



Title IX Training

PC & SWU

August 28, 2020 | Wyche, PA

The Presenters

Wyche Attorneys

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Capacities in which we've served

Outside GC

Investigators

Background to Title IX and New Regulations

- What is Title IX?
- April 2011 Dear Colleague Letter
- New Title IX Regulations issued - May 6, 2020
 - Implementation date of August 14, 2020
 - PC and SWU Policies revised, effective August 14, 2020
- Please provide feedback as you work with policies

Roadmap for Training Day

- Introduction (Wade)
- New Title IX Regulations and Definitions (Camden)
- Overview of the New Policies and Grievance Process (Wade)
- Conducting Investigations (McKinley)
- Hearing Processes for TIX and Non-TIX (Wade)
- Appeals (Wade)
- Informal Resolution (McKinley)
- Serving Impartially (Camden)

Roadmap Cont'd

- We will have two breaks!
- Please submit questions
- This will be fun (really!)



Regulatory Framework

When are we within the scope of
Title IX?

Institutional Obligation to Respond

If you have **actual knowledge** of **sexual harassment** that occurred in your **education program or activity** against a **person in the United States**, then you must **respond promptly** in a manner that is not **deliberately indifferent**.

Requirement – *Person in the United States*

Not speaking to citizenship or nationality

Referring to physical presence

Requirement - *Sexual Harassment*

Sexual Harassment – conduct on the basis of sex that satisfies one or more of the following:

- (1) quid pro quo sexual harassment;
- (2) severe, pervasive, and objectively offensive conduct; **or**
- (3) conduct that meets one of the VAWA definitions.

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

- (1) An **employee** of the institution conditioning the provision of an aid, benefit, or service of the institution on an individual's participation in unwelcome sexual conduct;

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

- (2) Unwelcome conduct determined by a reasonable person to be so **severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the institution's education program or activity;
- Different than Title VII standard
 - Conduct must be severe **AND** pervasive **AND** objectively unreasonable

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

(3) Conduct on the basis of sex that constitutes one or more of the following (as defined in the Clery Act, as amended by VAWA):

Sexual Assault
as defined 20
USC
1092(f)(6)(A)(v);

**Dating
Violence** as
defined by 34
USC 1229(a)(10);

**Domestic
Violence** as
defined in 34
USC 12291(a)(8);

Stalking as
defined in 34
USC
12291(a)(30).

Sexual Harassment

Sexual assault – means any sexual act directed against another person, without the consent of the person, including instances where the person is incapable of giving consent, including because of incapacitation.

Includes the following: rape; sodomy; sexual assault with an object; fondling; incest; statutory rape.

Sexual Harassment

Dating violence – means violence on the basis of sex committed by a person who is in or has been in a social relationship of a romantic or intimate nature with the victim and includes, but is not limited to, sexual or physical abuse or the threat of such abuse.

Sexual Harassment

Domestic violence – means violence on the basis sex committed by a current or former spouse or intimate partner of the victim; by a person with whom the victim shares a child in common; by a person who is cohabiting with, or has cohabited with, the victim as a spouse or intimate partner; by a person similarly situated to a spouse of the victim under the domestic or family violence laws of South Carolina; or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of South Carolina.

Sexual Harassment

Stalking - means engaging in a *course of conduct*, on the basis of sex, directed at a specific person that would cause a reasonable person to fear his or her safety or the safety of others; or suffer *substantial emotional distress*.

For the purposes of this definition

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

Sexual Harassment

Stalking - means engaging in a *course of conduct*, on the basis of sex, directed at a specific person that would cause a reasonable person to fear his or her safety or the safety of others; or suffer *substantial emotional distress*.

For the purposes of this definition

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

Requirement – *Education Program or Activity*

- Includes: Locations, events, **or** circumstances, whether on campus **or** off campus, over which the institution exercised **substantial control** over **both** the respondent **and** the context in which the sexual harassment occurred.
- No bright line on/off campus distinction
- Fact specific analysis

Requirement – *Education Program or Activity*

Ask: Did the conduct occur in a location/context where the institution:

1

funded, promoted, endorsed or sponsored the event,

2

owned the premises where the conduct occurred, OR

3

exercised any oversight, supervision, or discipline

Requirement – *Actual Knowledge*

Actual knowledge – means **notice** of sexual harassment or allegations of sexual harassment to an institution's **Title IX Coordinator** or any **official with the authority to institute corrective measures** on behalf of the institution.

Requirement – *Actual Knowledge*

This definition eliminates any vicarious liability or constructive notice components that may have previously existed.

Volume of chatter on campus not enough

Requirement – *Actual Knowledge*

Who is an official with authority?

- Not defined in the regulations
- The mere ability to report or even the obligation to report sexual harassment or to inform a student about how to report sexual harassment, or even having been trained to do any of the aforementioned, does **NOT** make the individual an official with authority
 - *responsible employees/mandatory reporters

Response Obligations

- If within the scope of Title IX -- then the institution has an obligation to respond **promptly** in a manner that is not **deliberately indifferent**.
- An institution is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

Response Obligations

Once the institution has **actual knowledge**, the Title IX Coordinator ***MUST***:

1. Promptly contact the complainant to discuss the availability of supportive measures;

Response Obligations

Once the institution has **actual knowledge**, the Title IX Coordinator ***MUST***:

2. Consider the complainant's wishes with respect to supportive measures;

Response Obligations

Once the institution has **actual knowledge**, the Title IX Coordinator ***MUST***:

3. Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint; and

Response Obligations

Once the institution has **actual knowledge**, the Title IX Coordinator ***MUST***:

4. Explain to the complainant the process for filing a formal complaint.

Response Obligations

- The institution needs to follow its procedures in regards to the respondent. And, treat the respondent as innocent (or a presumption of non-responsibility).
 - Section 2.07 in your respective Policies
- If a formal complaint is filed, make sure the process follows the school's policies and processes.

Supportive Measures

Supportive Measures are designed to **restore or preserve equal access** to the school's education program or activity **without unreasonably burdening** the other party, including measures designed to protect the safety of all parties or the school's educational environment, and to deter sexual harassment.

Supportive Measures

- Supportive measures should be:
 - Individualized and depend upon the circumstances,
 - **Non-punitive/non-disciplinary**,
 - Provided without fee or charge.
- Must be offered, as appropriate, before or after filing a formal complaint or where no formal complaint has been filed.

Supportive Measures

Examples:

- Counseling
- Extension of deadlines or other course related adjustments
- Modification of work or class schedules
- Campus escort services
- Mutual restrictions on contact between parties
- Changes in work or housing location
- Leaves of absence
- Increase campus security and monitoring certain areas of campus

Questions?

Overview of the Grievance Process

Inside or Outside TIX?

- Title IX applies only to
 - *certain* behavior (“Sexual Harassment”)
 - Against *certain* persons (complainants in the United States, who are students/employees or are seeking to be students or employees)
 - In *certain* places (locations, events, circumstances over which the school exercised substantial control)
- Look at § 1.08, definition of “Title IX Offense”

Misconduct “Outside” Title IX

- Examples
 - Inappropriate behavior that might be “severe” and “objectively offensive” but not pervasive (i.e. one time)
 - Sexual assault off-campus between students, or in a study abroad
 - Clemson student accuses PC or SWU student of sexual assault (complainant would not be a student or employee)
- Incidents are addressed but using the Non-Title IX Procedures.
- “TIX Offenses” get procedures required by law

Structure of the New Policies

- Article I: Introduction and Terminology
- Article II: Statements of Policy
- Article III: Reports and Intake Procedures
- Hearing Procedures:
 - For PC
 - Article IV (TIX Offenses)
 - Article V (Non-TIX)
 - For SWU
 - Article V (TIX Offenses)
 - Article VI (Non-TIX)

Policy Structure Cont'd

- Informal Resolution
 - PC: Article VI
 - SWU: Article IV
- Article VII: Appeals

ARTICLE I – Key Concepts

- § 1.03 – Reporting Misconduct
- § 1.04 – Confidential Resources
- § 1.06 - Applicability
 - PC: All “Sexual Misconduct” (see definition in § 1.08)
 - SWU: “Sexual Misconduct” excludes
 - Consensual Sexual Behavior
 - Certain other misconduct (e.g., use or distribution of explicit material)
 - These are handled through regular student conduct process

ARTICLE I – Key Concepts

- § 1.07 – Sexual Misconduct Board
 - May now include an attorney
- § 1.08 – Definitions
 - Offenses defined; “Consent”
- § 1.09 – Standard of Proof
- § 1.10 – Potential Sanctions

ARTICLE II - Highlights

- § 2.02 - Bar on Retaliation
- § 2.03 – Providing False Information
- § 2.04 – Amnesty for certain behavior by complainant, witnesses
- § 2.05 – Confidentiality and Privacy
 - But “no gag orders” on parties allowed
 - need to know standard

ARTICLE II - Highlights

- § 2.06 - Prompt resolution timeframes (90-120 days)
 - Notice required if there is delay
 - Explain
 - Reason for delay
 - What additional time is needed
- § 2.10 – Recordkeeping
 - Seven years

ARTICLE III

- Reports vs. “Formal Complaints” (§ 3.01)
 - *Reports* can come from anyone and trigger
 - Communication from TIX coordinator to complainant (§ 3.03)
 - Potential supportive measures (§ 3.04)
 - *Formal Complaints* (§ 3.05) request a formal investigation, must be signed by the Complainant or TIX Coordinator, and trigger
 - The grievance process and a formal investigation

ARTICLE III

- Initial Communication with Complainant (§ 3.03)
 - Availability of Supportive Measures (with or without filing a Formal Complaint)
 - Consider Complainant's wishes for Supportive Measures
 - Explain the process
- What if Complainant doesn't want to proceed? (§ 3.06)
 - TIX Coordinator has discretion to sign the Formal Complaint

ARTICLE III

Written Notice to All Parties (§ 3.07)

- Must provide certain information
 - Copy of policy
 - Notice of allegations with sufficient detail to allow for a response
 - Presumption of non-responsibility
 - Right to advisor
 - Prohibition on retaliation; Prohibition on filing false statements
 - Information on Supportive Measures & Informal Resolution
 - Offer to meet with Parties

ARTICLE III

- Emergency Removal (§ 3.08)
 - Actions against Student Respondent prior to determination
 - Requires “individualized safety and risk analysis”
 - Respondent gets notice and opportunity to tell his/her side
 - Administrative leave is permitted for employee Respondents
- Consider notification to law enforcement (§ 3.09)

ARTICLE III

- Technical Dismissal for Purposes of TIX (§ 3.12)
 - Confusing concept, but required by regulations
 - Recall distinction between “TIX Offense” and “Non-TIX”
- If TIX Coordinator determines a matter would not be a TIX Offense even if proved, it must be dismissed for TIX purposes, but that does not end the matter.

ARTICLE III

- A TIX Offense gets the special TIX hearing procedures:
 - For PC, Article IV
 - For SWU, Article V
- Non-TIX Misconduct gets other hearing procedures
 - For PC, Article V
 - For SWU, Article VI

ARTICLE III

- Notice of technical dismissal must explain
 - Why decision was made
 - Which hearing procedures will apply to the misconduct
- Institutional Discretion still applies (§ 3.14)
 - You are permitted to consolidate, and run non-TIX misconduct through the TIX procedures

ARTICLE III

- Permanent Dismissal (§ 3.13)
 - Permitted when
 1. Complainant indicates in writing she/he would like to withdraw Formal Complaint
 2. Respondent is no longer employed or enrolled
 3. School cannot gather sufficient evidence to determine responsibility
 - Notice and rationale must be provided to parties; decision is appealable (Art. VII)

THAT'S IT!!! (for Article III)

Questions????

It's Break Time!!!!

Coming Up:

Investigations with McKinley

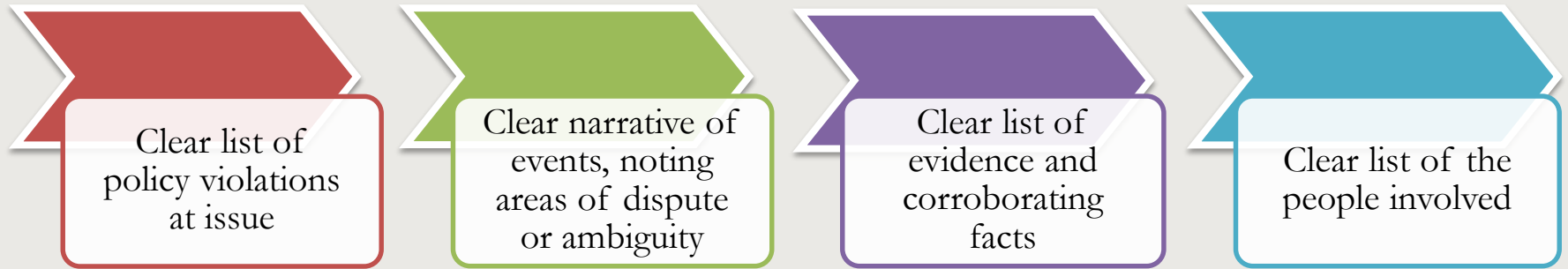



HOW TO CONDUCT AN INVESTIGATION

August 28, 2020 | McKinley Hyman

The Purpose of an Investigation:

Create order out of chaos





Main Duties of an Investigator

1. Planning and leading the investigation;
2. Interviewing the parties and any witnesses;
3. Collecting evidence; and
4. Drafting the Investigation Report.



Important Policy Changes to the Role of the Investigator

- ~~- Provide conclusions or recommendations on responsibility or sanctions~~
- + Provide testimony as needed at hearing




But First!

The Title IX Coordinator must inform the parties of the identities of the investigators, indicating that the parties may raise any concerns about bias within 24 hours.

Three Stages of Investigation

Plan the Investigation



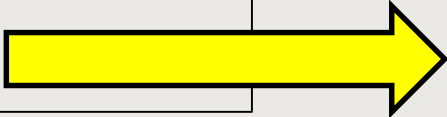
Gather Information



Create the Report



PLAN THE INVESTIGATION

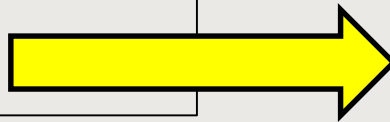
- ✓ Define the scope of the investigation
 - ✓ Review the policies and procedures
 - applicable definitions
 - Prepare yourself to be sufficiently objective, sensitive, etc.
 - ✓ Establish a timeline
- 

TIMELINE

- Interviewing parties
- Interviewing witnesses
- Drafting statements or obtaining transcriptions
- Verifying statements or transcriptions
- Gathering and obtaining documentation and evidence
- Drafting the Report

PLAN THE INVESTIGATION

- ✓ Define the scope of the investigation
- ✓ Review the policies and procedures
 - applicable definitions
 - Prepare yourself to be sufficiently objective, sensitive, etc.
- ✓ Establish a timeline
- ✓ Create a log



LOG

- Receipt of information, evidence and other materials as it is obtained in the course of the investigation
- Unsuccessful searches for evidence
- Delays
- Communications with parties and witnesses
- Procedural communications with administrators, attorneys, etc.

GATHER INFORMATION

Duties of the Investigators:

✓ Interview

- Parties
- Witnesses

✓ Collect evidence

Keep in mind:

- Be thorough
- Title IX Coordinator should provide periodic updates to the Parties as needed
- Keep the policy definitions in mind
- Stay on time

GATHER INFORMATION

✓ Interviewing – in General:

- Start with Complainant
- Provide prior notice to the interviewee – 24 hours
- Draft an outline
- Record or take detailed notes
- Keep as private as possible
- Hold in person if you can
- Allow the presence of an advisor
- Work in pairs
- Okay to circle back and do a second interview if necessary

GATHER INFORMATION

✓ Interviewing – Setting the Tone:

DO

- ✓ Develop rapport to put the interviewee at ease
- ✓ Explain your role as a **neutral** investigator
- ✓ Be sensitive to fears, embarrassment and confusion
- ✓ Be straightforward and matter of fact
- ✓ Be prepared to answer questions about confidentiality or privacy or to refer to the Title IX Coordinator

DONT

- × Use euphemisms for sexual terms
- × Express shock or discomfort
- × Provide commentary

GATHER INFORMATION

✓ Interviewing – Strategy:

- Ask the interviewee to share their story, then circle back for details
- Be thorough, ask “exhausting” questions
- Don’t ask leading questions
- Ask the interviewee to define words
- Don’t ask compound questions
- At the end, remind the interviewee to let you know if they think of anything else they think you should know

GATHER INFORMATION

✓ Interviewing – Questions to Ask:

- Anything else?/is there anything else you think we should know?
- Is there anyone else that you think we should talk to?
- Have you spoken with anyone about this incident?
- How have you been affected by this?
- Why do you think Respondent did this?
- Why do you think Complainant reported this?
- Ask for documents – texts etc. that might be relevant
- If you think of anything else, please let us know.

GATHER INFORMATION

✓ Interviewing – After the Interview :

- ❑ Transcribe/summarize the interview recording/notes
- ❑ Send the transcript/summary to its respective Party or witnesses to certify its accuracy

GATHER INFORMATION

✓ Collecting Evidence

- The school has the burden of collecting evidence
- But the parties are free to collect and provide evidence

Types of evidence



Relevance Determinations for Investigators

All Information Gathered

Not Directly Related

Information or evidence that has no readily apparent relationship to the allegations at issue

Directly Related

Information or evidence that has a clear relationship to the allegations at Issue but is not necessary to reach a determination regarding responsibility

Relevant

evidence, whether culpatory or exculpatory, on which the school will rely on in reaching a determination regarding responsibility.

Relevance Determinations for Investigators

Information that is Per Se Not Relevant:

1. Complainant's prior sexual behavior or predisposition
2. Any party's medical, psychological, and similar treatment records without party's voluntary written consent
3. Any info protected by legally recognized privilege



Two Exceptions

- a) Offered to prove someone other than the respondent committed the conduct
- b) Concerns specific incidents of prior sexual behavior with respondent that is offered to prove consent

Relevance Determinations for Investigators

Complainant: “When Theo was touching me, I said, ‘I don’t think we should do this.’”

Relevant

Respondent: “When I was touching Taylor, Taylor said, ‘that feels amazing’.”

Relevant

Respondent: “This is stressful because my mother is being treated for breast cancer right now.”

NDR

Parties’ Uber receipts for the night.

DR

Complainant’s therapy records, but Complainant has not consented to their release.

NDR

Text messages between Complainant and Respondent on the day following the incident.

DR

CREATE THE REPORT

1. Describe the general procedure and practices used in the investigation as outlined in the Policy
2. Outline the applicable definitions and references to the Policy
3. Describe the specific investigative process – who did you interview, what evidence was collected, etc.
4. Summarize the findings
5. Explain in more detail what you learned from each interviewee and the evidence gathered
6. Attach copies of the relevant policies, the evidence, all transcripts or summaries and authorizations of the same

REMEMBER:
THE REPORT
SHOULD BE
NEUTRAL,
OBJECTIVE AND
NON-
ADVERSARIAL

Questions?

TIX Hearings

TIX Hearings

- Just for offenses that could be a “Title IX Offense” (Remember the Key Concept of Inside or Outside TIX)
- Where are TIX hearing procedures?
 - For PC, Article IV
 - For SWU, Article V

TIX Hearings

Access to Gathered Evidence (§_.01) and Finalization of Investigation Report (§_.02)

1. Both parties have access to all gathered evidence that “directly relates to the allegations” for at least 10 days
2. They can then file responses, which Investigators must consider before finalizing the Investigation Report
3. Responses become part of Report
4. Parties get the Report at least 10 days before a hearing

TIX Hearings

Panel Appointment and Notice to Parties (§§ .03 & .04)

1. TIX Coordinator appoints the panel (Parties can object due to conflicts)
2. Parties receive notice of hearing that specifies
 - Date, time, location
 - Names of all participants (Parties, witnesses, panel members, etc.)
 - Alleged violations
 - Reminder of procedures being used

TIX Hearings

Hearing Basics and Logistics

1. Hearing may take place in separate rooms or virtually, but Parties **MUST** be able to simultaneously see and hear the participants answering questions (§_.05)
2. Panel appoints a chair, who oversees hearing (§_.06)
3. Parties **MUST** have an advisor (§_.07)
 - Advisor asks questions of other party and witnesses
 - School must appoint advisor if party does not have one
4. The Hearing is recorded (audio or audiovisual) (§_.08)

TIX Hearings

Hearing Basics and Logistics

5. Confidentiality of the Hearing (§_.09)
 - Hearing is closed except to Panel, Parties, Advisors, TIX Coordinator; witnesses are admitted just for purposes of their testimony
6. Equal access to Report and Gathered Evidence (§_.11)

TIX Hearings

Evidentiary Considerations

1. Certain types of evidence are EXCLUDED (§_.10):
 - Privileged information
 - Prior Sexual History of Complainant (*unless* offered to prove consent or that someone other than Respondent committed misconduct in question)
 - Treatment records (unless voluntary, written consent is provided)
2. Statements by any party or witness who refuses to consent to cross-examination (§_.12) may not be relied upon (but Panel cannot draw inference about Respondent's responsibility)

TIX Hearings

Testimony and Cross-Examination (§.12)

1. This is a major change of the TIX regulations
2. Following any direct testimony of a party or witnesses, the other party may ask any relevant questions “directly, orally, and in real time” through his/her advisor. These questions include those that may challenge credibility
3. Must be done through advisor. Party may not ask him/herself.

TIX Hearings

Procedure for Cross-Examination (§_.12)

1. Policy sets out steps:
 - Advisor asks question
 - Chair rules on relevancy
 - If relevant, questioned participant answers
 - If not relevant, Chair explains his/her decision

TIX Hearings

General Order of Hearings (§.13)

1. Subject to Revision by Chair/Panel
2. Order will typically proceed with
 - Opening statements by the Parties
 - Presentation by TIX Coordinator
 - Complainant's case (with questions following by Panel and opposing Party's Advisor)
 - Respondent's case (with questions following)
 - Closing statements

TIX Hearings

Panel Deliberation (§_.14) & Notice of Determination (§_.15)

1. Closed deliberations (preponderance of evidence standard)
2. Notice of determination MUST contain
 - Identification of the Allegations
 - Description of procedural steps
 - Findings of fact
 - Conclusions and rationale for resolution of each allegation
 - Sanctions (if applicable)
 - Remedies for Complainant
 - Description of Appeal Procedures
3. Determinations issued within 7 days, simultaneously to both Parties

Non-TIX Misconduct Hearings

Non-Title IX Misconduct

- Recall examples earlier
- Procedures
 - For SWU, Article VI
 - For PC, Article V
- Key idea for PC: it's essentially the old system
- Key idea for SWU: it's “TIX light”

Non-Title IX Misconduct

Summary of Key Differences from TIX Hearing Process

1. Just applies to student misconduct (§§_.01 & _.02)
2. Credible Evidence Determination by administrator (§_.03):
 - TIX Coordinator at PC
 - VPSL at SWU
3. No right to respond before the hearing to evidence or investigation report (but PC does make available)
4. Advisors are NOT required and if present have NO speaking role at hearing; may consult with the Parties only (§_.10)

Non-Title IX Misconduct

Summary of Key Differences from TIX Hearing Process Cont'd

5. No right to cross-examination
 - But parties can submit questions to Chair to be asked of the other side and of witnesses
6. Determination need only state finding of responsibility and sanctions (§_.15)

Non-Title IX Misconduct

Similarities with Title IX Hearing Process

1. Panel is appointed, with Chair responsible for oversight (§§_.05 &_.12)
2. Hearings can take place virtually, with Parties in separate rooms (§_.07)
3. Recording is made (§_.08)
4. Confidentiality applies; witnesses admitted singly (§_.09)
5. Both sides have fair opportunity to present their case (§_.13)
6. Preponderance of the evidence governs (§_.14)
7. Both sides receive simultaneous notice of decision and may appeal (§_.15)

Appeals

Appeals

Key Concepts for Appeals

1. Governed by Article VII
2. What can be appealed? (§ 7.01)
 - Findings of responsibility, non-responsibility, and/or sanctions under either hearing process
 - Determinations to dismiss a Formal Complaint under § 3.13
3. Who can appeal?
 - Either party (§ 7.02)

Appeals

Bases for Appeal (§ 7.03)

1. Procedural Error
2. New evidence not available before
3. Bias or conflict-of-interest by TIX Coordinator, Investigator or Decision Maker
4. (*PC only*) Sanction is inconsistent with guidelines or prior practice
5. (*PC only*) Totality of evidence does not support decision

Appeals

Timing of Appeal & Response

1. Must be received (§ 7.04) within 48 hours (not counting holidays or weekends) after receipt of determination
2. Upon receipt, the non-appealing party is notified of appeal and has 48 hours (not counting holidays or weekends) to provide an optional response (§ 7.07)
3. Both sides have access to hearing record and materials (§ 7.05)
4. Other consequences of appeal:
 - Any sanctions are stayed (§ 7.06)

Appeals

Resolution of Appeals

1. TIX Coordinator appoints Appellate Panel from SMB who were not involved in hearing (§ 7.08)
2. Procedures (§ 7.09)
 - Review is normally “on the record” and there is no rehearing
 - Can affirm in totality, affirm responsibility determination but modify sanctions, reverse, or remand
3. Decision is provided simultaneously to the Parties within the specified timeframe (7 days for SWU; 21 days for PC) (§ 7.10)
4. Decision of the Appellate Panel is final at SWU and Final for most appeals at PC

Appeals

Final Appeals at PC for Suspension/Expulsion

1. PC permits and additional appeal to the President of PC of Appellate Panel decisions that result in suspension or expulsion. (§ 7.11)
2. Same bases for appeal as initial appeal.
3. Appeal must be received in 48 hours (not counting holidays or weekends) after notice of Appellate Panel decision.
4. Non-appealing Party again has 48 hours to provide a response.
5. President can take same actions as Appellate Panel.
6. Decisions of the President are final.



INFORMAL RESOLUTION

August 28, 2020 | McKinley Hyman

What is Informal Resolution?

- Alternative to formal grievance procedure
- Less adversarial
- Less time intensive



Key Elements of Informal Resolution

- 1) Available any time, after a Formal Complaint has been filed
- 2) All Parties must provide voluntary, written consent to participate in the Informal Resolution process
- 3) Title IX Coordinator determines if Informal Resolution is an appropriate mechanism for resolving the Complaint

Key Elements of Informal Resolution

- 1) Available any time, after a Formal Complaint has been filed
- 2) All Parties must provide voluntary, written consent to participate in the Informal Resolution process
- 3) Title IX Coordinator determines if Informal Resolution is an appropriate mechanism for resolving the Complaint
 - ✓ Complainant is not against a University/College employee
 - ✓ Other weighing factors

IR may not be used to resolve less than all of the misconduct in a Formal Complaint, but the Title IX Coordinator retains discretion to make exceptions to this general rule.

Any Party may withdraw from the IR process at any time prior to agreeing to a resolution.

Two Ways to Facilitate IR Process

Mechanism A

Respondent has accepted
responsibility

Mechanism B

Parties elect to pursue
negotiated resolution

Two Ways to Facilitate IR Process

Mechanism A

Respondent has accepted
responsibility

- Title IX Coordinator will determine whether IR is appropriate
- If it is → Title IX Coordinator will propose sanctions, confer with the parties
- School and parties agree re: responsibilities, sanctions, remedies (in writing)
- Title IX Coordinator implements sanctions/remedies
- Not subject to appeal

Two Ways to Facilitate IR Process

- Title IX Coordinator will determine whether IR is appropriate
- If it is → Title IX Coordinator may use formal mediation sessions, informal meetings, or any other reasonable method to effect a negotiated resolution
- Parties agree (in writing)
- School must approve any final resolution (in writing)
- Not subject to appeal

Mechanism B

Parties elect to pursue negotiated resolution

Guidelines for Facilitators

- No conflict of interest or bias
- Must be trained on:
 - ✓ The definition of Sexual Harassment under the Title IX Regulations (34 C.F.R. § 106.30(a))
 - ✓ The scope of the school's education program or activity
 - ✓ How to conduct IR processes
 - ✓ How to serve impartially
- Maintain confidentiality

Questions?



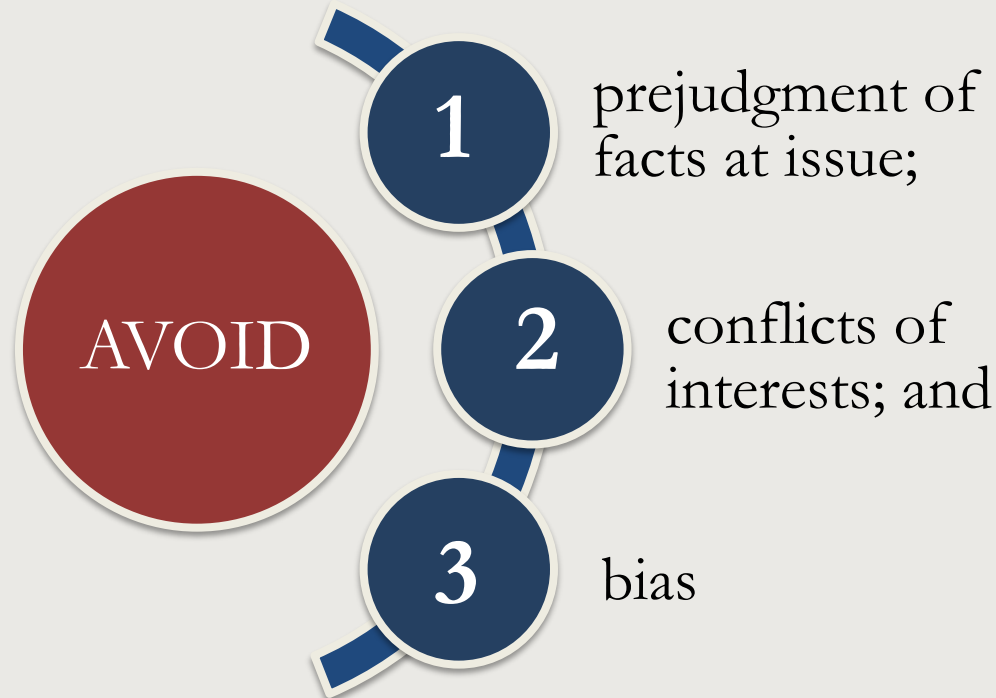
Serving Impartially and Without Bias

W Y C H E | A LexMundi Member

Objective Evaluation

Investigation and adjudication of allegations **must be** based on an **objective evaluation** of the **relevant evidence** available.

Serving Impartially



Do not rely on sex stereotypes

Avoid Prejudgment of Facts at Issue

- Do not pass judgment on the allegations presented by either party or any witness
- Do not jump to conclusions without fully investigating
- Do not apply a “*start by believing*” approach

Prohibit Sex Stereotypes

- Decisions must be based on *facts*
- *Not* on stereotypical notions of what men and women do or do not do



Conflict of Interest

- Not a conflict of interest for a recipient to:
 - Fill Title IX personnel positions with its own employees
 - Have different individuals from the same office serve in separate Title IX roles

Conflict of Interest - Functions

- **Title IX Coordinator**
 - Can serve as investigator and informal resolution facilitator
 - CANNOT serve as hearing decision maker or appeal decision maker
- **Investigator**
 - Can serve as Title IX Coordinator and informal resolution facilitator
 - CANNOT serve as hearing decision maker or appeal decision maker
- **Hearing Decision Maker**
 - CANNOT serve as Title IX Coordinator, investigator, or appeal decision maker
- **Appeal Decision Maker**
 - CANNOT serve as Title IX Coordinator, investigator, or hearing decision maker



Bias

The Department encourages recipients to apply **an objective** (*whether a reasonable person would believe bias exists*), **common sense approach** to evaluating whether a particular person serving in a Title IX role is biased.

Examples of Bias

(1) Treating a party differently on the basis of a party's sex or (2) stereotypes about how men or women behave with respect to sexual violence

- Women as victims or being more vulnerable and in need of protection
- Men as perpetrators and not victims of sexual assault; aggression being acceptable or explained

Examples of Bias

- (3) Ignoring, blaming, or punishing a student due to stereotypes
- Doubting, blaming, or not taking seriously victims of sexual assault who used drugs or alcohol at the time of the assault or who have a history of past use
 - Seeing women who use drugs or alcohol as being more promiscuous

Not Bias

(1) Outcomes of the Grievance Procedures

- Historical patterns
 - responsibility or non-responsibility findings

Not Bias

(2) Title IX Coordinator signing a formal Complaint

- Not adverse to the Respondent
- No conflict of interest created

Not Bias

(3) Professional experiences or affiliations don't constitute bias

- Don't apply generalizations that might unreasonably conclude biases exist:
 - Prior work as a victim advocate \neq biased against respondents
 - Prior work as a defense attorney \neq biased in favor of respondents

Credibility Determinations – Potential Bias?

Consider whether including credibility determinations at the investigative stage would encroach on the decision maker's purview

- Investigator's role should be factual

Section 2.08 – Impartiality and Conflicts of Interest

Title IX Coordinator - To raise any concern regarding bias or a potential conflict of interest concerning the Title IX Coordinator, a report must be made to the President of the University or the Deputy Title IX Coordinator.

Others - Reports of bias or a potential conflict of interest regarding anyone else involved in administering the procedures need to be made to the Title IX Coordinator **and** must be raised within 24 hours following notice to the parties of the identity of the person(s) involved, or they will be deemed to be waived.

May Apply Trauma-Informed Practices

Can apply practices that are informed by trauma research, so long as they do not violate the requirement to serve impartially and without bias.

- Apply equally to all genders
- Based on scientific, peer reviewed research
- Ask the party “Help me understand why”

Questions?
