



THE TEXAS  
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# Advanced Title IX Training

## Introduction to Case Study

**Darren G. Gibson, Shareholder**

Littler Mendelson P.C.  
November 7, 2024



LSCPA



# Introduction to Case Study



## Maxient Report: November 4, 2024

- I am Sophia, a junior in Theatre, and I am making a complaint against Theatre Professor John Williams. This all started last fall, when he started making inappropriate sexual comments during our private lessons. Over time, he started touching me, like rubbing my shoulders or touching my back and stomach when making a point about breathing or movement. I never asked him to do this, and it made me very uncomfortable.
- John's attention became more intense as the semester ended, and he initiated a sexual relationship during finals week. I wasn't into this, but he said it would be good for my acting and singing, as a sexual experience would help me learn how to express intense emotions through physical connections. We had sex at his office and at my off-campus apartment through the spring. Once, a janitor caught us in the act.



## Maxient Report: November 4, 2024 – continued

- Also, John is an alcoholic, and he would always bring alcohol and pot to my apartment. We would get drunk and high before having sex. He knew he had to get me really wasted to have sex so that I couldn't say no. He also sent me photos of his erections, which I didn't want.
- Over the summer, he started freaking out about cheating on his wife. I just wanted it to be over, so I told him he had to stop. He said he loved me and would leave his wife, but I was done. I broke it off in early August, and he became very upset. He refused to talk and ghosted me on social media.
- I went home for a couple of weeks, and I reconnected with my old high school boyfriend. He's been very understanding of the whole situation.



## Maxient Report: November 4, 2024 – continued

- When I got back to campus, John started harassing and stalking me. He started spreading false rumors around the Department about me being a liar and a whore, and he would drive by my apartment at night to see if I was at home alone. Once, another professor was over for pizza to talk about the situation, and John left a note on his car accusing him of having an affair with me.
- He also left cruel notes on my car while I was in class accusing me of being a liar and a whore for alleging sleeping with this other professor and cheating on my new boyfriend.



## Maxient Report: November 4, 2024 – continued

- I just want him to stop and go away. The other professor I spoke to in September suggested I file a complaint, but John is very influential in the theatre community, and he could ruin my career and future, so I waited to see if he would go away. I think other theater faculty also knew what was going on but did nothing.
- I can't take the stalking and harassment anymore. It keeps getting worse. He even contacted my new boyfriend under an alias, threatened him, and called me a cheating whore.
- I am starting to get scared, and I just want him to leave me alone.



## Respondent's Response to Notice: November 5, 2024

- Dear Title IX Coordinator: I was shocked by the allegations in the investigation notice. I have known Sophia since the spring of 2023, when she was in my Introduction to Acting class. I continued to teach her last fall in Advance Acting class and in one-on-one Voice Studio lessons. Even though she was very flirty, I never would never make inappropriate sexual comments to a student. Of course, certain theatre content is sexual, requiring that you engage the material. If I recall, we were working on numbers from Hair and Chicago, which both have overtly sexual themes.
- In the spring, we started seeing each other when I was no longer her teacher, eventually leading to a sexual relationship, which I believe does not violate University policy. We did not have sex while she was my student. At no point did Sophia ever suggest the sex wasn't consensual, and she wasn't "wasted" when we had sex.



## Respondent's Response – continued

- Over the summer, I realized that I was not being fair to my spouse or my family, and I decided to end the relationship. Sophia was very upset, and she threatened to share personal photos I had shared with her.
- Despite her threats, I decided I couldn't go on any longer. I broke it off with Sophia and came clean to my wife. We are working through the ramifications to our marriage and going to couples counseling.
- But recent events have made it worse. In the past week, I found out Sophia has shared my personal, intimate photos on social media and with students to get me cancelled. She also has spread false rumors that I assaulted her and that our sexual relationship was not consensual. A friend said that sharing personal photos is revenge porn and a crime in Texas.





## Respondent's Response – continued

- If anything, I am the victim of harassment here. Surely the University will not tolerate criminal revenge porn by a student against a professor. As for the alleged harassment, stalking, and leaving notes on her car, I have no idea what she is talking about. I would never do anything like that to a student.
- But it doesn't surprise me, as she likes to surround herself with drama. Since coming back this fall, other students have started complaining to me about her lies and drama. And I've heard she slept with another professor and also got back with an old boyfriend around the same time. I also heard she's been cheating on her boyfriend with another Theatre student. I would suspect the notes and harassment has something to do with all the drama in her life and the way she treats other people.
- I stand ready to defend myself against these false accusations.



# Applying Policy to Case Study



# Intake and Confidentiality

## First Steps:

- Assess the potential allegations in the complaint.
  - Sexual Harassment, Sexual Assault, Stalking (and Consensual Relationship Policy?) against John
  - Cyberstalking against Sophia
  - Failure to Report against second professor
- Determine relevant parties.
  - Sophia, Complainant and Counter Respondent
  - John Williams, Respondent and Counter Complainant
  - Second Theatre Professor, Witness and Potential Respondent
  - New Boyfriend, Witness
  - Janitor, Witness



# Intake and Confidentiality

- Contact Sophia and John to discuss:
  - Supportive measures
  - Grievance process and copy of policy
  - Investigation process and options to report to law enforcement
  - Option to proceed with Formal Complaint
  - Confidentiality and disclosure of information
  - Contents of report and additional information regarding reported incidents
  - Possibility of informal resolution (not applicable here)
  - Preservation of evidence
  - Refer to counseling and resources



# Assessment of Case Study Allegations

Parties	Allegation	Relevant Title IX / Non-Title IX Violation
C: Sophia R: John	Unwelcome sexual advances and touching during private lessons	Title IX Sexual Harassment
C: Sophia R: John	Possible sexual assault at his office (unclear)	Title IX Sexual Harassment
C: Sophia R: John	Possible sexual assault at her off-campus apartment	Non-Title IX Sexual Assault
C: University R: John	Sexual relationship with Student	Consensual Relationship Policy
C: Sophia R: John	Driving by her house, leaving harassing notes for her and second professor, and contacting boyfriend	Title IX and Non-Title IX Stalking (both on and off campus) Title IX Sexual Harassment (impact on educational environment)
C: John R: Sophia	Sending personal pics to friends and via social media	Sexual Intimidation and Cyberstalking (likely Non-Title IX Sexual Misconduct)
C: University R: Second Prof.	Second Professor failure to report	SB212 violation / Non-Title IX Sexual Misconduct





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# Advanced Title IX Training

Overview of TSUS's Sexual Misconduct  
Policy & Procedures

**Melissa J. Ackie, Associate**

Littler Mendelson P.C.  
November 7, 2024



LSCPA



## System Policies Appendix A-6 — Legal Disclaimer

### This training is meant to summarize TSUS Sexual Misconduct Policy and Procedures.

- This training should not be a substitute for reading TSUS Sexual Misconduct Policy and Procedures and related material.
- The text of this training does not quote the full language of the TSUS Sexual Misconduct Policy and Procedures, and the language of the Policy and Procedures governs.
- For a complete understanding of the TSUS Title IX policy and grievance process, please refer to TSUS Sexual Misconduct Policy and Procedures and supporting materials.
- TSUS Sexual Misconduct Policy updated August 2022







# Agenda

- ✓ **Purpose and scope of TSUS's Policy under the 2020 Title IX regulations**
  - ❑ Important Definitions
  - ❑ Key Provisions
  - ❑ Supportive Measures (3.8)
  - ❑ Informal Resolution (3.9)
  - ❑ Confidentiality (3.15)
  - ❑ Remedies and Sanctions (3.11 & 3.12)



## Purpose of Title IX

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

20 U.S.C. § 1681, *et seq.*



## Scope of Title IX – Sex Discrimination

An individual cannot be treated differently on the basis of their sex in regard to:

- Recruitment, admissions, and counseling
- Financial assistance
- Athletics
- Sex-based harassment (including sexual misconduct)
- Treatment of pregnant and parenting students
- Discipline
- Single-sex education
- Employment



## Scope of Title IX

- Title IX applies to sexual misconduct that occurs where:
  - Complainant (alleged victim) is enrolled in classes, participating in the institution's activities, employed by the institution, or attempting to participate in the institution's programs or activities; and
  - The alleged conduct occurred in an educational program or activity; and
  - The alleged conduct qualifies as Title IX Sexual Harassment; and
  - The alleged conduct occurred against a person in the United States.

34 C.F.R. § 106.30



## Scope of Title IX – Educational Program or Activity

- Any location, event, or circumstance over which the recipient exercises substantial control over both the respondent and the context in which the sexual harassment occurs.
- Includes all education programs or activities, whether occurring on or off-campus, and any building owned or controlled by a student organization that is officially recognized by a postsecondary institution (such as a fraternity or sorority house).

34 C.F.R. § 106.44(a); *Sexual Misconduct Policy, Glossary* at page 54



## Matters Outside the Scope of Title IX

- Off-campus conduct (where there is lack of substantial control).
- Conduct outside the U.S.
- Examples of matters outside scope:
  - Domestic violence between two employees that occurs at a private residence off campus
  - Sexual assault of student during study abroad
  - Sexual assault of post-doc at conference where respondent from another institution
  - Stalking of faculty member off campus by person not connected to university



## Addressing Matters Outside the Scope of Title IX

Other misconduct procedures continue to be available to students and employees for matters that are not required to be addressed by Title IX.

For example:

- Non-Title IX provisions of the Sexual Misconduct Policy
- *Chapter VI, Paragraph 5, Student Conduct & Discipline*
- Relevant provisions of *Chapter V, Component Personnel*
  - Depends on employee's status (e.g., staff, tenured faculty, administrator)



# Agenda

- Purpose and scope of TSUS's Policy under the 2020 Title IX regulations
- ✓ **Important Definitions**
- Key Provisions
- Supportive Measures (3.8)
- Informal Resolution (3.9)
- Confidentiality (3.15)
- Remedies and Sanctions (3.11 & 3.12)







# Sexual Misconduct

- **Sexual Misconduct** is a broad term encompassing a range of non-consensual sexual activity or unwelcome behavior of a sexual nature.
  - The term includes but is not limited to Sexual Assault, Sexual Exploitation, Sexual Intimidation, Sexual Harassment, Domestic Violence, Dating Violence, and Stalking.
- Sexual Misconduct can be committed by men or women, strangers or acquaintances, and can occur between or among people of the same or opposite sex.
- This term also includes Title IX Sexual Harassment.

*Sexual Misconduct Policy, Glossary at page 59*



# Title IX Sexual Harassment

- **Title IX Sexual Harassment** refers to Sexual Misconduct that meets one or more of these three types of behavior:
  - (i) A Component's Employee conditioning provision of an aid, benefit or service of the Component on an individual's participation in unwelcome sexual conduct ("quid pro quo" harassment which may be express or implied and need not be "severe" or "pervasive" as a single incident is inherently "offensive" and jeopardizes equal educational access);
  - (ii) Unwelcome conduct determined by a reasonable person to be so severe, pervasive and objectively offensive that it effectively denies a person equal access to the Component's Education Program or Activity; or
  - (iii) "Sexual Assault," "Dating Violence," "Domestic Violence," or "Stalking" as defined in referenced statutes.



# Non-Title IX Sexual Harassment

- **Non-Title IX Sexual Harassment**, or **sexual harassment under other applicable state and federal laws**, means unwelcome sex-based verbal or physical conduct that:
  - In the employment context—unreasonably interferes with a person’s work performance or creates an intimidating, hostile, or offensive work environment; or
  - In the education context—is sufficiently severe, persistent, or pervasive that the conduct interferes with the student’s ability to participate in or benefit from Education Programs or Activities at a post-secondary educational institution.

*Sexual Misconduct Policy, Glossary at page 58-59*



# Retaliation

- **Retaliation** means any adverse action threatened or taken against a person because he or she has filed, supported, or provided information in connection with a Formal Complaint of Sexual Misconduct.
- Retaliation includes direct and indirect intimidation, threats, and harassment.
  - Code of conduct violations that arise out of the same facts or circumstances as the Formal Complaint or Report of Sexual Misconduct constitute retaliation if filed to interfering with any right or privilege secured by Title IX or this Policy.

*Sexual Misconduct Policy, Glossary at page 55-56*



# Agenda

- Purpose and scope of TSUS's Policy under the 2020 Title IX regulations
- Important Definitions
- ✓ **Key Provisions & Foundational Concepts**
- Supportive Measures (3.8)
- Informal Resolution (3.9)
- Confidentiality (3.15)
- Remedies and Sanctions (3.11 & 3.12)



# Equitable Treatment

“A Component’s response to an allegation of Sexual Misconduct must treat Complainants and Respondents *equitably* by offering Supportive Measures to Complainants and Respondents, and by following a grievance process as described herein against a Respondent prior to the imposition of any disciplinary sanctions or other actions that are not Supportive Measures.”

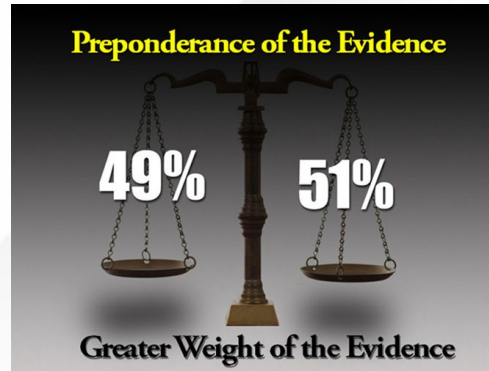
- All relevant evidence must be objectively evaluated.
- Credibility determinations cannot be based on a Party’s status as a Complainant or Respondent.
- All Parties and participants must be treated fairly—with dignity, respect, and sensitivity; and without bias, prejudice, or reliance on stereotypes.

*Sexual Misconduct Policy, Section 3.1*



# Standard of Evidence

- The standard of evidence is a preponderance of the evidence.



- The Respondent is presumed not responsible for the alleged conduct until a determination is made at the conclusion of the Grievance Process.

*Sexual Misconduct Policy, Section 3.2*



# Conflict of Interest

A conflict of interest is competing considerations that compromise objectivity.

- Prohibited for Coordinators, Investigators, Decision Makers of any level, Informal Resolution Facilitators, and Campus Administrators

Ways to avoid a conflict of interest:

- Don't prejudge the facts or assume outcomes based on Party status.
  - Respondents wouldn't be accused if they weren't guilty ✘
- No personal relationships with a Party.
  - Decision Maker mentors Respondent ✘
  - Appellate Authority supervises Complainant ✘
- Ensure sufficient separation in roles during the process.
  - Decision Maker facilitated the Informal Resolution ✘

*Sexual Misconduct Policy, Section 3.3*





# Prohibition on False Information

- An individual found who knowingly makes a false Complaint or Report, knowingly provides materially false information to a Component official, or intentionally misleads Component officials during any proceeding under this Policy **shall** be subject to disciplinary action up to and including dismissal or separation from the College.
  - Charging an individual with a code of conduct violation for making a materially false statement is **not** retaliation.
- A determination regarding responsibility alone is not sufficient to conclude that any party or witness made a materially false statement in bad faith.

*Sexual Misconduct Policy, Section 3.7*





# Agenda

- Purpose and scope of TSUS's Policy under the 2020 Title IX regulations
- Important Definitions
- Key Provisions
- ✓ **Supportive Measures (3.8)**
- Informal Resolution (3.9)
- Confidentiality (3.15)
- Remedies and Sanctions (3.11 & 3.12)





## What Are Supportive Measures?

- Include non-disciplinary, non-punitive, individualized services offered to restore or preserve equal access to the Educational Program or Activity to a Party as appropriate, available, and without fee or charge to the Party.
  - May be offered before or after the filing of a Formal Complaint or where no Formal Complaint has been filed.
- Immediate and appropriate corrective action, including measures designed to protect the safety of all Parties or the Component's educational environment, or deter Sexual Harassment.
- Title IX Coordinator directs effective implementation and duration.
  - Measures can remain in place even after a Determination is made.

*Sexual Misconduct Policy, Glossary at page 59*





# Types of Supportive Measures

- Some options for Supportive Measures include:
  - Mutual contact restrictions between the Parties
  - Counseling
    - The same counselor should not see both the Complainant and Respondent if possible.
  - Modification of work or class schedules
  - Extensions on deadlines
  - Changes in work or housing locations
  - Campus escorts, increased security, increased monitoring of certain areas



## Supportive Measures – Best Practices

- Offer promptly and equitably.
  - Inform Complainant of availability at first contact verbally and in writing.
  - Contact Respondent once report is made.
- Keep the process interactive throughout grievance process.
- Consider all possible impacts
  - Fact specific; each case is unique.
  - Neither Party can be unreasonably burdened.
- Maintain confidentiality to the extent possible.
  - Obtain prior written approval if outside parties are informed.
- Document outreach efforts, discussions with parties, and measures taken.



# Emergency Removals

- Removing Respondents allowed on an emergency basis when:
  - Individualized safety and risk analyses conducted;
  - Allegations raise immediate threat to anyone’s physical health or safety;
  - Provided notice and an immediate opportunity to challenge decision;
    - Hearings *not* required for removal challenges
  - Pertinent disability laws considered; and
  - Applicable System Rules and Regulations followed.
- Emergency actions must be the least restrictive under the circumstances.





# Agenda

- Purpose and scope of TSUS's Policy under the 2020 Title IX regulations
- Important Definitions
- Key Provisions
- Supportive Measures
- Informal Resolution (3.9)**
- Confidentiality (3.15)
- Remedies and Sanctions (3.11 & 3.12)



# An Overview of Informal Resolution

An alternative to the Grievance Process that may be offered and facilitated by the Component following the filing of a Formal Complaint and upon the *voluntary*, written consent of the parties.

- Not all situations are appropriate for Informal Resolution.
- Both Parties must consent.
- Statements made during Informal Resolution cannot be used for or against either Party if Informal Resolution is unsuccessful.
- The Grievance Process resumes if Informal Resolution is unsuccessful.





## Informal Resolution– Best Practices

- **Never** appropriate when Complainant-student alleges Respondent-employee sexual harassment.
  - Consider propriety in complaints of violence, stalking, or when a Respondent has prior Informal Resolution Agreements.
- Explain consequences of participation to Parties in a detailed notice.
  - Have the Parties provide signed, written approval before the process.
- Facilitator should be experienced with informal resolution techniques.
  - Trained, preferably certified where applicable (e.g., mediators).



## A Final Thought on Informal Resolution....For Now

- Ensure individualized process and resulting Agreements (if any).
  - Consider Party needs, underlying facts, specific allegations.
  - Discipline allowed where appropriate.
- Get another set of eye on Agreement before approving.
  - Have HR review when an employee is a Party.
  - Have the Dean of Students review when a student is a Party.
- Disciplinary action possible if non-compliant with Agreement's terms.
  - Confirm Party understanding before they sign.



# Agenda

- Purpose and scope of TSUS's Policy under the 2020 Title IX regulations
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- Confidentiality (3.15)**
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# Confidentiality

- Confidential Reports
  - Made to a Confidential Employee.
  - The Complainant's identity can remain secret if requested.
    - Only the **type** of violation is reported to the Title IX and Clery Act Coordinators.
  - Does not initiate a Formal Complaint.
- Formal Complaints
  - Identities of the Parties and participants withheld *to the extent possible*.
    - Disclosed to provide supportive measures, conduct the process, carry out Title IX's purpose.
  - Breaches of confidentiality can result in disciplinary action.
    - Cannot interfere with the gathering or presenting evidence.



# Confidentiality

- Maintain Complainant's confidentiality as circumstances and laws permit.
- Complainant's identity will be disclosed to:
  - Component employees necessary to conduct and resolve investigations;
  - Respondents;
  - Witnesses;
  - Healthcare providers in emergency situations; and
  - Law Enforcement (if criminal investigation).
- Either Party's Supportive Measures shall be kept confidential "to the extent allowed by law and that maintaining confidentiality will not impair the ability to provide the measures."





# Agenda

- Purpose and scope of TSUS's Policy under the 2020 Title IX regulations
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- Informal Resolution (3.9)
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# Remedies & Sanctions

Remedies and Sanctions are measures imposed if Respondent Responsible.

Measure	Recipient	Purpose
Remedies	Complainant	Restores or preserves access to Educational Program or Activity
Sanctions	Responsible Respondents	Disciplinary measures proportionate to misconduct's gravity

- Remedies and Sanctions **can** burden and discipline a Respondent.
- Pause implementation if determination appealed until appeal's conclusion.

*Sexual Misconduct Policy, Sections 3.11, 3.12*



# Remedies

- The Decision Maker must note in the written decision IF remedies will be provided to the Complainant but does not have to identify them.
- The Title IX Coordinator is responsible for implementing Remedies.
  - Works with the Complainant to develop Remedies.
- Appropriate remedies depend on the facts and circumstances of the situation and Complainant's needs.
- There can be overlap with the Supportive Measures.





## Sanctions (examples, not exhaustive)

### Students

- Expulsion (if warranted)
- Suspension (including deferred)
- Written warning
- Withholding official transcript or degree
- Withdrawal from a course with a grade of W, F, or WF
- No-contact order
- Mandatory counseling
- Relevant training
- Restitution

### Employees

- Termination
- Demotion
- Suspension without pay
- Withholding promotion or pay increase
- Reassignment
- No-contact order
- Relevant training
- Future employment bar
- Recommendation to revoke tenure



# Questions





# Break







THE TEXAS  
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# Advanced Title IX Training

Sexual Misconduct Grievance Process  
Under TSUS Policy

**Darren G. Gibson, Shareholder**

Little Mendelson P.C.  
November 7, 2024



LSCPA



# Agenda

- Reporting Incidents of Sexual Misconduct
- Classifying Sexual Misconduct
- Title IX Sexual Harassment Grievance Process
- Non-Title IX Grievance Process





# Reporting Sexual Misconduct – Complainant Options

- The Component supports, encourages, and will assist an alleged victim of Sexual Misconduct (“Complainant”) to report an incident.
- Complainants can file a report:
  - In person with a Responsible Employee,
  - By mail,
  - By e-mail,
  - Through a website provided by the Component,
  - Under a pseudonym in a law enforcement report,
  - Anonymously, although an anonymous report is difficult—if not impossible—to investigate.

*Sexual Misconduct Policy, Section 4.2*



# Complainant Reporting – Who Can Receive a Report

- Responsible Employee: Almost all employees of the TSUS or Component are Responsible Employees when engaged in the scope of employment.
  - Confidential Employees are not Responsible Employees.
- Title IX Coordinator: The official designated by the Component to oversee Title IX compliance.
  - Includes Deputy Title IX Coordinators
- Official with Authority: Anyone who has authority to institute corrective measures on behalf of the Component.
- Campus Security Authority: Individuals responsible for accurately reporting crime information under the Clery Act. This includes the Component Police and Security.
- Local Law Enforcement: A Complainant victim may report an incident to local law enforcement. The Complainant may request assistance from the Component.

*Sexual Misconduct Policy, Section 4.2; Tex. Educ. Code § 51.252*





## Complainant Reporting – Preserving Evidence

- TSUS recognizes importance of Title IX Misconduct Complainants going to a hospital for treatment and preservation of evidence, if applicable, as soon as practicable after the incident.
  - Obtaining an immediate medical exam, while preferable, is not always practicable.
  - A victim can obtain a Sexual Assault Forensic Exam (SAFE) by a Sexual Assault Nurse Examiner (SANE) within four days of the incident at the nearest emergency room.

*Sexual Misconduct Policy, Section 4.3; Tex. Code Crim. Proc. § 56A.303*



## Complainant Reporting – Preserving Evidence

- TSUS also recognizes a Complainant's right to choose whether to report an incident to law enforcement.
  - The SANE will collect physical evidence for a criminal investigation with the victim's consent; but victim *does not need to contact police or intend to contact police to obtain a SAFE.*
- **Supportive Measures are available even if no Report is filed.**

*Sexual Misconduct Policy, Section 4.3; Tex. Code Crim. Proc. § 56A.303(c)*



# Employee Mandatory Reporting

- Prompt reporting to Title IX Coordinator required when a Responsible Employee, acting in the scope of employment, witnesses or receives information about Sexual Misconduct.
- Before Complainant makes a disclosure:
  - Disclose mandatory reporting obligation;
  - Refer to Confidential Employee if anonymity and confidentiality requested.
- Components **must** terminate Responsible Employees who knowingly:
  - Fail to report Sexual Misconduct when required.
  - Make a malicious false report of Sexual Misconduct.



# Employee Mandatory Reporting

- Reporting obligation applies for Title IX Sexual Misconduct and less severe forms of sexual harassment.
- Failure to promptly report is a violation of Texas law.
- A knowingly false report is also a violation of Texas law.

*Tex. Educ. Code § 51.252*





## Employee Mandatory Reporting – Scenarios

- While eating dinner at a local restaurant over spring break, a professor overhears another Component employee tell his companion that his supervisor has been making sexual advances and groped him the week prior. Does the eavesdropping professor need to report this to the Title IX Coordinator?
- Does anything change if the professor overheard the other employee's disclosure while attending an out-of-town educational conference?



# Employee Mandatory Reporting – Exceptions

- Responsible Employees are not required to make a report of Sexual Misconduct when:
  - Employee was the victim of the conduct; or
  - Employee receives information through disclosure at a public awareness event sponsored by a Component or affiliated student organization.

*Sexual Misconduct Policy, Section 4.6*



## Employee Mandatory Reporting – Confidential Employees

Confidential Employees are employees with occupation-imposed confidentiality requirements.

- *E.g.*, counselors, clergy, healthcare providers
- Reporting exemptions only apply when acting in a confidential capacity.
- Confidential Employees provide crisis assistance and resource information:
  - *E.g.*, Counseling, Victim Advocacy, Legal Assistance, Criminal Prosecution, Component Title IX procedures, Supportive Measures
- Provide Confidential Employee contact information in multiple, easy to find locations.



## Confidential Employees – Scenarios

- A student tells their Student Counseling Center counselor that she has been calling her ex multiple times a day and following him around campus since they broke up two weeks ago. Does the counselor need to report the incident to the Title IX coordinator?
- Does anything change if the counselor overhears a coworker telling a friend that the coworker's ex has been following her around campus since they broke up while the counselor is grabbing water from the breakroom?





# Classifying Sexual Misconduct

Title IX Coordinator reviews and classifies all allegations.

## **Title IX**

- Meets Title IX Sexual Harassment definition;
- Occurred against a person participating or attempting to participate in an educational program or activity; and
- Occurred in the United States.

## **Non-Title IX**

- Sexual Misconduct that does not meet requirements of Title IX Sexual Misconduct.

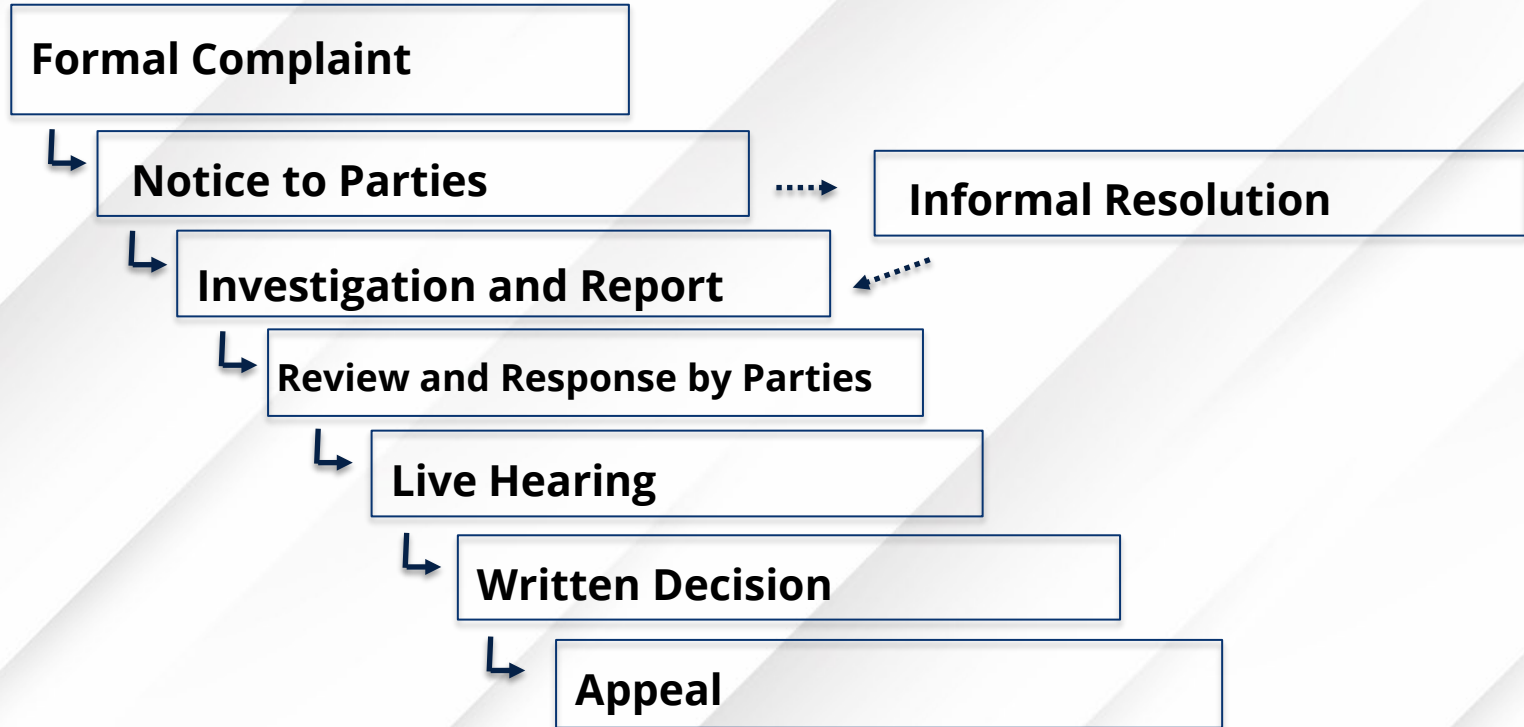


# Mandatory and Permissive Dismissals under Title IX

- The Title IX Coordinator must dismiss a Complaint under Title IX if:
  - Described conduct would not constitute Title IX Sexual Misconduct;
  - Unrelated to a Component's Education Program or Activity; or
  - Occurring outside of the United States.
- The Title IX Coordinator may dismiss a Complaint if:
  - A Complainant requests, in writing, to withdraw the Complaint or an allegation
  - The Respondent is no longer enrolled or employed by TSUS;
  - Circumstances prevent gathering sufficient evidence to reach a determination.
- Complaints dismissed under Title IX may be pursued under the Non-Title IX Sexual Misconduct Provisions or applicable code of conduct processes.



# Title IX Sexual Harassment Grievance Process





# Formal Complaint

Formal Complaint initiates the Grievance Process.

Formal Complaints originate with:

- A Report filed in person, by mail, or e-mail to the Title IX Coordinator;
- An additional method designated by the Component;
- A Formal Complaint signed by the Title IX Coordinator.
  - Signing the Formal Complaint does not make the Title IX Coordinator the Complainant or a Party.

*Sexual Misconduct Policy, Section 7.1-7.2*



# Notice of Investigation

Sent to all Parties upon filing of Formal Complaint. Includes:

- Known details of the allegation:
  - Party identities
  - Description of alleged misconduct
  - Approximate date and location of misconduct
- Information about the grievance process,
- Availability of informal resolution,
- Respondent's presumption of non-responsibility pending Determination,
- Parties' right to an Advisor of their choice,
- Right to inspect and review evidence, and
- False statements prohibition.
  - Covers verbal and written statements and submission.



## The Advisor's Role

- Advisors provide support, guidance, and advice throughout Process.
- Advisors permitted to attend meetings, interviews, and proceedings.
  - Advisor participation prohibited—usually.
  - Participating essential during Live Hearing; Conducts cross examination!
- Advisors can be anyone the Party chooses.
  - Can be an attorney, but not required.
  - Conflicts of interest allowed.
  - Parties can change their advisor.

The Advisor's Role will be discussed in detail during Session 6.



# Consolidation of Complaints

If the arising from *the same facts and circumstances*, a Title IX Coordinator may consolidate Formal Complaints:

- against more than one Respondent,
- by more than one Complainant against one or more Respondents, or
- by one party against the other party, where the allegations of Title IX Misconduct arise out of the same facts or circumstances.





# Investigations – Conducting the Investigation

- Component bears burden of proof and gathering sufficient evidence to determine responsibility.
- Investigators gather evidence, interview Parties and witnesses, and conduct site inspections if necessary.
  - Provide Parties equal opportunity to present witnesses and evidence.
  - Privileged information is not evidence unless authorized by privilege-holder.
- Investigator sends written notices with date, time, location, and meeting purpose to invited Parties or Witnesses.
  - Provide enough advanced notice so the Party or Witness can prepare.





# Investigations – Conducting the Investigation

- Investigator provides Parties and their Advisors opportunity to review and inspect directly related evidence at fact-finding conclusion.
  - “Directly related” encompasses more than “relevant.”
  - Provide even if evidence appears irrelevant.
- Provide for review in electronic format or hard copy.
  - Remind of confidentiality obligations.
- Parties get 10 calendar days to inspect, review, and respond to evidence.
  - Party’s written response must be considered in Investigative Report.

*Sexual Misconduct Policy, Section 7.7.6*





# Investigations – The Investigation Report

- Investigator will prepare a Report that includes:
  - A statement of the allegation(s),
  - Parties involved,
  - Summary of **relevant** evidence reviewed, and
  - Detailed report of related events.
- Investigator submits Report to Title IX Coordinator to ensure all investigation elements complete.





# What is Relevant?

According to Federal Rule of Evidence 401, evidence is relevant if:

- It has any tendency to make a fact more or less probable than it would be without the evidence; and
- The fact is of consequence in determining the action.

**RELEVANCE = PROBATIVE + MATERIAL**





# Notice of Hearing

- Component distributes Investigative Report and Hearing Notice to Parties and their Advisor.
  - Parties get at least 10 calendar days to review before the Live Hearing.
- At least 3 days before Live Hearing, the Parties provide the following:
  - Written response to Investigative Report;
  - Witnesses appearing on Party's' behalf;
  - Documents or other evidence to be used at the hearing;
  - Direct and cross examination questions for opposing Party and witnesses.

*Sexual Misconduct Policy, Section 7.9-7.10*





# Live Hearing Procedure

- Live Hearings with cross examination required when Formal Complaints not dismissed or resolved through informal resolution.
- Components create audio or audiovisual recording Live Hearing.
  - Parties may review or inspect the Recording or transcript upon request.





# Live Hearing – Location and Virtual Hearing

- Live hearings may be conducted with all parties physically present in the same geographic location *or virtually*.



- If the hearing is virtual, or with the parties located in separate rooms, TSUS must use technology that enables all participants to see and hear the party or the witness answering questions simultaneously.



## Live Hearing – Case Presentation and Questioning Witness

- Each Party may present their case by giving a statement, answering questions, presenting evidence and witnesses, and cross-examining the other Party through their Advisor.
  - If a Party does not have an Advisor, the Component shall provide one for the limited purpose of conducting cross-examination at no cost to the Party.

*Sexual Misconduct Policy, Section 7.11, 7.14*



## Live Hearing – Relevance Determinations

- A Party or Witness can only be asked relevant questions during the Live Hearing.
- The Decision Maker determines a question's relevance in real time.
  - The question is asked;
  - The Decision Maker issues a determination of relevance;
  - If relevant, the individual being questioned can answer.







## Live Hearing – Cross Examination

- 2020 Title IX Regulations initially excluded any statement made by a Party or Witness if that individual would not submit to cross-examination.
  - *i.e.*, Police reports excluded if the reporting officer did not attend the Hearing.



- Department of Education is no longer enforcing this rule after a court determined that the rule wasn't properly promulgated.
  - *Victim Rights Law Center v. Cardona*, (D. Mass. July 28, 2021).



## Written Decisions

Following the Live Hearing, the Decision Maker send both Parties a written Determination that includes:

- identification of the allegations;
- description of procedural steps taken in Grievance Process;
- findings of fact supporting responsibility determination;
- conclusions regarding application of policy to facts;
- a determination and rationale regarding responsibility for each allegation;
- any disciplinary sanctions and whether remedies are appropriate; and
- information concerning parties' ability to appeal.

*Sexual Misconduct Policy, Section 7.20*



# Appeals

Both Parties may appeal a Determination of Responsibility, dismissal of a Formal Complaint, or dismissal of any allegation based on:

- A procedural irregularity that affected the outcome;
- New evidence not reasonably available at the time the determination or dismissal was made;
- A conflict of interest or bias of the Title IX Coordinator, Investigator, or Hearing Panel Members; or
- The sanction imposed substantially varied from the range of sanctions normally imposed for similar infractions.

*Sexual Misconduct Policy, Section 7.21*



# Non-Title IX Grievance Process

- ✓ **Focus on key differences**
- ❑ Role of Title IX Coordination in making Findings and Recommended Sanctions to Component Administrator
- ❑ Role of Component Administration in sanctions
- ❑ Disputing Findings or Sanctions
- ❑ Appeals



## Key Differences

- Title IX Coordinator bases Findings on Investigative Report.
  - *Under Title IX, the Investigative Report has no findings, it only summarizes*
- Component Administrator's Sanction decision based on Coordinator's Findings.
  - Under Title IX, Decision Maker determines Sanctions.
- Hearings follows Sanctions only if student-Party disputes a Finding or Sanction.
  - Staff and non-tenure faculty disputes resolved by a Decision Maker.
  - Tenured faculty disputes mainly follow TSUS Chapter V, §4.54 hearing procedures.
    - *Under Title IX, Live Hearings required at post-secondary institutions.*



# Findings and Recommended Sanctions

- Early Title IX and non-Title IX Grievances processes follow same path.
- Noticeable divergence at the Investigative Report stage.
  - Title IX: only a Decision Maker issues findings.
  - Non-Title IX: Coordinator finds by a preponderance of the evidence either:
    - Respondent violated the Policy and the nature of the violation; or
    - Respondent did not violate the Policy.
- Coordinator provides basis for either finding.
  - Coordinator recommends Sanctions if violation found.



# Component Administrator's Role in Sanctions

- An appropriate Component Administrator receives Investigative Report, Findings, and recommended Sanctions if violations found.
  - Students: Dean of Students
  - Faculty: Department Chair
  - Staff: Supervisor in the Respondent's chain of command
- Administrator imposes Sanctions and notifies Respondent, Title IX Coordinator, and Respondent's relevant supervisors of the Sanctions.
  - Notifications not sent to supervisors with appellate authority.
- The Complainant is notified of Sanctions that directly relate to Complainant.



# Disputing Findings or Sanctions – Procedure

The dispute procedure depends on the status of the moving Party.

	Student	Staff
Written Submission Required?	Yes	Yes
Submitted to:	Title IX Coordinator	Chief Human Resource Officer or designee
Deadline	7 calendar days	5 calendar days
Process	Live or virtual hearing, but parties not compelled to attend.	No hearing; Written submissions to Decision Maker.
Questions / Response	Decision Maker asks pre-submitted questions.	Non-moving Party may submit response within 5 calendar days of receiving materials.
Possible Outcomes	Decision Maker can uphold, reject, modify, or remand the matter.	





# Disputing Findings or Sanctions – Procedure

The dispute procedure depends on the status of the moving Party.

	<b>Non-Tenured Faculty</b>	<b>Tenured Faculty</b>
Written Submission Required?	Yes	Yes
Submitted to:	President	Provost
Deadline	30 calendar days	5 calendar days
Sanctions supporting appeal:	Non-reappointment or termination	Full-time salary reduction, demotion, or termination
Process	Meeting between faculty and President-designated Hearing Officer.	Live or virtual hearing, but non-moving party need not attend.
Questions / Response	Hearing Officer asks pre-submitted questions.	
Possible Outcomes	President can uphold, reject, modify, or remand the matter.	President can uphold, reject, or remand the matter.



# Appeals

Title IX and Non-Title IX Grievances follow the same grounds for appeal. Only Student or Faculty Parties may appeal a determination in Non-Title IX grievances.

Student	Faculty
No hearing, decision is <b>final</b> .	
Appeals must be in writing and state grounds for appeal, and be filed within:	
5 calendar days of hearing decision	30 calendar days of hearing decision
Submitted to Chief Student Affairs Officers	Submitted to System Administration Office
Response following notice of appeal:	
from non-moving Party within 5 calendar days	from President within 30 calendar days
Appellate Authority approve, reject, modify, or remand	TSUS Board makes final decision

Final written appeal decision issued to Parties.



# Questions







THE TEXAS  
STATE  
UNIVERSITY  
SYSTEM™

# Advanced Title IX Training

## Complex Issues in Intake and Investigation Phase

**Darren G. Gibson, Shareholder**

Littler Mendelson P.C.  
November 7, 2024



LSCPA



# Agenda

- When should Title IX Coordinator sign a Formal Complaint?
- Supportive Measures when there is no Formal Complaint
- Combined Title IX and non-Title IX allegations and multiple or overlapping policy violations
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# Title IX Coordinator Signing a Formal Complaint

Recognized as option in definition of Formal Complaint, 34 CFR 106.30:

- “Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party under this part or under § 106.45, and must comply with the requirements of this part, including § 106.45(b)(1)(iii). ”





# Title IX Coordinator Signing a Formal Complaint

- Regulations provide little guidance as to when a Title IX Coordinator should sign a Formal Complaint. Preamble defers to discretion.
- Potential factors to consider:
  - Seriousness of the alleged incident;
  - Whether University has received other reports of sexual misconduct committed by the respondent or indications of serial predation;
  - Whether alleged incident poses a risk of harm to others;
  - Whether allegations involved violence, use of weapons, or other similar factors; and
  - Any other factors University determines relevant.

*See Preamble p. 702; H.B. 1735, TEC 51.285(a).*





# Things To Consider Before Signing Formal Complaint

- Is complainant willing to participate?
- Does an investigation go against the wishes of a complainant?
  - If so, is investigation nevertheless justified?
- Will investigator be able to gather evidence sufficient to for decision-maker to make a determination?
- Does conduct, even if true, rise to the level of Title IX Sexual Harassment?
- Are there other means to address reports without invoking Title IX grievance process?





## Hypothetical Example

- Employee A (Admin Asst. to Department Chair) comes to Title IX office and reports being subject to quid pro quo sexual harassment by Department Chair in the form of unwanted touching and groping, explicit text messages, and requests for sexual favors. Employee A has been in position only six months.
- Upon being informed of the Title IX grievance process, including live hearing with cross examination, Employee A states that they do not wish to proceed or participate in investigation. Employee A, a single parent, states they cannot risk the job by reporting and asks report to be kept confidential.
- You offer limited supportive measures in light of confidentiality request (e.g., EAP, other external resources).
- Do you file a Formal Complaint and investigate?



## Hypothetical Example for Title IX Coordinator – Part 2

- Employee B also reports Department Chair's conduct towards Employee A. Employee B also states that a former employee in the same position recounted similar conduct by the Department Chair before quitting six months ago and moving to California.
- Do you file a Formal Complaint?
- In addition, Employee B reports rumors that Department Chair has a history of having affairs with his own students in violation of the University's consensual relationship policy. Employee B does not know if relationships were consensual or coerced in any way. Employee B can provide names of students.
- Do you file a Formal Complaint and investigate?



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## Obligations: Timing OCR Q&A Supportive Measures

**Does a school have to offer supportive measures to a complainant who has not filed a formal complaint of sexual harassment?**

Yes. The 2020 amendments specify that the school must contact the complainant to discuss the availability of, and to offer, supportive measures, ***regardless*** of whether a formal complaint is filed. A school must also consider the complainant's wishes with respect to supportive measures.



## Obligations: Timing OCR Q&A Supportive Measures

**When does a school  
need to offer  
supportive  
measures to a  
Respondent?**

Only after a formal  
complaint is filed,  
either by a  
complainant or the  
Title IX Coordinator.



## Obligations: Substance OCR Q&A Supportive Measures

**What are the supportive measures a school must offer to parties?**

A school must offer supportive measures that “are designed to restore or preserve equal access to the [school’s] education program or activity. Measures should be “designed to protect the safety of all parties or the [school’s] educational environment, or deter sexual harassment.”



## Obligations: Clery Act OCR Q&A Supportive Measures

**Does the Clery Act require supportive measures?**

Yes. A statement that the institution will provide written notification to victims about options for, available assistance in, and how to request changes to academic, living, transportation, and working situations or protective measures. The institution must make such accommodations or provide such protective measures if the victim requests them and if they are reasonably available, regardless of whether the victim chooses to report the crime to campus police or local law enforcement.





## OCR Scrutinizes Interim Measures

### ***Eastern Mennonite University (VA)***

#### **•Allegation**

University discriminated against a university faculty member by failing to respond appropriately to a report of sexual harassment made against him.

#### **•Finding**

While University found to have investigated report (unsubstantiated findings), University failed to answer faculty member's request for interim measures during investigation, including eliminating the requirement that he be a student advisor during the investigation.

#### **•Remedy**

University agreed to conduct training with an emphasis on interim measures and retaliation and to develop a plan to assess the appropriateness of the university's response to the faculty member including, if necessary, consideration of remedial options.



## Litigation: No Contact Orders and First Amendment Rights *Perlot v. Green*, 609 F. Supp. 3d 1106 (D. Idaho 2022)

**Background:** Law students brought action against president of the University of Idaho and other school officials, alleging that university's issuance of a no-contact order, which forbade them from contacting a queer student with whom they discussed their opposition to same sex marriage at community event in response to instance of anti-LGBTQ+ harassment, violated their rights to free speech and free exercise of their religion in violation of the First Amendment and their due process rights. Plaintiffs moved for a temporary restraining order, preliminary injunction, and expedited hearing.





## Litigation: No Contact Orders and First Amendment Rights *Perlot v. Green*, 609 F. Supp. 3d 1106 (D. Idaho 2022)

**Holdings:** The District Court, [David C. Nye](#), Chief Judge, held that:

- No-contact order was content-based restriction;
- Comments did not constitute sexual harassment under Title IX;
- Imposition of no-contact order was not least restrictive means for accomplishing goal of preventing queer student from hearing disagreeable speech that she deemed sexual harassment;
- No-contact order was not least restrictive means to restrict plaintiffs' speech to accomplish goal of creating harmonious environment amongst students;
- Law students showed likely harm from public university's issuance of no-contact order; and
- No-contact order was issued with virtually no due process.





## Case Study—What Interim Measures Would be Appropriate?

- Prior to Sophia filing a formal complaint?
  - Assisting Sophia filing a report with campus police
  - Counseling for Sophia
  - Change of classes / schedule to avoid John
  - Campus escort services / increased security
- After Sophia files a formal complaint?
  - Mutual no-contact orders
  - Counseling for John
  - Administrative leave for John pending investigation
- After John's response?
  - Assisting John in filing a report with campus police
  - Directive to Sophia not to share John's intimate photos with anyone
  - Other?



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# Classifying Sexual Misconduct

- Title IX Coordinators review and classify Sexual Misconduct allegations as Title IX or Non-Title IX Sexual Misconduct.
- Sexual Misconduct falls under Title IX only if the following is true:
  - Complainant or Respondent connected to Component during incident;
    - ✓ • Employee, enrolled Student, Applicant, Potential Applicant, Program Participant
    - ✗ • Nearby resident just strolling through campus
  - The conduct occurred in Component's Educational Program or Activity;
  - The conduct occurred in United States; and
  - The conduct constitutes Sexual Harassment as defined by Title IX.
- Non-Title IX Sexual Misconduct covers all other Sexual Misconduct.

*Sexual Misconduct Policy, Section 5.1-5.3*



## The Non-Title IX Process

- Unlike Title IX, Title IX Coordinators makes findings and recommend Sanctions based on the Investigative Report.
  - No hearing
- Title IX Coordinators only recommend, not decide, Sanctions.
  - Component Administrators, not Decision Maker, decide Sanctions based on Investigative Report and Findings.
- Sanctions and Remedies still delayed until an appeal's conclusion.
  - Or the appeal deadline if no appeal filed.

*Sexual Misconduct Policy, Sections 8.5-8.8*



# Assessment of Case Study Allegations

Allegation	Relevant Title IX / Non-Title IX Violation
Unwelcome sexual advances and touching during private lessons	Title IX Sexual Harassment
Possible sexual assault at his office (unclear)	Title IX Sexual Harassment
Sexual assault at her <u>off-campus apartment</u>	Non-Title IX Sexual Assault
Sexual relationship	Consensual Relationship Policy?
Driving by her house, leaving harassing notes for her and second professor, and contacting boyfriend	Non-Title IX Stalking Title IX Sexual Harassment (impact on educational environment)
Sending personal pics to friends and via social media	Cyberstalking
Second Professor failure to report	SB212 violation / Non-Title IX Sexual Misconduct





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## What's Severe, Pervasive, and Objectively Offensive?

- Sex-based harassment must be “so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.”
- Title IX requires a plaintiff demonstrate not simply that the harassment affected student's education but that it “had a concrete, negative effect on student's ability to receive an education.”
- Purely de minimis effects are not sufficient.
- Conduct is actionable under Title IX only if it is *based on sex*.
- Must be more than “offensive conduct” that is “inappropriate, immature, and offense” or “teasing or bullying.”



## What's Severe, Pervasive, and Objective Offensive?

- In evaluating cases brought under Title IX, courts also rely on Title VII cases that found harassment if it caused a hostile environment.
- The Fifth Circuit uses a totality of the circumstances test to determine whether the acts are objectively severe, pervasive, and offensive. The Court looks at the:
  - (1) frequency of the acts,
  - (2) severity,
  - (3) physically threatening or humiliating, or mere offensive utterance, and
  - (4) whether it unreasonably interferes with the learning environment.



# What's Severe, Pervasive, and Objective Offensive?

Case from the Fifth Circuit finding alleged conduct sufficient to constitute harassment:

After being allegedly raped by football players at off-campus party, student alleged:

- Classmates called student “whore” and “slut”;
- Classmates asked whether she had sex with multiple people;
- Classmate asked, “How did it feel to be fucked in every single hole of your body?”;
- Classmates excluded her from cheerleading;
- One student asked her the race of the baby she would be having;
- Alleged rapist “wore the pants that he raped [student] in to school, which had [her] blood on them from intercourse, and stood on the lunch table and said, these are the pants that I took [student’s] virginity in.”; and
- Multiple football players called her a liar and told her that she was “going to ruin everything.”

*I.F. v. Lewisville Indep. Sch. Dist.*, 915 F.3d 360 (5th Cir. 2019)



# What's Severe, Pervasive, and Objective Offensive?

Case from the Texas District Court finding alleged conduct sufficient :

- White male student told complainant that she “was only [at University and the Honors College] to fill the black girl quota.”
- Complainant “regularly encounter[ed] white students referring to Jane Doe No. 3 and other African Americans at [University] as [the n-word].”
- Professors “facilitated racist and bigoted conversation” in courses with topics titled “Are people of color discriminated against or do they just commit more crimes?” and “Everyone is a little bit racist.”
- University used her as a minority show piece by regularly soliciting her participation in school activities.

*Doe No. 1 v. Tex. Christian Univ.*, 2021 WL 12288641 (N.D. Tex. Jan. 12, 2021) (same standard under Title VI)



# What's Severe, Pervasive, and Objective Offensive?

Case from the Fifth Circuit finding alleged conduct insufficient:

- Classmate called student “ho” and “would beat her ass if it weren’t for cheerleading” because she was seeing classmate’s ex-boyfriend.
- Classmate wiped away tears from complainant’s face “in a facetious manner”;
- Classmate spread a pregnancy rumor; and
- Classmate smacked ex-boyfriend’s butt while complainant’s holding his hand.
- “J.H. was acting like a typical high-school girl whose ex-boyfriend began dating a younger cheerleader. That is the sort of unpleasant conflict that takes place every day in high schools, and it is not the proper stuff of a federal harassment claim.”

*Sanchez v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156 (5th Cir. 2011)



# What's Severe, Pervasive, and Objective Offensive?

Case from Louisiana District Court finding conduct insufficient:

- Calling another student “fat” and “pig”
- Stealing food and throwing it down dorm hall
- Stealing student’s picture and writing “call for a good time” and posting on Snapchat
- “Play fighting”
- Stealing items and conditioning return on she came to his room and “cuddled with him”
- Calling student repeatedly, even after being blocked, and telling her to “grow up” and be nicer to roommate
- Calling student a “fag”; and
- Grabbing student’s “clothed buttocks” for several second.

*Owens v. La. State Univ.*, 709 F.Supp.3d 245 (M.D. La. 2023).



# What's Severe, Pervasive, and Objective Offensive?

## Case finding conduct insufficient:

- Two statements about a student's national origin over the course of a year. (Same standard.)
  - *Chih-Kai Liao v. Univ. of Tex. San Antonio*, 2024 WL 4564278 (W.D. Tex. Oct. 23, 2024)
- Students making derogatory remarks regarding complainant's sexual orientation.
  - *Henderson v. Bd. of Supervisors of Southern Univ. and A&M College*, 2022 WL 875592 (W.D. La. Mar. 23, 2022)
- Complainant alleged owner of required field internship location hugged her and verbally insulted her on isolated occasions.
  - *Knighton v. Univ. of Texas at Arlington*, 2021 WL 9881105 (N.D. Tex. May 24, 2021)





# Agenda

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## What is Consent?

Consent is an informed and freely and affirmatively communicated willingness to participate in particular sexual activity. Consent can be expressed either by words or by clear and unambiguous actions, as long as those words or actions create mutually understandable permission regarding the conditions of each instance of sexual activity. It is the responsibility of the person who wants to engage in the sexual activity to ensure that s/he has the consent of the other to engage in each instance of sexual activity.

*Sexual Misconduct Policy, Glossary at pages 52-53*



## Component-Considered Consent Factors

- Consent is a voluntary agreement/assent to engage in sexual activity;
- Someone who is incapacitated cannot consent;
- Consent can be withdrawn at any time;
- Past consent does not imply future consent;
- Silence or absence of resistance does not imply consent;
- Consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another.
- Coercion, force, or threat invalidates consent; and
- Being intoxicated or under the influence is never an excuse for engaging in Sexual Misconduct.

*Sexual Misconduct Policy, Glossary at page 53*



## Indications of a Lack of Consent

- Physical force is used or there is a reasonable belief of the threat of physical force;
- When duress is present;
- When one person overcomes the physical limitations of another person; or
- When a person is incapable of making an intentional decision to participate in a sexual act, which could include instances of incapacitation.





# Incapacity

- The state when a person cannot rationally decide whether to engage in sexual activity because he or she lacks ability to give knowing Consent.
  - *E.g.*, understanding the "who, what, when, where, why, or how" of the sexual interaction.
- The temporary or permanent inability to give Consent because drug or alcohol consumption, voluntary or involuntary, renders the individual mentally and/or physically helpless, unconscious, asleep, or otherwise unaware that sexual activity is occurring.
  - Incapacitation is determined through consideration of all relevant indicators of an individual's state.
  - **NOT** synonymous with intoxication, impairment, blackout, or being drunk.
  - Incapacitation is a step beyond drunkenness or intoxication.



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## Domestic Violence in College Living Arrangements— Definition

“Family (Domestic) Violence includes ***felony or misdemeanor crimes of violence committed*** by a current or former spouse or ***intimate partner of the Victim***, by a person with whom the Victim shares a child in common, ***by a person who is cohabitating with or has cohabitated with the Victim as a*** spouse or ***intimate partner or roommate***, by a person similarly situated to a spouse of the Victim under the domestic or family violence laws of the State of Texas, or by any other person against an adult or youth Victim who is protected from that person’s acts under the domestic or family violence laws of the State of Texas.”



## Domestic Violence in College Living Arrangements— Definition

- Included within definition of Title IX Sexual Harassment.
- “Family (Domestic) Violence includes ***felony or misdemeanor crimes of violence committed*** by a current or former spouse or ***intimate partner of the Victim***, by a person with whom the Victim shares a child in common, ***by a person who is cohabitating with or has cohabitated with the Victim as a*** spouse or ***intimate partner or roommate***, by a person similarly situated to a spouse of the Victim under the domestic or family violence laws of the State of Texas, or by any other person against an adult or youth Victim who is protected from that person’s acts under the domestic or family violence laws of the State of Texas.”





## Domestic Violence in College Living Arrangements— Definition

Potential examples:

- Physical, non-sexual fight between two roommates.
  - Title IX Sexual Misconduct? No. Not sex-based.
- Physical assault in dorm by girlfriend when boyfriend admits he slept with someone else.
  - Title IX Sexual Misconduct? Yes.
- Threats of physical assault by a graduate student against spouse while both live in University's graduate student housing?
  - Title IX Sexual Misconduct? Yes.



# Agenda

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## Referral to Informal Resolution

- Informal Resolution is an investigation and adjudication alternative.
  - Applies in Title IX and Non-Title IX Misconduct
  - When appropriate, allowed any time before a Live Hearing or Finding
  - Outcomes determined by Parties, not facilitator
- Possible Informal Resolution methods:
  - Mediation
  - Restorative Justice
  - Facilitated Dialogue
  - Shuttle Negotiation

*Sexual Misconduct Policy, Section 3.9, Glossary at pages 55-56*



# Referral to Informal Resolution

Title IX Coordinators cannot facilitate Informal Resolution.

Title IX Coordinators shepherd Informal Resolution by:

- Determining if Informal Resolution is appropriate;
- Informing Parties of availability in writing;
- Explaining rights and consequences to Parties;
  - Parties may withdraw consent and return to the Grievance Process
  - Agreement non-compliance may result in disciplinary action
- Arranging the Informal Resolution; and
- Resuming Grievance Process for Party withdrawal or lack of Agreement.

*Sexual Misconduct Policy, Sections 3.3, 3.9*



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## SB 212 Refresher, Texas Education Code Chapter 51, Subchapter E-2

- Effective January 1, 2020
- Imposes mandatory reporting requirement on any university employee who (see Sec. 51.252):
  - in the course and scope of employment
  - witnesses or receives information regarding an incident
  - reasonably believed to constitute sexual harassment, sexual assault, dating violence, or stalking
  - alleged to have been committed by or against a student or employee
- Mandatory termination and potential criminal penalties for violation
- Mandatory reporting obligations for Title IX Coordinator and Chief Executive
- Potential \$2 million fine from THECB for non-compliance



## SB 212 / Section 51. 252 – Reporting Requirements

“(a) An employee of a postsecondary educational institution who, in the course and scope of employment, witnesses or receives information regarding the occurrence of an incident that the employee reasonably believes constitutes sexual harassment, sexual assault, dating violence, or stalking and is alleged to have been committed by or against a person who was a student enrolled at or an employee of the institution at the time of the incident shall promptly report the incident to the institution's Title IX coordinator or deputy Title IX coordinator.”



## 19 Tex. Admin. Code § 3.5 – Additions to 51.252(a)

- “(1) The employee's duty to report an incident begins on the effective date of these regulations or January 1, 2020, whichever is later;
- (2) The employee is required to report an incident **regardless of when or where the incident occurred**; and
- (3) Institutions may establish **additional reporting avenues** to comply with this section provided that the reports are promptly routed to the Title IX coordinator or deputy Title IX coordinator.”





## SB 212 / Section 51. 252 – Existing Exceptions

- “(d) Notwithstanding Subsection (a), a person is not required to make a report under this section concerning:
  - (1) an incident in which the person was a victim of sexual harassment, sexual assault, dating violence, or stalking; or
  - (2) an incident of which the person received information due to a disclosure made at a sexual harassment, sexual assault, dating violence, or stalking public awareness event sponsored by a postsecondary educational institution or by a student organization affiliated with the institution.”





## 19 Tex. Admin. Code § 3.5 – Adds Exception (d)(3)

- “(3) a sexual harassment, sexual assault, dating violence, or stalking incident in which the person has either learned of the incident during the course of their institution's review or process or has confirmed with the person or office overseeing the review or process, that the incident has been previously reported.”



*This exception has serious implications for how to handle complaints that become known by multiple parties within institution – e.g., a report is submitted to a departmental email account, a report is shared during a meeting with multiple participants, or a recipient shares a report with a supervisor.*



## SB 212 Employee Sanctions

### Sec. 51.255. FAILURE TO REPORT OR FALSE REPORT; OFFENSES.

- (a) A person commits an offense if the person:
  - (1) is required to make a report under Section 51.252 and knowingly fails to make the report; or
  - (2) with the intent to harm or deceive, knowingly makes a report under Section 51.252 that is false.
- (b) An offense under Subsection (a) is a Class B misdemeanor, except that the offense is a Class A misdemeanor if it is shown on the trial of the offense that the actor intended to conceal the incident that the actor was required to report under Section 51.252.



## Meaning of “Knowingly” Under SB 212

- Statute and THECB do not include an express definition of “knowingly”
- For guidance, can look to definition of “knowingly” from other sources such as Texas Penal Code, State Board for Education Certification rules regarding the Educator’s Code of Ethics, and Texas Election Codes
- Applying the standard for “knowingly” under other authorities, Texas court could conclude that an employee acts “knowingly” with respect to failing to make a report required by SB 212 when that employee:
  - (1) knows that he or she has a duty to report incidents of sexual misconduct, generally, and
  - (2) knows that failure to make a report under the specific circumstances presented violates that duty.



# Mandatory Termination

Sec. 51.255. FAILURE TO REPORT OR FALSE REPORT; OFFENSES.

- (c) A postsecondary educational institution shall terminate the employment of an employee whom the institution determines in accordance with the institution's disciplinary procedure to have committed an offense under Subsection (a).



# Questions





THE TEXAS  
STATE  
UNIVERSITY  
SYSTEM™

# Advanced Title IX Training

Interim Action and Sanctions

**Melissa J. Ackie, Associate**

Littler Mendelson P.C.

November 7, 2024



LSCPA



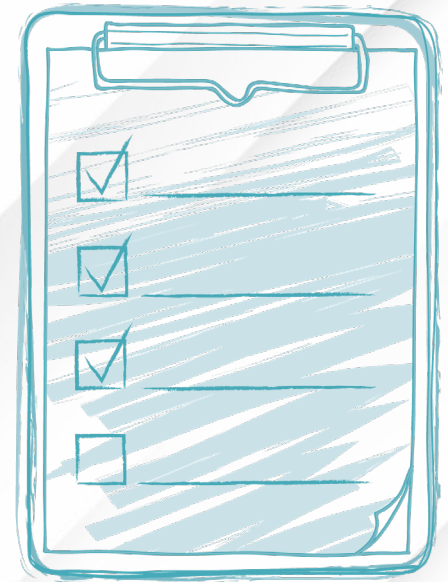
# Agenda

Definitions

Obligations

OCR Enforcement

Litigation







# What are interim or supportive measures? 34 CFR § 106.44 Recipient's response to sex discrimination



Counseling

Extensions of deadlines or other course-related adjustments

Modifications of work or class schedules

Campus escort services

Mutual restrictions on contact between the parties

Changes in work or housing locations

Leaves of absence

Increased security and monitoring of certain areas of campus.



# What are interim or supportive measures?

## 34 CFR § 106.30 Definitions

*Supportive measures* means **non-disciplinary, non-punitive individualized services** offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.

Such measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.



# What are interim or supportive measures?

## 34 CFR § 106.30 Definitions

The recipient must maintain as **confidential** any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures.





# What are interim or supportive measures? 34 CFR § 106.30 Definitions



The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.



# Obligations: Timing OCR Q&A Supportive Measures

**Does a school have to offer supportive measures to a complainant who has not filed a formal complaint of sexual harassment?**

Yes. The 2020 amendments specify that the school must contact the complainant to discuss the availability of, and to offer, supportive measures, ***regardless*** of whether a formal complaint is filed. A school must also consider the complainant's wishes with respect to supportive measures.



## Obligations: Timing OCR Q&A Supportive Measures

**When does a school need to offer supportive measures to a Respondent?**

Only after a formal complaint is filed, either by a complainant or the Title IX Coordinator.



# Obligations: Substance OCR Q&A Supportive Measures

What are the supportive measures a school must offer to parties?

A school must offer supportive measures that “are designed to restore or preserve equal access to the [school’s] education program or activity. Measures should be “designed to protect the safety of all parties or the [school’s] educational environment, or deter sexual harassment.”





# Obligations: Clery Act OCR Q&A Supportive Measures

**Does the Clery Act require supportive measures?**

Yes. A statement that the institution will provide written notification to victims about options for, available assistance in, and how to request changes to academic, living, transportation, and working situations or protective measures. The institution must make such accommodations or provide such protective measures if the victim requests them and if they are reasonably available, regardless of whether the victim chooses to report the crime to campus police or local law enforcement.





## OCR Scrutinizes Interim Measures

### ***Eastern Mennonite University (VA)***

#### **•Allegation**

University discriminated against a university faculty member by failing to respond appropriately to a report of sexual harassment made against him.

#### **•Finding**

While University found to have investigated report (unsubstantiated findings), University failed to answer faculty party request for interim measures during investigation, including eliminating the requirement that he be a student advisor during the investigation.

#### **•Remedy**

University agreed to conduct training with an emphasis on interim measures and retaliation and to develop a plan to assess the appropriateness of the university's response to the faculty member including, if necessary, consideration of remedial options.



# OCR Scrutinizes Interim Measures

## *University of Southern California*

### •Allegation

Student alleged the University failed to respond promptly to the Student's complaint that a professor of one of his classes harassed him on the basis of his sexual orientation.

### Finding

University failed to offer Student interim measures during prolonged investigation of his complaint. Records indicated that Student complained multiple times about this professor, and despite receiving notices of this and initially conducting an investigation under Title IX, the University did not take steps to determine whether the Student needed interim measures, such as changes to his teaching schedule, class schedule, or changes to the members of his qualifying exam committee.

### •Remedy

University agreed to a complaint review of all faculty-to-student sex-based harassment during the 2022-2023 and 2021-2022 academic years, \$17,000 to Student, and ongoing monitoring by OCR.



# OCR Scrutinizes Interim Measures

## *St. George's University – School of Medicine*

### •Allegation

Student alleged, among other things, that University discriminated against Student on the basis of sex by failing to respond appropriately to reports of sexual assault the Student made against another student.

### •Finding

Among other issues with the investigation, OCR found that other than issuing the mutual interim No Contact Agreements (NCAs), the School did not provide evidence of having offered the Student any interim measures, such as counseling, despite the Policy's authorizing the School to provide interim measures "as necessary, appropriate and available" to either or both parties.

### •Remedy

University agreed to conduct training with an emphasis on interim measures, and to develop and implement a record-keeping system to track various investigation information, including supportive measures provided to parties during and following investigations.



## Litigation:

# No Contact Orders and First Amendment Rights Perlot v. Green, 609 F. Supp. 3d 1106 (D. Idaho 2022)

**Background:** Law students brought action against president of the University of Idaho and other school officials, alleging that university's issuance of a no-contact order, which forbade them from contacting a queer student with whom they discussed their opposition to same sex marriage at community event in response to instance of anti-LGBTQ+ harassment, violated their rights to free speech and free exercise of their religion in violation of the First Amendment and their due process rights. Plaintiffs moved for a temporary restraining order, preliminary injunction, and expedited hearing.





## Litigation:

# No Contact Orders and First Amendment Rights Perlot v. Green, 609 F. Supp. 3d 1106 (D. Idaho 2022)

**Holdings:** The District Court, [David C. Nye](#), Chief Judge, held that:

- existence of disputed facts did not preclude court from ruling on motion for preliminary injunction;
- no-contact order was content-based restriction;
- comments did not constitute sexual harassment under Title IX;
- imposition of no-contact order was not least restrictive means for accomplishing goal of preventing queer student from hearing disagreeable speech that she deemed sexual harassment;
- no-contact order was not least restrictive means to restrict plaintiffs' speech to accomplish goal of creating harmonious environment amongst students;
- law students showed likely harm from public university's issuance of no-contact order; and
- no-contact order was issued with virtually no due process.





# Litigation: Deliberate Indifference and Interim Measures L.W. v. Roman Catholic Archdiocese of Indianapolis, Inc., (S.D. Ind. June 21, 2022)

- Students on football team videotaped student John Doe's genitals and posted on social media and made fun John Doe, who had physical and mental impairments.
- Defendants knew coach's son had been involved in multiple incidents of misconduct and bullying before the Video Incident but had been deliberately indifferent to those events.
- Dean assisted in deleting the Video and deliberately chose not to watch the Video before it was deleted.
- The student who took the Video received one after-school suspension.
- The student perpetrators were not precluded from participating in any football-related events.
- Defendants took no protections and made no accommodations to ensure John Doe's at school or in the locker room.
- Defendants did not have a Title IX coordinator, and no one contacted John Doe to discuss incident or offer supportive measures.
- Defendants' employees knew John Doe was bullied and sexually assaulted in the locker room during the Video Incident and failed to take any measures to prevent it from happening again.
- John Doe faced further abuse and harassment in retaliation for disclosing the Video Incident.
- Defendants failed to report either the Video Incident or the Retaliation Incident to the police, John Doe's parents, and the Department of Child Services.



## Case Study—What Interim Measures Would be Appropriate?

- Prior to Marie filing a formal complaint?
  - Assistance in filing a report with campus police
  - Counseling for Marie
  - Assistance with finding other research opportunities outside of Bunsen lab
  - Change of housing locations
  - Campus escort services / increased security
- After Marie or Title IX Coordinator files a formal complaint?
  - Mutual no-contact orders
  - Counseling for Linus
  - Consideration of continuing research role in Dr. Bunsen's lab with modification to both parties' schedules
  - Assistance with obtaining letter of reference from Dr. Bunsen
  - Other?



# Sanctions





# Agenda

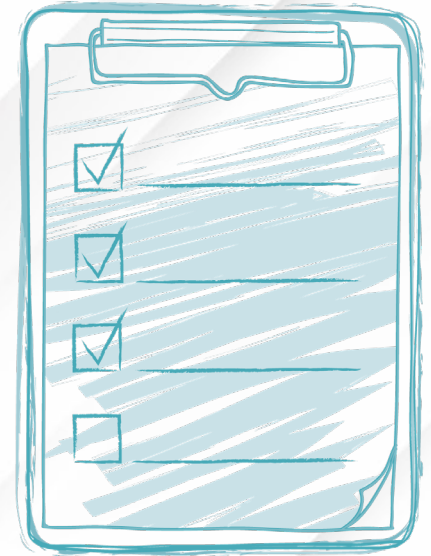
Title IX Regulations on Sanctions

Types of Sanctions

Process for Determining Sanctions

Risks Related to Sanctions and Litigation

Recommendations and Application to Case Study





# Title IX Regulations on Sanctions



# What the Title IX Regs Say about Sanctions 34 C.F.R. § 106.45

A grievance process must—

(i) Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. Remedies must be designed to restore or preserve equal access to the recipient's education program or activity. Such remedies may include the same individualized services described in § 106.30 as "supportive measures"; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent...





# What the Title IX Regs Say about Sanctions 34 C.F.R. § 106.45

The grievance process must ...

(vi) Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility...





# What the Title IX Regs Say about Sanctions 34 C.F.R. § 106.45

Determination regarding responsibility

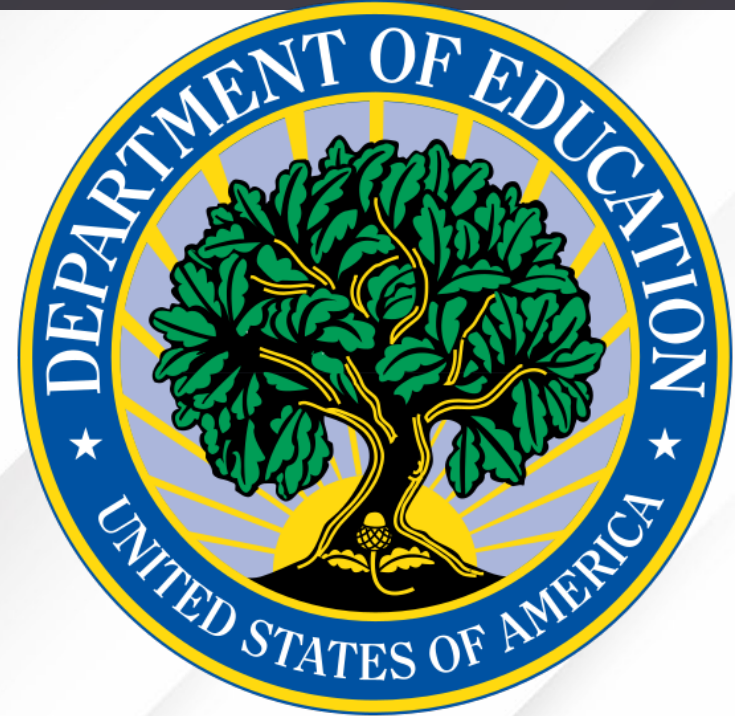
*(i) The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. To reach this determination, the recipient must apply the standard of evidence described in paragraph (b)(1)(vii) of this section.*





# What the Title IX Regs Say about Sanctions 34 C.F.R. § 106.45

The written determination must include — (E) A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant;





# Types of Sanctions





# Potential Sanctions from TSUS Sexual Misconduct Policy, Section 3.12 Distinguish Students from Employees

## Students

- No-contact orders;
- Probation (including disciplinary and academic probation);
- Expulsion from campus housing;
- Restricted access to activities or facilities;
- Mandated counseling;
- Disqualification from student employment positions;
- Revocation of admission and/or degree;
- Withholding of official transcript or degree;
- Bar against readmission;
- Monetary restitution;
- Withdrawing from a course with a grade of W, F, or WF;
- Relevant training;
- Suspension;
- Deferred suspension;
- Written warning;
- Expulsion.

## Employees

- Withholding a promotion or pay increase;
- Reassigning employment, including, but not limited to demotion in rank;
- Terminating employment;
- Barring future employment from System or Component;
- Temporary suspension without pay;
- Compensation adjustments;
- No-contact orders;
- Relevant training;
- Recommendation to revoke tenure.



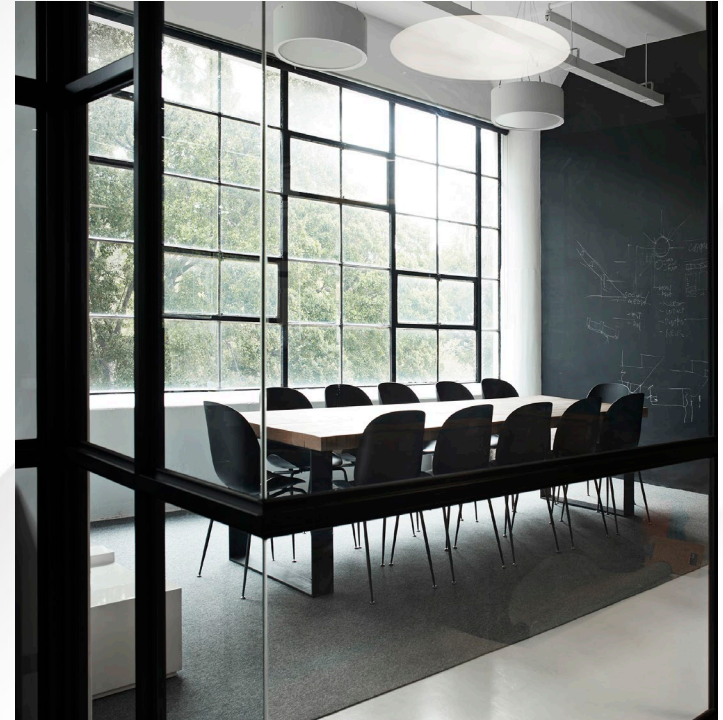


# Process for Determining Sanctions



# Overview of Title IX Adjudication Process

- Live Hearing
- If the decision-maker makes a finding of responsibility, there is need for sanctions.
- The designated Component Administrator determines appropriate sanction for substantiated conduct.
  - Sanctions for a Finding of a Policy violation will depend upon the nature and gravity of the misconduct and/or any record of prior discipline for Sexual Misconduct; and
  - Refer to policy for range of potential remedies.
- Component Administrator will issue written Sanctions and send such Sanctions and a copy of the Findings to the Complainant, Respondent, Title IX Coordinator, and when appropriate, additional individuals with supervisory authority over either Party that are not in line of appellate review.
- Component Administrator shall inform Complainant of any Sanction(s) imposed on Respondent that directly relates to Complainant.





## Guidance on Sanctions Department of Education, Office for Civil Rights

**Is the institution obligated to notify all parties of the sanctions against Respondent?**

In sex offense cases under the Clery Act, yes.

In other cases, *only when the sanction directly relates to the harassed student due to privacy concerns.*



## Guidance on Sanctions Department of Education, Office for Civil Rights

**Is a school required to impose particular remedies when a respondent is found responsible for sexual harassment?**

No. The 2020 amendments do not dictate that a school provide any remedies for the complainant or disciplinary sanctions for the respondent after a finding of responsibility. Each school is free to make disciplinary and remedial decisions that it “believes are in the best interest of [its] educational environment.”



# Risks Related to Sanctions and Private Litigation



## Example Risks Related to Sanctions

- Prior misconduct history by Respondent may affect sanctions.
  - “A recipient may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence.” 2020 Rule Preamble.
  - Failure to consider prior conduct (including possibly at other institutions) could result in failure to consider serial / predatory behavior and create additional risk.
- Important to consider comprehensive set of possible remedies to restore access to complainant and ensure enforcement.
  - For example, are trespass warnings necessary to keep respondent off campus if suspended/expelled?
  - Who is monitoring completion of sanctions to ensure compliance (e.g., training)?
  - Remedies may be needed beyond list, such as training for a student organization involved in the incident or precluding respondent from living on campus or being part of certain student organization.
- Disparate treatment of respondents in sanctioning can create risk of liability.
  - Helpful to have a sanctions matrix that considers nature and severity of the violation, as well as aggravating and mitigating factors, to guide decision-makers and assist in consistency.



# Private Litigation – Punishment Motivated by Gender Bias

*Doe v. Rice University (5th Cir. 2023)*

## **Title IX Allegations:**

Male student alleged that the university violated Title IX based on investigation and adjudication of punishment (rustication and loss of football scholarship) that was biased against student as a male, following incident in which female student alleged that male student failed to sufficiently disclose details of risks of herpes transmission from students' unprotected sex.

University denied and moved for summary judgment. SDTX granted summary judgment, but Fifth Circuit reversed findings.







# Private Litigation – Punishment Motivated by Gender Bias

*Doe v. Rice University (5th Cir. 2023)*

## Title IX Holdings

- Genuine issue of material fact as to whether university reached an ***erroneous outcome***:
  - *Opposing Evidence*: Female Student admitted knowing that Male Student had a history of herpes before they had sex.
  - *Investigation Omissions*: Investigator declined to investigate Male Student's claim that Female Student contracted herpes from another sexual partner before having sex with Male Student.
  - *Inequitable Application of Remedies*: University sanctioned Male Student with what amounted to expulsion for failing to inform Female Student of all the risks of having sex with a herpes carrier, even though the University Student Code did not contain such a requirement, and the University ultimately never required Female Student to inform all of her sexual partners of the same.





# Private Litigation – Punishment Motivated by Gender Bias

*Doe v. Rice University (5th Cir. 2023)*

## Title IX Holdings

- Genuine issue of material fact as to whether University engaged in ***selective enforcement***:
  - *Inequitable Application of Remedies*: Evidence University selectively enforced its policies against him by refusing to treat Female Student and Male Student equally when Male Student alleged—in response to Female Student's allegations—that she was guilty of the same conduct of which he was charged—failure to disclose the risk of STD transmission—yet never charged her for the same behavior.
- Genuine issue of material fact as to whether University relied on ***archaic assumptions***:
  - *Evidence of archaic assumption*: A rational jury could find that the University's policy arose from the view that a more-knowledgeable male had a duty to educate an unwitting female about the precise risks of herpes transmission—an archaic assumption.



# Private Litigation – Defer to Decision-Makers

## *Jane Doe v. Loyola University Maryland (D. Maryland 2021)*

### **Allegations**

Male Student and Female Student lodged competing claims of sexual misconduct against each other over the same occurrence. Both claim non-consensual sex. Both alleged sexual violence. Both received identical sanctions of a one-semester suspension, no contact order, and a substance education requirement. Female student filed suit against University challenging the University's process and its decision.

University denied and filed a Motion to Dismiss.

### **Title IX Findings**

- It is neither the province of the court to re-try plaintiff's disciplinary proceeding nor to require a particular outcome of a disciplinary proceeding.
- The court found that Loyola carefully followed its well-crafted and gender-neutral policies and that the record did not support a conclusion that an erroneous outcome had been reached.
- Plaintiff also failed to allege any facts that would amount to gender bias, which was also fatal to her erroneous outcome claim.





# Private Litigation – Defer to Decision-Makers

## *Garrett v. University of South Florida Board of Trustees (11th Cir. 2020)*

### **Allegations**

Plaintiff is a former doctoral student at the University of South Florida, who alleged that University inadequately responded to her report of sexual misconduct (non-consensual sexual touching) by a fellow student when they issued a deferred suspension and a no-contact order. Plaintiff alleged the University subjected her to additional sexual harassment by failing to issue harsher sanctions.

### **Title IX Findings**

- The court held that there was no genuine issue of material fact regarding whether USF was deliberately indifferent to plaintiff's report of sexual misconduct.
  - USF assigned plaintiff a victim advocate and opened a formal inquiry into her report.
  - It also was not clearly unreasonable for USF to offer the respondent a deferred suspension and no-contact order when he accepted responsibility.





# Private Litigation – Risk of Light Sanctions

## *Jane Doe v. Board of Trustees of Nebraska State Colleges (D. Nebraska 2021)*

### **Allegations**

Female student brought a Title IX deliberate indifference action against the Board of Trustees, based on allegations that college officials inadequately responded to a report that a fellow student sexually assaulted plaintiff on two separate occasions. While College found the respondent responsible for sexual assault and imposed sanctions of a mutual “no contact” order, counseling, and behavioral probation, plaintiff alleged the sanctions did not have the effect of shielding her from campus encounters with her assailant. College denied and Moved for Judgment on the Pleadings.

### **Title IX Findings**

- Evidence of repeated encounters, coupled with plaintiff’s allegation that College enrolled her in online courses without her consent, were sufficient for a jury to determine whether plaintiff was deprived of an education program or benefit.
- A jury could reasonably conclude that the discipline imposed on plaintiff’s assailant, in terms of a constraint on his freedom to move about campus, was not sufficient to protect plaintiff from further threats or intimidation.
- The court also felt the jury was best suited to determine whether College’s response subjected plaintiff to a heightened risk or vulnerability to sexual harassment.



# Recommendations for Avoiding Sanctions Landmines



## Recommendations for Sanctions Process

- Process should allow for communication of Respondent's prior misconduct history to Component Administrator for purposes of determining sanctions.
- Consider "other sanction(s) or remedies as deemed appropriate under the circumstances."
- Provide Component Administrator with sanctions matrix based on type of violation with example aggravating and mitigating factors for each.
- Document and calendar any follow-up on sanctions to ensure purpose of sanctions achieved (e.g., ensuring training completed).
- Consider privileged sanctions audit to establish guardrails for setting similar sanctions for similar violations.



# Sanctioning Students Versus Employees

- If Title IX governs, the Rule indicates the decision-maker is to issue sanctions for respondent, regardless if the respondent is a student or employee.
- Same consistent concerns apply to both students and employees, as inconsistent sanctions for similar violations can give rise to liability in both instances.
- While employee conduct more often involves quid pro quo and hostile environment claims (rather than VAWA crimes), employee sanctions generally involve adverse employment actions, including termination.
- Conduct that does not rise to the level of Title IX sexual misconduct may nevertheless be sufficient to justify serious sanction against employee.
- Be cautious of sanctioning student speech, as different free speech concerns apply students versus employees, particularly when speech in the context of employee's job.



# Questions

