U. S. Department of Education
Title IX Regulations

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Historical Perspective of Title IX

- Enacted in 1972
- HEW effective in 1975
- 1979 opinion Cannon vs. University of Chicago
- 2011 Dear College Letter, withdrawn of 2014 & 2017 Q&A
- 2020 Title IX regulations – Sexual harassment defined
Historical Perspective of Sexual Harassment as Sex Discrimination

The Secretary of Education amends the regulations implementing Title IX of the Education Amendments of 1972 (Title IX). The final regulations specify how recipients of Federal financial assistance covered by Title IX, including elementary and secondary schools as well as postsecondary institutions, (hereinafter collectively referred to as “recipients” or “schools”), must respond to allegations of sexual harassment consistent with Title IX’s prohibition against sex discrimination (DOE, 2020).
Sexual Harassment as Sex Discrimination

• The final regulations obligate recipients to respond promptly and supportively to persons alleged to be victimized by sexual harassment, resolve allegations of sexual harassment promptly and accurately under a predictable, fair grievance process that provides due process protections to alleged victims and alleged perpetrators of sexual harassment, and effectively implement remedies for victims (DOE, 2020).
Effective Date:
New Title IX Regulations

Final regulations are effective August 14, 2020.
Title IX Terminology

• ATIXA IS SHIFTING ITS TERMINOLOGY TO MATCH THE NEW REGS
• You/Blinn College District = Recipient
• Various titles = Title IX Coordinator
• Reporting Party = Complainant
• Responding Party = Respondent
• Resolution = Grievance Process
• ATIXA model policy offenses NCSC/NCSI = sexual assault
• Intimate Partner Violence = Dating and domestic violence
• OCR DEFINITIONS OF THESE OFFENSES MUST BE ADOPTED: Including OCR definition of Sexual Harassment, Clery Act definition of sexual assault, and VAWA definitions of DV/DV and stalking (ATIXA, 2020).
Sexual Harassment (106.30)

(1.) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct;

(2.) 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 recipient’s education program or activity (DOE, 2020).
Official with Authority

• New definition
  • Title IX Coordinator
  • Any official of the recipient who has authority to institute corrective measures on behalf of the recipient
  • Any employee of an elementary and secondary school
“Deliberate Indifference” Standard

- A recipient with actual knowledge of sexual harassment in an education program or activity of a recipient in the United States must respond in a manner that is not deliberately indifferent
- Mandatory dismissal
- Does not constitute sexual harassment (§ 106.30)
- Does not fall within jurisdiction
- Program or activity inside the United States
- Complainant participating in or attempting to participate in ed program
- Does not preclude action under another policy (General Non-Discrimination Policy, conduct code, etc.)

(ATIXA, 2020)
Designated School Official

- Standard for actual notice
- Therefore, a report must go to Title IX Coordinator or any official who has the authority to institute corrective measures
  - Most faculty in higher education do not have sufficient authority
  - Knowledge by employee who is harasser does not constitute actual knowledge by employer/recipient
- Broad implications for K-12 employees
- Restricts OCR enforcement mandate for responsible employees, but IHEs have discretion to keep current policies or define a broader mandated reporter requirement (ATIXA, 2020).
Notice

• Distinct procedural steps - actual knowledge and formal complaint
• Actual knowledge = notice of sexual harassment [or allegations] to TIXC
• Formal complaint = document filed by a complainant or signed by TIXC alleging sexual harassment against a respondent and requesting investigation
• TIXC is not party when signing formal complaint
• Constructive notice/respondent superior – insufficient under TIX, but can be acted upon discretionarily by a recipient
• Actual knowledge triggers the obligation to offer supportive measures, explain grievance process
• Formal complaint triggers the obligation to investigate
• Multiple reports mandate for TIXC to file complaint – provision removed from final regulations (ATIXA, 2020)
Jurisdiction

- Emphasizes the Davis standard:
  - Control over the harasser and the context in which the harassment occurs
  - “education program or activity” means…
    - locations, events, or circumstances under substantial control
    - any building owned or controlled by an officially recognized student organization
Supportive Measures

- Previously referred to by OCR as “interim measures”
- Non-disciplinary, non-punitive individualized services for all parties
- Must not unreasonably burden parties, protect the safety of parties and educational environment, and deter harassment
- Must be offered to complainant upon notice of harassment
- Must be available before, after, or in lieu of formal complaint
- May include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security, and monitoring of certain areas of campus (ATIXA, 2020).
Emergency Removal

- May remove a respondent from a recipient’s education program or activity on an emergency basis, provided that the school:
  - Undertakes an individualized safety and risk analysis,
  - Determines that an immediate threat to the physical health or safety of students or employees justifies removal, and
  - Provides the responding party with notice and an opportunity to challenge the decision immediately following the removal
- May place a non-student employee respondent on administrative leave during the pendency of an investigation under current procedures for doing so (ATIXA, 2020).
Advisor of Choice

- Advisor can be anyone – no restrictions in proposed regulations (though the advisor has a choice in the matter)
- Must allow advisor to be present at all meetings, interviews, hearings
  - May not restrict who may serve as advisor
  - May restrict advisor participation as long as applied equally to all parties
- If a party does not have an advisor to conduct cross-examination at hearing, the IHE must provide one
  - No fee or charge
  - Advisor of recipient’s choice
  - May be an attorney
  - Can’t be “fired” by party, but can be nullified by non-cooperation (ATIXA, 2020).
Burden of Proof on Recipient to Gather Evidence

- Procedures should clearly articulate that the burden of proof and burden of gathering evidence rests with the school, not the parties.
- So it’s not required that a respondent prove welcomeness or consent, the recipient must prove unwelcomeness or non-consent.
- “Sufficient to reach a determination”
- Equal opportunity to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.
- Evidence collected by law enforcement or any other source.
- Contracted/outsourced investigators do not absolve the school of responsibility for this provision (ATIXA, 2020).
Consent

• The DOE revises 106.30 to state that the Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault.

• It is not the respondent’s burden to prove or establish consent; questions and evidence may be posed or presented by the recipient during the recipient’s investigation and adjudication process.
Definitions

- **Sexual Harassment**: 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 recipient’s education program or activity.

- **Domestic violence** is violence committed by a person who is or has been a current or former spouse of the victim, person with whom the victim shares a child in common, or person who is cohabitating with or has cohabitated with the victim as a spouse.

- **Dating violence** is violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.
Definitions

• **Stalking** is engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for the person’s safety or the safety of others or suffer substantial emotional distress.

• **Quid pro quo** is harassment that occurs when an employee causes a student to believe that he or she must submit to unwelcome sexual conduct in order to participate in a school program or activity. Quid pro quo harassment can also occur when an employee causes a student to believe that the employee will make an educational decision based on whether or not the student submits to unwelcome sexual conduct.
Employee Obligations

What should Blinn College District employees do?

All Blinn employees are obligated to immediately notify Title IX personnel of all information regarding student sexual discrimination, harassment, misconduct and/or violence.

EXCEPTION: Blinn counselors and nurses are not obligated to notify Title IX personnel UNLESS the complainant chooses to disclose the information.
How to Report Sexual Harassment Violations

- Any student who believes that he/she OR another student has experienced sexual discrimination, harassment, misconduct or violence should immediately report the alleged acts to:
  - any Blinn Employee or Resident Assistant (RA)
  - any Blinn Campus Police Officer
  - any Blinn Counselor or Nurse (or staff) (CONFIDENTIAL)

- Violations may also be reported via:
  - Title IX Hotline at **979-830-4700**
  - Title IX Email at **titleix@blinn.edu**,
  - or by using the online reporting form
Definitions

- **A hostile environment** occurs when unwelcome conduct of a sexual nature is so severe, persistent, or pervasive that it affects a student’s ability to participate in or benefit from an education program or activity, or creates an intimidating, threatening, or abusive educational environment. A hostile environment can be created by an employee, another student, or even a visitor, such as a student or employee from another college.

- **Sexual Assault** means any offense that meets the definition of rape, fondling, incest, or statutory rape.
Definitions

- **Rape** is penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.

- **Fondling** is the touching of the private body parts of another person for the purpose of sexual gratification without consent of the victim.

- **Statutory** rape is non-forcible sexual intercourse with a person who is under the statutory age of consent.
Timeliness

- Reasonably prompt timeframes for the conclusion of the grievance process, including reasonably prompt timeframes for filing and resolving appeals
- Concurrent law enforcement investigation does not relieve the burden of the school to investigate
- Temporary delays for “good cause” and with written notice of the delay to parties
- Complexity of the investigation
- Concurrent law enforcement investigation with time-dependent release of evidence
- Delays for administrative needs are insufficient
Grievance Process

- Must include:
  - Presumption that responding party is not responsible until determination is reached
  - “Reasonably prompt” timeframes
  - Requirement to set specific timelines for major stages of the grievance process, out
  - Range of possible sanctions and remedies (mirrors Clery Act mandate)
  - Description of standard of evidence
  - Bases and procedures for appeal
  - Appeal now required, equitably, on three grounds
  - Range of supportive measures available to all parties • Note shift from “interim measures” terminology
Neutrality, Conflict of Interest, Objectivity

- Grievance process must treat parties “equitably”
- Must be designed to restore or preserve access to education programs
- Must include enhanced due process protections before disciplinary sanctions are imposed
- Prohibits conflict-of-interest or bias with coordinators, investigators, and decision-makers against parties generally or against an individual party
- All relevant evidence obtained must be objectively evaluated
- Mandates training on appropriate investigation, hearing, evidence, credibility, bias, conflict of interest (ATIXA, 2020).
Title IX
Blinn College Grievance Process

Title IX Coordinator: Initial Assessment
Notice to Parties

- Upon receipt of formal complaint, must provide written notice to the parties:
  - Relevant grievance procedures • Allegations with sufficient details: identity of parties, implicated policies, date, location if known
  - Statement that the respondent is presumed not responsible
  - Parties may request to inspect and review relevant evidence • Sufficient time to prepare a response
  - Ongoing notice
  - Any reasonable delay for good cause
  - Any additional allegations
  - All hearings, interviews, and meetings requiring attendance with sufficient time to prepare (ATIXA, 2020).
Access to Evidence & Report

- Regulations mandate creation of an investigation report
- Report fairly summarizes all relevant evidence
- What should go into a report? See our recent blog on this topic.
- Prior to the completion of the report, all evidence directly related to allegations must be provided to parties
- Parties must have at least 10 days to review and submit written responses prior to finalizing investigation report
- Parties must receive finalized report to review and submit written responses 10 days prior to hearing
- Essential to develop a clear protocol and workflow for these steps (ATIXA, 2020).
Live Hearing & Questioning

- Mandated live hearing for higher education
- Parties and witnesses must attend hearing and submit to live, advisor-led cross-examination
- Otherwise all statements submitted by absent party must be excluded
- Hearing administrator may not be Title IX Coordinator, the investigator, or the appeals officer
- Provisions for separate rooms, video-based hearing
- Must be able to clearly hear and see other parties (ATIXA, 2020).
Live Cross-Examination

- Must allow live cross-examination to be conducted exclusively by each party’s advisor
- Verbal, direct, in real time
- Each party must be permitted to ask the other party and all witnesses all relevant questions and follow-up questions
- Including questions challenging credibility
- Each question must be cleared by hearing administrator after being posed
- Questions deemed irrelevant may be excluded with rationale provided (other bases for exclusion allowed? options other than exclusion?)
- Must exclude complainant’s sexual disposition or prior sexual behavior unless specifically relevant (ATIXA, 2020).
Due Process: Evidence

- All relevant and reasonably available evidence must be considered – inculpatory and exculpatory
- No restrictions on discussing case or gathering evidence
- Equal opportunity to:
  - Present witnesses
  - Present evidence
- Inspect all evidence, including evidence not used to support determination
- No limits on types/amount of evidence that may be offered, except must be relevant and respect “rape shield” provision
- Includes all evidence directly related to the investigation, even evidence that determination does not, or will not, rely upon (ATIXA, 2020).
Standard of Proof

• Current industry standard is preponderance of the evidence.
• OCR says recipients must now apply either the preponderance of the evidence standard or the clear and convincing evidence standard.
• Standard of evidence must be consistent for all formal complaints of sexual harassment, regardless of policy or underlying statutory authority.
• Must also apply the same standard of evidence for complaints against students as for complaints against employees, including faculty (ATIXA, 2020).
Title IX - Website

Written Determinations

• Required elements for written determinations:
  • Allegations potentially constituting sexual harassment (§ 106.30)
  • All procedural steps taken
  • Findings of fact supporting the determination
  • A determination on each allegation regarding responsibility, any disciplinary sanctions, remedies
  • The recipient’s procedures and permissible bases for the complainant and respondent to appeal.
  • Document how recipient’s response was not deliberately indifferent (ATIXA, 2020).
Informal Resolution Options

- School and parties will determine when informal resolution is appropriate
- “[I]n responding to sexual harassment, it is important to take into account the needs of the parties involved in each individual case, some of whom may prefer not to go through a formal complaint process.”
- Does not preclude certain offenses from informal resolution
- DOES preclude informal resolution for allegations that an employee harassed a student, so presumably, employee-on employee informal resolution is permissible (ATIXA, 2020).
Requirements of Informal Resolution Options

• Informal resolution allowed at any time prior to a final determination at discretion of TIXC
• Formal complaint is required
• Must provide detailed notice to the parties:
  • Allegations
  • Requirements of the process
  • Circumstances which would preclude formal resolution
  • Consequences of participation
• Must obtain voluntary, written consent (ATIXA, 2020).
Appeals

- Must offer equitable appeal based on determination or dismissal of any allegations.
- All parties receive notification of any appeal.
- Opportunity for all parties to support or oppose outcome.
- Written decision with rationale delivered simultaneously to the parties.
- Appeal decision-maker cannot have had any other role in the investigation or resolution process.
- “Reasonably prompt” timeframe for producing appeal decision (ATIXA, 2020).
Record-Keeping

- Certain records must be created, retained, and available to the parties for at least seven years:
  - Sexual harassment investigation including any responsibility determination, any disciplinary sanctions imposed, and any remedies implemented
  - Any appeal and related result(s)
  - Any informal resolution implemented
  - Any supportive measures implemented
  - For each conclusion, school must document the rationale for its determination
  - School must document measures taken to preserve/restore access to education programs/activity (ATIXA, 2020).
Office of Civil Rights Enforcement

- OCR will continue to administratively enforce by:
  - Conducting investigations based on complaints filed with the U.S. Dept. of Education
  - Narrower in scope than previous Obama-era practice
  - Engaging in “voluntary compliance” reviews and investigations
  - Compensatory requirements (counseling, tuition, etc.) can be imposed.
  - May include equitable and injunctive actions as well as financial compensation to victims of discrimination or regulatory violations
  - OCR still retains authority to withhold federal funding; however, this power has never been used (ATIXA, 2020).
Grievance Committee

- Complainant
- Respondent
- Title IX Coordinator (TIXC)
- Title IX Investigators
- Decision-makers (DAC members-3)
- Hearing Panel Chair (DAC member)
- Student Advisors
- Hearing Advisor
Grievance Procedures

Must include:

• Presumption that respondent is not responsible until determination is reached
• “Reasonably prompt” timeframes
• Range of possible sanctions and remedies
• Description of standard of evidence
• Bases and procedures for appeal
• Appeal option required, equitably, on three grounds
• Range of “supportive measures” available to all parties
• Non-disciplinary, non-punitive, individualized services
• Procedure for emergency removal
• Non-student employee administrative leave (ATIXA, 2020).

Neutrality
Conflict of Interest and Objectivity

Grievance process must treat parties “equitably”

- Enhanced due process protections before disciplinary sanctions are imposed
- All individuals administering the grievance process must not:
  - Have a conflict of interest or bias for or against complainants or respondents generally, or
  - For or against an individual complainant or respondent
- All relevant evidence must be objectively evaluated
- Bias and conflict of interest by decision-makers that impacted the outcome are grounds for appeal (ATIXA, 2020).
Choice of Advisor

Advisor of choice may be anyone, including attorney

- May restrict participation of advisors equally, except:
- If a party does not have an advisor present at the hearing, the recipient must provide an advisor of the recipient’s choice to conduct cross-exam.
- The advisor must conduct thorough cross-exam (obligatory)
- If an advisor is provided, this must be done without fee or charge to the party.
- Parents, friends, teammates, coaches?
- Can a party have more than one advisor? Why would they need one (ATIXA, 2020)?
Investigation

- Rights of the Parties
- Evidence
- Investigation
- Live Hearing/Questioning
- Relevance
- Hearing Logistics
- Role of the Investigator
Rights of the Parties

- Investigation
- Right to present witnesses, including fact and expert witnesses
- Right to present inculpatory and exculpatory evidence
- Right to discuss the allegations under investigation without restriction
- Right to gather and present relevant evidence without restriction
- Right to inspect and review evidence and draft report before finalized and submit responses for inclusion in report (ATIXA, 2020).
Hearing

- Advisor to ask relevant cross-examination questions and follow-up questions of parties and witnesses, including challenging credibility
- Availability of directly-related evidence
- Use of technology allowing party to simultaneously see and hear the witness answering questions on cross-exam (ATIXA, 2020).
Evidence

All relevant evidence must be objectively evaluated and considered – inculpatory and exculpatory

- Credibility determinations may not be based on a person’s status as a complainant, respondent, or witness
- Access to privileged information requires waiver/consent
- No restriction on parties discussing case or gathering evidence

- Equal opportunity to:
  - Present witnesses
  - Present evidence
  - Inspect all evidence, including evidence not used to support determination
  - No limits on types/amount of evidence which may be offered (ATIXA, 2020).
Investigation and Report

• Required investigation results in an investigation report
  • Fairly summarizes all relevant evidence
  • Unclear from Regs if analysis, credibility assessment included
• Prior to the hearing, parties must be provided with the draft investigation report and all evidence directly related to allegations
  • Parties must have two separate ten-day periods to review and submit written responses
• Must also make all relevant evidence (excluded from report) available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-exam
• Investigation report submission to decision-makers not addressed in Regs (ATIXA, 2020).
Live Hearing & Questioning

• Mandated live hearing for higher education
• Optional for K-12 (unless already required by existing law/policy)
• Hearing must allow cross-examination of parties and witnesses conducted exclusively by each party’s advisor
• If a party does not have an advisor present at the hearing, the recipient must provide an advisor to conduct cross-exam
• All relevant and follow up questions, including challenging credibility
• K-12 live cross-examination not required • For K-12, parties given opportunity to submit written, relevant questions to decision-maker, exchange of answers, and additional limited follow-up questions. Explanation of non-relevance required (ATIXA, 2020).
Relevance

• During hearing, before a party or witness answers a posed question, the decision-maker must determine if the question is relevant and explain any exclusion of a question.
• Evidence is generally considered relevant if it has value in proving or disproving a fact at issue.
• Evidence of the complainant’s sexual behavior or predisposition is irrelevant unless:
  • Offered to prove that someone other than the respondent committed the conduct alleged, or
  • Concerns specific incidents of the complainant’s sexual behavior with respect to the respondent and is offered to prove consent (ATIXA, 2020).
Hearing Logistics

- Hearing Structure
- Hearing Preparation
- Technology and cross-examination
- Upon request, separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party answering questions
- Scheduling and administrative tasks
- Recording or creation of transcript
- Note-taking (ATIXA, 2020).
Role of the Investigator

• The investigator is often the key witness at any hearing.
• The investigation report is admitted as evidence.
• The investigator may be questioned and subjected to cross-examination.
• The investigator’s opinions regarding a determination should not influence the decision-maker; questions about the investigator’s opinions should be avoided (ATIXA, 2020).
Making a Determination

- Standard of Evidence
- Models of Proof/Analysis
- Credibility Determinations
- Sanctions and Remedies
- Written Determination
- Appeals
Standard of Evidence

- OCR allows recipients to apply either preponderance of the evidence or clear and convincing standard
- Preponderance of the evidence is best practice and an equitable standard
- Must be consistent for all formal complaints of sexual harassment
- Must apply the same standard for complaints against students as is applied to complaints against employees (ATIXA, 2020).

Note: Blinn College District uses preponderance of the evidence.
## Understanding Evidence Thresholds

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“More Likely Than Not “50% Plus a Feather”
Models of Proof and Analysis

- Explain the policy definition into its constituent elements
- Establish, by the applicable standard of proof, whether each element of the definition is met, to determine whether a violation occurred
- Weigh evidence to determine its value
Credibility Determinations

- Credibility generally refers to the trustworthiness, dependability, accuracy, and believability of testimony or evidence.
- Credibility determinations may not be based on a person’s status as a complainant, respondent, or witness.
- Corroboration, plausibility.
- Other research-based methods.
- May not draw inference about determination of responsibility based solely on a party’s presence or absence at hearing or refusal to answer questions (ATIXA, 2020).
Sanctions and Remedies Upon Determination of Responsibility

- Disciplinary sanctions for respondent
- “Remedies” to complainant
- Any sanction must be reasonable and proportionate to the severity of the behavior
- May consider prior misconduct
- The role of precedent
- May consider attitude, aggravation, mitigation, contrition, etc.
- May be educational, but safety is primary consideration
- Remedy for loss or injury to school or persons
- Compliant with laws and regulations
- Same panel/officer who decides finding should also decide sanctions with guidance from Title IX Coordinator (ATIXA, 2020).
Sanctioning in Sexual Misconduct Cases

- Must be a nexus between the sanctions and the discriminatory conduct which led to the sanction(s)
- What is appropriate?
  - Separation/expulsion
  - Suspension
  - Lesser sanctions
- Engage in strategic education and training as remedies
- Conduct a risk assessment audit and mitigation process (ATIXA, 2020).
Decision-maker must issue written determination that will be shared with the parties:

- Allegations potentially constituting sexual harassment
- All procedural steps taken
- Findings of fact supporting the determination
- A determination on each allegation regarding responsibility
- Any disciplinary sanctions, remedies provided to complainant
- The recipient’s procedures and permissible bases for the complainant and respondent to appeal
- Delivered simultaneously to all parties (ATIXA, 2020).
Appeals

- Appeal option must be offered to all parties:
  - From a determination regarding responsibility
  - From a recipient’s dismissal of a formal complaint or any allegation therein
- Three grounds for appeal, with additional grounds optional
- Decision-maker for appeal must differ from previous decision-maker
- All parties receive notification of any appeal filed
- Opportunity for parties to support or oppose outcome via written statement
- Written appeal decision with rationale delivered simultaneously to all parties (ATIXA, 2020).
Finality of Determination

- If an appeal is filed, the determination regarding responsibility becomes final on the date that the recipient provides the parties with the written determination of the results of the appeal.

- If an appeal is not filed, the determination regarding responsibility becomes final on the date on which an appeal would no longer be considered timely (ATIXA, 2020).
Title IX Hearing
Resource Video - Training

https://youtu.be/sokqSgHqDE8

(Thompson Coburn LLP, 2020)
Conclusion

Questions & Answers
References

