



Association of  
Title IX Administrators

# OIE TRAINING

## Ohio State University

### Part 2

# Decision Maker Training

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# DECISION-MAKER MISSION AND ROLE

# WHAT DOES IT MEAN TO BE A “DECISION-MAKER?”

- 2020 Title IX regulations require a “Decision-maker” to determine whether a Respondent has violated policy
  - May be a single person (a.k.a. “Hearing Officer”)
  - May be a panel of Decision-makers
  - May be internal or external individuals
- Required separation of roles
  - Title IX Coordinator may not serve as “Decision-maker”
  - Investigator(s) may not serve as “Decision-maker”
- Appeal Decision-maker is a separate role
  - May also be a single person or panel; previously uninvolved

# DECISION-MAKING OVERSIGHT AND SUPERVISION

## The Title IX Coordinator (TIXC) or Designee responsibilities include:

- Appointing Decision-makers (DMs)
- Properly training DMs or ensuring they are trained
- Serving as a resource to DMs on process and procedures
- Ensuring timeline compliance
- Reviewing DM work to ensure thoroughness
- Overseeing recordkeeping
- Serving as primary point of contact for parties



# DECISION-MAKER ROLE AND RESPONSIBILITIES

- Decision-makers have **no side**, other than the **integrity of the process**
- DM must have a thorough understanding of:
  - Institutional policy and procedures, including the investigation process
  - Whether you are addressing an alleged incident(s), a pattern, or a culture/climate complaint, and what findings are necessary based on that footing
  - Understand best practices for asking good questions
  - Knowledge of decision-making procedures and management
  - Understanding evidence and how to weigh it and apply it to institutional policy by the standard of evidence
  - How to analyze credibility
  - How to make determinations, decide sanctions/remedies, and write a rationale

# DECISION-MAKER SKILL SETS

**Decision-makers need to be an organized manager and multi-tasker with:**

- Effective questioning skills
- Strong writing skills
- Subject matter expertise
- Analytical skills

# DUE PROCESS

# DUE PROCESS IN PROCEDURE

- Consistent, thorough, and procedurally sound review of all allegations
- Substantial compliance with written policies and procedures
- Policies and procedures afford sufficient rights and protections to satisfy mandates of all applicable laws
  - Clear, written notice of the allegations
  - Opportunity to present witnesses and evidence and be heard by the Decision-maker



# DUE PROCESS IN DECISION-MAKING

## A decision must:

- Be appropriately impartial and fair (both finding and sanction)
- Be neither arbitrary nor capricious
- Be based on a fundamentally fair rule or policy
- Be made in good faith (i.e., without malice, ill-will, conflict, or bias)
- Have a rational relationship to (be substantially based upon, and a reasonable conclusion from) the evidence

# DUE PROCESS IN THE GRIEVANCE PROCESS

## **Rights of the parties during the Title IX grievance process:**

- Present witnesses, including expert witnesses
- Present all inculpatory and exculpatory evidence
- Discuss the allegations under investigation without restriction
- Gather and present relevant evidence without restriction, including expert sources
- Be accompanied by and confer with Advisor of choice
- Written notice of the date, time, location, participants, and purpose of investigation interviews or other meetings, with sufficient time to prepare

# DUE PROCESS IN THE GRIEVANCE PROCESS

## Rights of the parties during the Title IX grievance process

- Inspect and review directly related evidence and investigation report
- Conduct cross-examination, if desired, through the Advisor
- Right to explanation of any ruling that a question is not relevant
- See/hear all evidence the DM may rely upon in their decision
  - Right to review and comment on that evidence to the DM
- Access to recording of any hearing
- Receive a written rationale explaining the basis for the DM's decision
- Appeal

# NOTICE OF INVESTIGATION AND ALLEGATIONS

- The Notice of Investigation and Allegations (NOIA) is critical to fundamental fairness and due process
- The NOIA lists the rights of the parties in the grievance process, in addition to:
  - Known details of allegations, such as identities of the parties
  - A description of the alleged conduct and relevant policy provisions
  - The date and location of the alleged conduct
  - Information about grievance procedures
  - Any Informal Resolution options
  - Presumption of non-responsibility
  - Prohibition on retaliation and false statements
- May need to update NOIA during process

# CONFLICTS OF INTEREST AND BIAS

# CONFLICTS OF INTEREST AND BIAS

- Decision-makers must **not have a conflict of interest or bias** for or against the following:
  - Complainants, generally
  - Respondents, generally
  - The parties involved with a complaint
  - Subject matter or details of the complaint itself
- Consider a perception of a conflict or bias, even if none exists in fact
  - Not required, but TIXC or Designee may choose to substitute a DM based on perception alone

# WHAT'S THE DIFFERENCE?

## Conflict of Interest

- Refers to situations in which:
  - An **actual** (or perceived) clash,
  - Between the DM's role and
    - A current or previous relationship/situation with one of the parties
  - That prevents neutrality or objectivity
  - **Example:** A Residence Life Director serving as DM for a complaint filed by one of their Resident Assistants

## Bias

- Refers to prejudice for or against a **person or group**, or an unwillingness/inability to be influenced by factual evidence
- A preference or tendency to like or dislike
- Implicit or explicit
- Can be intentional, but generally unintentional or at least unconscious
- **Example:** A DM who believes Respondents cannot be trusted to tell the truth



# **DECISION-MAKING PHASE: SKILLS AND PRACTICAL APPLICATION**





# **SKILLS: WORKING WITH ADVISORS**

# WORKING WITH ADVISORS

- Parties have the right to be accompanied by an Advisor of their choice
  - Could be an attorney, but need not be
- Parties may request that the institution provide an Advisor for hearing
  - Institution may choose to appoint earlier in process
- DM may establish equitable ground rules for participation if they do not interfere with any party rights
- Set and communicate reasonable expectations for Advisor participation





# SKILLS: MATERIALS REVIEW

# INITIAL MATERIALS REVIEW

- Review the complaint file, including:
  - Complaint
  - Written Notice of Investigation and Allegations (NOIA)
  - Applicable policies
  - Investigation report and appendix



# MATERIALS REVIEW

- **ATIXA recommends reviewing materials multiple times**, focusing on areas of consistency and inconsistency
- **Consistency review:** note all areas of information consistency/alignment
  - No additional verification or questioning is likely needed on these issues
  - Begin to identify pieces of evidence that address the various policy elements
- **Inconsistency review:** identify information inconsistencies/disparities
  - DM compiles any remaining questions
  - DM identifies the pieces of evidence that address the various policy elements
  - DM's primary focus is resolving contested facts where possible

# POLICY ELEMENTS AND PROCEDURES

## Policy

- What policies are alleged to have been violated?
- What are the elements of those policies?
  - DMs will weigh and apply relevant evidence to determine whether a policy violation occurred

## Procedures

- Review decision-making procedures to refresh previous training
- Note any procedural questions to ask the TIXC or Designee/legal counsel

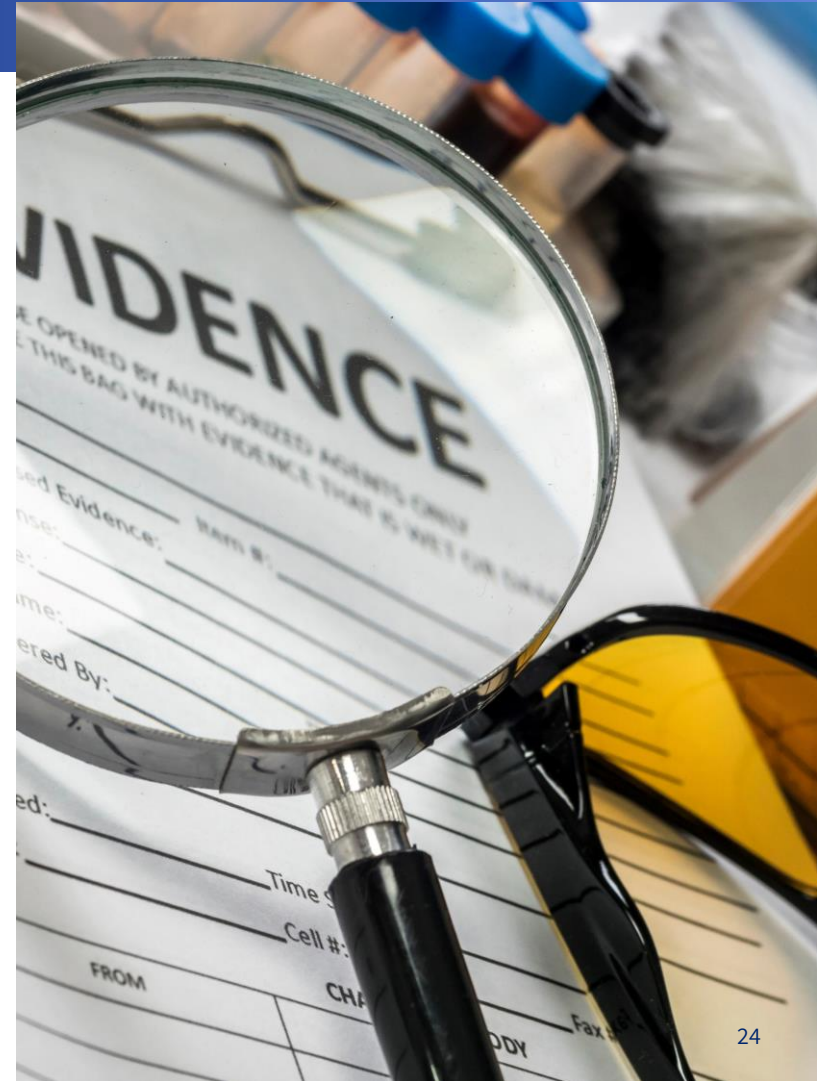


# **SKILLS: UNDERSTANDING EVIDENCE**

# UNDERSTANDING EVIDENCE

## DM must evaluate all relevant evidence:

- **Evidence** is any information presented to help determine what occurred
- **Relevant evidence** is evidence that may aid in showing whether the alleged sex discrimination occurred or contributes to assessing credibility
- **Impermissible evidence** is evidence that must not be accessed or considered, as outlined in the regulations





# TYPES OF EVIDENCE

Documentary Evidence	Supportive writings or documents
Electronic Evidence	Photos, text messages, and videos
Real Evidence	Physical objects
Direct or Testimonial Evidence	Personal observation or experience
Circumstantial Evidence	Not eyewitness, but compelling
Hearsay Evidence	Statement from outside the interview presented as truthful
Character Evidence	Evidence of a person's character or character traits

# PRIVILEGE AND MEDICAL INFORMATION

**A party or witness must provide written, voluntary permission to obtain and/or include:**

- Evidence protected under a legally recognized privilege
- Evidence provided to a confidential employee
- Records made or maintained by:
  - Physician
  - Psychiatrist
  - Other recognized professional or paraprofessional in connection with treatment

# OTHER EVIDENCE CONSIDERATIONS

- Institutions may permit expert witnesses, if the opportunity is provided equally to all parties
- Restrict sharing of evidence
  - Institutions must take reasonable measures to prevent the unauthorized disclosure of information obtained solely during the Resolution Process:
    - Parties cannot be restricted from talking to witnesses, family, or confidential employees
    - Other limits on the sharing of information may be appropriate

# PRIMARY QUESTIONS FOR DECISION-MAKERS

**1**

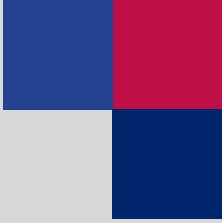
Is this information  
**relevant?**

**2**

Is this information  
**reliable?**

**3**

**Will DM rely upon  
it as evidence  
supporting a  
rationale?**



# SKILLS: DETERMINING RELEVANCE

# RELEVANCE

- All relevant evidence, unless otherwise impermissible, must be objectively evaluated and considered, including both inculpatory and exculpatory evidence:
  - **Inculpatory:** supports a finding of “responsible”
  - **Exculpatory:** supports a finding of “not responsible”
- **Relevant** means related to the allegations of sex discrimination under investigation:
  - Relevant **questions** seek evidence that may aid in showing whether the alleged sex discrimination occurred
  - Relevant **evidence** aids a decision-maker in determining whether the alleged sex discrimination occurred
  - DM may consider **credibility** when determining whether the alleged sex discrimination occurred

# IMPERMISSIBLE EVIDENCE

- Evidence of the **Complainant's sexual interests** is never relevant
- Evidence of the **Complainant's prior sexual behavior** is not relevant except:
  - If offered to prove that someone other than the Respondent committed the alleged conduct; or
  - If offered to prove consent with respect to prior consent with the Respondent
    - Any prior consensual sexual conduct between the parties does not by itself demonstrate or imply the Complainant's consent
- Even if admitted/introduced by the Complainant
- Does **not** apply to Respondent's prior sexual behavior or sexual interests



# **SKILLS: CREDIBILITY ASSESSMENT**



# DM QUESTIONING GOALS

- May ask questions to ensure a **comprehensive** understanding of information and evidence gathered during the investigation:
  - Including asking additional questions about relevant evidence regarding what happened during the incident(s)
  - DM does not have to ask questions but must have the opportunity to do so if they wish
    - If necessary to assess credibility, DM should ask
- **DM should use questions to:**
  - Resolve conflicting information as it relates to the policy elements
  - Elicit details, eliminate vagueness, fill in gaps

# CREDIBILITY CONSIDERATIONS

- Assessing and determining credibility is an important DM role
- Credibility is often a function of corroboration and consistency
- Credibility does not necessarily equate to honesty or truthfulness:
  - Believability does not equal truthfulness
  - Not judging character
  - Not calling people liars
- Credibility impacts the reliability of evidence and its weight
- Specific credibility issues that a DM may consider:
  - Relationships between the parties and witnesses
  - Whether a witness was exposed to information (e.g., in the case of a parent or Advisor) that may have influenced their testimony

# PARTY AND WITNESS CREDIBILITY

- **Credibility** impacts likeliness:
  - Would a reasonable person do the same?
  - Are there more likely alternatives?
- **Credibility Assessment** involves evaluating whether evidence is believable and reliable
  - Refrain from focusing on irrelevant inaccuracies and inconsistencies
- **Note:** Memory errors alone do not necessarily diminish witness credibility, nor does some evasion



# CREDIBILITY FACTORS

## Corroboration

- Aligned testimony and/or physical evidence

## Inherent Plausibility

- “Does this make sense?”
- Be careful of bias influencing sense of “logical”

## Motive to Falsify

- Do they have a reason to lie?

## Past Record

- Is there a history of similar behavior?

## Demeanor

- Do they seem to be lying or telling the truth?





# **SKILLS: ANALYZING CONSENT EVIDENCE USING THE CONSENT CONSTRUCT**

# THE CONSENT CONSTRUCT

1. **Force:** Did the Respondent use force to obtain sexual or intimate access?
2. **Incapacity:** Was the Complainant incapacitated?
  - a. If so, did the Respondent know, or
  - b. Should the Respondent have known that the Complainant was incapacitated
3. **Consent:** What clear words or actions by the Complainant gave the Respondent permission for each specific sexual or intimate act that took place as it took place?

**Note:** The Respondent's own intoxication can not be used as a reason they did not know of the Complainant's incapacity

# FORCE

## Physical Violence:

## Threats:

- Objective and subjective analysis of the viability of the threat

## Intimidation:

- Implied threat that menaces and/or causes reasonable fear

## Coercion:

- Unreasonable amount of pressure for sexual access  
(Consider: isolation, frequency, intensity, and duration)

# INCAPACITY

## Was the Complainant incapacitated?

- **Incapacitation:** a state where an individual cannot make rational, reasonable decisions because they **lack the capacity** to give knowing consent:
  - Unable to understand who, what, when, where, why, or how
  - Incapacity ≠ impaired, drunk, intoxicated, or under the influence
  - Insufficient situational awareness
  - Lack of consequential awareness
  - Blackout and incapacity are **not** synonymous:
    - Blackout means memory is not formed
    - Incapacitation is about decision-making capacity



# EVIDENCE OF INCAPACITY: POTENTIAL CONTEXT

- Slurred speech
- Scent of alcohol on the breath
- Shaky equilibrium; disorientation
- Passing out/unconsciousness
- Throwing up
- Known blackout
- Outrageous or unusual behavior (requires prior knowledge)

**Incapacitation determination is made contextually, in light of all the available relevant evidence**



# INCAPACITY ANALYSIS

- If the Complainant **was not** incapacitated, move to the Consent Analysis
- If the Complainant **was** incapacitated, but:
  - The Respondent did not know, **AND**
  - The Respondent would not have reasonably known of the Complainant's incapacity = no policy violation, move to Consent Analysis
- If the Complainant **was** incapacitated, and:
  - The Respondent **knew it or caused it** = policy violation
  - The Respondent **should have known it** = policy violation
- The Respondent's own intoxication does not excuse a policy violation

# PRIOR KNOWLEDGE CONSTRUCT

- Did the Respondent previously know the Complainant?
  - If so, was the Complainant acting differently than in previous similar situations?
- Evaluate what, if anything, the Respondent observed the Complainant consuming or ingesting
  - Use a timeline analysis
- Determine if the Respondent provided any substances to the Complainant
- Pace of consumption and amount of consumption can both be relevant

# DEFINITION: CONSENT

- **Consent** is not defined by the Title IX regulations, but institutions are required by law to provide a definition (some states prescribe a definition applicable in that state)
- ATIXA's Definition:
  - Informed, knowing, and voluntary (freely given)
  - Active (not passive)
  - Creates mutually understandable permission regarding the conditions of sexual activity
  - No means no, but nothing also means no; silence and passivity do not equal consent
  - To be valid, consent must be given immediately prior to or contemporaneously with the sexual or intimate activity
  - Consent can be withdrawn at any time, so long as it is clearly communicated verbally or non-verbally
  - Consent to one form of sexual activity does not necessarily imply consent to other forms of sexual activity

# CONSENT ANALYSIS

What **clear words or actions** gave the Respondent permission for each specific sexual or intimate act that took place as it did?

- Evaluate relevant sexual or intimate pattern or history between the parties
- Consider whether verbal and/or non-verbal cues were present during any acts or portion of the encounter that the parties agree were consensual
  - Contemporaneous communication
- Critical to gather evidence regarding detailed and specific intimate behaviors
- Analysis has objective and subjective elements

# OTHER HEARING PREPARATION

- Confirm the file is complete
- Discuss any hearing logistics or questions with Chair or TIXC
- Prepare questions in advance
  - Areas of inconsistency or disputed information
- If part of a panel, consider meeting to:
  - Prepare questions and discuss question asking
  - Conduct a final review of policies and procedures
  - Strategize for hearing
- Other elements of hearing preparation are covered in Live Hearings course



# **SKILLS: MAKING FINDINGS, THE FINAL DETERMINATION, AND SANCTIONING**

# FINDING VS. DETERMINATION

## Finding

Whether the conduct occurred, by the standard of proof

## Final Determination

Whether the conduct that is proven to have occurred violates policy



# MAKING A FINDING AND FINAL DETERMINATION

- Finding(s) must be based upon information gathered during the investigation and decision-making phases only
  - No outside information should influence decision-making
- **Separate the “Determination” from the “Sanction”:**
  - Do not consider the effect of a sanction on your analysis or determination of a policy violation
  - Do not consider prior misconduct, unless a pattern is alleged/proven
- Institutions can identify a separate individual to determine sanctions **OR** permit the DM to determine sanctions, if any

# WRITTEN DETERMINATION

- Cogent explanation of facts
- Evidence relied upon/not relied upon and why
- Evidence that was unavailable and why
- Whether the presumption of non-responsibility was overcome
- Credibility assessment and explanation
- Finding(s) based on standard of proof
- Rationale analysis explains how DM got from the allegation to the final determination and offers reasoning for any sanctions implemented
- Any appeal procedures available
- Any sanctions or remedies

# WRITTEN DETERMINATIONS

## Written Determination

- Authored by Decision-maker(s)
- TIXC or Designee/Legal counsel reviews
- TIXC or Designee communicates to the parties simultaneously in writing
  - No FERPA concerns

## Finality

- On the date the Recipient provides a written appeal determination
  - OR the date when an appeal would no longer be timely

## Written Determination Elements

- Applicable policy
- Procedural steps from complaint through determination
- Statement of and rationale for the result of each specific allegation
- Finding and Final Determination
- Sanctions imposed (if any) and rationale for chosen sanctions or deviation from precedent
- Whether remedies will be provided to Complainant
- Procedures and bases for appeal

# SANCTIONS AND REMEDIES

## Sanctions

- Only implemented after a determination of responsibility
- Nexus between sanctions and misconduct
- Goal: stop, prevent, and remedy
- TIXC or Designee assures sanction compliance
  - Failure to comply could lead to discipline

## Remedies

- May be implemented before or after a determination
- TIXC or Designee determines remedies that are equitable and not clearly unreasonable given the circumstances
- Goal: preserve or restore access to education program and activity
- TIXC or Designee ensures remedies are implemented for both Complainant and community

# DETERMINING SANCTIONS

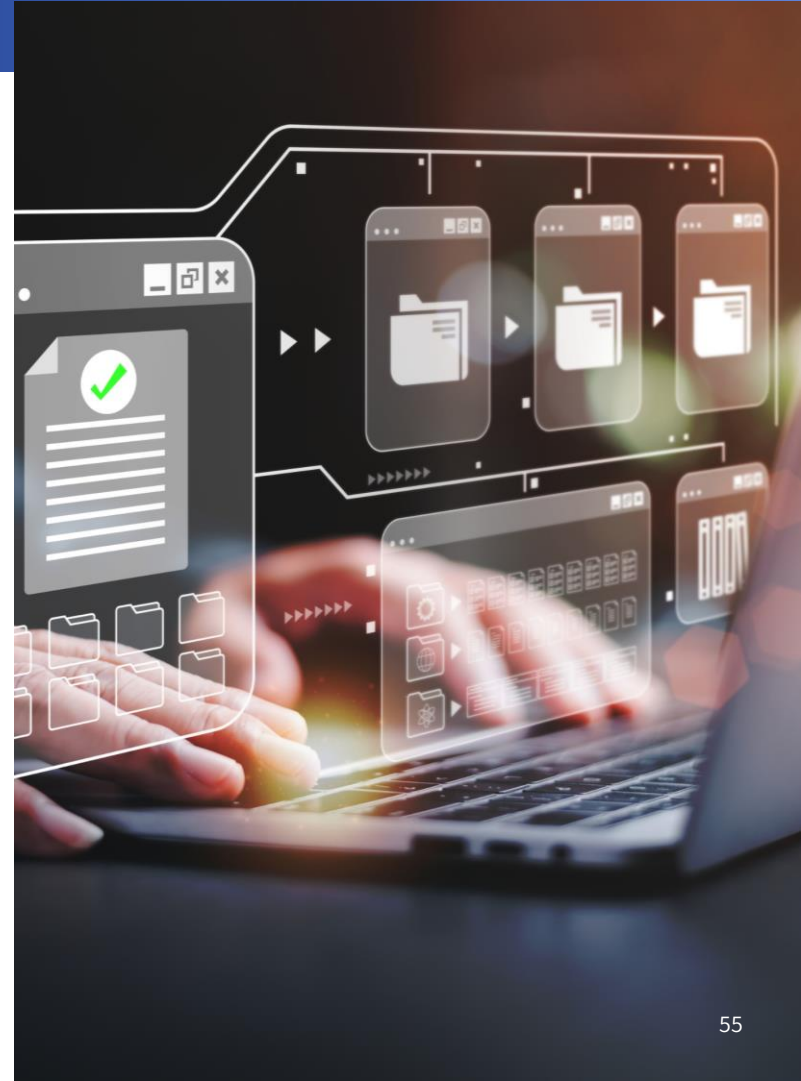
- Primary purpose should focus on ensuring equity and providing remedies
  - Each sanction should have a rationale
- DM may consider:
  - Nature and severity of the conduct, including the circumstances surrounding the violation
    - Aggravating or mitigating circumstances
    - Precedent, prior misconduct, proven pattern (if alleged), acceptance of responsibility, collateral violations, or multiple violations
  - The Respondent's disciplinary history
  - The need for sanctions or other responsive actions to stop, prevent, and remedy the discrimination, harassment, and/or retaliation
  - The impact on the parties
  - Any other information deemed relevant by the Decision-maker(s)



# **RECORDKEEPING AND DOCUMENTATION**

# RECORDKEEPING

- DM must compile all documentation related to the decision-making process, typically with the TIXC or Designee, including:
  - **Timeline** of decision-making process
  - **Interactions** and pre-hearing meetings with parties, other DMs, TIXC or Designee, etc.
  - **Determination** with any associated sanctions and/or remedies
  - **Rationales** for all determinations
  - **All work product** from the DM process
- TIXC or Designee is responsible for maintaining complaint files for a minimum of seven years



# DECISION-MAKER NOTES AND DRAFTS

- Decision-making creates opportunities to generate paperwork and paper trails
- Be judicious with notetaking, annotating, draft writing, and communication
- Anticipate that the parties could see DM work product:
  - Student FERPA inspection and review rights
  - Employee rights to personnel records
  - Litigation
- TIXC or Designee should provide guidance and clear expectations about saving work product, including personal notes





# ACTIVITY: CASE STUDY

# PHOEBE AND SIMON: A BRIDGE TOO FAR?

- Simon and Phoebe have been dating for several months
- They have been sexually active, including vaginal intercourse, multiple times
- They have never discussed protection or contraception, but neither has ever used any during their sexual activities with each other
- Phoebe is clear that Simon has never worn a condom during sex with her
- Simon is unaware whether Phoebe has ever used any form of contraception
- In discussing life goals generally, Simon has made it clear to Phoebe that he doesn't ever see himself having kids

# PHOEBE AND SIMON: A BRIDGE TOO FAR?

- During all of their sexual interactions, as intercourse was headed toward climax, Simon has withdrawn his penis before ejaculating
- On the night in question, in the heat of their romantic intimacy, which had always involved missionary position consensual sexual intercourse, Phoebe instead positioned herself on top of Simon, and decided she wanted the experience of Simon ejaculating inside of her, to be as close to him as she possibly could
- As their lovemaking neared climax, Simon realized he was pinned beneath Phoebe by the position, and that he was losing control

# PHOEBE AND SIMON: A BRIDGE TOO FAR?

- He said to her, “Wait,” twice as he became increasingly distressed that he would not be able to pull out in time
- Phoebe, caught up in the ecstasy of the moment, continued until Simon ejaculated inside of her
- Simon neither struggled nor physically attempted to remove Phoebe from her position or to pull his penis out before ejaculating because he realized it would be futile
- Simon became furious and broke up with Phoebe

# PHOEBE AND SIMON: A BRIDGE TOO FAR?

- He then filed a Title IX complaint alleging that she sexually assaulted him by forcing him to ejaculate inside of her, thus risking pregnancy that she knew he did not want
- Phoebe responded that she was simply caught up in the moment, wanted to be close to the man she loved, did not know if she would be become pregnant, and was unclear what Simon meant when he said “wait”
- She did not know that he was unwilling to ejaculate inside her, as they had never discussed it
- She said she really didn’t think about it much, as she was in the throes of climax herself, but that she did not interpret “wait” as “stop,” or she would have stopped

# PHOEBE AND SIMON: A BRIDGE TOO FAR?

- Upon reflection, Phoebe stated to investigators that “wait” could have meant, “wait so that we can climax simultaneously,” “wait, I want this to last longer,” or “wait you’re going too fast,” but that she really did not consider what it meant in the moment
- Simon clarified for Investigators that his insistence in saying “wait” twice, plus the clear distress on his face should have made it clear to Phoebe that he meant to stop
- Phoebe responded to this evidence by stating that the look on his face was one of extreme pleasure, and that this was very clear to her
- She also clarified that she was not pregnant

# PHOEBE AND SIMON: A BRIDGE TOO FAR?

- You have now been placed into a position of deciding whether Phoebe violated policy and stating your rationale.
- By a preponderance of the evidence, did Phoebe sexually assault Simon by having non-consensual sexual activity with him?
  - If yes, why?
  - If no, why not?

**Be very clear in your reasoning**

# PHOEBE AND SIMON: A BRIDGE TOO FAR?

- **Sexual Assault:** an offense classified as a forcible or non-forcible sex offense under Federal Bureau of Investigation's uniform crime reporting system
  - **Rape\*:**
    - Penetration,
    - without the consent of the Complainant,
    - including instances where the Complainant is incapable of giving consent,
    - because of age or
    - because of a temporary or permanent mental or physical incapacity

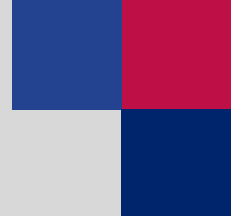
\*Definition of Rape from the 2024 Title IX Regulations, effective August 1, 2024



# PHOEBE AND SIMON: A BRIDGE TOO FAR?

## **Consent**, as defined as:

- knowing, and
  - voluntary, and
  - clear permission
  - by word or action
  - to engage in sexual activity
- Consent can be withdrawn once given if that withdrawal is clearly communicated
  - Once withdrawn, sexual activity must stop reasonably immediately



# CONTACT INFORMATION

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# OIE Training Ohio State University Part 3

December 13, 2023

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# Overview

- Pregnant students **and** employees are protected by Title IX, in addition to other applicable federal and state laws
- Ensure that pregnant and newly parenting individuals are supported as needed to access their education and workplace
- Ensure individuals know and understand their rights under Title IX, including the role of the Title IX Coordinator (TIXC or Designee)



# Pregnancy: Title IX's Scope

## Individuals and Status:

- Students
- Employees
- Actual, potential, or past pregnancy and related conditions
- Family status
- Marital status
- Parenting status
- “Head of household”

## Non-Discrimination Mandate:

- Academics and access to course offerings
- Admissions
- Athletics
- Employment, Recruitment, and Hiring
- Extra-curricular activities
- Facilities
- Financial Assistance
- Funding
- Lactation space and time
- Health Insurance
- Housing
- Leaves of Absence
- Salaries and Benefits

# Pregnancy or Related Conditions

**Includes the full spectrum of processes and events connected with pregnancy**

- Pregnancy, childbirth, termination of pregnancy, or lactation
- Related medical conditions
- Recovery therefrom





# Parental Status

The status of a person who, with respect to another person who is under the age of 18\*, is:

- A biological parent
- An adoptive parent
- A foster parent
- A stepparent
- A legal custodian or guardian
- *In loco parentis* with respect to such a person
- Actively seeking legal custody, guardianship, visitation, or adoption of such a person

\*Or who is 18 or older but is incapable of self-care because of a physical or mental disability





# Title IX Coordinator & Pregnancy

# TIXC or Designee is Point Person for Support



**Documentation**



**Policies,  
Practices, and  
Procedures**



**Outreach and  
Support**



**Reporting**



**Complaint  
Resolution  
Process**



**Training**

# Academic Policies and Procedures

TIXC or Designee must be well-versed in institutional policies that may have implications for students who are pregnant or have related conditions

**Academic  
Incompletes**

**Add/Drop**

**Grade Appeals**

**Internships/  
Externships/  
Co-Ops/Practicums**

**Leaves of Absence**

**Out-of-Class  
Expectations**

**Pass/Fail Option**

**Retakes**

# General Policy Awareness

- Non-academic policies may also impact individuals who are pregnant or have related conditions
- TIXC or Designee should be aware of policies and make themselves available for consultation with those developing and revising policies

## Common Policies

- Attendance
- Dress codes
- Financial aid and scholarships
- Housing contracts/live-on requirements
- Minors on campus
- Parking
- Student health insurance
- Visa requirements

# Granting Exceptions to Policies and Processes

- Request process should be clear and well-advertised
  - Online form or appointment request recommended
- Consider waivers for arbitrary policies (e.g., no leaves of absence longer than two weeks) even if that results in inconsistency with previous practices
- TIXC or Designee partners with other offices to implement and provide a seamless support process for students and employees
- Regulations do not require retroactive reasonable modifications
  - Common and often necessary with pregnancy or related conditions
  - ATIXA recommends developing a framework or rubric to guide consistent retroactive request decisions

# Documentation and Communication

- Clear, detailed documentation regarding reasonable modifications is recommended
- Must obtain written consent prior to disclosing personally identifiable information (e.g., pregnancy status)
- Office for Civil Rights (OCR) emphasizes that communication across the institution is key
- Consider nuance and employ soft skills to navigate conversations with other departments

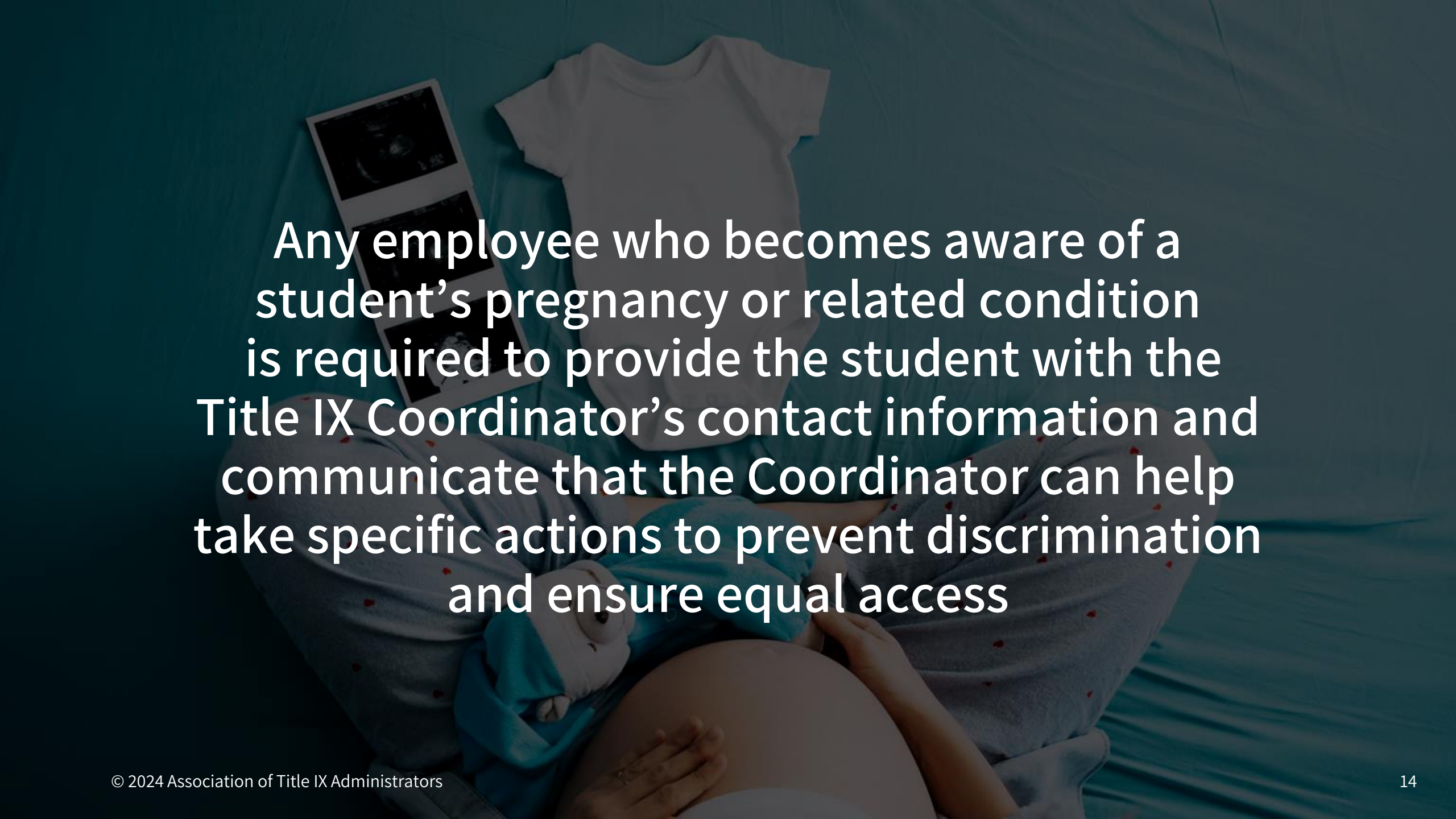


# Privacy and Recordkeeping

- Consider whether to maintain records of:
  - Initial request/contact
  - Reasonable modification information
  - Consultation with disability/accessibility services (if applicable)
  - Notifications
  - Complaints
  - Investigations and resolutions
- Medical records receive at least the same privacy as other Title IX documents
  - Limit access accordingly
- Education and employment records are subject to subpoena

# Reasonable Modifications



A pregnant woman is sitting on a bed, holding her belly. In front of her is a white t-shirt and a stack of ultrasound photos. The background is a teal-colored bedsheet.

Any employee who becomes aware of a student's pregnancy or related condition is required to provide the student with the Title IX Coordinator's contact information and communicate that the Coordinator can help take specific actions to prevent discrimination and ensure equal access

# Intake

## **TIXC or Designee must inform the individual of the institution's obligation to:**

- Prohibit sex discrimination
- Provide reasonable modifications
- Allow access, on a voluntary basis, to any separate and comparable portion of the institution's education program or activity
- Allow a voluntary leave of absence
- Ensure lactation space availability
- Maintain Resolution Process for alleged discrimination
- Treat pregnancy as comparable to other temporary medical conditions for medical benefit, service, plan, or policy purposes

# Reasonable Modifications

- **Reasonable Modifications** to the Recipient's policies, practices, or procedures to prevent discrimination:
  - Applies only to students under Title IX
    - Other laws provide modification/accommodation requirements for employees
  - Individualized: must consult with the student before offering
  - Voluntary: student may accept or decline each reasonable modification offered
    - If accepted, institution must implement
  - Fundamental alteration of education program or activity is **NOT** reasonable
- OCR emphasizes the importance of consulting with a student to meet their individualized needs in a prompt and effective manner

# Reasonable Modification Examples

**Not all reasonable modifications are appropriate for all contexts, but could include:**

**Breaks During  
Academic  
Activities**

**Excusing  
Intermittent  
Absences**

**Online or  
Homebound  
Participation**

**Providing  
Course  
Flexibility**

**Accessing  
Alternate  
Parking**

**Counseling**

**Adjusting  
Physical Space**

**Arranging  
Elevator Access**

# Supporting Documentation

- Medical documentation is typically unnecessary to determine reasonable modifications
- Proceeding based on a student's self-attestation of their needs will be the least burdensome for the student and enable the institution to promptly meet the student's needs
- Can only be required in limited circumstances when:
  - **Necessary** and **reasonable** under the circumstances to determine:
    - Reasonable modifications to offer
    - Other specific actions to take

# Supporting Documentation

## **Not necessary or reasonable when:**

- Student's need is obvious, such as:
  - Expressing breast milk or breastfeeding
  - Carrying or keeping water nearby and drinking
  - Using a bigger desk
  - Sitting or standing
  - Taking breaks to eat, drink, use the restroom
  - Needing a larger uniform
- Specific actions are available to students for other reasons without supporting documentation
- Not all students have access to healthcare providers or have seen one prior to needing reasonable modifications

# Reasonable Modifications

- Approach for pregnant students should be the same as non-pregnant students when considering exclusion from labs, athletics, clinical environments, etc.
  - Safety-related justifications are often discriminatory
- Maintain privacy of the student's pregnancy status to the extent possible
- Complaints alleging failure to provide reasonable modifications would be subject to resolution under the procedures outlined in § 106.45 (a form of disparate treatment)
- Cannot use Informal Resolution for reasonable modification complaints against the institution

# Certification to Participate

- Must **not** require health care provider or other certification that the student is **physically able to participate** in the program or activity, unless:
  - The certified level of physical ability or health is necessary for participation;
  - The institution requires such certification of all students participating; **and**
  - The information obtained is not used as a basis for pregnancy-related discrimination



# Voluntary Leaves of Absence (LOA)

## Students

- Must permit voluntary LOA for, at minimum, the period of time deemed medically necessary by the student's licensed healthcare provider
- May take a LOA under another policy if that policy provides a longer time-period for LOA than medically necessary (Title IX rights remain intact)
- Must be reinstated to the academic status, and (as practicable), the extracurricular status they held before LOA

## Employees

- Only applicable under Title IX if:
  - Institution doesn't have another leave policy;
  - Employee doesn't have enough leave under the other policy; or
  - Employee has not been employed long enough to qualify
- Employee must be reinstated to the status held when leave began or a comparable position without a negative effect on any employment privilege or right

# Lactation Space and Time

Ensure student and employee access to a lactation space that is functional, appropriate, and safe:

- A space other than a bathroom, that is:
  - Clean
  - Shielded from view
  - Free from intrusion from others
  - Available for expressing breast milk or breastfeeding as needed



# Pregnancy and Disability Intersection

- Pregnancy itself is not a disability under ADA/Section 504 but some pregnancy-related conditions could manifest as temporary disabilities
- TIXC or Designee should collaborate with disability/accessibility services staff to determine reasonable modifications for individuals with temporary disabilities
  - Ensure compliance with Title IX, Americans with Disabilities Act (ADA), and Section 504



# Title IX vs. ADA/Section 504 Obligations

## Title IX

- Prohibits sex discrimination
- Provides the student with the option of **reasonable modifications**
- Allows voluntary access to any separate and comparable portion of the program or activity
- Allows voluntary leaves of absence
- Ensures lactation space availability and access

## ADA/Section 504

- Prohibits discrimination against individuals with disabilities (including temporary ones)
- Involved as requested when someone has a physical or mental impairment that substantially limits one or more major life activities
- Follows institution's interactive process to provide **reasonable accommodations**

# Related Issues

# Pregnancy and Student-Athletes

- Pregnant student-athletes must be permitted to participate in athletics without restriction or modification (other than what restrictions are applied to all students)
- The National Collegiate Athletics Association (NCAA) is the only collegiate governing body to have a specific policy on pregnant student-athlete participation
  - Most others follow the NCAA's lead
  - TIXC or Designee and athletic staff, including coaches, should be familiar with NCAA policy



# Key Rights of Pregnant Student-Athletes

- Athletics financial aid awards cannot be conditioned on not becoming pregnant and are protected during the term of the award
- A student-athlete who has taken leave for pregnancy related conditions must be reinstated
- “Misconduct” involving pre-marital sex cannot be used as a justification for limiting a pregnant student-athlete’s participation (subject to religious exemption)
- Discrimination prohibitions apply to recruiting
- A pregnant student-athlete cannot be retaliated against for reporting or complaining about pregnancy discrimination

# Support for Non-Birthing Parents

- As a gender equity law, Title IX:
  - Focuses on providing support and resources to reduce disparities in access to the education program
  - Seeks to remedy the inequities sex and gender discrimination create
- Narrow application to only the birthing or pregnant individual **may** run afoul of Title IX, if it discriminates on the basis of sex
- TIXC or Designee may evaluate and determine on an individualized basis if requested modifications are reasonable and appropriate for a non-birthing parent
  - Can also support without relying on legal requirements



# Parenting

**If the institution would provide protections/modifications to a birthing parent, it might be sex discrimination under Title IX to refuse them to the non-birthing parent**

- Title IX covers attending to:
  - The pregnancy-related medical needs of the birthing parent
  - The birth-related immediate post-partum health/medical needs of the child
- No rule for how long post-partum medical protections apply
  - Six months is a reasonable estimate
  - Exceptions that can justify a longer protection period
- Sick/unhealthy birth parents/children are not otherwise covered by Title IX pregnancy or related conditions protections

# Non-Medical Childcare Needs

- Institution not legally required to provide childcare or reasonable modifications for childcare needs
  - May voluntarily and equitably provide reasonable modifications under institutional policy
- Requests for childcare support are usually for excused absences, remote learning options, or access to hybrid work environments
- TIXC or Designee may choose to evaluate each request case-by-case, considering the proximity of time to the pregnancy, necessity, etc.
- Modifications should have clear start and end dates and applicable parameters

# Fertility Treatments/Invitro Fertilization

- More frequent requests for fertility treatment support
- Reasonable modifications may be protected by Title IX or institutional policy
- Supporting documentation requests must comply with Title IX Regulations



# Consent

# Consent in Theory

## Consent is:

- Informed, knowing, and voluntary
  - Freely given, no duress, no fraud
- Active
  - No means no, but nothing also means no
  - Silence and passivity do not equal consent
  - Yes means yes, but yes to what?
- Creates mutually understandable permission regarding sexual activity
- Consent is simply the communication of sexual permission
  - Human communication is imperfect



# Consent in Context



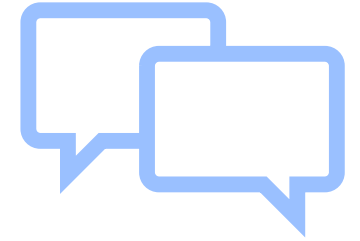
New relationships



Long-term relationships



First-time sex/  
hookups



Other scenarios without established communication norms between the parties



# Consent in Practice

# Consent in Practice

- Consent in practice can be very different than consent in theory
- If parties evolve their own norms for communicating consent, they should be held to their own norms
  - Assuming the norms are provable
  - Patterns of non-verbal or other communication can often convey consent when it is mutually understood between the parties
- Institutions may adopt a consent literalist approach or rigid application of policy
  - If they elect to do so, students and employees must be aware



# Consent in Practice

- Most practitioners are consent contextualists, not literalists
  - The details before, during, and after sexual interactions inform the context and consent determination
- Opt-in vs. Opt-out



# Contextual Consent

- Contextualists accept that consent can involve both giving and taking
  - At once or by turns
  - By all participants in a sexual interaction
  - Can involve consent to touching and consent to being touched
- As a default, it may be helpful to place the responsibility to obtain consent upon the initiator of a sexual interaction
  - Often though, initiation is mutual
    - Or at one point in an interaction one party initiates, but at another point, another party initiates
  - Sometimes, it is not possible to assess who initiated which actions

# Consent Principles to Understand

- Context often matters more than anything else
- Consent can, in fact, be implied because reasonable **reciprocation** (without leveling-up) is consensual
  - Unreasonable reciprocation
- Interactions that start in ways where consent is ambiguous can establish consent later in the interaction by **ratification**

# Consent Principles to Understand

- Individuals can put any conditions on consent that they want
  - Even if unreasonable
  - As long as there is agreement
  - Stealthing example
- Relevance of the reasonable person analysis to consent
- Do not permit rape myths to influence consent analysis

# Consent and Kink

- **Kink:** a variety of consensual, non-traditional sexual, sensual, and intimate behaviors
  - Role playing, objectification, breath play, fire play, BDSM, etc.
  - “Consensual non-consent”
    - Consenting parties form a mutual agreement that at least one partner will pretend to not consent to sexual activity
    - Significant trust between the players is required
    - Full consent is established prior to any sexual activity
    - Kink may involve intentional, consensual pain/force/violence



# Consent and Kink

- Core principle for kinks is consent negotiation
  - Most kink practitioners prioritize making the intended outcome as safe and controlled as possible
- Planning and communication around consent important for Decision-makers (DM) and Investigators to explore and understand



# Three Consent Concepts

- Every sexual interaction is like a traffic signal at a four-way intersection
  - What color was the light when the Respondent proceeded through?
    - Green = Go
    - Yellow = Slow down, stop, and/or clarify
    - Red = Stop
  - Not like baseball and rounding the bases, which assumes “the next base”
- Consent to one form of sexual activity does not imply consent to other forms
- Social constructs and identities create unspoken boundaries that impact on consent

# RETALIATION



# Retaliation Construct

# Retaliation Construct

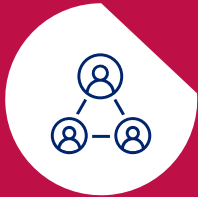
**Step 1:** Does the complaint satisfy the required elements for a retaliation complaint?

**Step 2:** Does the Respondent offer a non-retaliatory reason for the adverse action?

**Step 3:** Is there evidence that the offered reason is pretext for discrimination?

# Step One: Complaint

**Step 1:** Does the complaint satisfy the required elements for a retaliation complaint?



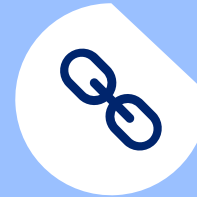
1(a)

Does the complaint implicate a protected activity?



1(b)

Does the complaint identify an adverse action?



1(c)

Does the complaint assert that the adverse action was because of the protected activity?

# Initial Assessment of Allegations

- When receiving a retaliation complaint:
  - Determine whether the allegations, if proven, have all three elements
  - If not, conduct a preliminary inquiry or “small i” investigation
- Cannot disregard because the Complainant’s initial report does not “check all the boxes”
- May need to meet with the Complainant to learn additional information

# Protected Activity

- Engaging in **protected activity is a required element** of all retaliation claims
  - Merely being mistreated is not enough
- Examples:
  - Making a Title IX report
  - Filing a formal complaint (or exploring doing so)
  - Assisting someone reporting discrimination or filing a complaint
  - Participating in the process
  - Refusing to participate in the process
  - Protesting sex discrimination

# Adverse Action

- If there is protected activity, move on to the next step:
  - **Did an adverse action occur?**
- An adverse action:
  - Significantly disadvantages or restricts
    - An individual in their status as a student/employee, or
    - Their ability to gain the benefits or opportunities of Recipient's program
  - Could deter an individual from future protected activity (e.g., filing a complaint)
- Very broad definition
  - Could be based on action or non-action

# Adverse Action Examples

- Demotion/termination
- Promotion/Tenure denial
- Poor performance reviews
- Less desirable work assignments
- Work-related threats
- Supervisory responsibility removal
- Abusive verbal or physical behavior
- Remedy inaccessibility
- Discipline
- Student leadership opportunity denial
- Unfair grading
- “Outing”
- Recommendation letter/reference denial
- Disability accommodation denial
- Public harassment

# Causation Element

- If there is protected activity and adverse action, move on to the next step:
  - **Does a causal connection exist between the two?**
- Direct evidence of motive or intent is not required
  - Often only indirect evidence is available
  - Consider whether the individual performing the adverse action knew of the protected activity





# Direct vs. Indirect Evidence of Motive

## Direct Evidence

- Supervisor told a peer, “I want to teach Davey a lesson about complaining”
- In class, a faculty member said, “I will not stand by while students attack me for my religious beliefs on transgenderism”
- The student union president told the vice president that she will “make Toni think twice before screwing with me again”

## Indirect Evidence

- Close timing between protected activity and adverse action
- Disparate treatment compared to similarly situated individuals
- Non-retaliatory reason is false/pretextual
- A Respondent posting “lol got him” after Complainant’s car was keyed
- Faculty makes disparaging comments about women during class

**EXAMPLE**

# Kenji's Complaint

- Kenji is an Admissions Counselor
- Kenji filed a complaint with the Title IX office alleging that the Vice President of Enrollment Management, Kenji's skip-level supervisor, created a hostile work environment through repeated sex-based harassment of queer employees in the division
  - This would qualify as **protected activity**



# Kenji's Complaint

- While the Title IX process was ongoing, Kenji received new territory assignments
  - Originally, Kenji had been assigned to the Northeast
  - The Northeast territory was highly prized, as many major cities were clustered near one another, leading to fewer travel days
  - Kenji's new territory is the Pacific Northwest, which includes Idaho, Washington, Oregon, Alaska, and parts of Northern California
- Kenji reported the territory reassignment to the Title IX office, asserting that his supervisor, the Director of Enrollment, was retaliating against Kenji for reporting the Vice President

**Could this be considered an adverse action?**

# Kenji's Complaint

## Is there a causal connection between Kenji's Title IX complaint and the territorial reassignment?

- Consider whether there is any direct evidence
- Consider the indirect evidence
  - The reassignment occurred during the Title IX process to resolve the original complaint
  - The Northeast is a prized territory based on travel considerations
  - The Northwest would appear to be less desirable in terms of travel
- Consider whether the Director of Enrollment knew about Kenji's complaint

## Step Two: Non-Retaliatory Reason

- If the initial assessment in Step One does not establish the required complaint elements, end the inquiry
  - Consider dismissal
  - Consider appropriateness for referral to a different process or office
- If an initial case of retaliation is established, the complaint moves forward
  - Step Two and Step Three roughly correspond to the investigation phase
  - “Big I” investigation



## Step Two: Non-Retaliatory Reason

- Interview the Respondent about the allegations:
  - Ask about the **why** behind the adverse action
    - “Why didn’t Sally get tenure?”
    - “Why did the student receive a C+ in your class?”
  - Gather any evidence that supports their rationale
    - May include directing the Investigator to potential sources for that evidence rather than providing it
- Investigator should seek corroboration of any offered non-retaliatory reason(s)
  - Analyze the Respondent’s offered reason(s) in light of relevant evidence



# Non-Retaliatory Reasons

- Poor academic or work performance
- Inadequate qualifications for role or position
- Other candidates are better qualified
- Evidence of misconduct and/or history of misconduct
- Insubordination
- Budget cuts or hiring freezes
- Does not qualify for requested accommodation or adjustment





# Step Three: Pretext Analysis

- **Pretext** occurs when an adverse action occurred for retaliatory reasons but an individual nonetheless asserts that there was a legitimate reason for the action
- When determining whether an alternative explanation for the adverse action is pretextual, consider whether:
  - The explanation makes sense
  - Other actions taken are inconsistent with the explanation
  - The explanation is inconsistent with past policy or practice
  - There is evidence of other individuals being treated differently in similar situations
  - There is witness testimony, including experts
  - The timeline of events aligns

# Techniques for Assessing Pretext

- Always provide the Complainant with the **opportunity to respond**
  - Complainant may have evidence or be able to suggest evidence to rebut Respondent's position as **pretext**
  - Investigator's responsibility to investigate pretext
- When a conflict between Respondent's position and Complainant's position arises, seek corroborating evidence
  - Coworkers or other students may be able to verify
  - Documents or testimony of senior officials may verify a policy or practice
- Perform a credibility analysis of all parties' positions and their respective arguments concerning the allegations

# Kenji's Complaint

- Assume the three elements for retaliation exist for Kenji's complaint
- Next, determine whether the Director of Enrollment has a **non-retaliatory reason** to reassign Kenji to the Northwest territory
- The Director of Enrollment offers the following:
  - Kenji was not hitting the goals outlined for the Northeast territory
  - The Northeast territory, historically, is a critical territory for applicants
  - The move out of the Northeast territory was also meant to be motivational, as the Director assumed Kenji would want to earn the assignment back
  - The Director learned of a new regional-based scholarship program in the PNW states that could dramatically increase admission numbers

# Kenji's Complaint

- Consider, next, whether the Director's alternative explanation for the adverse action is **pretextual**
- Upon hearing the Director's explanation, Kenji reported:
  - None of the staff in Kenji's position are hitting the goals outlined for their territories
    - Enrollment shortages and budget shortfalls have led to territory goals increasing by 10-20%
    - Kenji asserted that he was performing at the same level as his peers

**What action would the Investigator take to uncover evidence relevant to the pretext analysis?**

# Evidence Considerations

- The burden of proof remains on the **school, district, or institution**, though the burden shifts to the Respondent if they wish to proffer a non-retaliatory reason
  - The Investigator must be thorough in collecting evidence of protected activity, adverse action, a causal connection, non-retaliatory reason, and pretext
- Use the same standard of evidence
  - To find a policy violation, the Decision-maker must establish the adverse action was retaliatory according to the standard stated in policy – typically **preponderance of evidence**
  - Investigators and Decision-makers must adapt their approaches to analyzing evidence in retaliation cases



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# Questions?



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