

U. S. Department of Education Title IX Regulations

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Staff Convocation Training

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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).

Title IX Training

Part I

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

- Shift in “Responsible Employee” designations
- Previous definition
 - Who has the authority to take action to redress the harassment; or
 - Who has the duty to report harassment or other types of misconduct to appropriate officials; or
 - A student could reasonably believe has this authority or responsibility
- 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

Official with Authority cont.

- 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)

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).

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.

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.

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

Timeline

- 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

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).

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

Grievance Process cont.

- 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).

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 Grievance Flowchart

<https://www.blinn.edu/title-ix/pdf/title-ix-process-flow-chart.pdf>

Informal Resolution Options

- School and parties will determine when informal resolution is appropriate
- “In 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).

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).

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).

Conclusion

Questions & Answers



References

Association of Title IX Administrators. (2020).

Commitment Beyond Compliance for Colleges and Universities. Retrieved from: <https://atixa.org/r3/>.

Department of Education. (2020). Summary of Major Provisions of the Department of Education's Title IX Final Rule. Retrieved from:

<https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-summary.pdf>.

TITLE IX TRAINING

PART II

TITLE IX LIVE HEARING TRAINING

BLINN COLLEGE DISTRICT

CREATED AUGUST 2021

TITLE IX LIVE HEARING TRAINING PARTICIPANTS

VIRTUAL TRAINING – FRIDAY, SEPTEMBER 17, 2021 @ 10:00 AM

- **Brandon Franke** bfranke@blinn.edu – *Hearing Advisor*
- **Jessica Phillips** jessica.phillips@blinn.edu – *Transcriber*
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- **Sigrid Woods** sigrid.woods@blinn.edu – *Title IX Investigator*
- **Marie Kirby** marie.kirby@blinn.edu – *Vice Chancellor*

OPENING STATEMENT

- Each Advisor will have the opportunity to provide an opening statement to the Hearing Administrator presiding over the hearing as well as the Title IX committee.

CROSS EXAMINATION

- Witnesses will be sworn in
- Each advisor will have the opportunity to question a witness.
 - The side that originally called the witness shall have a second opportunity to question them through redirect examination if so desired.
- After the complainant concludes its case, the respondent may present its own evidence.
 - The advisor for the complainant shall have the opportunity to cross-examine any witnesses brought by the respondent.
- Once both sides have had the opportunity to present their case and to challenge the evidence presented by the others, both sides rest and no evidence will be presented to the committee before closing arguments are made.

U.S.
DEPARTMENT
OF EDUCATION
UPDATE –
AUGUST 24,
2021

- A decision-maker at a postsecondary institution may now consider statements made by parties or witnesses that are otherwise permitted under the regulations, even if those parties or witnesses do not participate in cross-examination at the live hearing, in reaching a determination regarding responsibility in a Title IX grievance process.

U.S. DEPARTMENT OF EDUCATION UPDATE – AUGUST 24, 2021 (CONTINUED)

- For example, a decision-maker at a postsecondary institution may now consider statements made by the parties and witnesses during the investigation, emails or text exchanges between the parties leading up to the alleged sexual harassment, and statements about the alleged sexual harassment that satisfy the regulation's relevance rules, regardless of whether the parties or witnesses submit to cross-examination at the live hearing.

U.S. DEPARTMENT OF EDUCATION UPDATE – AUGUST 24, 2021 (CONTINUED)

- A decision-maker at a postsecondary institution may also consider police reports, Sexual Assault Nurse Examiner documents, medical reports, and other documents even if those documents contain statements of a party or witness who is not cross-examined at the live hearing.

CLOSING ARGUMENTS

- Both sides shall have the opportunity to sum up their case, recapping their evidence.
- This is the final chance for parties to address the committee before deliberation.

COMMITTEE DELIBERATION

- After closing arguments, the committee will meet to provide a written determination as to if a policy or procedure from Blinn College was violated by the respondent.
- The Committee's written determination will be presented to the Title IX coordinator by the Hearing Administrator.

CONCLUSIONS

Questions & Answers



REFERENCES

Association of Title IX Administrators. (2021).

Commitment Beyond Compliance for Colleges and Universities. Retrieved from: <https://atixa.org/r3/>.

Department of Education. (2021). Summary of Major Provisions of the Department of Education's Title IX Final Rule. Retrieved from:

<https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-summary.pdf>.