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Association of
Title IX Administrators

Solutions for Managing Intake, Jurisdiction, and Dismissal in the Title IX Grievance Process

An ATIXA Workshop



Strategic Risk
Management Solutions



Any advice or opinion provided during this training, either privately or to the entire group, is never to be construed as legal advice. Always consult with your legal counsel to ensure you are receiving advice that considers existing case law, any applicable state or local laws, and evolving federal guidance.



CONTENT ADVISORY

The content and discussions in this course will necessarily engage with sex-based harassment, discrimination, and violence and associated sensitive topics that can evoke strong emotional responses.

ATIXA faculty members may offer examples that emulate the language and vocabulary Title IX Coordinators and Title IX team members encounter in their roles including slang, profanity, and other graphic or offensive language.

AGENDA

1 Intake

2 Jurisdiction

3 Dismissal

4 Charging

5 Case Studies

6 Group Discussion



INTAKE

- Emerging Best Practices
- Initial Assessment
- Title IX Coordinator Signs a Complaint
- Decision Tree
- Process A or B?
- Referral

INTAKE – EMERGING BEST PRACTICES

Notice of Incident vs. Complaint

- **“Complaint”** is a formula per the 2020 Title IX regulations; if it does not meet the formula, it’s not a complaint
- Structure online reporting to ensure that it provides notice, not a complaint
 - Control complaints through the Title IX office
 - Notice of Investigation and Allegations (NOIA) trap
 - Important to Complainant confidentiality
 - Avoids the problem of notifying Respondent of a dismissal when they don’t even know a complaint has been filed

INTAKE – EMERGING BEST PRACTICES

Intake Process

- Managed by the Title IX office or delegated?
 - If delegated, to whom?
 - Should advocates be empowered to manage intake?
 - How much authority should they have?
 - Recordkeeping implications
- Importance of online reporting mechanisms, especially in an age of remote employment and instruction and pandemics
- What are the most effective ways to connect a party with an Advisor as early as the intake step of the process?
 - How hard should we push a party to find an Advisor?



GROUP ACTIVITY

INTAKE – EMERGING BEST PRACTICES

Intake Process (Cont.)

- Notetaking/documentation (and then what do you do with your notes?)
- Addressing the risk that conducting intake can make you a witness after-the-fact

INTAKE – EMERGING BEST PRACTICES

Resolution Process Selection

- Steering the Complainant/Complaint to the right process
 - Can you leverage the initial assessment to meet your needs?
- What is the right amount of information to provide during intake?
 - Intake can be overwhelming
 - Don't expect immediate decisions
 - Don't expect the Complainant to know what to ask
 - Try to set realistic expectations and consider your tone and word choice with respect to the options provided

INTAKE – EMERGING BEST PRACTICES

Resolution Process Selection (Cont.)

- You may not like the regs-based § 106.45 process, but should you show that to the Complainant?
- What if they ask you what you would do?
- Follow-up and reiterate their options.
 - Are you trying to fit their needs to your offerings, or shape your offerings to meet their needs?
- Offer the VAWA Brochure or some other written summary of options
 - Process options are more accessible when depicted in flowcharts, roadmaps, rights guides, etc.
- Try to anticipate barriers to access and find workarounds

INTAKE – EMERGING BEST PRACTICES (CONT.)

- If the Complainant is reluctant to proceed, what strategies should you deploy?
- Don't forget that even as early as intake, there may be needs related to translation, interpretation, and/or accommodation
 - Make sure to offer; don't wait for the request, as the Complainant may not know what they can request, or what they are entitled to in your process

INTAKE – EMERGING BEST PRACTICES (CONT.)

- You know the process, and this is likely their first experience of the process. Research shows that students commonly find it confusing, lacking in transparency, and inaccessible, even if they have read the policies and procedures.
- Third-party notice has its own set of hurdles and challenges
 - How will you manage notice from third parties?
 - How does recent guidance from OCR on the authority of a TIXC to sign a complaint affect a Complainant who is not participating or attempting to participate (P/ATP) in your institution's education program?

INTAKE – INITIAL ASSESSMENT

- Formerly referred to as the preliminary inquiry, the initial assessment is preliminary inquiry-light
- Historically, when gatekeeping , the TIXC would lift the gate to proceed, or bring it down to stop the process. Under the current regulations, the complaint lifts the gate, and the TIXC can only bring it down if dismissal criteria are met
 - The TIXC can only bring the gate up in circumstances where the TIXC signs the complaint
- The initial assessment determines jurisdiction, and then jurisdiction determines process
- Initial assessment also includes considering potential for informal resolution, offering supportive measures, and beginning to frame the charges for the NOIA

INTAKE – TITLE IX COORDINATOR SIGNS A COMPLAINT

- This action can be very disempowering, so remember trauma-informed best practices when making this decision
- This action should be fairly rare and exceptional
- The more we empower and invite anonymous reports, the more likely we are to run into the issue of the TIXC deciding whether to sign
 - Anonymous reports can be very frustrating for TIXCs. How can you use them to best effect?
- TIXC has authority to sign complaint when the Complainant can't/won't, or when anonymous or third-party notice is provided

INTAKE – TITLE IX COORDINATOR SIGNS A COMPLAINT (CONT.)

- The TIXC can sign when the Complainant is not P/ATP, but the TIXC believes the institution should formally act
- The TIXC can sign the complaint when the Complainant is reluctant, but is accusing an employee, and the TIXC does not think it is reasonable to respect the Complainant's request for confidentiality
- Criteria-driven: what are the circumstances in which a TIXC should consider signing a complaint?
 - Post your thoughts in the chat and let's review!

INTAKE – TITLE IX COORDINATOR SIGNS A COMPLAINT (CONT.)

- The TIXC should sign the complaint when a safety concern or danger is reasonably present that requires the institution to act to protect the community from additional harm
- Should be a criteria-driven determination that considers age/vulnerability, weapons, patterns, threats, indicia of predatory conduct, a violence risk assessment, etc.

INTAKE – DECISION TREE

- Notice → Leads to:
 - Complaint, or
 - Supportive measures-only response, or
 - Remedial actions (when anonymous), or
 - No action (If so, then you probably aren't actually on notice)
- Complaint → Leads to:
 - Dismissal/Referral/Withdrawal of Complaint, or
 - Informal Resolution (IR), or
 - Formal Resolution (FR)

INTAKE – DECISION-TREE (CONT.)

- Title IX Coordinator signs the Complaint → Leads to:
 - Informal Resolution (IR), or
 - Formal Resolution (FR), or
 - Dismissal/Referral (this should be rare, do your homework first before signing), or
 - Withdrawal of Complaint

INTAKE – PROCESS A OR B?

**When you're a Title IX hammer,
everything can tend to look like a Title IX nail**

Thus, we need to remember...

**DON'T PUSH TOWARD PROCESS A (THE REGULATIONS-
BASED §106.45 PROCESS) IF PROCESS B WILL SUFFICE**

**WHY SHOULD WE PREFER PROCESS B,
FROM AN INSTITUTIONAL AND INTAKE PERSPECTIVE?**

Process A is the default, but Process B will likely be used
more frequently

INTAKE – REFERRAL

- Contrary to common misconceptions, the TIXC must choose whether Process A or B applies.
- This is not a call for the Dean of Students, Director of HR, Director of Student Conduct, or anyone else to make.
- Other officials need to consult the TIXC before accepting jurisdiction over an incident (Process B) that may fall within Title IX’s protections.
- The Complainant doesn’t get to opt for Process A or B. The regulations define this, and recipients must route complaints accordingly.

INTAKE – REFERRAL (CONT.)

- If another office investigates a Process B allegation and then the TIXC finds out and determines there is Title IX jurisdiction, that incident must be referred over to the Title IX office for proper resolution in accordance with the regulations. Train your Process B officials, accordingly.
- This can be quite challenging, especially in K-12 environments, where building-level administrators are accustomed to acting on allegations without much consultation.



JURISDICTION

JURISDICTION

- ❑ Alleged misconduct occurred in the U.S.
- ❑ Alleged misconduct would fall within the definitions of § 106.30 if proven
- ❑ Complainant is P/ATP in the recipient's education program or activity **OR** the TIXC signs a complaint
- ❑ Institution has control over the harasser (Respondent)
- ❑ Institution has control over the context of the harassment
- If you have **all five**, the 2020 Title IX regulations apply and Process A (§ 106.45) applies
- Anything less than all five, and you can/must dismiss/refer to Process B (e.g., student conduct, human resources)

JURISDICTION (CONT.)

- How is control determined?
 - Own property
 - Lease property
 - Provide transportation
 - Sponsor program
 - Institutional officials present and have decision-making authority
 - No one else has better control claim
 - Using institutional equipment/networks
 - Presence for official institutional business
 - Others?



DISMISSAL

- Mandatory Dismissal
- Discretionary Dismissal
- Appeal of Dismissal

MANDATORY DISMISSAL

The Title IX Coordinator **MUST** dismiss the complaint at any time during the investigation or hearing:

1. If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in the Title IX regulations even if proved, and/or
2. If the conduct did not occur in the Recipient's education program or activity, or
3. If the conduct did not occur against a person in the United States, or
4. If at the time of filing a Formal Complaint, a Complainant is not participating in or attempting to participate in the Recipient's education program or activity, and based on the available information, the Title IX Coordinator has determined that they do not need to sign a Formal Complaint on behalf of the Recipient

DISCRETIONARY OR PERMISSIVE DISMISSAL

The TIX Coordinator MAY dismiss the complaint if at any time prior to a determination:

- 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 Recipient
- Specific circumstances prevent the Recipient from gathering evidence sufficient to reach a determination as to the formal complaint or any allegations therein



Can a complaint be withdrawn without dismissing it, and if so, under what circumstances?

APPEAL OF DISMISSAL

- Dismissal decisions are appealable under the same three provisions that apply to hearing outcome appeals: new evidence, procedural deviation, and/or bias
- These appeals need to go to a different Decision-maker than whomever will hear the hearing outcome appeal, if there is one
- The effect of a granted appeal is to reverse the decision to dismiss; the complaint is reinstated
- Issue dismissal rationales carefully to ensure they will be upheld on appeal
- Beware that a groundless dismissal decision could also be grounds for a retaliation complaint by the parties



CHARGING

- The Basics
- Intermediate-Level Skills
- Mad Skills (Advanced Level)

CHARGING – THE BASICS

- Guiding Principles:
 - The Complainant does not pick the process; the regulations determine this
 - The Complainant does not determine the charges; the TIXC does
 - Charge with all applicable policies, noting which are overlapping, and which charges stand alone
 - e.g., charging a person in a couple with sexual assault = automatic dating violence charge

CHARGING – THE BASICS (CONT.)

- The TIXC chooses the footing of the investigation:
 - Incident (single)
 - Pattern (multiple)
 - Climate/Culture/Institution as Respondent
- Make sure to charge under all iterations of a policy based on the timing of the misconduct. Pre-August 2020 offenses and Post-August 2020 offenses may be implicated in the same complaint, but two different policy definitions will likely be applicable
- Don't automatically overlap sexual harassment and sexual assault charges

CHARGING – THE BASICS (CONT.)

- It used to be a best practice to charge with both whenever a sexual assault was alleged, but the 2020 regs have fundamentally changed that practice
- Under the current regulations, if sexual assault is found to have occurred, sexual harassment is automatically proven
- A SPOO analysis (severe, pervasive, & objectively offensive) is never needed for a sexual assault allegation under the current regulations
 - Sexual Assault = SPOO, by definition

CHARGING – THE BASICS (CONT.)

- There can be a stand-alone sexual harassment charge alongside a sexual assault charge when the allegations of misconduct do not overlap
- Update policies for the revised Summary Reporting System (SRS) changes that took effect in January of 2021, including:
 - Forcible Rape = Rape
 - Forcible Fondling = Fondling (don't get too hung up on the “for the purpose sexual gratification language” even though it's still there)
 - ~~Forcible Sodomy = Gone~~
 - ~~Sexual Assault with an Object = Gone~~
 - Sex offenses, Forcible and Non-Forcible (not a needed heading) = Sexual Assault

CHARGING – THE BASICS (CONT.)

- Incest and Statutory Rape are still offenses
 - Don't charge with incest unless intercourse occurred
 - Don't charge with statutory rape if the offense was forcible or without consent, as the proper charge is rape
- Public institutions – be very cautious about additional sexual harassment policies that use lower (broader) standards than SPOO – they may lead to outcomes that violate a Respondent's free speech rights
 - Special caution is needed with respect to allegations of intentional misgendering, deadnaming, or using incorrect pronouns

CHARGING – INTERMEDIATE-LEVEL SKILLS

- Recipients can and should charge with all applicable violations of § 106.30, as well as any additional charges that are applicable outside of the regulations
- A recipient's process should anticipate the need to be able to address collateral misconduct (additional non-TIX charges that arise from or are discovered as a result of the TIX process)
 - The effect is that whichever process is used (A or B) can address all charges simultaneously, regardless of the implicated policy
- The Notice of Investigation and Allegations (NOIA) will often need to be updated as circumstances change, and new information is obtained

CHARGING – INTERMEDIATE-LEVEL SKILLS (CONT.)

- Think divergently. There is often a basis to address disparate treatment allegations as sexual harassment under § 106.30.
- Retaliation is a bit of an outlier as an offense. The definition in the regulations is dense and complex and does not track with common case law definitions of retaliation.
- Retaliation is not a § 106.30 offense. It stands alone in § 106.71
- As such, retaliation can be addressed using Process A, but you may also resolve retaliation allegations under Process B.
- Retaliation and SPOO-Sexual Harassment can overlap in certain circumstances, so decide whether to charge with both if both could apply (which would mandate Process A).

CHARGING – MAD SKILLS (ADVANCED-LEVEL)

- Overlapping charges of **Titles IX and VII** will occur whenever there is an employee Complainant (regardless of the Respondent's affiliation). For Sexual Harassment offenses, this will mean charges of SPOO and SORPP.
- **Fair Housing Act (FHA)**. Any time a school provides residential facilities (for students or employees), and the Complainant is harassed or assaulted in the residential facility, the FHA standards – which track Title VII – apply. Measure the conduct as SORPP, regardless of whether the allegations include sexual assault, sexual harassment, dating/domestic violence, or stalking.
- Ensure students can be charged under the recipient's Title VII definitions

CHARGING – MAD SKILLS (ADVANCED-LEVEL)

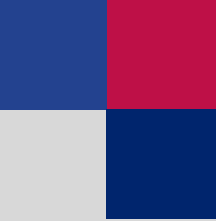
Conjoining Pattern Offenses Suggested Guidelines

- Conjoining makes sense when Respondents act in concert (e.g., gang rape) against one Complainant
- Conjoining makes sense when a single Respondent has allegedly engaged in pattern misconduct toward more than one Complainant
 - Pattern = similar MO, similar targets, similar types of offenses, etc.
- Complainants should not have to also serve as witnesses to a pattern in other grievance processes, when one grievance process can address the entire alleged pattern

CHARGING – MAD SKILLS (ADVANCED-LEVEL)

Conjoining Pattern Offenses Suggested Guidelines (Cont.)

- There is no value in conjoining if multiple Complainants alleged dissimilar, disconnected offenses by a single Respondent
- Pattern may not be established until the hearing, just suspected



CASE STUDIES

CASE STUDY 1

- Imagine that you're an Investigator (and maybe you are!)
- Your TIXC assigns you an investigation and provides you with a copy of the NOIA to get you started
- The NOIA charges the Respondent with sexually assaulting the Respondent's former significant other in the Complainant's residence hall room after they broke up
- You are concerned that the NOIA is too narrow in assigning just the sexual assault charge
 - What should you do?
 - What other charges should be considered?

CASE STUDY 2

- You're the TIXC
- You've initiated an investigation of alleged stalking
- During the investigation, the Investigator learns that there are many (dozens?) instances where the Respondent derisively referred to the Complainant as a CU^+ (the C-word)
- The Investigator relays this information to you and asks whether the NOIA needs to be updated
- How should you respond?
- What steps would you take?

CASE STUDY 3

- You're the TIXC
- You receive a complaint that alleges that the Respondent sexually assaulted the Complainant while they were in a relationship. They have since broken up.
- The Complainant alleges that after the breakup, they told the Respondent that they were going to file a Title IX complaint. As a result, the Respondent threatened, cajoled, and pressured the Complainant not to file the complaint.
- Which charges should be included in the NOIA and why?

CASE STUDY 4

- You're the TIXC
- A student comes to your office to file a complaint. The student is well-prepared for your meeting, having already consulted with an attorney who is a Title IX expert.
- The student shares with you that they are victim of dating violence (sexual assault in a previous relationship) and tells you that they have gone over the policy with their attorney, and they think the appropriate charges are:
 - Title IX Sexual Harassment (SPOO), FHA Sexual Harassment (SORPP), and Title IX Dating Violence
 - Do you agree or disagree? Why?
 - What charges should be included in the NOIA?

CASE STUDY 4 (CONT.)

- The student further informs you that they choose to use Process B, and that they are unwilling to file a Process A complaint. They argue that the applicable FHA charge is outside of Title IX, thus allowing you to file it under Process B, with the other charges being considered collateral misconduct, which Process B allows you to address in the same process.
- How should you respond?

CASE STUDY 5

- You're the TIXC
- You've received a sexual assault complaint
- The Respondent requests to meet with you to discuss supportive measures
- During this meeting, the Respondent shows you a text message timestamped an hour before the alleged sexual assault, in which the Complainant texted the Respondent, "Let's fuck"
- The Respondent shows you a second text message from the Complainant to the Respondent an hour after the alleged incident, "You totally rocked my world. Just what I needed"

CASE STUDY 5 (CONT.)

- Based on these texts, the Respondent informs you it is obvious they have been falsely accused and politely demands that you dismiss the complaint.
- What should you do?
- How should you respond?

CASE STUDY 6

- You're the TIXC
- You've received a sexual assault complaint
- The Respondent requests to meet with you to discuss supportive measures
- During this meeting, the Respondent shows you a text message timestamped an hour before the alleged sexual assault, in which the Complainant texted the Respondent, "Let's fuck"
- The Respondent shows you a second text message from the Complainant to the Respondent an hour after the alleged incident, "You totally rocked my world. Just what I needed"

CASE STUDY 6 (CONT.)

- Based on these texts, the Respondent informs you it is obvious they have been falsely accused and politely demands that you dismiss the complaint. You decline to dismiss the complaint.
- The Respondent then insists on filing a complaint against the Complainant for making a false complaint and a sexual harassment charge for alleging sexual assault in bad faith, as evidenced by the text messages.
- What should you do?

CASE STUDY 7

- You're the TIXC.
- You issued a no-contact order (NCO) to Justine and Alyssa based on Justine's allegation that Alyssa gave her a laced vape, resulting in Justine becoming "out-of-it," and Alyssa then sexually assaulting Justine. Justine does not want to file a formal complaint.
- Alyssa requests a meeting with you about the NCO.
- At the meeting, she shares with you that she is traumatized by the NCO, is confused why the Title IX office is involved, believes that her freedoms are being restricted by the NCO without any evidence and on a student's unsupported say so.

CASE STUDY 7 (CONT.)

- Alyssa doesn't know what the allegations are, but she denies anything other than getting high together took place, and nothing that would implicate Title IX. She asks you to lift the NCO, as it presumes her guilt.
- Let's assume that you refuse. What would you tell Alyssa?
- Alyssa responds that she wishes to appeal your decision. What now?

CASE STUDY 8

- You're conducting an intake
- You are speaking with a student named Jasper, who is upset that his ex-girlfriend is allegedly going around telling many other students that Jasper abused her during their relationship and sexually assaulted her multiple times. Jasper wants you to protect him from these falsehoods being spread further, and to ensure that his ex recants these allegations, because they are completely untrue.
- Devise three routes of resolution that you would present as options to Jasper, road-mapping each.

CASE STUDY 8 (CONT.)

- What are Jasper's options, and what are the repercussions of each that he should consider?
- What would you advise Jasper to do, if he asks you for your advice?

CASE STUDY 9

- You're the TIXC.
- Employee Nate comes to you. He “hooked up” with another employee, Jacques.
- Jacques told a friend, Nefertari, that Nate may have sexually assaulted him.
- Nate found out about this conversation, and to combat anyone's perception that he sexually assaulted Jacques, he told several other co-workers that he consensually hooked up with Jacques, including providing details and video (non-graphic) to back up his assertions.

CASE STUDY 9 (CONT.)

- You reach out to Jacques to discuss the situation and offer him a chance to file a formal complaint. Jacques alleges that Nate's discussion of their hookup with co-workers is retaliation for the private conversation he had with Nefertari about his feelings about the situation.
- Should you accept this retaliation complaint?
- How should Nate be charged, if at all?
- What considerations should influence your decision?

CASE STUDY 10

- You're conducting an intake
- Noelia comes to you, alleging a series of acts of sexual violence by Serge. She tells you she wants to file a formal complaint, and you explain the process. She tells you she prefers Process B, but you explain that the institution's jurisdiction rules and policies require that these allegations be resolved through Process A.
- Noelia asks you some questions and agrees to think about filing a formal complaint.

CASE STUDY 10 (CONT.)

- Noelia comes back to you one week later and says that she wishes to file a formal complaint about all of Serge's actions that took place off-campus, only, and does not wish to address the allegations of misconduct she made earlier involving on-campus conduct. She informs you that as a result of this narrower scope of her allegations, she believes she is eligible for a Process B resolution.
- How should you respond?

CASE STUDY 11

- You are the TIXC
- You receive an e-mail from a parent indicating that they have knowledge of a sexual relationship between a high school student (not their child) and the school resource officer.
- The sexual interactions have taken place both on school property and out of school.
- The parent indicates that they have also notified the local sheriff's office because they employ the school resource officer. The sheriff's office has commenced an investigation.

CASE STUDY 11 (CONT.)

- Do you have jurisdiction over the school resource officer's conduct? Why or why not?
- What steps should you take?

CASE STUDY 12

- You are the TIXC
- You receive a report from a teacher indicating that they overheard several high school students discussing what sounded like explicit text messages one of the students received from a student teacher while on a school-sponsored trip for the band.
- The student-teacher is enrolled at the local university and is assigned to complete their student teaching for the current semester with the music program at your high school.
- The reporting teacher did not see any specific messages, and the students wouldn't tell her what they were discussing when she asked.

CASE STUDY 12 (CONT.)

- You invite the Complainant to meet with you, and they confirm during your meeting that they received text messages from the student teacher that made them “uncomfortable,” but they do not want to file a formal complaint and just want to forget about it.
- Do you have jurisdiction over the student teacher’s conduct? Why or why not?
- What should you do under these circumstances?

CASE STUDY 13 PART A

- You are the Investigator
- You receive a formal complaint from a parent who reports that their student is being harassed and called names like “slut,” “whore,” and “Master Missy” by other students both in person during school hours and via social media. The parent is able to identify some of the respondent students by name in the complaint.
- Which behaviors, if any, warrant charges?
- What should those charges be?

CASE STUDY 13 PART B

- Upon issuing a NOIA to one of the responding students, their parent calls you and informs you that the Complainant is the one that should be investigated because she took a cell phone video of herself masturbating and sent it to another student. The parent states that is the reason that the other students were calling the Complainant names.
- Is it appropriate to charge the Complainant?
- If so, which charges would be appropriate and why?

CASE STUDY 14

- You are the TIXC
- You receive an anonymous e-mail with three attached video files.
- The first video shows a group of students gathered at an out-of-school location and a female student is berating a male student in front of the others.
- The second video shows the same female and male student in a school stairwell. The female student snatches the male's cell phone out of his hand, and the female says, "I guess I have to take this away from you again since you can't seem to follow my rules and stop talking to other girls."

CASE STUDY 14 (CONT.)

- The third video again shows the same two students in what appears to be an empty classroom. The male student is on his knees and the female student is standing over him. The male student can be heard saying, “Please, baby, I love you, don’t break up with me,” and the female student responds, “You’re such a dumb fuck; why should I stay with you? You can’t do anything right.”
- You are able to confirm that the two students in the videos are enrolled at your school.
- What should you do?



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Group Discussion

Questions and Thoughts

Thanks for joining us today.



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