



**Delgado Community
College
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Title IX Tune Up

**Presented by
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UNLIKE SOME PEOPLE

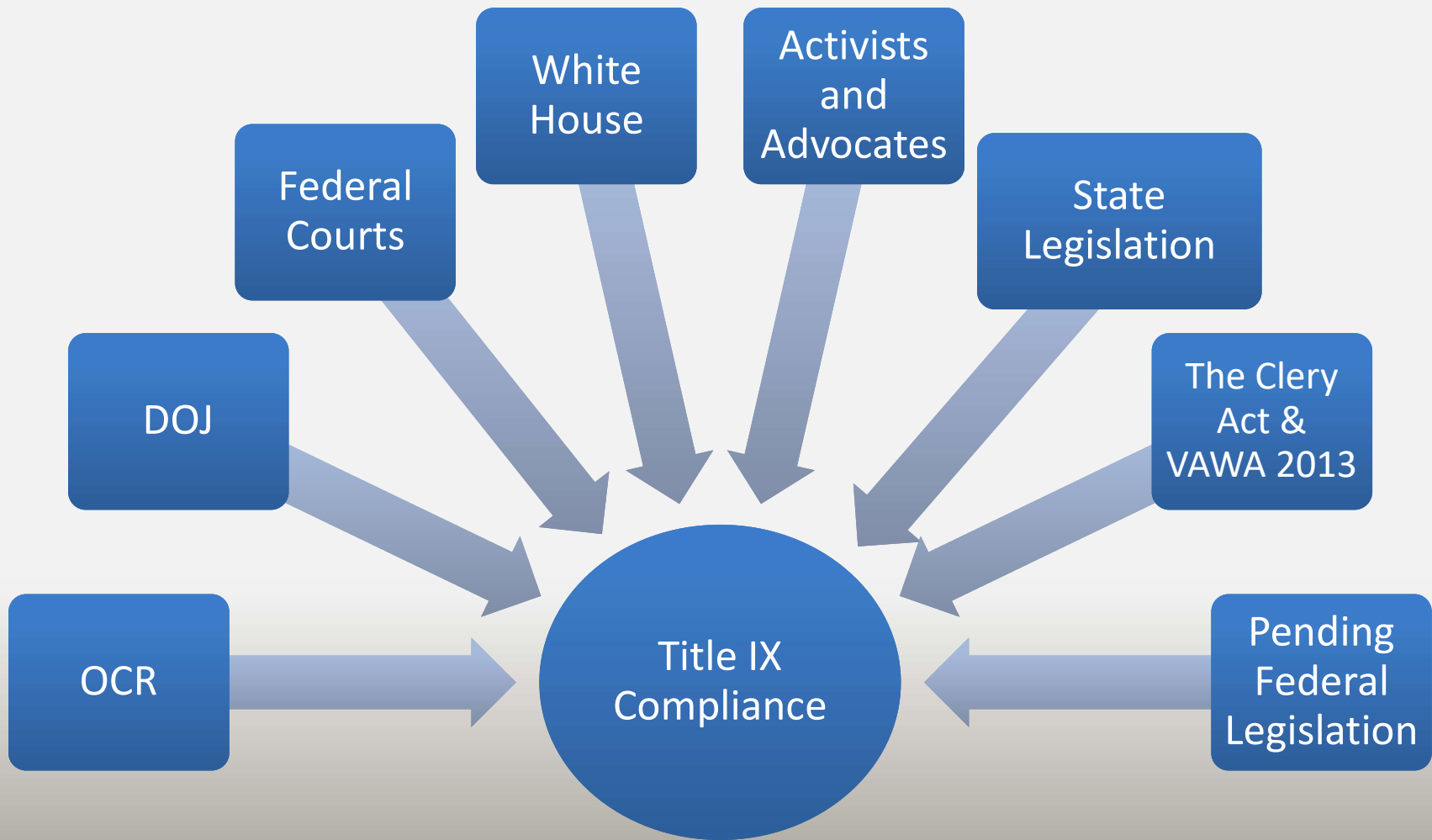


A Note About Terminology

- “Victim”, “Survivor”, “Complainant”, “Accuser” “Claimant” = Reporting Party.
- “Accused”, “Respondent”, “Perpetrator” = Responding Party
- Gender pronoun sensitivity and awareness, caution regarding strictly binary assumptions
- Rape, sexual assault, sexual violence, and sexual misconduct terms need specificity
- Understand Law(crime) vs. campus policy.
- Dating violence and Domestic violence/abuse = Relationship/Interpersonal/Intimate Partner violence

WHAT GOVERNS SEXUAL HARASSMENT, DISCRIMINATION & MISCONDUCT RESPONSES?

A Crowded Arena



Federal Laws Specifically Addressing Sex & Gender Misconduct on Campus

- **Title IX** – Applies to entire campus, covers sex/gender
 - **OCR** Provides compliance guidance
 - **OCR Guidance Document 2001**
 - **OCR DCL** (April 4, 2011) **OCR – FAQ** (April, 2014) **3 DCL's** (April 24, 2016)
- **Title VII** – Limited to employment only, covers sex, color, race, religion and national origin
- **Case law**
 - “Gamechanger” cases, North Haven (1982), Franklin (1992), Gebser (1998), Davis (1999)
- **Clery Act/VAWA Sec. 304**
 - “Campus Sexual Assault Victims’ Bill of Rights” (1992)
 - “Violence Against Women (VAWA) Act & SaVE Act (March, 2013)

What I Am Seeing On Campuses

- Increased attention to issues of sexual harassment, hostile environment, violence for entire community
- Confusion in sorting out issues when drugs or alcohol is involved-training needed!
- Increased reporting (Clery numbers are going up—that's a GOOD thing!)
- More “helpers” for victims (attorneys & advocates) in filing complaints or civil suits
- Increased media attention
- Conflicts with free speech

What I am Seeing on Campuses

- Concerns regarding balancing rights of accused and victim (Issues of due process for accused v. victim's rights)
- Emphasis on applying an “investigator model” to civil rights allegations, movement away from standard hearing board approaches
- Schools examining current policies & procedures for compliance-status quo challenged

Case law Trends

UE Study: “Student Sexual Assault: Weathering the Perfect Storm” - Studied claims from 2006-2010

- Accused brought 54% of claims and accounted for 72% of financial losses (legal fees and payments to claimants)
- 96% Involved acquaintances
- 92% Involved alcohol or other drugs
- 63% Accuser with no clear memory of incident
- 33% Accuser with prior mental health issues
- 63% Accuser was a first-year student

Source: United Educators – “Student Sexual Assault: Weathering the Perfect Storm

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Some Important Statistics

TITLE IX BASED CASES:

2014	11	
2015	33	
2016	26	(January-August 1)

OCR COMPLAINTS

2011	50
2017	312 active investigations at 227 schools as of 3/14/17*

***59 cases resolved**

Key Issues

These issues continue to affect the implementation of model procedures, polices, and practices in Title IX cases.



SCENARIO DISCUSSION

Sexual Misconduct Scenario

- A group of male students sit outside in front of the student life building in the nice weather and calls out ratings to female students as they pass by the group. One female student avoids having to pass by them and misses an appointment with a faculty member as a result.
- Title IX related?
- What if they call out ratings to everyone?
- How would you address this?

TITLE IX

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

Title IX of the Education Amendments of 1972
Implementing Regulations at:
20 U.S.C. § 1681 & 34 C.F.R. Part 106

IX

The IX Commandments

Thorough	Reliable	Impartial
Prompt	Effective	Equitable
End the Discrimination	Prevent its Recurrence	Remedy the effects upon the victim & community

Investigation
(prompt & fair –
VAWA Sec. 304)

Process

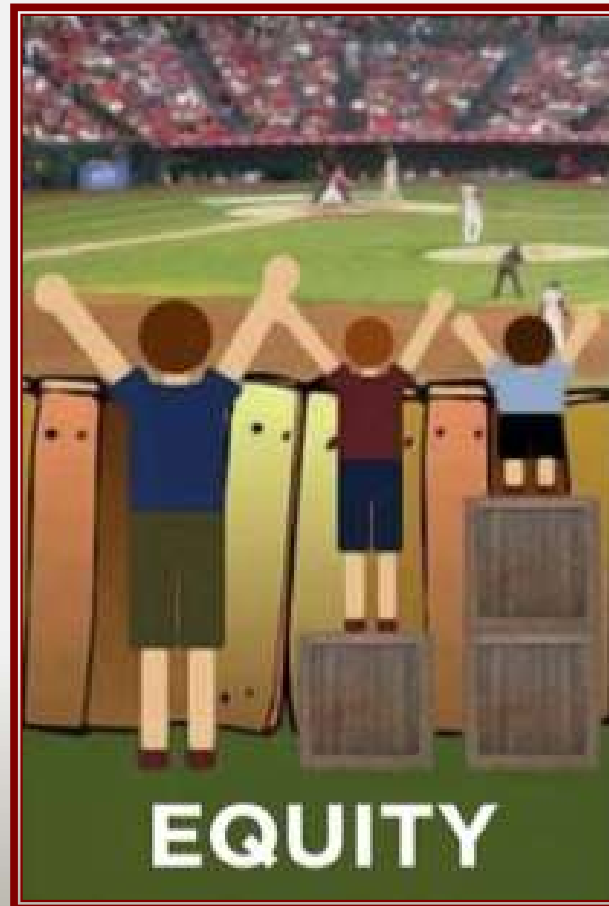
Remedies

WHAT IS EQUITY AND HOW DO WE GET THERE?

Equity & Grievance Procedures

- Preponderance of the Evidence
- Various forms of Notice: Policies & Procedures, Investigation, Hearing, Outcome (Finding & Sanction), Meetings and opportunities to present witnesses and provide evidence
- Access to information
- Advisor
- Impartial investigators, investigation, hearing and panelists
- Remedies
- Appeals

Equality v. Equity



Title IX and Title VII

Title VII

“Prohibits discrimination in the terms, conditions or privileges of employment on the basis of an employee’s sex, race, ethnicity or religion”

- **The statute also prohibits retaliation against employees who engage in activities opposing unlawful discrimination**

42 U.S.C. §2000e-3(a)

Title VII of the Civil Rights Act of 1964

Title IX Applies to Employees, Too

- “No **Person...**”
 - “Person” = Everyone: students, employees, visitors, agents...
- US Supreme Court holds “Employment discrimination comes within Title IX’s prohibition” (*North Haven Bd. of Education v. Bell*, 452 U.S. 512 (1982))
 - Employees = Staff, Administration & Faculty
- Equitable, prompt and impartial requirements apply to employee grievance processes as well

When Does Title IX Apply?

Subject Matter

- All unwelcome sex-based and gender-based conduct
- All sex discrimination (program equity)
- All gender discrimination
 - Including gender identity discrimination and
 - Sexual orientation discrimination that implicates gender
- Pregnant and parenting student (employees-FMLA) discrimination

When Does Title IX Apply?

Covered Individuals

- Students
 - Faculty
 - Staff
 - Campers
 - Subcontractors, vendors
 - Guests, visitors, alumni
- (all as both Reporting Party and Responding Party)

When Does Title IX Apply?

Covered Programs

- All programs run by a Title IV-funded recipient
- All programs using facilities funded by federal money (e.g., camps using your fields/stadium)
- It does not matter whether some of your programs are explicitly federally funded or not, all institutional programs are covered, as has been decided by OCR and the courts.

When Does Title IX Apply?

Subject Matter

- Any sex/gender-based:
 - Stalking
 - Hazing
 - Bullying
 - Arson
 - Vandalism
 - Theft
 - And any other policy violation that is sex/gender based that causes a discriminatory effect

When Does Title IX Apply?

Jurisdiction

- OCR says Title IX, by its text, does not apply outside the US, and will not enforce extraterritorial complaints
 - But King et. al. v. EMU, shows the courts connect Title IX to federally funded educational programs, even if they are overseas
- The Davis standard set forth that jurisdiction is expected when the institution has
 - Control over the harasser (discriminator) **AND**
 - Control over the context of the harassment (discrimination)

When Does Title IX Apply?

Jurisdiction

- This means we will be taking off-campus jurisdiction when:
 - Whenever our policy says
 - When the behavior occurs on property we own or control
 - When the behavior occurs in programs/events we sponsor
 - When the downstream effects of purely off-campus conduct cause a discriminatory impact on campus

Guidelines for Assessing Jurisdiction

- Anytime there is sexual harassment, sexual contact or penetration, intimate partner violence, stalking or sexual exploitation AND has the effect of limiting, depriving or denying educational or employment access, benefits or opportunities it's a Title IX
- VAWA will apply in all cases of sexual assault, dating or domestic violence and stalking (The “BIG 4”) but not in sexual harassment cases.
- Where two Title IX covered institutions share control (ex. high school students enrolled at the college, the Title IX Coordinators from each school should collaborate, providing a joint or coordinated resolution

Student or Employee Affiliated with Institution. Is It a IX?

- **Student or employee reports sexual harassment by another student or employee in class?**
 - *Yes, Title IX applies but VAWA doesn't.*
- **Student or employee reports sexual assault by student or employee off campus, not campus event?**
 - *Discretionary. Not IX, but should remedy on-campus effects. VAWA rights attach. Code of Conduct or Employee Manual likely applies.*
- **Student or employee reports sexual assault by another employee or student at off campus, institutional sponsored event?**
 - *Yes, IX applies and VAWA applies.*

Unaffiliated Reporting Party

Is it a IX?

- **Reporting Party unaffiliated with institution accuses student or employee of assault on campus?**
 - *Yes, it is a IX and VAWA applies, but institution has limited obligations regarding remedies owed, but a basis to discipline accused party*
- **Reporting Party unaffiliated with institution accuses student or employee of off campus assault?**
 - *Not a IX, limited remedies owed, would apply Employee Manual or Code of Conduct as appropriate to accused*
- **Reporting Party unaffiliated with institution accuses student or employee of assault at off campus institutional sponsored event?**
 - *Yes, Title IX & VAWA applies. Limited remedies owed. IX is basis to discipline Responding Party*

Unaffiliated Responding Party

Is it a IX?

- **Student, unaffiliated with institution, commits sexual assault on one of our students or employees on campus?**
 - *Yes, IX and VAWA applies, but no basis to discipline Responding Party. Remedies owed, consider issuing “No Trespass Order”*
- **Student, unaffiliated with institution commits sexual assault on one of our students or employees off campus, private event, private property? What if it’s an institutional controlled event?**
 - *No jurisdiction in either case, Not IX but must remedy on-campus effects and VAWA rights attach*

What Does It Mean When We Say Title IX Applies?

- You must provide a prompt and effective response that includes:
 1. Little “i” investigation (to determine the “known circumstances in order to take reasonable subsequent actions
 2. Specific steps to stop the conduct (if ongoing)
 3. Calculated steps to reasonably prevent the recurrence
 4. Comprehensive and ongoing steps to remedy the impact on the Reporting Party and others who may have been affected

TITLE IX, CLERY & VAWA 304

Title IX, Clery & VAWA 304

- Separate laws with separate histories and standards.
- Classic Clery is about reporting and consumer information.
 - Certain crimes occurring in certain geographic locations reported to certain individuals.
 - VAWA/SaVE amends Clery (and makes significant changes).
- Title IX is about response to unequal treatment on the basis of sex.
 - Unequal treatment based on sex regardless of location and whether a crime is committed.
- VAWA created to support campus efforts to address sexual assaults (expanded in 2013) through grants

The Clery Act

- Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (1990)
 - Crime reporting.
 - Campus crime log.
 - Campus Sexual Assault Victims Bill of Rights
 - Primary crimes (16+3).
 - Hate crimes (8 categories).
 - Policy and procedure disclosures.
 - Timely warnings & emergency notifications.
 - Sex offender information dissemination.
 - Enforcement and fines.
 - VAWA 2013 – Section 304.



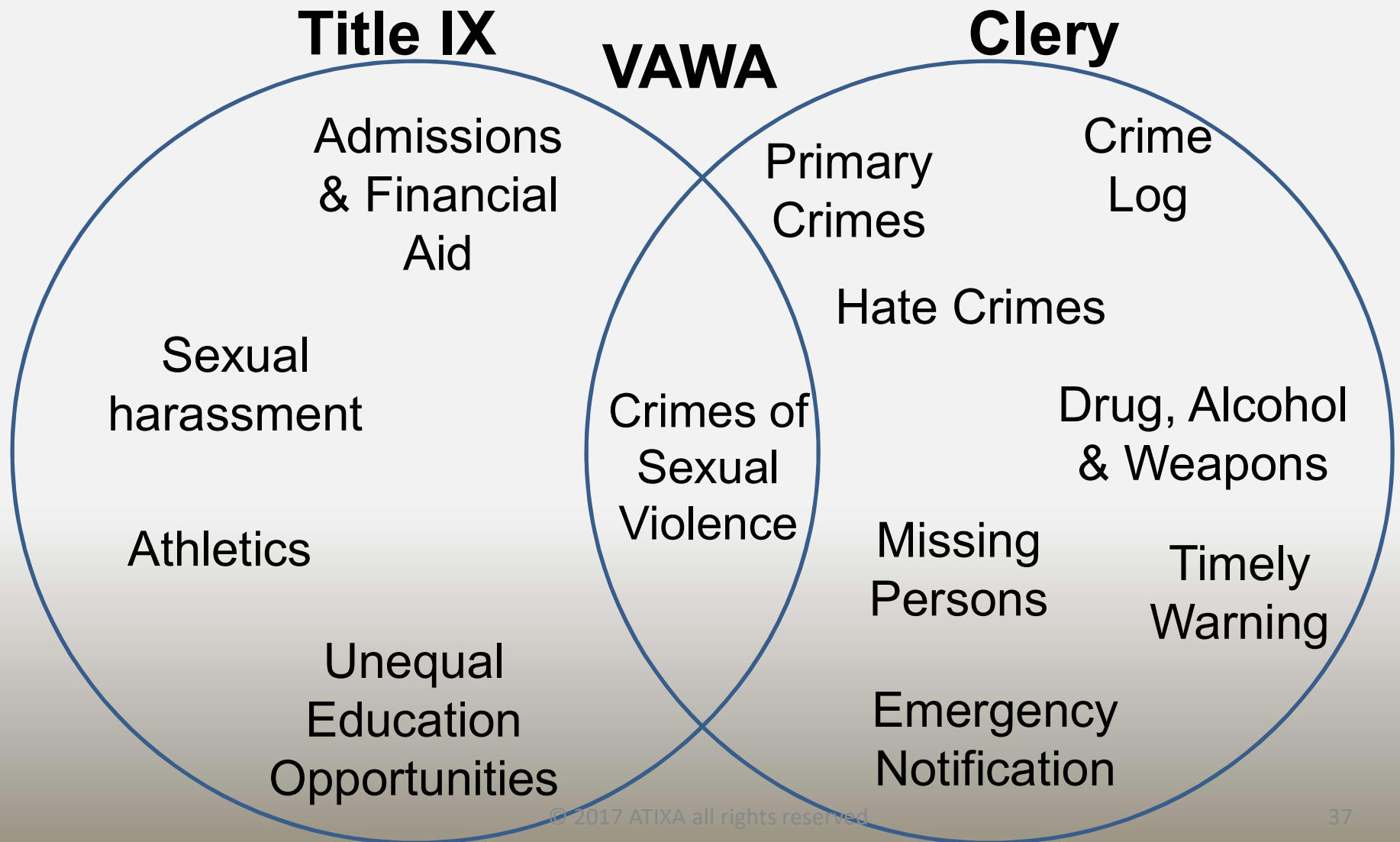
Recent Clery Amendment: VAWA Reauthorization & Section 304

Section 304: “Campus SaVE”

- **Section 304** significantly amends the Clery Act.
- Final Regulations released October 15, 2014.
- Effective date of the law is July 1, 2015.
- **Extensive** new policy, procedure, training, education, and prevention requirements for:
 - Sexual assault.
 - Stalking.
 - Dating violence.
 - Domestic violence.
- Prohibits retaliation.

} The “Big 4”

Title IX and Clery



NOTICE & REPORTING

Responsible Employee

- A **Responsible Employee** includes any employee who:
 - Has the authority to take action to redress the harassment;
 - Has the duty to report harassment or other types of misconduct to appropriate officials; or
 - Someone a student could reasonably believe has this authority or responsibility;



Institutions must ensure that employees are trained regarding their obligation to report harassment to appropriate administrators.

Title IX Essential Compliance Elements

- Once a “responsible employee” has either actual or constructive notice of sexual harassment/sexual misconduct, the school must:
 - Take immediate and appropriate steps to investigate what occurred
 - Take prompt and effective action to:
 - Stop the harassment
 - Remedy the effects
 - Prevent the recurrence

NOTE: This is regardless of whether or not the Reporting Party makes a complaint or asks the school to take action.

DUE PROCESS

What Is Due Process?

- Due Process (public institutions):
 - Federal and state constitutional and legal protections against a state institution taking or depriving someone of education or employment.
- “Fundamental Fairness” (private institutions):
 - Contractual guarantee that to impose discipline, the institution will abide substantially by its policies and procedures.
- Ultimately, both are the set of rights-based protections that accompany disciplinary action by an institution against students, employees, or others.
 - Informed by law, history, public policy, culture etc.
- Due process in criminal and civil courts vs. due process within an Institution.

Due Process

- A decision must be based on a fundamentally fair rule or policy. For public institutions, due process is guaranteed in the 14th Amendment
- The decision must be made in good faith (without malice, ill-will, or bias).
- It must have a rational relationship to the evidence introduced in the hearing.
 - Finding on the basis of a preponderance standard
- The process cannot be arbitrary or capricious.
- Sanctions must be reasonable and constitutionally permissible.

Due Process

- Most institutions base due process protections on the identity of the accused and the constituency to which they belong.
 - Students — undergraduate, graduate, professional, online, etc.
 - Faculty — tenure-track, tenured, contract-based.
 - Staff/Administrators— exempt, non-exempt, union membership.
- Also often based on the nature of the allegation:
 - Academic
 - Non-Academic

More About Due Process

- Two over-arching forms of due process:
 - Due Process in Procedure:
 - Consistent, thorough, and procedurally sound handling of allegations.
 - Institution substantially complied with its written policies and procedures.
 - Policies and procedures afford sufficient Due Process rights and protections.
 - Due Process in Decision:
 - Decision reached on the basis of the evidence presented.
 - Decision on finding and sanction appropriately impartial and fair.

Due Process in Procedures

- A school's process should include (at a minimum):
 - Notice — of charges and of the hearing/resolution process.
 - Right to present witnesses.
 - Right to present evidence.
 - Opportunity to be heard and address the allegations and evidence.
 - Right to decision made based on substantial compliance and adherence to institutional policies and procedures.
 - Right to appeal (recommended).

Due Process in Decisions

- A decision must:
 - Be based on a fundamentally fair rule or policy.
 - Be made in good faith (i.e., without malice, ill-will, or bias).
 - Have a rational relationship to (be substantially based upon, and a reasonable conclusion from) the evidence.
 - Not be arbitrary or capricious.
- Sanctions must be reasonable and constitutionally permissible.

OCR & TITLE IX



- OCR's role
- Regional offices
- Enforcement mechanisms
- OCR complaints
- Investigation process
- OCR process alternatives
- Remedies under Title IX
- Civil lawsuits v. administrative actions

Role of OCR & Title IX

- The Office for Civil Rights (OCR) under the Department of Education is responsible for establishing the **compliance standards to be applied in investigations and enforcement** of Title IX regarding sexual harassment.
 - Provides regulatory and sub-regulatory guidance.
- OCR standard indicates that upon receipt of **notice**, institution must immediately take immediate and appropriate steps to **investigate** what occurred and take **prompt and effective action to end the harassment, remedy the effects, and prevent the recurrence.**

OCR & Title IX

- The OCR guidelines distinguish the administrative oversight of Title IX from the standards applicable to private litigation for monetary damages.
- OCR standards require the sexual misconduct must rise to the level of **severe, pervasive or persistent**.
- OCR administratively enforces Title IX by:
 - Conducting investigations from complaints filed with the U.S. Dept. of Education.
 - Engaging in “voluntary compliance investigations.

OCR INVESTIGATIONS

Interesting OCR Trends: Restitution

- OCR resolution agreements are increasingly requiring institutions to pay complainants some form of restitution.
 - “University agrees to reimburse the student complainant for education and other reasonable expenses as incurred from January 2010 through June 2011 related to this matter and as identified by the complainant prior to the execution of this agreement” (Tufts University Agreement).
 - “The university agrees to provide to Students 1, 2, and 3 reimbursement for appropriate university-related expenses as well as expenses for counseling, that Students 1, 2, and 3 incurred from the date on which each student first reported alleged sexual assault/violence to the university to the date of resolution” (Princeton Agreement).

Interesting OCR Trends: MOU with Local Law Enforcement

- University should coordinate with local law enforcement to discuss:
 - University's Title IX obligation to investigate.
 - Ability of university to temporarily delay fact-finding during law enforcement's evidence-gathering process.
 - University will promptly resume investigation once notified by local law enforcement that they have completed evidence gathering.
 - During temporary delay, university will provide witnesses with information regarding Title IX rights and resources.

Interesting OCR Trends: Grievance Procedures

- Procedures should explain how to file a complaint (SUNY, Princeton).
- Off-campus conduct:
 - “Explicit statement that the university will consider the effects of off-campus conduct when evaluating whether there is a hostile environment on campus” (Princeton Agreement, p. 2).
- Cross-examination:
 - “Provisions prohibiting parties from personally cross-examining each other during disciplinary processes” (Princeton Agreement, p. 3).
- University will investigate and provide appropriate remedies to complainant **regardless of the enrollment status of an accused student** (e.g., a current versus former student)” (Princeton Agreement, p. 3).

Civil Law Suits v. Administrative Action & Title IX

Lawsuit

- File in federal court.
- Monetary damages, injunction.
- Requires:
 - Actual notice.
 - Employee with authority to take action.
 - Deliberate Indifference.

Administrative Action

- Initiated by OCR.
- Voluntary compliance or findings
- Requires:
 - Actual OR constructive notice (“knew or should have known”).
 - Investigate.
 - End harassment.
 - Remedy impact.
 - Prevent recurrence.

Title IX Litigation Trends

- Increase in lawsuits by the accused.
 - St. Joseph’s University, Xavier University, Vassar College, Denison University, DePauw University, Occidental College, and Columbia University.
- Negligence-based claims.
- Due process-based claims.
- *Chevron/Auer* Deference & private right of action on OCR guidance?
- Breach of contract.
- Shifting view of what constitutes “notice.”
- Title IX increasingly viewed as a viable cause of action.
- Impact of VAWA 2013 – Section 304.
- Pending legislation

CAMPUS CIVIL RIGHTS INVESTIGATIONS

Why Apply Investigation Model?

- Sex/gender based misconduct is not only a campus behavioral violation (i.e. student code of conduct or employee handbook), but also a violation of federal civil rights laws
- Requires Title IX response (for students and employees)
- Civil Rights Investigation Model is the most effective approach for victim-based violations
 - Investigation process involves strategic information gathering, comprehensive investigation, credibility information
- Investigation model can stand alone or be grafted onto and/or integrated into existing procedures

Civil Rights Investigation Model Hallmarks

- Active identification and strategic gathering of evidence.
- Investigation is the center of the procedure for resolution.
- Grounded in the concepts of neutrality and equity.
- Most effective for victim-based violations.

**Investigators, have no
“side” other than the
integrity of the process!**

How is Investigation Different Regarding Employees v. Students ?

- Role of FERPA
- Employee/Faculty Handbook
- Collective Bargaining Agreements
- At-will v. property interest

Steps of a Civil Rights Investigation

1. Receive Notice or Complaint
2. Preliminary Investigation (initial strategy)(PPTV)
3. Gatekeeper Determination (by Title IX Officer)
4. Issue Spotting
5. Preliminary Strategy of the Investigation
Will continue throughout process
6. Notice of Investigation to Responding Party and Notice of Formal Allegation (“Charge”)(may vary in time. May be two different letters)
7. Formal Comprehensive Investigation
Witness Interviews
Evidence Gathering
8. Analysis of Evidence
9. Finding

Formal Comprehensive Investigation

- When you commence a thorough, reliable, impartial, prompt and fair investigation you must:
- Determine the strategy for the investigation.
 - Issues Presented, Policies violated
 - Witness interviews (Who? When?)
 - Evidence gathering.
 - Timeframe to complete the investigation.
 - Finding.
 - Presentation of finding.
- Complete the investigation promptly, and without unreasonable deviation from the timeline.

Understanding Evidentiary Standards



General Terminology for Evidence Evaluation

- **Probable Cause:** Reasonable grounds for issuing a charge; a reasonable belief that a policy has been violated to allow further investigation
- **Preponderance of the Evidence:** Greater weight of the evidence (see next slide)
- **Clear and Convincing Evidence:** Evidence that must be highly and substantially more probable to be true than not – a firm belief in the factuality
- **Proof Beyond a Reasonable Doubt:** Proof that leaves you firmly convinced that the accused is in violation
- The standard of evidence to be applied and the potential loss of “rights” impacts the amount of due process required.

What is the “Preponderance of the Evidence” Standard?

- It's any amount of evidence beyond equal
- Often called “Great Weight of the Evidence” or “More Likely Than Not”
- Sometimes considered 50.1% or 50% and a feather
- Preponderance as the standard provides the greatest amount of equity in deciding a case because it does not create a burden on either party or the institution to overcome

Preponderance of the Evidence



Clear and Convincing Evidence



Proof Beyond a Reasonable Doubt



**PROOF BEYOND A
REASONABLE DOUBT**

Advocates and Confidential Advisors

Advocates

- A person who supports a student party in a campus process.
- Does not represent or speak on the student's behalf.
- May provide guidance to a student on questions of process and policy.
- May attend any process meetings with the student if the student desires.
- An advocate may be anyone the student sees as helpful or supportive (parent, sibling, friend, classmate, attorney, etc.).
- Private not necessarily confidential

Confidential Advisor

- A person who as part of his/her role can ensure confidentiality to the student.
 - Counselor, clergy, trained victim's advocate, medical personnel
- Confidentiality is often afforded through a qualified licensure.
- Reports submitted to a confidential advisor must still be reported for Clery data collection.
- Inform students who on campus can serve as a confidential advisor.
- May be asked to attend process meetings by a student.

Confidential Advisor

- Louisiana Act 172 – outlines a basic potential training curriculum
- Confidential Advisors must be trained on campus process (online format is acceptable)
- Confidential Advisors may be employed by the institution or contracted out in the case of smaller institutions.
- Must be well versed in process, policy, and options available to student.

Tips For Institutional Leadership

- Ensure your institution has appointed a Title IX Officer
 - Must be trained in the scope of the laws and regulations related to sex & gender misconduct; knowledgeable about Title IX response requirements
- Require development of climate surveys
- Require a published non-discrimination notice in compliance with Title IX
- Encourage school to audit their policies and procedures
- Encourage school to develop a single Community-Based Policy on Sexual Misconduct and Harassment
- Require school to identify “Responsible Employees” and Confidential Reporting Sources

Louisiana Act 172 (2015)

- Sexual Assault Climate Survey submitted to BoR annually
- MOU between Law Enforcement Agencies
- BoR Uniform policies and procedures
- Confidential Advisor
- Detailed website on TIX contact, report, process, amnesty, etc.
- Transfer rules – Transcript holds



QUESTIONS?

THANK YOU!

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