



Association of
Title IX Administrators

2024 Title IX Regulations: Investigations

2024 Title IX Conference

West Virginia School of Osteopathic Medicine

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Content Advisory

The content and discussion in this course will necessarily engage with sex- and gender-based harassment, discrimination, violence, and associated sensitive topics that can evoke strong emotional responses.

ATIXA faculty members may offer examples that emulate the language and vocabulary that Title IX practitioners may encounter in their roles including slang, profanity, and other graphic or offensive language. It is not used gratuitously, and no offense is intended.

Title IX, Discrimination, and Disparate Treatment

Title IX and Equity

- Title IX is a sex and gender equity law
- Equity refers to the understanding that not all individuals have access to the same resources and opportunities
 - Equity focuses on providing support and resources to reduce disparities in access to the education program
 - Title IX seeks to remedy the inequities created by sex and gender discrimination
- Title IX imposes a duty to stop, prevent, and remedy sex and gender discrimination

Title IX Regulatory Applicability

Regulatory Application

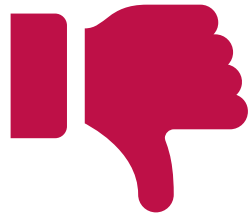
- The 2020 Regulations did **not** apply to sex discrimination complaints based on sexual orientation (SO), gender identity (GI), sex stereotypes, etc.
 - No need to worry about retroactively applying the 2020 Regulations to disparate treatment complaints
 - May apply 2024 Regulations beginning **August 1, 2024**
- **Note:** State laws vary significantly on these issues
 - Incorporation of SO and GI into state civil rights laws, usually restrictive
 - Distinctions based on “biological sex”
 - Although Title IX overrides state law, legal challenges are evolving

Institution as Respondent

- Under the 2024 Regulations, when a complaint alleges an institution's **policy or practice** discriminates on the basis of sex, the Resolution Process still applies, but some Respondent rights will **not** apply
 - Certain procedural rights that would not make sense to afford to an institution
 - OCR did not provide guidance on the procedural rights not owed to institutional respondents
 - Preamble suggests a Title IX Coordinator (TIXC) could take action to stop, prevent, and remedy a discriminatory policy and practice in lieu of Informal Resolution (IR)

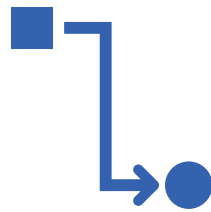
Types of Discrimination

Distinguishing Types of Discrimination



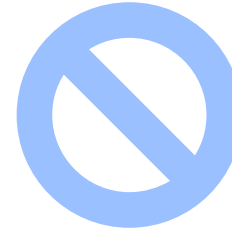
Disparate Treatment

- Intentional
- Usually requires adverse action
- Affiliated with or perception of affiliation to protected class



Disparate Impact

- Occurs with unintentional discrimination
- Impact disadvantages certain groups



Harassment

- Quid Pro Quo
- Hostile Environment
- Sexual Assault
- Dating/Domestic Violence
- Stalking



Retaliation

- Suffered adverse academic or employment action based on participation in a protected activity

Examples of Disparate Treatment

Employees

- Hiring
- Promotion/Performance reviews
- Pay
- Responsibilities/Job assignments
- Shifts
- Access to resources

Students

- Athletics
- Grading
- Program access
- Student conduct outcomes
- Housing access
- Guest visitation policies

Adverse Action Examples

- Not hiring/demotion/termination
- Promotion/Tenure denial
- Poor performance reviews
- Less desirable work assignments
- Work-related threats
- Supervisory responsibility removal
- Abusive verbal or physical behavior
- Discipline
- Student leadership opportunity denial
- Unfair grading
- Pay and compensation disparity
- Resource inaccessibility
- Remedy inaccessibility
- Opportunity denial

Disparate Impact

- Stems from “neutral” policies and practices applied evenhandedly, but that allegedly have a discriminatory impact
- Complex investigations
 - Often examines culture/climate
- High level statistical analysis
 - Validity studies
 - Programmatic necessity
- Focuses on remedies, not sanctions
- Examples: effect of hiring, admissions, or disciplinary processes, even when conducted in a facially neutral way

Disparate Treatment Construct

Disparate Treatment Construct

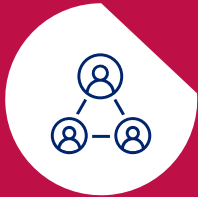
Step 1: Does the complaint satisfy the required elements for a disparate treatment complaint?

Step 2: Does the Respondent offer a non-discriminatory reason for the adverse action?

Step 3: Is there evidence that the offered reason is pretext for discrimination?

Step One: Complaint

Step 1: Does the complaint satisfy the required elements for a disparate treatment complaint?



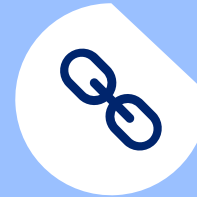
1(a)

Does the complaint implicate a protected characteristic?



1(b)

Does the complaint identify an adverse action?



1(c)

Does the complaint assert that the protected characteristic status caused the adverse action?

Step One: Initial Allegation Assessment

- When receiving a report or complaint of disparate treatment:
 - Determine whether the allegations, if proven, have all three elements
 - If not, conduct an evaluation or “small i” investigation
- Cannot disregard because the Complainant’s initial report does not “check all the boxes”
- Examples:
 - Meet with the Complainant to learn additional information
 - Consult with human resources or a department chair (if appropriate)
 - Perform a preliminary employment data review

Step One: Examples

“The College of Engineering hates women!”

- No specific discriminatory treatment alleged
- Meet with the Complainant to get additional information; may not ultimately result in an investigation

“I’m not getting paid enough because the College of Engineering hates women!”

- Discriminatory treatment alleged, but need additional information
- Meet with the Complainant, possibly request human resources records about relevant salaries to get started

Step One: Examples

“The College of Engineering denied my tenure application because I am a woman. All male candidates who applied, even those who had less experience and had worse evaluations, were promoted. All the female candidates were denied.”

- Complaint identifies a protected characteristic, an adverse action, and points to comparators to connect the tenure decisions to the alleged disparate treatment
- Establishes all three required elements of disparate treatment for Step One

Step One: Initial Allegation Assessment

Some evidence must connect the adverse action to the protected characteristic

- Examples:
 - “Similarly situated individuals” outside the protected characteristic group are treated differently than those in the protected group
 - Any individual is “**similarly situated**” if it is reasonable to expect that they would receive the same treatment as the Complainant, within context
 - Fact-specific analysis
 - Direct evidence of a connection
 - Documents or witnesses who have evidence of discriminatory intent/animus
 - Can also be circumstantial or indirect evidence
 - Satisfactory job performance data or academic performance data

Gathering Evidence

- Similarly situated does not mean identically situated
 - **Most relevant** comparisons based on the available evidence
 - Evidence of differential treatment of similarly situated individuals creates an inference of the presence of a discriminatory motive
- It is the responsibility of the institution to gather relevant evidence once an initial showing of disparate treatment has been made



Statistical Evidence

Statistical evidence could be important for an alleged pattern or practice of discrimination

- Example: A professor alleges his department chair implemented a hiring process that is biased against males
 - Consider the identities of the department chair's hires against the overall applicant pools in those hiring cycles
 - 75% of applicants are male identifying but comprise only 25% of hires



Initiating a Complaint

- If the initial assessment in Step One **does not** establish the required complaint elements, end the inquiry
 - Consider appropriateness for referral to a different process or office
 - Under the 2024 Regulations, discretionary dismissal #4 would apply
- If an initial showing of disparate treatment is made, the complaint moves forward
 - Follow institutional policy to initiate a complaint and the Resolution Process
 - Step Two and Step Three roughly correspond to the investigation phase



Step Two: Non-Discriminatory Reason

- Interview the Respondent about the allegations to elicit an explanation:
 - Ask about the **why** behind the adverse action or disparate treatment
 - “Why didn’t Sally get tenure?”
 - “Why did John get tenure when Sally didn’t?”
 - Gather any evidence that supports the stated reason(s)
- Investigator should seek corroboration of any offered non-discriminatory reason(s)
 - Analyze the Respondent’s offered reason in light of relevant evidence
 - Statistical evidence may also be used to rebut a discriminatory motive
- A complaint may implicate multiple Respondents, a department, a division, or an entire institution/district

Step Three: Pretext Analysis

- If the Respondent offers a non-discriminatory reason for the adverse action, the Investigator must then seek relevant evidence to determine if that reason is “legitimate”
 - Is the Respondent’s stated reason just pretext for discrimination?
 - **Pretext** occurs when an adverse action occurred for discriminatory reasons, but an individual nonetheless asserts that there was a legitimate reason for the action
- Provide the Complainant with an opportunity to respond to the Respondent’s reasoning
 - Use follow-up interview to identify any evidence to rebut the Respondent’s reasoning
 - Direct evidence
 - Other witnesses or documents
- Consider other sources to thoroughly investigate whether the reasoning is pretextual

Putting It All Together: Michelle & Tim

- Michelle, a Black woman currently employed at State University (SU), applied for the new Chief Information Officer (CIO) role at SU
- The job posting required experience with a specific student information software, as well as a minimum of three years of supervising other IT professionals
 - Michelle met all the requirements for the position but was not hired
 - The district hired Tim, a Black male
 - Tim previously worked at the district before Michelle arrived and left for a tech start-up in the finance sector
 - Tim had no experience with the specific student information software and hadn't yet supervised other IT professionals
 - Michelle initiated a complaint, arguing she was discriminated against on the basis of sex

Did she allege all the elements of a disparate treatment complaint?

Michelle & Tim

- Tyrone, who supervises the CIO role, asserts that he offered Tim the job because they're friends from when Tyrone was SU's AVP for administration and Tim worked in the IT office
 - Tyrone never worked directly with Michelle and opted to hire his friend

Has Tyrone provided a **non-discriminatory** reason for not hiring Michelle?



Michelle & Tim

- Tyrone claimed his decision was based on favoritism for his friendship with Tim
- Michelle responds that Tyrone's argument is pretext
- Michelle offers two coworkers as witnesses to Tyrone's statements about how he does not trust women in IT roles because his mother is completely inept when it comes to technology
 - Tyrone counters that these comments were made in jest
 - Witnesses provide evidence that Tyrone made such comments more than once

Does the evidence suggest that Tyrone's offered reason was pretext?

Putting It All Together: Rory

- Rory is a high school student and works at her school's gym checking student and staff ID cards. She attends class from 8:30am to 3:00pm and usually works at the desk from 3:00pm-5:00pm.
- Rory joined the basketball team, requiring her to be at practice from 3:00pm-4:30pm each day. Rory asked her supervisor to change her shift to 5:00pm – 7:00pm, when the gym closes each night.
- Her supervisor said he could not accommodate her request for a shift that late, but Rory knows others with that shift assignment – however, they are all boys. Rory ended up making a complaint to the Principal.

Has Rory alleged all the elements of a disparate treatment complaint?

Rory

- The supervisor responded that he does not assign girls to the closing shift during the winter months because it is dark out by closing time
 - He said he would not want his daughters closing alone and waiting for a ride when it is dark and cold outside
 - He said he was not trying to keep Rory from her hours, he was just trying to look out for her

Has the supervisor provided a non-discriminatory reason for the shift assignment practice?

If not, what may next steps look like?

Making a Determination

- After completing Steps One, Two, and Three, a Decision-maker applies the standard of evidence to determine whether a violation occurred
 - May involve credibility analysis
- If a violation occurred, consider appropriate sanctions and/or remedies



Special Considerations in Resolving Disparate Treatment Complaints

Intake

- Disparate treatment complaints require very specific elements
 - May need to tweak intake approach to elicit key information to fill in the blanks
 - Who is alleged to have done what, precisely?
 - Be transparent with the Complainant about the reasons for your questions
 - Intake meeting is usually **not** an interview, but can help to flesh out the Step One allegation elements
 - Intake meeting can also help to set expectations about the investigation
 - Explain the process and the Disparate Treatment construct

Techniques for Assessing Motive

- Investigator should look for direct evidence of a motive
 - Respondent statements or statements made on Respondent's behalf indicating bias
 - Can include evidence that Respondent failed to take appropriate corrective actions to resolve known discriminatory practices or policies
 - Documentary evidence
 - Emails, performance reviews, text messages, grading patterns, etc.
 - Testimonial evidence
 - Party statements, witness statements
- Discriminatory motive may be inferred from similarly situated individuals who do not identify with the protected characteristic being treated differently
- Previous satisfactory job performance can also support an inference of discrimination

Direct Motive Examples

- A student supervisor regularly refers to LGBTQIA+ individuals with a slur
- Facilities and Maintenance refuses to hire women because the director does not believe women can perform all aspects of the job
- A Resident Assistant told another student that he likes to file disciplinary reports against transgender residents because they are just looking for attention



Similarly Situated Individuals

- “**Similarly situated**” is not precisely defined
- Individuals may be similarly situated in one context but not another
- Investigators must determine which individuals, in the same context as the Complainant, should receive the same treatment as the Complainant
- Consider the scope of the complaint
 - If a student is reporting an individual faculty member, similarly situated students may be the other students in that course and students in the faculty member’s other courses
 - If an employee is reporting a vice president’s bias in hiring/promotion, similarly situated employees may be other divisional employees

Similarly Situated Individuals

- If there are no individuals in the same position as the Complainant, the Investigator should consider other individuals in the most similar situations
 - Make the **most relevant comparisons possible** based on the available evidence
 - Do not force a comparison where there really is no comparator
- Generally, the similarly situated comparison is most useful if the similarly situated individuals **are not** part of the Complainant's protected group

Comparative Evidence

Investigators may use a variety of tools to obtain comparative evidence from similarly situated individuals

- Surveys
- Focus groups
- Policy reviews
- Performance reviews/other evaluations
- Previous complaints
- Grading records/reviews
- Expert witnesses to analyze complex cases such as compensation/experience



Satisfactory Job Performance Example

- Discriminatory intent may also be identified by viewing the adverse action in relation to a person's prior performance
 - This is not fool-proof
 - Past performance does not guarantee future performance, but it's an indicator

Example:

- In each of the past three years, the Director has gotten rave reviews during her annual evaluation
- She has previously been told that she will be up for a promotion during her fourth year and is a “shoe-in”
- One month before evaluations and promotions occur, the Director shares with her supervisor that she's pregnant
- After evaluations, the Director was given a Performance Improvement Plan instead of a promotion

Assessing Rationale

- Investigator should ask the Respondent for any rationale for their actions
 - Seek corroborating evidence from other sources
 - Look for evidentiary consistency
 - Consider pre-existing relationships among parties and witnesses
 - Be mindful that decisions may have more than one reason
- Similar to assessing credibility in other contexts



Common Rebuttal Arguments

Respondent may provide evidence that:

- Complainant's allegations are **factually incorrect**
 - Ex: A Complainant's pay disparity allegations are based on inaccurate compensation information
 - Ex: Elliott was offered housing with private bathrooms at no additional cost and chose their room
- Complainant has been **improperly compared** to individuals not similarly situated
 - Ex: A Complainant alleges student conduct outcome disparities, but Complainant had previous violations, while comparators did not
- Complainant was compared to **some**, but not **all**, similarly situated individuals

Common Rebuttal Arguments

Respondent may offer evidence that:

- Actions were based on **favoritism**
 - Investigator should consider if favoritism is **pretext** for discrimination
 - Ex: Consider Michelle's hiring allegations
- Any statistical evidence the Complainant relies upon that **does not raise an inference** of disparate treatment
 - Comparison group in the statistical data is not appropriate
 - Disparity is not statistically significant enough to derive conclusions
 - Ex: The hiring pool is 50/50 but successful candidates are 55/45

Common Rebuttal Arguments

Respondent may offer evidence that:

- Not **all** members of a sex or gender group have received disparate treatment
 - This could be a red herring
 - The question is whether the **Complainant** was treated less favorably than similarly situated persons of a different sex or gender group
- Respondent treated Complainant the same as a member of a **different** sex or gender group
 - Unless that other individual is **similarly situated**, this is not a justification

Common Rebuttal Arguments

Respondent may offer evidence that:

- A Complainant was qualified for a position but asserts that another person was selected because that person was **better qualified or a better fit**
 - This type of argument requires close examination
 - Respondents should articulate why the other person was more qualified than the Complainant
 - An expert witness may be helpful in these situations
 - Qualifications can be multifaceted and subjective

Mixed motives for adverse actions are possible

- If any one of the motives is discriminatory, even if other motives are non-discriminatory, a policy violation occurred

Techniques for Assessing Pretext

- Always provide the Complainant with the **opportunity to respond**
 - Complainant may have evidence or be able to suggest evidence to rebut Respondent's position as **pretext**
 - Investigator's responsibility to investigate pretext
- When a conflict between Respondent's position and Complainant's position arises, seek corroborating evidence
 - Coworkers or other students may be able to verify
 - Documents or testimony of senior officials may verify a policy or practice
- Perform a credibility analysis of all parties' positions and their respective arguments concerning the allegations

Questioning Guidelines

- Investigating a disparate treatment complaint is different from investigating a sex-based harassment complaint
- Investigators should:
 - Start with broad questions
 - Follow up to explore gaps
 - Use policy definitions to drive questioning
 - Use trauma-informed questioning skills where appropriate
- Investigators should avoid:
 - Accusatory or argumentative questions
 - Confusing questions



Questioning Guidelines

- Investigator may be more direct than in a sex-based harassment complaint
 - “Why do you feel like you have been subjected to sex discrimination?”
 - “Could there be any other possible reasons for your treatment?”
 - “If your professor were to provide one of the reasons you described, how would you respond to that?”
 - “Why did you say that in front of the department?”

Questioning Guidelines

- Be transparent when being direct
 - Explain the Disparate Treatment construct, in comprehensible terms
 - “I need to establish some of these facts before we can move forward”
 - “These types of complaints focus on whether there is a legitimate, non-discriminatory reason for the action, so I am trying to gather insight and facts from all parties in that regard”
- Structure questioning and evidence gathering based on Disparate Treatment construct

Applying Policy in Sexual Harassment Investigations

Applying Policy in Investigations

- Know what to look for
- **Models of Proof:** the specific elements of each violation
- Investigators collect information and evidence specific to the alleged policy violations
- Policy language informs appropriate questions
 - Policy provisions, definitions, jurisdiction
- Decision-makers (DM) use the information gathered in the investigation to determine whether all necessary elements are met for each alleged policy violation
 - DMs rely upon Investigators to collect all of the relevant and available evidence

Sex-Based Harassment

- Subset of sex discrimination
- Includes (the “Big Six” offenses):
 - Quid Pro Quo (QPQ)
 - Hostile Environment Harassment
 - Sexual Assault
 - Dating Violence
 - Domestic Violence
 - Stalking
- No consent definition provided
 - ATIXA recommends adopting a definition in institutional policy





Activity: Applying Policy to Investigations

Definition: Fondling

The touching of the private body parts of the Complainant, for the purpose of sexual gratification, without the consent of the Complainant, including instances where the Complainant is incapable of giving consent because of their age or because of a temporary or permanent mental incapacity

Model of Proof: Fondling

- ❑ The touching of the private body parts of the Complainant
- ❑ For the purpose of sexual gratification
- ❑ Without the consent of the Complainant
 - Including instances where the Complainant is incapable of giving consent
 - Because of their age or
 - Because of a temporary or permanent mental incapacity

Model of Proof: Fondling

“Sexual Gratification”

- Intentional
- Environmental factors
- Prior/current relationship
- Prior/current interactions
- Communication

Example: “Witness 1 testified that he dared Respondent to touch Complainant’s butt ‘as a joke to make [Complainant] uncomfortable.’”

Definition: Quid Pro Quo

- “An employee, agent, or **other person authorized by the Recipient** to provide an aid, benefit, or service under the Recipient’s education program or activity
 - Explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person’s participation in unwelcome sexual conduct”
- If a **student** occupies a position as an “other person authorized by the Recipient...” then QPQ **could** apply
- Definition encompasses:
 - Extracurriculars and academics
 - Detriment or threat thereof
 - If an individual purports to have authority to provide some aid, benefit, or service, even if they are unable to do so

Model of Proof: Quid Pro Quo

- An employee, agent, or **other person authorized by the Recipient** to provide an aid, benefit, or service under the Recipient's education program or activity
- explicitly or impliedly conditioning the provision of such an aid, benefit, or service
- on a person's participation in unwelcome sexual conduct.

Model of Proof: Quid Pro Quo

“Explicitly or impliedly conditioning”

- Context
- Communication
- Disparate Treatment
- Prior/current relationship
- Prior/current interactions

Example: “Respondent asked Complainant to sit on Respondent’s bed so that Respondent could assist Complainant with Complainant’s homework.””

Definition: Hostile Environment Harassment

- Unwelcome sex-based conduct that
- Based on the totality of the circumstances
 - Is subjectively and objectively offensive **AND**
 - Is so severe **OR** pervasive
 - That it **limits or denies** a person's ability to participate in or benefit from the Recipient's education program or activity

Model of Proof: Hostile Environment Harassment

- Unwelcome
- sex-based conduct that is
- subjectively offensive **AND**
- objectively offensive **AND**
- so severe **OR**
- so pervasive
- that it **limits or denies** a person's ability to participate in or benefit from the Recipient's education program or activity

Model of Proof: Hostile Environment Harassment

“Severe”

- Physical, Violent, Threatening, Intimidating
- Abusive
- Humiliating
- Exploitative
- Power differential
- Age differential
- Location and context

“Pervasive”


- Widespread
- Openly practiced
- Well-known
- Repeated/shared
- In front of an audience
- Repetitive

Investigation

Two-Track Grievance Process

- Which grievance process applies depends on the identities of the parties
 - Section 106.45 provides a civil rights resolution process for resolving complaints
 - Section 106.46 incorporates § 106.45 and adds some due process protections
 - Retains many, but not all, features of the formal process from the 2020 Regulations
- Two separate processes are permitted but **not** required
 - If using only one, it must be § 106.46 (ATIXA’s recommendation)

§ 106.45	§ 106.46
<ul style="list-style-type: none">▪ All sex discrimination complaints that are not sex-based harassment▪ All sex-based harassment complaints that do not involve a post-secondary student	<ul style="list-style-type: none">▪ All sex-based harassment complaints involving a post-secondary student Complainant and/or student Respondent



Section 106.45: Investigation Overview

Section 106.45: Basic Requirements

- Treat parties equitably
- Require TIXCs, Investigators, or DMs have **no** conflicts of interest or bias
 - DM may be the same person as the TIXC or Investigator
- Assume Respondent is not responsible unless and until evidence supports a finding of responsibility by the standard of proof
- Establish reasonably prompt timeframes for “major stages” of the process
 - E.g., Evaluation, Investigation, Determination, Appeal
- Advisors not required

Section 106.45: Basic Requirements

- Take reasonable steps to protect the privacy of the parties and witnesses
 - Cannot restrict ability of parties to:
 - Obtain and present evidence
 - Consult with family members, confidential resources, or Advisors
 - Otherwise prepare for or participate in the Resolution Process
- Require an objective evaluation of relevant (and not otherwise impermissible) evidence
- Respondent requirements apply **only** to individuals
 - Recipients are **not** Respondents in policy or practice complaints

Section 106.45: Notice of Investigation and Allegations

- Does **not** need to be written
 - But remember, documentation proves it happened
- **Must include:**
 - Recipient's grievance procedures, including Informal Resolution
 - Sufficient available information to permit parties to respond to the allegations, such as identities (who), allegations (what), date (when), and location (where) of the alleged conduct
 - Statement that retaliation is prohibited
 - Statement that parties have opportunity to access relevant evidence or description of the evidence

Section 106.45: Investigations

§ 106.45

- Adequate, reliable, and impartial
- Gather evidence
- Permit parties to present fact witnesses; inculpatory and exculpatory evidence
- Recipient reviews all evidence gathered through the investigation and determines relevance
- Provide parties opportunity to access relevant evidence or accurate description of such evidence
- Provide parties reasonable opportunity to respond to evidence
- Investigation report not required
- Take reasonable steps to prevent and address parties' unauthorized disclosure of information and evidence obtained through process

Section 106.45: Parties' Review and Response

- ATIXA recommends Investigators compile relevant evidence into an investigation report
 - Send to each party and Advisor (if any) in an electronic format or hard copy
- Investigator must:
 - Provide parties a reasonable opportunity to respond to investigation report/accurate summary
 - Provide all relevant evidence upon a party's request (if Investigator only provides an accurate evidence summary)
 - Consider parties' feedback and incorporate where appropriate



Section 106.46: Investigation Overview

Section 106.46: Notice of Investigation and Allegations

Incorporates elements of NOIA from § 106.45, with alterations:

- Notice must be in writing, with time for parties to prepare before any initial interview
- Right to an Advisor of choice
- Parties will have an opportunity to present relevant evidence to a DM
- Presumption of non-responsibility
- Statement that parties will be able to access relevant evidence or an investigation report
- Any prohibition against false statements

Section 106.46: Investigations

§ 106.46 (+ non-conflicting elements of § 106.45)

- Must permit Advisor of choice
- Provide written notice of all meetings or proceedings with time to prepare
- Provide parties with the same opportunities to have support persons present, if any
- Provide equal opportunity to review relevant evidence or an investigation report
- Provide opportunity to respond to evidence or an investigation report
 - If using a hearing, must permit review of evidence prior to hearing
- May equitably permit expert witnesses



Investigation Principles Applicable to Both §§ 106.45 and 106.46

Common Steps in TIX Investigations

Investigation Steps:

1. Receive Notice/Complaint
2. Initial Evaluation and Jurisdiction Determination
3. Determine Basis for Investigation
4. Notice of Investigation and Allegations (NOIA)
5. Establish Investigation Strategy
6. Adequate, Reliable, Impartial Investigation
7. Relevant Evidence Summary/Investigation Report
8. TIXC Reviews Evidence
9. Parties Review and Respond to Summary/Investigation Report or Relevant Evidence
10. Final Investigation Report/updated summary provided to Decision-maker

Determining a Basis for Investigation

There are three bases for civil rights investigations:

- **Incident:** a specific incident or period
 - May involve one or multiple alleged violations
- **Pattern:** repetitive or similar behaviors or targets chosen by the same Respondent over a period
 - Tend to involve multiple Complainants
- **Climate/Culture:** discriminatory policies, processes, and environments
 - May have no identifiable Respondent
 - May cue up a subsequent incident or pattern investigation based on information gathered during climate/culture investigation

Investigation Scope

- TIXC determines the scope of the investigation
- **Scope** refers to the allegations, timeframes, and parties subject to the investigation
- Considerations:
 - Collateral misconduct allegations
 - Individual vs. Group
 - Multiple Complainants or Respondents
 - Counter-complaints
 - Patterns
- If scope needs to be adjusted during the process, Investigator should consult with TIXC



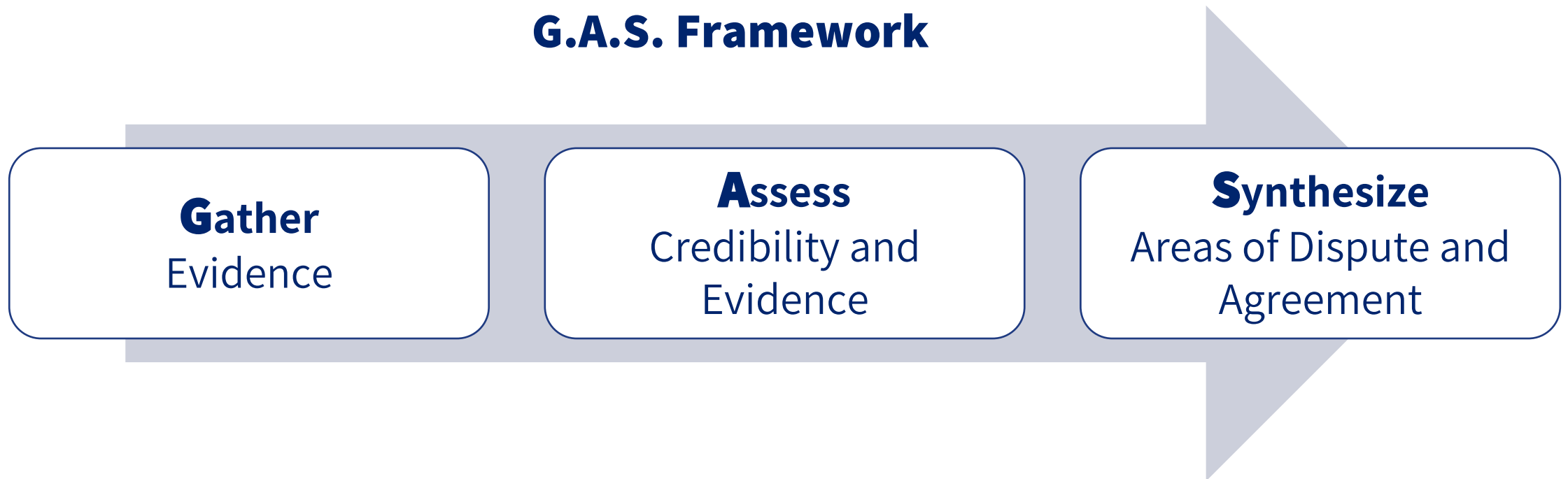
Investigation Strategy

TIXC consults with Investigator(s) to strategize and plan the investigation:

- Review elements of the specific policy provision(s) alleged to have been violated
- Develop initial witnesses and tentative interview order
- Discuss challenges with the type of complaint and the parties involved
 - Anticipate allegiances
 - Disrupt possible collusion
 - Predict obstacles and obstructions
- Assess relevant pattern considerations
- Identify preliminary undisputed and disputed facts and their significance
- Consider types of possible evidence and the plan to acquire such evidence
- Establish preliminary investigation timeline

Comprehensive Investigation

G.A.S. Framework



The burden to gather evidence is on the institution, not the parties

Understanding Evidence

- Duty to collect **relevant** and not otherwise impermissible evidence
 - Relevant evidence is information **related to the allegations** of sex discrimination under investigation that may aid in determining whether the alleged misconduct occurred
 - Inculpatory and exculpatory evidence
 - Some evidence may only be relevant to assessing credibility
- Relevant evidence forms the basis of the investigation report



Privileged and Medical Information

The party must provide written permission to obtain and/or include:

- Evidence protected under a legally recognized privilege, including evidence relevant to determining capacity to consent for students with disabilities
- Records made or maintained by:
 - Physician
 - Psychiatrist
 - Psychologist
 - Recognized professional or paraprofessional in reference to party or witness treatment



Impermissible Evidence: Complainant's Sexual History

- Evidence of the **Complainant's sexual interests** is never relevant
- Evidence of the **Complainant's prior sexual behavior** is not relevant except:
 - If offered to prove that someone other than the Respondent committed the alleged conduct; or
 - If offered to prove consent with respect to prior consent with the Respondent
 - Any prior consensual sexual conduct between the parties does not by itself demonstrate or imply the Complainant's consent
- Even if admitted/introduced by the Complainant
- Does **not** apply to Respondent's prior sexual behavior or sexual interests

Credibility

- **Credibility:** Largely a function of corroboration and consistency
 - Credibility and honesty are not the same
- **Credibility Assessment** involves evaluating the extent to which evidence is believable and reliable (accurate reflection of what occurred)
 - Refrain from focusing on irrelevant inaccuracies and inconsistencies
- **Note:** Memory errors alone do not necessarily diminish witness credibility, nor does some evasion



Common Investigation Report Sections

- Complaint Information
- Summary of Allegation(s)
- Relevant Background)
- Jurisdiction Statement
- Applicable Policies and Relevant Definitions
- Investigation Timeline
- Incident Timeline
- Summary of Relevant Evidence
- Credibility Assessment and Analysis
- Discussion and Synthesis
- Recommended Findings and Final Determination
- Appendices
- Evidence File



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Questions?



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Association of
Title IX Administrators

Overview of the 2024 Title IX Regulations

2024 Title IX Conference

West Virginia School of Osteopathic Medicine

WELCOME!

- Please log in to your ATIXA Event Lobby each day to access the training slides, supplemental materials, and to log your attendance.
- The ATIXA Event Lobby can be accessed by the QR code or visiting www.atixa.org/atixa-event-lobby in your Internet browser.
- Links for any applicable training evaluations and learning assessments are also provided in the ATIXA Event Lobby. You will be asked to enter your registration email to access the Event Lobby.
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Strategic Risk
Management Solutions



Any advice or opinion provided during this training, either privately or to the entire group, is **never** to be construed as legal advice or an assurance of compliance. Always consult with your legal counsel to ensure you are receiving advice that considers existing case law in your jurisdiction, any applicable state or local laws, and evolving federal guidance.

Content Advisory

The content and discussion in this course will necessarily engage with sex- and gender-based harassment, discrimination, violence, and associated sensitive topics that can evoke strong emotional responses.

ATIXA faculty members may offer examples that emulate the language and vocabulary that Title IX practitioners may encounter in their roles including slang, profanity, and other graphic or offensive language. It is not used gratuitously, and no offense is intended.

2024 Title IX Final Rule

- Issued **April 19, 2024**
- Effective and enforceable **August 1, 2024**
- Apply to incidents occurring **on or after August 1, 2024**, regardless of when the incident is reported
 - Incidents occurring from August 14, 2020, to July 31, 2024, will still be resolved using 2020 Regulations training and procedures, in perpetuity
- Combination of 2011 Dear Colleague Letter, 2020 Regulations, and new approaches
- 1561 pages total (1504 Preamble and 57 Regulations)
- More flexibility for Recipients in how to structure and staff resolution processes

2024 Title IX Regulations Litigation

- The 2024 Title IX Regulations are subject to legal challenges across the country
 - Generally, the recent lawsuits are targeting the gender identity provisions and the hostile environment definition
- Opponents of the Regulations are seeking **injunctions** to delay or halt implementation of all or some of the Regulations
 - **Injunction:** A court order requiring an individual or entity to either perform or stop performing a specific action
- Types of injunctions:
 - A **complete injunction** prohibits the Department of Education (ED) from enforcing the 2024 Regulations in its entirety
 - A **partial injunction** prohibits ED from enforcing specified provisions of the 2024 Regulations

2024 Title IX Regulations Litigation

- If a court orders an injunction, that decision may be appealed to a higher court
 - Otherwise, the injunction stays in effect until a trial occurs
- ATIXA anticipates that any injunction decision will be appealed
- If the 2024 Regulations are not enforceable in some or all states as a result of injunctions, schools, districts, and institutions in those states will continue to follow the **2020 Regulations**
- **Note:** Some states also have “Do Not Implement” directives from state officials
 - Independent from any federal lawsuits or injunctions
- Implementation will be unsettled for the foreseeable future
 - Consult legal counsel to determine implementation plans
- Track developments on ATIXA’s Regulations website

Retroactivity

Retroactivity

- The 2024 Regulations apply **only** to sex discrimination alleged to have occurred **on or after** August 1, 2024
 - For conduct alleged to have occurred prior to August 1, 2024, the regulations in place at the time the alleged behavior occurred will apply
- Institutions will need to maintain/update policies, procedures, and training that are compliant with the **2020** Regulations and **2024** Regulations
 - If the institution is not fully compliant with 2020, now is the time

Terminology & Definitions

Selected Terminology

- Complainant
- Complaint
- Confidential Employee
- Evaluation
- Parental Status
- Peer Retaliation/Retaliation
- Pregnancy or Related Conditions
- Relevant Evidence
- Respondent
- Student



Sex Discrimination

Sex discrimination includes:

- Discrimination on the basis of:
 - Sex Stereotypes
 - Sex Characteristics
 - Pregnancy or Related Conditions
 - Sexual Orientation
 - Gender Identity
- “More than *de minimis* harm”
- Sex-based harassment
 - “Big Six Offenses”

*Big Six Offenses: quid pro quo, hostile environment, sexual assault, dating violence, domestic violence, and stalking

De Minimis Harm

- In limited circumstances where Title IX permits different treatment or separation based on sex, a Recipient **must not** implement differential treatment by means that subjects a person to **more than *de minimis* harm**
- Adopting a policy or practice preventing someone from participating in a program/activity **consistent with their gender identity** violates the *de minimis* harm provision
- Notable exceptions:
 - Religious exemptions
 - Fraternities and sororities
 - Housing
 - Athletics

Sex-Based Harassment

- Subset of sex discrimination
- Includes (the “Big Six” offenses):
 - Quid Pro Quo (QPQ)
 - Hostile Environment Harassment
 - Sexual Assault
 - Dating Violence
 - Domestic Violence
 - Stalking
- No consent definition provided
 - ATIXA recommends adopting a definition in institutional policy



Quid Pro Quo

- “An employee, agent, or **other person authorized by the Recipient** to provide an aid, benefit, or service under the Recipient’s education program or activity...”
 - Explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person’s participation in unwelcome sexual conduct”
- If a **student** occupied a position as some “other person authorized by the Recipient...” then Quid Pro Quo **could** apply to student Respondents
- Definition encompasses:
 - Extracurriculars and academics
 - Detriment or threat thereof
 - If an individual purports to have authority to provide some aid, benefit, or service, even if they are unable to do so

Hostile Environment Harassment

- Definition:
 - Unwelcome sex-based conduct that
 - Based on the totality of the circumstances:
 - Is subjectively and objectively offensive **AND**
 - Is so severe **OR** pervasive
 - That it **limits or denies** a person's ability to participate in or benefit from the recipient's education program or activity
- Lesser and broader standard than 2020 Regulations with First Amendment implications

Hostile Environment Harassment

- The definition provides factors for evaluating whether a hostile environment exists
 - Complainant's ability to access the education program or activity
 - Type, frequency, and duration of the conduct
 - Parties' ages, roles, and previous interactions
 - Location and context of the conduct
 - Control the school/district has over the Respondent
- These are **factors**, not requirements
 - There could also be other factors to consider

Retaliation

Defined as:

- Intimidation, threats, coercion, or discrimination against any person
 - By the Recipient, a student, or an employee, or other person...
 - “For the purpose of interfering with any right or privilege under Title IX,” **OR**
 - “Because the person has reported information, made a complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing in the Title IX grievance process”
- **May require** employees to support the Resolution Process as witnesses
 - Still cannot require students to participate
 - Retaliation allegations should be resolved under Title IX Resolution Process

Title IX Jurisdiction

Jurisdiction Refresher

- Title IX Coordinator (TIXC) is responsible for evaluating Title IX jurisdiction:
 - Is the conduct of a nature that “may reasonably constitute sex discrimination?”
 - Who is the Complainant?
 - Student or employee at the time of the incident
 - Non-student or employee subject to participate or attempting to participate (P/ATP) standard
 - Who is the Respondent?
 - Is the incident part of the institution’s education program or activity?

Education Program or Activity

- Within education program or activity
 - Conduct subject to Recipient's **disciplinary authority**
 - Conduct in a building **owned or controlled by a student organization** officially recognized by a postsecondary institution
- Downstream (in-program) effects
 - Including off-campus and outside the United States
 - Brings the effect, not the underlying conduct, within jurisdiction



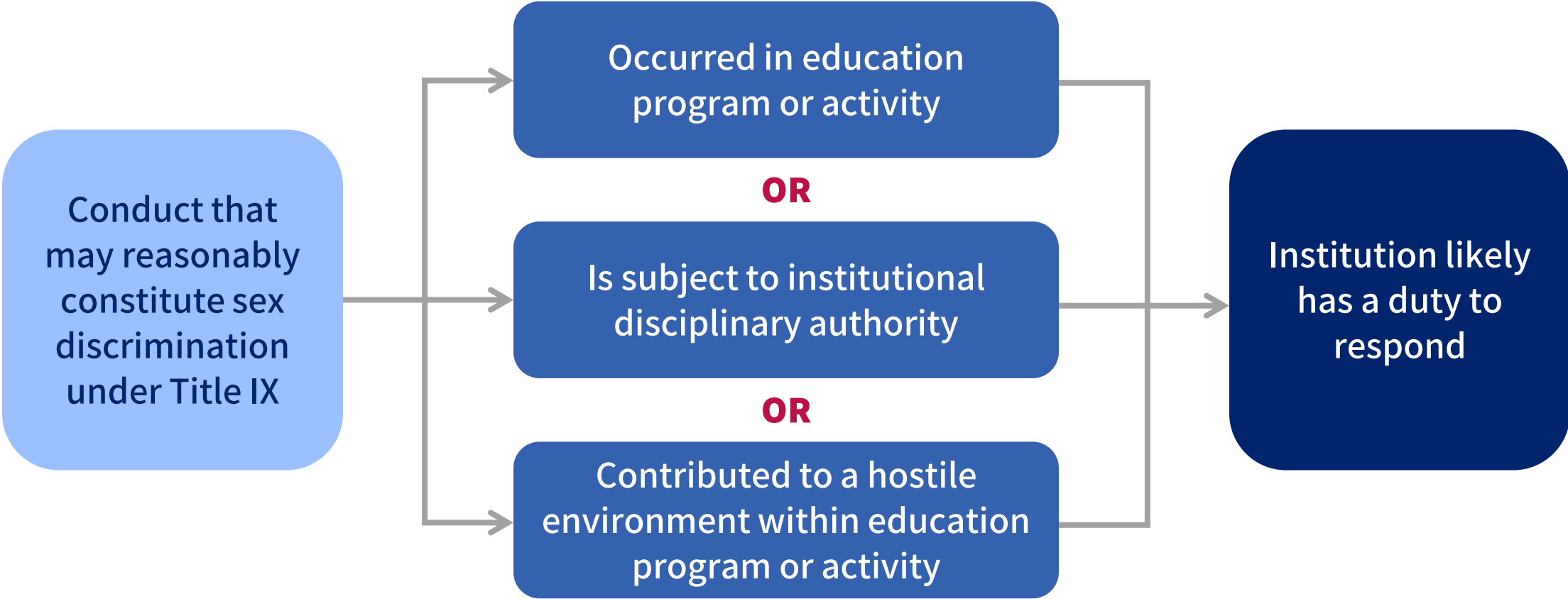
Disciplinary Authority

- “Conduct that is subject to Recipient’s disciplinary authority”
 - Fact-specific analysis
 - “To the extent a Recipient addresses other student misconduct...a Recipient may not disclaim responsibility for addressing sex discrimination that occurs in a **similar context**”
- Similar context
 - Ex: Theft, non-sexual assault, other forms of discrimination
- The institution’s obligation to **investigate** conduct under its disciplinary authority is governed by a **reasonableness standard**

Downstream Effects

- “Obligation to address sex-based hostile environment under its education program or activity...
 - Even when **some conduct** alleged to be contributing to the hostile environment occurred **outside** the Recipient’s education program or activity”
- Do **not** need to determine whether the conduct occurring outside the program/activity is itself sex-based harassment
 - Alleged conduct outside the program/activity may be relevant to investigation or Recipient response
 - But no need to independently respond to alleged underlying conduct
 - Practically speaking, addressing effects may not fully resolve the issue

Visualizing Jurisdiction



Reporting Requirements

Reporting and Notification

EMPLOYEE ROLE	NOTIFY TIXC	PROVIDE TIXC CONTACT INFO
Confidential Employees	NO	YES
Employees with the authority to institute corrective measures	YES	YES
Employees with responsibility for administrative leadership, teaching, and advising	YES	YES
All other employees who are not confidential employees	CHOOSE ONE OR THE OTHER	

Confidential Employees

- Employee whose communications are privileged or confidential (at the time of disclosure) under Federal or State law
- Employee whom the institution has **designated** as confidential for providing services related to sex discrimination
- Institutional Review Board-approved human-subjects research study, designed to gather information about sex discrimination

Evaluation

Complaints

- **Complaint: Verbal** or **written** request to the institution that **objectively** can be understood as a request for the institution to investigate and make a determination about alleged discrimination
 - No more formal complaint requirement
- **Complainant:**
 - A student or employee alleged to have been subjected to conduct that could constitute sex discrimination, or
 - A person other than a student or employee alleged to have been subjected to conduct that could constitute sex discrimination and who was participating or attempting to participate in the institution's education program or activity at the time of the alleged sex discrimination

Complaints

- Individuals who may make a complaint depends on the **nature** of the complaint:
 - **Sex-Based Harassment:**
 - A Complainant, or parent/guardian
 - Title IX Coordinator
 - **Sex Discrimination:**
 - A Complainant, or parent/guardian
 - Title IX Coordinator
 - Any student or employee
 - Any other person participating or attempting to participate in the institution's education program or activity at the time of the alleged sex discrimination

For purposes of having Complainant process rights, there is an important distinction between being a **Complainant** and being **able to initiate** a complaint

Evaluation

- Identified as a **major stage** of the Resolution Process
 - Described as “the Recipient’s decision whether to dismiss or investigate a complaint of sex discrimination”
- Notice of Investigation and Allegations (NOIA) no longer required immediately after complaint
- Provides TIXC with opportunity to clarify allegations
- May reduce dismissals

Dismissals

All dismissals involving conduct occurring after August 1, 2024, are **discretionary**, and may be used under the following circumstances:

- Unable to identify Respondent after **reasonable** steps to do so
- Respondent no longer participating in education program or employed by Recipient
- Complainant withdraws all or a portion of complaint and any remaining conduct would not be sex discrimination under Title IX
- Alleged conduct, if proven, would not be sex discrimination under Title IX
 - Recipient must make reasonable efforts to clarify allegations before dismissal

Dismissals

Upon dismissal of a complaint, institution must:

- Notify Complainant
 - Notify Respondent only if Respondent has already been notified of complaint
 - Offer supportive measures, as appropriate
- Inform Complainant of their right to appeal
 - Also inform Respondent, if they have been notified of the complaint
- Take other appropriate, prompt, and effective steps to ensure that sex discrimination does not continue or recur

Dismissal Appeal

- Implement appeal procedures equally
- Only Complainant has right to appeal dismissal if Respondent is not notified of the complaint
- If Respondent knows of complaint, parties have equal right to appeal
- Appeal Decision-Maker must be trained and **not** have taken part in investigation of allegations or dismissal of complaint
- Provide parties a reasonable and equal opportunity to make a statement
- Notify parties of the appeal result and rationale
 - No requirement of a **written** notification of outcome

Supportive Measures

- Individualized measures designed to:
 - Restore or preserve access
 - Protect safety of parties or educational environment
 - Provide support during Resolution Process
- May **not unreasonably** burden a party
- May **not** be for **punitive** or **disciplinary** reasons
- Must be **without** fee or charge
- Available to all parties



Supportive Measures

- Institution may deem which supportive measures are **reasonably available**
 - Must provide a **timely opportunity** to seek modification, reversal, or denial
 - An impartial employee, uninvolved in initial decision, must have authority to modify or reverse
 - This is a challenge, not an appeal
 - Review considers whether the original decision was **inconsistent** with the definition of supportive measures
 - Permit additional opportunity to contest if circumstances change materially
 - Disclosure about supportive measures is need-to-know
- Measures may be continued, modified, or ended at conclusion of the Title IX Resolution Process

Emergency Removals

- May remove a Respondent after an individualized safety and risk analysis
 - An **imminent and serious threat** to the health or safety of the Complainant, any students, employees, or other persons must exist
 - Threat must arise from sex discrimination allegations
- Provide the Respondent an opportunity to challenge the decision **immediately**



Administrative Leave

- Substantially the same as the 2020 Regulations
- May place employees on administrative leave during **pendency** of the Resolution Process
 - With pay and benefits if used as a supportive measure
 - Otherwise, if unreasonably burdensome, use removal provision
- Student employees
 - May be placed on leave from employment responsibilities if doing so would not violate other regulatory provisions
 - Must comply with Resolution Process before any disciplinary sanctions are imposed

Informal Resolution

- Requires consent of TIXC and voluntary consent of the parties
- Available without a complaint
- Must provide Notice of Allegations and Informal Resolution Process
- Available any time prior to determination
- Parties may withdraw from Informal Resolution (IR) at any time prior to agreement
- May offer for complaints between an employee and student
- Parties precluded from initiating or resuming investigation and Resolution Process if agreement is reached, unless parties do not adhere to agreement terms

Informal Resolution

- Forms of IR not defined (e.g., facilitated dialogue, shuttle negotiation, restorative practices, etc.)
- Resolution may include restrictions the institution could have imposed as disciplinary sanctions or remedies
 - Binding only on the parties
- IR Facilitator:
 - May **not** serve as Investigator or Decision-Maker (DM)
 - Must be trained
 - Must be free of bias or conflicts of interest
- Expanding IR options may help with anticipated increase in reporting

Resolution Process

Two-Track Resolution Process

- Which Resolution Process applies depends on the identities of the parties
 - Section 106.45 provides a civil rights Resolution Process for resolving complaints of sex-based discrimination
 - Section 106.46 incorporates § 106.45 and adds some due process protections
 - Retains many, but not all, features of the formal process from the 2020 Regulations
- Two separate processes are permitted but **not** required
 - If using only one, it must be § 106.46

§ 106.45	§ 106.46
<ul style="list-style-type: none">▪ Sex discrimination complaints that are not sex-based harassment▪ Sex-based harassment complaints that do not involve a post-secondary student	<ul style="list-style-type: none">▪ Sex-based harassment complaints involving a post-secondary student Complainant and/or Respondent

Types of Evidence

Relevant

Impermissible
(regardless of relevance)

Not Relevant

§ 106.45 Grievance Procedures

§ 106.45: Basic Requirements

- Treat parties equitably
- Requires TIXCs, Investigators, Decision-Makers have **no** conflict of interest or bias
 - DMs may be the same person as the TIXC or Investigator
- Presume that Respondent is not responsible for sex discrimination
- Establish reasonably prompt timeframes for “major stages” of the process
 - E.g., Evaluation, Investigation, Determination, Appeal
- Advisors not required
 - Note VAWA § 304 requirements or state laws

§ 106.45: Basic Requirements

- Take reasonable steps to protect the privacy of the parties and witnesses
 - Cannot restrict ability of parties to:
 - Obtain and present evidence
 - Consult with family members, confidential resources, or Advisors
 - Otherwise prepare for or participate in the Resolution Process
- Require an objective evaluation of relevant (and not otherwise inadmissible) evidence
- Respondent requirements apply **only** to individuals
 - Recipients are **not** Respondents in policy or practice complaints
 - Though an official acting at institutional direction/policy may be

§ 106.45: Notice of Investigation and Allegations

- Does **not** need to be in writing
- **Must include:**
 - Recipient's Resolution Process, including Informal Resolution (if available)
 - Sufficient available information to permit parties to respond to the allegations, such as identities (who), allegations (what), date (when), location (where)
 - Statement that retaliation is prohibited
 - Statement that parties have opportunity to access relevant evidence or description of the evidence

§ 106.45: Investigations

§ 106.45

- **Adequate, reliable, and impartial**
- Gather evidence
- Permit parties to present fact witnesses and inculpatory and exculpatory evidence
- Recipient must review all evidence gathered through the investigation and determine relevance
- Provide parties opportunity to access relevant evidence or accurate description of such evidence
- Provide parties reasonable opportunity to respond to evidence
- Investigation report not required
- Take reasonable steps to prevent and address parties' unauthorized disclosure of information and evidence obtained through process

§ 106.45: Decision-Making

- Provide a process enabling DM to question parties and witnesses to assess credibility
 - DM may be the same person as the TIXC or Investigator
- Use **preponderance of the evidence** standard
 - Unless clear and convincing is used for all “comparable proceedings”
 - “Comparable proceedings”
 - Proceedings for other discrimination complaints involving the same **category of Respondents** (students vs. employees)
 - Similar types of “person-to-person offenses” that are physical in nature but do not pertain to sex

DM Models: Separation of Roles

ATIXA recommends:

- Investigators make non-binding recommended findings and recommended final determinations
- A separate Decision-maker
 - Meets with parties in individual meetings to ask questions and assess credibility
 - May meet with investigators or witnesses as needed
 - Makes findings and policy violation determinations
 - Determines sanctions and remedies
- Offer a robust appeal opportunity

§ 106.46 Grievance Procedures

§ 106.46 Notice of Investigation Allegations

- Incorporates elements of NOIA from § 106.45, with alterations
- Notice must be in writing, with time for parties to prepare before any initial interview
- Right to an Advisor
- Parties will have an opportunity to present relevant evidence to a DM
- Presumption of non-responsibility
- Statement that parties will be able to access relevant evidence or an investigation report
- Any prohibition against false statements

Investigations § 106.46

§ 106.46 (+ non-conflicting elements of § 106.45)

- Permit Advisors
- Provide written notice of all meetings or proceedings with time to prepare
- Provide parties with the same opportunities to have support persons present
- Provide equal opportunity to review relevant evidence or an investigation report
- Provide opportunity to respond to evidence or an investigation report
 - If using a hearing, must permit review of evidence prior to hearing
- May equitably permit expert witnesses

§ 106.46: Decision-Making

- Incorporates non-conflicting elements of § 106.45
- Institution must provide opportunity for proposing and asking relevant questions
- In all cases, the DM must make relevance determinations of all questions prior to a party or witness answering
 - May not permit questions that are unclear or harassing, but may rephrase
- A DM may place **less or no weight** on statements by a party or witness who refuses to respond to relevant questions
- A DM may **not** draw an inference about whether sex-based harassment occurred **solely** on a party or witness's refusal to respond to relevant questions

§ 106.46: Individual Meetings

Institution may use individual meetings rather than conducting a live hearing

- The Investigator or DM asks relevant and follow-up questions during individual meetings
 - Each party may propose questions to be asked of any party or witness, **AND**
 - Has the right to have those relevant questions asked by the investigator or DM during individual meetings, **AND**
- Each party has the right to a recording or transcript of the meetings with a reasonable opportunity to propose follow-up questions
- DM must have the ability to ask more questions, if needed

Written Determination

§ 106.45

- Rationale
- Appeal procedures (if applicable)
- TIXC to implement remedies and disciplinary sanctions as appropriate

§ 106.46

- Simultaneous to the parties
- Description of allegations
- Applicable policy and procedures
- Evaluation of relevant evidence
- Determination
- Sanctions and remedies
- Appeal procedures

Appeals

- Under § 106.45, offer an appeal process mirroring those in **comparable proceedings**
 - If there is no appeal in comparable proceedings, none is required
 - Institutions may exceed this requirement
 - Comparable proceedings may include those used to resolve other discrimination complaints
- Under § 106.46, Recipients **must** offer an appeal
 - Required grounds:
 - Procedural irregularity that would **change the outcome**
 - New evidence that would **change the outcome** and not reasonably available when determination was made
 - Conflict of interest or bias that would **change the outcome**
 - May offer additional grounds for appeal, must be equally available to parties

Pregnancy & Related Conditions

Pregnancy or Related Conditions

Includes the full spectrum of processes and events connected with pregnancy

- Pregnancy, childbirth, termination of pregnancy, or lactation
- Related medical conditions
- Recovery therefrom



Institutional Obligations

- Institution may not discriminate in its program/activity against any **student or employee** based on their current, potential, or past pregnancy or related conditions
- When a pregnant student informs any employee of their pregnancy or related conditions, the employee must inform the student of:
 - The TIXC's contact information
 - Information about the support available through the TIXC
- TIXC coordinates actions to ensure equal access

Institutional Obligations

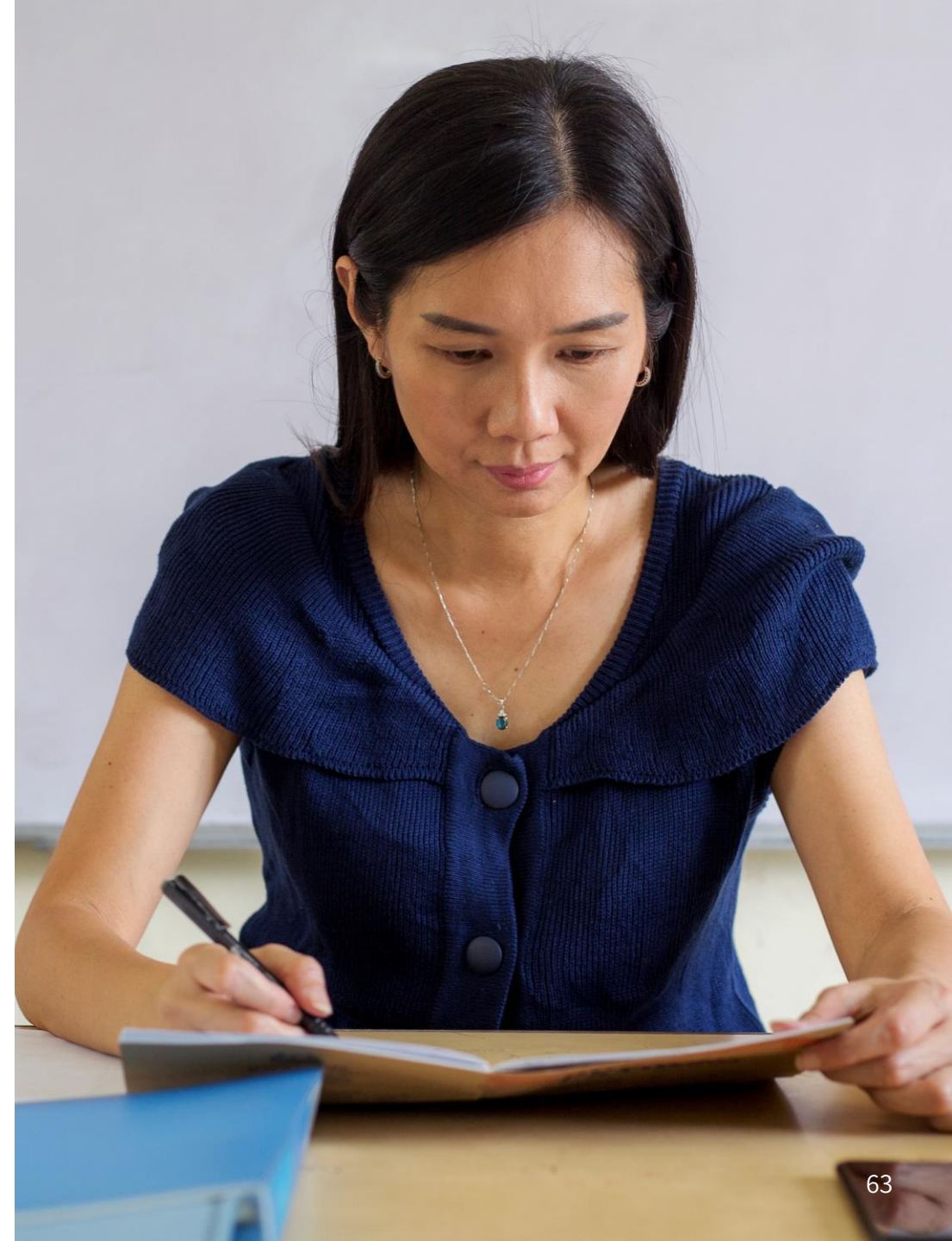
- Must permit student or employee to **voluntarily** take a leave of absence
 - Student or employee must be reinstated to the same status held prior to leave
- Must ensure access to lactation space and time
 - Cannot be a bathroom
 - Must be clean, shielded from view, and free from intrusion
- Treat pregnancy or related conditions in the “same manner” and under the same policies as other temporary medical conditions

Reasonable Modifications

- Reasonable modifications to **policies, practices, or procedures**
 - Based on individualized needs
 - Consult with student
- Student has discretion to accept or decline a reasonable modification
- Examples:
 - Breaks during class or work to express breast milk, breastfeed, eat, or drink
 - Intermittent absences to attend medical appointments
 - Changes to academic or work schedule
 - Access to online education
 - Extensions for coursework or rescheduling of tests

Pregnancy and Documentation

- May **not** require certification from a medical provider or other individual that the student is able to participate in class or activity
 - Unless certification required of all students in the class or activity, **or**
 - A certified level of physical ability or health is necessary, **or**
 - The information obtained is not used for discriminatory purposes
- Cannot require documentation, generally, unless necessary for reasonable modifications



Title IX Potpourri

Training Requirements

- All employees **must** be trained on
 - Recipient's obligation to address sex discrimination in its education program or activity
 - Scope of conduct constituting sex discrimination, including the definition of sex-based harassment
 - All notification and information-sharing requirements
- At time of hire and annually thereafter
- Training methods may be:
 - In-person or online/virtual
 - Synchronous or asynchronous
 - Internal or external
- Employees must complete training, not enough to offer it

Training Requirements

- Title IX Team – TIXC, deputies, anyone involved in carrying out Title IX duties
 - Recipient’s response obligations
 - Resolution Process
 - Serving impartially
 - The meaning and application of “relevant” and impermissible evidence
- IR Facilitators on institutional IR rules and practices
- TIXCs on their specific responsibilities and recordkeeping systems

Monitoring & Barrier Analysis

- TIXC has ongoing obligation to **monitor** the program/activity for barriers to reporting
 - Take steps reasonably calculated to address such barriers
- Examples:
 - Reporting process accessibility
 - Confusing or delayed procedures
 - Difficulty finding information or contacting Title IX staff
 - Perceptions of bias

FERPA*

For practitioners:

- Title IX requirements override any conflicting FERPA provisions

For legal counsel:

- OCR asserts that the due process protections in Title IX are **constitutional requirements**
- Not only does Title IX override FERPA where this is a conflict, constitutionally guaranteed due process rights in the Resolution Process add an additional layer of override

*FERPA: Family Educational Rights and Privacy Act



Recordkeeping and Posting

Must maintain records for seven years

- For each complaint of sex discrimination, record any IR or resolution process documentation and the outcome
- For each notification of sex discrimination, record any documentation re: response
- All materials used to provide training **after** August 1, 2024
 - Make available upon request
 - No requirement to post publicly





Questions?