

T I T L E I X



C O N S U L T
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Title IX Training

- Title IX Overview
 - Title IX law and regulations
 - Title IX policy violations
 - Title IX definitions and grievance process overview
 - State law obligations
- NJIT's policies on Title IX and Sexual Harassment
- Interviewing techniques and best practices
- Informal resolution under Title IX
- Notice of proposed rulemaking on Title IX – potential changes on the horizon



Title IX Overview

Title IX Office Administrators



Title IX Law

- Federal law passed in 1972
- No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.
 - Prohibits sex discrimination and sexual harassment
- Enforced through the Department of Education, Office for Civil Rights (OCR)



Final Rule on Title IX, effective 08/14/20

- Has the force and effect of law
- Set legal standards under Title IX for colleges and universities
- Defined Title IX Coordinator's Role
- Clarified parties' and other administrative roles in Title IX enforcement
- Defined sexual harassment, including sexual assault, under federal law
- Described required complaint grievance process
 - Supportive measures
 - Requirements for the formal complaint process and informal resolution
 - "Due process" obligations



LEGAL OBLIGATION

Educational institution must respond in a manner that isn't deliberately indifferent when it has actual knowledge of sexual harassment occurring in the institution's education program or activity against a person in the United States.



Title IX Definition of Sexual Harassment

Defined conduct on the basis of sex and includes:

- Quid pro quo harassment
- Hostile environment harassment
- Sexual assault
- Dating/domestic violence
- Stalking



Title IX Definition of Sexual Harassment, continued

- **Quid pro quo** - An employee who conditions the receipt of an aid, benefit, or service of the institution on an individual's participation in unwelcome sexual conduct.
- **Hostile environment** sexual harassment, defined as 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 school's education program or activity.



Title IX Definition of Sexual Harassment, continued

Sexual Assault

- Rape
- Fondling
- Incest
- Statutory Rape

Dating/Domestic Violence

Stalking



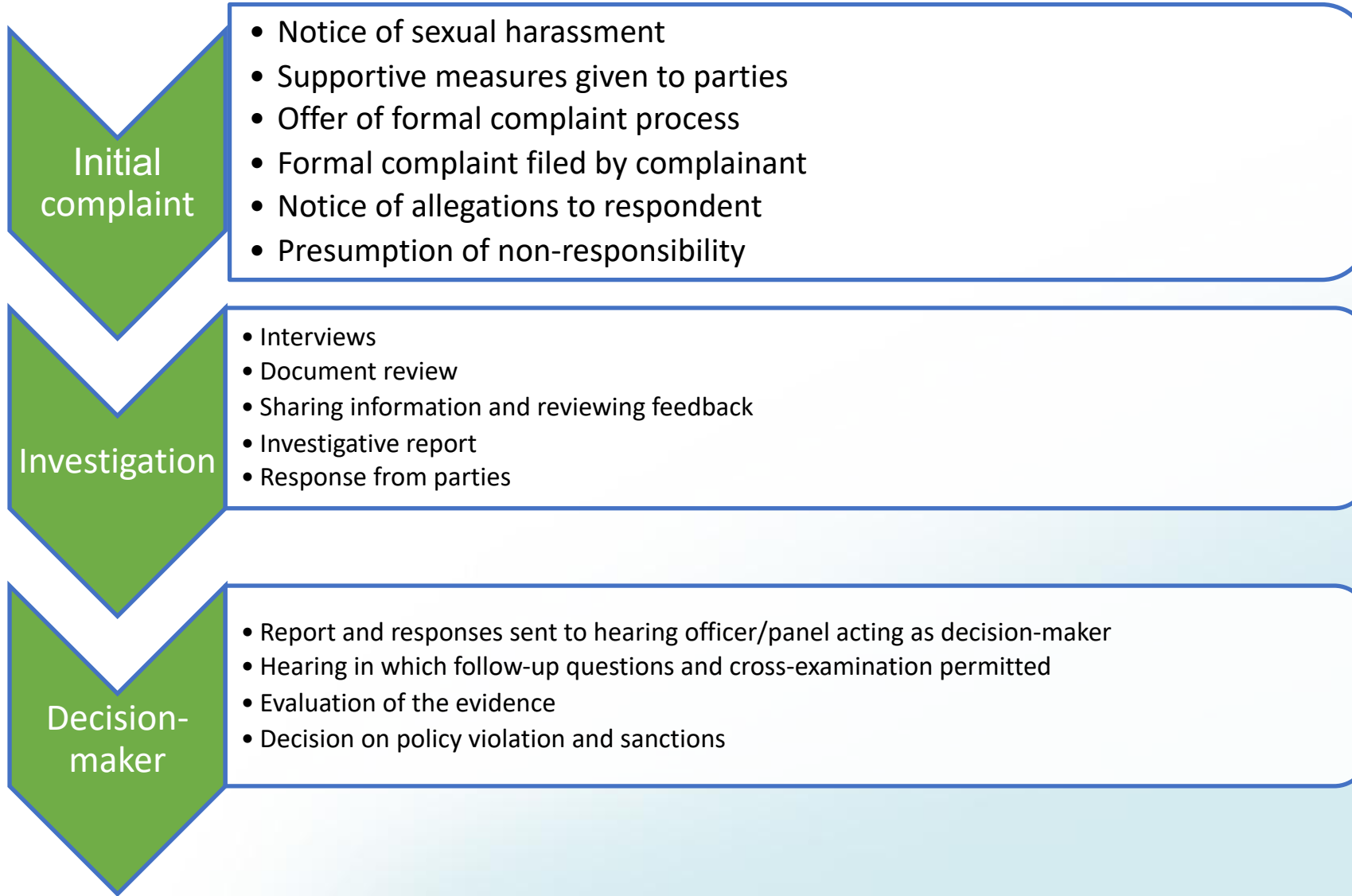
Title IX Jurisdiction

- In order for the institution to have jurisdiction, the incident must have occurred in the institution's education program or activity, which is defined to include:
 - "locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs"
- In order for the institution to have jurisdiction, the sexual harassment must have occurred against a person in the United States



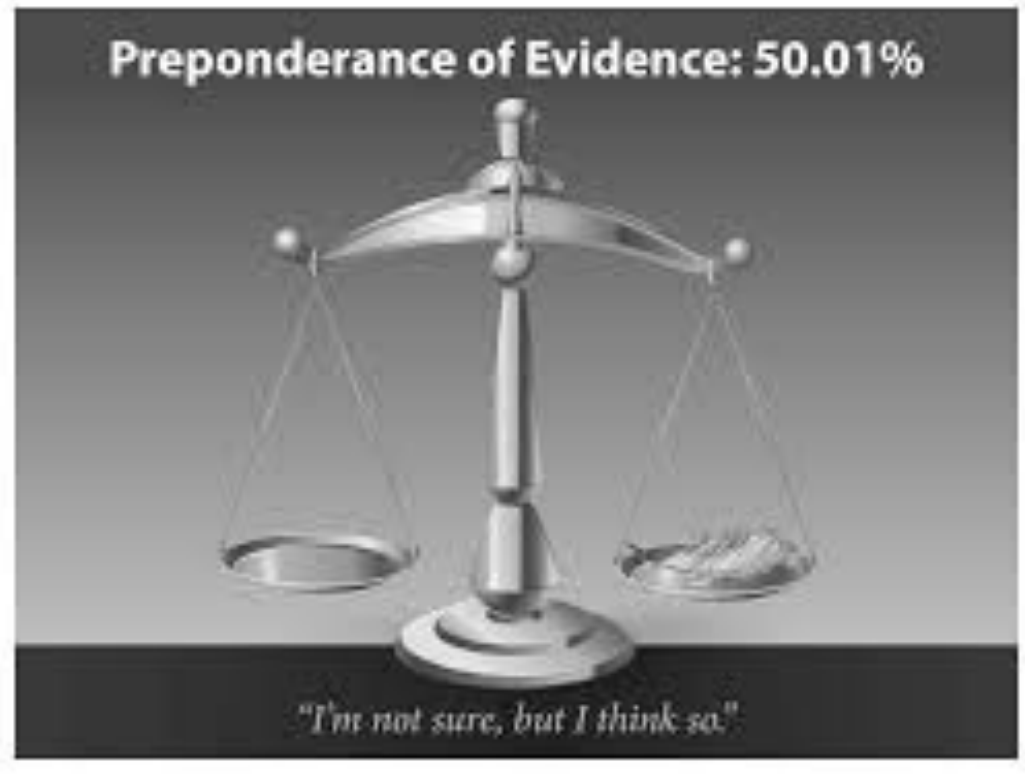
Overview of Title IX Grievance Process

OBLIGATION: Respond promptly in a manner that is not deliberately indifferent

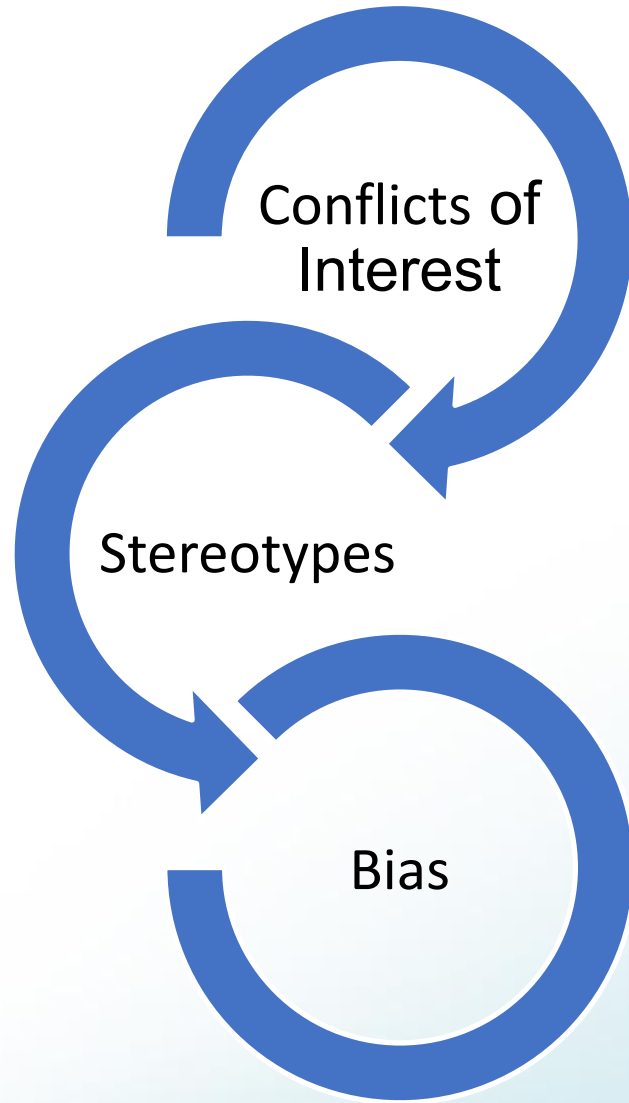


Title IX Burden of Proof

- Preponderance of the evidence standard is used in evaluating a potential Title IX violation



Title IX Process MUST Avoid



Title IX Prohibition against Retaliation

- Prohibition against retaliation for any participant in the Title IX investigation process
- Requires some level of institutional action



State Law Distinctions

- Definitions of sexual harassment
- Processing an allegation of sexual harassment



NJIT Policies and Procedures



NJIT Policies and Title IX

- Title IX Sexual Harassment Policy
- Code of Student Conduct (students only)
- Human Resources Anti-Discrimination and Anti-Discriminatory Policy
- Find policy links here:
<https://www.njit.edu/titleix/policies>



Interviewing Techniques and Tips



Overview

- Interviewing Techniques, including how to prepare for an interview
- Interview summary tips
 - Critique of interview summary
- Case study
 - Practice interviewing complainant
 - Practice interviewing a reluctant respondent
 - Draft interview summary of complainant



Preparing for and Conducting an Interview

- Creating an outline
- Understanding the advisor's role
- Avoiding conflicts of interest, bias and stereotypes
- Addressing difficult questions
- Relevance
- Non-responsive and/or forgetful interviewees
- Documenting the interview
- Preparing the investigation report



Creating an outline

Prepare in advance by making a thorough outline. You can then fill in the outline itself as you conduct the interview. This is a good outline to start with:

- Discussion about process
 - what you, as investigator, do, and who you are – your experience matters;
 - confidentiality and privacy of information provided;
 - non-retaliation;
 - timeframe for interviews and report;
 - role of advisor;
 - tape-recording by you or parties;
 - participation is voluntary;
 - drug/alcohol amnesty
- Confirm that the interviewee understands the process



Creating an outline, continued

- Background of and history between the parties
- The hours before the reported incident
- The reported incident
- After the reported incident
- Next steps
 - ask for any additional information/documentation the party has;
 - witnesses will be interviewed;
 - parties may be interviewed a second time;
 - information provided to parties to review;
 - final report



Advisors

- Review the role of the advisor in your policy – handout
 - Lawyer as advisor
- If the advisor violates the rules (e.g., speaks on behalf of their client), politely remind them of the rules.
- If this continues, suggest that you take a break so that the advisor can talk to their client.
- Terminate the interview, if necessary.



Conducting the Interview



Fundamental principles

- **Presumption of non-responsibility [Section 106.45(b)(1)(iv)]**

“A recipient’s grievance process must—

(iv) Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process;”

- **Treating all parties with respect**

- Thank the party for meeting with you
- Acknowledge that this is a difficult situation [Complainant and Respondent]
- Tell them to take their time, and take breaks if necessary



Fundamental principles, continued

- Do not “cross-examine” parties or witnesses, or complete their sentences
 - Instead, ask open-ended questions – “what are you able to recall about the incident?”
 - Do not interrupt parties or witnesses – LISTEN
- You are there to gather facts, not to draw conclusions
- You do not make credibility determinations – your facial expressions and/or body language should not indicate that you have made such determinations
- If a party or witness is struggling because of a language difference or disability let the TIXC know



Conflicts of Interest

Per the regulations [Section 106.54(b)(1)(iii)], the institution must "Require that any individual designated by a recipient as a[n] investigator.....not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent."

- Are you known on campus as being an advocate for complainants or for respondents?
- What have you written, published, or tweeted about that could be interpreted as a conflict of interest?
- Disclose to the TIXC any personal knowledge about or relationship with the parties



Avoiding bias and stereotypes

- What are some stereotypes that you hear about sexual assault and misconduct?
 - About complainants?
 - About respondents?
 - About men?
 - About women?
 - About athletes?
 - About non-binary individuals?
 - About the LGBTQIA community?



Bias

- Ask yourself if you have been influenced by any of these stereotypes
- Ask yourself if you are influenced by the party in front of you (e.g., do you tend to believe female complainants over male respondents?)
- Does the likability of the party/witness effect whether you believe them?
- Ask if your own race, ethnicity, religion, culture, may make you biased in some way against either party

In order to overcome any biases you must be aware of them and actively work to overcome them.



Addressing Difficult Questions

- Alerting the interviewee about the nature of the question and why you are asking it – e.g., questions to the complainant about alcohol usage and clothing
- Asking for their help/assistance to respond to concerns and challenges raised by Respondent - e.g., regarding continuation of relationship after the incident or delay in reporting



Questions about the Incident

These are intimate, intrusive and difficult questions – acknowledge that

You must be specific in your questions –

- Details about sexual contact -
 - Ask specifically about genitalia, anus, groin, breast, inner thigh, buttocks if the party is not being clear
 - Ask specifically about penetration [vaginal/anal/oral] if the party is not being clear

You must ask them why they thought consent was or was not given – was there coercion, intimidation, threats or force?



Relevance

- The regulations require that both parties be provided “an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint.” [Section 106.54(b)(5)(vi)]
 - So you must provide them both relevant and irrelevant evidence to review, if the evidence is “related”
- But, at the end of the investigation you will prepare a report that “fairly summarizes [only] relevant evidence.”
[Section 106.54(b)(5)(vii)]



Relevance

- The final regulations do not define relevance, and “the ordinary meaning of the word should be understood and applied.”
[Preamble, 30247]
 - [E]vidence that “may show whether facts material to the allegations under investigation are more or less likely to be true” (Preamble, p. 30294)



When is information not relevant?

- **NOT RELEVANT**

- Information protected by a legally recognized privilege, unless the party has waived the privilege [legal/clergy/self-incrimination] Section 106.45(b)(1)(x) NOTE: this depends on NJ law
- Party's medical, psychological, and similar records unless voluntary written consent to disclose this information is provided by the party Section 106.45(b)(5)(i)



Rape Shield protections

- Evidence about complainant's prior sexual history must be excluded unless such questions/evidence: [Section 106.45(b)(6)(i)]
 - are offered to prove that someone other than the respondent committed the conduct, or
 - if the questions/evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.
- NOTE – this doesn't apply to Respondents, so you can question them about prior sexual history IF THIS INFORMATION IS RELEVANT TO THE CURRENT COMPLAINT.



Other types of relevant evidence

- Lie detector tests
- Character evidence
- Hearsay evidence
- Forensic computer/phone information

You've got to collect all of it if it is offered. The hearing panel will determine how much weight to give it.

For computer/phone information, an expert may be needed.



The non-responsive interviewee

- Nobody has to participate – even the parties. Tell them their participation is voluntary and not required.
- Allay any concerns about the process
 - Retaliation protections
 - Explain drug-alcohol amnesty to parties
- Ask if they would like to submit a written statement or other documentation even if they won't talk to you.



The interviewee who doesn't remember

In many cases this is due to alcohol or drug consumption – ask detailed questions -

What did you drink/ingest – [hard alcohol ; beer; wine; size of drinks]

- Over what period – include entire day
- What food/water during that period?
- Who purchased/supplied the alcohol/drugs
 - Ask if there are receipts for alcohol purchase if relevant



Drugs and alcohol

- Possibility of date rape drugs [were drinks unattended/prepared by someone else outside of your sight?]
- By time of incident/how did alcohol/drugs affect you?
 - Ask specifically about each symptom
 - Slurring of words
 - Drowsiness/lack of awareness/unconsciousness
 - Stumbling/gait
 - Vomiting
 - After-effects of alcohol – “hung-over” next day; headache; dehydrated?



The potential impact of trauma on memory

- This is a field of study that the Preamble describes as “developing.” [page 30187]
- It is also [controversial](#)
- If you wish to understand this better, you can find information [here](#) about conducting a “Forensic Experiential Trauma Interview.”



What does this have to do with interviewing?

- The regulations do not preclude the use of trauma-informed techniques in conducting interviews
- What is the “neurobiology of trauma”?
- How does this inform interviewing techniques?
 - Encourage a witness to share what they are able to recall, including especially sensory impressions that may jog memory [see, hear, taste, feel, smell]
 - Be aware of questions that may appear to be judgmental
 - Do not demand or expect that they recall everything in a chronological manner
 - Use the same approach with respondents, who are likely experiencing stress during the interview



Documenting the information gathered

- Drafting a summary of the Interview - template
- Sharing the summary with the Interviewee – how will you do this?
 - I typically use a file sharing program like Box, rather than emailing individuals sensitive information
- Documenting potential changes of the summaries
 - There are different ways to do this
 - E.G., Drop a footnote in your original summary of what change the person requested and whether you made the change.
 - Perhaps they gave you a redlined version of the summary, or an email with changes. Include these in the investigation file to document the process.



The investigation report

Handout



One Last Tip

- **DO NOT DELAY IN CONDUCTING THE INVESTIGATION OR FINALIZING THE REPORT**
 - DELAY IS ONE OF THE HARDEST THINGS FOR PARTIES TO DEAL WITH – THEY ARE UNDER TREMENDOUS STRESS AND DESERVE YOUR FULL ATTENTION
 - BE IN REGULAR TOUCH WITH THE PARTIES ABOUT PROGRESS (WEEKLY)
 - IF DELAY IS UNAVOIDABLE, LET THE PARTIES KNOW



Lunch and Case Study

Fact Scenario



Case Study Exercises

- Break into two groups; each group will conduct the interview of Complainant
 - Critique of exercise
- Return to larger group; prepare for Respondent and Advisor interview
- Break back into your groups and prepare an interview summary based on the information your group gathered
- Submit interview summaries for review and critique



Informal Resolution under Title IX



Types of Informal Resolution

- Arbitration
- Mediation
- Restorative Justice
- Depending upon the time-period, informal resolution has been in favor and has fallen out of favor



Concepts Around Informal Resolution

- Informal means less attention/focus/importance by institution
- Power dynamics
- Victims/survivors confronting accused/perpetrators



Status of Informal Resolution in Title IX Process

- After the filing of a formal complaint
- Both parties must agree to participate (in writing)
- Both parties must receive a description of the process
- Either party can withdraw from the process and proceed formally
- Information gathered during informal resolution methods may (or may not) be shared in the formal process



Title IX: Notice of Proposed Rulemaking

- Draft of proposed new regulations released 6/23/22
- Reported in federal register on 7/12/22
- Comments to OCR due by 9/12/22
- New regulations in the future with an unknown effective date



Proposed Areas of Change

- Key areas that are expected to change:
 - Legal obligation for an institution's response
 - Pregnant students
 - Jurisdiction
 - Definitions of sex-based harassment
 - Gender identity and sexual orientation
 - Grievance Process
 - Flexibility in response
 - Hearings?
 - Training



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