University of Alabama
System External Decision-Maker/Advisor Training
November 8, 2021 and January 5, 2022
Purpose of Today’s Training

- Review General Process under Title IX
- Highlight Your Role
- Answer Questions
- Provide Guidance and Examples
- Serve as a Resource
- Provide Trauma Informed Practices for Consideration
- On-Going Process - this is still very new!
Housekeeping

- Chat bar
- Understanding
- Assume basic knowledge of the 2020 Title IX Regulations
- Disclaimer
What is 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.
What Does Title IX Cover?

SEXUAL HARASSMENT

EQUITY IN PROGRAMMING (INCLUDING ATHLETICS)

DISCRIMINATION ON THE BASIS OF SEX (INCLUDING PREGNANCY AND SOGI)
The Evolution of Title IX

1. 2001 Title IX Guidance on Sexual Harassment
2. 2011 Title IX Guidance (DCL)
3. 2014 Title IX Guidance (Q & A)
4. 2015 Title IX Guidance (DCL)
5. 2017 Q & A and DCL Withdrawing 2011 and 2014 Guidance
6. 2018 Notice of Proposed Rulemaking
7. May 6, 2020 Title IX Regulations w/August 14, 2020 Implementation Deadline
8. April 6, 2021 DOE Launches Comprehensive Review of the Title IX Regulations
9. June 16, 2021, Notice of Interpretation "On the Basis of Sex"
10. July 20, 2021 Q & A on the Title IX Regulations and Sexual Harassment

EXPECTED
May 2022
Title IX Rule Changes/Amendments

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Catherine E. Lhamon
Assistant Secretary
Office for Civil Rights
WHAT NOW?

THOUGHTFUL URGENCY
Title IX Applies to...

- Student on Student Sexual Harassment
- Employee on Employee Sexual Harassment
- Employee on Student Sexual Harassment
- Student on Employee Sexual Harassment

**UA System has diverse settings and scenarios!**
CHANGES AND REQUIREMENTS
OVERVIEW

Prescriptive Title IX Process

Officials with Authority

Policies and Procedures

Team and Training

Coordinator with Authority
Terminology

- Sexual Harassment
- Complainant
- Respondent
- Formal Complaint
- Education Program/Activity
- Supportive Measures
SEXUAL HARASSMENT + EDUCATION PROGRAM OR ACTIVITY = FORMAL TITLE IX PROCESS
Additional Prohibited Conduct:

- Sexual Discrimination Broader than T9
- Sexual Violence
- Sexual Exploitation
BASIC TITLE IX PROCESS

1. SEXUAL HARASSMENT REPORTED
2. FORMAL COMPLAINT BY COMPLAINANT/TITLE IX COORDINATOR
3. NOTICE OF ALLEGATIONS
4. INVESTIGATION
5. LIVE HEARING
6. APPEAL

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INVESTIGATIVE TIMELINE

1. INVESTIGATE
   - Notice of Allegations
   - Notice of all interviews with sufficient time to prepare

2. OPPORTUNITY TO INSPECT AND REVIEW EVIDENCE DIRECTLY RELATED TO ALLEGATION & PROVIDE WRITTEN RESPONSE
   - 10 days*

3. INVESTIGATIVE REPORT

4. OPPORTUNITY TO REVIEW FINAL REPORT AND PROVIDE WRITTEN RESPONSE
   - 10 days

5. LIVE HEARING (EXTERNAL DM FOR UAB and UAH/Impact Statement)

6. APPEAL (INTERNAL)
INVESTIGATIVE TIMELINE
HOSPITAL EMPLOYEES

1. INVESTIGATE
   - Notice of Allegations
   - Notice of all interviews with sufficient time to prepare

2. OPPORTUNITY TO INSPECT AND REVIEW EVIDENCE DIRECTLY RELATED TO ALLEGATION & PROVIDE WRITTEN RESPONSE
   - 10 days*

3. INVESTIGATIVE REPORT

4. OPPORTUNITY TO REVIEW FINAL REPORT AND PROVIDE WRITTEN RESPONSE
   - 10 days

5. WRITTEN Q&A

6. APPEAL (INTERNAL)

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Three Distinctive Campuses
Three Distinctive Processes/Policies – UAB and UAH are the same
Variety of types of cases
Crucial you know your role in the process
Intimately familiar with the Policy/Process/Definitions of Conduct
- Not a court proceeding – campus proceeding
- Not adversarial
- Remove advocacy hat
- Not working for UA as attorney
- Equitable for Complainant and Respondent
Student on Student Sexual Harassment – Alcohol/Incapacitation/Etc.
Athletics
Fraternity/Sorority Matters
Clinical Matters/Physicians
Employee HR Issues
Faculty Matters
MOST LIKELY THIS WILL BE COMPLETELY DIFFERENT THAN CASES YOU HAVE SEEN IN PRACTICE
Hearing Location

- Live v. Virtual
- Special Consideration with Virtual Hearings
  - Breakout Rooms
  - Non-verbals
  - Test it out in advance!
Hearing Structure

- Institution Specific
- Get Clarity Prior to Hearing on Structure and Role
Set the Tone, Enforce the Rules

- The parties and advisors must abide by the rules of decorum set by the institution
  - Provide the rules to the parties prior to the hearing
- The decision maker must-
  - set the tone for the hearing
  - ensure that the rules are clearly outlined
  - ensure that the rules are explicitly followed
  - have the ability to take breaks as necessary
QUESTIONING WITNESSES (106.45(b)(6)(i))

- Advisor must be permitted to ask relevant questions (including follow up questions and questions challenging credibility) of the other party and witnesses.
- Never by a party directly
  Conducted live
- Orally
- In real time
- May be submitted in advance, but not required
Relevance and Your Role
Regulations do not define relevancy.

Regulations define some things that are NOT relevant:

- Treatment unless parties agree
- Privileged Information
- Questions and evidence about the Complainant’s sexual predisposition or prior sexual behavior unless they are offered to prove that someone other than Respondent committed the sexual harassment, or if the questions and evidence concern specific incidents of the Complainant’s prior sexual behavior with the respondent and are offered to prove consent (does not extend to Respondent’s)

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QUESTIONING WITNESSES CONTINUED...

DECISION-MAKER

- Decision-maker must decide whether the question is relevant BEFORE it is answered.
- Decision-maker must EXPLAIN any decision to exclude a question as not relevant.
- Decision-maker may ask any additional/follow up questions.
QUESTIONING WITNESSES CONTINUED...

DECISION-MAKER

- Advisors of choice – may be a student, faculty, staff member unfamiliar with process
- Burden on institution, not parties
Utilizing Trauma Informed Practices

WHAT DOES IT MEAN?

- Realizing the prevalence of trauma
- Understanding the impacts of trauma
- Avoiding the creation of additional trauma
Using Non-Trauma Informed Practices:

- Jeopardizes future reporting
- Results in premature judgment and accusations of false reporting
- Can cause additional trauma
70% of adults in the U.S. have experienced some type of traumatic event at least once in their lives.

223.4 MILLION PEOPLE

National Council for Behavioral Health.
Neurobiological Impact of Trauma

How does trauma impact the brain?
Brain detects threat – trauma triggers chemical reaction

Impacts:
- Decision-making;
- Rational thinking;
- Perception;
- Planning effective responses;
- Memory

During trauma – may function less effectively

“Survival Mode” – may not be able to think through the situation clearly
Fight, Flight, or Freeze

OR ALL THREE...

Or Something Completely Different...
Response to Trauma

THE POSSIBLE IMPACT

SHOCK  DENIAL  SELF-BLAME  EMBARRASMENT  FEAR

ANGER  CONFUSION  DISRESPECT  HUMILIATION  LIMITED EMOTION
AVOIDING ADDITIONAL TRAUMA
Investigative Trauma May Trigger Same Reactions

**FIGHT**
- Hostile; Angry; Explosive; Annoyed

**FLIGHT**
- Stop participating; Run Away

**FREEZE**
- No Response; Radio Silence
Leading with Empathy

1. Make the participant feel safe, in control, support
2. Gain trust and creates cooperation
3. More willing and able to remember information
4. More comfortable sharing the information
5. Increased amount of information gained in the investigation
6. Additional witnesses provided
7. More accurate findings and complete investigation

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Use these types of questions:

| Help me understand | Do you have any additional information to share? | Can you tell me a little more? | Questions for clarity |

NOT these types of questions:

| The "Why" Questions | Leading Questions | Blaming questions | Interrogating questions |
FRAMING THE QUESTION EXAMPLES

- Why didn't you ask for help?
- Why did you drink if you didn't want to?
- Why didn't you report right away?
- Was there anyone around or available?
- What happened after you had the drink?
- Was there anything in particular that helped you decide to report?
TREAT THE PARTIES EQUITABLY, INTERVIEW THEM UNIQUELY

- Ensure that the complaint and response are being taken seriously
- No prejudgments
- Prohibitions against retaliation
- Ask hard questions, but acknowledge that they are hard
Don't go Overboard

IT CAN GO TOO FAR...
You cannot lead with your emotions

ACKNOWLEDGE CONFLICTS OF INTEREST AND/OR BIASES
Truly reflect on how they are impacting your ability to serve in role

IF YOU FIND YOURSELF HERE, TAKE A BREAK
From the hearing, the witness/party, the project

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Questions?
Victim Rights Law Center et al. v. Cardona,
August 24, 2021

Letter to Students, Educators, and other Stakeholders re: "Statements"

"In practical terms, a decision-maker at a postsecondary institution may now consider statements made by parties or witnesses that are otherwise permitted under the regulations, even if those parties or witnesses do not participate in cross-examination at the live hearing, in reaching a determination regarding responsibility in a Title IX grievance process."

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Decision-maker must issue a WRITTEN DETERMINATION regarding responsibility- using preponderance standard set by UA. 106.45(b)(7)
Special Considerations

- Party shows up without an advisor
- Party continues to attempt to address other party directly
- Advisor removed because fails to follow rules of decorum
- Party asks for informal resolution
Reminders

1. Presumption of Not Responsible
2. Cure any procedural issues immediately
3. Not a criminal proceeding
4. Do not prejudge/conflicts of interest
5. Burden on institution—not the parties
Guidance: Discrimination
Sexual Orientation/Gender Identity
Bostock v. Clayton County

2020: Supreme Court held Title VII prohibition on discrimination based on sex covers discrimination on the basis of gender identity and sexual orientation
FINAL THOUGHTS/REMINDERS

- Campus Proceeding – Be Kind
- Variety of Cases – Students, Employees, Clinicians, Physicians, Faculty
- Consult Title IX Coordinator/GC Office on Process/Procedures
- Remember your Role
- Be Prepared – Conversant on Policy, Process, Conduct being Evaluated, Requirements in Written Determination, Review of Hearing Packet, Role of Everyone in the Hearing (Appellate Options)
- EQUITABLE TREATMENT OF BOTH PARTIES – extensions, breaks, delays, time, etc.
Questions?