



Title IX Coordinator Training Online Course: Fundamentals of the August 2020 Regulatory Requirements

Module 1: Jurisdiction and Other Threshold Topics

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Course Overview

- Jurisdiction and Other Threshold Topics
- Formal Complaints, Investigations, and Grievance Procedures
- Policy and Training Obligations



Title IX Final Regulation

- Effective August 14, 2020
- Where to Begin
 - Inventory
 - Implementation Plan



PLAN & DOCUMENT YOUR EFFORTS

- Inventory
 - Current Title IX Procedures
 - Clery Act Policies & Compliance
 - Student Conduct Code
 - HR Policies & Agreements
 - State or Local Laws or Regulations
- Implementation Plan
 - What?
 - Who?
 - When?

**Jurisdiction: What,
Who, Where, When,
How?**

WHAT?

DEFINITION OF SEXUAL HARASSMENT

§106.30(a): Sexual Harassment to include one or more of the following:

1. Quid Pro Quo
2. Hostile Environment
3. Clery Definitions

QUID PRO QUO

1. Conditioning provision of an aid, benefit, or service on participation in an unwelcome sexual conduct
2. Carried out by an employee

HOSTILE ENVIRONMENT

- Unwelcome sexual conduct
- “So severe, pervasive, and objectively offensive” (2020)
 - Pattern or practice is sustained and non-trivial (2001)
- “Effectively denies equal access”
 - Denies or limits student’s ability to participate in or benefit from (2001)
 - Interferes with or limits student’s ability to participate or benefit from (2011)
- “Determined by a reasonable person”
 - “[S]tanding in the shoes of the complainant.” (Preamble, p. 1514)

CLERY DEFINITIONS

- Sexual Assault— a forcible or non-forcible sex offense under the FBI UCRS (as defined by the Clery statute)
 - Rape, attempted rape, sodomy, fondling, statutory rape
- Dating Violence— violence by a person who is or has been in a romantic or intimate relationship (Clery statute)
- Domestic Violence— violence by a current or former spouse or intimate partner, co-parent, living partner, youth or other under state law
- Stalking— fear for safety or safety of other or suffer substantial emotional distress

COMPARE TO

- Institution Conduct Code
- Court standards
- Title VII
- State law

WHO?

IN ADDITION TO STUDENTS...APPLIES TO EMPLOYEES

§106.51 Employment

- “No person shall, on the basis of sex, be excluded from participation in, or denied benefits of, or be subjected to discrimination in employment...”
- Remains unchanged by current amendments

WHAT'S NEW THEN...

- 2011 Guidance directed at student-on-student sexual violence
- Courts and OCR have relied on Title VII when considering employees' complaints alleging sexual harassment even under Title IX.
- OCR acknowledges differences, expects institutions of higher education (HES) to comply with both Title IX and Title VII requirements.
 - OCR will try to “avoid an actual conflict” regarding employer’s obligations. (Preamble p. 511.)

OTHER CHANGES

- Requires HES to handle allegations by employees, including at-will employees, using the same procedures it uses for students
- Independent contractors and volunteers are not considered employees who may create *quid pro quo* Title IX liability.
- Actions by non-employees may create liability for other types of sexual harassment. (Preamble p. 48)
- Volunteers who experience discrimination may be covered. (Preamble p. 544)

TITLE VII – SEXUAL HARASSMENT DEFINITION

- Conduct
 - Unwelcome sexual advances
 - Requests for sexual favors
 - Other verbal or physical conduct of a sexual nature
- Viewed by a reasonable person in the complainant's position

WHEN...

- Submission becomes a term or condition of employment
- Rejection is used as the basis for an employment decision
- The conduct unreasonably interferes with work performance or creates a hostile, intimidating or offensive environment

EMPLOYEE-EMPLOYEE HARASSMENT

- Employer's knowledge
 - Knew or should have known
- Immediate and appropriate corrective action
 - Reasonably calculated to end the harassment and prevent recurrence
- Actions by third parties

SUPERVISOR LIABILITY

- Tangible Employment Action
 - Strict Liability
- Not Tangible Employment Action
 - Employer takes reasonable care to prevent and correct promptly
 - and
 - Employee unreasonably failed to use employer's preventive or corrective options

INSTITUTIONAL REQUIREMENTS

- Contractual Obligations
 - Collective bargaining agreements
 - Employee handbooks
 - Individual employee contracts



OTHER LEGAL REQUIREMENTS

- Conflicting State Requirements
 - State laws
 - State administrative rules and regulations
- Choice of HE to accept federal funding

OTHER ISSUES

- Procedures
 - Serial or parallel
 - Clearly identify what applies to employees
- Student employees
- Clerical obligations to employees
- Notification to all employees and applicants (§106.8)

WHERE?

JURISDICTION

- No distinction between on- or off-campus
 - If in location, at an event, or in circumstances that meet the definition
- Only in the United States
 - Harassment must occur against a person *in the United States*
 - Study abroad & foreign employment

BUT DON'T FORGET...

- May apply other institutional conduct standards and procedures
- Clergy applies to students and employees regardless of location
- Title VII applies to U.S. citizens working for U.S. corporations abroad

EDUCATION PROGRAM OR ACTIVITY

- §106.44(a): Locations, events, or circumstances over which HE exercises substantial control over both the respondent and the context in which the sexual harassment occurred
- Any building owned or controlled by a recognized student organization
- Training on the scope of the institution program or activity

WHEN?

ACTUAL KNOWLEDGE

- §106.30(a): Notice to Title IX Coordinator or any official who has authority to institute corrective measures
- Sexual harassment or allegations of sexual harassment
- No vicarious liability, “constructive notice” or “should have known”

OFFICIAL WITH AUTHORITY

- Authority to institute corrective measures
- Not an official with authority (OWA)
 - An official with only the ability or obligation to report
 - An official with only the ability or obligation to inform student about how to report
 - An official having been trained to report or inform students how to report
- Respondents are not OWAs

IMPLEMENTATION ISSUES

- Institutions determine who is OWA
 - Institutions decide who must, may or may only with student's consent report sexual harassment.
 - Make lists of who has authority
 - Need to give notice of all OWAs only Title IX Coordinator information
- Responsible employees
 - No longer in regulations
 - Institutions how may want to re-conceptualize or how they will designate
 - May require employees to inform HE
 - Resident Assistants

RETALIATION §106.71(a)

- No retaliation by any person to interfere with any right "secured by Title IX"
- No retaliation for
 - Making a report or complaint
 - Participating or refusing to participate
- Filing charges regarding conduct that arises out of the "same facts or circumstances" but does not involve sex discrimination

CONFIDENTIALITY

- IHEs must keep confidential the identity of any individual
 - Who has made a report or filed a complaint
 - Who has been reported as a perpetrator
 - Who has been a witness
- Exceptions
 - FERPA
 - Legal obligations
 - Carry out the purposes of these regulations

RETALIATION AGAINST EMPLOYEES

- Future employment decisions
- Employment references
- Licensing boards

HOW?

THE INITIAL REPORT

- Anyone may report
 - Not automatically a formal complaint
- Institution response to notice
 - Offer of supportive measures
 - Explanation of formal complaint process
 - Compare to Clery

MAKING REPORTS

- Who
 - Any individual
 - alleged to be the victim of conduct that could be sexual harassment
 - Distinguish from Formal Complaint
- Against Whom
 - Any individual
 - Reported as perpetrator of conduct that could be sexual harassment
 - Distinguish from Formal Complaint

INSTITUTION RESPONSE

- Promptly contact the complainant to discuss the availability of supportive measures
 - Consider complainant's wishes
 - Make clear available with or without formal complaint
- Explain the process for filing a formal complaint
- Treat complainants and respondents equitably
- Consider clergy obligations

SUPPORTIVE MEASURES §106.30(a)

- Non-disciplinary, non-punitive individualized services
 - Impose actions that are disciplinary sanction or not supportive measure only after grievance process
- Appropriate, reasonably available, free to complainant or respondent
- Restore equal access without unreasonably burdening the other party
- Confidential, if possible

EMERGENCY REMOVALS §106.44(c)

- May remove respondent from education program or activity if:
- Conduct an individualized safety and risk analysis
 - Determine that respondent poses an immediate [imminent] threat to the physical health or safety of anyone justifying removal
 - The threat arises from the allegations of sexual harassment, and
 - Provide opportunity for respondent to challenge removal immediately thereafter

BUT...



- This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the American with Disabilities Act.
- Review disability policies regarding danger to self or others.

EMERGENCY REMOVALS

Other Points to Consider:

- Not limited to instances of sexual assault
- Who will conduct the assessment and make the decision?
- Beyond verbalized threats, what information will be considered?
- Institution can determine the scope of removal.
- No specific timeframes - may (not required to) reassess
- What will respondent's ability to challenge look like?
- Separate from non-student employee Administrative Leave

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Class Two: Conducting a Title IX Investigation

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Class Overview:



- Investigations Involving Employees
- Investigating a Formal Complaint
- Impartiality/Conflicts of Interest
- Relevance
- Violations of Other Policies



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Investigations Involving Employees

The Basics:

- Remember that the regulations also apply to employees— both as those allegedly subject to Title IX sexual harassment and as those accused of engaging in Title IX sexual harassment.
- Investigations of formal complaints of conduct potentially constituting Title IX sexual harassment involving employees must comply with the regulations.
- Institutions must use the same procedures for employee and student allegations of Title IX sexual harassment.

However:

- Title VII also applies.
- Collective bargaining and other contractual obligations might also apply.
- OCR expects institutions to comply with Title VII requirements.



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Title VII Requirements



- Standards
 - Submission becomes a term or condition
 - Unreasonably interferes with work performance or creates a hostile environment
 - Employer knew or should have known
- Immediate and appropriate corrective action
 - End the harassment and prevent recurrence



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Special Considerations

- Collective Bargaining Rights
- Administrative Leave
- “Reasonably prompt timelines”
vs.
“Immediate and Appropriate Corrective Action”



Investigating a Formal Complaint

Conducting an Investigation



- Investigator must be free from bias and conflict of interest.
- Don't restrict the ability of either party to discuss allegations or gather evidence.
- Provide parties written notice sufficient to prepare.
- Allow parties an equal opportunity to identify witnesses, and other inculpatory and exculpatory evidence.
- Allow parties to have advisors.
- Don't access, consider, disclose or otherwise use a party's records prepared by a professional in a treatment capacity without voluntary, written consent.



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Interviewing



Consider in advance whether interviews will be:

- Recorded or not recorded.
- Be followed with written statements or summaries.

In interviewing, the investigator must:

- Be prepared.
- Be objective and unbiased, free from stereotypes.
- Be free of conflict of interest.
- Avoid any prejudging of the parties or responsibility.
- Demonstrate respect.
- Take the lead in seeking evidence (inculpatory and exculpatory) - it is not the parties' responsibility to investigate.
- Demonstrate respect.
- Be alert to non-verbal communications.



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Review of Evidence

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- Parties must have equal opportunity to inspect and review all evidence directly related to the allegations.
- Provide access to evidence to both parties and their advisors.
- Ten days prior to completion of the investigative report.
- Consider parties' written responses before completing report.



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Investigative Report



- Complete an Investigative Report that fairly summarizes relevant evidence.
- Provide to parties and their advisors for review and response at least 10 days before hearing.



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Impartiality & Conflicts of Interest

Impartiality, Bias, Prejudgment & Conflict of Interest



Impartiality, Bias, Prejudgment & Conflict of Interest

- | | |
|--|---|
| <ul style="list-style-type: none"> • Impartiality – basing a conclusion or decision on the facts rather than on a preference for one party over another; unbiased. • Bias – a pre-disposition or pre-conceived opinion that prevents one from impartially evaluating facts | <ul style="list-style-type: none"> • Conflict of Interest – demonstrating bias or inability to be impartial because it will be to one's own personal benefit or other competing interest • Prejudgment – reaching a conclusion before considering all relevant evidence |
|--|---|



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Understanding Relevance

How is Relevance Defined?



- September 7, 2020 Guidance.
- Title IX Rule does not adopt the Federal Rules of Evidence for hearings conducted under Title IX.
- “The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied.”
- A school may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence.
- A school may adopt rules of order or decorum to forbid badgering a witness, and may fairly deem repetition of the same question to be irrelevant.



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Relevant Evidence



- Evidence is relevant if:
 - It has any tendency to make a fact more or less probable than it would be without the evidence; and
 - The fact is of consequence in proving or disproving the allegations.
- Does the evidence tend to prove or disprove the allegations?
- A determination regarding relevancy can rely on logic, experience or science.

FED. R. EVID. (401), Legal Information Institute, Cornell Law School,
https://www.law.cornell.edu/rules/fre/rule_401



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Admission vs. Weight, Credibility, or Persuasiveness

- There is a difference between the admission of relevant evidence, and the weight, credibility, or persuasiveness of particular evidence.
- Because § 106.45 does not address how relevant evidence must be evaluated for weight or credibility by a decision-maker, an IHE can adopt and apply its own rules so long as:
 - The rules do not conflict with § 106.45; and
 - The rules apply equally to both parties.
- For example:
 - An IHE may, e.g., adopt a rule regarding the weight or credibility (but not the admissibility) that a decision-maker should assign to evidence of a party's prior bad acts, so long as its rule applies equally to the prior bad acts of complainants and the prior bad acts of respondents.
- **REMEMBER:** An IHE's investigators and decision-makers must be trained specifically with respect to "issues of relevance" and any relevance rules adopted by the IHE should be addressed in the IHE's publicly available training materials.



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What Is NOT Relevant?

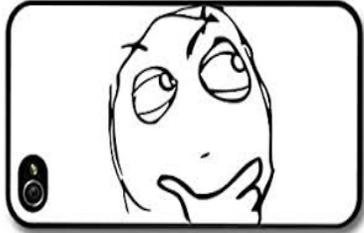


- **September 4, 2020 Guidance.**
- The Regs direct schools to exclude the following evidence and information:
 - a party's treatment records, without the party's prior written consent [§ 106.45(b)(5)(i)];
 - information protected by a legally recognized privilege [§ 106.45(b)(1)(x)];
 - questions or evidence about a complainant's sexual predisposition, and questions or evidence about a complainant's prior sexual behavior unless it meets one of two limited exceptions [§ 106.45(b)(6)(i)-(ii)]; and,
 - a decision-maker is not permitted to rely on the statements of a party or witness who does not submit to cross-examination [§ 106.45(b)(6)(i)].



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Defining Relevance in Policy



- **September 4, 2020 Guidance.**
- “An HE may **not** adopt rules excluding certain types of relevant evidence (e.g., lie detector test results, or rape kits) where the type of evidence is **not** either deemed “not relevant” (as is, for instance, evidence concerning a complainant’s prior sexual history) or otherwise barred from use under § 106.45 (as is, for instance, information protected by a legally recognized privilege).”
- Hmm. Let’s break it down.



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All Relevant Information Is Not Created Equal



- May weigh evidence
- Considerations:
 - Is it corroborated?
 - Is there a reason the source might not be reliable?
 - Is it logical given other established facts?
- The Regs require the decision-maker to objectively evaluate only “relevant” evidence during the hearing and when reaching the determination regarding responsibility.
- The decision-maker must determine the relevance of each cross-examination question before a party or witness must answer.
- “Not probative of any material fact.”



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Violations of Other Policies

Violations of Other Policies

- Knowingly making false statements or submitting false information
- Sexual Harassment not covered in the regulations but violating campus policies
 - Violations occurring in programs or at locations outside the current definition
 - Violations that don't meet the standards under the regulations
- Student Conduct Violations
- Employee Conduct Standards



Update notice with later-discovered allegations.



Questions?

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Class Three: The Grievance Process – Hearings & Appeals

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Class Overview



- Due Process / Fundamental Fairness
- Credibility Determinations
- Advisors
- The Written Determination
- Appeals

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Due Process (Fundamental Fairness)

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A large red arrow pointing to the right, containing the text "The Process That Is Due".

The Process That Is Due

A Fair Process:

- that follows the law,
- is implemented without bias, stereotypes or pre-judgment, and
- provides an equal opportunity for parties to be heard and present evidence,
- so as to allow the decision-maker(s) to reach a determination consistent with the standard of evidence.

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Title IX Sexual Harassment Grievance Process: Elements of “Due Process”



- Notice to the Respondent of the allegations
 - Opportunity to respond
 - Adequate opportunity to prepare before responding
- Notice to the Parties of the process that will be used, including appeals
- Opportunity to present evidence and witnesses
- Cross-examination, including questioning of witnesses
- Live hearing (in separate spaces upon request and as appropriate)
- Opportunity to have advisors of choice



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State the Standard of Evidence



Same standard of evidence for all.

Either:

- *Preponderance of the evidence, i.e., more likely than not;* **or**
- *Clear and convincing evidence, i.e., substantially more likely to be true than not.*

And Not:

- *Beyond a reasonable doubt (no other reasonable explanation possible – criminal cases).*



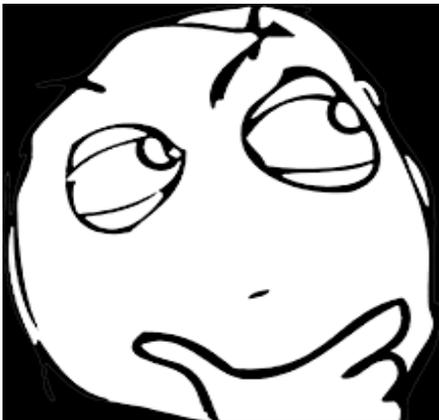
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Credibility Determinations

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Considerations



- What evidence is most believable?
- Corroborating evidence
 - Other testimony
 - Physical evidence
- Consider faulty memories
- Explore reasons for inconsistencies
- There are no “perfect” witnesses, complainants or respondents

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Factors to Weigh

- Consider each material fact separately.
- Credibility as to the facts:
 - Credibility on one fact doesn't make all of that person's testimony credible, and
 - Lack of credibility on one point doesn't make all of that person's testimony non-credible.
- Does the testimony feel rehearsed or memorized?
- Is the testimony exactly the same as another witness?
- Does the testimony make sense?
- Is the testimony detailed, specific & convincing? If not, is there a reason?
- Is it a statement against interest?
- Less credible witness isn't necessarily being dishonest.

Caution



- Eyewitness accounts
- Bias/Assumptions about witness credibility that may not take account of cultural norms or may stereotype.
- Assumptions about memory that may not reflect witness experiences.
- Failure of decision-maker to explain credibility determinations.

The Decision-Maker (Hearing Officer)

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Getting Ready

- Self-identify any conflict of interest or bias.
- Prepare, prepare, prepare.
- Read the report carefully and repeatedly, but don't prejudge.
- Understand the conduct at issue and the elements of the alleged violations.
- Identify areas of agreement and disagreement.
- Determine if there are areas that require further inquiry, e.g., did the investigator explore & consider all the relevant evidence?

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Hearing Decorum

Points to Consider: May have rules that:

- Require advisors be respectful and prohibit abusive/intimidating questioning.
 - Deem repetition of the same question irrelevant.
 - Allow for removal of advisors.
- Specify any objection process.
- Govern the timing and length of breaks to confer, and prohibit disruption.
- Require that *parties* make any openings and closings.
- Who will enforce the rules of decorum?
 - How will you train decision-makers?

Advisors

Advisors



- Parties must have the opportunity to have an advisor present during any grievance proceeding (hearing or related meeting).
- A party may choose not to have an advisor.
 - However, the institution must provide an advisor to question and cross-examine witnesses if the party isn't accompanied by one.
 - Institutions may require parties to provide advance notice of their advisor's attendance.
 - What if they are a no-show?
- Advisor provided by institution need not be an attorney.
 - Need not be of "equal competency."
- May establish guidelines for advisors.
 - Role of advisors in hearings and meetings.
 - Use of non-disclosure Agreements.

More on the Advisor's Role



- Provide support and advice to the party.
- Understand the allegations and the process.
- Understand the purpose and scope of questioning and cross-examination.
- Ask questions that elicit relevant information.
- Wait for relevancy determinations after asking a question.
- Adhere to rules of decorum and encourage the party to do the same.
- NOTE: Institutions may remove disruptive advisors ... *carefully*.

Working with the Parties' Attorneys

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Advisor or Legal Representative

- Clarify procedures and role in advance.
- Distinguish between advisor and legal representative.
- Emphasize the “ground rules” - provide any rules of decorum.
- Establish lines of communication and points of contact.



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Written Determination

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Written Determination

- Identification of allegations potentially constituting sexual harassment
- Description of the procedural steps
- Findings of fact supporting the determination
- Conclusions regarding the application of the code of conduct/policy to the facts
- Statement of and rationale for the result as to each allegation, including sanctions and whether remedies will be provided
- Appeal procedures and grounds

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Appeals

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A large red arrow pointing to the right, with the word "Appeals" written in white text inside it.

Appeals

Must provide an appeal from a determination of responsibility and dismissal of a formal complaint, based on:

- Procedural irregularities that affected the outcome.
- New evidence not reasonably available at the time of determination that could affect the outcome.
- Bias or conflict of interest of the Title IX Coordinator, investigator or decision-maker that affected the outcome.
- Inappropriate or impermissible dismissal of any formal complaint or allegation.
- May include other grounds, equally available to both parties.

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Appeal Process



- Notify other party upon receipt of appeal.
- Appeal decision-maker can't be Title IX Coordinator, investigator or hearing decision-maker.
- Opportunity for both parties to submit written statement.
- Written decision with the result and rationale simultaneously to both parties.

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Class Four: Anatomy of an OCR Investigation

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Class Overview



- Demystifying the OCR's Multi-Phase Process
- Understanding different aspects of OCR's Case Processing Manual
- Practical Points to Consider in Working with OCR
- Summary

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Why is this Important to You?

- OCR is the primary enforcement agency regarding Title IX, which may make your department more likely to interact with them
- OCR's process is its own, meaning that responding to OCR often looks different from responding to litigation or even responding to other civil rights enforcement agencies
- Most importantly, understanding OCR's perspectives and the way that it approaches its role can help you maintain policies, files, and other materials in a way that is helpful to you and eases the burden of an OCR review



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What Complaints Does OCR Handle?

- OCR enforces several laws:
 - Title VI
 - Title IX
 - Section 504 of the Rehabilitation Act and Title II of the ADA
 - Age Discrimination Act
- DOJ/USAO and EEOC may also conduct investigations that overlap into these areas, *e.g.*, DOJ reviews disability issues under Title III of the ADA, sexual misconduct issues under VAWA
- OCR may refer complaints to DOJ for enforcement
- NOTE: It's extremely easy for individuals to file complaints!



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Demystifying the OCR Process

- The main phases of an OCR complaint investigation:*
 - Notification to the Institution
 - Early Resolution Options
 - Data Requests
 - Investigation
 - Negotiation and Monitoring of Resolution Agreements (if necessary)

***Note that OCR can also conduct broad, agency-instituted compliance reviews, but they typically follow these same phases**



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OCR Investigations: Resources

- OCR Complaint Processing Manual (Aug. 2020)
- Dear Colleague Letters and Enforcement Guidance by Statute
- Prior OCR/DOJ Resolution Agreements by Statute
- Case law can be helpful, but OCR does not always recognize court precedent unless it is directly on point



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Phase I: Evaluating the Complaint

OCR evaluates the complaint to determine whether it can investigate:

- Does the complaint allege a violation of law enforced by OCR?
- Was the complaint filed within 180 days of last act which complainant alleges to be discriminatory?
- OCR may:
 - Contact complainant for clarification
 - Waive 180 day filing requirement at its discretion
 - Do all of this without the institution knowing it's happening!



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Phase I: Evaluating the Complaint

OCR may administratively close/dismiss the Complaint if, *e.g.*:

- Complaint does not state a violation of a law OCR enforces
- Complaint is not filed timely
- Complaint is unclear/incomplete and complainant did not provide OCR with clarifying information
- Complaint has been investigated by another federal, state, or local civil rights agency and resolution meets OCR regulatory standards
- Same allegations have been filed by same complainant against same school in state or federal court



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Phase I: Strategies

- There's not much an institution can do to advocate with OCR when it has advance notice that a complaint is headed to OCR
 - OCR uses this period to determine whether it has jurisdiction and sufficient facts to investigate
 - OCR typically does not appreciate outside opinions at this early stage of the process; any efforts to intercede should be done very delicately
- When should an institution intercede?
 - A fundamental premise is inaccurate that might lead to dismissal
 - The matter in question is currently being heard internally at the institution and the process is not completed, or it has been filed in court or with another agency



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Phase II: Notification of Investigation

- OCR sends “**Letter of Notification**” to the institution and the complainant if it determines it will open the complaint for investigation. This letter typically includes:
 - OCR’s jurisdiction
 - A brief factual description and allegations to be investigated
 - A statement that OCR is a neutral party
- OCR may refuse to disclose the identity of the student/group bringing the complaint
- OCR may consolidate multiple similar complaints into a single investigation
- OCR may convert a complaint into a broader compliance review



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Phase II: Notification of Investigation

- Notification letters are not typically detail heavy
- OCR will typically provide a link to the Case Processing Manual and the complaint, but some offices only provide the complaint upon request and/or with heavy redactions
 - **Make FOIA request**
 - Simple to do and usually costs nothing
 - OCR is required to respond; but may deny the request until the investigation is concluded
 - May request additional information beyond complaint, *e.g.*, documents submitted by complainant or even prior complaints against the institution

Phase II: Strategies

- Review regulatory provisions cited by OCR for insight into what OCR will investigate, *e.g.*, facts may cloud the fact that OCR is only focused on the publication of a policy
- Pay particular attention to what OCR says it is investigating, which may be broader or narrower than what is in the complaint
- OCR will remind the institution that it may not retaliate against any complainant or any person who participates in OCR investigation; make sure that is understood by relevant community members who may interact with the complainant

Early Resolution Options

- Rapid Resolution Process (RRP): Cases chosen by OCR because resolution seems more straight forward or timing is an issue. Often precedes the notification letter and could obviate a finding of any sort.
- Facilitated Resolution Between the Parties (FRBP): An OCR-facilitated mediation-like process:
 - Available only where OCR deems “appropriate.”
 - Both parties must agree to mediate; if unsuccessful the case goes back to mediation . (Different OCR staff mediate v. investigate.)
 - Ultimate agreement not typically monitored by OCR unless a breach is alleged and, even then, OCR will typically revert to investigating the original allegations and not the breach.

Voluntary Resolution

- Institutions may seek to affirmatively resolve complaint before conclusion of the investigation by initiating negotiations for a Resolution Agreement (a/k/a “302 Agreement,” because it’s defined under CPM Section 302)
- Appropriate when the institution agrees to forego the investigation and enter a compliance agreement on some or all issues
- OCR reserves the right to include any fact learned to date in the Resolution Letter, which may create a strategic advantage in requesting a Voluntary Resolution early if you know that is where it may be headed
- New change to Section 302 allows recipients an opportunity (5 days) to review the draft resolution letter, usually while negotiating draft resolution agreement

Phase III: Data Request

- OCR will typically include a Data Request with the notification letter:
 - Requests documents, policies, practices, data and explanations
 - Offers opportunity for the institution to provide additional information at its discretion
 - OCR is exempt from FERPA
- Must respond within date on letter, usually 10-30 days
 - Brief extensions may be granted on request
 - Keep in mind OCR has an internal clock for case processing and that clock often runs from date OCR receives complaint

Phase III: Strategies

- Maintain updated and comprehensive records of trainings
- Review accessibility and consistency of policies
- Begin gathering information *promptly* upon receipt of Notification Letter; clearly communicate delays with OCR staff
- PROVIDE A NARRATIVE: An opportunity to educate OCR staff; can also propose witnesses
- OCR does not have authority to compel production in a specific form or create materials; obligation can be satisfied by permitting OCR to come onsite and permit access
- All data submitted to OCR is subject to a FOIA request; consider redactions, as appropriate

Phase IV: Onsite Visit

Types of Activities:

- **Interview employees**, including Title IX Coordinator and Deputies; Director of Student Conduct; Dean of Students; Resident Directors; Athletics Director; coaches; etc.
- **Interview students**, including those trained to respond to reports of sexual misconduct; member(s) of the judiciary/hearing board; members of student organizations; students involved in the grievance process
- **Focus group meetings**, involving community members (including students) who wish to meet with OCR to share their perception of climate on campus regarding presence and effects of sexual harassment
- **File review**, if not already completed (May ask OCR to only review certain sensitive material on campus so it does not end up in the government file.)

Phase IV: Strategies

- Be involved: The process can take clumps of days over an extended period of time. Be judicious in choosing battles
- Identify / suggest relevant witnesses to OCR
- Prepare witnesses
 - Demystify OCR/DOJ staff by explaining types of questions
 - Provide witnesses with relevant policies/procedures
 - Evidentiary rules don't apply; OCR will weigh hearsay in certain situations – explain this to witnesses
 - Share OCR "Rights of Witnesses" document

Phase IV: Strategies

- Determine appropriate role of counsel:
 - Will counsel sit in on interviews? Will counsel be able to ask limited questions?
 - Certain lower level employees may have right to refuse to have anyone present during interview and to refuse to reveal interview content
- This is an opportunity to:
 - Demonstrate ongoing compliance efforts to OCR
 - Supplement data response as new information becomes apparent
 - Develop a relationship with OCR staff who will be critical in remaining phases of the case



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Phase V: Compliance Determination

- If OCR determines the institution was out of compliance with a legal requirement, it will issue a Resolution Letter and a Resolution Agreement:
 - Resolution Letters are fact-intensive summaries that apply the law to OCR's factual findings, but OCR makes clear that they are not formal statements of OCR policy
 - The Resolution Agreement then sets forth the agreed upon steps the institution will take to correct the compliance concern
 - Resolution Agreements typically include specific monitoring requirements that often involve continued oversight by OCR



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Phase V: Compliance Determination

- OCR may end Resolution Agreement negotiations at any time if there is an “impasse” or if 90 day period expires. Letter provides OCR will issue findings within 10 days if resolution is not reached
- If institution and OCR are still unwilling or unable to negotiate, OCR will issue a Letter of Impending Enforcement Action
- After that, OCR will initiate administrative enforcement proceedings to suspend, terminate, or refuse to grant or continue Federal financial assistance, or refer to DOJ for litigation
- OCR may also move to defer any new or additional Federal financial assistance to school

Phase V: Examples

Typical requirements in resolution agreements:

- Mandatory training, with OCR potentially reviewing and approving training content. Occasionally, OCR must approve trainer(s).
- Revision of policies and submission of policies to OCR for approval within a specific period.
- Conduct climate surveys or other assessments in the area of concern.

Phase V: Strategies

- Seek details on findings to understand how to narrow agreement terms to findings:
 - Discuss proposed terms and how they align with legal/factual concerns
 - Review and be prepared to discuss OCR recent resolution letters addressing the same statute and similar facts
- Focus on flexibility for the institution
 - What is a realistic time period for compliance?
 - Have a candid conversation to try to determine OCR's internal flexibility (or inflexibility – often not driven by regional office) on certain issues, *e.g.*, timing



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In Summary ...

- An OCR investigation requires significant internal resources to address data requests and onsite visits
- Be an active participant, as appropriate, in each stage of the process
- Identify and begin taking steps to remedy possible vulnerabilities upon notice of complaint
- Organize files and processes as part of school's regular operations – not just if there is an OCR investigation



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Questions?

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Note

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Title IX Coordinator Training Online Course

Class Five: Title IX Training & Policies

Amy C. Foerster
Attorney and Higher Education Professional

Melinda Grier
Melinda Grier Consulting & Novus Law Firm, Inc.

Janet P. Judge
Partner, Holland & Knight LLP

PLEASE NOTE: Training Course Only. Does Not Constitute Legal Advice.

Class Overview



- Audiences To Be Trained
- Elements of a Good Training Program
- Benefits and Perils of Trauma-Informed Training
- Auditing Training Materials
- Developing and Revisiting Policies
- Records Retention and Posting

Who Do You Train?

3

The Regulations (Title IX Personnel)

- Title IX Coordinators
- Investigators
- Decision-makers
- Anyone who facilitates an informal resolution process



4

Consider Training Others, even though not Required by the Regulations

- Title IX staff who are not identified by the regulations
- Officials With Authority to take corrective measures
- Other individuals with the responsibility to report sexual harassment – former Responsible Employees
- Campus Safety Authorities (CSAs)
- The Campus Community

Elements of a Good Training Program

Planning & Preparation

- Identify who must or will be trained on what topics
- Identify who will conduct training
- Identify the method that will be *most effective* and efficient for those to be trained and trainers
 - Live training v. on demand v. hybrid
 - Should groups be combined?
 - When should training occur?
- Consider training resources and campus culture around training
- Ensure training is without bias or stereotypes
 - Complainants vs. Respondents
 - Balanced without regard to gender or other classifications



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Required Training

A school must ensure that Title IX Personnel (coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process) receive training on:

- the definition of sexual harassment;
- the scope of the institution's education program or activity;
- how to conduct an investigation and grievance process including hearings, appeals and informal resolution processes, as applicable; and
- how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest and bias.



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Required Training

Title IX Personnel Continued:

- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest and bias.
- Including: sex, race, ethnicity, sexual orientation, gender identity, disability or immigration status, financial ability, or other characteristic.

**Implicit bias training not required.

Required for Investigators



- Conducting a fair and thorough investigation.
- Determining relevance in order to prepare an investigative report that fairly summarizes relevant evidence.

Required for Informal Resolution Facilitators



- How to conduct informal resolution processes (85 FR 30405)
- Document or make public?



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Required for Decision-makers:

- Training on any technology to be used at a live hearing.
- Training on issues of relevance, including how to rule on evidence during a hearing and how to apply the rape shield protections provided only for complainants.
- Include training around the presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.



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Other Training Topics

Investigator	Decision-maker
<ul style="list-style-type: none">• Questioning• Institutional policies• Responsibility for proposed findings and conclusions• Redacting privileged information• Coordinating investigation with supportive measures	<ul style="list-style-type: none">• Managing the process• Hearing protocol• Institutional policies• Questioning• Preparing findings and conclusions



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Training Transparency

- Post all training materials for Title IX personnel on publicly available website. (If no website, then make materials available for members of the public to inspect.)
- Ensure the materials posted are up-to-date, reflecting the most current training provided.



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Benefits and Perils of Trauma-Informed Training

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How to Be Fair to All

Benefits	Perils
<ul style="list-style-type: none">• May help those interviewed retrieve memories• May help those interviewed stick with the process.• May prevent re-traumatizing witnesses	<ul style="list-style-type: none">• May be perceived to favor Complainants• May be perceived as less intense questioning or cross-examination of witnesses• May be misused by untrained questioners

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Auditing Training Materials

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When & What to Audit

- Who was trained
- Was training effective
 - Measured outcomes
 - Observed outcomes
- How often to monitor
- Documenting monitoring



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Policies: Management, Notice, and Some Reminders

19

Managing the Policies

Developing policies	Monitoring policies
<ul style="list-style-type: none">• Existing institutional policies• Existing laws, agreements & practices• Identify conflicts and concurrences and harmonize or change• Include stakeholders	<ul style="list-style-type: none">• Changes in law, regulations, guidance or institutional needs• Changes in related laws or guidance, e.g. FERPA, state APA• Effectiveness• Include stakeholders

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Notification and Dissemination

- Title IX Coordinator contact info must be distributed and prominently displayed on the IHE website, and in each handbook or catalog made available to applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations with CBAs.
- Nondiscrimination Policy stating:
 - that the IHE does not discriminate on the basis of sex in the education program or activity it operates.
 - That the IHE is required by Title IX not to discriminate.
 - That the IHE's nondiscrimination policy extends to admission and employment.
 - That inquiries about the application of Title IX may be referred to the school's Title IX Coordinator, to OCR, or to both.



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Adopt & Publish

- Adopt and publish:
 - grievance procedures that provide for the prompt and equitable resolution of student *and* employee complaints alleging *any* action prohibited under Title IX.
 - a grievance process that complies with 106.45 for formal complaints as defined in 106.30.

Notice

WHAT: Notice of the school's grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the school will respond.

TO WHOM: applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the school.



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Policy Decision Point: Framework

All-in-One Policy

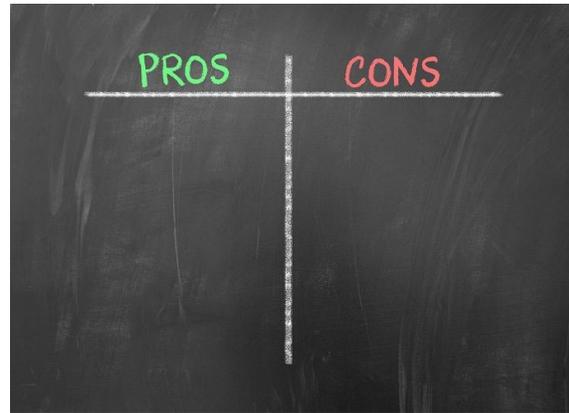
1. Treat all the Same; or
2. Decision Trees

Two Policies: If not TIX, then ...

1. Title IX Regulation+
2. Everything Else

Three plus:

1. TIX Regulation Conduct
2. Other Sexual Misconduct
3. Other Prohibited Conduct



Policy Definitions:

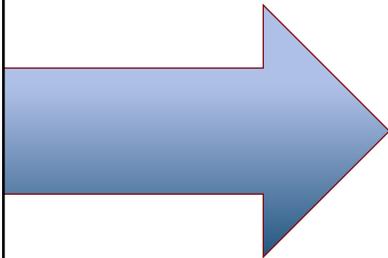
- Actual Knowledge
- Complainant/Respondent
- Supportive Measures
- Formal Complaint
- Prohibited Conduct
 - Sexual Harassment
 - Sexual Assault
 - Dating Violence
 - Domestic Violence
 - Stalking
- Consent
- Title IX Coordinator
- Officials with Authority
- Other Reporters, if any.
- Confidential Resources
- Standard of Review
- Evidence
 - Directly Related
 - Relevant
 - Weight
- Deliberate Indifference
- Education Program or Activity
- Informal Resolution
- Emergency Removal



Please Note:

Where there is a conflict between State or local law and Title IX regulations, Title IX regulations win.

Don't Forget Clery ... Annual Security Report Policies



- Description of proceedings and processes for filing and handling complaints of sexual assault, dating violence, domestic violence and stalking.
- The standard of evidence used in disciplinary actions for covered offenses.
- List of possible sanctions for covered offenses.
- Range of protective measures available to victims.
- Assurances that proceedings will be prompt, fair, impartial & conducted by trained officials.
- Equal opportunity for parties to have an advisor chosen by the party.
- Simultaneous notification of result, process for appeal and when final.
- Description of primary prevention and awareness programs.
- Procedures for victims to follow if a covered crime occurs.
- Notification of services and accommodations for victims.

Record Retention 7 Years



- For formal complaints:
 - Investigation
 - Determination of responsibility
 - Transcripts or recordings of hearings
 - Sanctions, if any
 - Remedies to Complainant, if any
 - Appeal, if any, and result
 - Informal resolution and result, if any
- For all reports, regardless of whether there is a formal complaint:
 - Actions taken and supportive measures, if any, provided in response to a formal complaint.
 - Basis for a determination that the institution was not deliberately indifferent.
 - Measures to restore or preserve equal access or reasons why not providing support was not clearly unreasonable under the circumstances.
- All training materials for Title IX personnel

Questions?

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Title IX Coordinator Training Online Course



Class Six: Athletics Equity and Applying the New Regulations

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Melinda Grier
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Janet P. Judge
Partner, Holland & Knight LLP

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1

Class Overview



- Athletic Equity
- Pay Equity
- Practical Effects of the New Regulations
- Training/Related NCAA Requirements

2



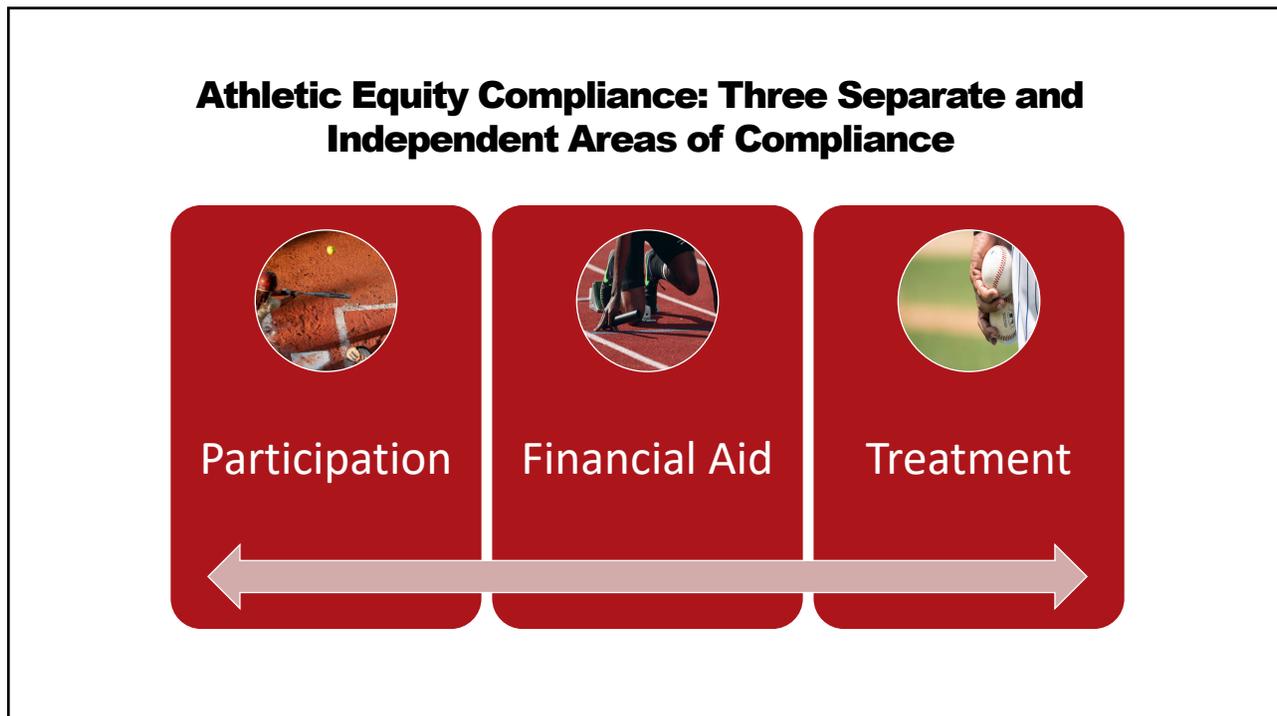
3

A YouTube video player is embedded in the slide. The video thumbnail shows a cartoon with three circular frames. The top frame shows a group of people sitting at a table. The bottom left frame shows a person sitting on a throne. The bottom right frame shows a group of people standing together. The video title is 'Sources of Law, Title IX Enforcement, and the impact of Pandemics (NCAA does NOT enforce Title IX)'. Below the video player, the text 'Schoolhouse Rock:' is followed by the URL <https://www.youtube.com/watch?v=tEPd98CbbMk>. The NACUA logo and name are visible in the bottom left corner of the slide.

4

The screenshot shows the EADA (Equity in Athletics Data Analysis) website. At the top, it says "U.S. DEPARTMENT OF EDUCATION" and "EADA Equity in Athletics Data Analysis". There are navigation icons for home, help, search, and menu. The main heading is "The tools you need for Equity in Athletics analysis". Below this are five colored boxes with descriptions of tools: "Get Data for One School" (blue), "Compare Data for Multiple Schools" (orange), "Download Custom Data" (teal), "Generate Trend Data" (dark blue), and "Download Data" (yellow-green). At the bottom, a black banner reads "PART 1: ATHLETIC EQUITY".

5



6

Activities counted as Sports for purposes of Title IX

- NCAA Championship sports are presumed to be countable.
- For non-NCAA sports, a review may consider the following, among other factors:

PROGRAM STRUCTURE AND ADMINISTRATION —

Is the program provided a budget, support services, access to coaching, equitable eligibility for athletics scholarships and awards, and are the student-athletes recruited in a manner consistent with established varsity sports?

TEAM PREPARATION AND COMPETITION —

Does the team practice and compete in a manner consistent with established varsity sport programs? Included in this review, among other factors, are the following considerations:

- Are there standardized rules of play and competition criteria for the sport?
- Are the support services provided based on the competitive needs of the program?
- Is post-season play determined by regular season performance?
- Is team selection based on athletics ability?

Dear Colleague Letter: Athletic Activities Counted for Title IX Compliance (OCR 2008), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20080917.html>.

7

Title IX Countable Participation Opportunity

OCR defines a Title IX Participant as one:

1. who is receiving the institutionally sponsored support normally provided to athletes competing at the institution involved (e.g., coaching, equipment, medical and training room services) on a regular basis during a sport's season; **and**
2. who is participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; **and**
3. who is listed on the eligibility or squad lists maintained for each sport; **or**
4. who, because of injury, cannot meet 1, 2, or 3 above but continues to receive financial aid on the basis of athletic ability.

Per guidance, "OCR considers a sport's season to commence on the date of a team's first intercollegiate competitive event and to conclude on the date of the team's final intercollegiate competitive event."

Dear Colleague Letter, *Clarification of Intercollegiate Athletics Policy Guidance: the Three-Part Test*, OFFICE FOR CIV. RIGHTS, U.S. DEP'T OF EDUC. (Jan. 16, 1996)) available at <https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>.

8

What about . . .



9

Equitable Participation: The Three Part Test



**Substantial
Proportionality**

Prong 1.

Male and female intercollegiate participation is provided in numbers substantially proportionate to their respective full-time undergraduate enrollment, or



**History and Ongoing
Practice of Expansion**

Prong 2.

The institution has a history and continuing practice of program expansion responsive to the developing interests and abilities of the members of the underrepresented gender, or



**Full Accommodation
of Interest and Ability**

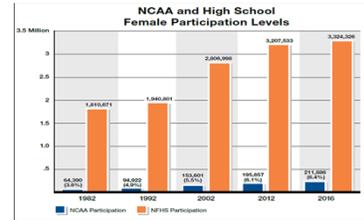
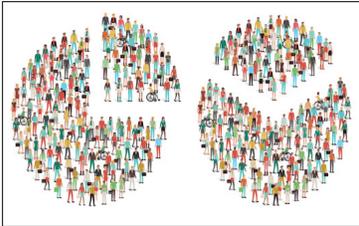
Prong 3.

The interests and abilities of the members of the underrepresented gender are fully and effectively accommodated by the present program.

Dear Colleague Letter, *Clarification of Intercollegiate Athletics Policy Guidance: the Three-Part Test*, OFFICE FOR CIV. RIGHTS, U.S. DEP'T OF EDUC. (Jan. 16, 1996)) available at <https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>.

10

Sport Cuts that Involve the Underrepresented Sex: Typically Require Prong 1 Compliance



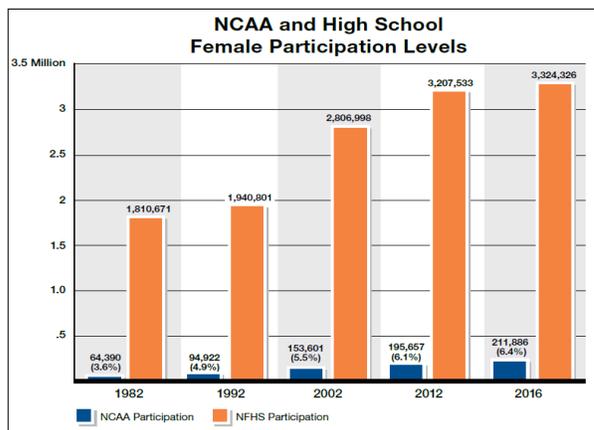
ENFORCEMENT —

OCR: Investigation. Letter of Findings. 302 Resolution Agreement. Referral to DOJ.

Court: No Administrative Exhaustion. No Cap on Damages. Injunctive Relief. Class Actions. Attorneys Fees.

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Prong 3: Accommodating Interest & Abilities



Does the current line up of sports effectively accommodate the athletic interests and abilities of the underrepresented sex?

What is the underrepresented sex?

Is there:

- unmet interest in a particular sport;
- sufficient ability to sustain a team in the sport; and
- a reasonable expectation of competition in the normal competitive area?

How much interest/ability/competition is enough?

What is the relevant pool to be assessed?

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Equitable Levels of Competition:

The competitive schedules for men's and women's teams, on a program-wide basis, afford proportionately similar numbers of male and female athletes equivalently advanced competitive opportunities;

OR

There exists a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex.

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Athletics-Based Financial Aid/Scholarship Equity



"If any unexplained disparity in the scholarship budget for athletes of either gender is 1% or less for the entire budget for athletic scholarships, there will be a strong presumption that such a disparity is reasonable and based on legitimate and nondiscriminatory factors. Conversely, there will be a strong presumption that an unexplained disparity of more than 1% is in violation of the "substantially proportionate" requirement.

We would like to clarify that use of statistical tests is not appropriate in these circumstances."

Dear Colleague Letter – [Bowling Green](#) (July 23, 1998)

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Non-Exhaustive Areas of Review	Men's Program Overall	>/</=	Women's Program Overall
Equipment and Supplies (Apparel and Equipment)			
Scheduling (Practice, Competition)			
Travel (Mode, Housing, Food)			
Tutors/Academic Services (Personnel, Services)			
Coaches (Quantity, Quality, Compensation*)			
Facilities/Spaces (Practice, Competition, Locker Room)			
Medical (Personnel, Experience, Availability)			
Housing & Dining (Home)			
Publicity/Communications (Sports Information & Marketing)			
Support Services (Administrative, Office, Support)			
Recruiting (Financial & Other Support)			

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Sources of Funding

It's not a dollar to dollar analysis. Focus on goods and services. Where differences exist, OCR may focus on funding.

Private donations are institutional dollars and goods and services provided through private funding still count. In other words, those goods and services are included in the equity analysis.

See, e.g., Chalenor v. Univ. of North Dakota, 142 F. Supp. 2d 1154 (D.N.D. 2000)



Are the Disparities Significant? OCR v Judicial Review



Difference, on the Basis of Sex

- in benefits or services that has a . . .
- negative impact on athletes of one sex . . .
- when compared with benefits or services available to athletes of the other sex.

Disparity:

- So Substantial as to Deny Equal Opportunity to Athletes of One Sex.

Disparities that are not Substantial. . .

- Evidence to be Evaluated on a case by case basis.

See, e.g., Policy Interpretation, 44 Fed. Reg at 71,417 (1979).

Retaliation Prohibited

Retaliation is intentional discrimination on the basis of sex.

One who witnesses and complains about discrimination is protected from adverse action they encounter because of the complaints.

Recognition that coaches, teachers, administrators and students are in the best position to witness and alert schools

See, e.g., [Jackson v. Birmingham Bd. of Educ.](#), 544 U.S. 167 (2005)



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Compensation and Pay Equity

- **Title IX Program Review:**
Coaches of women's sports as compared to coaches of men's sports, and usually only when coaching inequities are otherwise identified.
- **Title IX Employment/EPA:**
Female coaches' salaries compared to male coaches' salaries.
 - Equal Pay for Equal Work
 - Non-Discriminatory Justifications
- **OFCCP Audits/Title VII/State Law**
- **Documenting & Auditing Compensation Systems/Approaches**



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Application (per the preamble):

- “[T]he Department declines to address other topics . . . such as pregnancy, parenting, or athletics under Title IX, coverage of Title IX to fraternities and sororities, whether speech codes discriminate based on sex, funding intended to protect women or young adults on campus, funding cuts to girls’ programs by recipients, or forms of harassment other than sexual harassment.”
- These complaints “may be referred” to the recipient’s Title IX Coordinator to review under the grievance procedures required by these Regulations.
- “[T]he handling of non-sexual harassment sex discrimination complaints brought by students and employees (for instance, complaints of sex-based different treatment in athletics . . .) remains the same as under current regulations (*i.e.*, recipients must have in place grievance procedures providing for prompt and equitable resolution of such complaints).”

See Title IX Regulations, 85 FR 30026 at <https://www.federalregister.gov/documents/2020/05/19/2020-10512/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>

 The footer contains the NACUA logo on the left and the text 'National Association of College and University Attorneys' on the right, both in a white font against a red background.

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Infusing Equity: Consider a Supplemental Policy

Sample Language:

This policy supplements the overall school policy prohibiting sexual harassment, [provide link] which also applies to all members of the athletics department, both staff and student-athletes.

School U. values the educational aspect of athletics and as such offers opportunities to compete in a [NAIA/NCAA] Division [I, II or III] varsity athletics program and is a member of the [name] conference[s], club level and intramural programs. School U. believes that its student-athletes should be provided gender equitable participation opportunities, receive gender equitable athletic scholarships, and be afforded gender equitable treatment overall.

To report an athletics gender equity concern or to a request for varsity status for an athletic team not currently offered at the varsity level, please contact School U's Title IX Coordinator, titleix@schoolu.edu, Office 405, University Hall, 8-4490.

No Retaliation Policy:

Employees and/or students who ask questions, seek advice or report a suspected violation of this policy are protected by School U's no retaliation policy. Retaliation will not be tolerated. If you suspect that you or another employee may be the victim of retaliation, you should contact TIX immediately. Those who violate the No Retaliation policy are subject to discipline.

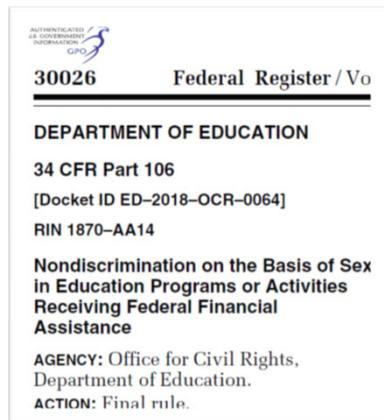
IMPORTANT: Consider how complaints would be managed and findings would be implemented.



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Discussion



- Title IX Coordinator and Deputies
- Actual Knowledge/Reporting Responsibilities*
- Definitions of Prohibited Conduct
- Supportive Measures*
- Formal Complaints/Notice/Investigation
- Confidentiality
- Advisors
- Jurisdiction/Mandatory v. Permissive Dismissals
- Emergency Removals*
- Informal Resolution
- Findings/Sanctions/Appeals*



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Notice:

- Reporting in Athletics
 - Title IX Coordinator in Athletics?
 - Officials with Authority to address Sexual Harassment?
 - Who else is required to report?
 - Confidential? By licensure?
 - Limited confidentiality? Why?



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Athletics:

Supportive Measures

- Can not punish, discipline, or unreasonably burden the respondent.
- Denials must be documented.



Emergency Removals

- A school may remove an individual from one or more education programs or activities in situations where the person poses an immediate threat to the physical health and safety of any individual before an investigation into sexual harassment allegations concludes (or where no grievance process is pending).
 - The school makes an individualized assessment that “an imminent threat to the physical health or safety of any person, *arising from* sexual harassment allegations, justifies removal,” **and**
 - The school provides an opportunity to challenge its determination.
- An emergency removal cannot be imposed simply *because* an individual has been accused of sexual harassment.
- The Regulations do not prohibit a school from addressing violations of a school’s code of conduct, policies, or laws, **provided the conduct does not constitute Title IX sexual harassment or is not “arising from” Title IX misconduct allegations.**

Findings, Sanctions, & Appeals



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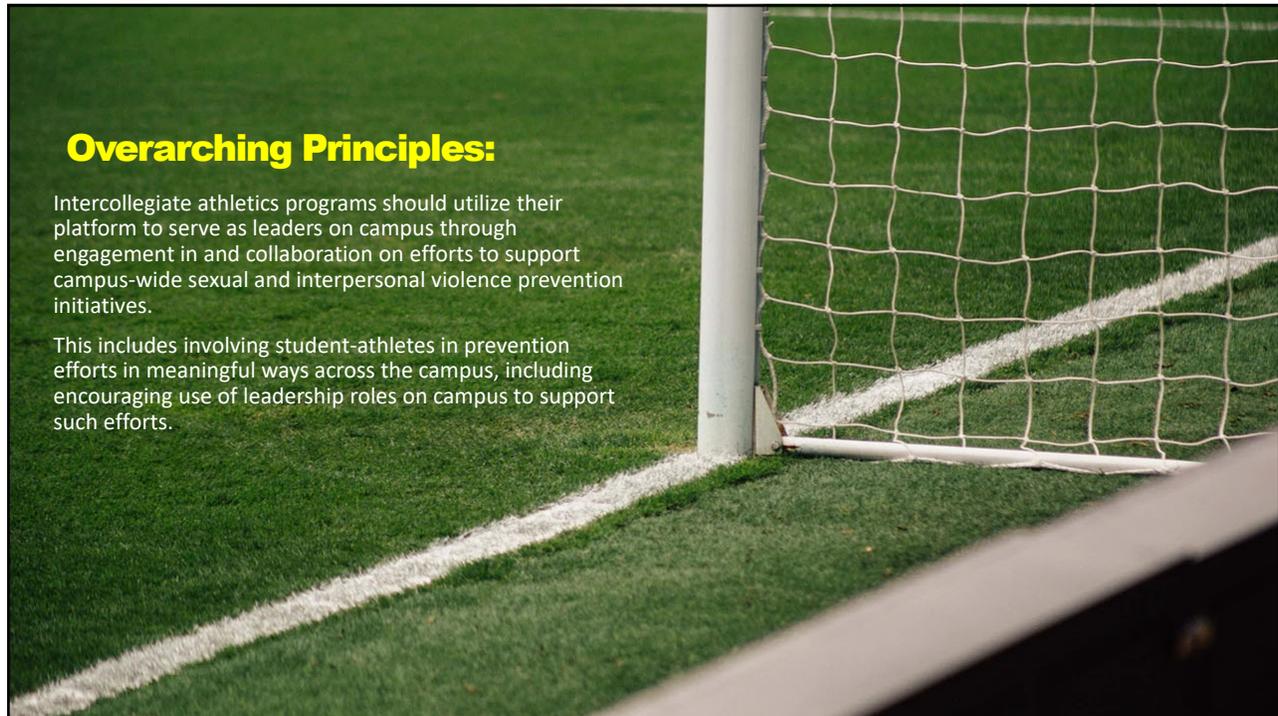
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Training:

- Annual Per NCAA Requirements
- All Staff
 - Administration
 - Team Doctors/ATC
 - Support Staff
 - Coaches
 - GAs and Paid Student Workers
- Student-Athletes
- Cross Campus Engagement
- Reporting Protocols
- Complaint Avenues
- In Person and Safe
- Protocols for Outside Speakers
- Importance of Face Time
- Retention/Time of Day/Time of Year
- Sport Examples
 - Consider Student Involvement/Investment
- Culture of Sport/Supervisor
- Confidential Resources
- Support for Complainants and Respondents
- Spotlight/Speed/Updates/Engagement
- Head Coach Culture of Compliance

Complying with NCAA Requirements: Policy and Attestation

- NCAA Board of Governors adopted a Policy on Campus Sexual Violence on Aug. 8, 2017.
- Requires annual attestations signed by the Director of Athletics, Title IX, and President (CEO).
- April 30, 2020 BOG revisions to the Policy expanded its reach and attestation content, effective Spring 2023.
- Policy and FAQ are on the NCAA Website
- Task Force
- In the meantime:
 - Consider Discussions with Title IX, General Counsel, and others on campus.
 - Explore Compliance Position.
 - Consider Intersection with the new Regulations around Permissive Dismissals and Confidentiality.
 - Forward Comments to Regional Conference or NCAA Office.



Overarching Principles:

Intercollegiate athletics programs should utilize their platform to serve as leaders on campus through engagement in and collaboration on efforts to support campus-wide sexual and interpersonal violence prevention initiatives.

This includes involving student-athletes in prevention efforts in meaningful ways across the campus, including encouraging use of leadership roles on campus to support such efforts.

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Attestation:



1. The athletics department is informed on, integrated in, and compliant with institutional policies and processes regarding sexual violence prevention and proper adjudication and resolution of acts of sexual and interpersonal violence.
2. The institutional policies and processes regarding sexual violence prevention and adjudication, and the name and contact information for the campus Title IX coordinator, are readily available within the department of athletics, and are provided to student-athletes.
3. All student-athletes, coaches and staff have been educated each year on sexual violence prevention, intervention and response, to the extent allowable by state law and collective bargaining agreements.

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Attestation, cont'd:

Nos. 4-6 require attestation beginning with the 2022-2023 academic year attestation:

4. All prospective, continuing and transfer student-athletes have completed a disclosure form annually related to their conduct that resulted in an investigation, discipline through a Title IX proceeding or in a criminal conviction for sexual, interpersonal or other acts of violence.** Failure to accurately and fully disclose investigatory activity, a disciplinary action or criminal conviction could result in penalties, including loss of eligibility to participate in athletics as determined by the member institution.
5. Institutions have taken reasonable steps to confirm whether prospective, continuing and transfer student-athletes have been under investigation, subject to discipline through a Title IX proceeding or criminally convicted of sexual, interpersonal or other acts of violence.** In a manner consistent with federal and state law, all NCAA member institutions must share information related to these matters with other member institutions when a student-athlete attempts to enroll in a new college or university.
6. An institution choosing to recruit a prospective student-athlete or accept a transfer student-athlete must have a written policy that directs its staff to gather information that reasonably yields information from the former institution(s) to put the recruiting institutional leadership on notice that the prospect has been under investigation, disciplined through a Title IX proceeding or a criminal conviction for sexual, interpersonal or other acts of violence.** Failure to have a written policy and to gather information consistent with that policy could result in penalties.

Further, the athletics department will cooperate with college or university investigations into reports and matters related to sexual and interpersonal violence involving student-athletes and athletics department staff in a manner compliant with institutional policies for all students.

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FAQs:

- **When did the policy begin?** August 2017. The most recent amendments are effective in the 2022-23 academic year. The annual attestation period runs from March 1 – May 15 each year.
- **What is the deadline for completing the annual education for coaches, student-athletes and athletics staff?** For the 2020-21 academic year, education should be completed prior to the May 15, 2021 deadline so that presidents or chancellors, athletics directors and campus Title IX coordinators can attest to their compliance by the May 15 deadline. The attestation form will be available electronically in the NCAA Learning Portal and on ncaa.org/csvpolicy beginning March 1, 2021 and must be completed by May 15, 2021. This is a firm deadline.
- **How do I upload my completed form?** Each school's director of athletics must upload the final form in the NCAA Learning portal.
- **What type of education meets the expectations of the policy?** The policy allows member schools to determine the types and manner of education provided. The [NCAA Sexual Violence Prevention Tool Kit](#) can assist member schools in this effort. The tool kit provides checklists for campus collaboration and educational resources created specifically for student-athletes. Those resources include the online curriculum myPlaybook, which includes a course on sexual violence prevention.
- **What happens after the deadline?** A list of schools that have and have not attested to the requirements of the policy will be presented in a report to the Board of Governors at their August meeting each year. Once approved, the lists will be published on ncaa.org.
- **Which athletics staff members are expected to complete the education requirement?** While the policy does not provide a specific definition of staff for purposes of the educational prong and provides institutions the discretion to determine how far to extend their educational efforts (e.g. whether to include temporary workers, consultants or contractors), there is an expectation that all education will meet the requirements of local, state and federal law. All coaches including part-time, volunteer and assistant coaches, as well as athletics administrators full-time and temporary, and participating student-athletes are expected to complete the education.
- **If I have additional questions about the policy where should I go?** Questions may be sent to questions@ncaa.org. This inbox will only answer questions related to the policy and attestation process.

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At the bottom of the slide, there is a red and white striped pattern. Overlaid on this pattern is the NACUA logo in white, which includes the stylized 'N' and the letters 'NACUA'. Below the logo, the full name 'National Association of College and University Attorneys' is written in a smaller, white, sans-serif font.

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