A New Era in Title IX Enforcement

TTUS's New Title IX Regulation and Grievance Process

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Introduction – "Who Are You and Why Are We Here?"

Presenters:

- Darren Gibson: Co-Chair of Littler's Higher Ed Group

Purpose of today's presentation:

- Training on new Title IX Regulation 07.06.A and grievance process.
- Comply with training mandates in new Title IX regulations for Title IX Coordinators, investigators, decision-makers (i.e. Hearing Panel), and those who facilitate informal resolution.

See 34 CFR § 106.45(b)(1)(iii).

AGENDA

- ✓ Overview of Title IX
- ❑ Key Changes Required by New Title IX Regulations
- ❑ University Regulation 07.06.A
- ❑ Title IX Grievance Process
- ❑ Live Hearing under 07.06.A
- ❑ Appeals, Informal Resolution, and Other Provisions
- ❑ Intersection with Other TTUS Regulations and Legal Obligations

Title IX of the Education Amendments of 1972

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

20 U.S.C. § 1681, *et seq*.

Title IX Enforcement

- All educational institutions, both public and private, that receive federal funds are subject to Title IX.
- Failure to comply risks federal funds.
- Department of Education's Office for Civil Rights (OCR) enforces Title IX by:
    - *Investigating complaints and entering agreed resolutions; and*
    - *Compliance reviews and technical assistance.*
- Additional enforcement through private lawsuits.

What does "sex discrimination" mean with respect to Title IX?

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

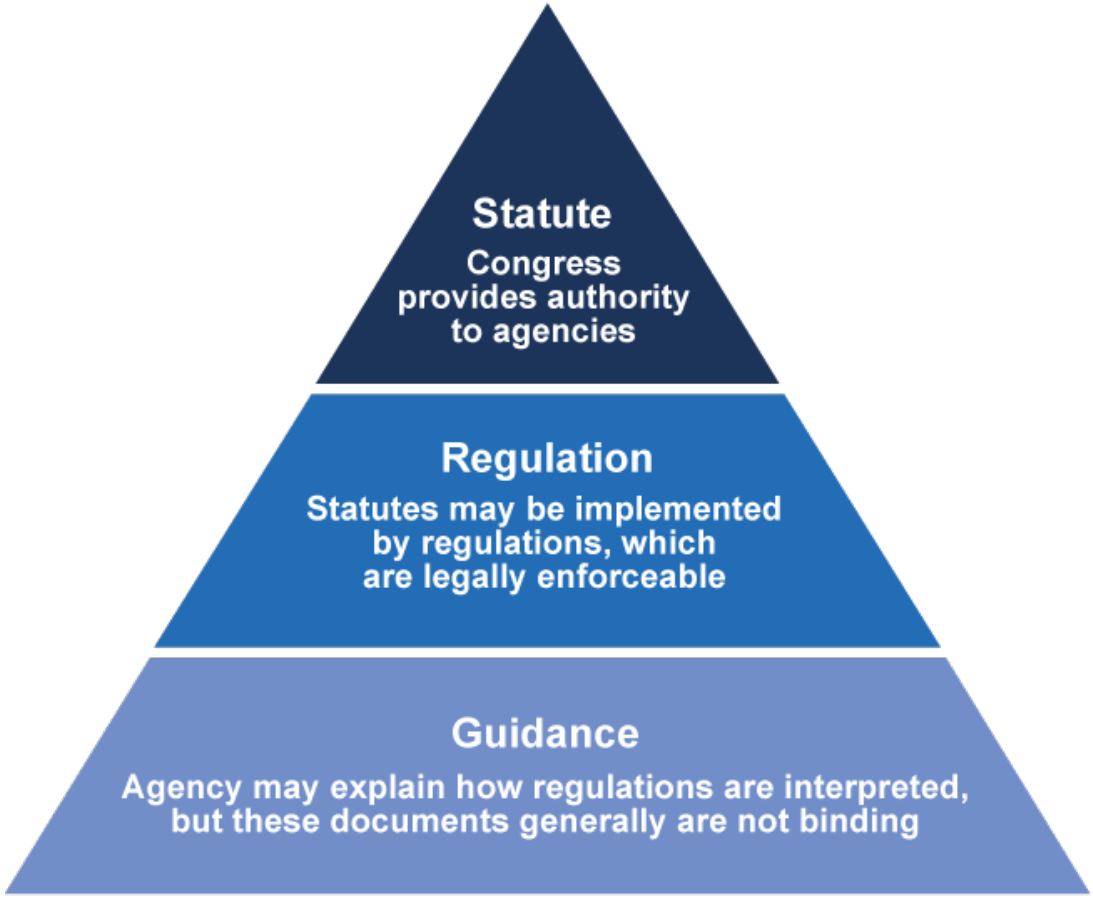
- Recruitment, admissions, and counseling
- Financial assistance
- Athletics
- **Sex-based harassment (including sexual misconduct)**
- Treatment of pregnant and parenting students
- Discipline
- Single-sex education
- Employment

Today's Focus

- ✓ Prompt and Equitable Response to Sexual Harassment and Sexual Misconduct

- ✓ Compliance with New Federal Title IX Regulations through New TTUS Title IX Regulation 07.06.A

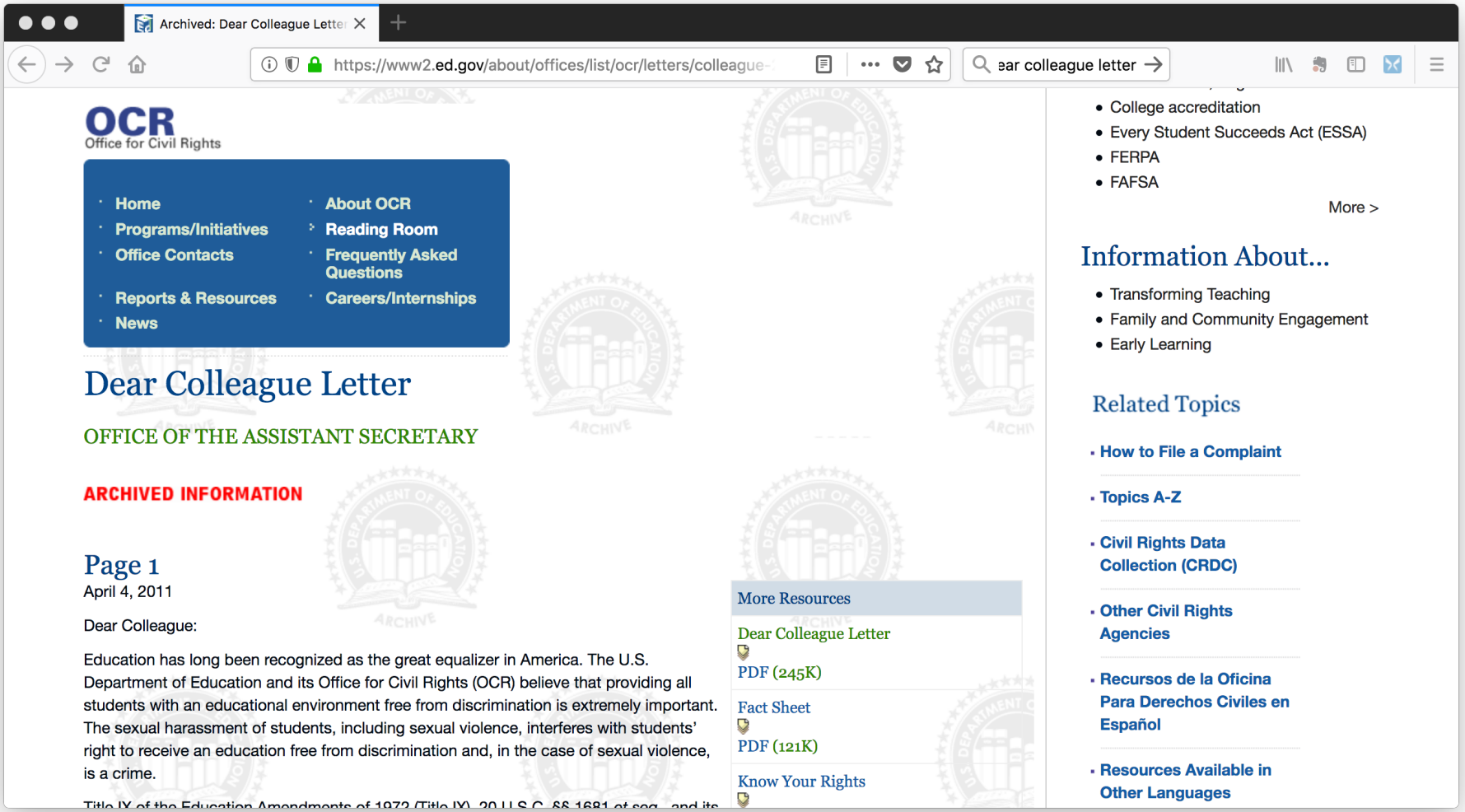
Title IX Regulations



Source: GAO analysis of regulatory authority | GAO-18-436T

Title IX Under Obama Administration – Guidance

Obama Administration Relied on Guidance



Title IX Under Obama Administration – Guidance

Archived Information

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

Questions and Answers on Title IX and Sexual Violence[1]

Title IX of the Education Amendments of 1972 ("Title IX")[2] is a federal civil rights law that prohibits discrimination on the basis of sex in federally funded education programs and activities. All public and private elementary and secondary schools, school districts, colleges, and universities receiving any federal financial assistance (hereinafter "schools", "recipients", or "recipient institutions") must comply with Title IX.[3]

On April 4, 2011, the Office for Civil Rights (OCR) in the U.S. Department of Education issued a Dear Colleague Letter on student-on-student sexual harassment and sexual violence ("DCL").[4] The DCL explains a school's responsibility to respond promptly and effectively to sexual violence against students in accordance with the requirements of Title IX.[5] Specifically, the DCL:

- Provides guidance on the unique concerns that arise in sexual violence cases, such as a school's independent responsibility under Title IX to investigate (apart from any separate criminal investigation by local police) and address sexual violence.

Backlash to Enforcement: Increasing Respondent Litigation

From 2011-2013, estimated 32 percent of Title IX lawsuits against institutions filed by respondents/accused.

United Educators Report, *Confronting Campus Sexual Assault* (January, 2015).

From 2013-2014, estimated 76 percent of Title IX lawsuits filed by respondents/accused.

NACUA Notes, V1, No. 4 (May 18, 2016).

Backlash: Increasing Respondent Advocacy

Growth of advocacy respondent rights groups:

- FIRE - Foundation for Individual Rights in Education (1999)
- SAVE – Stop Abusive and Violent Environments (2010)
- FACE – Families Advocating for Campus Equality (2013)
- Save Our Sons (approx. 2014)

FIRE
Foundation for Individual Rights in Education

SAVE
Stop Abusive and Violent Environments
Working for policy reform to protect all victims, support due process, and stop false allegations

FACE

Criticism from Within Campuses

5/16/16: Letter from 21 Distinguished Law Professors from across the country criticizing 2011 DCL and other guidance.

- "As a result, free speech and due process on campus are now imperiled."

9/1/17: Four female Harvard Law School professors write letter in opposition to 2011 DCL:

- "These policies have meant that accused students have, on many occasions, been subjected to a process that really does not give them a fair chance to establish what the real facts of the incident were," Bartholet said.

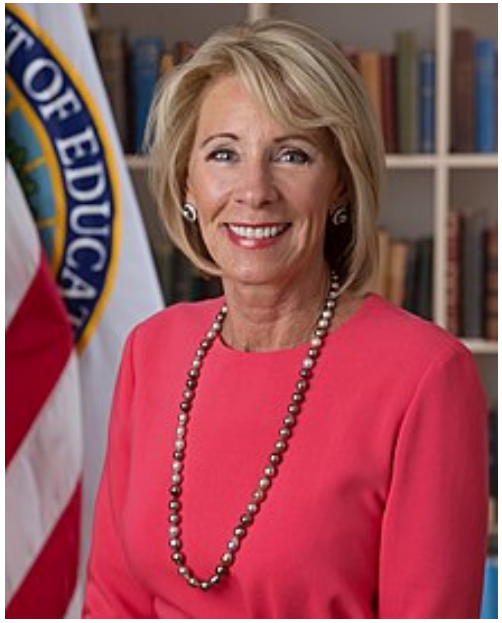
Title IX Under Trump Administration

Betsy DeVos Speech at George Mason University, September 7, 2017:

- “Here is what I've learned: the truth is that the system established by the prior administration has failed too many students. Survivors, victims of a lack of due process, and campus administrators have all told me that the current approach does a disservice to everyone involved. That's why we must do better, because the current approach isn't working. Washington has burdened schools with increasingly elaborate and confusing guidelines that even lawyers find difficult to understand and navigate. Where does that leave institutions, which are forced to be judge and jury?”

Sept. 2017 OCR Interim Guidance

- OCR withdraws 2011 DCL and 2014 Q&A.
- OCR issues Q&A on Campus Sexual Misconduct for on equitable process.
- Reaffirms 2001 Revised Sexual Harassment Guidance.
- Expresses intent to initiate rulemaking process leading to Title IX regulations.



Focus on Due Process and Rulemaking

DeVos Comments on New Interim Guidance on Campus Sexual Misconduct, September 22, 2017

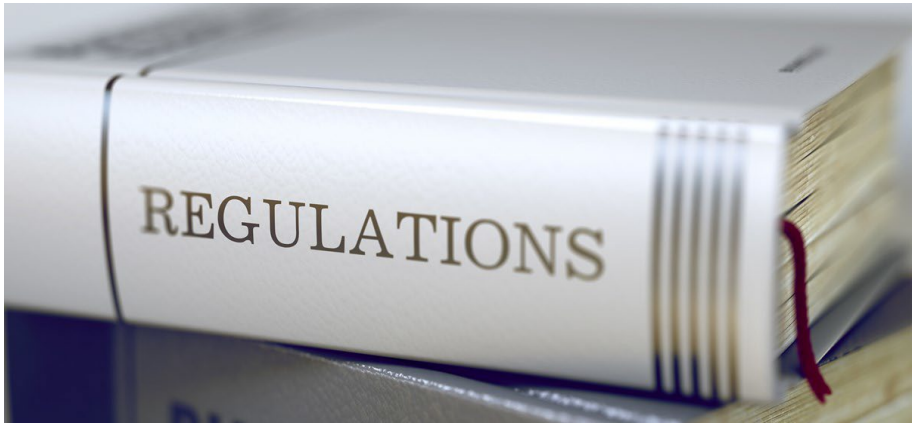
- "This interim guidance will help schools as they work to combat sexual misconduct and will treat all students fairly," said DeVos. "Schools must continue to confront these horrific crimes and behaviors head-on. There will be no more sweeping them under the rug. But the process also must be fair and impartial, giving everyone more confidence in its outcomes."
- "[T]he era of rule by letter is over. The Department of Education will follow the proper legal procedures to craft a new Title IX regulation that better serves students and schools."

Department of Education Notice of Proposed Rulemaking

- On November 29, 2018, DOE published a Notice of Proposed Rulemaking (NPRM) to amend the Title IX regulations.
- Department received over 100,000 public comments to the proposed regulations.
- Significant debate among universities, victim advocacy groups, and respondent advocacy groups regarding proposed regulations.

May 6, 2020 Final Regulations Issued by DOE

- On May 6, 2020, DOE released long-awaited amended Title IX regulations.
- Amended regulations take effect August 14, 2020.
- DOE expressly declined to extend deadline despite requests from higher ed and lawsuit by 18 states.
- Significant changes in definition of sexual misconduct, scope of Title IX, and mandated grievance process.



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Scope of Title IX: "Education Program or Activity"

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

34 CFR § 106.44(a)

Heightened Standard for Sexual Harassment

1) Any instance of quid pro quo harassment by a recipient's employee;
2) Any unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it denies a person equal educational access; or
3) Any instance of sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA).

34 CFR § 106.30

Additional Key Provisions of Amended Regulations

- Formal Complaint, Actual Knowledge, and Deliberate Indifference.
- Supportive Measures (even if no Formal Complaint filed).
- Uniform evidentiary standard and grievance process for students, staff, and faculty.
- Mandatory dismissal where allegations do not rise to heightened standard of sexual harassment.
- Investigation, notice, parties' rights during investigation, and equitable treatment.
- Rights of parties to inspect and review evidence.

Additional Key Provisions of Amended Regulations –*Continued*

- Live Hearing with cross examination by Advisors.
- Exclusion of statements from non-testifying party/witness.
- Independent Decision-Maker(s).
- Mandatory appeal process provided.
- Retaliation included within Title IX policy and can result in violation.
- Informal resolution – discretionary.
- Recording keeping.

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University Regulation 07.06.A – Legal Disclaimer

This training is meant to summarize TTUS Regulation 07.06.A and related materials.

- This training should not be a substitute for reading Regulation 07.06.A and related materials.
- The text of this training does not quote the full language of the Regulation 07.06.A, and the language of Regulation 07.06.A governs.
- For a complete understanding of the TTUS Title IX policy and grievance process, please refer to Regulation 07.06.A and supporting materials.

Purpose of TTUS Title IX Sexual Misconduct Regulation 07.06.A Section 2.a.

- Provide students and employees with notice their rights and options, including how to report allegations of Title IX Sexual Misconduct.
- Clearly define what is Title IX Sexual Misconduct.
- Explain how the University will provide a prompt and equitable resolution of student and employee complaints alleging Title IX Sexual Misconduct.
- Each University must adopt Regulation 07.06.A through an Operating Policy and Procedure.

TTU Commitment to Address Title IX Sexual Misconduct – Regulation 07.06.A Section 3

- "The University is committed to providing and strengthening an educational, working, and living environment where students, faculty, staff, and visitors are free from Title IX Sexual Misconduct of any kind."
- The University must take reasonable steps to respond to complaints of Title IX Sexual Misconduct, and
- The University must take reasonable steps to restore or preserve equal access to the University's Educational Programs or Activities.

Alternative Processes Still Available

- Other misconduct procedures continue to be available to students and employees for matters that are not required to be addressed by Title IX.
- "[Mandatory dismissal of a Formal Complaint] does not preclude action under another provision of the recipient's code of conduct." 34 CFR § 106.45(b)(3).
- *However*, "charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances [as a report of sexual misconduct] for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation." 34 CFR § 106.71(a).

Let's Start with Key Definitions

Key Definitions –Regulation 07.06.A at Section 4

Title IX Sexual Misconduct. Conduct that allegedly occurred against a person in the United States, in University's Education Program or Activity, on the basis of sex, and that satisfies one or more of the following:

- i. **Quid Pro Quo**. A University employee conditioning the provision of an aid, benefit, or service of the University on an individual's participation in unwelcome sexual conduct;
- ii. **Severe, Pervasive, and Objectively Offensive Conduct**. 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 University's Education Program or Activity. Without limiting the foregoing, the following types of conduct are deemed to meet this severe, pervasive, and objectively offensive standard:
  1. "Sexual Assault" as defined in 20 U.S.C. § 1092(f)(6)(A)(v);
  2. "Dating Violence" as defined in 34 U.S.C. § 12291(a)(10);
  3. "Domestic Violence" as defined in 34 U.S.C. § 12291(a)(8); or
  4. "Stalking" as defined in 34 U.S.C. § 12291(a)(30).

Key Definitions –Regulation 07.06.A at Section 4

- ***Education Program or Activity***. Includes locations, events, or circumstances over which the University exercised substantial control over both the Respondent and the context in which the Title IX Sexual Misconduct allegedly occurred, and also includes any building owned or controlled by a student organization that is officially recognized by the University.

Key Definitions –Regulation 07.06.A at Section 4

- ***Complainant***. An individual, who must be participating or attempting to participate in the University's Education Program or Activity, who is alleged to be the victim of conduct that could constitute Title IX Sexual Misconduct.
- ***Respondent***. An individual who has been reported to be the perpetrator of conduct that could constitute Title IX Sexual Misconduct.
- ***Reporting Party***. An individual or entity (in the case of the University), other than the Complainant, who reports an alleged violation of this regulation.

Key Definitions –Regulation 07.06.A at Section 4

- ***Formal Complaint***. Document filed by a Complainant or signed by the University's Title IX Coordinator alleging Title IX Sexual Misconduct against a Respondent and requesting that the University investigate the allegation(s) of Title IX Sexual Misconduct. Provided, however, where the Title IX Coordinator signs a Formal Complaint, the Title IX Coordinator is not a Complainant or otherwise a party under this regulation.

- ***Actual Knowledge***. Notice of Title IX Sexual Misconduct or allegations thereof to the University's Title IX Coordinator or Deputy Coordinator.

Key Definitions –Regulation 07.06.A at Section 4

- ***Grievance Process***. The process of addressing Formal Complaints of Title IX Sexual Misconduct before the imposition of any disciplinary or other actions that are not Supportive Measures against a Respondent.
- ***Supportive Measures***. Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the Complainant or the Respondent before or after the filing of a Formal Complaint or where no Formal Complaint has been filed.
- ***Informal Resolution***. An alternative to the Grievance Process that may be offered and facilitated by the University following the filing of a Formal Complaint and upon the voluntary, written consent of the parties.

Where to Report Title IX Misconduct

Where to Report Title IX Misconduct

- Each University has a Title IX Coordinator who oversees the University's compliance with Title IX.
- Students should contact the appropriate University Title IX Coordinator, as identified on the institution's website and in Regulation 07.06.A.
- Employees should contact the Deputy Title IX Coordinator for Employees in the System Office of Equal Opportunity.
  - Employees may also contact Human Resources at their respective institutions, who will coordinate handling of complaints with the System OEO.

Regulation 07.06.A Section 5

How to Report Title IX Misconduct

- Any individual may inquire or make a report or complaint of sexual misconduct of any kind.
- A report may be made in person, by mail, by phone, by email, or by online form, or by any other means that results in the University's Title IX Coordinator or System Office of Equal Opportunity receiving the report.
- A report may be made at any time (including during non-business hours).

Regulation 07.06.A Section 6(b)

Mandatory Employee Reporting – SB 212

- *Employee Obligation to Report*. Employees (including student Employees) that, in the course and scope of their employment, witness or receive information regarding the occurrence of an incident that the Employee reasonably believes constitutes sexual misconduct must promptly report such incident and information to the University Title IX Coordinator or System Office of Equal Opportunity in accordance with Texas law.
- Section 10 of Regulation 07.06.A goes into more detail regarding reporting obligations under state law.

Regulation 07.06.A Section 6(d), 10.

Additional Reporting Concerns

- Students and third parties are strongly encouraged to promptly report any incidents of sexual misconduct.
- All students, Employees, and third parties may also report incidents of sexual misconduct to law enforcement, including University and local police.
- Individual who experiences sexual misconduct is encouraged to seek medical care for treatment and preservation of evidence as soon as practicable after the incident.
- Individual who experiences sexual misconduct should preserve other relevant evidence.

Regulation 07.06.A Section 6(e)-(h)

Good Faith Actors

- University may not discipline or otherwise discriminate against Employee who in good faith: (i) makes a report or (ii) cooperates with an investigation, a disciplinary process, or judicial proceeding relating to a report.
- If a student enrolled makes a report or Formal Complaint in good faith, University may not take disciplinary action against that student for code of conduct violations occurring at or near the time of the incident.
- Does not apply to individual who perpetrates or assists in the perpetration of the reported incident.

Regulation 07.06.A Section 6(i)

Request of Complainant Not to Investigate

- If Complainant requests University not to investigate, University may investigate in same manner that an anonymous complaint and shall inform Complainant.
- In determining whether to investigate, University shall consider:
  - Seriousness of the alleged incident;
  - Whether University has received other reports of sexual misconduct committed by the respondent;
  - Whether alleged incident poses a risk of harm to others;
  - Whether allegations involved violence, use of weapons, or other similar factors; and
  - Any other factors University determines relevant.

Regulation 07.06.A Section 6(k)

Supportive Measures

Supportive Measures Provided by University

- Supportive Measures offered to parties:
  - in order to maintain an environment free from harassment, discrimination, or retaliation;
  - protect the safety and well-being of the parties and the University Community; or
  - restore or preserve equal access to the University's Education Program or Activity.
- May be kept in place through or beyond the conclusion of any review, investigation, or appeal process and may be implemented regardless of whether Complainant files a Formal Complaint.

Regulation 07.06.A at Section 7.a.

Scope of Available Supportive Measures

The range of Supportive Measures can include:

- Separation or modification of academic or working environment
- Mutual contract restrictions (or possibly one-way)
- Permissive withdrawal from a class without penalty
- Counseling
- Extensions of course-related deadlines
- Campus escort services and increased security
- Leaves of absence

Regulation 07.06.A. at Section 7.b.

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Title IX Grievance Process

- Formal Complaint required to initiative Grievance Process.
- Upon receiving report (or if Actual Knowledge of alleged Title IX Sexual Misconduct), Title IX Coordinator or System OEO will promptly contact Complainant to:
  - (1) discuss the availability of Supportive Measures, which are available with or without Formal Complaint, and
  - (2) explain to the Complainant the process of filing a Formal Complaint.
- At time of filing Formal Complaint, Complainant must be participating in or attempting to participate in University's Education Program or Activity.

Regulation 07.06.A. Section 8.a.

Initial Review of Formal Complaint – Mandatory Dismissal

University shall dismiss a Formal Complaint if:

- the allegation does not describe conduct that would constitute Title IX Sexual Misconduct;
- the Title IX Sexual Misconduct did not occur in the University's Education Program or Activity; or
- the Title IX Sexual Misconduct did not occur against a person in the United States.

Regulation 07.06.A. Section 8.a.iv.

Initial Review of Formal Complaint – Permissive Dismissal

University may dismiss Formal Complaint if:

- Complainant notifies Title IX Coordinator or System OEO in writing that they wish to withdraw Formal Complaint;
- Respondent is no longer enrolled in or employed by the University; or
- circumstances exist that prevent the University from gathering sufficient evidence to reach a determination

Regulation 07.06.A. Section 8.a.iv.

Written Notice and Appeal of Dismissal Decision

- If the University dismisses a Formal Complaint or any allegations therein, University must provide written notice of dismissal and reasons simultaneously to all parties.
- Any party can appeal the dismissal.

Regulation 07.06.A. Section 8.a.iv

Application of Other Policies Upon Dismissal

- Regulation 07.06.A applies only to Title IX Sexual Misconduct.
- Any other form of sexual misconduct is governed by System Regulation 07.06.B.
- Dismissal of a Title IX Sexual Misconduct Formal Complaint does not preclude action pursuant to other applicable disciplinary policies.

Regulation 07.06.A. Section 8.a.iv

Right to Consolidate Formal Complaints

University may consolidate Formal Complaints:

- against more than one Respondent,
- by more than one Complainant against one or more Respondents, or
- by one party against the other party, where the allegations of Title IX Sexual Misconduct arise out of the same facts or circumstances.

Regulation 07.06.A. Section 8.a.iv

Grievance Process Requirements – Equitable Treatment of Parties

University must treat parties equitably by:

1) offering Supportive Measures,
2) providing remedies after a determination regarding responsibility has been made,
3) executing Grievance Process before the imposition of any disciplinary sanctions; and
4) providing the parties with the same opportunities to have others present during any proceeding.

Regulation 07.06.A at Section 8.b.

Grievance Process Requirements – No Conflicts of Interest

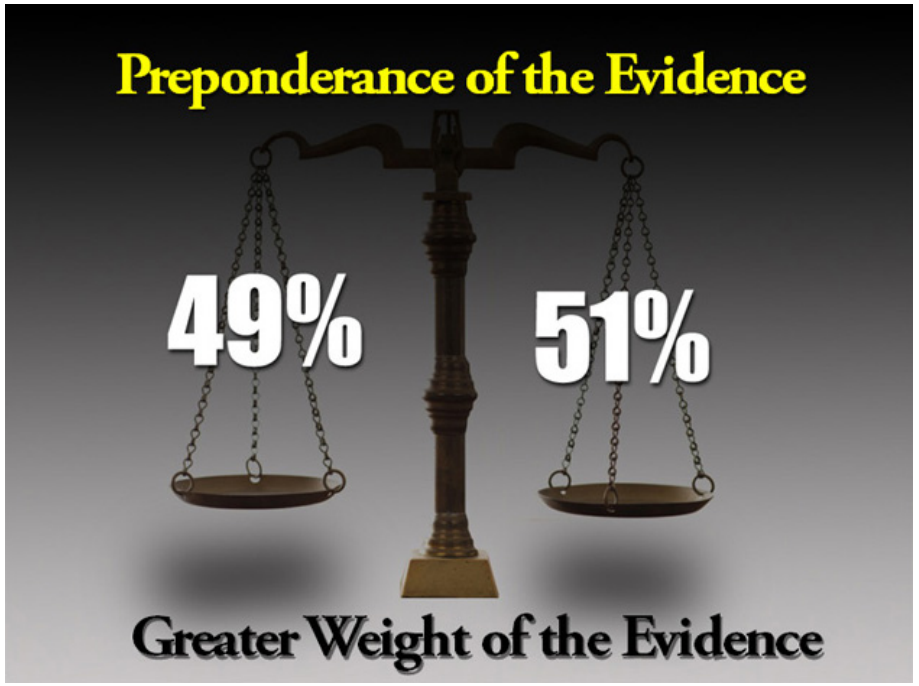
There can be no conflicts of interest or bias against a party by the:

- Title IX Coordinator,
- Investigator,
- Hearing Panel members,
- Appeal officers, or
- Any facilitators of an Informal Resolution process.

Regulation 07.06.A Section 8.b

Grievance Process Requirements – Presumption of Non-Responsibility and Standard of Evidence

- Presumption that Respondent is not responsible for the alleged conduct until a determination is made at the conclusion of the Grievance Process.
- The standard of evidence is a preponderance of the evidence.



Regulation 07.06.A Section 8.b.

Grievance Process Requirements – Objectivity and Relevance

- Credibility determinations may not be based on a person's status as a Complainant, Respondent, or witness.
- There must be an objective evaluation of all relevant evidence, both inculpatory and exculpatory.
  - *Investigators and decision-makers will need to consider all relevant evidence and explain why the weight of evidence supports a particular finding or conclusion.*

Regulation 07.06.A Section 8.b.

Credibility

Credibility Assessments: Best Practices

- You assess credibility daily.
- Use those skills by applying recognized credibility criteria to assess witness's statement:
  - *Witness's Manner and Demeanor*
  - *Personal vs. Second-Hand Knowledge*
  - *Witness's Bias or Interest*
  - *Corroborating Testimony of Evidence*
  - *Inconsistencies and Prior Statements*

For example of credibility framework, see Fifth Circuit Civil Pattern Jury Instruction 3.4.

Grievance Process Requirements – Protection of Privileged Information

- Information protected under a legally recognized privilege may not be used during any part of Grievance Process *unless* person holding such privilege has waived the privilege and Univeristy has obtained that party's voluntary, written consent to do so for the Grievance Process.
- For example, documents made or maintained by a physician, psychiatrist, psychologist, or other professional regarding treatment to the party.

Regulation 07.06.A Section 8.b.

Timeframe for the Grievance Process

The Grievance Process must be completed within 120 days.

- Any extension "for good cause" must be reviewed by the University, and
- All parties given notice and justification for the extension.

Regulation 07.06.A Section 8.c.

Mandatory Notices to Parties

- University must provide initial written notice to both parties on receipt of a Formal Complaint.
- Supplemental notice required if additional allegations later included in scope of investigation.
- Notice must be given to all parties of hearings, interviews, or meetings.
- Written notice via University email sufficient.

Regulation 07.06.A at Section 8.d

Initial Notices to Parties

Initial written notice to both parties must include

- Sufficient details to prepare response before an initial interview, including parties involved, the alleged misconduct, and date and location of alleged incident.
- Such notice shall also include notice of:
  (1) the Grievance Process, including Informal Resolution;
  (2) Respondent presumed not responsible until determination made at conclusion of Grievance Process;
  (3) parties may have advisor of their choice;
  (4) parties may inspect and review evidence; and
  (5) any applicable provision in University's code of conduct that prohibits knowingly making false statements or knowingly submitting false information.

Regulation 07.06.A at Section 8.d

Emergency Removal and Administrative Leave

- University must conduct individualized safety and risk analysis to determine if individual poses immediate threat.
- If so, University may remove respondent to protect safety of University Community.
- University must provide notice and immediate opportunity to challenge the removal.
- University retains right to place Employee on paid or unpaid administrative leave.

Regulation 07.06.A at Section 8.e

Prehearing Investigation – Gathering Evidence

- University, not the parties, bears burden of proof and burden of gathering sufficient evidence to make a determination.
- Parties must be given an equal opportunity to present witnesses and evidence.
- Neither party may be restricted from discussing the allegations or from gathering evidence.

Regulation 07.06.A at Section 8.f.i

Inspection and Review of Relevant Evidence

- Prior to issuing Investigative Report, parties must have opportunity to review and inspect evidence directly related to allegations.
- Evidence subject to inspection sent to party and advisor in an electronic format or a hard copy.
- University must provide parties at least 10 days to submit a written response to the evidence.

Regulation 07.06.A at Section 8.f.ii

Investigative Report

At the conclusion of investigation, University must:

- Create an investigative report that summarizes ***relevant*** evidence; and
- Send report to each party and party advisor for review of written response at least 10 days before hearing.

Regulation 07.06.A at Section 8.f.iii

Relevance – What is Relevant?

According to Federal Rule of Evidence 401, evidence is relevant if:

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

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

RELEVANCE = PROBATIVE + MATERIAL

Specific Information Deemed Not Relevant

Information that will be deemed not relevant includes:

- Information protected by a legal recognized privilege;
- Evidence about Complainant's sexual predisposition or prior sexual behavior
  - Unless offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant, or
  - If evidence concerns specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and is offered to prove consent.
- Any party's medical, psychological, and similar records (unless the party has given voluntary written consent).

Hearing Procedures 07.06.A-2 Section 2.e

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Live Hearing –Regulation 07.06.A – Attachment 2, Hearing Procedures

- If the Formal Complaint is not dismissed or resolved by Informal Resolution, new Title IX regulations require live hearings with cross examination.

- Live hearings will be conducted pursuant to the Title IX Sexual Misconduct Hearing Procedures, set forth in Attachment 2 to Regulation 07.06A.

Live Hearing, Location and Virtual Hearings

- Live hearing may be conducted with all parties physically present in the same geographic location ***or virtually***.
- If the hearing is virtual, or with the parties located in separate rooms, the University must use technology that enables the Hearing Panel, Hearing Officer, parties, and witnesses to simultaneously see and hear the party or the witness answering questions.

Hearing Panel and Hearing Officer

- University must appoint a four-member Hearing Panel, with an independent Hearing Officer as chair.
- Hearing Panel will be decision-maker that evaluates all relevant evidence and renders a determination.
- Hearing Panel asks questions and elicits information from parties and witnesses.
- Hearing Officer oversees and conducts the hearing and participates in deliberations and drafting written determination.

Rules of Order and Decorum

- University will adopt rules of order and decorum provided for and enforced by Hearing Officer.
- The rules will include:
  - time limits,
  - hearing order,
  - requirements that participants not badger a witness, and
  - questioning shall be relevant, respectful, and non-abusive.

Advisors

- Complainant and Respondent shall have an advisor present at the hearing.
- If party does not have an advisor of their choice present, University will provide an advisor of the University's choosing, without fee or charge to that party.
- Advisor may be, but is not required to be, an attorney.
- Advisors only permissible roles at the hearing are to advise the party and to conduct cross-examination on behalf of that party.

Recording or Transcript

- Hearing will be no more than four (4) hours, absent exceptional circumstances.
- University will create a record of the live hearing.
- The record must be made available to the parties for inspection and review upon request.
- But, the Hearing Panel's deliberations are not part of the live hearing and therefore not be part of the record.

Opening and Closing Statements

- At the direction of the Hearing Office, the parties will have an opportunity to offer their own opening and closing statements.
- Hearing Office may set time limits for the parties' opening and closing statements.

What Evidence May Be Introduced at Hearing?

- Only evidence provided by parties to the Investigator during the pre-hearing investigation, and/or identified or included in the Investigative Report may be presented, introduced, or used at the hearing.
- Any new evidence that a party intends to present, introduce, or use must be provided to the Title IX Coordinator at least five (5) days prior to the hearing and to the other party at least three (3) days prior to the hearing.
- Failure to comply will result in new evidence being excluded from consideration.

Direct Examination

Direct examination may be conducted by Hearing Officer or Hearing Panel.

Cross Examination

- Must be conducted directly, orally, and in real time by party's Advisor and never by party personally.
- Only relevant questions may be asked of party or witness.
- For each question, prior to a response, Hearing Officer must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.

Failure to be Subject to Cross Examination

- If party or witness does not submit to cross-examination,
  - Hearing Panel must not rely on any statement of that party or witness in reaching a determination.
- However, if a party or witness does not attend hearing or refuses to answer cross-examination or other questions,
  - Hearing Panel cannot draw an inference regarding responsibility based solely on that absence or refusal to answer.

Excluding Statements If No Cross Examination – OCR Guidance

If a party or witness chooses not to appear or opts not to answer cross-examination questions, the decision-maker merely excludes that party or witness's statements, and evaluates any evidence that does not involve those statements.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
OFFICE FOR CIVIL RIGHTS

Conducting and Adjudicating Title IX Hearings: An OCR Training Webinar, U.S. Department of Education (July 23, 2020)

Exclusion Does Not Affect Alleged Harassing Statements – OCR Guidance

A Respondent's alleged verbal conduct, that itself constitutes the sexual harassment at issue, is not subject to exclusion for lack of cross-examination.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
OFFICE FOR CIVIL RIGHTS

Office for Civil Rights Blog (May 22, 2020)

Examples of When to Exclude Witnesses Statements

- ✓ When a witness refuses to submit to cross-examination, even if the witness has already submitted to direct examination.
- ✓ When a witness or party stops responding to cross examination questions.
- ✓ When a witness or party does not appear for the hearing.

Relevance Determinations During Hearing

The Hearing Officer must determine:

- Whether a cross-examination question must be excluded on relevance
- Whether any evidence must be excluded on relevance

Specific Information Deemed Not Relevant

Information that will be deemed not relevant includes:

- Information protected by a legal recognized privilege;
- Questions or evidence about Complainant's sexual predisposition or prior sexual behavior
  - Unless offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant, or
  - If evidence concerns specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent.
- Any party's medical, psychological, and similar records (unless the party has given voluntary written consent).
- Party or witness statements that have not been subjected to cross-examination.

Hearing Procedures 07.06.A-2 Section 2.e

Written Determination Required Components

Following hearing, Hearing Panel will issue a written determination that includes:

1) identification of the allegations;
2) description of the procedural steps in Grievance Process;
3) findings of fact supporting responsibility determination;
4) conclusions regarding application of policy to facts;
5) a determination and rationale regarding responsibility for each allegation;
6) any disciplinary sanctions or other remedies; and
7) information concerning parties' ability to appeal.

Regulation 07.06.A Section 8.h.

Impact Statements

Hearing Panel may request, and the parties may provide, impact statements for consideration, but only:

- after a determination regarding responsibility, and
- before a decision regarding sanctions.

Regulation 07.06.A Section 8.i.

Potential Sanctions and Remedies -- Students

Possible sanctions or remedies that may be imposed on student respondents can include:

- disciplinary reprimand;
- educational training;
- scheduling adjustment;
- housing reassignment;
- disciplinary probation;
- withholding of grades, official transcript, and/or degree;
- bar against readmission / enrollment, and/or withdrawal;
- suspension of privileges;
- time-limited disciplinary suspension;
- disciplinary expulsion;
- or any other sanctions or remedies as deemed appropriate.

Regulation 07.06.A Section 9

Potential Sanctions and Remedies -- Employees

Possible sanctions or remedies that may be imposed on employee respondents can include:

- employment probation;
- job demotion or reassignment;
- suspension with or without pay for a specified period of time;
- dismissal or termination from employment;
- ineligibility for re-hire;
- other coaching, conduct or corrective actions;
- or any other sanctions or remedies as deemed appropriate.

Regulation 07.06.A Section 9

AGENDA

- ❑ Overview of Title IX
- ❑ Key Changes Required by New Title IX Regulations
- ❑ University Regulation 07.06.A
- ❑ Title IX Grievance Process
- ❑ Live Hearing under 07.06.A
- ✓ **Appeals, Informal Resolution, and Other Provisions**
- ❑ Intersection with Other TTUS Regulations and Legal Obligations

Grounds of Appeal

The parties may appeal a determination or a dismissal based on:

- A procedural irregularity that affected the outcome;
- New evidence not reasonably available at the time the determination or dismissal was made;
- A conflict of interest or bias of the Title IX Coordinator, Investigator, or Hearing Panel Members; or
- The sanction imposed substantially varied from the range of sanctions normally imposed for similar infractions.

Regulation 07.06.A Section 8.j.

Filing of Appeal and Response

- A party must file a written appeal within 3 business days after University's delivery of the written decision regarding responsibility.
- The written appeal must set forth the grounds for the appeal and any supporting information.
- The non-appealing party will have 3 business days after the University's delivery of the written notice to respond to the appeal.

Regulation 07.06.A Section 8.j.

Appeal Officer

- The University will designate an Appeal Officer as the decision-maker for the appeal.
- The Appeal Officer cannot be the same person as:
  - *any of the Hearing Panel members that reached the determination regarding responsibility or dismissal,*
  - *the Investigator(s), or*
  - *the Title IX Coordinator.*

Regulation 07.06.A Section 8.j.

Response of Hearing Panel

- The Appeal Officer may submit the written appeal and the non-appealing party's response to the Hearing Panel.
- The Hearing Panel may respond in support of the appeal or the original decision to the Appeal Officer.

Regulation 07.06.A Section 8.j.

Review and Written Decision

- The Appeal Officer must issue a written decision describing the result and rationale within 5 business days.
- The Appeal Officer must provide the written decision simultaneously to both parties.
- The written decision of the Appeal Officer is final and may not be appealed.

Regulation 07.06.A Section 8.j.

Informal Resolution Process

- When may the parties engage in the process?
  - *At any time after written notice of a formal complaint and before a determination regarding responsibility, the parties can consent to the Informal Resolution Process.*
- May include a mediation process.
- A party may withdraw from the process at any time.
- The University may not require any party to participate in the process.
- Informal Resolution Process will not be offered to resolve allegations that an Employee engaged in Title IX sexual misconduct against a student.

Regulation 07.06.A Section 8.k.

Retaliation

- Retaliation is strictly prohibited and will not be tolerated.
- Retaliation includes threats, intimidation, coercion, discrimination, reprisals, or adverse actions related to employment or education.
- The exercise of rights protected under the First Amendment does not constitute retaliation.
- Individuals found to have retaliated will be subject to disciplinary action.

Regulation 07.06.A Section 11

Exceptions for Employees

Retaliation protections do not apply to employees who:

- Report an incident of Title IX Sexual Misconduct perpetrated by the Employee;
- Cooperate with an investigation, a disciplinary process, or a judicial proceeding relating to an allegation that the Employee perpetrated an incident of Title IX Sexual Misconduct; or
- Make a report of Title IX Sexual Misconduct which after investigation is found not to have been made in good faith.

Regulation 07.06.A Section 11

False Information

- An individual found to have knowingly and in bad faith provided materially false information during a Grievance Proceeding may be subject to disciplinary action up to an including dismissal or separation from the University.
- A determination regarding responsibility alone is not sufficient to conclude that any party or witness made a materially false statement in bad faith.

Regulation 07.06.A Section 11

Confidentiality – Who is Covered?

The confidentiality provisions protect:

- Complainant;
- Reporting Party;
- Individual who sought guidance from the University;
- Individual who participated in the investigation; and
- Respondent, if after completing an investigation, the University determines the report to be unsubstantiated or without merit.

Regulation 07.06.A Section 12

Confidentiality – What May Be Disclosed?

- An individual's identity may only be disclosed to:
  - *University Employees who are necessary for an investigation of the report or other related hearings;*
  - *a law enforcement officer;*
  - *a health care provider in an emergency;*
  - *the Respondent, to the extent required by other law or regulation; and*
  - *potential witnesses to the incident as necessary to conduct an investigation of the report and to the extent required by other law or regulation.*

Regulation 07.06.A Section 12

Confidentiality – Confidential Reports

- Students may make confidential reports to:
  - *University Student Counseling Centers, where available, or*
  - *to other counselors identified by the University.*
- Employees may make confidential reports through EAP.
- All Complaining Parties may also make confidential reports to local rape crisis centers or to other licensed clinical and/or mental health professionals acting in their professional role of providing those services, including medical providers employed by the University.
- Information may be shared by the clinical and/or medical provider only with the Complainant's or Respondent's consent.

Regulation 07.06.A Section 12

Cooperation and Non-Interference with Grievance Process

- All Employees who are not a Complainant or Respondent are required to comply with Supportive Measures or information requests.
- Any individual who knowingly and intentionally interferes with a Grievance Process is subject to disciplinary action.
- Interference with a Grievance Process may include:
  - attempting to coerce, compel, influence, control, or prevent an individual's participation in an investigation or Grievance Process;
  - removing, destroying, or altering documentation relevant to the investigation; or
  - encouraging others provide false or misleading information.

Regulation 07.06.A Section 13

Training Obligations

- University Employees and administrators responsible for implementing Regulation 07.06.A receive training about offenses, investigatory procedures, due process requirements, impartiality, conflicts of interest, informal resolution processes, and University policies related to or described in the regulation.
- Title IX Coordinators, Investigators, Hearing Panel members, and facilitators of an Informal Resolution process shall receive adequate and unbiased training on:
  - Application of Title IX Sexual Misconduct policy; and
  - The Grievance Process, including, where appropriate, how to conduct hearings, the use of technology, and how to make relevancy determinations.
- All materials used to train University Title IX Coordinators, Investigators, Hearing Panel members, and any person who facilitates an informal resolution process are publicly available on the University's Title IX websites.

Regulation 07.06.A Section 14

Recordkeeping Obligation

- The University must maintain the following information for a period of 7 years:
  - *The investigation*
  - *Any appeal*
  - *Informal resolution*
  - *All training materials*
  - *Supportive measures*

Regulation 07.06.A Section 15

AGENDA

- ❑ Overview of Title IX
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- ✓ **Intersection with Other TTUS Regulations and Legal Obligations**

Title IX Versus Title VII/State Law – Different Definition of Sexual Harassment

- Title VII defines sexual harassment as "severe or pervasive" not "severe and pervasive."
- Title VII "knew or should have known" versus "actual knowledge."
- Title VII vicarious liability for acts of supervisors, no exception when the supervisor is the one engaging in the harassment.

Mandatory Reporting Obligations Apply Regardless

- Employees must report both sexual misconduct, whether defined as Title IX Sexual Misconduct or "sexual misconduct" as defined in Regulation 07.06.B.
- A failure to promptly report is a violation of Texas law.
- A knowingly false report under this regulation is also a violation of Texas law.

Obligation to Address Less Severe Sexual Misconduct

If the sexual misconduct does not fall within the definition under Regulation 07.06.A, the University must assess whether the misconduct meets the definition of sexual misconduct under Regulation 07.06.B.

How Two Policies Interact

Is the alleged conduct severe, pervasive, and objectively offensive?

- No: proceed under Regulation 07.06.B
- Yes: did the alleged conduct occur in an education program or activity?
  - *No, proceed under Regulation 07.06.B*
  - *Yes, proceed under Regulation 07.06.A*

**Refer to 07.06.A-1 Flowchart*

What About Complaints with Mixed Allegations?

- The University may consolidate complaints arising out of the same facts or circumstances, involving more than one Complainant or more than one Respondent, or that amount to counter-complaints by one party against the other.
- If at any time during a Title IX Sexual Misconduct Grievance Process it is determined that the alleged conduct does not constitute Title IX Sexual Misconduct, the University may proceed under System Regulation 07.06.B or any other applicable policy and procedure.

Regulation 07.06.A Section 3.e.

Additional Resources

TTUS maintains websites that provide comprehensive information about Title IX, Regulation 07.06.A, available resources and support options.

- ***ASU***: *https://www.angelo.edu/services/title-ix/*
- ***TTU***: *http://titleix.ttu.edu/*
- ***TTUHSC***: *https://www.ttuhsc.edu/title-ix/default.aspx*
- ***TTUHSC El Paso***: *https://elpaso.ttuhsc.edu/gsbs/catalog/title-IX.aspx*
- ***TTU System Office of Equal Opportunity:*** *https://www.texastech.edu/offices/equal-employment/*

Additional Resources

- **OCR Guidance**: https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/index.html
- **NACUA:** https://www.nacua.org/

Key Takeaways and Questions?