

The Title IX Tango

Anticipating Future Moves in Regulatory Requirements

Carl Crosby Lehmann & Kari Hohn
Minnesota Office of Higher Education
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Policy & Documentation Changes

Broader Scope

Covers all forms of gender discrimination & retaliation

Covers all conduct impacting educational environment regardless of location of incidents

Covers students, employees and third parties participating in programs or activities

Policies and Notifications

Policy prohibiting sex discrimination in all programs and activities including admissions and employment

Grievance procedures for prompt and equitable resolution of all gender discrimination complaints

- Sex-based harassment of students
- All other complaints by students, employees and third parties

Notice of nondiscrimination policy in all employee, student and applicant publications

Record-keeping

Records for each complaint of sex discrimination

- Informal resolution process

- Grievance process

- Resulting outcome

- Actions taken to comply with obligations

All training materials publicly available

Records of efforts to prevent discrimination on basis of pregnancy and related conditions

Must maintain at least 7 years



Training

All
Employees

Policy prohibiting gender
discrimination

Conduct prohibited by
policy

Reporting obligations of
employees

Frequency?

Investigators,
Decisionmakers
& Persons
Responsible for
Implementation

Same employee training

Grievance processes

Serving impartially and
without bias

Determining relevance and
inadmissible evidence

Informal Resolution Facilitators

Same employee training

Informal resolution process

Serving impartially and
without bias

Title IX Coordinators

ALL the above trainings

Title IX Coordinator
responsibilities



Employee Reporting Obligations

Title IX Coordinator Responsibilities



RESPOND TO CONCERNS



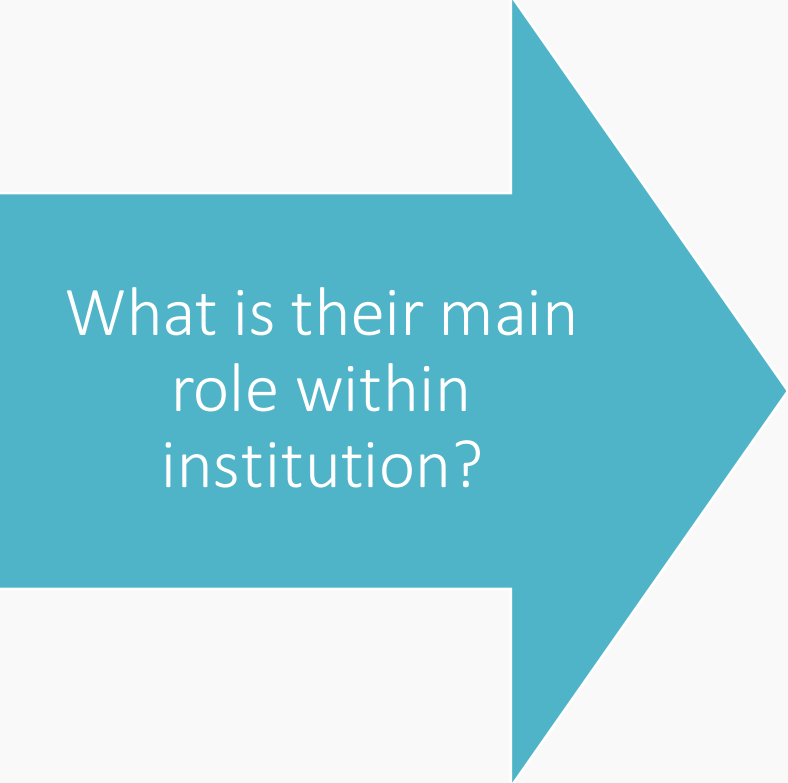
ACTIVELY MONITOR CAMPUS

Non- Confidential Employee Reporting Obligations


Authority to
institute
corrective
measures

*Notify Title IX Coordinator of any sex
discrimination*

Student or Employee?



What is their main
role within
institution?



Was the incident
related to their
employment with
institution?

Confidential Employees

Must notify community of who are confidential employees

Confidential employees must:

Explain their confidential status

Provide contact information for the Title IX Coordinator

Explain how to report sex discrimination

Public Awareness Events

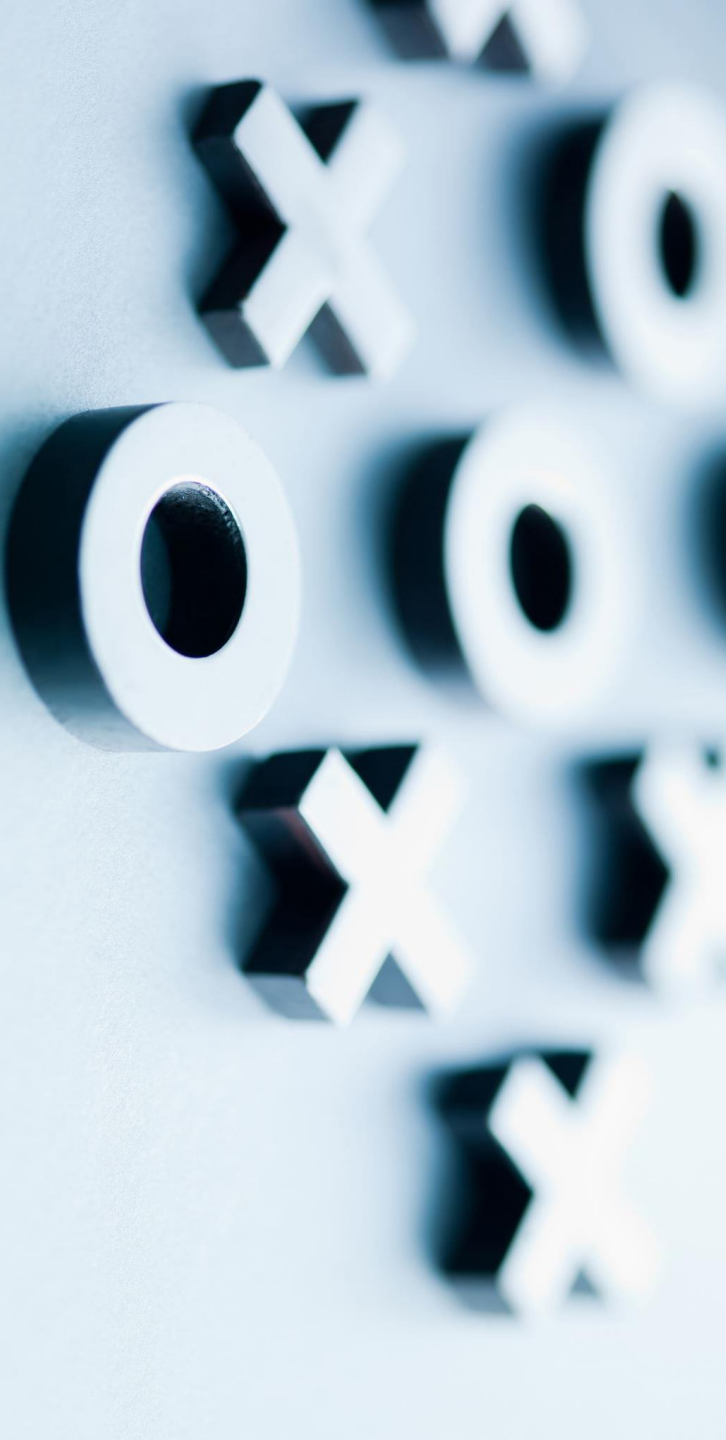
Held on campus or through on-line platform

Purpose to raise awareness of sex-based harassment related to institution's programs or activities

“Not obligated to act” except:

Immediate and serious threat to health or safety

Still need to consider in efforts to prevent future sex-based harassment



Responding to Reports

Title IX Coordinator Role

Treat parties equitably

Notify complainant of grievance procedures
(and respondent if complaint is made)

Notify of informal resolution process if
available

Offer supportive measures

Initiate grievance process or informal
resolution

If party not pursuing process, determine
whether institution should pursue

Take other appropriate prompt and effective
measures to address discrimination

Supportive Measures

Goal is to restore or preserve access to programs and activities

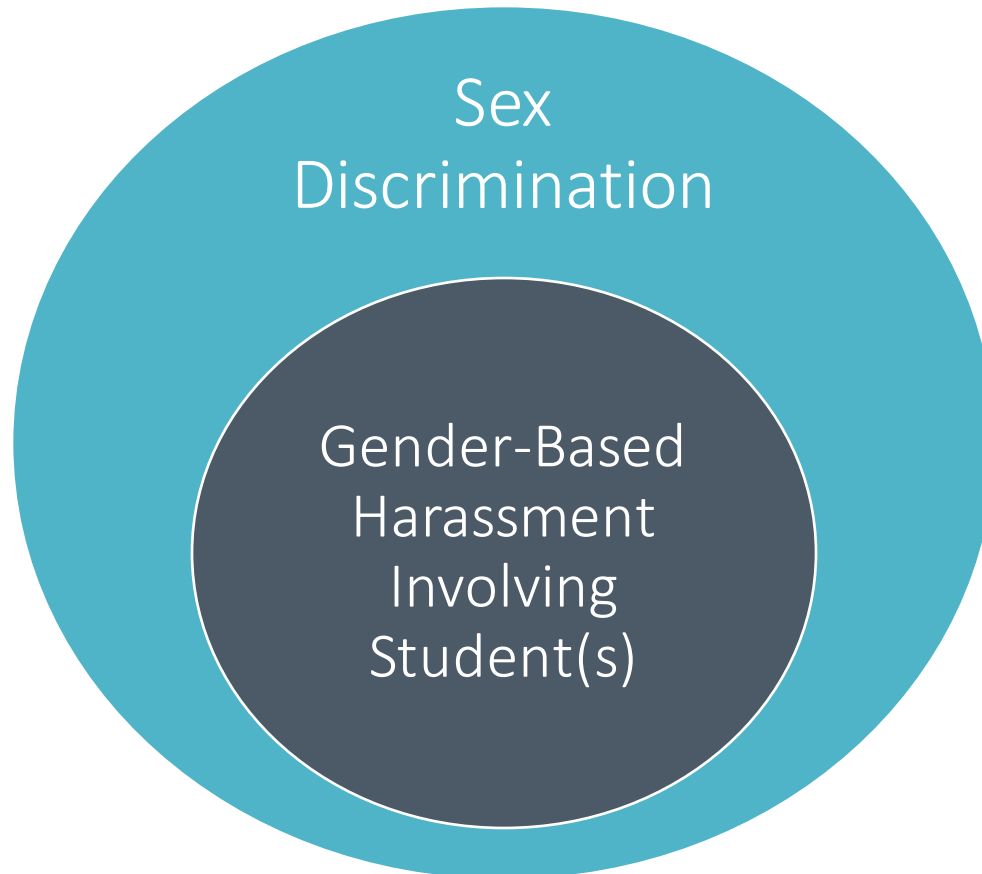
Individualized assessment (could be counseling, deadline extensions, increased security, leaves, changes in classes, work, housing, etc.)

Can burden a respondent if:

- Only during grievance process
- No more restrictive than necessary
- Cannot be punitive or disciplinary
- Impartial employee available to review and modify or terminate before measure imposed

Must be kept on need-to-know basis

Grievance Processes



General Requirements for Grievance Processes

Must be in writing and provide for prompt equitable resolution

Complainants may be a student, employee or third party participating or seeking to participate in program or activity

Requirements relating to respondents not applicable when institution is accused of sex discrimination

Treat parties equitably, respondent presumed not responsible, burden on institution to conduct sufficient investigation

Reasonably prompt time frames for each major stage:

Evaluation

Informal resolution

Determination

Appeal

Notice of Allegations

Provide written notice to parties:

Grievance procedures

Sufficient information to permit response

Anti-retaliation statement

Allegations potentially constituting sex-based harassment

Respondent presumed not responsible

Parties will have opportunity to present evidence to a trained impartial decisionmaker

May have an advisor who may be an attorney

Will have access to relevant evidence or an investigation report

Notice of prohibition against knowingly making false statements/ submitting false information

Must update if additional allegations later added to investigation

Dismissal

Institution may dismiss if:

Unable to identify respondent

Respondent not participating in program or activity

*Complainant voluntarily withdraws allegations – **obtain the complainant's withdrawal in writing***

Determine that alleged conduct could not be sex discrimination even if true

Notify parties of dismissal and right to appeal

Informal Resolution: General Terms

Not required to offer informal

Cannot require participation

May decline to permit in certain cases
(e.g., future risk of harm)

Available any time prior to
responsibility decision (unless
allegations that employee engaged in
discrimination toward a student)

Title IX Coordinator still responsible for
addressing discrimination

Informal Resolution: Notice Requirements

Before initiating process must provide notice to the parties of:

- *The allegations*
- *The requirements of the informal process*
- *The right to withdraw at any time*
- *That any resolution will preclude future grievance procedures*
- *Potential terms that may be requested*
- *The records that will be maintained*
- *Ban on utilizing information obtained through the informal process and limits to facilitator serving as witness*
- *Facilitator cannot be investigator or decisionmaker*
- *Facilitator must be trained; cannot have a conflict of interest or bias*

Complaint Investigation

Must ensure burden is on recipient to conduct investigation that gathers sufficient evidence

Provide same opportunity to all parties to present witnesses and evidence

Review all evidence gathered and determine what is relevant and whether impermissible (privileged, treatment records, or complainant's "sexual interests or prior sexual conduct")

Provide each party a description of evidence that is relevant and opportunity to respond

Date, time location, participants and purpose of all meetings where party is invited to attend

Opportunity to be accompanied by advisor – may impose limits on extent of participation

Same opportunity, if any, to have others present

Whether permitted to present expert witnesses

Permit reasonable extensions of timelines for good cause

Equitable access to the evidence (either access to the evidence of a written investigation report)

Evaluating Evidence, Assessing Credibility, and Making Decision

Must provide a process that enables decisionmaker to adequately assess the credibility of witnesses – includes either decisionmaker asking questions, including ones proposed by other party (hearing or investigation) OR a hearing with advisor asking questions

Use preponderance of evidence standard unless institution uses different standard in comparable proceedings

Notify parties of outcome – must provide the determination in writing including: description of alleged harassment; information about grievance process; evaluation of the evidence; any disciplinary sanctions; any remedies provided; process for appeal

Provide remedies

Require Title IX Coordinator to take other appropriate actions

Appeals

If provide right to appeal, must provide all parties same rights

Must provide for appeal on the following bases:

Procedural error that would have changed the outcome of the proceeding;

New evidence that was not available at the time of the determination and would have changed the outcome; and

Title IX Coordinator, investigator or decisionmaker had a conflict of interest or bias

Amendment to Title IX that states:

If a recipient adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity, such criteria must, for each sport, level of competition, and grade or education level:

- (i) be substantially related to the achievement of an important educational objective, and
- (ii) minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.

Athletics & Title IX

NPRM

April 13, 2023

Applies to K-12 and higher education institutions that receive federal funding.

What does this mean?

Schools **cannot** categorically ban trans students from participating on the sports team that corresponds with their gender identity.

If creating sex-based eligibility criteria, those criteria must serve an **important education objective**, i.e. ensuring fairness in competition and/or preventing sports-related injury.

Criteria must account for the **specific sport, level of competition,** and **grade or education level** to which they apply.

Criteria also need to **minimize harms** to students whose opportunity would be limited.

What does this mean?

Schools can categorically allow trans students to participate on the sports team that corresponds with their gender identity.

But what about the NCAA and other sport governing bodies?

Department of Ed is assuming national athletic associations would review and revise their policies as necessary in order to comply with this proposed regulation.

Right now, the NCAA has delegated decisions about trans athlete participation to each sport's national governing body. This is messy...

Parental, Family, Marital Status & Pregnancy

Students:

Train all employees on directing students to Title IX Coordinator

Coordinator must inform the student:

Discrimination prohibited

Option for reasonable modifications
(individualized assessment – breaks, online classes, rescheduling exams...)

Permit access to separate but comparable resources

Permit voluntary leave with reinstatement right

Maintain grievance process

Employees:

Comparable treatment to temporary disabilities

Right to leave and reinstatement for employees