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Learning Outcomes

- Participants will understand the function of remedies, as both an industry standard (legally required) and a best practice.
- Participants will understand the difference between remedies, supportive measures, and interim actions.
- Participants will understand the role and purpose of remedies as sanctions.
- Participants will understand how to determine, document, and track sanctions.

Discussion Questions

- What role do remedies play in ensuring equity in your process?
- When documenting remedies, what information should you include?
- At what stage of the process are remedies appropriate?
- How do you determine whether to use a remedy, supportive measure, or interim action?
- What procedural considerations impact the use of remedies and/or interim actions?

Case Study

Frank

Frank, an openly gay student, comes to you to complain that Professor Jones, his (tenured) English professor, has made comments in class that make Frank “feel unsafe.”

Specifically, he alleges that Professor Jones made the following comments:

- After the transgender letter was repealed by the Trump administration, Professor Jones brought it up in class and said, “Finally, some common sense from Washington – you are either a man or a woman. Period.”
- When a student wore a gay pride shirt to class, Professor Jones said, “I get not being ashamed of who you are having sex with, but is ‘proud’ really the word you should use?”
- He assigned all the students in class to write their persuasive essays on “trying to convince me that people should be able to use whatever bathroom they want to.”

There are about 26 students in the class, and Frank brought with him Georgina, Haley, Isaiah, Jeremy and Ken. He tells you that all the students will back him up and that he has heard that Jones is not liked in the department as well.

He also says he knows a student who is a transgender female. He says she is not comfortable even going to the English department offices because she also feels “unsafe.”

Further, Frank shares with you that a month ago, while walking across campus with Ken, he heard another student use the word “faggot.” He cannot identify the other student, but thinks he is in student government. He also heard from Georgina that, at a recent social function, a group of students made fun of the LBGTQ group on campus. As a result of this, he says that he feels even more “unsafe.”

Case Study Questions & Answers

What interim/supportive measures might be taken?

- Counseling
- Transfer to different section
- Conversation with Professor Jones
 - Consider how academic freedom does(n't) apply to each reported comment

Would they be different if Jones was tenure track or adjunct?

- They shouldn't be, but they might be based on the rights extended to tenured or tenure-track faculty. Consult HR regarding agreements with faculty.

Frank requests that you assist him in withdrawing from Jones' class, as do the other 5 students.

- What considerations come into play here?
- Has the normal period for withdraw expired?
- Is Frank willing/able to retake the class with a different professor?
- What are the financial implications, if any? Will the institution absorb those costs, or will the students be expected to make necessary financial sacrifices?

How would you handle the following requests?

- **Frank requests that you assist him with a full withdrawal and refund.**
 - Before an investigation, these requests would be contingent on the institution's policies. Exceptions may always be made, but they should be applied as equally as possible in all similar circumstances.
- **He wants Jones removed from the classroom and possibly fired.**
 - At this point, there is not enough evidence to justify action consistent with this request. A conversation with Jones, even
- **He and the other 5 students want an audience with the President and want the President to write a letter to the campus denouncing Jones.**
 - It would not be appropriate for the President to personally involve her/himself in the process at this stage, particularly because allegations have been made but no institutional action to resolve has yet concluded. Advise the students that the resolution process is necessarily separate from the President in order to preserve neutrality.

- Any Presidential statements, to denounce or support or for any other reason, would be inappropriate at this stage.

Supplemental Materials

Athletics Department Protocol for Suspensions and Remedies Template

In accordance with Title IX of the Education Amendments of 1972 and its implementing regulations, [Recipient] has implemented the [Policy] effective immediately. This protocol addresses how the Athletics Department will respond to allegations of sex or gender-based discrimination, harassment, or violence and/or retaliatory conduct involving all members of the campus community in education programs and activities. This includes, but is not limited to, sexual harassment, sexual assault, dating and domestic violence, and stalking.

If a student-athlete is involved or believed to be involved **in any way** in an incident that involves any of the above offenses, neither the [Department of Athletics], nor any staff, trainers, or coaches, may alter or restrict a student-athlete's involvement in competition, training, or practice or access to athletic facilities, associated programs, or services without conferring first with the [Office] or Title IX Coordinator (outside of or in addition to any Athletics Department Title IX Coordinator or deputy).

Any such restriction or alteration may require some type of due process that will be afforded through the [Office], not through the [Department of Athletics]. This process is afforded under the [Policy]. Any restrictions or alterations requested by the student-athlete (including self-restrictions) should be immediately communicated to the Title IX Coordinator.

Athletic staff may make modifications to [practice or weightlifting schedules, transportation, travel and/or lodging arrangements, etc.] pending the outcome of the investigation and formal grievance process, but only after conferring with the [Recipient] Title IX Coordinator, and so long as the student-athlete is not unduly burdened by such modification. The [Department of Athletics] will work with the [Recipient] Title IX Coordinator to help to facilitate any No Contact Directives or other supportive measures issued by the [Office].

Any decisions regarding student-athlete involvement in athletics following any determination of any violation(s) of Title IX-related policies should be made after conferring with the Title IX Coordinator. For more information, please contact [TIXC Full Name] [TIXC Title] [Contact Information].

Excerpt from the Title IX Comprehensive Guide: Finalizing Sanctions and Remedies

Finalizing Sanctions and Remedies

The regulations contain distinct expectations about when sanctions and remedies should be considered “final” and effective. Specifically, the new regulations state that “(t)he determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.”

Practical Tips from ATIXA

- Based on this language and the overall tone of the regulations, ATIXA is changing its long-held support for the practice of implementing sanctions before an appeal is complete. We think it will be risky for recipients to continue to do so, and in most cases, the safest way not to violate Title IX “due process” is to wait until the determination is truly final and not susceptible to further changes before sanctions take effect.
- However, in the event that an ongoing risk or threat is apparent, the same “due process” necessary to implement an emergency removal (interim suspension) under the regulations can be used post-hearing but before an appeal is decided.
- As with an emergency removal implemented early in the resolution process, recipients should take reasonable steps to ensure that a Respondent’s academic progress is not unnecessarily impeded, even if they are barred from campus/school until a determination becomes final.

Excerpt from the Title IX Comprehensive Guide: K-12 Range of Possible Sanctions and Remedies

Clear Description of the Range of Possible Sanctions and Remedies_ Notes for K-12 Schools

Although the requirement is the same for K-12 recipients, the “list of sanctions and remedies” should be tailored to sanctions used in the recipient’s specific K-12 setting. Be sure to include any common sanctions that are contemplated by board, school, or district policy.

Retroactive Remedies, OCR Q&A

Office for Civil Rights

U.S. Department of Education

September 10th, 2015

Question: What is a school's Title IX obligations to respond to a complaint filed by a former student alleging that a few years ago, while he was a student at the school, he was subjected to off-campus domestic violence by a non-student.

Example: Student was enrolled at university during the Spring 2013 semester and received a 0.42 and Fall 2013 semester and received a 0.21 GPA. Since then he has been enrolled at 4 different community colleges and is currently on probation at 2 out of the 4 colleges. His anticipated graduation date from one of the colleges is Fall 2015 and wants to apply for the Engineering program at the original university but is having difficulties getting in to the program. Student is claiming that during the Spring 2013 semester, he was in a domestic violence relationship off campus. Respondent is not a student, incident occurred off campus. Student stated that he never told anyone about his case and is only bringing it up now. Student stated that he read all of the Title IX regulations and feels that the original university is obligated to provide accommodations (interim measures) and would like his grades wiped out during the semester that the incident occurred. They do not have a statute of limitation for reporting, and he is reporting this incident now. What is the original university's obligation under Title IX for this student?

Answer: Each case is fact-specific, and each determination is based on the particular set of facts presented. Although we do not give legal advisory opinions, we do provide information on how the civil rights laws that OCR enforces apply generally. While I cannot opine on the specific hypothetical you pose in your email, I can provide information regarding the general principles that apply to a school's duty to respond to complaints under Title IX. Title IX requires schools to adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints of sex discrimination, including sex-based harassment. As explained in OCR's various policy guidance documents on sexual harassment and sexual violence,

school's procedures will vary in detail, specificity, and components, reflecting differences in state or local legal requirements and each school's size, administrative structure, and what it has learned from past experiences. In order for these procedures to comply with the prompt and equitable requirements of Title IX, they must include, among other things, a provision for an adequate, reliable, and impartial investigation of complaints. The specific steps in a school's Title IX investigation will vary depending on the nature of the allegation. OCR does not require the use of a specific set of grievance procedures for handling complaints of sex-based harassment. Provided that a school's procedures meet the prompt and equitable requirements of Title IX, it has the flexibility to determine whether it is appropriate to include a procedure for dismissing complaints that, even if true, would not constitute violations of Title IX in its grievance procedures. When a school knows or reasonably should know of possible sexual-based harassment, it must take immediate and appropriate steps to investigate or otherwise determine what occurred. Sex-based harassment must be sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's educational program (i.e., creates a hostile environment) to cause a Title IX violation. If an investigation reveals that the sex-based harassment created a hostile environment, the school must then take prompt and effective steps reasonably calculated to end the sex-based harassment, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects. Because not all behaviors associated with domestic or dating violence will be considered conduct of a sexual nature (e.g., hitting or pushing), determining whether such an incident triggers a school's obligations under Title IX requires an in-depth review of the facts at hand. Harassing conduct like domestic or dating violence could still be based on sex or gender, even if not sexual in nature, and therefore may still be prohibited by Title IX. An educational institution should analyze the specific conduct associated with an allegation of domestic or dating violence to determine whether it is sexual in nature or is otherwise based on sex or gender, and meets the other requirements for a hostile environment under Title IX. If so, then Title IX requires the educational institution to respond appropriately.

As explained in Question F-4 of OCR's April 2014 Questions and Answers on Title IX and Sexual Violence, if a school receives a complaint of sex-based harassment that occurred off campus, it must process the complaint to determine whether it occurred in the context of an education program or activity or had continuing effects on campus.

If there are no continuing effects of the off-campus sex-based harassment experienced by students on campus, the school should still handle these incidents as it would handle other off-campus incidents of misconduct or violence and consistent with other applicable laws and its own code of conduct. OCR is committed to providing the public with information about the civil rights laws OCR enforces. In responding to correspondence, OCR provides general, publicly available information about a wide variety of civil rights issues in the education context. OCR does not, however, provide legal or other advice or issue advisory opinions to customers concerning specific factual scenarios. Correspondence issued by OCR in response to an inquiry from the public does not constitute a formal statement of OCR policy and should not be construed as creating or articulating new policy. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

Providing Remedies

Steps to Prevent Sexual Harassment/Violence and Correct its Discriminatory Effects on the Complainant and the Community

Prevention Education and Training

- Provide mandatory training for those implementing resolution procedures, including on the institution's applicable policies and procedures and how to address Title IX-based reports
- Provide training on sexual harassment, dating and domestic violence, sexual assault, and stalking prevention in accordance with VAWA Section 304
- Include information about Title IX in course curricula (such as FYE classes) and implement that content in syllabus statements in general education courses for all undergraduate students
- Provide information about Title IX during new student orientation (undergraduate, transfer, graduate, and international students), teaching assistant orientation, and new faculty/staff orientation
- Encourage students to report incidents of sex and gender-based discrimination, violence, and harassment, by providing amnesty to Complainants and Witnesses if they were involved with collateral alcohol and/or other nonviolent violations of campus policy
- Publish specific sex and gender-based discrimination, violence, and harassment materials for policies, rules, and resources, including in the employee and student handbooks, manuals, website, and brochures
 - Include information on sex and gender-based discrimination, violence, and harassment; what to do and how to report; information for resources; how to contact the Title IX Coordinator; and measures the institution will take

Interim Actions, Longer-term Remedies, and Enforcement

- The institution will take immediate action to eliminate a hostile environment, prevent recurrence, and address any effects on the Complainant and the community

- The institution will take immediate steps to protect the parties even before the final outcome of investigations, including prohibiting a party from having any contact with the other party, if appropriate. Steps should minimize the burden on the parties while also respecting the (due process) rights of the Respondent.
- Remedies for the Complainant might include, but are not limited to, no-contact orders, transportation assistance, campus safety escorts, ensuring parties do not attend the same classes if possible, moving either/both/all parties to a different residence hall, counseling services, advocacy, medical services, academic support services, course withdrawal without penalty, review of the effectiveness of implemented measures, etc. Remedies should be provided at no cost to the Complainant.
- Develop and provide a listing of available resources for counseling, advocacy, and support
- Remedies for campus student populations might include counseling services, on-call victim assistance, policy review, educational, awareness, and prevention programs, Title IX Coordinator training, school law enforcement Title IX training, and other employee Title IX training.
- The institution will have policies and procedures that protect against retaliation, including how to report any subsequent problems
- Provide notification and assistance in reporting to local law enforcement, including notice that the criminal and institutional processes may be simultaneously pursued
- The institution will comply with law enforcement requests for cooperation, including temporarily suspending the Title IX fact-finding process while law enforcement gathers evidence. The institution will promptly resume its Title IX investigation once notified that law enforcement has completed its evidence-gathering process.
- The Title IX Coordinator reviews all sex and gender-based discrimination, violence, and harassment cases to ensure prompt and equitable remedies are put in place
- The institution will create a committee to identify and implement education strategies
- Issue, reiterate, and/or review policy statement and all faculty/staff/student resolution procedures to ensure equitable processes and compliance with Title IX
- Ensure investigation practices and reports are aligned with Title IX regulations
- Respond promptly to all allegations, to potential retaliation, to possible violations of no-contact orders, and/or to non-compliance with any assigned interim actions or final sanctions

- Assess what will make the Complainant whole and ensure their access to the educational program
- Target remedies to specific members of the community, departments, clubs, and/or groups who are impacted

Tip of the Week: Supportive Measures for the Respondent? Yes...But...

Authored by Brett A. Sokolow, J.D., Chair, TNG & President, ATIXA

So, I get that we are all very busy with or distracted by the pandemic. Not everyone has taken the time to read 2,083 pages of new federal Title IX regulations. So, where we are hearing repeated misstatements of the new rules, we like to offer whatever clarity we can. This Tip of the Week focuses on Section 106.44, supportive measures.

We are hearing from many professionals that recipients are obligated to provide equitable supportive measures to each party. Now, this isn't a bad idea generally (though in execution it can become cumbersome), and we hope that support of all students and employees is a reflection of our institutional ethos. That said, the regs don't require it!

To be clear, the regs kind of fudge the issue. They say that supportive measures must be offered equitably to the complainant and respondent, but the preamble then goes on to clarify that supportive measures for complainants include the laundry list of supports and resources that we all have in our policies. But they state that supportive measures are equitably provided to respondents by doing nothing more than ensuring that respondents are not subject to penalty or discipline without first assuring the rights of Section 106.45 are accorded. There is no requirement to provide counseling, or academic adjustments, or multilateral no-contact orders. If you think about it, this is an incoherent interpretation of the concept of equity, but that is what it says (p. 877 of 2,083-page version):

Under § 106.44(a) and the § 106.30 definition of “supportive measures,” recipients must offer complainants supportive measures designed to restore or preserve complainants’ equal educational access (with or without a grievance process pending), and the final regulations’ prohibition against a recipient punishing a respondent without following a fair grievance process, including application of a presumption of non-responsibility until conclusion of the

grievance process, does not diminish the supportive, meaningful response that a recipient is obligated to offer complainants.

But, didn't the regs say that the laundry list of all supportive measures must be offered equitably? Yep, the draft regulations did say that. Then, the final version backed off of that position. It's discussed at length in the preamble. Despite backing off of the position in the draft, ED slyly wrote the regs to de-emphasize this shift to all but the most careful readers. So, should you provide equitable supports to all parties? Yes, to the extent it makes sense to do so. But, do you have to invent an equitable roster of respondent advocates because you offer access to victim advocates as a supportive measure? Nope (and there's actually no such thing as a respondent advocate – they're called lawyers). Pages 905-06 of the preamble are absolutely clear on this:

Discussion: Section 106.44(a) obligates a recipient to offer supportive measures to every complainant, by engaging in an interactive process by which the Title IX Coordinator contacts the complainant, discusses available supportive measures, considers the complainant's wishes with respect to supportive measures, and explains to the complainant the option for filing a formal complaint ... There is no corresponding obligation to offer supportive measures to respondents; rather, recipients may provide supportive measures to respondents and under § 106.45(b)(1)(ix) the recipient's grievance process must describe the range of supportive measures available to complainants and respondents.



Equitable Remedies Within Civil Rights Grievances

20 Minutes to... *Trained*

1



YOUR FACULTY

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2

MANDATES

**STOP
PREVENT
REMEDY**

- Remedies:
 - Redress effects
 - Tailored
 - Offered to all parties
 - Ensure measures are necessary and effective
 - Communication with parties re: measures throughout process

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- Pre-investigation services
- Supportive measures throughout process
- Interim measures
- Final sanctions
- Supportive measures taken after process is completed

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4

- Available to all parties
- Tailored to circumstances
- *Reasonably available*
- May provide without formal investigation
- May continue throughout and after investigation
- Examples of supportive measures:
 - Counseling, adjustments to schedule, deadlines or other obligations, temporary leaves

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- Designed to stop and prevent reported misconduct
- Consider specific circumstances
- Record measures taken and rationale(s)
- Not punitive, although may create inconvenience
- *Reasonably available*
- Examples of interim measures:
 - No contact order, removal of access, limited responsibilities

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- Stop & prevent further misconduct
- Remedy misconduct
- Proportionate to misconduct
- Communicate sanctions and rationale(s)
 - Clery → all parties
 - If not Clery → reporting party only when sanctions directly relate to reporting party
- *Document*

7

- Fairness *under the circumstances*
- All parties – not just reporting party(s)
- Restore loss/denial due to discrimination
- Articulate measures implemented
- Articulate specific rationale
- Stop, Prevent, Remedy

8



Questions?

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