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Association of
Title IX Administrators

Implementing Title IX in the Health Professions

An ATIXA Best Practices Seminar



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

ATIXA faculty members may offer examples that emulate the language and vocabulary that Title IX practitioners may encounter in their roles, including slang, profanity, and other graphic or offensive language. It is not used gratuitously, and no offense is intended.

Introduction



The primary focus of this seminar is to explore unique issues related to Title IX within institutions' health professions programs and to discuss strategies for navigating those matters.



Title IX professionals should understand intersections between federal civil rights laws and health profession programs to navigate policy overlap, jurisdictional questions, and Title IX obligations.



The goal of this course is to elicit participants' questions and equip participants with the knowledge and skills they need to comply with Title IX in their programs.

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Title IX Refresher

Understanding the Title IX Regulations

- Issued May 6, 2020, effective August 14, 2020
 - Located at 34 C.F.R. 106
- Regulations have the force and effect of law
 - They provide a prescriptive set of requirements that act as the **floor**, not the ceiling
 - Federal regulations preempt state laws if they conflict
- The Preamble explains the regulations but does not have the same force of law as the regulations
 - 409 pages of 423 pages of the Title IX Regulations tri-column PDF are Preamble
 - Persuasive authority

Key Regulatory Sections

- Section 106.8 Designation of coordinator; dissemination of policy
- Section 106.30 Definitions
- Section 106.44 Recipient's response to sexual harassment
- Section 106.45 Grievance process
- Section 106.71 Retaliation

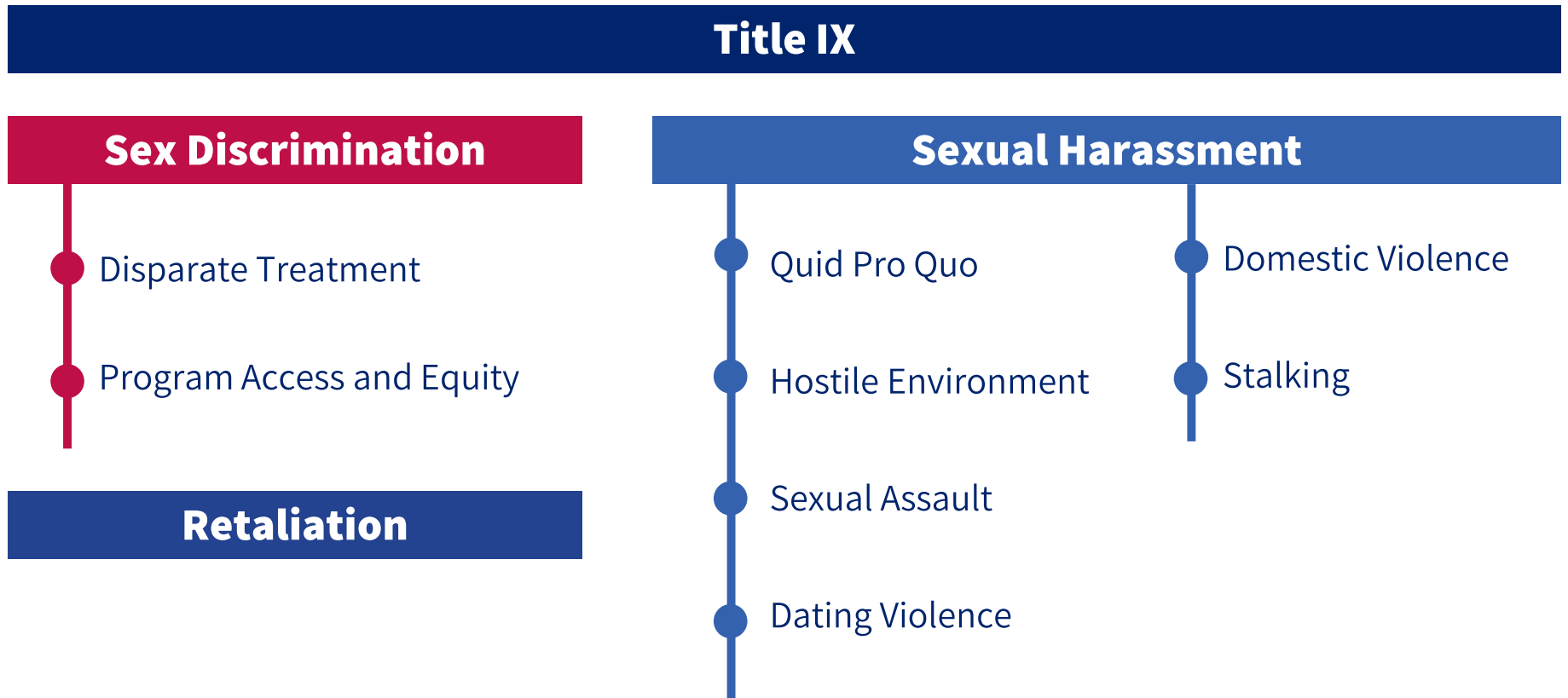
Limited Scope

- Title IX is broad, but Title IX Regulations apply to a narrow slice of Title IX
 - Only applies to a handful of behaviors the regulations define as “Title IX Sexual Harassment”
 - Any other types of behavior (e.g., sex discrimination) fall outside of the regulations
 - More flexibility to respond
 - May be influenced by state law, federal court decisions, CBAs, etc.



Scope

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Essential Compliance Elements

The requirements to **Stop, Prevent,** and **Remedy** guide Title IX Coordinators (TIXCs) in their compliance work

1

STOP discriminatory conduct

2

PREVENT recurrence, on both individual and institutional levels

3

REMEDY the effects of discrimination for individuals, for the community, and on an institutional level

Title IX Grievance Process Overview

INCIDENT

- Formal Complaint/ Notice to Title IX Coordinator (TIXC)

INITIAL ASSESSMENT

- Jurisdiction
- Dismissal
- Supportive Measures
- Emergency Removal
- Referral to Another Process
- Informal/ Formal Resolution

FORMAL INVESTIGATION

- Notice of Investigation and Allegations
- Interviews
- Evidence Collection
- Draft Report
- Party Review/ Comment
- Follow Up
- Final Report

HEARING

- Questioning
- Credibility Assessment
- Determination and Rationale
- Sanctions
- Remedies

APPEAL

- Appeal Grounds
- Determination and Rationale

Title IX Applicability to Healthcare Entities

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Doe v. Mercy Catholic Medical Center

Doe v. Mercy Catholic Medical Center (MCMC) Summary

850 F. 3d 545 (2017)

A former resident brought claims against MCMC for retaliation, quid pro quo harassment, and hostile work environment under Title IX

- MCMC disputed that Title IX applied to its program
- A primary question was whether MCMC’s program had educational characteristics



Doe v. Mercy Catholic Medical Center

Considerations

850 F. 3d 545 (2017)

The court outlined a few considerations for the analysis, including whether:

- A program is structured through a particular course of study or training
- A program permits participants to earn a degree or diploma, **qualify for a certification or certification examination**, or pursue a specific occupation or trade
- A program provides instructors, examinations, an evaluation process or grades, or accepts tuition
- The entities offering accrediting or otherwise regulating a program hold it out as **educational in nature**

Doe v. Mercy Catholic Medical Center Determination

850 F. 3d 545 (2017)

The court determined that Title IX applied to MCMC's program

- The court emphasized that Doe needed to complete MCMC's program to take her certification exams, **and** that MCMC was affiliated with Drexel University's College of Medicine
 - MCMC and Drexel shared staff, funding, and other support



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The Civil Rights Restoration Act

Civil Rights Restoration Act of 1987 (CRRA)

- Congress passed the CRRA in response to the Grove City Supreme Court decision
 - Grove City: Court held that student financial aid does **not** trigger institution-wide Title IX coverage, only within the financial aid program
- The CRRA overrode Grove City by defining “program or activity” to mean **all** of the operations of an entity if **any part** of that entity receives federal funding
 - This extends to corporations, partnerships, and other private organizations
 - Potentially broadens Title IX applicability

CRRA & the 2020 Title IX Regulations

The 2020 Title IX Regulations echo CRRA's scope

- “Program or activity” means **all the operations of**:
 - Any college, university, or post-secondary institution
 - Ex: A college with a teaching hospital on campus
 - Any other entity that is established by two or more entities, **any part of which** is extended federal financial assistance
 - Ex: A college with an affiliation agreement with a local hospital
 - A teaching hospital is owned by a health care conglomerate that forms a captive insurance entity with the hospital
 - Could this relationship make the captive insurance entity subject to Title IX?

Intersection of CRRA and Title IX Regulations

- The Department of Justice (DOJ) clarified that if an entity whose function is **not entirely** educational receives federal funding, Title IX applies to all of the **educational** components of the program
 - Recall the analysis in *Mercy Catholic*
- In multi-function entities, where does the education program stop, and other functions begin?

TIXCs should consult with legal counsel about their obligations



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Title IX Jurisdiction

Jurisdiction Determination

- TIXC is responsible for conducting an initial assessment to determine Title IX jurisdiction:
 - Does the alleged conduct, if proven, meet one of the definitions of Title IX Sexual Harassment?
 - Who is the Complainant? Were they participating or attempting to participate (P/ATP) at the time of filing the Formal Complaint?
 - Did the alleged misconduct occur in the institution's education program or activity?
 - Does the institution have control over the context of the alleged harassment?
 - Does the institution have control over the Respondent?
 - Did the behavior occur in the United States?

Jurisdiction: Question Framework

Scenario:

- Resident was at an out-of-state, unaffiliated hospital at a required rotation
- Complainant is an employee of the hospital
- Complainant met the resident over a dating app
- The resident hosted Complainant at their long stay AirBNB that was paid for by the resident's home institution
- Complainant alleged sexual assault when the resident digitally penetrated Complainant without their consent
- Complainant initiated a Title IX complaint at the resident's home institution

Jurisdiction: Discussion

- Is the conduct of a nature that may reasonably constitute sex discrimination?
 - **Yes, the alleged conduct could be sexual assault**
- Is Complainant a student/employee? A non-student/employee P/ATP at the time of the incident?
 - **Probably not**
- Does the institution still have control over the Respondent?
 - **Yes**
- Did the incident occur within the institution's education program or activity?
 - **The institution provided the housing**
- Is the conduct subject to the institution's disciplinary authority?
 - **It may, depending on policy**
- Are there in-program downstream effects of out-of-program conduct?
 - **Unlikely**

Framework Complexities

Who are the possible parties?

- Students
- Staff or faculty
- Contracted employees
- Providers (doctor, nurse, etc.)
- Patients
- Volunteer Preceptors

What is the context?

- Education program and activity
- Residency program/rotations
- Internships/Externships
- Conferences
- Sponsorship/Funding/Subsidizing
- Personnel control

Jurisdiction

- **Yes, or Arguable:** move forward with Title IX Grievance Process
- **No:** determine whether an alternate policy or process applies
 - Dismiss the complaint under Title IX
 - Document the rationale
 - Refer to other process
- Dismissal analysis can occur throughout the process

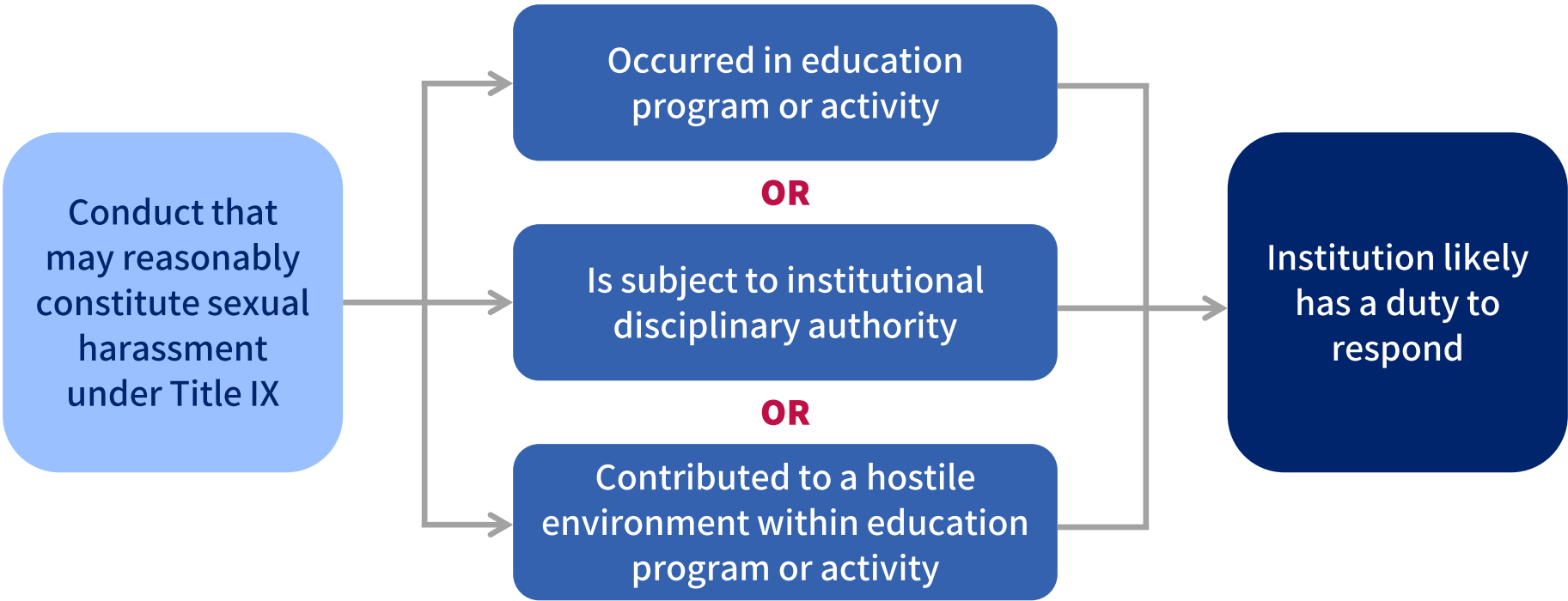


Types of Response

- There will almost always be **some** level of response
 - Supportive measures
 - Initial inquiry
 - When jurisdiction is unclear
 - Investigation and Decision-making Process
 - Informal Resolution
 - Remedial actions
- Typically coordinated or collaborative between entities, personnel



Visualizing Jurisdiction



Activity and Discussion: Applying the Framework

Applying the Framework

Let's apply the three-question framework to your jurisdictional challenges

- **What was the incident?**
 - Is the conduct of a nature that may reasonably constitute sex discrimination?
- **Who was involved?**
 - Is Complainant a student or employee? Non-student or non-employee P/ATP?
 - Does the institution still have control over the Respondent?
- **Where and when did it occur?**
 - Did the incident occur within the institution's education program or activity?
 - Is the conduct subject to the institution's disciplinary authority?
 - Are there in-program downstream effects of out-of-program conduct?

Multi-Jurisdictional Settings

- There are many situations in healthcare and medical education in which the jurisdictional assessment is **complex**
- There are a variety of responses available depending on the circumstances
 - Grievance Process (disciplinary response)
 - Supportive Resolution or response (supportive measures)
 - Remedial Response (other kinds of remedies)
- Based on the Title IX Regulatory emphasis on downstream effects, the question broadens to: “**What is the institution’s obligation to respond?**”
 - The obligation to respond may be broader than disciplinary jurisdiction

Relationships, Partnerships, and Collaborative Responses

Relationships

- Health professions programs will have many relationships with providers with varying degrees of formality
 - Ongoing, such as a university-owned hospital
 - Recurring
 - Contracted
 - Volunteer
- Title IX jurisdiction may **vary** and **evolve** depending on the jurisdictional analysis as it existed at the time of the alleged harassment

Partnerships & MOUs

- Create memoranda of understanding (MOUs) with partners and providers
 - **Prior to** sending students to placements
- Consider including:
 - Expectations for sexual misconduct training for providers
 - Information sharing expectations and process
 - Investigation process for alleged harassment by providers
 - Points of contact
 - Recordkeeping
 - Reporting mechanisms
 - Terminology, role clarification, jurisdiction
 - Vetting of clinical providers, preceptors

Coordinating Institutional Policies and Processes

Overlapping Policies

- Multiple policies may apply at once
 - Professionalism and ethics policies
 - Title VI
 - Title VII
 - Title IX
 - Codes of Conduct
 - Acceptable Use policies
- Using non-Title IX policies or procedures to resolve Title IX allegations is prohibited
 - May use Title IX Grievance Process to resolve consolidated allegations including both Title IX and non-Title IX allegations

Example: Title VII

- Title VII is a federal civil rights law that prevents workplace discrimination because of a person's protected characteristics
 - In some circumstances, a Complainant may be **both** a student and an employee
- In some situations, both Title IX and Title VII could apply to a complaint
- ATIXA's recommended Grievance Process "A" provides sufficient due process protections for both Title IX and Title VII complaints
 - Therefore, the investigation can be combined into **one** Grievance Process

Example: Professional Ethics

- Institutions and health programs may have professionalism or ethics policies that also apply to Title IX allegations
- Some institutions operate the Title IX Grievance Process separately from the ethics process
 - Often results in the ethics process concluding first and determining sanctions
 - Termination from ethics processes may lead to discretionary dismissal from Title IX Grievance Process, based on lack of control over the terminated Respondent
 - Sequencing processes in this way may create Title IX liability, but there are risk management and other considerations at play
 - Determine approach with legal counsel
- TIXC must be able to assert authority in these kinds of situations to guard against overzealous reactions as well as overly dismissive reactions

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Unique Issues in Healthcare

Pregnancy and Related Conditions

- Institutions are obligated to prevent discrimination based on pregnancy and related conditions
 - Extends to **all** aspects of the education program/activity
- Significant overlap with recent federal pregnancy protections
 - PUMP Act
 - Pregnant Workers Fairness Act
- Collaborate with providers to ensure appropriate adjustments or supports available
 - Standing, lifting, walking, shift-length requirements
 - Cohort programs
 - Licensure requirements

Academic Policies and Procedures

TIXC must be well-versed in institutional policies that may have implications for students who are pregnant or have related conditions

Academic Incompletes

Add/Drop

Grade Appeals

**Internships/
Externships/
Co-Ops/Practicums**

Leaves of Absence

Out-of-Class Expectations

Pass/Fail Option

Retakes

Supporting Documentation

- Medical documentation is typically unnecessary to determine reasonable modifications
- Proceeding based on a student's self-attestation of their needs will be the least burdensome for the student and enable the institution to promptly meet the student's needs
- Should only be required in limited circumstances when:
 - **Necessary** and **reasonable** under the circumstances to determine:
 - Reasonable modifications to offer
 - Other specific actions to take

Supporting Documentation, Cont.

Generally, not necessary or reasonable when:

- Student's need is obvious, such as:
 - Expressing breast milk or breastfeeding
 - Carrying or keeping water nearby and drinking during class
 - Using a bigger desk
 - Sitting or standing
 - Taking breaks to eat, drink, use the restroom
 - Needing a larger uniform
- Specific actions are available to students for other reasons without supporting documentation
- Not all students have access to healthcare providers or have seen one prior to needing reasonable modifications

Certification to Participate

Must **not** require health care provider or other certification that the student is **physically able to participate** in the program or activity, unless:

- The certified level of physical ability or health is necessary for participation;
- The institution requires such certification of all students participating; **and**
- The information obtained is not used as a basis for pregnancy-related discrimination

International Students

- Prominently publish Title IX policies
 - Make available to international students
- Provide training or education to bridge cultural differences that may implicate Title IX
- Collaborate with international student services or community agencies



Visiting Students

- Students who are not enrolled in an institution’s program but may be participating in the institution’s education program or activity
 - A student taking a course or participating in an externship
- Considerations:
 - Title IX training and education
 - Reporting
 - Jurisdiction



Complaint Audits

- Typical patterns at colleges and universities may not apply to health programs
- Reporting may still follow patterns
 - Timing
 - Location
 - Department
 - Individuals
- Important to monitor for patterns to identify training and education needs
 - Conduct ongoing barrier analysis



Research Dollars

- Federal agencies other than the Department of Education (ED) often maintain their own regulations addressing Title IX, and those overlay with ED regulations
- National Institutes of Health (NIH) and the National Science Foundation (NSF) grant research dollars to institutions with health professions programs
 - Require that no one involved in the research or grant is under investigation for sexual misconduct
 - Anyone may report sexual misconduct directly to NIH or NSF
 - These reports can be anonymous
 - The organization will notify the institution and expect a response
 - Route to TIXC



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Questions?

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