

Title IX Training Freire Schools

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Today's Agenda



Title IX

- (1) Background: The law and Definitions
- (2) Conduct Covered by Title IX
- (3) Reporting
- (4) Response Obligations
- (5) Expectations
- (6) Formal Complaints
- (7) Grievance Process
- (8) Outcome
- (9) Appeals
- (10) Recordkeeping

What is Title IX and What Does it Mean?

Relevant Laws and Definitions



The Statute

No person in the United States shall, *on the basis of sex*,

- be excluded from participation in,
- be denied the benefits of, or
- be subjected to **discrimination**

under **any education program or activity** receiving Federal financial assistance.



Interpretation of Statute

Since sexual harassment = discrimination on the basis of sex, what does Title IX say a school has to do to address sexual harassment?

- The Supreme Court has interpreted Title IX so that if a school has **(i)** actual knowledge of harassment it **(ii)** must respond in a way that is **(iii)** not deliberately indifferent.
- **In short:** **(i)** if you know about harassment, **(ii)** you must respond in **(iii)** a meaningful way.



Responding Meaningfully

How to comply with Title IX in terms of responding to sexual harassment in a **meaningful way**:

The law that applies to your school says you must start by doing these two things:

- Designate a TIXC to carry out the school's responsibilities;
- Adopt and publish **policies and procedures** to make sure your school does not respond in a way that is deliberately indifferent; and
- Publish TIXC's contact information on website and in policy.



Foundational Principle #1

If you have *actual knowledge* of *sexual harassment* that occurred in your *education program or activity* against a person *in the United States*, then you must respond promptly in a manner that is not *deliberately indifferent*.

Scope and Jurisdiction

Title IX Covered Conduct



Actual Knowledge

Freire's response obligations begin with “*actual knowledge*.” But what does that mean?

An elementary or secondary school is considered to have “actual knowledge” of sexual harassment if such allegation is made by the complainant or any third-party to the TIXC *or* to *any employee* of the school, triggering the school's response obligations.



Actual Knowledge

- Students should know that they can make a report to **any employee**; and any employee who receives a report must tell the TIXC.
- **One of the major responsibilities of the TIXC is to educate the Freire community that any report received by an employee **must be passed on to the TIXC**.**



Sexual Harassment

Sexual Harassment for the purposes of Title IX is defined as conduct *on the basis of sex* that satisfies one or more the following:

- Any instance of *quid pro quo* harassment by a School employee;
- Any unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it denies a person equal educational access; or
- Any instance of “sexual assault” (20 U.S.C. 1092(f)(6)(A)(v)), “dating violence” (34 U.S.C. 12291(a)(10)), “domestic violence” (34 U.S.C. 12291(a)(8)) or “stalking” (34 U.S.C. 12291(a)(30)).



Sexual Harassment

Reasonable Person Standard:

- “Unwelcome conduct determined by a ***reasonable person*** to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity.”
- Applies to ***both elements***: (1) severity, pervasiveness, objective offensiveness ***and*** (2) effective denial of equal education access.



Sexual Harassment

If you have a question about whether conduct constitutes sexual harassment, contact school leadership or counsel!



Educational Program/Activity

Education Program or Activity Includes:

- Locations, events, *or* circumstances
- whether on campus *or* off campus (as long as it is in the U.S.)
- over which the institution exercised ***substantial control*** over *both* the respondent *and* the context in which the sexual harassment occurs.

It Also Includes:

- Any building owned or controlled by an officially recognized student organization (e.g., fraternity or sorority houses).



Educational Program/Activity

Examples Include:

- Academic Advising
- Admissions
- Athletics
- Counseling
- Discipline
- Education
- Employment
- Financial Aid
- Health Services
- Housing
- Recreational Services
- Recruitment
- Registration
- Residential Life Programs
- Grading

The Title IX Coordinator must respond to *all* complaints about discrimination in *any* of these areas. But, practically, this training – and the majority of your efforts – will center around sexual harassment that disrupts access to educational programs or activities at your school.

Reporting Sexual Harassment

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Reporting (Alleged) Sexual Harassment

The TIXC must:

- Receive all Title IX complaints, even when initially filed with another Freire employee:
 - Ensure that complainants and third parties have clear, accessible ways to report; and
 - Respond to all complaints by following Title IX grievance procedures



Who Can Report?

- ***Any person*** may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment)
 - Complainant
 - Third Party (e.g., an alleged complainant's friend or a bystander witness, the complainant's parent, or a peer)
 - Anonymous/blind reporting (**But** Freire's ability to respond (i.e. offer supportive measures) or to consider initiating a grievance process will be affected by whether the anonymous report disclosed the identity of the complainant or respondent).



How to Report?

Reports may be made:

- In person
- Mail
- Telephone
- Email
- Electronic/online portal
- Using TIXC published contact information
- To any Freire employee (how must then pass the report to the TIXC)
- ***Any means that results in the TIXC receiving a verbal or written report***

Response Obligations Post- Report



Responding to a Report

Once Freire has *actual knowledge* of allegations of sexual harassment the *TIXC must*:

1. Promptly *contact the complainant* to discuss the availability of supportive measures,
2. *Consider the complainant's wishes* with respect to supportive measures,
3. Inform the complainant of the availability of supportive measures with or *without the filing of a formal complaint*, and
4. Explain to the complainant the process for filing a formal complaint.



Emergency Removal or Administrative Leave

Freire may employ an *emergency removal process* if there is an *immediate threat to the physical health or safety* of any students or other individuals arising from the allegations of sexual harassment. **This is not discipline!**

The institution may place a non-student employee on *administrative leave* during the pendency of a grievance process. **But** employees may not be placed on administrative leave *unless and until* a Formal Complaint is filed.



Supportive Measures

What are they?

- Non-disciplinary, non-punitive individualized services,
- offered as appropriate, as reasonably available, and without fee or charge,
- to the complainant *or* the respondent, that are
- designed to restore or preserve equal access to Freire's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.



Supportive Measures

- The law says you must respond to every report of sexual harassment by offering *supportive measures*.
- Part of this response is making sure the complainant is supported, *whether or not* you pursue your grievance procedure/conduct an investigation.
- Freire *may* (but is not required to) provide supportive measures to respondents (practically, you should).
- **Supportive measures** may include, for example, offering counseling, altering class schedules, offering virtual education, or no-contact orders.



Supportive Measures

If you do not provide supportive measures to the Complainant, you *must document* why that response was not clearly unreasonable in light of the known circumstances (e.g., because complainant did not wish to receive supportive measures or refused to discuss measures with the TIXC or the report was anonymous and the complainant could not be identified).



Supportive Measures

- The TIXC is responsible for knowing what supportive measures Freire can offer, and for offering them at the outset.
- The TIXC should work with Freire leadership to decide on these measures.
- The TIXC may rely on other Freire employees to *actually provide* supportive measures
- Freire has flexibility to determine how to process requests for supportive measures and which measures to ultimately offer but *must consider the complainant's wishes*.
- **But** the burden of arranging and enforcing supportive measures remains on the institution *not on a party*.



Supportive Measures

Think about the purpose of the measures:

To restore/preserve equal access to Freire's educational program or activity and/or protect the safety of the Freire community and deter sexual harassment.

These measures cannot be punitive, disciplinary, or unreasonably burdensome.



Supportive Measures

Designed to” ≠ “Necessarily Do

- Supportive measures are *designed* to help a party retain equal access to education. But they may not.
- This standard is meant to preserve discretion and protect against unfair imposition of liability (e.g., where underlying trauma from a sexual harassment incident still results in a party’s inability to participate in an education program or activity).



Supportive Measures

No “Unreasonable Burden:”

- Meant to protect each party from a request from the other for measures that would unreasonably interfere with either party’s educational pursuits
- It does not bar all measures that place *any* burden on a respondent
- *Does not mean* “proportional to the harm alleged”
- *Does not mean* “least burdensome measures” possible
- *May be* unreasonable to make housing/schedule adjustments or to remove a party from an extracurricular/athletic pursuit
 - Fact-specific determination
 - Take into account the nature of the educational programs, activities, opportunities, and benefits in which a party is participating . . . **not limited to academic pursuits.**
 - *You should document the reasons why a particular supportive measure was not appropriate, even though requested . . . including by documenting the assessment of burden*



Supportive Measures

Supportive Measures ≠ Sanctions!

- The possible sanctions described/listed in a grievance procedure constitute actions the institution considers “disciplinary”
- Those sanctions thus ***cannot be supportive measures***
- Certain actions are inherently disciplinary/punitive/unreasonably burdensome even if not listed as sanctions in grievance procedure:
 - ***Suspension, Expulsion, Termination***
- Even a temporary ‘hold’ on a transcript, registration, or graduation will generally be considered to be disciplinary, punitive, and/or unreasonably burdensome.



Supportive Measures

- **Must** be kept confidential unless confidentiality would impair provision
- Complainant thus may obtain supportive measures while keeping identity confidential from respondent (and others)
 - *Unless* disclosure is necessary to provide the measures (e.g., where a no-contact order is appropriate).

Formal Complaints



What is a Formal Complaint?

A 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.



Formal Complaints

Who can file?

- Complainant may file Formal Complaint by signing document
 - *Freire must* investigate when Complainant desires the action (unless the Complaint must or may be dismissed);
- Title IX Coordinator may sign Formal Complaint
 - If the Title IX Coordinator has determined on behalf of Freire that an investigation is needed (*clearly unreasonable standard*)
- ***No anonymous filing*** (unlike reports)



Formal Complaints

If the TIXC signs the Formal Complaint

- Title TIXC is not a complainant or otherwise a party;
- Not evidence of “bias;”
- Complainant remains the party to the action;
- Complainant has right to refuse to participate in grievance process.



Formal Complaints

Where and How to File:

A formal complaint may be filed with the TIXC *in person, by mail*, or by *electronic mail*, by using the contact information required to be listed for the TIXC in Freire's Title IX Policy/website, and by *any additional method designated by Freire*.



Formal Complaints

When to file:

- No set time limit from date of allegations to filing (no statute of limitations).
- *At the time the complaint is filed* (not when the alleged incident occurred) the complainant *must be participating in or attempting to participate in Freire's* education program or activity.
- **But** the Rule permits TIXC's to sign a formal complaint regardless of whether a complainant is "participating or attempting to participate in the school's education program or activity."



Dismissal of Complaint

Mandatory Dismissal

If the conduct alleged in a Complaint:

- would not constitute *sexual harassment* even if proved,
- did not occur within Freire's *program or activity*,
- did not occur against a *person in the United States*, or
- complainant is not participating in the programs or activities

Freire *must terminate* its grievance process with regard to that conduct for the purposes of sexual harassment under Title IX.

Dismissal does not preclude action under another provision of Freire's code of conduct.

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Role of Advisors



Advisors During Title IX Process

- Parties may have their advisor of choice throughout the Title IX process;
- Freire cannot:
 - impose limits on who a party selects as an advisor;
 - set a cost “ceiling” for advisors selected by parties; or
 - charge a party a cost or fee for an assigned advisor.



Advisor Qualifications

- **No** particular expectation of skill, qualifications, or competence.
- Advisors are **not** subject to the same impartiality, conflict of interest, or bias requirements as other Title IX personnel.
- Freire may not impose training or competency assessments on advisors of choice.
- Regulations do not preclude institution from training and assessing the competency of its own employees whom it appoint as assigned advisors.



Limiting Advisor's Role

- Freire may apply rules (equally applicable to both parties) restricting advisor's active participation in the investigation process.
- However, the Department declined to specify what restrictions on advisor participation may be appropriate.
 - *Proportionality is key.*

Grievance Process



Informal Resolution

At any time prior to reaching a determination regarding responsibility, an informal resolution process that does not involve a full investigation may be facilitated. **But:**

- You cannot require the parties to participate in an informal resolution process; and
- You cannot offer an informal resolution process unless a formal complaint is filed.



Informal Resolution

Any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint

*****Cannot offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student*****



Informal Resolution

To facilitate an alternative resolution, you must:

- Obtain the parties' voluntary written consent; and
- Provide written notice to the parties disclosing:
 - The allegations;
 - The requirements of the informal resolution process, including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations; and
 - Any consequences resulting from participating in the informal resolution process, including records that will be maintained or could be shared.



Informal Resolution

A written consent form to participate in informal resolution might include agreement that:

- Successful completion of preparatory meetings is a precondition to participation in informal resolution;
- The parties are bound by the terms of any final informal resolution agreement, cannot return to formal resolution *after an agreement*, and consequences for failing to comply with agreement's terms; and
- How, and for how long, records will be kept



Investigation

The institution ***must investigate*** allegations of a ***Formal Complaint*** (*unless and until the Complaint must or may be dismissed*)



Investigations: The Basics

- ❑ Trained Investigator(s) (may want a third-party (i.e., not TIXC) if allegations are severe)
- ❑ Written Notice of Allegations (*update if necessary*)
- ❑ Advance written Notice of any investigative interview(s)
- ❑ Burden on *institution/investigator* to collect evidence
- ❑ Both Parties = Equal Advisor Rights (*can be an attorney*)
- ❑ Both Parties = Right to Identify Witnesses/Evidence
- ❑ Voluntary, Written Consent to Access Medical/Mental Health Records
- ❑ Both Parties = Right to Inspect & Review Any Evidence “Directly Related”
- ❑ Both Parties = Right to submit written questions to the other party
- ❑ Both Parties = Meaningful Opportunity to Respond to Evidence
- ❑ Investigative Report = Fairly Summarize Relevant Evidence
- ❑ Both Parties = Right to Review & Respond to Investigative Report
- ❑ Retain Records for 7 years



Investigations: The Basics

Investigations are inherently difficult because:

- Nature of the trauma response (“tonic immobility”)
- Counterintuitive victim behaviors
- Delays in reporting
- Wavering level of cooperation/recantation
- Role of drugs and alcohol
- Most sexual assaults committed by someone known to the victim
- Many sexual assaults are achieved through threats, intimidation, and exploiting vulnerabilities or incapacitation
- Concerns over false reports
- Little to no physical or forensic evidence
- Most common defense is consent
- Decisions often based solely on credibility
- Inability to completely eliminate occurrence
- Emotionally charged and incendiary in nature
- Cultural differences



Investigations: Practical Steps

- ✓ **Prepare in advance:** order of witnesses and questions to be asked.
- ✓ Take time at the outset to **establish a rapport** with all of your interviewees, especially the complainant and respondent.
- ✓ Stress to the respondent that you want to hear his/her account; no conclusions will be drawn **until all evidence is obtained & reviewed.**
- ✓ Explain that at any time a witness can **stop to ask questions or request clarification.** Repeat this throughout your interview.
- ✓ Explain that at any time a witness **can ask to take a break.** Repeat this again, especially during lengthy interviews.
- ✓ **Acknowledge the awkwardness of the situation,** and, when appropriate, advise that you will likely have to ask questions that may be personal, or even sexual, in nature.



Investigations: Practical Steps

- ✓ Help **orient witnesses to the time and date** of the alleged incident as needed.
- ✓ **Don't fear/fill in silences.** The witness may just be trying to get his/her thoughts together, or may be on the verge of an admission.
- ✓ Ask the witnesses to explain **any/all slang terms or acronyms** used; **don't assume that you know.**
- ✓ Ask for any/all evidence/documentation that could corroborate/disprove an account (i.e., **social media posts, texts, emails, voicemail**)
- ✓ Ask **who else the witness has spoken to** about the incident/allegation, and when? Interview that person.
- ✓ Invite the witness to provide additional information throughout the interview (i.e., **“What else?” “What else should I know?” “What else do you want me to know?”**)



Investigations: Meeting Notice

Parties (and their advisor) must be given advance **written notice** of the date, time, location, participants, and purpose of all investigative interviews or other meetings. The written notice to the parties of such meetings must be provided with **sufficient time for the party to prepare to participate.**

You should inform parents/guardians of witnesses that they will be interviewed.



Investigation: Rights of Parties

- Receive written notices (i.e. notice of allegations, notice of interviews)
- Be accompanied by an advisor of choice
- Discuss the allegations under investigation
- Present witnesses & evidence (inculpatory & exculpatory)



Investigation: Step One

Gathering evidence:

The burden of proof and the **burden of gathering evidence** sufficient to reach a determination regarding responsibility rests on Freire, *not on the parties*.



Investigation: Step One

Gathering evidence:

- The Investigator must gather **all available evidence sufficient to reach a determination regarding responsibility** (preponderance standard).
- The investigator should:
 - undertake a thorough search,
 - for relevant facts and evidence,
 - while operating under the constraints of completing the investigation under designated, reasonably prompt timeframes,
 - and without powers of subpoena.



Investigation: Step One

Gathering evidence:

- **Cannot** access, consider, disclose, or otherwise use a party's records 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 party provides voluntary, written consent.



Investigation: Step Two

Review of/Response to Evidence:

- Both parties must be given equal opportunity to ***inspect and review*** any evidence obtained during the investigation that is ***directly related*** to the allegations in the formal complaint (does not mean “relevant”)
- Evidence must be **sent** to each party, and their advisors (if any), in an electronic format or hard copy



Investigation: Step Two

Evidence that must be shared includes:

- evidence upon which Freire does not intend to rely in reaching a responsibility determination
- Inculpatory & exculpatory evidence, whether obtained from a party or other source

**“Directly
Related”**

Relevant



Investigation: Step Two

- Parties must have at least 10 days to respond in writing to the “directly related” evidence (if they so choose) to:
 - Clarify ambiguities or make corrections where the party believes the investigator did not understand
 - **Assert which evidence is “relevant” and should therefore be included in the Investigative Report**
- The investigator *must consider* any written responses before finalizing the investigative report



Investigation: Step Three

After the parties have had the opportunity to inspect, review, and respond to the evidence, the Investigator must –

- Create an investigative report that fairly summarizes *relevant evidence* and,
- Send the report to each party and their advisor (if any) for their review and written responses.
 - (Hard copy **or** electronic format)



Investigation: Step Three

Relevance:

- The final regulations do not define relevance.
 - Ordinary meaning of relevance should be applied throughout the grievance process.
 - Fact determinations reasonably can be made by layperson recipient officials impartially applying logic and common sense.
 - Relevant evidence must include both inculpatory and exculpatory evidence.



Investigation: Step Three

“The requirement for recipients to summarize and evaluate [only] relevant evidence, . . . appropriately directs recipients to focus investigations and adjudications on ***evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true***”



Investigation: Step Three

You cannot exclude relevant evidence. Meaning you cannot:

- Adopt an “undue/unfair prejudice” rule
- Adopt a rule prohibiting character, prior bad acts, evidence.
- Exclude certain types of relevant evidence (e.g., lie detector test results, or rape kits)



Investigation: Step Three

The following is *per se* **not relevant**:

- Complainant's prior sexual behavior (subject to two exceptions) or predisposition (Rape Shield; Collect but not use in report (i.e., directly related but not relevant))
- Any party's medical, psychological, and similar treatment records without the party's voluntary, written consent; and
- Any information protected by a legally recognized privilege unless waived.



Investigation: Step Three

Exceptions to Rape Shield Law:

- **Exception 1:** Evidence of prior sexual behavior is permitted if offered to prove someone other than the respondent committed the alleged offense.
- **Exception 2:** Evidence of prior sexual behavior is permitted if it is specifically about the complainant and the respondent **and** is offered to prove consent. Does not permit evidence of a complainant's sexual behavior with anyone other than the respondent.



Investigation: Step Four

The regulations do not prescribe the contents of the investigative report other than specifying its core purpose of summarizing relevant evidence.

But you should include:

- Summary of allegations
- Policy provisions potentially implicated
- Timeline of investigative process
- Description of the procedural steps taken
- Summary of relevant evidence
- Summary documents collected/reviewed
- Summary of witnesses interviewed
- Any unsuccessful efforts to interview (and why)
- Any unsuccessful efforts to obtain documents (and why)
- Parties' required responses



Investigation: Step Four

Providing Report to Decision-Maker:

- The regulations do not prescribe how or when the investigative report should be given to the decision-maker
- *However*, the decision-maker will need to have the investigative report and the parties' responses to same, prior to reaching a determination regarding responsibility.

Decision-Maker's Determination (i.e., the Outcome)



The Outcome

**At the conclusion of the investigation, the
Decision-maker must make a
determination regarding responsibility**

***That determination must be based on a preponderance
of the evidence standard***



The Outcome

Assessing evidence:

Decision-maker assigns weight & credibility to evidence

- For example, where a question is relevant, but concerns a party's character, the decision-maker *must consider* the evidence, but may proceed to *objectively evaluate* it by analyzing whether the evidence *warrants a high or low level of weight or credibility*
 - Evaluation must treat the parties equally by not, for instance, automatically assigning higher weight to exculpatory character evidence than to inculpatory character evidence.



The Outcome

Important considerations:

- The Respondent must be **presumed not responsible** for the alleged conduct until the determination regarding responsibility is made.
- Outcome must be based on an objective evaluation of all **relevant evidence**—including both inculpatory and exculpatory—and not taking into account the relative “skill” of the parties’ advisors.
- **Credibility determinations** may not be based on a person’s status as a Complainant, Respondent, or witness.



The Outcome: Written Determination

- The Decision-maker must issue a **written determination regarding responsibility** and provide the written determination to the parties ***simultaneously***.
- The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.



The Outcome: Written Determination

Key Elements:

1. **Identification of the allegations** alleged to constitute sexual harassment ;
2. **The procedural steps taken** from receipt of the formal complaint through the determination regarding responsibility;
3. **Findings of fact** supporting the determination;
4. **Conclusions** regarding the application of the **recipient's code of conduct** to the facts;
5. The decision-maker's **rationale for the result** of each allegation, including rationale for the determination regarding responsibility;
6. **Any disciplinary sanctions** the recipient imposes on the respondent, and **whether** the recipient will provide **remedies** to the complainant; and
7. Information regarding the **appeals process**.



The Outcome: Remedies and Sanctions

- **Sanctions.** The Department does not require or prescribe disciplinary sanctions after a determination of responsibility and leaves those decisions to the discretion of recipients, but recipients must effectively implement remedies.
- **Remedies.** Remedies must be designed to “restore or preserve equal access to the recipient’s education program or activity.” They may include the same services described as “supportive measures.” Unlike supportive measures, though, remedies may in fact burden the respondent, or be punitive or disciplinary in nature. The TIXC is responsible for implementation of remedies.

Appeals



Appeal Rights

- Freire must offer both parties an appeal from a **determination regarding responsibility** and from Freire's **dismissal of a formal complaint** or any allegations therein (whether or not it is a mandatory or discretionary dismissal)
- Appeal rights are not conditioned on enrollment/employment/participation. Meaning, for example, a respondent who has graduated or withdrawn from the institution since the hearing retains the right to an appeal.



Appeal Requirements

Requirements for Appeals:

- Notify the non-appealing party in writing when an appeal is filed and implement appeal procedures equally for both parties;
- Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the TIXC;
- Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
- Issue a written decision describing the result of the appeal and the rationale for the result; and
- Provide the written decision simultaneously to both parties.



Grounds for Appeal

Mandatory bases 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; and
- The Title IX Coordinator, investigator(s), or decision-maker(s) 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.**



Conflict of Interest/Bias

Any individual designated as the TIXC, investigator, decision-maker, or informal resolution process facilitator, must “*not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.*”



Conflict of Interest/Bias

“Whether bias exists requires examination of the ***particular facts*** of a situation . . . and the Department encourages recipients to apply ***an objective*** (whether a reasonable person would believe bias exists), ***common sense approach*** to evaluating whether a particular person serving in a Title IX role is biased[.]”

*****Impermissible bias occurs when a decision is based on the characteristics of the parties, rather than the facts*****



Conflict of Interest/Bias

What is not bias:

- **Outcomes of grievance procedures:** “[T]he mere fact that a certain number of outcomes result in determinations of responsibility, or non-responsibility, does not necessarily indicate or imply bias on the part of Title IX personnel.”
- **The fact that the TIXC signed a formal complaint.**
- **Professional/Personal Experiences o affiliations** (i.e., self-proclaimed feminist; history of work as sexual violence advocate; history of work as defense attorney, etc.)



Conflict of Interest/Bias

The Department does not define conflict of interest and instead leaves it to recipients to define. However, it is not a conflict of interest for *a recipient to fill Title IX personnel positions with its own employees*:

“Any recipient, *irrespective of size*, may use existing employees to fill Title IX roles, as long as these employees do not have a conflict of interest or bias and receive the requisite training.”



Appeal Analysis

- *First*, do sufficient grounds exist for at least one basis of appeal (i.e., procedural irregularity, new evidence, bias/conflict, disproportionate sanction)?
- *Second*, is there merit to the appeal (e.g., there was a procedural irregularity)?
- *Third*, if yes, was the outcome affected (or, if new evidence, could it have been)?

Overview of Roles: Who can Serve Which Function?

Title IX Coordinator ...

- Investigator ✓
- Informal resolution facilitator ✓
- “Procedural facilitator” @ hearing ✓
- Decision-maker or appeal decision-maker ✗

Investigator ...

- Title IX Coordinator ✓
- Informal resolution facilitator ✓
- Decision-maker or appeal decision-maker ✗

Overview of Roles: Who can Serve Which Function?

Decision-maker...

- Investigator ✗
- Title IX Coordinator ✗
- Appeal decision-maker ✗

Appeal decision-maker ...

- Investigator ✗
- Title IX Coordinator ✗
- Decision-maker ✗



Appeal: Written Determination

- Appeal Officer must issue a **written decision** describing the result of the appeal and the rationale for the result:
 - The regulations require “reasoned written decisions describing the appeal results.”
 - Written decision must be issued **simultaneously** to both parties.

Documenting Decisions and Recordkeeping



Documentation

Friere must create and maintain records of any actions taken in response to a report or formal complaint of sexual harassment.

Document:

- the basis for conclusion that response was not deliberately indifferent;
- that measures taken were designed to restore or preserve equal access to the education program or activity; and
- the reasons why failure to provide supportive measures was not “clearly unreasonable in light of the known circumstances.”



Document Retention

Friere must keep all required documents for a *seven year period* (beginning on the date of the document's creation).



Document Retention

Any record Freire creates to investigate an allegation, regardless of later dismissal or other resolution of the allegation, must be maintained.

- Even those records from “truncated investigations” that led to no adjudication because the acts alleged did not constitute sex discrimination under Title IX (dismissal)



Document Retention

Must maintain records of:

- Investigation;
 - Any determination regarding responsibility;
 - Any audio or visual recording or transcript;
 - Any disciplinary sanctions imposed on the respondent; and
 - Any remedies provided to the complainant designed to restore or preserve equal access to the institution's educational program or activity.
- Any appeal and the result.
 - Any informal resolution and the result.
 - All materials used to train the TIXC, investigators, decision-makers, and any person who facilitates an informal resolution process.

§106.45(b)(10)(i)(A)



Publication

Freire must make training materials publicly available on its website.

Goal: Increase transparency and integrity of grievance process.

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