




# TITLE IX COORDINATOR & ADMINISTRATOR TRAINING & CERTIFICATION LEVEL ONE COURSE

## COURSE SLIDE PACKET

*This training manual is intended to provide assistance for achieving best practices with respect to campus sexual misconduct, but is not given and should not be taken as legal advice.*

*Before acting on any of the ideas, opinions or suggestions in this publication, participants should check first with a licensed attorney in their own jurisdiction.*



Orlando, FL  
January 25-28, 2016

**ATIXA TITLE IX COORDINATOR AND ADMINISTRATOR  
TRAINING & CERTIFICATION LEVEL ONE COURSE**

Presented by  
W. Scott Lewis, J.D., Saunie K. Schuster, J.D., Daniel C. Swinton, Ed.D., J.D.,  
Annie Kerrick, J.D., Georgina Dodge, Ph.D., & Amy Zavadil, Ph.D.

© 2016, ATIXA  
All rights reserved.

### YOUR FACULTY



**SAUNDRA K. SCHUSTER, J.D.**  
Partner,  
The NCHERM Group, LLC.  
ATIXA Advisory Board Member



**W. SCOTT LEWIS, J.D.**  
Partner,  
The NCHERM Group, LLC.  
ATIXA Advisory Board Member



**DANIEL C. SWINTON, J.D., ED.D.**  
Managing Partner  
The NCHERM Group, LLC.  
ATIXA Senior Associate  
Executive Director

© 2016, ATIXA. All rights reserved. 2

### YOUR FACULTY



**ANNIE KERRICK, J.D.**  
ATIXA Faculty Member  
Director of Title IX/ADA504  
Compliance  
Boise State



**GEORGINA DODGE, Ph.D.**  
ATIXA Faculty Member  
Chief Diversity Officer and  
Associate Vice President  
University of Iowa



**AMY ZAVADIL, Ph.D.**  
ATIXA Faculty Member  
Associate Dean for Equity  
Barnard College

© 2016, ATIXA. All rights reserved. 3

### COORDINATOR TRAINING AGENDA


Day 1

- I. Overview of Title IX Coordinator Responsibilities
- II. History & Overview of Title IX
- III. Extensive Review of Title IX Legal Standards and Case Law
- IV. OCR & Title IX
- V. Major OCR Guidance
  - A. 2001 OCR Guidance
  - B. April 4th, 2011 Dear Colleague Letter
  - C. 2014 Q&A on Title IX and Sexual Violence
  - D. 2015 DCL, Letter to Coordinators and Resource Guide
- VI. Notice, Reporting, Responsible Employees, Confidentiality
- VII. Reluctance to Report


© 2016, ATIXA. All rights reserved. 4

**THE TITLE IX COORDINATOR**

**Overview of the Responsibilities**




- Description
- Roles
- Discussion

 © 2016, ATIXA. All rights reserved. 5


**The Title IX Coordinator**

- The campus Title IX coordinator is an administrator with significant authority and wide-ranging responsibilities.
- Must be able to effect change across many departments, including Human Resources, Academic Affairs, Athletics, and Student Conduct.
- Some campuses will allocate part-time responsibilities to the coordinator. Others will dedicate a full-time position as recently recommended by OCR.
- We need to see the Title IX coordinator as a profession within the field of civil rights compliance.
- To alleviate the burden on one administrator, campuses should consider identifying multiple deputy coordinators.

 © 2016, ATIXA. All rights reserved. 6


**The Role of the Title IX Coordinator**

- Prevention and remediation of:
  - Gender Discrimination
  - Sexual Harassment
  - Sexual Assault
  - Stalking
  - Intimate Partner/Relationship Violence
  - Bullying and Cyberbullying
  - Retaliation
- Assurance of compliance with requirement to stop, prevent, remedy.
- Assurance of compliance with final sanctions.

 © 2016, ATIXA. All rights reserved. 7

**The Role of the Title IX Coordinator**

- Contact for government inquiries.
- Point person for campus complaints.
- Oversight and coordination of prompt and equitable grievance procedures (faculty, student, and staff).
- Creator and implementer of appropriate policies.
- Compliance auditor.
- Training oversight: Faculty, staff, students, investigators, hearing officers, and appellate officers.
- Assurance of First Amendment protections.
- Section 504 disabilities compliance oversight.
- Athletics gender equity.

 © 2016, ATIXA. All rights reserved. 8

### Small Group Discussion

- What are the three biggest concerns you have regarding your role as a Title IX administrator (coordinator, deputy, etc.)?
- What are you hoping to take away from this training?
- Describe and discuss a recent or current Title IX case at your institution that presented a number of difficulties.



© 2016, ATIXA. All rights reserved.

9

### HISTORY & PURPOSES OF TITLE IX

- The road to Title IX
- Text of the law
- Where we are today



© 2016, ATIXA. All rights reserved.

10

### A Brief History of Title IX Pre-1972

- **Title VI of the Civil Rights Act of 1964**
  - *No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.*
- **Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e-3(a))**
  - *"Prohibits discrimination in the terms, conditions or privileges of employment on the basis of an employee's sex, race, ethnicity or religion."*
- **1965 - Executive Order 11246**
  - Prohibited federal contractors from discriminating on basis of race, color, religion, national origin. "Sex" was added in 1968; renamed Exec. Order 11375.



© 2016, ATIXA. All rights reserved.

11

### Title IX

20 U.S.C. § 1681 & 34 C.F.R. Part 106 (1972)

***"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance."***

**IX**



© 2016, ATIXA. All rights reserved.

12

## A Brief History of Title IX 1972-Present

- Department of Health, Education and Welfare (HEW) – Title IX regulations codified in 1975.
  - “Title IX and Intercollegiate Athletics” (1979).
- 1979 – Supreme Court created a private right of action under Title IX, *Cannon v. U. of Chicago*, 441 U.S. 677 (1979).
- 1980 – U.S. Department of Education was created.
  - Title IX oversight transferred to Dept. of Ed.’s Office for Civil Rights (OCR).
- Supreme Court holds “Employment discrimination comes within Title IX’s prohibition,” *North Haven Bd. of Education v. Bell*, 452 U.S. 512 (1982).



© 2016, ATIXA. All rights reserved.

13

## A Brief History of Title IX 1972-Present

- OCR Guidance
  - 1997 Guidance.
  - 2001 Guidance.
  - 2011 Dear Colleague Letter (The “DCL”).
  - Questions and Answers on Title IX and Sexual Violence (April 2014).
  - 2015 Dear Colleague Letter, Dear Coordinabr Letter & Resource Guide.
- “Not Alone” – White House Task Force to Protect Students From Sexual Assault (April 2014).
- Also: The Clery Act, VAWA 2013: Section 304.



© 2016, ATIXA. All rights reserved.

14

## Title IX

- Title IX of the Education Amendments of 1972 is a federal law intended to end sex discrimination in **all areas of education**.
  - Applies to **non-discrimination based on sex/gender** to all recipients of federal funds, both public and private institutions
  - Applies to issues of **program equity**, such as in athletics, and also to **sexual harassment and sexual assault**.
- In addition to the implementing regulations, the guidelines for compliance with Title IX are provided by the U.S. Department of Education, Office of Civil Rights:
 

[www2.ed.gov/about/offices/list/ocr/docs/shguide.html](http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html)



© 2016, ATIXA. All rights reserved.

15

## Title IX Essential Compliance Elements

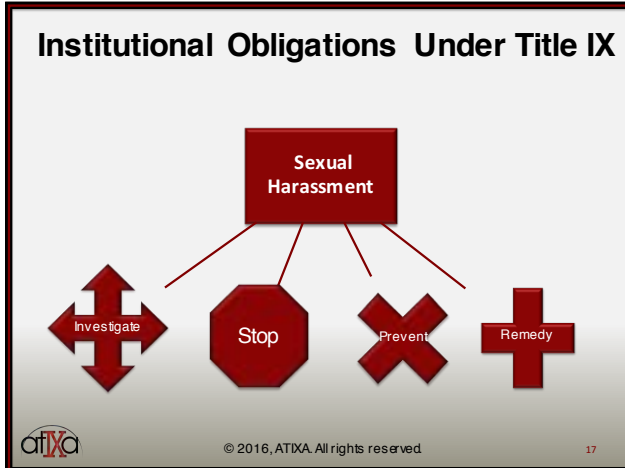
- Once a “responsible employee” has either actual or constructive notice of sexual harassment/sexual misconduct, the school must:
  - Take immediate and appropriate steps to **investigate** what occurred.
    - The obligation to investigate is absolute, even if just a preliminary inquiry (see *Davis*).
  - Take prompt and effective action to:
    - **Stop** the harassment;
    - **Remedy** the effects; and
    - **Prevent** the recurrence.

**NOTE:** This is regardless of whether or not the victim makes a complaint or asks the school to take action.



© 2016, ATIXA. All rights reserved.

16



### The IX Commandments

<b>Thorough</b>	<b>Reliable</b>	<b>Impartial</b>	Investigation (prompt & fair – VAWA Sec. 304)
<b>Prompt</b>	<b>Effective</b>	<b>Equitable</b>	Process
End the Discrimination	Prevent its Recurrence	Remedy the effects upon the victim & community	Remedies

© 2016, ATIXA. All rights reserved. 18


### Equity Defined

- “Fairness or justness in the way people are treated; justice according to natural law or right; specifically, freedom from bias or favoritism” ([www.merriam-webster.com](http://www.merriam-webster.com)).
- “Equity encompasses fairness, justice, and most precisely, fairness under the circumstances. Fairness under the circumstances is intended to make someone whole, in this context when sex or gender is the basis for some form of deprivation or discrimination” (2014 ATIXA Whitepaper, p.4).

© 2016, ATIXA. All rights reserved. 19



**SIGNIFICANT CASES**



- **North Haven Bd. of Education v. Bell**, 456 U.S. 512 (1982).
- **Cannon v. Univ. of Chicago**, 441 U.S. 677 (1979).
- **Franklin v. Gwinnett County Public Schools**, 503 U.S. 60 (1992).
- **Gebser v. Lago Vista Independent School District**, 524 U.S. 274 (1998).
- **Davis v. Monroe County Bd. of Education**, 526 U.S. 629 (1999).

atIXA © 2016, ATIXA. All rights reserved. 21

**North Haven Board of Education v. Bell**  
456 U.S. 512 (1982)

- Involved two cases: North Haven Board of Education and Trumbull Board of Education (both in Connecticut).
- **North Haven Board of Education**
  - Elaine Dove, a tenured teacher in North Haven public school system took a one-year maternity leave. North Haven refused to rehire Dove. In Jan. 1978, Dove filed a complaint with HEW for violation of Title IX.
  - HEW began an investigation, but North Haven refused to cooperate.
    - "Asserting that HEW lacked authority to regulate employment practices under Title IX."
  - HEW notifies North Haven it is considering enforcement proceedings, which could result in loss of federal funding.
  - District Court found in favor of North Haven in summary judgment.

atIXA © 2016, ATIXA. All rights reserved. 22

**North Haven Board of Education v. Bell**  
456 U.S. 512 (1982)

- **Trumbull Board of Education**
  - Oct. 1977, Linda Potz, a former guidance counselor in Trumbull school district, filed a complaint with HEW alleging sex discrimination "with respect to job assignments, working conditions, and failure to renew her contract."
  - HEW determined Trumbull had violated Title IX and required Trumbull to engage in a number of corrective actions, including reinstating Potz to her position.
  - Trumbull filed a lawsuit in federal court seeking to invalidate the decision and HEW's authority to address employment under Title IX.
  - Same District Court cited its decision in North Haven and found in favor of Trumbull.

atIXA © 2016, ATIXA. All rights reserved. 23

**North Haven Board of Education v. Bell**  
456 U.S. 512 (1982)

- Cases consolidated on appeal and Second Circuit reversed, thereby indicating HEW has authority under Title IX to address employment discrimination.
  - Court did not render a decision as to whether HEW could terminate funding under Title IX for employment cases.
- Appealed to the Supreme Court.
- USSC, citing a number of factors including Title IX's legislative history, post-enactment history, and language of "no person", the Supreme Court determined that Title IX's **"broad directive that 'no person' may be discriminated against on the basis of gender, on its face, includes employees as well as students."**

atIXA © 2016, ATIXA. All rights reserved. 24

**Cannon v. University of Chicago**

441 U.S. 677 (1979)

**Basic Facts:**

- In 1975, Geraldine Cannon (age 39) was denied admission to Univ. of Chicago and Northwestern Univ. medical schools.
- Schools had policy of not admitting candidates older than 30 unless they already had an advanced degree.
- Cannon argued that policy was more likely to discriminate against women due to interruptions related to pregnancy and raising families.
- Filed a Title IX complaint with HEW.



© 2016, ATIXA. All rights reserved.

25

**Cannon v. University of Chicago**

441 U.S. 677 (1979)

- Filed sex discrimination lawsuit in federal court, arguing violation of the 14<sup>th</sup> Amendment, Civil Rights Act of 1871, and Title IX.
  - District and Circuit Courts (7<sup>th</sup> Cir.) dismissed the Title IX claim, indicating Title IX had neither an express nor implied private right of action.
  - Appealed to Supreme Court.
- Supreme Court Finding: **There is an implied private right of action under Title IX.**
  - Court relied on legislative history, modeling of Title IX after Title VI of the Civil Rights Act of 1964, the underlying purposes of Title IX, and federal interest in discrimination in education to support its finding.



© 2016, ATIXA. All rights reserved.

26

**Franklin v. Gwinnett Public Schools**

503 U.S. 60 (1992)

- Christine Franklin alleged that during her junior year (1986), an economics teacher, Andrew Hill, engaged her in sexually explicit conversations, forced kissing, and coercive sexual intercourse on school grounds.
  - Hill allegedly pulled her out of class on three occasions and engaged in sexual intercourse with her in a private office.
- In 1988 Franklin filed suit against the school district alleging:
  - Sexual harassment under Title IX; and
  - Failure to take appropriate action upon learning of the harassment.
- Hill resigned in exchange for school district closing the investigation.



© 2016, ATIXA. All rights reserved.

27

**Franklin v. Gwinnett Public Schools**

503 U.S. 60 (1992)

- District and Circuit Court of Appeals dismissed the case, finding Title IX does not allow for award of monetary damages.
- In 1992, the U.S. Supreme Court decided *Franklin v. Gwinnett County Public Schools*, which established that sexual harassment constituted sex discrimination under Title IX.
- *Gwinnett* also provided a private right for recovery of monetary damages under Title IX.
- *Gwinnett* did not address issues concerning the educational institution's liability.
- What about a statute of limitations?



© 2016, ATIXA. All rights reserved.

28



**Gebser v. Lago Vista Indep. School**

524 U.S. 274 (1998)

**Basic Facts – Faculty/student sexual harassment:**

- In spring of 1991, Alida Star Gebser, 8<sup>th</sup> grade student in Lago Vista Independent School District (TX), joined a book discussion group led by Frank Waldrup, a teacher. During book group, Waldrup made a number of sexually suggestive comments to the students.
- In Fall 1991, Gebser (9<sup>th</sup> grade) was assigned to two of Waldrup's courses. Waldrup also began tutoring Gebser at her home.
- In Spring 1992, Waldrup and Gebser began a sexual relationship that continued until spring 1993, when a police officer discovered them having sex in a car in the school parking lot. Gebser and Waldrup often engaged in sex during school hours, though not on school property.
- No one at the school or in the district knew of the relationship.
- Upon his arrest, Lago Vista fired Waldrup and Texas Education Agency revoked his teaching license.



© 2016, ATIXA. All rights reserved.

29

**Gebser v. Lago Vista Indep. School**

524 U.S. 274 (1998)

- Gebser and her mother sued Lago Vista and Waldrup, making a number of state and federal claims, including seeking monetary damages for violation of Title IX.
- Supreme Court created a high standard that a student must meet in order to prevail on a sexual harassment claim against the institution when an employee-student consensual relationship is the basis of the claim.
- The court said you cannot recover monetary damages against the school unless the behavior has been reported to someone with the power to alter the situation ("actual notice") and a "deliberate indifference" has been demonstrated by the school.



© 2016, ATIXA. All rights reserved.

30

**Gebser v. Lago Vista Indep. School**

524 U.S. 274 (1998)

**➤ Three-Part Standard:**

- An official of educational institution must have had "**actual notice**" of harassment;
- The official must have authority to "**institute corrective measures**" to resolve the harassment problem;

AND

- The official must have "**failed to adequately respond**" to the harassment and, in failing to respond, must have acted with "**deliberate indifference.**"



© 2016, ATIXA. All rights reserved.

31

**Davis v. Monroe County Bd. Of Ed.**

526 U.S. 629 (1999)

**Basic Facts:**

- In December 1992, a fifth-grade boy attempted to touch LaShonda Davis's breasts and genitals and made statements such as "I want to get in bed with you," and "I want to feel your boobs." Similar conduct occurred on January 4 and 20, 1993.
- Each time Davis reported the conduct to her teacher, Davis's mother also contacted the teacher and was allegedly told the principal was aware of the situation; no disciplinary action was taken.
- Series of incidents in February-May 1993 in P.E. and other classes (e.g. the same male student stuck doorstop in his pants and acted in sexually suggestive manner towards Davis; rubbed up against her in suggestive manner; and touched her breasts and genitals). Davis repeatedly reported incidents to teachers; Davis's mother also contacted teachers multiple times; no disciplinary action was taken.



© 2016, ATIXA. All rights reserved.

32

**Davis v. Monroe County Bd. Of Ed.**

526 U.S. 629 (1999)

**Facts (cont.):**

- Davis's assigned seat was next to the male student throughout the harassing behavior; not allowed to change seats for over three months.
- Davis's grades declined and her father found a suicide note his daughter had written; Davis told her mother she "didn't know how much longer she could keep [the male student] off her."
- Others in the class also faced harassment; group of students tried to complain to the principal, but were allegedly prevented from doing so and told, "If [the principal] wants you, he'll call you."
- Parents had complained to three teachers and the principal; student had also complained to three teachers.
- In May 1993, principal told Davis' mother, "I guess I'll have to threaten him a little harder"; male student not disciplined.



© 2016, ATIXA. All rights reserved.

33

**Davis v. Monroe County Bd. Of Ed.**

526 U.S. 629 (1999)

- Davis's parents finally reported the harassment to the local sheriff; male student charged with and plead guilty to sexual battery.
- The abuse finally stopped; male student ultimately moved away.
- Davis's mother filed a Title IX action, alleged that persistent harassment and deliberate indifference resulted in her daughter's inability to attend school and participate in activities.



© 2016, ATIXA. All rights reserved.

34

**Davis v. Monroe County Bd. Of Ed.**

526 U.S. 629 (1999)

- Finding in favor of Davis, the Supreme Court applied same standards to find the institution liable for damages as in the *Gebser* case: the institution must have "**actual notice**" of the harassment; and the institution must have responded to the harassment with "**deliberate indifference.**" Additionally, court held:
  - Harassment must be "**severe, pervasive, and objectively offensive,**" and the indifference "**systemic,**" to the extent that the victim is deprived of educational opportunities or services.
  - Justice O'Connor added a framework to determine deliberate indifference – stating that **deliberate indifference constitutes a response that is "clearly unreasonable in light of the known circumstances."**



© 2016, ATIXA. All rights reserved.

35

**What's next for Title IX litigation?**


- Increase in lawsuits by the accused.
  - St. Joseph's University, Xavier University, Vassar College, Denison University, DePauw University, Occidental College, and Columbia University.
- Negligence-based claims.
- Due process-based claims.
- Breach of contract.
- Shifting view of what constitutes "notice"
- Title IX increasingly viewed as a viable cause of action.
- Is there a private right of action pertaining to OCR's Title IX guidance?
- Impact of VAWA 2013 – Section 304.
- Pending legislation – CASA, S.O.S. Campus Act.




© 2016, ATIXA. All rights reserved.

36

## OCR & TITLE IX



- OCR's role
- Regional offices
- Enforcement mechanisms
- OCR complaints
- Investigation process
- OCR process alternatives
- Remedies under Title IX
- Civil lawsuits v. administrative actions




© 2016, ATIXA. All rights reserved.

37

## Role of OCR & Title IX

- The Office for Civil Rights (OCR) under the Department of Education is responsible for establishing the **compliance standards to be applied in investigations and enforcement** of Title IX regarding sexual harassment.
  - Provides regulatory and sub-regulatory guidance.
- OCR standard indicates that upon receipt of **notice**, institution must immediately take immediate and appropriate steps to **investigate** what occurred and take **prompt and effective action to end the harassment, remedy the effects, and prevent the recurrence**.




© 2016, ATIXA. All rights reserved.

38

## OCR & Title IX

- The OCR guidelines distinguish the administrative oversight of Title IX from the standards applicable to private litigation for monetary damages.
- OCR standards require the sexual misconduct must rise to the level of **severe, pervasive or persistent**.
- OCR administratively enforces Title IX by:
  - Conducting investigations from complaints filed with the U.S. Dept. of Education.
  - Engaging in voluntary compliance investigations.



© 2016, ATIXA. All rights reserved.

39

## OCR Regional Offices





© 2016, ATIXA. All rights reserved.

40

## OCR Enforcement Mechanisms

- **Complaints**
  - Filed by an individual, a representative, or a group.
- **Compliance Reviews**
  - OCR targets resources on class-wide compliance problems that appear particularly acute.
- **Technical Assistance**
  - To help institutions, students, and parents understand their rights and responsibilities.



© 2016, ATIXA. All rights reserved.

41

## OCR Complaints

- When received by an office, the complaint is evaluated.
- OCR will open an investigation if:
  - OCR has jurisdiction over the institution.
  - The allegation alleges a violation of one of the laws enforced by OCR.
  - The complaint is timely (180 days).
  - The allegation contains sufficient detail to raise an inference of discrimination or retaliation.



© 2016, ATIXA. All rights reserved.

42

## The OCR Investigation Process

- OCR is a neutral fact-finder that collects and analyzes relevant information.
- Notification letters:
  - To the reporting party and recipient informing them that OCR is opening an investigation.
  - Normally will be sent to the college president or chancellor.
- Data request – written request for documents and narrative responses to questions.
- Scheduling Interviews: telephone or in-person.
- On-site visit.



© 2016, ATIXA. All rights reserved.

43

## OCR Process Alternatives

- **Early Complaint Resolution (ECR)**
  - A form of alternative dispute resolution facilitated by OCR.
  - Reporting party and recipient voluntarily participate in the resolution of the complaint.
- **Investigation and Voluntary Resolution (“302 Letter”)**
  - At any point before the conclusion of an investigation, a recipient may express to OCR that it is interested in resolving the complaint through a voluntary resolution agreement.
- **Investigation and Findings (“303 Letter”)**
  - Compliance determination; agreement if non-compliance.



© 2016, ATIXA. All rights reserved.

44

## Voluntary Resolution Agreement The “302 Letter”

- At any point before the conclusion of an investigation, a recipient may express to OCR that it is interested in resolving the complaint through a voluntary resolution agreement.
- This does not indicate an admission liability or wrongdoing.
- OCR determines whether the 302 is appropriate.
- OCR ensures that agreement is aligned with the complaint allegations or the information obtained thus far in the investigation, and consistent with applicable regulations.
- Reporting party approval is not required.
- OCR monitors the voluntary resolution agreement until it is fully implemented (3+ years).



© 2016, ATIXA. All rights reserved.

45

## Resolution Agreement The “303 Letter”

- Investigative Determinations – made using a preponderance of the evidence standard.
  - Insufficient evidence to support a conclusion of noncompliance.
  - Sufficient evidence to support a conclusion of noncompliance.
    - Typically, OCR shares proposed terms of resolution with the institution and give a 90-day window to resolve voluntarily.
- OCR will monitor the agreement for compliance (typically 3+ yrs).



© 2016, ATIXA. All rights reserved.

46

## Resolution Agreements

- Must be signed by a person with authority to bind the recipient;
- Must be approved by the Chief Attorney or designee;
- Must be approved by the Office Director or designee; and
- Must include:
  - Specific acts or steps the recipient will take to resolve compliance issues;
  - Dates for implementing each act or step;
  - Dates for submission of reports and documentation verifying implementation; and
  - A statement indicating OCR may initiate enforcement action or judicial proceedings, but OCR will give 60 days’ notice to cure the alleged breach.



© 2016, ATIXA. All rights reserved.

47

## Insufficient Evidence Determination

- If OCR determines there is insufficient evidence to support a conclusion of non-compliance:
  - Letters are issued to both parties explaining the issues, factual analysis, and conclusion.
  - Reporting parties may appeal.
  - If an appeal is filed, the recipient is typically not notified unless OCR determines that the investigation should be re-opened.



© 2016, ATIXA. All rights reserved.

48

## Recent OCR Resolutions

- The Ohio State University (Sept. 2014).
- Princeton University (Nov. 2014).
- Southern Methodist University (Nov. 2014).
- Harvard Law School\* (Dec. 2014).
- LaPorte Community School Corporation (April 2015).
- Rockford University (Spring 2015).
- Michigan State University (August 2015).
- University of Virginia (Sept. 2015)



© 2016, ATIXA. All rights reserved.

49

## Additional Resources About OCR

- About OCR:
  - <http://www.ed.gov/about/offices/list/ocr/index.html>
- Updated OCR Case Processing Manual:
  - <http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>
- NCHERM Group database of OCR Resolution Agreements:
  - <http://www.nchem.org/resources/legal-resources/ocr-database/>



© 2016, ATIXA. All rights reserved.

50

## Remedies Under Title IX

- An individual may assert a Title IX claim against the institution by:
    - Suing the institution in court and seeking monetary damages or injunctive or declaratory relief.
- And/Or
- Filing an administrative complaint, a grievance with U.S. Dept. of Ed. Office for Civil Rights.



© 2016, ATIXA. All rights reserved.

51

## Civil Law Suits v. Administrative Action & Title IX

Lawsuit	Administrative Action
<ul style="list-style-type: none"> <li>• File in federal court.</li> <li>• Monetary damages, injunction.</li> <li>• Requires:                             <ul style="list-style-type: none"> <li>– Actual notice.</li> <li>– Employee with authority to take action.</li> <li>– Deliberate Indifference.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Initiated by OCR.</li> <li>• Voluntary compliance or findings</li> <li>• Requires:                             <ul style="list-style-type: none"> <li>– Actual OR constructive notice (“knew or should have known”).</li> <li>– Investigate.</li> <li>– End harassment</li> <li>– Remedy impact.</li> <li>– Prevent recurrence.</li> </ul> </li> </ul>



© 2016, ATIXA. All rights reserved.

52

## TITLE IX UPDATES: OCR GUIDANCE

- 2001 Revised Sexual Harassment Guidance
- 2011 Dear Colleague Letter
- 2014 Q&A on Title IX and Sexual Violence
- 2015 Dear Colleague Letter, Resource Guide, and Dear Coordinator Letter



© 2016, ATIXA. All rights reserved.

53

## 2001 Revised Sexual Harassment Guidance

- "Sexual harassment is unwelcome conduct of a sexual nature."
- "Sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature."
- "Sexual harassment of a student can deny or limit, on the basis of sex, the student's ability to participate in or to receive benefits, services, or opportunities in the school's program."
- "Sexual harassment of students is, therefore, a form of sex discrimination prohibited by Title IX under the circumstances described in this guidance."



© 2016, ATIXA. All rights reserved.

54

## 2001 Revised Sexual Harassment Guidance

- The "education program or activity" = all of the school's operations.
- "All academic, educational, extra-curricular, athletic, and other programs of the school" regardless of location.
- Addresses sexual harassment and sex discrimination by the institution, teachers, employees, students, and third parties.
- Prompt and effective action required upon receipt of notice of the harassment/discrimination.



© 2016, ATIXA. All rights reserved.

55

## 2001 Revised Sexual Harassment Guidance

- **Publication of policies and procedures that:**
  - Provide non-discrimination statement.
  - Offer effective reporting and response protocol.
  - Have appropriate grievance procedures.
  - Ensure fair and equitable investigations.
  - Include equitable remedies.
  - Prevent recurrence.
  - Incorporate preventive training.
  - Appoint a Title IX coordinator.



© 2016, ATIXA. All rights reserved.

56

### 2011 Dear Colleague Letter

- Centrality of the Title IX coordinator.
- Sexual violence is a form of sexual harassment.
- Preponderance of the evidence.
- Promptness and time frames.
- Equity in process.
- Equity in appeals.
- Possible off-campus jurisdiction.



© 2016, ATIXA. All rights reserved.

57

### 2011 Dear Colleague Letter

- Provision of interim and long-term remedies.
- Mediation not permitted for sexual violence cases.
- Balancing reporting party requests for confidentiality.
- Training of those involved in resolution of complaints.
- Training of student population.



© 2016, ATIXA. All rights reserved.

58

### 2014 Q&A on Title IX and Sexual Violence

- Clarify who is and the role of a "Responsible Employee."
- Confidentiality and reporting.
- Title IX coordinator role and responsibilities.
- Disciplinary processes – robust investigation.
- Interim measures.
- Remedies
- Appeals.
- Training, education, and prevention.



© 2016, ATIXA. All rights reserved.

59

### 2014 Q&A on Title IX and Sexual Violence

- **Training, Education and Prevention**
  - Responsible employees.
  - For all employees – What to report, to whom, and how.
  - Nature of sexual violence.
  - Victimology and trauma.
  - How to prevent and identify sexual violence.
  - Bystander intervention.
  - Those responsible for grievance procedures.



© 2016, ATIXA. All rights reserved.

60



## 2014 Q&A on Title IX and Sexual Violence

### ➤ Training for Students

- Title IX and what constitutes sexual violence, including same-sex sexual violence, and unwelcome conduct under the school's policies.
- The school's definition of consent applicable to sexual conduct, including examples.
- Reporting options, including formal reporting and confidential disclosure options and any time frames set by the school for reporting.
- The school's policies, grievance procedures, and sanctions used to process sexual violence complaints.



© 2016, ATIXA. All rights reserved.

61

## 2014 Q&A on Title IX and Sexual Violence

### ➤ Training for Students

- Effects of trauma, including neurobiological changes.
- The role alcohol and drugs often play in sexual violence incidents.
- Bystander intervention strategies – prevention.
- How to report sexual violence to campus or local law enforcement.
- Ability to pursue law enforcement proceedings simultaneously with a Title IX grievance.
- Title IX's protections against retaliation.



© 2016, ATIXA. All rights reserved.

62

## 2015 Letter to Title IX Coordinators

- Thanks coordinators for their service and efforts.
- Stresses the centrality and import of the Title IX coordinator's work and responsibilities.
  - "you must have the full support of your institution."
- Introduces the April 2015 Dear Colleague Letter to superintendents and presidents.
- Introduces the Title IX Resource Guide.



© 2016, ATIXA. All rights reserved.

63

## April 2015 Dear Colleague Letter: Title IX Coordinators

- Sent to all K-12 superintendents and all college presidents.
- Specifically applied the 2011 DCL on sexual violence to K-12.
- Targets the responsibilities, functions, and centrality of the Title IX coordinator role.
- Reiterates requirement to designate a Title IX coordinator.
- Must have necessary positional and actual authority to perform their role.



© 2016, ATIXA. All rights reserved.

64

## 2015 DCL: Key Title IX Coordinator Constructs

- **Independence**
  - should report to senior leadership (e.g., president or superintendent).
  - Avoid conflicts of interest.
- **Full-time?**
  - "It is critical that the employee has the qualifications, training, authority, and time to address all complaints throughout the institution."
- **Multiple/Deputies**
  - Must have "one lead Title IX coordinator who has ultimate oversight responsibility."



© 2016, ATIXA. All rights reserved.

65

## 2015 DCL Title IX Coordinator

- **Responsibility and Authority**
  - Notified of ALL Title IX-related reports and complaints.
  - Coordinate all responses to complaints.
  - Monitor all outcomes.
  - Identify and address patterns.
  - Assess campus climate.
  - May determine outcome or institutional response to complaint
  - Must be protected from retaliation.



© 2016, ATIXA. All rights reserved.

66

## 2015 DCL Title IX Coordinator

- **Visibility**
  - Notice of non-discrimination with Title IX and coordinator information posted and included in virtually all publications, materials, and websites.
  - Encourages Title IX-specific website.
- **Training**
  - Institutions must ensure coordinators are well-trained and up-to-date on all responsibilities and all applicable laws, policies, guidance, regulations, institutional policies, and procedures.



© 2016, ATIXA. All rights reserved.

67

## Title IX Resource Guide (2015)

- Broad-ranging, topically-organized summary guide for coordinators.
  - Intended to help coordinators perform their jobs and receive needed support from their institutions.
- Topics addressed:
  - Scope of Title IX.
  - Coordinator's responsibilities.
  - Administrative requirements and oversight
    - E.g., Grievance procedure requirements and notice of nondiscrimination.



© 2016, ATIXA. All rights reserved.

68

## Title IX Resource Guide (2015)

- Topics addressed (cont.)
  - Key Title IX issues:
    - Recruitment, admissions, and counseling.
    - Financial assistance.
    - Athletics.
    - Sex-based harassment
    - Pregnant and parenting students.
    - Discipline.
    - Single-sex education.
    - Employment.
    - Retaliation.
  - Information collection and reporting.



© 2016, ATIXA. All rights reserved.

69

## Other Guidance Regarding Sexual Harassment & Violence

- OCR Resolution Agreements.
- October 29, 2010 – Bullying.
- January 25, 2013 – Athletics & ADA.
- April 24, 2013 – Retaliation.
- June 25, 2013 – Pregnancy.
- Not Alone – White House Task Force to Protect Students From Sexual Assault – April 2014.
- VAWA 2013 Section 304 – “Campus SaVE.”
- DOJ Title IX Legal Manual.



© 2016, ATIXA. All rights reserved.

70

## NOTICE, REPORTING, RESPONSIBLE EMPLOYEES & CONFIDENTIALITY

- “Responsible employee”
- When do you investigate?
- Examples of actual and constructive notice
- Clery: Campus Security Authorities
- Additional reporting requirements
- Timely warnings and emergency notifications



© 2016, ATIXA. All rights reserved.

71

## Title IX: “Responsible Employee”

- A “**responsible employee**” includes any employee who:
  - Has the authority to take action to redress the harassment;
  - Has the duty to report harassment or other types of misconduct to appropriate officials; OR
  - Is someone a student could reasonably believe has this authority or responsibility.
- Accordingly colleges and universities need to ensure that employees are trained regarding their obligation to report harassment to appropriate administrators.



© 2016, ATIXA. All rights reserved.

72

## When Do You Investigate?

- Receive Notice
  - Actual notice or constructive notice.
- How do rumors, gossip, social media, etc., fit in?
- Once notice exists, the duty to investigate is absolute.
  - Small “i” preliminary *Inquiry*.
  - Big “I” comprehensive *Investigation*.



© 2016, ATIXA. All rights reserved.

73

## Examples of Actual Notice

- Individual files a Title IX grievance.
- Individual notifies the Title IX coordinator or other responsible employee.
- Individual reports to campus police or security official.
- Responsible employee witnesses harassment.
- Indirect notice is received from sources such as flyers posted on campus, media, social media, or video.



© 2016, ATIXA. All rights reserved.

74

## Examples of Constructive Notice

- Pervasiveness of the harassment may be enough to conclude that the college should have known of the hostile environment.
- Harassment is widespread, openly visible, or well known to students and/or staff.
- OCR can conclude the institution should have known of incidents of harassment from a report to an employee who had a reporting duty to a supervisor, but failed to do so.



© 2016, ATIXA. All rights reserved.

75

## The Clery Act: Campus Security Authority

- Clery identifies a CSA as:
  - Campus police.
  - Non-police security staff responsible for monitoring campus property.
  - Individuals and offices designated by the campus security policies as those to whom crimes should be reported.
  - Officials of the institution with significant responsibility for student and campus activities.



© 2016, ATIXA. All rights reserved.

76

## Additional Reporting Requirements

- **Supervisors and Managers (per Title VII)**
  - Mandated to report harassment or other misconduct of which they are aware.
- **Abuse or Suspected Abuse of Minors**
  - All employees are required to report abuse or suspected abuse of minors consistent with the law of the state. This generally includes reporting immediately to law enforcement and to the state's child welfare agency.
- Additional state reporting requirements (e.g., elder abuse and felony reporting).



© 2016, ATIXA. All rights reserved.

77

## The Clery Act: Timely Warning

- In order to keep the campus community informed about safety and security issues on an ongoing basis, an institution must alert the campus community of certain crimes in a manner that is timely and will aid in the prevention of similar crimes. These are crimes that are:
  - Reported to campus security authorities or local police agencies; and
  - Are considered by the institution to represent a serious or continuing threat to students and employees.



© 2016, ATIXA. All rights reserved.

78

## The Clery Act: Emergency Notification

- Triggered by a broad range of potential threats.
  - Any significant emergency or dangerous situation.
  - Involving an immediate threat to the health or safety of students or employees on the campus.
  - Issued without delay once designated campus Clery authorities have confirmed the emergency.
- Includes both Clery and non-Clery incidents.
  - Clery-based example: campus shooting.
  - Non-Clery-based examples: outbreak of communicable disease or impending weather emergency.



© 2016, ATIXA. All rights reserved.

79

## CASE STUDY: TODD & AMY, PT. 1



- What should Julia do with the information?
- How should the Title IX Coordinator decide whether to investigate?
- Should anyone else meet with Amy?
- How could Julia have handled the situation differently?



© 2016, ATIXA. All rights reserved.

80

## Who is “Confidential”

- **Confidential/Privileged Employees\***
  - Licensed professional counselors.
  - Pastoral counselors.
  - Licensed medical professionals (Health Service Employees).
- **May Be Deemed Confidential\*\***
  - Student health staff (support staff).
  - Counseling center staff (support staff).
  - Victims advocate/sexual assault related services and resource centers & staff.
  - Others?

\* To be confidential, these individuals must be acting in the capacity for which they are employed, acting within the scope of their license, and receive the disclosure during the scope of that employment.

\*\* OCR indicates these should still report aggregate, non-identifiable data for Clery and Title IX purposes.



© 2016, ATIXA. All rights reserved.

81

## Who is Not “Confidential”

- Faculty – all levels.
- Faculty advisors.
- Student organization advisors.
- Mediators & ombuds.
- Resident advisors.
- Student affairs staff.
- Academic affairs.
- Residence life staff.
- Campus police/public safety.
- Intercollegiate athletics staff.
- Everyone else...



© 2016, ATIXA. All rights reserved.

82

## Training For Responsible Employees

**Colleges and universities should ensure that employees are trained so that:**

- Those with authority to address harassment know how to respond appropriately.
- Other responsible employees know that they are obligated to report harassment to appropriate officials.
  - Essential topics for training:
    - Knowledge of institutional and community resources.
    - Information regarding reporting.
      - Who to report to.
      - What to report.



© 2016, ATIXA. All rights reserved.

83

## Reluctance to Report

- If a reporting party requests that his or her name not be used:
  - The institution should take all reasonable steps to respond and investigate consistent with that request.
  - So long as doing so does not prevent the school from responding effectively and preventing the harassment of other students or the reporting party.
- PPTVW – Pattern, Predation, Threat, Violence, Weapon.



© 2016, ATIXA. All rights reserved.

84

## Analyzing a Reporting Party Request for Confidentiality

- **Pattern, Predation, Threat, Violence, or Weapon**
  - Additional complaints of sexual violence involving the same perpetrator.
  - Whether the sexual violence was committed by multiple perpetrators.
  - Whether the perpetrator has a history of arrests or records from a prior school indicating a history of violence.
  - Whether the sexual violence was committed by multiple perpetrators.
  - Whether the student's report reveals a pattern of perpetration at a given location or by a particular group.



© 2016, ATIXA. All rights reserved.

85

## Analyzing a Reporting Party Request for Confidentiality

- **Pattern, Predation, Threat, Violence, or Weapon (cont.)**
  - Whether the alleged perpetrator threatened further sexual violence or violence against the student or others.
  - Whether the sexual violence was perpetrated with a weapon.
  - Age of the victim.
  - Whether the school possesses other means to obtain relevant evidence (e.g., security cameras or personnel, or physical evidence).
- If institution proceeds, it should notify the reporting party and utilize appropriate interim measures to protect the reporting party.



© 2016, ATIXA. All rights reserved.

86

## Reluctance to Report

- The SUNY Resolution Agreement provides us some direction above the DCL:
  - An institution has an “obligation to make reasonable efforts to investigate and address instances of sex discrimination when [the institution] knows or should have known about such instances, regardless of complainant cooperation and involvement” (p.3).
  - Policies should include “provisions for the investigation of complaints when the complainant does not choose to proceed with an informal or formal resolution or a hearing” (p.3).



© 2016, ATIXA. All rights reserved.

87

## Reluctance to Report

- The reporting party should be notified as to their options:
  - That the process will still be available to them, regardless of how long they wait.
  - That the institution will support them in any way it can (e.g., housing, classes, no contacts, etc.). Engage in ways to limit the effect of the behavior on the reporting party.
  - That, if information is brought to the attention of the of the institution that may involve a threat to the community, the office may be forced to proceed with an investigation, but that the victim will be notified of this process.



© 2016, ATIXA. All rights reserved.

88

## Reluctance to Report

- The college or university should explain to the reporting party that:
  - Its responsive action may be limited based on the level of privacy requested by reporting party.
  - It cannot guarantee privacy if doing so would jeopardize the safety of the reporting party or others.
- Emphasize that only those with a need to know will be informed.
  - Train those who will be informed about confidentiality expectations.



© 2016, ATIXA. All rights reserved.

89

## COORDINATOR TRAINING AGENDA

### Day 2

- I. Is it a IX Matter? – When Does Title IX Apply?
- II. VAWA 2013 – Section 304 & Clery
- III. Case Study
- IV. Consent Construct
- V. Job Responsibilities of the Title IX Coordinator
  - A. Training Oversight
    - i. Training Campus Constituencies
    - ii. ATIXA Training Checklist
  - B. Creator and Implementer of Appropriate Policy
    - i. Three Forms of Harassment



© 2016, ATIXA. All rights reserved.

90

## IS IT A IX?

- When does Title IX apply?
  - Jurisdiction
  - Covered programs
  - Covered individuals
  - Subject matter



© 2016, ATIXA. All rights reserved.

91

## When does Title IX apply?

### *Jurisdiction*

- OCR says Title IX, by its text, does not apply outside the U.S., and will not enforce extraterritorial complaints.
  - But see *King et. al. v. EMU*, which shows the courts connect Title IX to federally funded educational programs, even if they are overseas.
- The *Davis* standard is that jurisdiction is expected when the institution has:
  - Control over the harasser (discriminator); **AND**
  - Control over the context of the harassment (discrimination).



© 2016, ATIXA. All rights reserved.

92



## When does Title IX apply?

### *Jurisdiction*

- This means we will be taking off-campus jurisdiction.
  - See, e.g., *Simpson v. Colorado*.
- When?
  - Whenever our policy says.
  - When the behavior occurs on property we own or control.
  - When the behavior occurs in programs/events we sponsor.
  - When the downstream effects of purely off-campus conduct cause a discriminatory impact on campus.



© 2016, ATIXA. All rights reserved.

93

## When does Title IX apply?

### *Jurisdiction*

- For Sexual Misconduct/Title IX Cases.
  - There is an expectation that you have *SOME* jurisdiction over off campus incidents.
- For all other conduct cases.
- Jurisdictional Limitations.
  - Geographic.
  - Temporal.
- When is a student a "student"?
  - Application-Admission-Registration-Attendance-Breaks?



© 2016, ATIXA. All rights reserved.

94

## When does Title IX apply?

### *Covered Programs*

- All programs run by a Title IV-funded recipient.
- All programs using facilities funded by federal money (e.g., camps using your fields/stadium).
- It does not matter whether some of your programs are explicitly federally funded or not, all institutional programs are covered, as has been decided by OCR and the courts.



© 2016, ATIXA. All rights reserved.

95

## When does Title IX apply?

### *Covered Individuals*

- Students.
- Faculty.
- Staff.
- Campers.
- Subcontractors, vendors.
- Guests/visitors.  
(as either reporting or responding party)



© 2016, ATIXA. All rights reserved.

96

## When does Title IX apply?

### Subject Matter

- All unwelcome sex-based and gender-based conduct.
- All unwelcome conduct of a sexual nature.
- All sex discrimination.
- All gender discrimination,
  - Including gender identity discrimination; and
  - Sexual orientation discrimination that implicates gender.
- Pregnant and parenting student (employee?) discrimination.



© 2016, ATIXA. All rights reserved.

97

## When does Title IX apply?

### Subject Matter

- Hostile environment sexual harassment.
- *Quid Pro Quo*.
- Retaliatory harassment
- Sexual violence.
- Relationship violence/intimate partner violence.



© 2016, ATIXA. All rights reserved.

98

## When does Title IX apply?

### Subject Matter

- And, any sex/gender-based:
  - Stalking.
  - Hazing.
  - Bullying.
  - Arson.
  - Vandalism.
  - Theft.
  - And any other policy violation that is sex/gender based that causes a discriminatory effect.



© 2016, ATIXA. All rights reserved.

99

## When does Title IX apply?

### Subject Matter

- Limitations:
  - Actions/conduct/speech protected by academic freedom.
    - Pedagogically appropriate and germane to the subject matter of course that instructor hired to teach/research.
  - Actions/conduct/speech protected by the First Amendment.
    - Merely offensive conduct cannot be disciplined at a public (or CA) university.
      - Must be severe, pervasive (persistent), and objectively offensive.
      - Must still remedy for conduct that is severe or pervasive (OCR).
    - Subjectively offensive conduct cannot be disciplined at a public (or CA) university unless it is also objectively offensive.




© 2016, ATIXA. All rights reserved.

100

## VAWA 2013 – Section 304 & Clery



- The Clery Act
- Campus Sexual Assault Victims' Bill of Rights
- Recent Clery Amendments from VAWA Reauthorization
- Reporting – Hate Crimes
- Annual Security Report
- Sexual Assault, Dating Violence, Domestic Violence and Stalking
- Clery: VAWA 2013 Section 304



© 2016, ATIXA. All rights reserved. 101

## The Clery Act


- Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (1990)
  - Crime reporting.
  - Campus crime log.
  - Campus Sexual Assault Victims Bill of Rights
  - Primary crimes (7+3).
  - Hate crimes (8 categories).
  - Policy and procedure disclosures.
  - Timely warnings & emergency notifications
  - Sex offender information dissemination.
  - Enforcement and fines.
  - VAWA 2013 – Section 304.

© 2016, ATIXA. All rights reserved. 102

## Campus Sexual Assault Victims' Bill of Rights (1992)

- Added to the Clery Act through the Higher Education Amendments of 1992.
- Provisions:
  - In a disciplinary proceeding, the victim and accused must have equal opportunity to present witnesses.
  - The victim and the accused must have equal notification of the proceeding's outcome.
  - Institution must:
    - Inform the victim of counseling services.
    - Inform the victim of option to notify law enforcement.
    - Inform victim of options to avoid the accused, such as changing residence halls or classes.



© 2016, ATIXA. All rights reserved. 103


## Recent Clery Amendment: VAWA Reauthorization & Section 304

Section 304: "Campus SaVE"

- **Section 304** significantly amends the Clery Act.
- Final Regulations released October 15, 2014.
- Effective date of the law is July 2015\*.
- **Extensive** new policy, procedure, training, education, and prevention requirements for:
  - Sexual assault
  - Stalking.
  - Dating violence.
  - Domestic violence.

} The "Big 4"

- Prohibits retaliation.



© 2016, ATIXA. All rights reserved. 104

### VAWA 2013 Section 304 “Primary” Crimes

- Criminal Homicide:
  - Murder and non-negligent manslaughter.
  - Negligent manslaughter.
- Sex Offenses:
  - Rape.
  - Fondling.
  - Incest.
  - Statutory rape.
- Robbery.
- Aggravated assault.
- Burglary.
- Motor vehicle theft
- Arson.
- **PLUS:**
  - Dating violence.
  - Domestic violence.
  - Stalking.



© 2016, ATIXA. All rights reserved

105

### VAWA 2013 Section 304 Bias and Hate Crimes

- Added two categories of actual or perceived bias.
  - Race.
  - Gender.
  - **Gender identity\***.
  - Religion.
  - Sexual orientation.
  - Ethnicity\*.
  - **National origin\***.
  - Disability.



© 2016, ATIXA. All rights reserved

106

### VAWA Section 304: Reporting – Hate Crimes

- Hate Crimes:**
- Murder and non-negligent manslaughter.
  - *Forcible sex offenses.*
  - *Non-forcible sex offenses.*
  - Robbery.
  - Aggravated assault.
  - Burglary.
  - Motor vehicle theft.
  - Arson.
  - Larceny-theft.
  - Simple assault
  - Intimidation.
  - Destruction/damage/vandalism of property.



© 2016, ATIXA. All rights reserved

107

### VAWA 2013 Section 304 Annual Security Report

- Arrests and disciplinary actions.
  - Arrests for:
    - Liquor law violations.
    - Drug law violations.
    - Illegal weapons possession.
  - Individuals referred for campus disciplinary action for:
    - Liquor law violations.
    - Drug law violations.
    - Illegal weapons possession.



© 2016, ATIXA. All rights reserved

108

## VAWA 2013 – Sec. 304 Sexual Assault

*“Sexual Assault” means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the FBI.”*

- Forcible sex offense – “is defined as any sexual act directed against another person, forcibly and/or against that person’s will; or not forcibly or against the person’s will where the victim is incapable of giving consent.”
- Non-forcible sex offense – is defined as unlawful, non-forcible sexual intercourse. (Sex with a minor or incest.)



© 2016, ATIXA. All rights reserved.

109

## VAWA 2013 – Sec. 304: 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; and
  - Where the existence of such a relationship shall be determined based on a consideration of the following factors:
    - Length of the relationship.
    - Type of relationship.
    - Frequency of interaction between the persons involved in the relationship.
  - Includes sexual or physical abuse or the threat of such abuse (does not include emotional or psychological).
  - Any incident meeting this definition is considered a crime for purposes of Clery Act reporting.



© 2016, ATIXA. All rights reserved.

110

## VAWA 2013 – Sec. 304: Domestic Violence

- Felony or misdemeanor crimes of violence committed by:
  - A current or former spouse or intimate partner of the victim.
  - A person with whom the victim shares a child in common.
  - A person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner.
  - A person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.
  - 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.
- Any incident meeting this definition is considered a crime for purposes of Clery Act reporting.



© 2016, ATIXA. All rights reserved.

111

## VAWA 2013 – Sec. 304: Stalking

- Engaging in a course of conduct (two or more acts) in which the stalker engaged in behavior either directly or indirectly or through a third party.
- Engaged in any action, method, device or means to follow, monitor, observe, surveil, threaten, or communicates about a person.
- Directed at a specific person that would cause a reasonable person to:
  - Fear for his or her safety or the safety of others.
  - Suffer substantial emotional distress (i.e., significant mental suffering or anguish).



© 2016, ATIXA. All rights reserved.

112

### Clery: VAWA 2013 Section 304

- Institutional disciplinary procedures shall "provide a prompt, fair and impartial investigation and resolution."
  - Accuser and accused are entitled to the **same opportunities** to have a support person/advisor **of their choice at any** proceeding or related meeting.
  - Accuser and accused must be simultaneously informed in writing of:
    - The outcome that arises from an allegation of domestic violence, dating violence, sexual assault, or stalking.
      - Outcome = Finding, sanction, and rationale.
    - The institution's procedures for appeal.
    - Any change to the results that occurs prior to the time that such results become final.
    - When such results become final.



© 2016, ATIXA. All rights reserved.

113

### Clery: VAWA 2013 Section 304

- Victims should receive written information regarding:
  - Procedures victims of DV, DV, SA, and S should follow.
  - Interim measures (e.g., academic, living, transportation, and work).
  - Services available on and off-campus (e.g., counseling, advocacy, and health).
  - Reporting options (e.g., campus police, local police, student conduct, HR, etc.).
  - Protection options (e.g., order of protection, no-contact orders, etc.)



© 2016, ATIXA. All rights reserved.

114

### VAWA 2013 – Sec. 304 & Prevention Programs

- Primary prevention programs for **all incoming students** and **new employees**; AND
- **Ongoing** prevention and awareness campaigns **for students and employees** including:
  - "A description of safe and positive options for **bystander intervention**."



© 2016, ATIXA. All rights reserved.

115

### VAWA 2013 – Sec. 304 & Prevention Programs

- Primary prevention programs for **all incoming students** and **new employees**; AND
- **Ongoing** prevention and awareness campaigns **for students and employees** including:
  - "A statement that the institution...prohibits the crimes of"
    - Domestic violence.
    - Dating violence.
    - Sexual assault
    - Stalking.
  - Definitions of each of the above "in the applicable jurisdiction."



© 2016, ATIXA. All rights reserved.

116

## VAWA 2013 – Sec. 304 Consent

- Primary prevention programs for **all incoming students** and **new employees**; AND
- **Ongoing** prevention and awareness campaigns **for students and employees** including:
  - The applicable jurisdiction’s “**definition of consent** in reference to sexual activity.”
    - Typical definitions cite to force as well as incapacity due to alcohol, drugs, mental disease or defect, and age (minors).
- ATIXA Consent Statutes by State:
  - <http://atixa.org/resources/consent-statutes-by-state/>



© 2016, ATIXA. All rights reserved.

117

## Clery: VAWA 2013 Section 304

- Annual training for those involved in disciplinary proceedings (e.g., investigators, hearing officers, and appellate officers) on:
  - Domestic violence, dating violence, sexual assault, and stalking.
  - How to conduct an **investigation** “that protects the safety of victims and promotes accountability.”
  - How to conduct a “**hearing process** that protects the safety of victims and promotes accountability.”
  - Appeals.



© 2016, ATIXA. All rights reserved.

118

## CASE STUDY



© 2016, ATIXA. All rights reserved.

119

## CONSENT CONSTRUCT

- Force
- Incapacity
- Consent
- Case Study



© 2016, ATIXA. All rights reserved.

120

## Consent is...

- Informed, knowing, and voluntary (freely given),
- Active (not passive),
- Affirmative action through clear words or actions,
- That create mutually understandable permission regarding the conditions of sexual activity.
- Cannot be obtained by use of:
  - Physical force, compelling threats, intimidating behavior, or coercion.
- Cannot be given by someone known to be — or should be known to be — mentally or physically incapacitated.



© 2016, ATIXA. All rights reserved.

121

## Consent

- Lack of protest or resistance ≠ consent.
- Consent should not be assumed.
- Must be present through the entire incident; consent can be withdrawn at any time.
- The inability to give consent may be a result of, but not limited to, the following individuals:
  - Persons who are asleep or unconscious.
  - Persons who are incapacitated due to the influence of drugs, alcohol, or medication.
  - Persons who are unable to communicate consent due to a mental or physical condition, including minors.



© 2016, ATIXA. All rights reserved.

122

## Overview of the Three Questions

1. Was force used by the accused individual to obtain sexual access?
2. Was the reporting party incapacitated?
  - a. Did the accused individual know, or
  - b. Should s/he have known that the alleged victim was incapacitated (alcohol, other drugs, asleep, etc.)?
3. What clear words or actions by the reporting party gave the accused individual permission for the specific sexual activity that took place?



© 2016, ATIXA. All rights reserved.

123

## Force

- Was force used by the individual to obtain sexual access?
- Because consent must be voluntary (an act of free will) consent cannot be obtained through use of force.
- Types of Force to consider:
  - Physical violence: hitting, restraint, pushing, kicking, etc.
  - Threats: anything that gets the other person to do something they wouldn't ordinarily have done absent the threat.



© 2016, ATIXA. All rights reserved.

124



## Force

- Types of Force to consider (cont.)
  - Intimidation: an implied threat that menaces and/or causes reasonable fear.
  - Coercion: the application of an unreasonable amount of pressure for sexual access.
    - Consider:
      - Frequency.
      - Intensity.
      - Duration.
      - Isolation.



© 2016, ATIXA. All rights reserved.

125

## Incapacity

- What was the form of incapacity?
  - Alcohol or other drugs.
    - Incapacity ≠ Impaired, drunk, intoxicated, or under the influence.
      - Incapacity = an extreme form of intoxication.
    - Administered voluntarily or without victim's knowledge.
    - Rape drugs.
  - Mental/cognitive impairment.
  - Injury.
  - Asleep or unconscious.



© 2016, ATIXA. All rights reserved.

126

## Incapacity

- First, was the alleged victim incapacitated at the time of sex?
  - Could s/he make rational, reasonable decisions?
  - Could s/he appreciate the situation and address it consciously such that any consent was informed?
    - Knowing who, what, when, where, why and how.
- Second, did the accused individual know of the incapacity (fact)?
- Or, should the accused individual have known from all the circumstances (reasonable person)?



© 2016, ATIXA. All rights reserved.

127

## Evidence of Incapacity

- Evidence of incapacity will come from context clues, such as:
  - A witness or the accused may know how much the other party has consumed.
  - Slurred speech.
  - Bloodshot eyes.
  - The smell of alcohol on the breath.
  - Shaky equilibrium.
  - Vomiting.
  - Outrageous or unusual behavior.
  - Unconsciousness (including blackout).



© 2016, ATIXA. All rights reserved.

128

## Incapacity

- Incapacity is dependent on many or all of the following factors:
  - Body weight, height, and size.
  - Tolerance for alcohol and other drugs.
  - Amount, pace, and type of alcohol or other drugs consumed.
  - Amount of food intake prior to consumption.
  - Voluntariness of consumption.
  - Vomiting.
  - Propensity for blacking-out (mentally or physically).
  - Genetics.



© 2016, ATIXA. All rights reserved.

129

## Consent

- Question 3 is the consent question: What clear words or actions by the reporting party gave the accused individual permission for the specific sexual activity that took place?
- Equity demands a “pure” consent-based policy, defining what consent is rather than defining it by what it is not (e.g., force, resistance, against someone’s will, unwanted, someone unable to consent, etc.).



© 2016, ATIXA. All rights reserved.

130

## Consent Is...

- Informed (knowing).
- Voluntary (freely given).
- Active (not passive).
- Clear words or actions.
- Indicates permission to engage in mutually agreed upon (sexual) activity.
- What does “affirmative consent” mean...?
- The “cup of tea metaphor.”



© 2016, ATIXA. All rights reserved.

131

## Consent Is...

**CONSENT**  
IT'S SIMPLE AS TEA

**Rock Star Dinosaur Pirate Princess**

<http://rockstardinosaurpirateprincess.com/2015/03/02/consent-not-actually-that-complicated/>



© 2016, ATIXA. All rights reserved.

132

### Consent: Rules to Remember

- No means no, but nothing also means no. Silence and passivity do not equal permission.
- To be valid, consent must be given prior to or contemporaneously with the sexual activity.
- Ongoing or continuous.
- Consent can be withdrawn at any time, as long as that withdrawal is clearly communicated by the person withdrawing it.



© 2016, ATIXA. All rights reserved.

133

### THE TITLE IX COORDINATOR



- Detailed Review of the Responsibilities



© 2016, ATIXA. All rights reserved.

134

### Responsibilities of the Title IX Coordinator – “Quick List” – Part 1

- Training oversight for employees, boards, investigators, and appeals officers.
- Contact for government inquiries.
- Point person for campus complaints.
- Creator and implementer of appropriate policy.
- Prevention and remediation of gender discrimination.
- Prevention and remediation of sexual harassment



© 2016, ATIXA. All rights reserved.

135

### Responsibilities of the Title IX Coordinator – “Quick List” – Part 2

- Prevention and remediation of sexual assault.
- Prevention and remediation of stalking.
- Prevention and remediation of intimate partner and relationship violence.
- Prevention and remediation of bullying and cyberbullying.
- Oversight and coordination of prompt and equitable grievance procedures.



© 2016, ATIXA. All rights reserved.

136

### Responsibilities of the Title IX Coordinator – “Quick List” – Part 3

- Coordinator of the interaction of multiple student and employee grievance processes.
- Supervisor of investigations.
- Compliance auditor.
- Assurance of First Amendment protections.



© 2016, ATIXA. All rights reserved.

137

### Responsibilities of the Title IX Coordinator – “Quick List” – Part 4

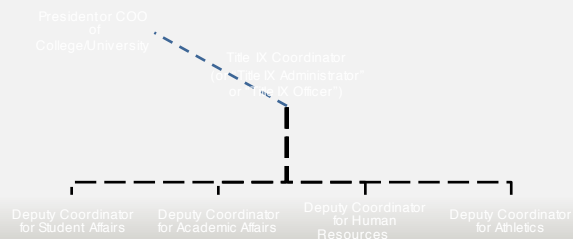
- Prevention and remediation of retaliation.
- Section 504 disabilities compliance oversight.
- Oversight of athletics gender equity.
- Assurance of compliance with requirement to stop, prevent, and remedy.
- Assurance of compliance with final sanctions.



© 2016, ATIXA. All rights reserved.

138

### Sample Title IX Team Structure



© 2016, ATIXA. All rights reserved.

139

### Title IX Team Structure: Additional Issues

- Job responsibilities of deputy coordinators?
- Multiple campuses.
  - Campuses within a larger system (e.g., SUNY schools)
  - Extension campuses.
  - Online communities.
- Co-Coordinator?
- Investigator oversight.



© 2016, ATIXA. All rights reserved.

140

## TRAINING OVERSIGHT

- Employees
- Students
- Boards & Panels
- Investigators
- Appeals Officers



© 2016, ATIXA. All rights reserved.

141

## Supervisor of Training

- General training content categories:
  - Legal Overview: Title IX, Clery, and regulations.
  - Institutional policy.
  - Institutional procedures.
  - Reporting.
  - Working with victims.
  - Victim resources and remedies.
  - Consent in sexual interactions.
  - Rights of parties in complaint, investigation, hearing, and appeals.
  - Sanctions/repercussions.
  - Additional prevention and community education.



© 2016, ATIXA. All rights reserved.

142

## Title IX/VAWA Sec. 304 Prevention & Training Checklist

- The basis of each training as required/recommended by:
  - Title IX-based guidance from OCR and/or DOJ.
    - April 2011 Dear Colleague Letter.
    - 2014 Q&A .
    - 2015 Dear Colleague Letter & Resource Guide.
    - Major resolution agreements and letters.
  - Implied necessary elements in various OCR resolution agreements.
  - Elements recommended by ATIXA.
  - VAWA 2013 – Sec. 304.



© 2016, ATIXA. All rights reserved.

143

## Title IX/VAWA Sec. 304 Training Checklist

- Trainee Populations:
  - **Title IX Compliance Officers**
    - E.g.: coordinator and deputies, investigators, hearing boards (including appeals), and others involved in processing, investigating, or resolving complaints.
  - **First Responders**
    - E.g.: RAs, health center employees, counselors, sexual assault response coordinators, academic advisors, and public safety.
  - **All Faculty & Staff; ATIXA Mandatory Reporters**
    - ATIXA recommends making all faculty and staff mandatory reporters.
  - **All Students**
    - Undergraduate, graduate, professional, distance and online, etc.



© 2016, ATIXA. All rights reserved.

144

## Training Coordination and Operationalization

- Centralization and oversight of campus-wide efforts.
- How?:
  - In person? Online? Classroom?
  - Administrator-driven? Peer-driven?
- When/how often?
  - Orientation: summer orientation, orientation (student, faculty, and staff).
    - Follow-up is crucial.
  - Ongoing prevention and awareness campaigns.
    - Programs, conversations, speakers, hall and floor meetings, first-year seminar, third-party online training, etc.



© 2016, ATIXA. All rights reserved.

145

## Training Oversight for Employees, Boards, Investigators & Appeals Officers

- Each of these will be different.
- Must identify the compliance elements that constitute required knowledge for each entity.
- Consider most effective approach for training as well as most efficient.
  - For example, investigators will be responsible for completeness, fairness, and equity, their training must be extensive.
  - Appeals officers must have a comprehensive understanding of the process; should be in-person using case studies.
  - Employees need general resource and reporting information and could be trained by video.



© 2016, ATIXA. All rights reserved.

146

## Essential Competencies for Title IX Coordinators, Deputies & Investigators

- |                         |                              |
|-------------------------|------------------------------|
| ✓ Strategic process.    | ✓ Patterns.                  |
| ✓ Questioning.          | ✓ Predation.                 |
| ✓ Evaluating evidence.  | ✓ Recantation.               |
| ✓ Establishing rapport. | ✓ False complaints.          |
| ✓ Good report writing.  | ✓ Rape myths.                |
| ✓ Alcohol.              | ✓ Consent.                   |
| ✓ Other drugs.          | ✓ Force/incapacity.          |
| ✓ Blackouts.            | ✓ Gender bias.               |
| ✓ Victimology.          | ✓ Victim-blaming, etc.       |
| ✓ Technology.           | ✓ Psychology of the accused. |
| ✓ Cultural competence.  |                              |



© 2016, ATIXA. All rights reserved.

147

## Investigator Training

- The institution's policies and procedures.
- Applicable federal and state law and court decision.
- Investigative techniques including specifically interviewing witnesses.
- Cultural sensitivity; diversity competence.
- Applicable legal standards and framework.
- How to analyze evidence in relation to the standard.
- How to synthesize evidence, write reports, and make findings.



© 2016, ATIXA. All rights reserved.

148

## Training for “Responsible Employees”/Mandatory Reporters

- Colleges and universities should ensure that employees are trained so that:
  - Those with authority to address harassment know how to respond appropriately.
  - Other responsible employees know that they are obligated to report harassment to appropriate officials, what to report, and to whom.
    - Who does this represent on your campus? Faculty? Coaches? Trainers? Graduate teaching assistants? RAs?



© 2016, ATIXA. All rights reserved.

149

## Training for “Responsible Employees”/Mandatory Reporters

- The institution's policies and procedures – must also address cross-constituency complaints.
  - Faculty.
  - Staff.
  - Students.
- The departmental/college expectation for reporting incidents of sexual assault and harassment:
  - Who to tell.
  - How to tell.
  - When to tell.
  - Confidentiality.



© 2016, ATIXA. All rights reserved.

150

## Basic Training Topics (cont.)

- The college's resources for sexual assault/harassment victims including:
  - Title IX administrator or deputy administrator.
  - Law enforcement – campus and local.
  - Student conduct.
  - EOP/EEOC officers.
  - Victims' services/advocates.
  - Counseling services.
  - Health services.
  - Remedial measures available (e.g., no-contact orders, course or work adjustments, etc.).



© 2016, ATIXA. All rights reserved.

151

## Training for Students

- Review institutional policies.
- Discussion of consent (use case studies).
- Discussion regarding how to report.
  - Where to find reporting resources.
- Presentation of resources.
- Present statistics and role of drugs and alcohol, and introduce “incapacitation.”
- Discuss privacy and confidentiality.
- Discuss rights of all parties.
- Provide resource/reporting guide.




© 2016, ATIXA. All rights reserved.

152

### SMALL GROUP DISCUSSION: TRAINING

- What are you doing that works?
  - Faculty?
  - Staff?
  - Students?
- How do you reach as many as possible?



© 2016, ATIXA. All rights reserved. 153

### CREATOR & IMPLEMENTER OF APPROPRIATE POLICY





© 2016, ATIXA. All rights reserved. 154

### Creator And Implementer Of Appropriate Policy

- Policies should clearly define expected/prohibited conduct.
- Policies should be regularly updated, revised, and assessed.
- Procedures should clearly channel the grievant to appropriate resources.
- Procedures should provide for the equitable remedying of complaints.


**NOTE:** Policies will be discussed throughout the training.



© 2016, ATIXA. All rights reserved. 155

### Creator And Implementer Of Appropriate Policy

- The Title IX coordinator does not unilaterally create policies, but must be an integral part of the policy development and review process.
- The Title IX coordinator must ensure all policies related to sex/gender misconduct and discrimination are legally accurate, complete and, if the institution has multiple policies (for faculty, staff, students) and procedures, must ensure that these policies are not conflicting, nor contain conflicting definitions.
  - A strong argument for a single policy!(1P1P).



© 2016, ATIXA. All rights reserved. 156



## THREE TYPES OF SEXUAL HARASSMENT

1. Hostile Environment
2. *Quid Pro Quo*
3. Retaliatory Harassment



© 2016, ATIXA. All rights reserved.

157

## Hostile Environment

- A hostile environment is created when sexual harassment is:
  - sufficiently **severe**, or
  - **persistent or pervasive**, and
  - **objectively offensive** that it:
    - unreasonably interferes with, denies or limits someone's ability to participate in or benefit from the university's educational [and/or employment], social, and/or residential program.
- From both a subjective (the alleged victim's) and an objective (reasonable person's) viewpoint.



© 2016, ATIXA. All rights reserved.

158

## Hostile Environment

- Totality of the circumstances to consider:
  - The frequency (persistent or pervasive), nature, and severity of the conduct
  - Whether the conduct was physically threatening.
  - Whether the conduct was humiliating.
  - The identity of and relationship between the alleged harasser and the subject or subjects of the harassment.
  - The age and sex of the alleged harasser and the subject or subjects of the harassment.
  - The size of the school, location of the incidents, and context in which they occurred.



© 2016, ATIXA. All rights reserved.

159

## Hostile Environment

- Totality of the circumstances to consider:
  - The effect on the alleged victim's mental or emotional state.
  - Whether the conduct was directed at more than one person.
  - Whether the conduct unreasonably interfered with the alleged victim's educational or work performance.
  - Whether the statement is an utterance of an epithet which is offensive, or offends by discourtesy or rudeness.
  - Whether the speech or conduct deserves the protections of academic freedom or the First Amendment protection.



© 2016, ATIXA. All rights reserved.

160

## “Severe”

*“The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the conduct is physical. Indeed, a single or isolated incident of sexual violence may create a hostile environment.”  
—(Q&A: A-3)*

- Physical is more likely to be severe without need for repetition: “attempts to grab a female student’s breasts or attempts to grab any student’s genital area or buttocks” (2001 Guidance).
  - Non-consensual sexual intercourse or contact are almost always sufficiently severe.
  - Consider the circumstances: E.g., the ability for victim to escape the harassment.
- Accompanied by threats or violence.



© 2016, ATIXA. All rights reserved.

161

## “Pervasive”

- Widespread.
- Openly practiced.
- Well-known among students or employees – reputation of a department etc.
- Occurring in public spaces (more likely to be pervasive).
- “Harassment is pervasive when incidents of harassment occur either in concert or with regularity” (2001 Guidance – Footnote 44).
- Frequency of the conduct is often a pervasiveness variable.
  - Intensity/duration.
- Unreasonable interference.
- A “gauntlet of sexual abuse” *Meritor v. Vinson*, 477 U.S. 57 (1986).



© 2016, ATIXA. All rights reserved.

162

## “Persistent”

- Repeated.
  - Intensity.
  - Duration.
  - Welcomeness.
- Defined:
  - Continuing to do something or to try to do something even though other people want you to stop.
  - Continuing beyond the usual, expected, or normal time; not stopping or going away (Merriam-webster.com).



© 2016, ATIXA. All rights reserved.

163

## “Objectively Offensive”

- Reasonable person standard in context.
- “I know it when I see it...”
- Age and relationships of accuser and accused.
- Number of persons involved.
- Frequency.
- Severity.
- Physically threatening.
- Humiliation.
- Intimidation.
- Ridicule.
- Abusive.



© 2016, ATIXA. All rights reserved.

164

## Severe? Pervasive? Persistent? Objectively Offensive?

### *Student-based examples*

- Female student “sexts” pictures of herself to a male classmate.
- Whiteboard writings.
- E-mailed pictures.
- “Revenge” pictures.
- Viewing porn on a computer in the library.



© 2016, ATIXA. All rights reserved.

165

## Hostile Environment?



© 2016, ATIXA. All rights reserved.

166

## Hostile Environment?



© 2016, ATIXA. All rights reserved.

167

## Severe? Pervasive? Persistent? Objectively Offensive?

### *Faculty-based examples*

- Giving a student a back-rub.
- Post-class sex demonstration.
- Require students to read *50 Shades of Grey* and give an assignment to compare their own experiences against those from the book.
- Female faculty member repeatedly referring to male students as “penises.”
- Telling repeated “dirty” jokes in class.



© 2016, ATIXA. All rights reserved.

168

## Severe? Pervasive? Persistent? Objectively Offensive?

### Staff-based examples

- Telling dirty jokes: In common area? Staff meeting? To a single individual?
- Sending porn to a colleague.
- Rolling eyes and making masturbation motion with hand at comments during a staff meeting.
- Coming up behind a colleague and giving a brief shoulder rub.
- Repeated staring at a colleague of the opposite sex; accompanied by occasional winking.
- Colleague repeatedly mentions how much he/she likes a person's outfits.



© 2016, ATIXA. All rights reserved.

169

## Quid Pro Quo Sexual Harassment

### ➤ Quid Pro Quo harassment is:

- Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature,
- By a person having power or authority over another constitutes sexual harassment when
- Submission to such sexual conduct is made either explicitly or implicitly a term or condition of rating or evaluating an individual's educational [or employment] progress, development, or performance.
- This includes when submission to such conduct would be a condition for access to receiving the benefits of any educational [or employment] program.



© 2016, ATIXA. All rights reserved.

170

## Case Study Jeremy & Professor Sanchez

- What *Quid Pro Quo* elements are present in this scenario?
  - How do those impact your investigation and response?
- After receiving the minimal anonymous report, what should you do?
- Now, assuming the report was detailed as to Professor Sanchez's relationship with Jeremy, does that change your approach?
- How does your consensual relationship policy impact your response?
- What, if any, sanctions should Professor Sanchez face?



© 2016, ATIXA. All rights reserved.

171

## Retaliatory Harassment

### ➤ Retaliation is defined as:

- any adverse action taken against a person participating in a protected activity because of their participation in that protected activity.
- Also includes retaliation against the victim by the accused or by the accused friends or others who are sympathetic to the accused.
- Also can include retaliation directed toward third parties because of their participation in a grievance process or for supporting a grievant.



© 2016, ATIXA. All rights reserved.

172

## Retaliation and Adverse Action

- Common definition of adverse action:
  - Significantly disadvantages or restricts the reporting party as to his or her status as a student or employee, or his or her ability to gain the benefits or opportunities of the program; or
  - Precluded from his or her discrimination claims; or
  - Reasonably acted or could act as a deterrent to further protected activity.
  - The U.S. Supreme Court and the federal courts have defined adverse action very broadly.



© 2016, ATIXA. All rights reserved.

173

## COORDINATOR TRAINING AGENDA

Day 3

- I. Creator and Implementer of Appropriate Policy (cont.)
- II. Contact for Government Inquiries
- III. Prevention and remediation
  - A. Gender Discrimination
  - B. Sexual Harassment
  - C. Sexual Assault
  - D. Stalking
  - E. Intimate Partner/Relationship Violence
  - F. Bullying/Cyberbullying
- IV. Oversight of Prompt and Equitable Grievance Procedures
  - A. Supervisor of Investigations



© 2016, ATIXA. All rights reserved.

174

## MODEL POLICY FRAMEWORK

- Non-Consensual Sexual Intercourse
- Non-Consensual Sexual Contact
- Sexual Exploitation
- Related Misconduct



© 2016, ATIXA. All rights reserved.

175

## Non-Consensual Sexual Intercourse

- **Non-consensual sexual intercourse is:**
  - Any sexual intercourse,
  - However slight,
  - With any object,
  - By one person upon another person,
  - That is without consent and/or by force.



© 2016, ATIXA. All rights reserved.

176

## Intercourse Defined

- **Non-consensual sexual intercourse includes:**
  - Vaginal or anal penetration,
  - By a penis, object, tongue or finger, and oral copulation (mouth to genital contact),
  - No matter how slight the penetration or contact.



© 2016, ATIXA. All rights reserved.

177

## Non-Consensual Sexual Contact

- Non-consensual sexual contact is:
  - Any intentional sexual touching,
  - However slight,
  - With any object,
  - By one person upon another person,
  - That is without consent and/or by force.



© 2016, ATIXA. All rights reserved.

178

## Sexual Contact Defined

- Sexual contact includes:
  - Intentional contact with the breasts, buttock, groin, or genitals, or touching another with any of these body parts, or making another touch you or themselves with or on any of these body parts; or
  - Any other intentional bodily contact in a sexual manner.



© 2016, ATIXA. All rights reserved.

179

## Sexual Exploitation

- Occurs when one person takes non-consensual or abusive sexual advantage of another for his/her own advantage or benefit, or to benefit or advantage anyone other than the one being exploited, and that behavior does not otherwise constitute one of other sexual misconduct offenses.
- Examples of sexual exploitation include, but are not limited to...



© 2016, ATIXA. All rights reserved.

180

## Sexual Exploitation (Cont.)

- Invasion of sexual privacy.
- Non-consensual digital, video, or audio recording of nudity or sexual activity.
- Unauthorized sharing or distribution of digital, video or audio recording of nudity or sexual activity.
- Engaging in voyeurism.
- Going beyond the boundaries of consent (such as letting your friend hide in the closet to watch you having consensual sex).
- Knowingly exposing someone to or transmitting an STI, STD, or HIV to another person.
- Intentionally or recklessly exposing one's genitals in non-consensual circumstances, or inducing another to expose their genitals.
- Sexually-based stalking and/or bullying may also be forms of sexual exploitation.



© 2016, ATIXA. All rights reserved.

181

## Other Misconduct Offenses That May Require Title IX Based Response

- Violence between those in an intimate relationship to each other.
- Bullying/cyberbullying.
- Hazing.
- Stalking.
- Threatening or causing physical harm.
- Conduct which threatens or endangers the health or safety of any person.
- Discrimination.
- Intimidation.
- Any rule violated on the basis of the victim's sex/gender, which is severe enough to cause a discriminatory effect



© 2016, ATIXA. All rights reserved.

182

## CONTACT FOR GOVERNMENT INQUIRIES



© 2016, ATIXA. All rights reserved.

183

## Contact for Government Inquiries

- Clearly and widely identify your coordinator in public policies and procedures (the government knows who to contact) – single point of contact.
- Various government inquiries:
  - Department of Education's Office for Civil Rights (OCR).
    - Title IX, 504 disability complaints and Title II disability complaints, and Title VI (race, color, and national origin).
    - Generally initiated by OCR Regional Office.
    - Voluntary review.
    - Complaint-instigated investigation.



© 2016, ATIXA. All rights reserved.

184

## Contact for Government Inquiries

- A person may make a complaint with OCR and file a lawsuit under Title IX, 504, and Title VI.
  - Government permission to sue is not required for OCR complaints.
- Equal Employment Opportunity Commission (EEOC) will investigate Title VII (employment) complaints.
  - EEOC does not conduct voluntary reviews.
  - A person filing a Title VII complaint must go through the administrative process (via EEOC or state Civil Rights Commission) prior to being provided a "right to sue" letter from the government.



© 2016, ATIXA. All rights reserved.

185

## Contact for Government Inquiries

- OCR will likely contact Title IX coordinator or president if a complaint is filed against the institution, or your school is selected for a voluntary compliance review.
  - Contact legal counsel if complaint is filed or voluntary compliance review is initiated.
  - Coordinator will be expected to produce all documents requested by OCR. Generally this is substantial.
  - Don't be surprised if documents are requested going back 10 years. If you have them you must produce them.



© 2016, ATIXA. All rights reserved.

186

## Contact for Government Inquiries

- Cooperation with OCR is key.
- Institution's timely response is essential.
- Expect substantial delays on the part of OCR (don't be alarmed by this).
- Often the OCR investigation will take 1-2 years.
- OCR will likely want to interview individuals. Sometimes this is done via conference calls, sometimes in person.
  - The Title IX person will be the point person on all of this.



© 2016, ATIXA. All rights reserved.

187

## Contact for Government Inquiries

- Even if OCR is investigating based on a complaint, it will seek voluntary compliance on the part of the institution before rendering a finding.
- Voluntary Compliance Resolution (or Resolution Agreements) are really not voluntary on the part of the institution; they are an opportunity for the institution to come into compliance before a finding is rendered.
- Generally compliance agreements require 3-5 years of monitoring by and documentation to OCR.



© 2016, ATIXA. All rights reserved.

188



### Contact for Government Inquiries

- The Title IX coordinator is responsible for the implementation and oversight of all compliance elements in the voluntary resolution agreement.
- It's always a good idea to review recent voluntary resolution agreements sent to other institutions. However, recognize that while there may be similarities, each regional office will have unique priorities for compliance.



© 2016, ATIXA. All rights reserved.

189

### POINT PERSON FOR CAMPUS COMPLAINTS



© 2016, ATIXA. All rights reserved.

190

### Point Person for Campus Complaints

- The Title IX Coordinator will be the individual designated to ensure the Title IX protocol is implemented and therefore should be the individual to whom all complaints or notice related to sex/gender misconduct and disability discrimination should be directed.
  - However, the institution may designate multiple portals for receipt of information.
    - All responsible employees are expected to report notice and complaints to the Title IX coordinator.



© 2016, ATIXA. All rights reserved.

191

### Point Person for Campus Complaints

- Deans, supervisors, the athletic director, and deputy coordinators may also be identified in publications and policies as individuals to whom a complaint may be made.
  - The Title IX coordinator must create a structure of documentation and reporting by these designated individuals to ensure that the Title IX coordinator is aware of the complaint and will either designate the individual to lead the Title IX-based response protocol or will implement that process.



© 2016, ATIXA. All rights reserved.

192

## Point Person for Campus Complaints

- The Title IX coordinator must ensure the institution is promptly engaging in:
  - Initiation of the preliminary inquiry.
  - Prompt response to stop the harassment/discrimination.
  - Immediate remedial support for the victim.
  - Action to reasonably prevent the recurrence.
- The Title IX coordinator must coordinate all these steps, oftentimes across administrative processes.



© 2016, ATIXA. All rights reserved.

193

## Point Person for Campus Complaints

- The Title IX coordinator must establish a reporting and information sharing structure with campus law enforcement.
  - All campus law enforcement officers (whether sworn or public safety/security) are considered "responsible employees" and have an obligation to report to the Title IX officer.
  - Institutions with with sworn law enforcement officers may need to negotiate timing and information-sharing based on the law enforcement's role with criminal investigations and state laws.



© 2016, ATIXA. All rights reserved.

194

## PREVENTION AND REMEDATION

- Gender Discrimination
- Sexual Harassment
- Sexual Assault
- Stalking
- Intimate Partner/Relationship Violence
- Bullying/Cyberbullying



© 2016, ATIXA. All rights reserved.

195

## Prevention And Remediation of Gender Discrimination

- Prohibition of:
  - Sexual misconduct.
  - Gender discrimination.
  - Sexual harassment.
  - Retaliation.
  - Intimate partner/relationship violence.
  - Stalking.
- Applies to other behaviors when gender-based.
- Obligation to recognize and respond consistent with Title IX.



© 2016, ATIXA. All rights reserved.

196