to the level of severe, pervasive and objectively offensive

- Calling another student “fat” and “pig.”
- Stealing food and throwing it down dorm hall.
- Stealing student’s picture and writing “call for a good time” and posting on Snapchat.
- “Play fighting.”
- Stealing items and conditioning return on she came to his room and “cuddled with him.”
- Calling student repeatedly, even after being blocked, and telling her to “grow up” and be nicer to roommate.
- Calling student a “fag.”
- Grabbing student’s “clothed buttocks” for several second.

Owens v. La. State Univ., 709 F. Supp. 3d 245 (M.D. La. 2023).

Title VI case where conduct DIDN'T rise to the level of severe, pervasive and objectively offensive



- White male student told complainant that she “was only [at University and the Honors College] to fill the black girl quota.”
- Complainant “regularly encounter[ed] white students referring to Jane Doe No. 3 and other African Americans at [University] as [the n-word].”
- Professors “facilitated racist and bigoted conversation” in courses with topics titled “Are people of color discriminated against or do they just commit more crimes?” and “Everyone is a little bit racist.”
- University used her as a minority show piece by regularly soliciting her participation in school activities.

Doe No. 1 v. Tex. Christian Univ., 2021 WL 12288641 (N.D. Tex. Jan. 12, 2021)
(same standard under Title VI)

Hypothetical – What law applies?

- Complainant (a junior) is interviewed by school newspaper and says she won't play unless University kicks complainant off campus.
 - She refuses to play in a game pending hearing, is kicked off team, and loses \$75K NIL deal.
- Respondent is found responsible, suspended for one year, and sues, alleging he was discriminated against based on race, gender, and his beliefs.
- Associate Professor goes on podcasts with Respondent stating that outcome was a violation of Respondent's First Amendment rights.
- Associate Professor is denied tenure 6-months later, and sues State U, alleging denial because of his race, participation in the case, and speech on podcast.
- Complainant sues State U for breach of contract, discrimination, and retaliation.
- What law(s) apply?

Hypothetical – What law applies?

Party	Potential Applicable Laws
Respondent	Title IX (sex-based discrimination) Title VI (race-based discrimination) First Amendment (viewpoint discrimination; retaliation)
Associate Professor	Title VII (race-based discrimination) Title IX and Title VI (retaliation) First Amendment (retaliation)
Complainant	Title IX (sex-based discrimination and retaliation) Title VI (race-based discrimination and retaliation) First Amendment (retaliation) State contract law (breach of NIL agreement)

Agenda

- Title IX vs. Title VI vs. Title VII
- Intersection of free speech and Title IX
- Intersection of religious freedom, religious accommodations, and Title IX
- Intersection with Clery and VAWA

Intersection of Free Speech and Title IX

- “Although OCR does not have jurisdiction to enforce the First Amendment to the U.S. Constitution, as a threshold issue and throughout the processing of the complaint, OCR interprets its statutes and regulations consistent with the requirements of the First Amendment, and all actions taken by OCR must comport with First Amendment principles. OCR will not interpret any statute or regulation to impinge upon rights protected under the First Amendment or to require recipients to encroach upon the exercise of such rights.” *OCR Case Processing Manual, Section 109 (February 2025).*

Case Processing Manual

Page 1

U.S. DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS



CASE PROCESSING MANUAL
(CPM)

EFFECTIVE DATE: FEBRUARY 19, 2025

Free Speech on Campus

- Public universities are subject to constitutional limitations when restricting student and employee speech protected by First Amendment.
- Administrators can be personally liable for restrictions that violate students' or employees' constitutional rights.
- However, universities generally can enforce content-neutral time, place, and manner restrictions.
 - For example, noise restrictions during finals, camping bans, approval for outside speakers, approval to use reservable spaces, no blocking of egress to buildings or on roadways.
 - Enforcement should be consistent without regard to the speaker's viewpoint.

When can University restrict speech?

Brandenburg v. Ohio (1969)

Imminent Lawless Action Test

Speech loses First Amendment protection when it is:

- Directed to inciting or producing imminent lawless action
- Likely to incite or produce such action

Both prongs must be met. Abstract advocacy of lawlessness is still protected speech.

Tinker v. Des Moines (1969)

Substantial Disruption Test

Speech may be restricted when the university:

- Reasonably forecasts the speech will cause a material and substantial disruption to university operations
- Or the substantial disruption actually occurs.

Undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.

*Note: Tinker decided in K-12 context. There is some debate whether it should apply to higher ed.

Enforcement of Time, Place, and Manner Restrictions

- Enforcement must be consistent, as actions to enforce create precedent.
- Selective enforcement may be found to be unlawful if used to suppress or punish particular speech or other religious or political activity under the First Amendment.
- Consistency is critical—respond to rules violations the same each time, regardless of whether the speech is supported by the majority or clearly offensive.
- Your community members are watching.



Intersection of Free Speech and Title IX

- Universities are permitted to take action against conduct that meet the definition of harassment or discrimination under Title IX.
- First Amendment generally covers speech, not conduct.
- To be considered harassment, actions must include something beyond the expression of offensive views, words, or symbols protected by the First Amendment.
- Discomfort or unpleasantness alone does not justify suppressing speech.
- Free speech advocacy groups have sued numerous universities challenging their speech codes as allegedly infringing students' First Amendment rights, including suits in Texas, Florida, Oklahoma, Virginia, Michigan, Indiana, and Illinois.
- In many cases, courts sided with plaintiffs and/or universities quickly moved to narrow policies.

Example: Speech First, Inc. v. Cartwright (11th Cir. 2022)

- Speech First sued Central Florida University challenging university's discriminatory-harassment policy.
- *The discriminatory-harassment policy is almost certainly unconstitutionally overbroad. The overbreadth doctrine is designed "to prevent the chilling of protected expression." A regulation that covers substantially more speech than the First Amendment allows is overbroad and thus invalid. ... the policy (1) prohibits a wide range of "verbal, physical, electronic, and other" expression concerning any of (depending on how you count) some 25 or so characteristics; (2) states that prohibited speech "may take many forms, including verbal acts, name-calling, graphic or written statements" and even "other conduct that may be humiliating"; (3) employs a gestaltish "totality of known circumstances" approach to determine whether particular speech, for instance, "unreasonably ... alters" another student's educational experience; and (4) reaches not only a student's own speech, but also her conduct "encouraging," "condoning," or "failing to intervene" to stop another student's speech.*
- *The policy, in short, is staggeringly broad, and any number of statements—some of which are undoubtedly protected by the First Amendment—could qualify for prohibition under its sweeping standards.*

Intersection of Free Speech and Title IX

Perlot v. Green, 609 F. Supp. 3d 1106 (D. Idaho 2022) – No Contact Orders and First Amendment Rights

- **Background:** Law students brought action against president of the University of Idaho and other school officials, alleging that university's issuance of a no-contact order, which forbade them from contacting a student with whom they discussed their opposition to same sex marriage, violated their rights to free speech and free exercise of their religion. Plaintiffs moved for a TRO, preliminary injunction, and expedited hearing.
- **Holdings:** The District Court held that:
 - No-contact order was content-based restriction;
 - Comments did not constitute sexual harassment under Title IX;
 - Imposition of no-contact order was not least restrictive means for accomplishing goal of preventing student from hearing disagreeable speech that she deemed sexual harassment;
 - No-contact order was not least restrictive means to restrict plaintiffs' speech to accomplish goal of creating harmonious environment amongst students;
 - Law students showed likely harm from public university's issuance of no-contact order; and
 - No-contact order was issued with virtually no due process.

Agenda

- Title IX vs. Title VI vs. Title VII
- Intersection of free speech and Title IX
- Intersection of religious freedom, religious accommodations, and Title IX
- Intersection with Clery and VAWA

Enforcement and Intersection of Speech, Religion, and Title VII

- February 24, 2026, DOJ filed Title VII enforcement action UCLA for discrimination and retaliation against Jewish and Israeli faculty and staff.
- Alleges antisemitic harassment became severe and pervasive after October 7, 2023, and that UCLA knew but failed to respond effectively and declined to enforce policies.
- Lawsuit focuses on spring 2024 campus encampment at UCLA, which coincided with similar encampments around the country.
- Treats campus protest activity as workplace conduct when it interferes with employees' terms and conditions of employment
- Protest activity is no longer viewed solely through the lens of student affairs or expressive rights.
- DOJ alleges policies were selectively unenforced when violations affected Jewish or Israeli employees.



Key Compliance Takeaways

- Protest activity affecting employees can trigger Title VII exposure.
- The risk might not be limited to Title VII (e.g., state laws).
- Policies must be enforced consistently, not just written neutrally.
- Civil rights intake and aggregation practices matter.
- Mandatory reporting failures increase institutional risk.
- Internal reviews can increase exposure if not followed by action.



Intersection of Religious Freedom, Religious Accommodations, and Title IX



- Title IX religious exemptions for institutions “controlled by a religious organization” to the extent application of Title IX “would not be consistent with the religious tenants of such organization.”
 - 20 U.S.C. § 1681(a)(3).
- The government, including state public universities, cannot violate the free exercise of religion or discriminate based on religion.
 - Title IV prohibition on religious discrimination by public educational institutions.
 - Title VI prohibition on discrimination based on shared ancestry in federally funded programs.

Intersection of Religious Freedom, Religious Accommodations, and Title IX

- *Meriwether v. Hartop* (6th Cir. 2021)
 - Meriwether is a devout Christian teaching at a public university. University informed faculty they needed to refer to students by their “preferred pronoun[s].” Meriwether refused to call a transgender student by her preferred pronouns during classroom instruction due to his religious beliefs.
 - Review of lower court’s motion to dismiss.
 - Court found the refusal to use preferred names and pronouns is not per se discriminatory. Faculty member may have viable First Amendment claim based on academic freedom and/or freedom of religion. University’s application of its gender-identity policy was not neutral because university officials expressed hostility toward Meriwether’s religious beliefs.

Intersection of Religious Freedom, Religious Accommodations, and Title IX

- Title IX grievance process requires institutions to treat complainants and respondents equitably.
- Institutions need to provide religious accommodations to parties and witnesses during the grievance process.
 - Reasonable accommodations should not fundamentally alter or provide for inequity in the grievance process.
- Common religious accommodation: extended deadlines, flexible scheduling, prayer breaks, fasting-sensitive timing.
- University should have a religious accommodations process that parties or witnesses can invoke for purposes of Title IX grievance process.

Agenda

- Title IX vs. Title VI vs. Title VII
- Intersection of religious freedom, religious accommodations, and Title IX
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- Intersection with Clery and VAWA

Purpose of Clery Act and VAWA Amendments

Clery Act:

- Requires all postsecondary institutions participating in Title IV student financial assistance programs to disclose campus crime statistics and other security information to students and the public.
- Requires institutions to develop and implement specific campus safety and crime prevention policies and procedures.
- VAWA amendments added requirements that institutions disclose statistics, and adopt policies and programs related to dating violence, domestic violence, sexual assault, and stalking, among other changes.
 - The Violence against Women Act Reauthorization Act of 2022 (VAWA) went into effect October 1, 2022, containing new measures and new/revised definitions.

Clery Crimes and Reporting Requirements

- Report to the Department and disclose in ASR statistics for three most recently completed calendar years.
- Submit crime statistics to the Department as part of the annual data collection and survey, including the number of each of the Clery and VAWA crimes that occurred on or within its Clery Geography and that are reported to local police agencies or to campus security authority (CSA).
- Clery Act reporting does not require institution initiate investigation or disclose personally identifiable information (PII) about the victim.

34 C.F.R. § 668.46(c); 2021 Clery Appendix

Three Categories of Locations

1. On-Campus
2. Noncampus Buildings or Property
3. Public Property

Purpose:

- Clery Geography requirements intended to inform campus community of crimes so that community aware of safety issues and may take steps to protect their own safety.
- In the past, institutions struggled with complexities of Clery Geography, resulting in different approaches to the reporting requirement.
- When in doubt, apply the plain meaning of regulatory and statutory requirements.

Clery Geography – Campus and Noncampus

- Campus defined
 - Any building or property owned or controlled by an institution within the same reasonably contiguous geographic area and used by the institution in direct support of, or in a manner related to, the institution's educational purposes, including residence halls; and
 - Any building or property that is within or reasonably contiguous to the area identified in paragraph (i) of this definition, that is owned by the institution but controlled by another person, is frequently used by students, and supports institutional purposes (such as a food or other retail vendor).
- Noncampus defined
 - Any building or property owned or controlled by an institution within the same reasonably contiguous geographic area and used by the institution in direct support of, or in a manner related to, the institution's educational purposes, including residence halls; and
 - Any building or property that is within or reasonably contiguous to the area identified in paragraph (i) of this definition, that is owned by the institution but controlled by another person, is frequently used by students, and supports institutional purposes (such as a food or other retail vendor).

34 C.F.R. § 668.46(a)

Clery and Title IX

- Institution's obligation to address sexual harassment in "education program or activity" is separate from institution's Clery Act obligations.
- Conduct that occurs off campus and outside of Clery Act geography may invoke institution's Title IX obligations depending on whether the institution:

"exercised substantial control over both the respondent and the context in which the sexual harassment occurs."

Clery Act and Title IX Hypothetical

- Hypothetical: Undergraduate student reports being a victim of a sexual assault by a graduate student that allegedly occurred during a summer research field work while camping in remote parts of Alaska to look for fossils.
- Questions:
 - Would that be within the institution's Clery geography to give rise to Clery reporting obligations?
 - Would the allegations be within the scope of Title IX and mandated grievance process under 2020 regulations?

- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking

Statement of policy

- Programs to prevent domestic violence, dating violence, sexual assault, and stalking
- Procedures to follow once a report has been made
- Educational programs to promote awareness of rape, acquaintance rape, domestic violence, dating violence, sexual assault, and stalking
- Identify possible sanctions or protective measures the institution may impose following final determination

VAWA Section 304 Notice

- A student who reports a VAWA crime, whether on or off campus, shall be provided a written explanation of:
 - ✓ Possible sanctions or protective measures
 - ✓ Procedures victim should follow, including preserving evidence, to whom to report, options regarding reporting to law enforcement, and option to be assisted by campus authorities
 - ✓ Orders of protection
 - ✓ Applicable institutional disciplinary procedures
 - ✓ Confidentiality of victims
 - ✓ Availability of counseling and supportive measures

Questions?



Lunch Break





UT System Title IX Training

Complex Issues in Title IX Compliance

Darren G. Gibson, Partner
Emi M. Passini, Partner

August 6, 2026

Agenda

- Reluctant or hostile witnesses or parties
- What constitutes severe, pervasive, and objectively offensive conduct?
- Investigations with overlapping Title IX and non-Title IX allegations
- Consistency in sanctions
- Special considerations for graduate students and academic medical centers

Tips for Handling Difficult Parties or Witnesses

- Set the tone of professionalism and decorum at the outset.
- If needed, remind the parties that behavior in violation of University rules can result in disciplinary action.
- If parties refuse to cooperate, take a break and inform them that further violations will result in waive of their participation in the hearing.
- Reinforce anti-retaliation rules and how to report concerns.
- Keep questions focused, specific, and non-accusatory; avoid argumentative phrasing.

Tips for Handling Reluctant Parties or Witnesses

- Clarify purpose and process early.
- Normalize reluctance and acknowledge that hesitation is common.
- Offer supportive measures up front. No-contact directives, schedule adjustments, housing or class changes, safety planning, academic support, and workplace measures.
- Address confidentiality limits.
- Explain and remind about retaliation protections.
- Explain evidentiary value. Without pressuring, note how timely statements, documents, and phone data can help create an accurate record—especially before memories fade.

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- Reluctant or hostile witnesses or parties
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What is Severe, Pervasive, and Objectively Offensive?

- Sex-based harassment must be “so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.”
- Title IX requires not simply that the harassment affected student's education but that it “had a concrete, negative effect on student's ability to receive an education.”
- Purely de minimis effects are not sufficient.
- Conduct is actionable under Title IX only if it is *based on sex*.
- Must be more than “offensive conduct” that is “inappropriate, immature, and offense” or “teasing or bullying.”

What is Severe, Pervasive, and Objectively Offensive?

- In evaluating cases brought under Title IX, courts also rely on Title VII cases that found harassment if it caused a hostile environment.
- The Fifth Circuit uses a totality of the circumstances test to determine whether the acts are objectively severe, pervasive, and offensive. The Court looks at the:
 - (1) frequency of the acts,
 - (2) severity,
 - (3) physically threatening or humiliating, or mere offensive utterance, and
 - (4) whether it unreasonably interferes with the learning environment.

What is Severe, Pervasive, and Objectively Offensive?

Case from the Fifth Circuit finding alleged conduct sufficient to constitute harassment:

After being allegedly raped by football players at off-campus party, student alleged:

- Classmates called student “whore” and “slut”;
- Classmates asked whether she had sex with multiple people;
- Classmate asked, “How did it feel to be fucked in every single hole of your body?”;
- Classmates excluded her from cheerleading;
- One student asked her the race of the baby she would be having;
- Alleged rapist “wore the pants that he raped [student] in to school, which had [her] blood on them from intercourse, and stood on the lunch table and said, these are the pants that I took [student’s] virginity in.”; and
- Multiple football players called her a liar and told her that she was “going to ruin everything.”

I.F. v. Lewisville Indep. Sch. Dist., 915 F.3d 360 (5th Cir. 2019)

What is Severe, Pervasive, and Objectively Offensive?

Case from the Texas District Court finding alleged conduct sufficient :

- White male student told complainant that she “was only [at University and the Honors College] to fill the black girl quota.”
- Complainant “regularly encounter[ed] white students referring to Jane Doe No. 3 and other African Americans at [University] as [the n-word].”
- Professors “facilitated racist and bigoted conversation” in courses with topics titled “Are people of color discriminated against or do they just commit more crimes?” and “Everyone is a little bit racist.”
- University used her as a minority show piece by regularly soliciting her participation in school activities.

Doe No. 1 v. Tex. Christian Univ., 2021 WL 12288641 (N.D. Tex. Jan. 12, 2021) (same standard under Title VI)

What is Severe, Pervasive, and Objectively Offensive?

Case from the Fifth Circuit finding alleged conduct insufficient:

- Classmate called student “ho” and “would beat her ass if it weren’t for cheerleading” because she was seeing classmate’s ex-boyfriend.
- Classmate wiped away tears from complainant’s face “in a facetious manner”;
- Classmate spread a pregnancy rumor; and
- Classmate smacked ex-boyfriend’s butt while complainant’s holding his hand.
- “J.H. was acting like a typical high-school girl whose ex-boyfriend began dating a younger cheerleader. That is the sort of unpleasant conflict that takes place every day in high schools, and it is not the proper stuff of a federal harassment claim.”

Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist., 647 F.3d 156 (5th Cir. 2011)

What is Severe, Pervasive, and Objectively Offensive?

Case from Louisiana District Court finding conduct insufficient:

- Calling another student “fat” and “pig.”
- Stealing food and throwing it down dorm hall.
- Stealing student’s picture and writing “call for a good time” and posting on Snapchat.
- “Play fighting.”
- Stealing items and conditioning return on she came to his room and “cuddled with him.”
- Calling student repeatedly, even after being blocked, and telling her to “grow up” and be nicer to roommate
- Calling student a “fag.”
- Grabbing student’s “clothed buttocks” for several second.

Owens v. La. State Univ., 709 F. Supp. 3d 245 (M.D. La. 2023).

What is Severe, Pervasive, and Objectively Offensive?

Case finding conduct insufficient:

- Two statements about a student's national origin over the course of a year. (Same standard.)
 - *Chih-Kai Liao v. Univ. of Tex. San Antonio*, 2024 WL 4564278 (W.D. Tex. Oct. 23, 2024)
- Students making derogatory remarks regarding complainant's sexual orientation.
 - *Henderson v. Bd. of Supervisors of Southern Univ. and A&M College*, 2022 WL 875592 (W.D. La. Mar. 23, 2022)
- Complainant alleged owner of required field internship location hugged her and verbally insulted her on isolated occasions.
 - *Knighton v. Univ. of Texas at Arlington*, 2021 WL 9881105 (N.D. Tex. May 24, 2021)

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Classifying Sexual Misconduct

- Title IX Coordinators review and classify Sexual Misconduct allegations as Title IX or Non-Title IX Sexual Misconduct.
- Reminder: sexual Misconduct falls under Title IX only if the following is true:
 - Complainant or Respondent connected to the institution during incident;
 - Employee, enrolled Student, Applicant, Potential Applicant, Program Participant
 - Nearby resident just strolling through campus
 - The conduct occurred in the institution's Educational Program or Activity;
 - The conduct occurred in United States; and
 - The conduct constitutes Sexual Harassment as defined by Title IX.
- Classify Non-Title IX Sexual Misconduct under the appropriate institution policy and/or grievance track.

Example Allegations – How to Classify

Allegation	Relevant Title IX / Non-Title IX Violation
Unwelcome sexual advances and inappropriate touching by Professor to student during private lessons	Title IX Sexual Harassment
Sexual assault in the Professor's office	Title IX Sexual Harassment
Sexual assault at student's off-campus apartment	Non-Title IX Sexual Harassment
Consensual sexual relationship between employee and student	Consensual Relationship Policy
Professor driving by student's off-campus apartment, leaving harassing notes for the student, and contacting student's boyfriend resulting in student avoiding coming to campus	Non-Title IX Stalking Title IX Sexual Harassment (impact on educational environment)
Second professor learns of unwelcome conduct and does not report it	SB212 violation / Non-Title IX Sexual Harassment

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What the Regulations Say About Sanctions

106.45(b)(1)(i)

- Must treat the parties equitably
- Must follow the grievance process before imposition of any disciplinary sanctions or other actions that are not supportive measures

106.45(b)(1)(vi)

- The grievance process must describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility

106.45(b)(7)(ii)(E)

- The written determination must include any disciplinary sanctions the institution is imposing on the Respondent

106.45(b)(10)(i)(A)

- Each institution must maintain for a period of 7 years records of any disciplinary sanctions imposed on a Respondent

Is a school required to impose particular remedies when a respondent is found responsible for harassment?

- No.
- The 2020 amendments do not dictate that a school provide any remedies for the complainant or disciplinary sanctions for the respondent after a finding of responsibility. Each school is free to make disciplinary and remedial decisions that it “believes are in the best interest of [its] educational environment.”

*Guidance document currently unavailable

Examples

- Prior misconduct history by Respondent may affect sanctions.
 - “A recipient may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence.” 2020 Rule Preamble.
 - Failure to consider prior conduct could result in failure to consider serial / predatory behavior.
- Important to consider comprehensive set of possible remedies to restore access to complainant and ensure enforcement.
 - For example, are trespass warnings necessary to keep respondent off campus if suspended/expelled?
 - Who is monitoring completion of sanctions to ensure compliance?
 - Remedies may be needed beyond list, such as training for involved student organization.
- Disparate treatment of respondents in sanctioning can create risk of liability.
 - Helpful to have a sanctions matrix that considers nature and severity of the violation, as well as aggravating and mitigating factors, to guide decision-makers and assist in consistency.

Agenda

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Title IX and Graduate Students

- Graduate students often hold multiple roles within an institution:
 - Student
 - Teaching Assistant
 - Research Assistant
 - Employee
 - Advisee/Mentee
- Graduate students are entitled to the same protections from sex discrimination and sex-based harassment as other students, but institutions must recognize the additional complexities created by graduate education
- “Program or activity” can extend to: Academic programs, research opportunities, laboratory assignments, fellowships and funding, clinical placements, campus employment opportunities
- Because of the various roles a graduate student may hold, allegations may involve both:
 - Educational impacts; and
 - Employment-related impacts

Hypothetical – Graduate Student in a Research Lab

Facts

- A doctoral student reports that her faculty advisor repeatedly comments on her appearance and invites her to private dinners. After she declines the invitations, she is:
 - Removed from a funded research project;
 - Excluded from conference travel; and
 - Experiences delays in dissertation approvals.

Discussion Questions

1. What Title IX concerns are present?
2. What role does the advisor's authority play?
3. What supportive measures may be appropriate?
4. Are there retaliation concerns?
5. What steps should the institution take to preserve educational access?

Title IX and Academic Medical Centers

- Same rules regarding sexual misconduct apply to academic medical centers, including Title IX, SB 212, and Clery/VAWA.
- Same requirements for investigations and grievance process, including live hearing requirement for matters covered by Title IX.
- Courts have held that educational trainee roles (e.g., medical residents) are more akin to students than employees for purposes of Title IX analysis.
 - *Doe v. Mercy Catholic Med. Center*, 850 F.3d 545 (3d Cir. 2017) (holding Title IX applied to a resident at a research hospital unaffiliated with a medical school)
 - *Aguiluz v. Univ. of Tex. Health Science Center San Antonio*, 2021 WL 148057 (W.D. Tex. Jan. 15, 2021) (holding that medical resident may bring Title IX claims given educational nature of position, and distinguishing from normal employee, whose Title IX claims would be preempted by Title VII)
 - *See also Doe v. Prairie View A&M*, 2018 WL 1947804 (S.D. Tex. Apr. 25, 2018) (applying *Doe v. Mercy* to hold student could pursue Title IX sexual harassment claims based on on-campus job conditioned upon student status and “tied to her education”)

Title IX and Academic Medical Centers – Sponsored Research

- Federal funding agencies have rules that address sexual misconduct within sponsored research.
- NIH, NSF, and NASA have specific rules regarding awardee obligations regarding sexual misconduct allegations in funded research programs.
- Participants may also bring complaints directly to funding agencies.
- Agencies may require awardee to respond to information requests and apprise agency of investigation and outcomes.
- Title IX coordinator / investigators should work closely with institution's compliance / sponsored research office to assess sponsored research obligations and ensure compliance.



Title IX and Academic Medical Centers – Unique Considerations

- Dual nature of educational and employment roles among participants.
- Title IX matters in AMCs often include imbalance of power between faculty and trainees (e.g., residents/fellows, graduate students).
 - Professionalism / reputational concerns may mean complainants/ witnesses decline to participate.
- Risk of “retaliation” with a little “r”, particularly given parties’ rights of access to evidence.
 - Complainant often reliant on respondents for professional support and reference (e.g., medical resident, graduate student, post-docs).
- Handling pregnancy accommodations during clinical training within clinical rotation, licensing, and accreditation requirements.

Questions?



Break





UT System Title IX Training

Title IX and Athletics

Darren G. Gibson, Partner

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August 6, 2026

Historical Context

- ❑ Amateurism Model: NCAA framework conditioned eligibility on athletes remaining “amateurs,” limiting compensation to scholarships and prohibiting pay-for-play, endorsements, and monetization of athletic ability or NIL.
- ❑ Title IX in 1972: Enacted to prohibit sex-based discrimination in federally funded education programs and to expand opportunities for women.
- ❑ OCR guidance and enforcement, plus Title IX litigation has developed the rules since its enactment.



Statutory and Regulatory Framework

- Athletics Regulations under 34 C.F.R. § 106.41 governs overall athletics programs, requiring schools to provide equal athletic opportunity, including:
 - Equal participation opportunities to “effectively accommodate the interests and abilities of members of both sexes;” (three-pronged test)
 - Also analyze nine other factors of benefits of participation (e.g., equipment and supplies, travel, coaching, facilities, housing and dining, publicity)
- Difference between intentional discrimination (derived from the statute) and disparate impact (derived from subsequent regulations).
 - Title IX law is not settled on whether disparate impact is allowable for private damage disputes, unlike Title VII, which expressly allows for disparate impact.

Title IX Regulations Governing Athletics

- 34 C.F.R. § 106.41(c):
 - Equal participation opportunities to “effectively accommodate the interests and abilities of members of both sexes” (three-pronged test)
 - Also analyze equal opportunity based on nine other factors of benefits of participation (e.g., equipment and supplies, travel, coaching, facilities, housing and dining, publicity)
- 34 C.F.R. § 106.37(c):
 - Requires scholarship aid to be proportionate to the number of participating athletes.



The Three-Prong Test for Participation

- Established by Intercollegiate Athletics Policy Interpretation (Policy Interpretation) in the *Federal Register* on December 11, 1979.
- Central issue in most Title IX litigation.
- Only need to meet one of the three elements below to be compliant:
 1. Substantially Proportionate Participation;
 2. History & Continued Expansion; OR
 3. Full Accommodation of Interest & Abilities.

See Policy Interpretation and Additional Clarification of Intercollegiate Athletics policy: Three-Party Test – Party Three, Educ. OCR 2005.



Prong 1: Substantially Proportionate Participation

- Measures full-time enrollment sex ratio between males and females to that of the university's collegiate sport participation.
- To meet this prong, the sex ratio of athletes must be as close to the sex ratio of full-time undergraduate students as possible.
- Factors outside of the control of the university are taken into account when evaluation compliance, such as last-second transfer or the year-to-year natural fluctuation of the student body.

Prong 1: The Numbers

- While OCR has not formally established a fixed safe harbor percentage, courts typically find universities compliant if the sports participation ratio is within 5.5% of the ratio of full-time undergraduate students.
 - While most circuits follow OCR's fact-specific framework, other circuits (e.g., the Sixth Circuit) adopt a stricter "any viable team" standard rather than relying on percentage gaps.
 - The team-viability considerations checks the number of potential athletes of the underrepresented sex that are "left out" due to the difference in sex ratio.
 - If the number of athletes "left out" can form a full sports team, the greater the odds a court finds a university is not compliant.
- Courts very rarely find compliance in any university when the ratio disparity is greater than 10%.



Prong 1 Illustrated

Scenario: Suppose a university is 55% female and 45% male in its full-time undergraduate enrollment. Also assume that the university offers 500 athletic opportunities split equally between male and female students.

Measure	Men	Women	Total
Undergraduate Enrollment	9,000	11,000	20,000
Percent Enrollment	45%	55%	100%
Participation Opportunities	250	250	500
Percent Participation Opportunities	50%	50%	100%
Percent difference	+5%	-5%	
Count of Gap in Opportunities		56	

Key Participation Considerations

- Multi-sport athletes are counted multiple times for each team in which they meaningfully participate.
- EADA reporting numbers are a snapshot that occur at the time of the first competition of a sport, while the OCR observes participation all year.
 - So, relying on EADA reporting may not tell the full and correct story.



Participation Opportunity Prong 2: History & Continued Expansion

- Requires both historical evidence of fixing the disparity/noncompliance and ongoing responsiveness to developing interests.
- OCR guidance applies a heightened scrutiny to this compared to Prong 1.
- Cutting sports of underrepresented groups weighs heavily against the university, and replacing the cut teams does not count under this prong.



Participation Prong 3: Unmet Interest & Sufficiency to Sustain a Team

- If institution cannot prove compliance on prongs 1 or 2, it must show evidence of unmet interest and lack of sufficiency to sustain a team.
 - Also requires proof that the team can compete and be sustained a Division 1 varsity level.
 - Does not require proof of making playoffs, posting a positive record, etc.
- Requires consistent use of surveys, club sports, and a process to request elevation to a Division 1 sport.
- Most difficult prong of the three to satisfy, especially when a sport is cut or where sports have recently been cut.
 - When an institution cuts a sport of underrepresented group, a court will presume that there was interest and sufficient ability to sustain a team.

Case Study: University of Oregon's Women's Athletes Denied Class Certification



- Female athletes brought class action and accused Oregon of treating female athletes unequally.
- Beach Volleyball athletes alleged inferior facilities, equipment, and access to other resources as compared to men.
- Rowing athletes alleged denial of varsity status and other participation opportunities.
- Plaintiffs alleged reduced access to athletic scholarships and financial aid.
- Oregon sponsors 8 men's varsity teams and 12 women's varsity teams and has several women's club teams, which were all self-funded.
- **Legal Issue**: Whether Oregon violated Title IX by providing unequal treatment and benefits, unequal financial aid, and fewer varsity participation opportunities to female athletes.

Case Study: University of Oregon's Women's Athletes Denied Class Certification

- On May 29, 2026, court ruled the women's sports teams were denied class certification in their bias suit.
 - Though, the judge left certification as a possibility at a later date.
- Women's volleyball team denied certification because of its "lack of typicality" compared to other women's sports teams.
 - The team had no full-time coach, no on-campus facility, and no locker room.
- Women's rowing team also denied certification because they could not prove that they could compete at the Division 1 level as required by the third prong.
- Case shows that differences across sports (facilities, funding, competition level) can make Title IX claims difficult to aggregate.

Caselaw Update: *Niblock v. Univ. of Kentucky* (6th Cir. 2026)

- Plaintiffs alleged a failure to add women's Division 1 teams (equestrian, field hockey, and lacrosse).
- Compliance was found under prong 3: full and effective accommodation.
 - Based on extensive factual record demonstrating lack of sufficient Division I skill and interest in the general student body for sports in question.
- Two judges, in their concurrence, questioned the validity of Title IX regulations and guidance. And suggested future challenges based on new, lower standard for deference to federal agencies in *Loper Bright* decision.
- While the judges declined to decide the question of the Title IX regulations in *Niblock*, the concurrence signals likelihood of future litigation on this question and that judges are open to overturning Title IX regulations and guidance.

Caselaw Update: *Myers v. Stephen F. Austin State Univ.* (E.D. Tex. 2025)

- Female student-athletes challenged the university's decision to eliminate multiple women's sports teams, including beach volleyball, bowling, and golf.
- Plaintiffs (sports teams) argue that the Court should rely on the 1979 Policy Interpretation, and the university argued that *Loper Bright* requires courts to not merely defer to these agency interpretations.
 - The Court deferred to the DOE's 1997 Interpretation and uses its three-pronged test.
- The Court granted an injunction requiring the preservation of women's sports teams pending litigation.
 - Court found sufficient likelihood success and irreparable harm for the injunction.
- Institutions become vulnerable to litigation when cutting women's sports teams.
 - SFA already had 223 athletes "left out" pre-cuts (63% women in undergraduate pool; 45.6% of athletic pool).
 - Post-cuts, the number of "left out" student athletes would be 245 to close the gap.

Athletes Financial Aid Standard – 34 C.F.R. § 106.37(c)

- If offered, financial amounts must be substantially proportionate to the sex ratio of participating athletes.
 - Note: This is a different and more exacting standard than participation.
- OCR only allows a disparity of up to 1% between the scholarship amounts ratio and sex ratio of participating athletes (1998 DCL).
- Multi-sport athletes are only counted once under this standard.
- However, if university is in “safe harbor” by satisfying participation through prong 2 or 3, they can arguably defend against resulting scholarship proportionality challenges.
 - *Gonyo v. Drake Univ.*, 879 F. Supp. 1000, 1005-06 (S.D. Iowa 1995) (cited by 1998 DCL and allowing scholarship disproportionality where Drake met prong 2).

Does 106.37(c) apply to
distribution of NIL funds?

Does § 106.37(c) apply to NIL?

- NIL regulations and Ed guidance never contemplated NIL agreements.
- NIL agreements fundamentally different than athletics scholarships.
- If the goal of House revenue sharing is to share revenue with those who generate it, subjecting NIL to 103.37(c) would undermine that objective.
- Section 106.37(c) is generally aimed at institutionally-controlled financial assistance.
- NIL payments are best understood as tied to publicity rights, not participation-based benefits.
- Applying § 106.37(c) to NIL risks treating market-based compensation as regulated financial aid in ways the framework may not fit.
 - For example, NIL and athletics scholarships have different tax treatment, different rules under immigration law, and different treatment under NCAA rules and *House* settlement.



The consolidation of revenue-sharing funds to football, men's basketball, and women's basketball creates a Title IX risk due to disparity concerns.



If payments are characterized as financial aid, Title IX may require a proportionate allocation based on gender ratio.



Treating revenue-sharing as financial aid rather than compensation goes against the plain meaning of financial assistance in § 106.37(c) and the common understanding of NIL.

Equal Treatment Standard “Laundry List”

- Beyond participation opportunities and scholarship dollars, institutions must provide equal treatment, benefits, and opportunities to male and female athletes in the form of equal:
 1. Equipment and supplies;
 2. Scheduling games and practice time;
 3. Travel and per diem allowances;
 4. Opportunity to receive coaching, and the assignment and compensation of coaches;
 5. Opportunity to receive academic tutoring, and the assignment and compensation of academic tutors;
 6. Locker rooms and practice and competitive facilities;
 7. Medical and training facilities and services;
 8. Housing and dining facilities and services; and
 9. Publicity.

Evaluating Equal Treatment

- Evaluations are done on a program-wide basis (not by team).
- Differences in treatment may be justified by sports-specific needs (men's vs. women's basketball, for example), or nondiscriminatory facts such as market revenue or travel.
- Section 106.41(c): *“Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.”*



Key Takeaways

- These three standards (equal participation opportunities, equal athletic scholarships, and equitable benefits) are separate but highly interconnected.
- Compliance is easiest when the numbers are met with consistency.
- Consider conducting regularly compliance reviews and, if necessary, start documenting legitimate, nondiscriminatory reasons for any disparity in the compliance numbers in your programs and strategize for how to be compliant (e.g., Prong 3).

Questions?



End of Day 2

Thanks!