Annual Training for New Title IX Coordinators and Deputy Coordinators

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Agenda

- The Legal Landscape
- Providing Services to Victims/Survivors
- Title IX Coordinator & Team
- Responding to a Report
- Complaint Process: Investigations & Adjudications
- Drafting a Sexual Misconduct Policy
- Creating a Culture of Understanding & Prevention

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Terminology

- DOE = Department of Education
- Recipient = Institutions covered by Title IX
- OCR = Department of Education's Office for Civil Rights
- VAWA = Violence Against Women Reauthorization Act
- FERPA = Family Educational Rights and Privacy Act
- CSA = Campus Security Authority
- DCL = Dear Colleague Letter
- Investigation/Grievance Procedures/Complaint Procedures
- Adjudicator/Decision-Maker
- Complainant/Reporting Party/accuser/ victim/survivor
- Respondent/Responding Party/ accused/alleged perpetrator

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TERMINOLOGY

- Complainant
  - An individual who is alleged to be the victim of conduct that could constitute sexual harassment
- Respondent
  - An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment

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SEXUAL VIOLENCE STATISTICS

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SEXUAL VIOLENCE STATISTICS

- United Educators' Study
  - 28% of reports resulted in lawsuits, demand letters, or federal Title IX complaints
  - Types of sexual assault:
    - Incapacitation: 33%
    - Physical force: 29%
    - Failed consent: 16%
    - Sexual coercion: 13%
    - Drug-facilitated: 7%

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Sexual Violence Statistics

- 78% of incidents involved one or both parties consuming alcohol
- 40% of complainants delayed reporting, waiting, on average, nearly a year after the incident
- 80% of complainants were freshmen or sophomores
- 90% of complainants knew the respondent

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SESSION 1: THE LEGAL LANDSCAPE

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Session Overview

- Title IX Overview
- Clery Act
- Violence Against Women Reauthorization Act
- When an Institution Must Respond Under Title IX
- Interaction with Other Laws
- Case Studies

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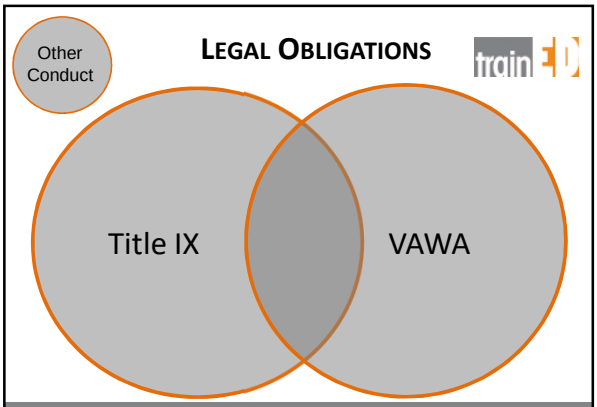
Legal Obligations



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Title IX

- "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 educational program or activity receiving Federal financial assistance"

20 U.S.C. § 1681

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Who Must Comply With Title IX?

- Institutions that receive federal funds
  - Students
  - Employees
  - Third Parties
    - Visitors
    - Vendors

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Discrimination "On the Basis of Sex"

- Includes:
  - Sexual harassment
  - Differential treatment

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How Institutions Must Respond under Title IX

- Must respond promptly in a manner that is not deliberately indifferent
- Deliberately indifferent = response is clearly unreasonable in light of the known circumstances
- Follow grievance process outlined in the regulations

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Title IX Requirements

- All schools receiving federal funds must:
  - Publish Notice of Nondiscrimination
  - Designate a Title IX Coordinator
  - Disseminate policy prohibiting sex discrimination
  - Adopt and publish prompt and equitable grievance procedures
  - Offer supportive measures to a complainant
  - Follow a legally compliant grievance process
  - Train individuals with heightened responsibilities

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OCR's Enforcement and Guidance

- OCR's Role:
  - Issue guidance
  - Compliance reviews
  - Resolution agreements

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Recent OCR Actions

- Withdrew 2011 Dear Colleague Letter and 2014 Q & A's
- Issued 2017 Q & A Guidance
- Proposed regulations released in November 2018
- Final regulations released May 2020
- Final regulations take effect August 14, 2020

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OCR Guidance

- January 2001 Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties
- January 25, 2006 Dear Colleague Letter on Sexual Harassment
- April 24, 2015 Guidance on Title IX Coordinators
  - Dear Colleague Letter on Title IX Coordinators
  - Letter to Title IX Coordinators
  - Title IX Coordinator Resource Guide
- September 22, 2017 Q & A on Campus Sexual Misconduct

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Title IX Coordinator Guidance

- Key points:*
  - Independence and seniority of Title IX Coordinator
  - Notice of Nondiscrimination
  - Website and prominent link from homepage
  - Training
  - Annual climate surveys
  - Recordkeeping
  - Information collection and reporting
  - Responsibilities besides sexual harassment

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*2015 DCL on Title IX Coordinators

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Title IX Coordinator Guidance

- Areas of responsibility besides sexual harassment:*
  - Recruitment, admissions, and counseling
  - Financial assistance
  - Athletics
    - Student interests and abilities
    - Athletic benefits and opportunities
    - Athletic financial assistance
  - Pregnant and parenting students
  - Discipline
  - Employment

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*2015 Title IX Resource Guide

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Clery Act

- Provide accurate, timely, and complete information
- Regarding certain types of crimes/incidents
- Occurring on or adjacent to campus
- To promote campus safety and consumer protection

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Crime Reporting Under Clery

- Collect, classify, and count crime reports
  - Annual notification
  - Current and prospective students/employees
- Campus alerts
  - Emergency notifications
    - Ongoing threat to health or safety
    - Sufficient information for informed decisions
  - Timely notification of Clery crimes
    - Includes stalking, domestic violence, dating violence, sexual assault
    - Cannot identify complainant
- Daily crime logs
  - Updated every 2 days
  - Publicly available

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VAWA Changes to Clery

- Additional Clery crimes
  - Domestic violence
  - Dating violence
  - Stalking
- Additional policy statements
  - Procedures following a VAWA crime or sexual assault
  - Prevention and awareness programs
- Other changes
  - Hate crimes include "national origin" and "gender identity" motivated crimes
  - Prohibits identification of complainants in threat reports
- Codified parts of 2011 Dear Colleague Letter

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Clery Fines

- Fine for each Clery Act violation is $58,328
- In June 2020, The University of North Carolina at Chapel Hill reached a $1.5 million settlement with the DOE for Clery Act violations, including in the areas of reporting crime statistics, defining Clery geography, issuing warnings, and including required information in their annual security reports
- In 2019 the DOE issued a $4.5 million fine – the largest in history – against Michigan State University
- University of Saint Thomas fined $172,000 in 2017 for failure to include required policy statements and under-reporting of crime statistics among other violations

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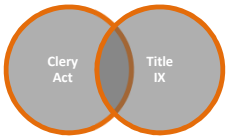
Interaction Between Title IX & Clery



- Clery is about the reporting of crimes (broader than sexual misconduct), regardless of investigation
- Title IX is about the investigation of reports of sexual harassment, including VAWA crimes and sexual assault

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VAWA Regulations

- Requires policy addressing:
  - Procedures complainants should follow
  - Disciplinary procedures
  - Confidentiality
  - Notifications to students, employees, and complainants
  - Right to advisor of choice (including attorney)
  - Right to have notice of meetings with parties
  - Right to have access to information used in formal/informal disciplinary meetings
  - Rationale must be included in Notice of Determination
  - Training for individuals with heightened responsibilities
  - Training for students and employees

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Interaction Between Title IX & VAWA

- Title IX
  - Sexual harassment (as defined by regulations)
  - In an education program or activity
  - Against a person in the United States
- VAWA
  - Allegations of sexual assault, domestic violence, dating violence, or stalking
  - Applies regardless of location of alleged conduct (on or off campus; in or out of the education program of activity; in or out of the U.S.)

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When Institutions Must Respond under Title IX

- Institution has actual knowledge of
- Sexual harassment
- In an education program or activity of the institution
- Against a person in the United States

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Title IX—Actual Knowledge

- Actual knowledge
  - Notice of sexual harassment or allegations of sexual harassment to the Title IX Coordinator or an official who has authority to institute corrective measures on behalf of the institution
    - Notice includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator
    - Elementary and secondary schools: Any employee
  - Vicarious liability and constructive notice are insufficient
  - Standard not met if the only official with actual knowledge is the respondent

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Title IX—Actual Knowledge

- Actual knowledge (cont.)
  - The following does not qualify an individual as having the authority to institute corrective measures
    - Mere ability or obligation to report sexual harassment
    - Ability or obligation to inform a student about how to report
    - Being trained in how to report

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TITLE IX—SEXUAL HARASSMENT

- Conduct *on the basis of sex* that satisfies one or more of the following:
  - Quid pro quo
  - Hostile environment
  - VAWA crimes and sexual assault

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TITLE IX—SEXUAL HARASSMENT

- Quid pro quo:
  - Employee conditions aid, benefit, or service of the institution on an individual's participation in unwelcome sexual conduct
  - Examples
    - Supervisor conditioning promotion on participation in sexual advance
    - Professor conditioning grade on participation in sexual advance

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- Employee
- Conditions aid, benefit, or service of the institution
- On an individual's participation in unwelcome sexual conduct

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TITLE IX—SEXUAL HARASSMENT

- Hostile Environment:
  - Unwelcome conduct (on the basis of sex) determined by a reasonable person to be *so severe, pervasive, **and** objectively offensive* that it effectively denies a person equal access to the institution's education program or activity

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TITLE IX—SEXUAL HARASSMENT

- Hostile environment harassment
  - Reasonable person: perspective of a reasonable person in the shoes of the complainant
    - Consider ages, abilities, and relative positions of authority of the individuals involved
  - Effectively denies a person equal access
    - Equal access has been denied – not that a person's total or entire educational access has been denied
    - No specific type of reaction is necessary to conclude that severe, pervasive, objectively offensive sexual harassment has denied a complainant "equal access"
    - Analysis is whether a reasonable person in the complainant's position would be effectively denied *equal* access to education compared to a similarly situated person who is not suffering the alleged sexual harassment

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TITLE IX—SEXUAL HARASSMENT

- Examples: Multiple incidents of the following conduct may constitute hostile environment sexual harassment
  - Unwelcome sexual flirtations, advances, or propositions
  - Requests for sexual favors
  - Verbal abuse of a sexual nature, obscene language, off-color jokes, sexual innuendo, and gossip about sexual relations
  - The display of derogatory or sexually suggestive posters, cartoons, drawings, objects, notes, letters, photos, emails, or text messages
  - Visual conduct such as leering or making gestures
  - Sexually suggestive comments about an individual's body or body parts, or sexually degrading words to describe an individual

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TITLE IX—SEXUAL HARASSMENT

- Examples: Multiple incidents of the following conduct may constitute hostile environment sexual harassment
  - Unwelcome touching of a sexual nature such as patting, caressing, pinching, or brushing against another's body
  - Unwelcome verbal or physical conduct against an individual related to the individual's gender identity or the individual's conformity or failure to conform to gender stereotypes
  - Cyber harassment, including but not limited to disseminating information, photos, or videos of a sexual nature without consent
  - Videotaping or taking photographs of a sexual nature without consent

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TITLE IX—SEXUAL HARASSMENT

- VAWA Crimes
  - Dating violence
  - Domestic violence
  - Stalking
- Sexual Assault
- As defined in Clery
- Consent: No particular definition of consent with respect to sexual assault is required

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TITLE IX—SEXUAL HARASSMENT

- **VAWA Crimes—Sexual Assault:**
  - ***Rape***: The 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***: The touching of the private body parts of another person for the purpose of sexual gratification without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity

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TITLE IX—SEXUAL HARASSMENT

- **VAWA Crimes—Sexual Assault:**
  - ***Incest***: Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law
  - ***Statutory Rape***: Sexual intercourse with a person who is under the statutory age of consent

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TITLE IX—SEXUAL HARASSMENT

- VAWA Crimes Definitions
  - ***Domestic Violence***:
    - Includes felony or misdemeanor crimes of violence committed—
      - By a current or former spouse or intimate partner of the victim
      - By a person with whom the victim shares a child in common
      - By a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner
      - By a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies
      - By any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred

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TITLE IX—SEXUAL HARASSMENT

- VAWA Crimes Definitions
  - ***Dating Violence***:
    - Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim
      - Where the existence of such a relationship shall be determined based on **the reporting party's statement and** with consideration of—
        - The length of the relationship
        - The type of relationship
        - The frequency of interaction between the person involved in the relationship

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TITLE IX—SEXUAL HARASSMENT

- ***Dating Violence***: (cont.)
  - Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse
  - Dating violence does not include acts covered under the definition of domestic violence

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TITLE IX—SEXUAL HARASSMENT

- VAWA Crimes Definitions
  - ***Stalking***:
    - Engaging in a course of conduct directed at a specific person that would cause a reasonable person to—
      - Fear for his or her safety or the safety of others; or
      - Suffer substantial emotional distress

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TITLE IX—SEXUAL HARASSMENT

- VAWA Crimes Definitions
  - ***Stalking*** (cont.): For purposes of this definition—
    - ***Course of conduct*** means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person or interferes with a person's property

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TITLE IX—SEXUAL HARASSMENT

- VAWA Crimes Definitions
  - ***Stalking*** (cont.)
    - ***Reasonable person*** means a reasonable person under similar circumstances and with similar identities to the victim
    - ***Substantial emotional distress*** means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling

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TITLE IX—SEXUAL HARASSMENT

- Male/Female
- Female/Male
- Female/Female
- Male/Male

- Gender Identity

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TITLE IX—SEXUAL HARASSMENT

- Examples of Title IX conduct
  - Quid pro quo harassment based on sex by an employee
    - Supervisor conditioning promotion on participation in sexual advance
    - Professor conditioning grade on participation in sexual advance
  - Severe, pervasive, and objectively offensive harassment based on sex, such as:
    - Multiple text messages and other comments based on sex
    - Multiple incidents of unwelcome kissing and other unwelcome touching
    - Multiple incidents of gossip about sexual relations
  - Sexual Assault & VAWA crimes (domestic violence, dating violence, stalking)

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Title IX—Sexual Harassment

- Examples of Non-Title IX conduct
  - Quid pro quo harassment by a student
    - Captain of a sports team conditioning a benefit on participation in a sexual advance
  - Single incident of harassment based on sex (clearly not pervasive)
    - Single unwelcome kiss
    - Single comment about an individual's body
    - Single sexual joke
  - Harassment based on sex that is not so severe, pervasive, and objectively offensive that it denies a person equal access to the institution's education program or activity (*caution!*)
  - Rare cases of stalking that are not based on sex
    - Student following star quarterback

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Title IX – Education Program or Activity

- Education program or activity
  - Locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs
    - Includes all incidents of sexual harassment occurring on an institution's campus
    - Also includes off-campus conduct if
      - Occurs as part of the institution's "operations"
      - Institution exercised substantial control over the respondent and the context of alleged sexual harassment
      - Occurs at an off-campus building owned or controlled by a student organization officially recognized by the postsecondary institution (e.g., fraternities and sororities)

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Title IX – Education Program or Activity

- Education program or activity (cont.)
  - Consider whether recipient funded, promoted, or sponsored the event or circumstance
  - No single factor is determinative
  - Clery Act geography is not co-extensive with scope of education program or activity

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Context/Location of Alleged Conduct

- Example locations of Title IX matters
  - Campus housing
  - Fraternity or sorority house
  - Off-campus institution-sponsored event
    - Dance
    - Orientation retreat
    - Service trips
    - Alumni event
    - Away game?

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Context/Location of Alleged Conduct

- Example locations of Non-Title IX matters
  - Off-campus housing*
  - Off-campus conduct over summer or school breaks*
  - Study abroad trip (outside of US)

*Unless specific circumstances make it part of the education program or activity

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Relationship Between Parties and Institution

- Education program or activity
  - Locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs
- Formal complaint
  - At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed
- Permissive dismissal
  - Discretionary dismissal of formal complaint if respondent is no longer enrolled or employed by the institution
  - Also have discretion if respondent was never enrolled or employed by institution

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Relationship Between Parties and Institution

- Third party complainant and respondent who is a member of the campus community
  - Title IX (if within scope of Title IX)
    - Provide supportive measures
    - May not be required to comply with Title IX grievance process
  - VAWA (if allegation of VAWA crime or sexual assault)
    - No requirement to provide written explanation of rights and options (but still recommended)
    - Disciplinary process that complies with VAWA

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Relationship Between Parties and Institution

- Complainant who is a member of the campus community and third party respondent
  - Title IX (if within scope of Title IX)
    - Provide supportive measures
    - Generally not required to comply with Title IX grievance process
  - VAWA (if allegation of VAWA crime or sexual assault)
    - Provide a written explanation of student or employee's rights and options
    - Could take action (no trespass) without disciplinary process
    - If engaging in a disciplinary process, comply with VAWA requirements

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Relationship Between Parties and Institution

- Examples of Title IX matters
  - Complainant
    - Student
    - Employee
    - Applicant for admission or employment
    - Alumnus/alumna interested in participating in alumni events
    - Guest at sporting event?
    - Visitor to campus with no affiliation with institution?
  - Respondent
    - Student
    - Employee
    - Applicant for admission?
    - Applicant for employment?

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Relationship Between Parties and Institution

- Examples of Non-Title IX matters
  - Complainant
    - Former student with no intent to re-enroll or participate in institution events
    - Former employee
  - Respondent
    - Non-student/non-employee (unless circumstances weigh in favor of providing Title IX process)

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Determining Title IX vs. Non-Title IX Matters

- Factors to consider
  - Type of alleged conduct – sexual harassment?
  - Location and context of alleged conduct
    - within education program or activity?
    - against a person in the United States?
  - Relationship between parties and institution

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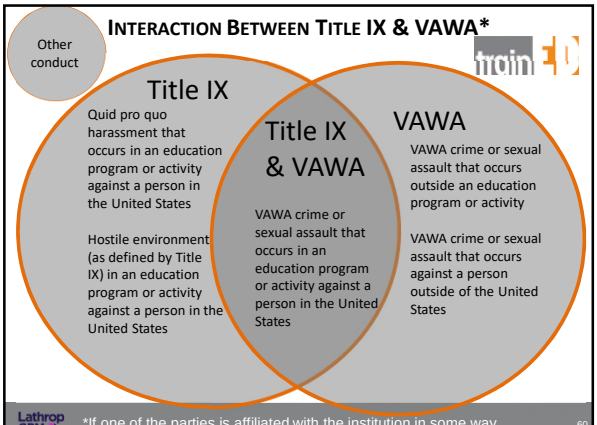
Interaction Between Title IX & VAWA*



Lathrop GPM *If one of the parties is affiliated with the institution in some way 60

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Other conduct

Quid pro quo harassment by a student

Hostile environment harassment that occurs outside a program or activity

Hostile environment harassment that occurs against a person outside of the United States

Sexual harassment that is not sufficiently severe, pervasive, and objectively offensive that it effectively denies a person equal access to education program or activity (caution!)

Lathrop GPM 61

Non-Title IX and Non-VAWA Cases

- Flexibility to determine whether and how to respond to alleged conduct
- Factors to consider
  - State law
  - Expectations of community

Lathrop GPM 62

Interaction with Other Laws

- FERPA: Family Educational Rights and Privacy Act
- Disability accommodation laws
- State mandatory reporting laws
- Title VII/State anti-discrimination laws
- State student safety laws

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Interaction with Other Laws—FERPA

- FERPA: Family Educational Rights and Privacy Act
  - Limits disclosure of student education records
  - Several exceptions permit disclosure
    - In Title IX cases, exception permits school to disclose to both parties all directly related evidence, all information in the investigation report and attachments that goes to the decision-maker, and statement of, and rationale for, the final results of any disciplinary proceedings or appeals, including sanctions and whether remedies will be provided
      - Required by Title IX
      - Does not include what the remedies are
    - In cases involving sexual assault/VAWA crime, exception permits school to disclose to the parties any information provided to the decision-makers and the final results of the disciplinary proceedings, including *all* sanctions

Lathrop GPM 64

Interaction with Other Laws—Accommodations

- Provide reasonable accommodations to an individual with a disability who requests an accommodation necessary to ensure an equal opportunity to participate in the complaint resolution process.

Lathrop GPM 65

Interaction with Other Laws—Mandatory Reporting Laws

- Mandatory reporting laws: state-specific laws requiring school employees to report child abuse
  - Mandatory reporters
    - Includes school officials in most states
    - Some states broadly define
  - Must report – known or suspected
  - Abuse or neglect of a child or vulnerable adult
  - Report to police or designated government official
    - Orally within specified time frame (immediately → within short time period)
    - Follow-up in writing within specified time frame

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Interaction with Other Laws— Title VII/Anti-Discrimination

- Title VII/State Anti-Discrimination Laws
  - Employment discrimination based on sex
  - Sexual harassment (severe ***or*** pervasive)
  - Constructive knowledge (knew or should have known)
  - May have one incident that violates both Title IX and employment discrimination laws

Lathrop GPM 67

Interaction with Other Laws— State Campus Sexual Assault Laws

- States with Campus Sexual Assault Laws:
  - Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Louisiana, Maryland, Minnesota, Missouri, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Virginia, Washington
- Address various topics, such as:
  - Reporting, procedural, and training requirements; policy definitions; transcript notations; information sharing; advisors; support services; involvement of law enforcement, etc.

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CASE STUDIES

Spotting the Issues

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CASE STUDY #1

- A student, Melissa, complains to the Associate Provost that one of her instructors is "hitting on her." Melissa states that her instructor asked her to meet him at 9:00 at night on multiple occasions. Does the Associate Provost have an obligation to report? Assuming a report is made to the Title IX Coordinator, what are the institution's obligations?
  - Title IX obligations?
  - VAWA obligations?
  - Clery obligations?
  - Other policy obligations?

Lathrop GPM 70

CASE STUDY #2

- Nick's friend, David, is visiting for the weekend and staying in Nick's dorm room. After a night of heavy drinking, Nick wakes up suspecting that they may have had sex. When Nick confronts David, David says that Nick was coming on to him and that at first David resisted but that Nick was quite persistent. After basketball practice that afternoon, Nick's coach notices that something is wrong and asks him about it. Nick confides in his coach and expresses frustration with himself for having put himself in that position. Nick tells his coach that he doesn't want anything done about this; he just wanted him to know why he was distracted. Does the coach have an obligation to report? Assuming a report is made to the Title IX Coordinator, what are the institution's obligations?
  - Title IX obligations?
  - VAWA obligation?
  - Clery obligations?

Lathrop GPM 71

CASE STUDY #3

- Anna, a sophomore at your institution who is on the volleyball team, alleges that during the last away volleyball game, Luke, a junior at your institution was making lewd, harassing comments to her during her game. Anna stated that she has seen Luke before but doesn't really know him. She stated that he often addressed her by the number on her jersey. Anna stated that Luke made several comments about how her butt looked in her spandex shorts. Anna stated that at one point during the game she was standing next to her team's bench and Luke came up behind her, put his lips right next to her ear and whispered, "That uniform looks good on you number 9 but I'd like to see what you look like without it." Anna stated that the comment and Luke's closeness to her made her really uncomfortable. She tells you that she's worried about him doing it again at the next game.
  - Title IX obligations?
  - VAWA obligations?
  - Clery obligations?
  - Other policy obligations?

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Case Study #5

- Jake contacts you and alleges that Molly sexually assaulted him during a spring break trip to Florida. Jake tells you that he and Molly were on the trip with other members of your institution's Student Government Association. When you ask Jake about the trip, he tells you that it wasn't an official SGA trip, but one of the members had the idea to take a trip together, and he passed around a sign-up sheet during one of the meetings. What are the institution's obligations?
  - Title IX obligations?
  - VAWA obligations?
  - Clery obligations?

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Q & A

Lathrop GPM 74

Session 2: Providing Services to Victim/Survivors

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Aurora Center Services

- Our mission:
  - To serve all victims/survivors/concerned people of sexual assault, relationship violence, sexual harassment, and stalking at the University of Minnesota and Augsburg University.
- Program Areas:
  - **Get help** (advocacy/support services)
  - Get educated (prevention/education workshops)
  - Get involved (volunteer opportunities)

AURORA EST 1986

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Aurora Advocacy Services

- 24 hour helpline
- In-person support (by appt or walk-in)
- Support groups
- Academic/Employment Advocacy
- Medical advocacy during forensic exams
- Housing advocacy (campus or community)
- Legal advocacy
- Accompaniment during reporting processes
  - Law enforcement
  - Title IX

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Sexual & Relationship Violence Advocates

- Provide practical, legal and emotional support to sexual & domestic assault victim/survivors
- Not mental health providers but share the goal of helping the victim heal holistically
- Ensure that victim/survivors have full knowledge and access to all available options and the chance to discuss these options and the potential consequences of these options
  - Safety planning
  - Not attorneys, but knowledgeable about laws

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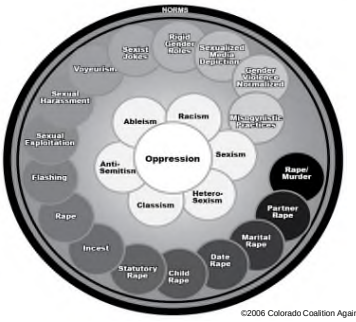
Forms of Sexual Violence



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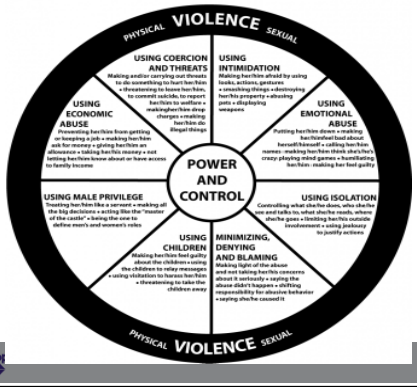
Forms of Relationship Violence



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VICTIM/SURVIVOR RESPONSES

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Responses

- Victim reactions vary widely
  - Flight, Fight, Freeze
- Many return to the "normal"
- Continued contact with assailant
  - In one study, 32% of rape victims said they continued their relationship with the perp and 25% **continued to have sex** with them, particularly if they did not acknowledge experience as rape (even though it met legal definition) (Layman et al., 1996)

Lathrop GPM 82

Feelings, Symptoms and Reactions

- Physical symptoms
- Disbelief/denial
- Apparent calm & control
- Guilt/shame/blame
- Embarrassment
- Anger
- Remembering or repressing what happened
- Difficulty with decision-making
- Fear & vulnerability
- Concern for the perpetrator
- Grief & loss

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Dimensions of Trauma

- Shock
- Denial
- Reactivation (life falls apart)
- Anger
- Integration

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RESPONDING TO DISCLOSURES

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NEGATIVE REACTIONS

- Many victims received at least one negative reaction from an informal support person
- Strong predictor of poor psychological outcomes
- Dissuades victim from seeking support or reporting
- Can include:

Victim-blaming	Stigmatizing response	Controlling reactions
Disbelief/doubt	Egocentric response	Distracted
Interrupting	Discouragement	Being treated differently afterward

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SUPPORTIVE REACTIONS

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How Do I Respond to Disclosures?

Ask/Acknowledge
- Seek **permission**— "Can I ask you more about…"
- Get more **info**— "Tell me more about…"

Listen
- "**Silent**" and "**listen**" have the same exact letters
- Poker face—**attentive, supportive nonverbal**—No horror faces

Understand
- What are they *saying, feeling, wanting?*
- Be **present. Believe. Be non-judgmental.**

Validate
- Rephrase what was said, what they've been through. Clarify if need be.
- **Validate** feelings- "Your feelings/reactions are **normal** for an **abnormal** situation"

Promote Safety
- "Are you in imminent **danger**?" If so, you can call the **police** to help.

Listen, Calm, Comfort
- "You aren't **alone**." "It's not your **fault**."
- "**Help** is available."

Arrange Connection/Referral
- "Do you have friends or family to talk to or to **support** you as well?"
- Refer to **The Aurora Center**, UCCS or Boynton.

Nurture Empowerment
- "Thank you for **trusting** me".
- "I **believe** you." "You can **heal** from this."

"I'm sorry this is such a difficult time and that you have to go through this process."

"I know this may be hard, so feel free to let me know anytime if you need to take a break."

"Thank you for sharing all of this with me. It's not easy, and you did a really good job."

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Why don't they report?

- Serious enough to report?
- Was harm intended?
- Lack of proof
- Guilt, shame, embarrassment
- Confidentiality
- Fears of:
  - Being blamed, not believed
  - Loss of friends/support
  - Parent response
  - Ruining perpetrator's life
  - Retaliation

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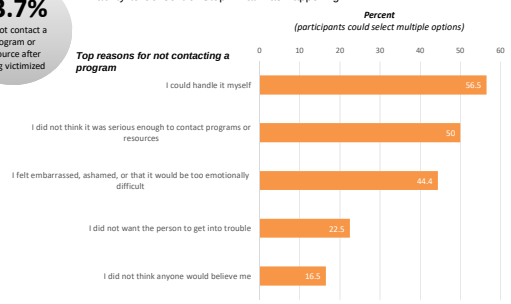
2019 UMN Twin Cities AAU Campus Climate Survey on Sexual Assault & Sexual Misconduct

Penetration or Sexual Touching Involving Physical Force or Inability to Consent or Stop What Was Happening

73.7% Did not contact a program or resource after being victimized



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VICTIM SUPPORT SERVICES

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POLICIES HELP ENCOURAGE REPORTING

- Connect victims with community based advocacy resources
- Services & accommodations for victims
- Written policy protocols
- Coordination between campus and community
- Training & education

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PREVENTION PROGRAM: PRIMARY PREVENTION & RISK REDUCTION

How not to be a perpetrator

How to be an active bystander

How to reduce risk

- Violence is never the fault of the victim
- Empowerment

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MOU & SMARTEAMS

- Formation of partnerships between the school and community
- Coordinated response among:
  - Medical
  - Legal
  - Advocacy
  - Law Enforcement
  - Prosecution
  - Psychological support

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RESOURCES DURING TITLE IX PROCESSES

- Advocate accompaniment throughout process
- Connect complainant with legal resources if respondent has counsel
- Respondent resources
- Sanctioning Guidelines

https://communitystandards.umn.edu/sites/communitystandards.umn.edu/files/title_ix_sanctioning_guidelines_-_revisions_4_5_18_2.pdf

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STRESS	vs	TRAUMA
Response to a situation that causes bodily or mental tension Causes difficulty in concentrating Usually short-term		Direct exposure to actual or threatened harm; immediate safety or life is threatened An emotional response to a terrible event like an accident, rape or natural disaster Longer term effects can include PTSD, depression, anxiety, panic attacks, flashbacks, nightmares, strained relationships and even physical symptoms like headaches, nausea, GI issues

AMERICAN PSYCHOLOGICAL ASSOCIATION

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How Your Title IX Office & Advocacy Can Work Together

- Title IX make referrals to confidential advocate
- Title IX consult advocacy office on policy & language
- Annual meetings to communicate trends & issues
- Discuss roles & communication styles
- Collaborate on helpful handouts
- Ongoing trainings on best practices and trauma-informed care

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Q & A

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Session 3: Title IX Coordinator & Team

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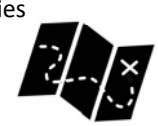
Session Overview

- Identifying the Title IX Coordinator & Team
- Making the Team known on Campus
- Title IX Coordinator Responsibilities
  - Policies
  - Training the team
  - Promptly respond to all reports
  - Oversee the grievance process
  - Identifying patterns or problems
  - Additional responsibilities



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Title IX Coordinator - Who?

- Position may not be left vacant
- Employee must be referred to as the Title IX Coordinator
- Should be independent
- Should report to senior leadership (president?)
- Must have adequate training
- May not have a conflict of interest
  - Not an in-house attorney
  - Not a member of the disciplinary board
  - Not Director of Athletics
  - Not Dean of Students?
  - Others?

Lathrop GPM 101

The Team

- Title IX Coordinator
- Deputy Coordinator(s)
- Investigators
- Adjudicators/hearing board
- Appeal officers
- Decision makers
- Campus Security
- Student Affairs
- Human Resources
- Counseling/support service providers
- Community partners
- Others

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Making Team Known on Campus

- Title IX Coordinator Contact Information (Name or title, phone number, office address, email address):
  - Provide to students, employees, applicants for admission and employment, and all unions
  - Put in trainings for students and employees, in communications to the campus, on social media (if used)
  - Must be prominently displayed on website, in handbooks, in catalogs
- May identify Title IX Coordinator only through position title in printed materials with position email address, but website must include all information

Lathrop GPM 103

Making Team Known on Campus

- Notice of Nondiscrimination
  - Must be widely distributed and easily accessible to: students, employees, applicants for admission and employment, sources of referral of applicants for admission and employment, unions or professional organizations
  - Must be prominently displayed on website, in handbooks, catalogs, electronic and printed publications for general distribution, locations throughout the school, bulletins, announcements, application forms, recruitment materials
  - If more than one Title IX Coordinator, Notice of Nondiscrimination and grievance procedures should designate one coordinator as having ultimate oversight responsibility and have titles reflect rank
  - Covered in Session 6 on Policies

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Making Team Known on Campus

- Ensure that employees know to report to you
- Key relationships with other offices/individuals on and off campus
- Be available to meet with students

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Responsibilities

- Create and implement policies
- Ensure training requirements are met
- Promptly respond to all reports
- Oversee the grievance process
- Identify and address any patterns or systemic problems
- Additional responsibilities

Lathrop GPM 106

Creating & Implementing Policies

- Create, implement, and disseminate policies and procedures for responding to, investigating, and adjudicating sexual misconduct
- Review school's procedures to ensure they comply with the prompt and equitable requirements of Title IX and VAWA
- Ensure that appropriate policies and procedures are in place for working with local law enforcement and coordinating services with local victim advocacy organizations and service providers

Lathrop GPM 107

Training the Team

- Train Title IX Coordinator, investigator, decision-maker, facilitator of informal resolution process, and individuals responsible for appeals on
  - Definition of sexual harassment
  - Scope of the institution's education program or activity
  - How to conduct investigation and grievance process, including hearings, appeals, and informal resolution processes, and how to serve impartially, including by avoiding prejudgment of the facts at interest, conflicts of interest, and bias
  - Issues related to sexual assault, domestic violence, dating violence, and stalking (annually)
  - How to conduct an investigation and hearing that protects the safety of complainants and promotes accountability (effects of trauma) (annually)

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Training the Team

- Train Title IX Coordinator, investigator, decision-maker, facilitator of informal resolution process, and individuals responsible for appeals on
  - Relevant evidence and how it should be used during a proceeding (annual)
  - Proper techniques for questioning witnesses (annual)
  - Basic procedural rules for conducting a proceeding (annual)
  - Avoiding actual and perceived conflicts of interest (annual)
  - Institution's policies and procedures

Lathrop GPM 109

Training the Team

- Decision-makers must also receive training on
  - Technology to be used at a live hearing
  - Issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant

Lathrop GPM 110

Training the Team

- Investigators must also receive training on
  - Issues of relevance to create an investigative report that fairly summarizes relevant evidence
- Training materials must not rely on sex stereotypes and must promote impartial investigations and adjudications
- Training materials must be publicly available on institution's website

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Responding to Reports

- Contact complainant to set up initial meeting
  - Discuss options
  - Discuss supportive/interim measures
  - Evaluate requests for confidentiality/no action
  - More to come in Session 4

Lathrop GPM 112

Role of Title IX Coordinator During Complaint/Grievance Process

- Conduct intake meeting
- Assess report/complaint
- Determine which process applies (if multiple)
- Determine who will provide ongoing communication with the parties throughout the complaint process
  - Notify parties of delays and reason for delays
  - Notify parties of their own and other party's meetings
- Ensure that parties receive adequate notice of any new allegations
- Conduct informal resolution?

Lathrop GPM 113

Role of Title IX Coordinator During Complaint/Grievance Process

- Oversee process to ensure compliance with policy and designated time frames
- Investigate?
  - Beware of conflicts when filling multiple roles
- Review investigation report, party responses, and rebuttals
  - Redact impermissible content
  - Evaluate whether further investigation is necessary
- Cannot adjudicate or decide appeal (Title IX)
- More to come in session 5

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Dual Roles within Team

- Title IX requires independent decision-maker
  - Title IX Coordinator and decision-maker must be different individuals
  - Investigator and decision-maker must be different individuals
  - Title IX Coordinator and investigator may offer recommendations regarding findings and/or conclusions on responsibility, but decision-maker has independent obligation to objectively evaluate relevant evidence and cannot simply defer to recommendations
- Title IX Coordinator may act as investigator

Lathrop GPM 115

Identifying Patterns/Problems

- Oversee creation and implementation of culture and climate review
- Review data from surveys and make appropriate changes to policies, procedures, and practices
- Review recent complaints for issues with policies/practices and lessons learned
- Consider community-wide remedies in addition to responses to individual complaints

Lathrop GPM 116

Recordkeeping

- For 7 years, must maintain:
  - Investigation and adjudication
    - Any determination regarding responsibility
    - Any audio or audiovisual recording or transcript of the hearing
    - Any disciplinary sanctions imposed
    - Any remedies provided to complainant
    - Any appeal and result
    - Any informal resolution and the result
  - Training materials for investigators, decision-makers, coordinators, and persons designated to facilitate informal resolution process

Lathrop GPM 117

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Recordkeeping

- For 7 years, must maintain (cont.):
  - Any actions taken (including supportive measures) in response to a report of sexual harassment
    - Basis for conclusion that response was not deliberately indifferent
    - Measures were designed to restore or preserve equal access to educational programs and activities
    - If supportive measures were not provided, document the reasons why such a response was not clearly unreasonable in light of known circumstances
- Recordkeeping does not prevent inclusion of additional details or explanations later

Lathrop GPM 118

Additional Responsibilities

- Provide training to students, faculty, and staff on Title IX issues
  - See Session 7 for more information
- Work with OCR in the event of an investigation

Lathrop GPM 119

Additional Responsibilities

- Areas of responsibility beyond sexual harassment:
  - Recruitment, admissions, and counseling
  - Financial assistance
  - Athletics
    - Student interests and abilities
    - Athletic benefits and opportunities
    - Athletic financial assistance
  - Pregnant and parenting students
  - Discipline
  - Employment

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Title IX Team

- Title IX Coordinator can delegate duties to others, but:
  - Avoid conflicts
  - Make roles and responsibilities clear

Lathrop GPM

121

Q & A

Lathrop GPM

Session 4: Responding to a Report

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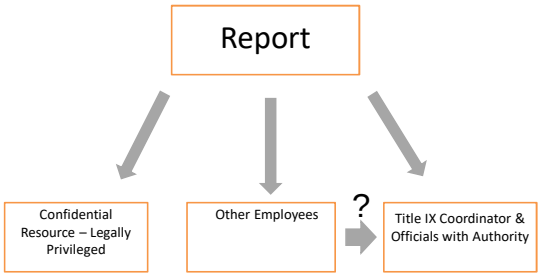
Session Overview

- Responding to a Report
- Duties of Confidential Resources & Employees
- Title IX vs. Non-Title IX
- Initial Meeting with Complainant
- Report vs. Complaint
- Interim Measures
- Responding to Requests for Confidentiality/No Action
- Written Notification of Rights
- Case Studies

Lathrop GPM 124

Responding to a Report



Lathrop GPM 125

Responding to a Report

- Types of report recipients:
  - Title IX Coordinator and officials with authority to institute corrective measures on behalf of the institution
  - Confidential Resources
    - Professional and pastoral counselors
    - Others with state-law privilege
    - Not required to report any information*
  - Other Employees: Institution may designate reporting obligation:
    - Designate semi-confidential resources?
    - Designate employees who are required to report
    - Designate employees who are not required to report?

*NOTE: These individuals may have other reporting requirements under Clery Act and/or state law

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Duties of Confidential Resources

- Discuss reporting options and rights - Title IX Coordinator, law enforcement, campus security
  - Offer to assist with reporting
  - Discuss school's prevention of and response to retaliation
- Discuss/offer support services and interim measures
- Disclose institution's limited ability to respond if request for confidentiality
- Discuss the importance of preserving evidence
- State law may require reporting of non-identifying information

Lathrop GPM 127

Duties of Other Employees Who Are Required to Report

- If possible, before information revealed disclose:
  - Additional reporting requirement
  - Option to report to school and request confidentiality (school will consider but not guarantee)
  - Option for complainant to disclose to a confidential resource
- Only share information with individuals responsible for handling the institution's response (e.g., Title IX Coordinator, Deputy)

Lathrop GPM 128

Duties of Employees Who Are Not Required to Report

- Ask person reporting if they want the information shared with the Title IX Coordinator
- Only share information with individuals responsible for handling the institution's response (e.g., Title IX Coordinator, Deputy)

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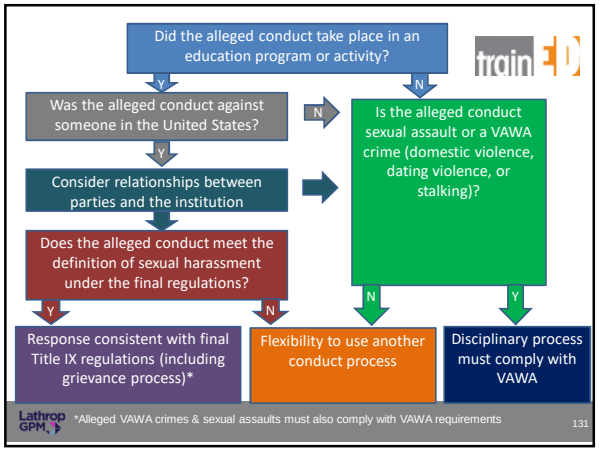
Determining Title IX vs. Non-Title IX Matters

- Factors to consider
  - Type of alleged conduct – sexual harassment?
  - Location and context of alleged conduct
    - within education program or activity?
    - against a person in the United States?
  - Relationship between parties and institution

Lathrop GPM 130



Responding to a Report

- Response must treat complainant and respondent equitably by
  - Offering supportive measures to a complaint (with or without formal complaint)
  - Following a grievance process that complies with the regulations before imposing any disciplinary sanctions or other actions that are not supportive measures against a respondent

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Responding to a Report

- Title IX Coordinator must promptly contact complainant (with or without formal complaint)
  - Inform complainant of the availability of supportive/interim measures with or without the filing of a formal complaint
  - Consider complainant's wishes with respect to supportive/interim measures
  - Explain the process for filing a formal complaint
  - Notify complainant of right to report to law enforcement and offer help with report (VAWA)
  - Provide complainant with written notification of rights (VAWA)

Lathrop GPM 133

Responding to a Report

- Report vs. Formal Complaint
  - Report
    - Initiates obligation to respond, including offering supportive measures (see next slide for more details)
    - Complainant's identity may be kept confidential from respondent
  - Formal complaint
    - Initiates grievance process
    - Cannot be filed anonymously
      - Requires complainant's physical or digital signature or otherwise indicates that the complainant is the person filing the complaint
      - Title IX Coordinator can sign a complaint
      - Grievance process requires that complainant's identity be disclosed to respondent, if known

Lathrop GPM 134

Responding to a Report – Supportive/Interim Measures

- Offered to complainant and respondent
- Must be non-disciplinary, non-punitive
- Must be without fee or charge to the complainant or respondent
- Available before or after the filing of a formal complaint or where no formal complaint is filed
- Designed to restore or preserve equal access to recipient's education program or activity without unreasonably burdening the other party
- Including measures designed to protect safety of all parties or the educational environment, or deter sexual harassment
- Must maintain as confidential as long as confidentiality does not impair ability of the institution to provide measures

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Responding to a Report – Supportive/Interim Measures

- Mutual restrictions on contact between the parties
- Change academic or extracurricular activities, living, transportation, dining, and working situations
- Access to resources, such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, legal assistance, visa and immigration assistance, campus escort services, increased security, and student financial aid
- If school does not offer these services, enter into MOU with local victim services provider, if possible

Lathrop GPM 136

Responding to a Report

- Other obligations:
  - Notify campus security, if necessary
  - Clery report, if necessary
  - Consider emergency removal

Lathrop GPM 137

Responding to a Report—Requests for Confidentiality or No Action

- Recommended Approach:
  - If a complainant asks that his/her name not be disclosed to alleged perpetrator or that no investigation or disciplinary action be pursued:
    - Inform the student that honoring the request may limit the school's ability to respond fully to the incident, including pursuing disciplinary action against the alleged perpetrator
    - Explain that Title IX includes protections against retaliation and that school officials will not only take steps to prevent retaliation but also take strong responsive action if it occurs

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Responding to a Report—Requests for Confidentiality or No Action

- Recommended Approach:
  - Factors to consider
    - Seriousness of the alleged harassment
    - Increased risk of additional violence by the alleged perpetrator
      - Other complaints about the same alleged perpetrator
      - History of violence from arrests/records from prior school
      - Alleged perpetrator threatened further violence
    - Increased risk of additional violence under similar circumstances
      - Pattern of perpetration at a given location or with a certain group
    - Whether sexual violence was perpetrated with a weapon
    - Age of the complainant
    - Whether school has other means to obtain evidence (security footage, eye witness or physical evidence)
      - Notice will still need to identify parties involved
    - Rights of the accused individual to receive information about the accuser and the allegations if a formal proceeding with sanctions may result

Lathrop GPM 139

Responding to a Report—Requests for Confidentiality or No Action

- Recommended Approach:
  - If the school determines it *can* honor the request for confidentiality/no action
    - Continue to offer supportive measures
  - If the school determines it *cannot* honor the request for confidentiality/no action
    - Inform the complainant prior to proceeding
    - Continue to offer supportive measures
    - Title IX Coordinator signs formal complaint and begins process

Lathrop GPM 140

Responding to a Report – Written Notification of Rights

- Written notification to complainants about—
  - Options for, available assistance in, and how to request changes to academic, living, transportation, and working situations, if so requested by the complainant and if such accommodations are reasonably available, regardless of whether the complainant chooses to report the crime to campus police or local law enforcement

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Responding to a Report – Written Notification of Rights

- Written notification to complainants about (cont.)—
  - Possible sanctions and protective measures
  - Procedures individual should follow
  - Disciplinary procedures
  - Confidentiality
  - Existing resources for counseling, etc.
  - Supportive/interim measures

Lathrop GPM 142

Responding to a Report – Written Notification of Rights

- Inform complainants that school officials will take steps to prevent all forms of retaliation and take strong responsive action if it occurs

Lathrop GPM 143

Case Study #1

- Kelly comes into the health center on Saturday morning and tells Becky, a nurse at the health center, that she was at a frat party the night before and was talking with Ben, a student at another school. She liked Ben, so she accepted his invitation to go to another party with him. Instead, Ben took her to his apartment, where no one else was. Kelly became uncomfortable and said she was going to call a cab. Ben wouldn't let her leave and aggressively came on to her. Knowing Ben was much stronger than her, Kelly gave in and slept with him.

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Case Study #1

- What responsibilities does Becky, the nurse, have?
- Imagine you are the Title IX Coordinator and you get a call from Becky. She tells you that she talked to a student about an incident of sexual violence. She says she remembers something about how to handle these situations from her orientation, but she can't remember exactly what she is supposed to do. What should you tell Becky?

Lathrop GPM 145

Case Study #2

- Maria, a freshman, comes to talk to her RA, Amanda, with whom she has become good friends. Maria tells Amanda she just saw her ex-girlfriend, Andrea. Maria explains that Andrea has gone crazy since they broke up. Andrea constantly texts her about getting back together. Andrea's friends badger Maria about it during class. Maria's even found Andrea waiting for her at her door when she returns to her dorm.

Lathrop GPM 146

Case Study #2

- Maria tells Amanda she just needs someone to talk to.
- What are Amanda's responsibilities?
- What if Maria tells Amanda that she doesn't want anyone to know about their conversation—especially Andrea?

Lathrop GPM 147

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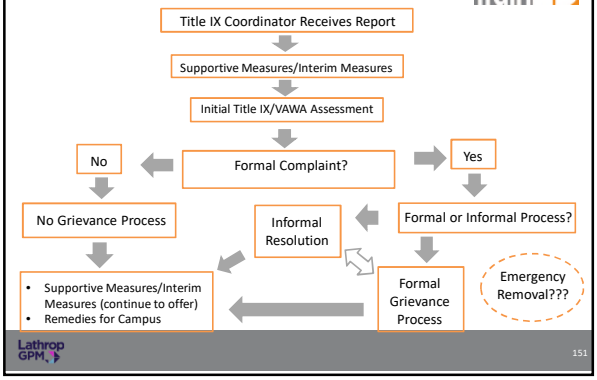
Overview of Process



Lathrop GPM 151

General Requirements of Complaint Process

Lathrop GPM 152

Complaint/Grievance Process

- The process the school uses to resolve sexual harassment complaints. This includes the fact-gathering investigation and any hearing or decision-making process the school uses to determine:
  - Whether or not the conduct occurred using
    - Preponderance of the evidence standard ("more likely than not") or
    - Clear and convincing evidence standard ("highly probable"); and
  - If the conduct occurred, what actions the school will take to eliminate the hostile environment, prevent its recurrence, and remedy its effects, which may include:
    - Imposing sanctions on the respondent;
    - Providing remedies for the complainant; and
    - Addressing the campus community

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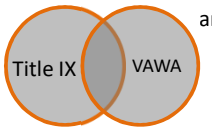
Complaint/Grievance Process

- Objective evaluation of all relevant evidence
  - Inculpatory and exculpatory evidence
  - Credibility determinations may not be based on status as complainant, respondent, or witness
- No conflicts of interest or bias as Title IX Coordinator, investigator, decision-maker, or facilitator of informal resolution process
  - For or against complainants or respondents generally
  - For or against an individual complainant or respondent
- Presumption of non-responsibility

Lathrop GPM 154

Complaint/Grievance Process

- Must be prompt, fair, impartial, and equitable
  - Timely completion
  - Consistent with policies
  - Conducted by officials with training and without conflict/bias



Lathrop GPM 155

Complaint/Grievance Process—Timeframes

- Reasonably prompt timeframes
  - Including timeframes for filing and resolving appeals and informal resolution processes
  - Temporary delay or extension of timeframes for good cause, which may include
    - Absence of parties, a party's advisor, or witnesses
    - Concurrent law enforcement activity
    - Need for language assistance or accommodations of disability
  - Must provide written notice to parties of the delay or extension and the reason for it
  - Some timeframes are set by the regulations (Title IX)

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Complaint/Grievance Process— Role of the Title IX Team

- Serve impartially
  - Avoid prejudgment of the facts
  - Presumption of non-responsibility
  - Avoid/disclose conflicts of interest/bias
    - For or against complainants or respondents individually or generally
  - Make determination of responsibility at the conclusion of the grievance process

Lathrop GPM 157

Formal Grievance Process — Criminal Process

- Separate from criminal investigation
- May not dissuade complainant from going to police in cases involving allegations of criminal conduct—should encourage reporting to police
- May temporarily delay for initial police investigation
  - Prior guidance said police evidence-gathering stage typically takes 7-10 days
  - Must resume when notified that police are done gathering evidence
- May not delay for criminal prosecution

Lathrop GPM 158

Complaint/Grievance Process— Equal Rights of the Parties

- Interview/hear from both parties
- Equal opportunity for parties
  - Identify/present fact witnesses and evidence, including inculpatory and exculpatory evidence
  - Access to evidence (if any) (Title IX and VAWA)
    - Must allow *access* for sexual assault/VAWA
    - Must provide *copy* for Title IX
  - Right to an advisor (may be attorney) (Title IX and VAWA)
    - May limit extent of participation (must apply equally)
    - If party has no advisor, school will provide for cross-examination
  - Participate in pre-hearing meeting (if any)
  - Identify/present character or expert witnesses (if any)
  - Written notice of
    - Meetings
    - Allegations
    - Informal Complaint Process
  - Written simultaneous notices of outcome

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Complaint/Grievance Process— Other Requirements

- Burden of proof and gathering evidence is on the institution, not on the parties
- May not restrict ability of either party to discuss the allegations or to gather and present relevant evidence
- Allow advisor of choice

Lathrop GPM 160

Complaint/Grievance Process — Advisors

- Parties have a right to an advisor of their choice
- May be, but not required to be, an attorney
- Advisors have right to receive copies all directly related evidence and the investigation report (Title IX only)
- Advisors may cross-examine parties and witnesses at live hearing (Title IX only)
- Institution must provide if none (Title IX only)
  - Limited role
- May otherwise limit extent of advisor's participation in the process (must apply equally)

Lathrop GPM 161

Complaint/Grievance Process — Advisors

- Advisors, particularly attorney advisors, have become increasingly common participants
- Tips for addressing disruptive advisors:
  - Inform parties about restrictions on advisors in advance
    - "Potted plant"
    - No direct communication (orally or in writing) with Title IX Coordinator, Deputy Coordinator(s), Investigator,(s) Adjudicator(s), Appeal Officer(s)
    - Must keep information confidential
    - Rules at the hearing
  - Signed advisor agreements – acknowledge role and restrictions
  - Be prepared to enforce the agreement parameters
  - Hold the party responsible for the advisor's actions
  - Don't be afraid to consider pausing the process if the advisor continues to be disruptive
  - Institutions may remove or dismiss advisors who become disruptive or who do not abide by the restrictions on their participation
  - Be consistent

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Stages of the Complaint Process

- Pre-investigation
- Investigation
- Adjudication/hearing
- Sanctions & Remedies
- Notice of Determination
- Appeal

Lathrop GPM 163

Pre-Investigation

Lathrop GPM 164

Formal Complaint

- Document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment
- At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed

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Formal Complaint

- A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, and a formal complaint may be filed by using the contact information required to be listed for the Title IX Coordinator and by any additional method designated by the recipient
- Can be a document or electronic submission that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint
- Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party, and must comply with the requirements to be free from conflicts and bias

Lathrop GPM 166

Emergency Removal

- Institution may remove a respondent from the education program or activity on an emergency basis if institution:
  - Undertakes an individualized safety and risk analysis;
  - Determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal; and
  - Provides the respondent with notice and an opportunity to challenge the decision immediately following the removal
- Non-student employees may be placed on administrative leave during grievance process
- Provision does not modify any rights under the IDEA, Section 504 of the Rehabilitation Act, or the ADA

Lathrop GPM 167

Notice of Meetings

- Title IX: Written notice to the party whose participation is invited or expected of the
  - Date
  - Time
  - Location
  - Participants
  - Purpose

  of all hearings, investigative interviews, or other meetings with a party, with sufficient time for the party to prepare to participate
- VAWA: Timely notice to the other party of meetings that are part of the disciplinary process

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Meeting with Respondent

- Prior to meeting
  - Notice of meeting
  - Notice of rights
  - No contact directive
- At the meeting
  - Notice of allegations
  - Notice of informal resolution process?
  - Preservation of evidence
  - Supportive/interim measures
  - Retaliation

Lathrop GPM 169

Notice of Allegations

- Upon formal complaint, provide written notice to known parties, including:
  - Notice of grievance process, including any informal resolution process
  - Notice of the allegations, including sufficient details known at the time and with sufficient time to prepare response before initial interview
    - Identities of the parties involved, if known
    - Conduct allegedly constituting sexual harassment
    - Date and location of the alleged incident, if known

Lathrop GPM 170

Notice of Allegations

- Upon formal complaint, provide written notice to both parties, including:
  - Statements that:
    - Respondent is presumed not responsible
    - Determination of responsibility is made at conclusion of grievance process
    - Right to advisor of choice who may be but is not required to be an attorney
    - Parties may inspect and review evidence *as permitted in sexual misconduct policy*
    - Inform parties of any policy provision that prohibits knowingly making false statements or knowingly submitting false information during the grievance process
- Provide notice of *additional* allegations about the complainant or respondent that arise during process

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RETALIATION

- Inform parties that school officials will take steps to prevent all forms of retaliation and take strong responsive action if it occurs
- When a school knows or reasonably should know of possible retaliation by other students, employees or third parties, it must take immediate steps to investigate and take appropriate action
- Title IX requires the school to protect the parties and ensure their safety

Lathrop GPM 172

INFORMAL RESOLUTION

- VAWA: No specific requirement
- Title IX:
  - Any time prior to determination, may facilitate informal resolution process, such as mediation, if
    - Provide parties with written notice disclosing
    - Allegations
    - Requirements of the informal resolution process including circumstances when it precludes the parties from resuming a formal complaint for the same allegations
      - Provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint
    - Consequences resulting from participating in the informal resolution process, including records that are maintained and could be shared
  - Obtain parties' voluntary written consent to informal process

Lathrop GPM 173

INFORMAL RESOLUTION

- May not offer informal resolution unless a formal complaint is filed
- May never require the parties to participate in an informal resolution process
- May not condition enrollment/continuing enrollment, employment/continuing employment, or enjoyment of any other right on waiver of the right to an investigation and adjudication of formal complaint
- May not offer or facilitate informal resolution to resolve allegations that an employee sexually harassed a student

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Informal Resolution

- Factors to consider when determining whether informal resolution is appropriate
  - Nature of alleged incident
  - Other allegations against same respondent
  - What sanctions would be necessary if the allegation is true
  - Whether complainant is willing to fully participate in a formal process
  - Whether institution could proceed with a formal process without complainant

Lathrop GPM 175

Informal Resolution

- Issues to consider when using informal resolution process
  - Is there an admission from the respondent?
  - Will this be a final resolution?
  - What information will be shared during the informal process?
  - Can the resolution be used in future discipline decisions?
  - What records will be maintained and could be shared?
  - What action is necessary to stop the harassment, prevent its recurrence, and address its effects?

Lathrop GPM 176

Consolidation of Formal Complaints

- Title IX: An institution may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the *allegations of sexual harassment arise out of the same facts or circumstances*
- VAWA: No specific guidance

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Dismissal of Formal Complaint

- Mandatory Dismissal under Title IX
  - Must dismiss formal complaint if alleged conduct
    - even if proved, would not constitute sexual harassment
    - did not occur in the institution's education program or activity or
    - did not occur against a person in the United States
  - Such dismissal does not preclude action under another provision of institution's code of conduct
- Discretionary Dismissal under Title IX
  - May dismiss formal complaint if at any time during the investigation or hearing
    - complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations, therein
    - respondent is no longer enrolled or employed by the recipient or
    - specific circumstances prevent the recipient from gathering sufficient evidence to reach a determination as to the formal complaint or allegations therein

Lathrop GPM 178

Dismissal of Formal Complaint

- Notice of Dismissal: Upon dismissal (mandatory or discretionary), institution must promptly send written notice of dismissal and reasons for the dismissal simultaneously to the parties

Lathrop GPM 179

Investigation

Lathrop GPM 180

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INVESTIGATION

- Conducted by someone who is not a decision-maker (Title IX)
- Burden of gathering evidence sufficient to reach a determination is on the institution
- Provide an equal opportunity for the parties to present witnesses and other inculpatory and exculpatory evidence
- Provide directly related evidence to parties and advisors to review and respond (Title IX)
- Provide investigation report containing relevant evidence to parties and advisors to review and respond (Title IX)
- Provide investigation report and attachments to decision-makers
  - Provide access to any information shared with decision-makers (VAWA)

Lathrop GPM 181

PROVIDE "DIRECTLY RELATED" EVIDENCE TO PARTIES *

- *Prior to completion of investigation report*, must provide equal opportunity to inspect and review any evidence obtained that is *directly related to the allegations*
  - Includes evidence upon which the institution does not intend to rely in reaching a determination and inculpatory or exculpatory evidence whether obtained from a party or other source
  - Must send to party and party's advisor in hard copy or electronic format
  - Party must be given at least 10 days to submit a written response
- Investigator must consider that written response before completing investigation report
- Must make all that evidence available at any hearing

Lathrop GPM *Title IX Only 182

PROVIDE "DIRECTLY RELATED" EVIDENCE TO PARTIES *

- Types of evidence that must be provided to parties:
  - Documents collected from the parties
    - Text messages
    - Emails
    - Social media posts and messages
    - Photos and videos
  - Other evidence
    - Police reports
    - Security footage
    - Wifi access point records
  - Party and witness interviews

Lathrop GPM *Title IX Only 183

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Provide "Directly Related" Evidence to Parties *

- Sexual history = include if directly related
  - Protections related to complainant's prior sexual history do not apply at this stage
  - Still analyze whether such evidence is "directly related to the allegations"
- Privileged information = only with waiver of privilege
- Treatment records = only with written consent

Lathrop GPM *Title IX Only 184

Provide "Directly Related" Evidence to Parties *

- Privileged information
  - Do not require, allow, rely upon, otherwise use questions or evidence that constitute or seek disclosure of, information protected under a legally recognized privilege, unless person holding such privilege has waived the privilege
- Treatment records
  - Institution cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the school obtains that party's voluntary, written consent to do so.

Lathrop GPM *Title IX Only 185

Provide "Directly Related" Evidence to Parties *

- May permit or require the investigator to redact information that is not directly related to the allegations (or that is otherwise barred from use under the final regulations)
  - Redactions are limited to information not directly related or that is otherwise specifically barred
  - May not redact other information, such as confidential, sensitive, or prejudicial information, if it is directly related to the allegations

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Provide "Directly Related" Evidence to Parties *

- Maintain records of any information withheld and the rationale for doing so
- Investigator and Title IX Coordinator should both be involved in determination of what is directly related

Lathrop GPM *Title IX Only 187

Provide "Directly Related" Evidence to Parties *

- Ensuring privacy
  - May require parties and advisors to:
    - Use the evidence (and investigation report) only for purposes of the grievance process and
    - Require them not to further disseminate or disclose these materials
  - May use a non-disclosure agreement
  - May use digital encryption or other practices to address privacy concerns

Lathrop GPM *Title IX Only 188

Provide "Directly Related" Evidence to Parties *

- Steps following parties' review
  - Review parties' responses
  - Consult with investigator to decide whether any additional action is needed
  - Investigator should consider parties' viewpoints about whether the evidence directly related to the allegations is relevant and therefore whether to include it in the investigation report
  - May provide a copy of each party's written response to the other party, but that is not required

Lathrop GPM *Title IX Only 189

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INVESTIGATION REPORT

- Must create investigative report that fairly summarizes ***relevant*** evidence
- Parties must be provided:
  - VAWA: information used in the decision-making process – access required
  - Title IX:
    - Any evidence obtained that is ***directly related*** to the allegations – copy for parties and advisors required
    - Investigation report – copy to parties and advisors required
    - Opportunity to submit written response to each

Lathrop GPM 190

INVESTIGATION REPORT

- Complainant's sexual behavior or predisposition are not relevant *unless*:
  - Such questions and evidence are offered to prove someone other than respondent committed the alleged conduct or
  - The questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent
- Investigator should redact any information about the complainant's sexual history from the investigation report

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ADJUDICATION/HEARING

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Live Hearing

- General requirements under Title IX
  - Must provide live hearing
  - Permit each party's advisor to ask the other party and witnesses "all relevant questions and follow-up questions"
  - If party does not have advisor, institution must provide one for cross-examination
  - If a party or witness does not submit to cross-examination at hearing, their statements cannot be considered by decision-maker(s)

Lathrop GPM 193

Hearing—Decision-Maker(s)

- May have single decision-maker or a panel of decision-makers
- If a panel of decision-makers, may appoint one decision-maker to make relevancy determinations at the hearing
- May appoint Title IX Coordinator or another individual who is not a decision-maker to enforce procedural rules at the hearing
  - Decision-maker(s) must still determine relevancy issues

Lathrop GPM 194

Preparation for Hearing

- Determine hearing format and arrange technology
  - May conduct with all parties physically present in the same location
    - At the request of either party, institution must provide for live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party or witness answering questions
    - Witness cannot demand to be in a separate room, unless that witness alleges they are also a victim of respondent (institution can permit witness to be in a separate room upon request)
  - May conduct virtually (for all parties, witnesses, and other participants), with technology enabling participants simultaneously to see and hear each other
    - Video is required; phone is insufficient

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Preparation for Hearing

- Decision-maker(s) should review adjudication file
- Decision-maker(s) identify ultimate questions that will need to be decided
  - Consider questions or topics that may come up and any anticipated relevancy issues
- Decision-maker(s) determine which witnesses they anticipate needing to rely on to make their determination
  - Request that these witnesses make themselves available for cross-examination at the hearing
- Parties identify additional witnesses
  - Request that these witnesses make themselves available for cross-examination at the hearing

Lathrop GPM 196

Attendance at Hearing

- Parties may be accompanied only by their advisors and other persons for reasons "required by law"
  - Institution must keep confidential the complainant, respondent, and any witness except as may be permitted by FERPA, as required by law, or to carry out the grievance process
    - Limits institution's ability to authorize the parties to be accompanied to the hearing by individuals other than their advisors
  - A person assisting a party with a disability, or a language interpreter, may attend because presence is required by law and/or necessary to conduct the hearing

Lathrop GPM 197

Hearing: School-Appointed Advisors

- Can request that the parties inform school in advance whether they have an advisor
  - If party does not have an advisor at the hearing, still required to provide an advisor even if party stated that they would have one
  - May want to have an advisor for each party on standby so that delaying the hearing is not necessary
- School-appointed advisor
  - Role is limited to relaying a party's questions
  - No particular skills, qualifications, or training is required
  - Does not need to be neutral or avoid conflicts of interest
  - If a party refuses to work with an assigned advisor – the party forfeits his or her right to cross-examination

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Hearing: Relevancy Determinations

- Decision-maker may hear arguments regarding relevancy of a question on the spot or may tell parties to reserve arguments for appeal (incorrect relevancy determination could be an alleged procedural error on appeal)
- Must allow question if relevant, even if misleading or assumes facts not in evidence
- Can establish rule that duplicative questions are not relevant
- Exclude questions with caution

Lathrop GPM 199

Hearing: Cross-Examination

- Party or witness who does not appear at the hearing
  - Cannot rely on any statements from a party or witness who does not submit to cross-examination
    - Failure to answer one question constitutes a failure to submit to cross-examination (unless question came from decision-maker)
    - Still applies even if disability or death is the reason the person did not submit to cross-examination
  - Statements that cannot be considered include statements in investigation report or any other source (police report, medical exam, text messages, witness accounts, etc.)

Lathrop GPM 200

Hearing: Cross-Examination

- Party or witness who does not appear at the hearing
  - Advisor may conduct cross-examination on behalf of party even if party is not present
  - If one party does something to wrongfully procure absence of a party or witness, that is likely retaliation and the school must remedy
  - School also cannot coerce unwilling participant
    - Be careful with any requirement that a student or employee cooperate with grievance process
    - Discipline for not attending hearing may constitute retaliation

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Hearing: Other Procedural Rules

- May establish additional rules that apply equally to both parties
  - Cross-examination must be respectful, non-abusive, not intimidating
  - Limit evidence at hearing to evidence that was gathered or presented as part of the investigation (or otherwise prior to the hearing)
  - Whether investigator may be called as a witness
  - Process for making objections to the relevance of questions and evidence
  - Other procedures at the hearing
    - Opening statements by parties or advisors
    - Closing statements by parties or advisors
  - Reasonable time limitations on hearings

Lathrop GPM 202

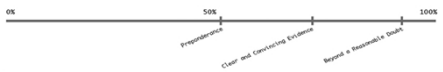
Hearing: Other Procedural Rules

- Some procedural rules are prohibited
  - Cannot prohibit a party from conferring with his or her advisor during the hearing
    - Likely can prohibit conferring when a question is pending
    - Could also discourage from conferring when a question is pending by warning that such conduct will be considered when weighing the party's credibility
  - Cannot prohibit character evidence, lie detector test results, evidence that is unduly prejudicial, or evidence of prior bad acts
    - Decision-maker may determine how much weight to give such evidence

Lathrop GPM 203

Complaint Procedures

- Standard of evidence
  - "Preponderance of the evidence" or "clear and convincing" (not "beyond a reasonable doubt")
  - Use same standard of evidence for all formal complaints of sexual harassment
  - Burden is on the school to gather sufficient evidence to reach a fair, impartial determination
  - Presumption of non-responsibility that would need to be overcome
  - Decision-maker(s) must ultimately decide whether it was more likely than not that a policy violation has occurred (preponderance) or whether it is highly probable that a policy violation has occurred (clear and convincing)



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Sanctions and Remedies

Lathrop GPM 205

Sanctions

- Consider who will decide the sanctions and how
  - Consider limited role of Title IX Coordinator
- Sanctions are designed to stop the harassment, prevent its recurrence, and remedy its effects
- Any information provided to individual(s) who determine sanctions must also be provided to the parties
- Institution's policy must include a list of *all* possible sanctions
- The list of sanctions must be specific, including the type and length of suspensions and any requirements that must be met for reinstatement

Lathrop GPM 206

Sanctions

- Possible Sanctions
  - No contact order
  - Suspension or Expulsion
    - Transcript notations?
    - Disclosure to other institutions?
    - Separate disciplinary file?
  - Change in class schedule/living arrangements
  - Mandatory training/counseling
  - Limitations on access to campus facilities
  - Limitations on campus activities
  - Community service
  - Delay of degree conferral
  - Temporary or permanent revocation of degree

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SANCTIONS

- Sanctions when student not suspended or expelled
  - Make inquiries to determine whether restrictions need to be made to:
    - living arrangements
    - class schedules
    - use of facilities
    - co-curricular activities
    - campus events
  - Allow for Title IX Coordinator to modify or clarify
    - General no contact directive → limit use of facilities to specific time
    - Address ability to appeal

REMEDIES

- Title IX goals:
  - End the sexual violence/hostile environment
  - Prevent its recurrence
  - Address its effects

REMEDIES

- Consider who will decide the remedies and how
  - Consider role of Title IX Coordinator
- Remedies for complainant
  - Changing living arrangements
  - Escorts
  - Separation from respondent
  - Counseling services
  - Medical services
  - Academic support services/accommodations
  - Allowing course withdrawal without penalty
  - Reviewing disciplinary actions against complainant to determine if harassment contributed
  - Reviewing academic issues to determine if harassment contributed
  - Financial aid and/or immigration assistance

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Remedies

- VAWA and Title IX only require policy to describe range of remedies available
- Title IX Coordinator is responsible for effective implementation of any remedies
- Remedies must be designed to restore or preserve equal access to the institution's education program or activity
- May include the same individualized services as "supportive measures"
- Do not need to be "non-disciplinary" or "non-punitive" and do not need to avoid burdening the respondent
- Remedies for broader student population in some cases
  - Take proactive measures to prevent sexual harassment and violence, such as trainings
  - Develop effective written materials to educate students on policy and resources
  - Encourage students to report
  - Periodic "climate checks" and review of issues (e.g., better lighting?)

Lathrop GPM 211

Notice of Determination

Lathrop GPM 212

Notice of Determination

- Identification of the allegations potentially constituting sexual harassment
- Procedural steps since complaint
  - Notices to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, hearings held
- Findings of fact
- Conclusion regarding application of code of conduct to the facts
- Statement of and rationale for the result as to each allegation
  - Determination of responsibility
  - Any disciplinary sanctions imposed on respondent
  - *Whether* remedies will be provided to complainant
- Appeal information
- Simultaneous delivery to the parties
- Becomes final either the date the parties receive the written determination of the appeal or the date on which an appeal would no longer be timely

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Notice of Determination: Delivery

- Must be in writing
- Must be delivered simultaneously
  - Email
  - In-person meetings to deliver hard copies of written notice
- Best practice: Let parties know ahead of time when decision will be delivered

Appeal

Appeals Under Title IX

- Must be offered to both parties
  - From a determination regarding responsibility
  - From a recipient's dismissal of a formal complaint or any allegations therein
- Required bases:
  - Procedural irregularity that affected the outcome of the matter;
  - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter;
  - The Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter;
- May offer an appeal equally to both parties on additional bases.

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Appeals Under Title IX

- Requirements
  - Notify other party in writing when an appeal is filed
  - Appeal officer is different than Title IX Coordinator, investigator and decision-maker at hearing
  - No conflict of interest or bias
  - Individuals responsible for appeal must receive training
  - Give both parties reasonable, equal opportunity to submit written statement in support of, or challenging, the outcome
  - Written decision describing result of appeal and rationale
  - Simultaneous delivery of result to parties

Lathrop GPM 217

Appeals Under VAWA

- Not required, but if offered, must do so equally
- Transparency, equality, notice requirements from main process will apply to appeals
- Examples include:
  - Right to advisor
  - Notice of meetings
  - Access to information used by appeals panel/individual
  - Simultaneous notice of outcome

Lathrop GPM 218

Additional Required Post-Determination Notices

- For sexual assault and VAWA crimes, your institution must provide simultaneous notice to both parties of—
  - Any change to the results that occurs prior to the time that such results become final
  - When such results become final
- For Title IX, your institution must provide concurrent written notice of—
  - The outcome of any appeal

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Case Study

- After final exams, a group of students, including Matt and Jane, go out to celebrate. A great deal of drinking takes place.
- The next semester, Jane is having trouble in one of her classes. Her instructor asks what's bothering her, and she tells her instructor that one of her classmates raped her a few months ago.
- The institution requires all employees who are not confidential resources to report allegations of sexual misconduct.
- The instructor alerts the Title IX Coordinator.

Lathrop GPM 220

Case Study

- Jane agrees to meet with the Title IX Coordinator and states that she has decided she wants to file a complaint against Matt. She claims that Matt walked her home after the finals celebration. When they got to her apartment, she invited him into her apartment for another drink as friends. In the apartment, he forced himself on her and raped her.
- An hour later, the local police call the Title IX Coordinator and state that they are conducting a criminal investigation. They ask your institution to suspend its investigation.

Lathrop GPM 221

Case Study

- After the police complete evidence gathering, the institution starts the investigation. Matt admits that he and Jane had sex, but claims it was consensual. The other students who saw Matt and Jane at the celebration stated that they had both been drinking and flirting.

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Case Study

- The decision-maker ultimately concludes that there's not enough evidence to demonstrate that it is more likely than not that Matt violated the policy.
- Jane appeals. She claims that after she received a notice of outcome another student approached her and asked what had happened. The student told Jane that Matt had done the same thing to her a year ago.

Lathrop GPM 223

Case Study

- Jane claims that friends of Matt are harassing her as a result of the complaint she raised. She claims they post mean Facebook messages and have called her a slut to common friends off campus.

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Q & A

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Session 6: Drafting a Sexual Misconduct Policy

Lathrop GPM

Session Overview

- Notice and Policy Requirements
- Policy Drafting Process
- Content of the Policy
- Implementation

Lathrop GPM

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Notice and Policy Requirements

- Title IX requires institutions to:
  - Adopt and publish a notice of non-discrimination
  - Adopt and publish policy(ies) prohibiting sex discrimination and grievance procedures (complaint procedures) for prompt and equitable resolution of complaints
- VAWA also requires a policy statement providing details regarding:
  - Procedures individuals should follow
  - Disciplinary procedures
  - Sanctions and remedies
  - Confidentiality
  - Resources and interim measures

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Comprehensive Policy Drafting Process

- Driven by campus leadership at the highest level
- Identify office/personnel responsible for drafting
- Engage a range of administrators to ensure broad institutional support
- Review with legal counsel with Title IX / VAWA expertise
- Consider your target audience
- Engage in a vetting period where key participants have multiple opportunities to provide feedback
- Coordinate with other institution policies and procedures

Lathrop GPM 229

Content of Policy

- Introduction
  - Notice of Non-Discrimination
- Scope
- Prohibited Conduct
- Definitions
- Title IX Coordinator and Team
- Immediate Action & Assistance
- Reporting Options & Considerations
- Resources & Interim Measures
- Complaint Process
  - Informal resolution
  - Investigation
  - Adjudication
  - Appeal
- Related Misconduct

Lathrop GPM 230

Policy: Introduction

- Notice of Nondiscrimination
- Statement of the school's commitment to address sex discrimination, which includes sexual harassment, sexual violence and sexual misconduct
  - Statement that the school will take steps to prevent recurrence of sexual harassment, sexual violence, and sexual misconduct and to correct its effects on complainants and others

Lathrop GPM 231

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Notice of Nondiscrimination

Must include statement that:

- School does not discriminate on the basis of sex in its education programs and activities, which includes employment and admissions
- Title IX prohibits discrimination
- Sexual harassment is a form of sexual discrimination that includes sexual violence
- Examples of prohibited conduct include: domestic violence, dating violence, sexual assault, and stalking
- Questions regarding Title IX may be referred to Title IX Coordinator or OCR

Lathrop GPM 232

Notice of Nondiscrimination

Must also include the following:

- Name and title of Title IX Coordinator
  - Printed materials may have only title
  - Website must include all information
- Office address
- Phone number
- Email address
  - May create email for the position

Lathrop GPM 233

Scope—Who?

- Complainants
  - Students
  - Employees
  - Third Parties
- Respondents
  - Students
  - Employees
  - Third Parties
- Regardless of sexual orientation or gender identity

Lathrop GPM 234

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Scope—Who?

- Different procedures for students, staff, and faculty?
  - Different decision-makers
  - Some sanctions governed by faculty handbook (standard of evidence must be the same)
- Different procedures if accused is not a member of your community?

Lathrop GPM 235

Scope—What?

- Institution will respond to:
  - All forms of Title IX sexual harassment that occur within an education program or activity against a person in the United States
    - Quid pro quo
    - Hostile environment
    - Sexual assault and VAWA crimes
  - Non-Title IX sexual harassment?
  - Sexual assault and VAWA crimes outside of an education program or activity or against a person outside of the United States

Lathrop GPM 236

Prohibited Conduct

- Provide definitions of the following terms:
  - Title IX sexual harassment
  - Non-Title IX sexual harassment (optional)
  - Sexual assault
  - Domestic violence
  - Dating violence
  - Stalking
  - Sexual exploitation (optional)
  - Retaliation
- Policy's definition may set higher standard than state law—but confirm that it isn't less stringent

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Other Definitions

- Consent
- Coercion
- Incapacitation

Other Definitions

Recommended Consent Definition

Consent means words or overt actions by a person clearly communicating a freely-given present agreement to perform a particular sexual act. Words or overt actions clearly communicate consent when a reasonable person in the circumstances would believe those words or actions indicate a willingness to participate in a mutually agreed-upon sexual activity. Although consent does not need to be verbal, verbal communication is the most reliable form of asking for and obtaining consent. It is the responsibility of the person initiating the specific sexual activity to obtain consent for that activity.

Other Definitions

Recommended Consent Definition (cont.)

The definition of consent is subject to the following:

- Consent can only be given if one is of legal age.
- Consent to one form of sexual activity cannot, by itself, constitute consent to other forms of sexual activity.
- Consent can be withdrawn at any time. When consent is withdrawn, the sexual activity for which consent was initially provided must stop.
- Consent is active, not passive. Silence or the absence of resistance or saying "no," in and of themselves, cannot be interpreted as consent.
- Whether an individual actively and willingly participates in conduct may be a factor in determining whether there was consent.

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OTHER DEFINITIONS

Recommended Consent Definition (cont.)

The definition of consent is subject to the following (cont.):

- Previous relationships or previous consent do not, by themselves, constitute consent to future sexual acts. In cases of prior relationships, the manner and nature of prior communications between the parties and the context of the relationship may be factors in determining whether there was consent.
- An existing sexual, romantic, or marital relationship does not imply consent.
- Prior sexual activity with other individuals does not imply consent.
- Consent cannot be procured, expressly or implicitly, by use of force, intimidation, threats, or **coercion**, as that term is defined below.
- There can be no consent to sexual activity with someone known to be—or who should be known to be—mentally or physically **incapacitated**, as that term is defined below.
- Use of alcohol or other drugs will never function to excuse behavior that violates this Policy.

Lathrop GPM 241

OTHER DEFINITIONS

Recommended Incapacitation Definition

A person who is incapacitated cannot give valid consent to sexual contact. Incapacitation means the inability to understand the fact, nature, or extent of the sexual situation. Incapacitation may result from mental or physical disability, sleep, unconsciousness, involuntary physical restraint, or from the influence of drugs or alcohol. With respect to incapacitation due to the influence of drugs or alcohol, incapacitation requires more than being under the influence of drugs or alcohol; a person is not incapacitated just because they have been drinking or using drugs.

Lathrop GPM 242

OTHER DEFINITIONS

Example Incapacitation Definition (cont.)

Where drugs and/or alcohol are involved, incapacitation is determined based on the facts and circumstances of the particular situation looking at whether the individual was able to understand the fact, nature, or extent of the sexual situation, whether the individual was able to communicate decisions regarding consent, nonconsent, or the withdrawal of consent, and whether such condition was known or reasonably known to the respondent or a reasonable person in respondent's position. Use of drugs or alcohol by the respondent is not a defense against allegations of sexual misconduct.

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Other Definitions

Recommended Coercion Definition

Coercion refers to conduct or intimidation that would compel an individual to do something against their will by (1) the use of physical force, (2) threats of severely damaging consequences, or (3) pressure that would cause a reasonable person to fear severely damaging consequences. Coercion is more than an effort to engage in sexual activity. Coercive behavior differs from seductive behavior based on the degree and type of pressure someone used to get consent from another.

Lathrop GPM 244

Title IX Coordinator

- Identify the school's Title IX Coordinator and deputy coordinators (if any)
- Explain each individual's role and responsibilities in the school's overall response to sexual misconduct

Lathrop GPM 245

Immediate Action & Assistance

- Resources for immediate assistance
- Explain the importance of preserving evidence as may be necessary to the proof of sexual assault or a VAWA crime, or in obtaining a protection order*
- Discuss health care options on and off campus*
  - Provide information about where to obtain forensic examinations
- Explain the rights of complainants and the institution's responsibilities regarding orders of protection, no contact orders, restraining orders, or similar law orders issued by a criminal, civil, or tribal court or by the institution*
- Identify other services available on and off campus*

Lathrop GPM * indicates statutory/regulatory requirement under VAWA 246

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Reporting Options & Considerations

- Confidentiality
  - Identify confidential resources*
  - Describe what information will be kept confidential and what may be disclosed, to whom, and why (FERPA, Clery, state privilege laws)*
    - Reporting requirements
    - To facilitate a protective measure or accommodation
    - To conduct a complaint resolution process
  - Explain when institution may not be able to honor a student's request for confidentiality or no investigation/discipline
  - Explain institution's mandatory reporting obligations; cross-reference mandatory reporting policy

Lathrop GPM

* indicates statutory/regulatory requirement under VAWA

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Reporting Options & Considerations

- Reporting to the institution
  - Explain how and to whom the alleged offense should be reported*
    - Title IX Coordinator, other designated employees
  - Discuss employee reporting obligations
  - Explain the process for anonymous reporting
  - Describe when school will grant amnesty from student conduct policies

Lathrop GPM

* indicates statutory/regulatory requirement under VAWA

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Reporting Options & Considerations

- Reporting to law enforcement
  - Explain options regarding law enforcement and campus authorities, including notification of the complainant's option to*—
    - Notify proper law enforcement authorities, including on-campus and local police*
    - Be assisted by campus authorities in notifying law enforcement authorities if the complainant so chooses*
    - Decline to notify such authorities*
  - Explain that a report to law enforcement is not necessary for school to proceed

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* indicates statutory/regulatory requirement under VAWA

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Resources & Interim Measures

- Provide information about existing counseling, health, mental health, victim advocacy, legal assistance, visa and immigration assistance, student financial aid, and other services available for complainants, both on campus and in the community*
- Provide information about academic assistance*
- Identify additional resources and interim measures available*

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* indicates statutory/regulatory requirement under VAWA

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Resources & Interim Measures

- Explain options for, available assistance in, and how to request changes to academic, living, transportation, and working situations, if so requested by the complainant and if such accommodations are reasonably available, regardless of whether the complainant chooses to report the crime to campus police or local law enforcement*

Lathrop GPM

* indicates statutory/regulatory requirement under VAWA

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Written Notification to Complainants

- Policy must include a statement that the institution will provide complainants of sexual assault or VAWA crimes with written documentation of their rights and options*

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* indicates statutory/regulatory requirement under VAWA

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Complaint Process

- Identify and explain Title IX Coordinator(s) role
- Identify investigators, adjudicators, sanctioning officials, and appeals officials or explain process for selecting them
- Identify each type of disciplinary proceeding used by the institution and explain how the institution determines which type of proceeding to use based on the circumstances of an allegation*
- Explain how to file a disciplinary complaint*

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* indicates statutory/regulatory requirement under VAWA

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Structuring the Complaint Resolution Process

- Process options
  - One process: Use the same procedures for all sexual misconduct cases (including live hearings)
  - Hybrid: Use the same procedures for all Title IX and VAWA cases (including live hearings) and a separate process for non-Title IX/non-VAWA cases
  - Separate processes: Create separate procedures for Title IX, VAWA, and non-Title IX/non-VAWA cases

Lathrop GPM

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Same Procedures for Title IX and VAWA

- Pros
  - Clarity on the process that applies to allegations of sexual misconduct
  - Less risk of due process litigation
- Cons
  - Chilling effect of live hearing in all cases
  - Cost of additional procedural requirements, including hearings
  - Cannot explain hearing process as legally required in all cases
  - Potential FERPA issues with information sharing in non-Title IX cases

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Separate Procedures for Title IX and VAWA

- Pros
  - Fewer hearings (less chilling effect; less administrative burden/cost)
  - Clear FERPA exceptions for each process
  - Can rely on legal requirements for each process (not requiring additional process beyond legal obligations)
- Cons
  - More analysis needed to determine what process will apply
    - Complications when additional facts arise and in cases with multiple allegations
  - Confusing for parties
  - Risk of due process litigation seeking a hearing requirement

Lathrop GPM 256

Other Considerations

- If using a non-hearing process for sexual misconduct cases that do not fall within Title IX, consider discontinuing the use of hearings in other student conduct matters that involve two parties

Lathrop GPM 257

Complaint Process

- Explain the steps, anticipated timelines, and decision-making process for each type of disciplinary complaint*
- Explain informal process, if applicable
- Provide equitable rights and transparency to the parties*
- Discuss interaction with law enforcement
- Presumption of non-responsibility

Lathrop GPM * indicates statutory/regulatory requirement under VAWA 258

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Complaint Procedures

- Policy must state that proceedings will*—
  - Provide a prompt, fair, and impartial investigation and resolution*
  - Be conducted by officials who receive annual training on the issues related to sexual assault and VAWA crimes and how to conduct an investigation and hearing process that protects the safety of complainant and promotes accountability*

Lathrop GPM

* indicates statutory/regulatory requirement under VAWA

259

Complaint Procedures

- Standard of Evidence
  - Policy must state the standard of evidence that will be used during any institutional conduct proceeding arising from such a report*

Lathrop GPM

* indicates statutory/regulatory requirement under VAWA

260

Complaint Procedures

- Timing
  - Designate reasonably prompt time frames within which the proceedings will be completed*
  - Describe the process for the extension of time frames for good cause with written notice to the accuser and the accused of the delay and the reason for the delay*

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* indicates statutory/regulatory requirement under VAWA

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Complaint Procedures

- Conflicts of Interest
  - State that proceedings will be conducted by officials who do not have a conflict of interest or bias
    - For or against complainants or respondents generally
    - For or against an individual complainant or respondent
  - Describe procedure for reporting conflicts and requesting removal of investigator/adjudicator

Lathrop GPM 262

Complaint Procedures

- Sanctions and Remedies
  - Policy must list all of the possible sanctions that the institution may impose following the results of any institutional disciplinary proceeding for an allegation of Title IX sexual harassment, sexual assault, or VAWA crime*
  - Policy must describe the range of protective measures that the institution may offer to the complainant following an allegation of a sexual assault or VAWA crime*

Lathrop GPM * indicates statutory/regulatory requirement under VAWA 263

Complaint Procedures

- Notice of Determination
  - Policy must state that both the respondent and the complainant shall be simultaneously informed, in writing of*—
    - The outcome and rationale of any institutional disciplinary proceeding that arises from an allegation of sexual assault or a VAWA crime*
    - Disclose all sanctions and rationale to both parties for cases of sexual assault or VAWA crime*
    - The institution's procedures for the respondent and the complainant to appeal the results of the institutional disciplinary proceeding*
    - Any change to the results that occurs prior to the time that such results become final*
    - When such results become final*

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Complaint Procedures

- Policy *must* provide the accuser and the accused with the same opportunities to have others present during any institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice (Title IX/VAWA only)*
  - **Not limit the choice of advisor or presence** for either the accuser or the accused in any meeting or institutional disciplinary proceeding—must permit attorneys*
  - However, the institution may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties*

Lathrop GPM indicates statutory/regulatory requirement under VAWA 265

Complaint Procedures

- Notice of Meetings
  - VAWA: The policy must state that the proceeding will be conducted in a manner that includes timely notice of meetings at which the accuser or accused, or both, may be present*
  - Title IX: Written notice to the party whose participation is invited or expected of the
    - Date
    - Time
    - Location
    - Participants
    - Purpose

    of all hearings, investigative interviews, or other meetings with a party, with sufficient time for the party to prepare to participate

Lathrop GPM * indicates statutory/regulatory requirement under VAWA 266

Complaint Procedures

- Access to information and right to respond
  - VAWA: Provide timely and equal access to the accuser, the accused, and appropriate officials to any information that will be used during informal and formal disciplinary meetings and hearings*
  - Title IX:
    - Provide copies of directly related evidence to parties and advisors (and make available at hearing)
    - Provide opportunity to respond to directly related evidence
    - Provide copy of investigation report to parties and advisors
    - Provide opportunity to respond to investigation report

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Complaint Procedures—Adjudications

- Hearings
  - Advisor to conduct cross-examination
    - Institution will appoint an advisor if none
  - Relevancy rulings
  - Consequence of failure to submit to cross-examination
  - Other hearing procedures/rules
  - Decision-making process
- Procedures for other forms of adjudications

Lathrop GPM

* indicates statutory/regulatory requirement under VAWA

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Appeal Procedures

- Describe appellate procedures,* including:
  - Grounds for appeal
    - Procedural irregularity that affected the outcome of the matter
    - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter
    - Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias that affected the outcome of the matter
    - Other grounds optional
  - Appeal statement and responsive appeal statement
  - Standards of review
  - Process for determining whether grounds have been stated
  - Individual(s) who decide appeal or selection process
  - Timelines

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* indicates statutory/regulatory requirement under VAWA

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Retaliation

- Ensure the policy prohibits retaliation
- Provide instructions and contact information for reporting retaliation
- Identify process for investigating/adjudicating complaints of retaliation

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Implementation of the Policy

- Develop a plan for implementing and widely publicizing the policy to the entire campus community and provide training on the new policy
- Establish procedures for regularly reviewing, evaluating, and updating the policy
- Create user-friendly materials to explain the policy and how complainants can get help, and provide these materials online and through other strategies appropriate for the campus

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Q & A

Lathrop GPM

Session 7: Creating a Culture of Understanding & Prevention

Lathrop GPM 273

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Missing the Mark

- Common Concerns from Students:
  - Lack of clarity and transparency in policy and process
  - Lack of communication and coordination with parties
  - Lack of fairness and equity
  - Complainants discouraged from reporting
  - Retaliation/harassment and re-victimization
  - Inadequate support during and after process
  - Failure to accommodate documented disabilities
  - Dissatisfaction with outcome or sanctions
  - Inadequate training, education, and prevention programs

Lathrop GPM 274

Creating a Culture of Understanding

- Confidentiality – Revisited
  - Importance of Confidential Resources
    - Make confidential resources available and publicize their availability
      - Train responsible employees to notify complainants of their right to talk to a confidential resource
    - Many complainants will end up reporting after talking to a confidential resource
  - Even if confidentiality is not requested, always respect the parties' privacy
  - These practices will create trust on your campus and encourage reporting

Confidentiality → Trust → Reporting → Responding and Preventing

Lathrop GPM 275

Training

- Who?
  - Title IX Coordinators
  - Investigators
  - Individuals on hearing panels or who have responsibility for student discipline decisions
  - Student Affairs/HR
  - Residence Life staff
  - Security
  - Counseling staff
  - Other employees likely to witness or receive reports – faculty, certain staff, coaches, and athletic department members
  - Student leaders
  - New students and employees
  - Existing students and employees

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Prevention & Awareness Programs

- Primary prevention and awareness programs and the ongoing campaigns that include:
  - Statement that the institution prohibits VAWA crimes and sexual assault
  - Definition of VAWA crimes and sexual assault in the jurisdiction
  - Definition of consent in the jurisdiction
  - Safe and positive options for bystander intervention where there is a risk of VAWA crimes and sexual assault
  - Information on risk reduction to recognize warning signs of abusive behavior and how to avoid potential attacks
  - Procedures to be followed after a report of a VAWA crime or sexual assault (see above)

Lathrop GPM 277

Prevention & Awareness Programs

- *Programs to prevent sexual assault and VAWA crimes*:
  - Include both primary prevention and awareness programs and ongoing prevention and awareness campaigns
  - Comprehensive, intentional, and integrated programming, initiatives, strategies, and campaigns intended to end sexual assault and VAWA crimes that—
    - Are culturally relevant, inclusive of diverse communities and identities, sustainable, responsive to community needs, and informed by research or assessed for value, effectiveness, or outcome
    - Consider environmental risk and protective factors as they occur on the individual, relationship, institutional, community, and societal levels

Lathrop GPM 278

Prevention & Awareness Programs

- Training for employees who are not confidential resources and who are expected to report should also include discussion of:
  - Inability to promise confidentiality
  - Need to direct to confidential resource
  - Need to report to Title IX Coordinator

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Ongoing Prevention and Awareness Campaigns

- Examples
  - Bystander intervention
  - Drug and alcohol awareness
  - Coach-based prevention
  - It's on Us campaign

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How not to be a perpetrator

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Lathrop GPM 282

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Title IX Coordinator: Continually Review Policies/Procedures

- Are your policies and procedures effective?
  - Is your complaint process so cumbersome that it is deterring reports?
  - If a student searches "rape" or "sexual assault" on your student website, will resources come up?
  - What changes should be made based on past hearings or investigations?
    - You may be caught off-guard the first time a new issue arises, but you should be prepared the second time

Lathrop GPM 283

Title IX Coordinator: Continually Review Policies/Procedures

- After a complaint of sexual misconduct, review:
  - Anything with your facilities or practices that needs changing?
  - Are there patterns that should be addressed?
    - Times of the year (e.g., start of school)
    - Events (e.g., annual concert in the quad)
    - Groups
    - Location

Lathrop GPM 284

Climate Surveys

- Not required under Title IX or VAWA
  - May be required under state law
- A climate survey examines both
  - The number of sexual assaults occurring (prevalence or incidence) and
  - Perceptions of campus climate
- May provide more accurate data on number and type of incidents
  - Conducting regularly can show changes over time
- Assist in tailoring prevention and response efforts
- Demonstrate the institution's commitment to addressing sexual misconduct

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Climate Surveys

- What are the legal risks of conducting climate surveys?
  - Must be prepared to respond to data
    - Changes to policies/procedures
    - Remedies for particular incidents reported
    - Information will be available to OCR and in litigation

Lathrop GPM 286

Upcoming Trainings

- **8/4/20: Annual Training for Advanced Title IX Coordinators and Deputy Coordinators**
- **8/5/20: Title IX/VAWA Investigator Training**
- **8/11/20: Title IX/VAWA Hearing Panel Training**

Lathrop GPM 287

On Demand Trainings

- **Available on-demand:**
  - Annual Trauma Informed Training for Investigators and Adjudicators
  - Annual Training for NEW Title IX Coordinators and Deputy Coordinators
  - Annual Training for ADVANCED Title IX Coordinators and Deputy Coordinators
  - Title IX/VAWA Hearing Panel Training
  - Trauma Informed Training for First Responders, Confidential Resources, and Campus Security
  - Making Your Sexual Misconduct Policy a 10
  - Title IX/VAWA Training for Chief Academic Officers
  - Title IX/VAWA Panel Discussion for Coaches and Athletic Directors
  - Compliance Update: New VAWA Guidance
  - Senior Leadership Training
  - Transgender Students and Employees Training
  - Minnesota Law Update: Title IX Coordinator Overview of Legal Requirements
  - Confidential Resources Training
  - Attorneys Serving as Advisors
  - Panel Discussion on Interviewing Survivors of Sexual Assault
  - Fundamentals of FERPA
  - Drafting Your Notice of Determination

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On Demand Trainings

- Available on-demand:
  - Post-VAWA Annual Security Report Drafting
  - Additional Requirements Under Minnesota's Campus Sexual Assault Law
  - Drafting Effective and Compliant Investigation Reports
  - Title IX Coordinator Training: Duties Beyond Sexual Assault
  - Title IX/VAWA Training for Adjudicators
  - Title IX/VAWA Investigator Training
  - Train the Trainer: Title IX/VAWA Training for Coaches and Athletic Directors
  - Panel Discussion on Title IX Recordkeeping Requirements and Best Practices
  - Complying with the NCAA Sexual Violence Policy – Part 1
  - Complying with the NCAA Sexual Violence Policy – Part 2
  - Unique Challenges in Responding to Allegations of Domestic Violence, Dating Violence, and Stalking
  - Title IX Update: Proposed Regulations
  - Conducting a Grievance Process Under the New Title IX Regulations
  - Title IX Update: Final Regulations
- Prevention programs for students & employees—customizable online modules

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Training for

Annual Training for New Title IX Coordinators and Deputy Coordinators

WEB RESOURCES

Title IX Final Regulation:

- **Department of Education Fact Sheet:** https://www2.ed.gov/about/offices/list/ocr/docs/titleix-fact-sheet.pdf
- **Department of Education Final Rule Overview:** https://www2.ed.gov/about/offices/list/ocr/docs/titleix-overview.pdf
- **Department of Education Summary of Major Provisions:** https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf
- **Final Regulation:** https://www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf

January 2001, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties:
https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf

January 25, 2006 Dear Colleague Letter on Sexual Harassment:
https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html

April 24, 2015 Department of Education Guidance on Title IX Coordinators:

- **Dear Colleague Letter on Title IX Coordinators:** http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf
- **Letter to Title IX Coordinators:** http://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-letter-201504.pdf

- **Title IX Resource Guide:** http://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf

Final Regulations for the Violence Against Women Act amendments to the Clery Act (October 20, 2014):
http://www.gpo.gov/fdsys/pkg/FR-2014-10-20/pdf/2014-24284.pdf

Handbook for Campus Safety and Security Reporting:
http://www2.ed.gov/admins/lead/safety/handbook.pdf

September 22, 2017 Department of Education Guidance:

- **Dear Colleague Letter:** https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf?utm_name
- **Q & A on Campus Sexual Misconduct:** https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf?utm_name

April 4, 2011 Dear Colleague Letter on Sexual Violence (withdrawn):
http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf

Questions and Answers on Title IX & Sexual Violence (2014) (withdrawn):
http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf

Building Partnerships among Law Enforcement Agencies, Colleges and Universities: Developing a Memorandum of Understanding to Prevent and Respond Effectively to Sexual Assaults at Colleges and Universities:
https://obamawhitehouse.archives.gov/sites/default/files/docs/white_house_task_force_law_enforcement_mou.pdf

Not Alone: https://obamawhitehouse.archives.gov/1is2many/notalone

It's On Us Campaign:
http://www.itsonus.org/

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