

Addressing Inappropriate Employee Behaviors

20-Minutes-to... *Trained*

Please note that this video module and some of the supplemental materials were created prior to the 2020 Title IX regulations, thus the information contained within may not coincide perfectly with current regulations, as it was filmed in 2019. Any deviation is minor.

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Learning Outcomes

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Discussion Questions

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Case Studies

Cameron is an employee who has come to file a complaint about David, another employee who is in

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As the Title IX Coordinator at a community college, you were recently notified that a sociology faculty member, Professor Weber, had written a somewhat inflammatory memo regarding pregnancy and wage discrimination and circulated it throughout the department. Professor Weber, an older, outspoken, and staunchly conservative lifelong academic, is known for enga

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sex-based, written behavior that is so pervasive that you would be hard pressed to find a member of the community who didn't know about it."

In your initial meeting with Professor Weber, he told you that he was stunned by the community response to his memo, insisting that not only was the memo never intended for anyone outside of his department, but that he was simply offering a differing viewpoint on a topic and never intended to offend anyone. He added that it was exactly this type of thin-skinned, overreaction that he was referring to in his memo and that undermines the free exchange of ideas.

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can complete their job responsibilities without interference from the other. Ed should also be coached to not engage in conversations about personal matters between employees beyond providing employment-related supports to limit the impact of the issue on the workplace.

Scenario C

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Introduction

If you've tried to read the college's new procedures for addressing sexual offenses, we can't blame you if it's been a challenge to understand some of their complexity. This brief guide is intended to help explain the changes and make the new resolution process more transparent to you.

A Brief History

In 2011, the Obama-era Department of Education (ED) perceived that colleges needed to be more victim-centered in addressing sexual

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- The regulations have now created options for informal resolution that were discouraged by the Dear Colleague Letter.
- To protect the due process rights of respondents, colleges are required to use a formal grievance process for certain types of allegations. That formal process includes an investigation, a live hearing, questioning of the parties through their advisors, a determination by an objective decision-maker, and an appeal.

As a result of these changes, the college has worked hard to balance the rights of all parties, and to

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applies, regardless of what process each party might prefer. For a college to choose Process B when Process A applies would be considered a form of retaliation against the respondent. Let's take each in turn to better explain this.

1. The complaint falls within Title IX AND is covered by the 2020 Title IX regulations

The complaint will fall in this category when it alleges sexual harassment, sexual assault, domestic

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4. The complaint does not fall within Title IX or VAWA Section 304

Finally, where the complaint falls within neither Title IX nor VAWA Section 304, the college is not required by law to act on the complaint. However, the college will act with discretionary jurisdiction, meaning that it still thinks it is important to address the allegations even if law does not require it. The complaint can be then addressed under Process B. If there is no formal complaint made, the allegation can be addressed using Process B without needing to go through a technical dismissal first with respect to Process A.

Hopefully, what you now understand from this section is that the incidents that fall within Process A occur within a narrow range. They must fit the description of sexual harassment, sexual assault, domestic violence, dating violence, or stalking (as defined by college policy, if proven) in the United States, where the college controls the context of the incident and has control over the respondent and the complainant is participating in or attempting to participate in the college's educational program. Outside of that, all sex offenses or sex discrimination complaints will fall within Process B, including those, for example, that happen between two students, off-campus, on private property.

The last part of jurisdiction to understand is dismissal. As noted above, the college is mandated to and must dismiss a formal complaint or any allegations therein if, at any time during the Process A investigation or hearing, it is determined that:

- The conduct alleged in the formal complaint would not constitute sexual harassment, sexual assault, dating violence, domestic violence or stalking as defined in policy, even if proved; and/or
- The conduct did not occur in an educational program or activity controlled by the school (including buildings or property controlled by recognized student organizations), and/or the school does not have control of the respondent; and/or
- The conduct did not occur against a person in the United States; and/or
- At the time of filing a formal complaint, a complainant was not participating in or attempting to participate in the education program or activity of the recipient.²

Then there are three permissive dismissal provisions. The college may dismiss a formal complaint or any allegations therein if, at any time during the investigation or hearing:

- A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; or
- The respondent is no longer enrolled in or employed by the recipient; or
- Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

Upon any dismissal, the college will send written notice of the dismissal and the rationale for doing so simultaneously to the parties. This dismissal decision is appealable by any party under the college's procedures for appeal. The effect of a dismissal (permissive or mandated) is either that the complaint is done, or that the school reinstates it, usually within Process B. Even if a complaint is done, supportive measures are still made available to the parties. Understanding these mechanisms

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The First Amendment and Employer Regulation of Employee Speech

WHO IS SPEAKING?	ABOUT WHAT?	CAN EMPLOYER IMPOSE DISCIPLINE?
1. Employee of Private Employer	Anything	Yes, First Amendment does not apply, unless concerted action speech of union(izing) employees, which has greater protections

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individual who was retaliated against receives redress and to ensure that the recipient complies with the prohibition against retaliation in the future. OCR will determine which remedies, including monetary relief, are appropriate based on the facts presented in each specific case.

Steps OCR could require a recipient to take to ensure compliance in the future include, but are not limited to:

- training for employees about the prohibition against retaliation and ways to avoid engaging in retaliation;
- adopting a communications strategy for ensuring that information concerning retaliation is continually being conveyed to employees, which may include incorporating the prohibition against retaliation into relevant policies and procedures; and
- implementing a public outreach strategy to reassure the public that the recipient is committed to complying with the prohibition against retaliation.

If OCR finds that a recipient engaged in retaliation and the recipient refuses to voluntarily resolve the identified area(s) of noncompliance or fails to live up to its commitments in a resolution agreement, OCR will take appropriate enforcement action. The enforcement actions available to OCR include initiating administrative proceedings to suspend, terminate, or refuse to grant or continue financial assistance made available through the Department to the recipient; or referring the case to the U.S. Department of Justice for judicial proceedings.⁵

OCR is available to provide technical assistance to entities that request assistance in complying with the prohibition against retaliation or any other aspect of the civil rights laws OCR enforces.

Thank you for your help in ensuring that America's educational institutions are free from retaliation so that concerns about equal educational opportunity can be openly raised and addressed.

Sincerely,

/s/

In the past decade, full-time Title IX Coordinators and Title IX offices have become more common for schools, colleges, and universities. Having pools of Title IX-trained personnel has even grown in popularity, both within and across organizations. With the 2020 Title IX regulations, the formation and operation of Title IX teams has become a necessity for recipients to achieve compliance.

Although ATIXA usually directs its position statements to Title IX personnel, this statement is directed to senior-level campus, school, and district leaders. It is vital for you to understand the complexity and challenges ahead under Title IX.

As a foundation, recall that compliance with Title IX of the Education Amendments of 1972 is mandatory for all recipients of federal financial assistance, and that a failure to comply can result in investigation and accountability from Offices for Civil Rights within government agencies and costly lawsuits, in addition to negative publicity and reputational damage.

What Do Senior-Level Leaders and Stakeholders Need to Know?

First, we encourage our Title IX administrator members to share this Position Statement with key school, campus, and district stakeholders and leaders. To these leaders, Title IX is now likely one of the most complex regulatory compliance obligations your institution or district is facing.

The U.S. Department of Education (ED) needed 2,068 pages to explain 15 pages of new federal regulations. ATIXA's Regs Comprehensive Implementation Guide needed 130 pages more to explain those 15 pages and translate them into operational precepts for the field.

ED, through these new regulatory requirements, promotes a new and/or expanded bureaucracy of Title IX personnel, operating under a complex set of rules for dramatically expanded due process protections, transparent sharing of all evidence collected during an investigation, formal live hearings, advisors³, sophisticated rules of questioning and evidence, and mandated appeals.

ED is turning your educational hearings into mini-courtrooms and expanding employee rights that may not have previously existed, with live hearings, cross-examination, and appeal requirements.

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What Will Happen if You Don't Prioritize Title IX Compliance, Staffing, and Training?

Each of the roles described above, except for advisors, has an attached training requirement per the regulations. The roles are all complex, sophisticated, and multifaceted. As noted above, many of the skills may exist in-house already for some institutions and organizations, but many others will need to build and expand capacity. And although there is no training mandate for advisors in the regulations, most institutions will likely want to provide institution-appointed advisors with information or training about the process and their role in it, at the very least.

What are the risks? Losing the confidence of your community. Reputation. Investigation and accountability from Offices for Civil Rights within government agencies. Lawsuits that allege breach of contract, negligence, Title IX claims, Section 1983 actions, and more.

We are concerned that the scope of changes in the new regulations present a real risk of systemic failure for institutions also facing severe economic pressures if leaders underestimate what is being added to the compliance requirements, and what levels of your support will be essential to meet them.

We hope you will also bring creativity to your staffing needs. We are seeing schools located within systems developing cooperative agreements for shared resources. We are seeing the same with state-based coalitions, or schools located within similar geographic areas. Local advisor pools may also make a lot of sense. We are also seeing more and more schools engage external investigators, and now, hearing chairs and decision-makers. That may represen



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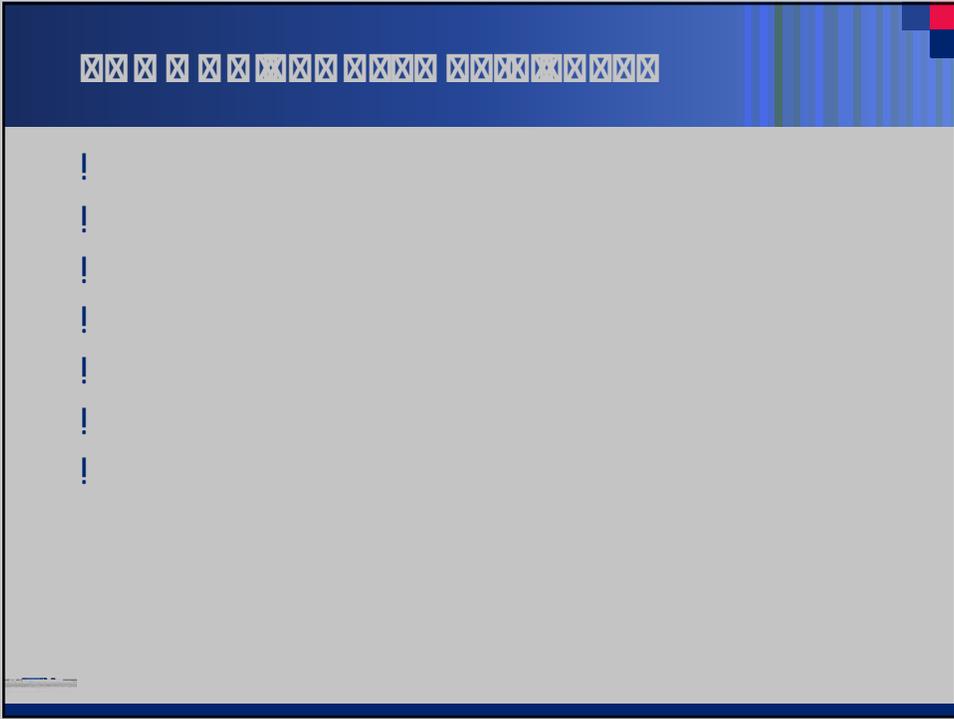
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- ! Evolving ideas of appropriate/acceptable interaction
- ! Notions re: sex/gender (stereotypes/conformity)
- ! Power imbalances
- ! Consensual relationships
- ! Unwanted vs. unwelcome conduct
- ! Social media/attention on misconduct in institutional setting

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