Association of Title IX Admin

#### May 14, 2025

# University of Mount Union **Title IX Regulations Refresher Faculty Training**

Saundra Schuster, Esq. Partner, TNG Consulting, LLC **President**, ATIXA

#### 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 & 34 C.F.R. Part 106 (1972)



## **Title IX Updates**

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### **Department of Education Updates**

- Department changes include:
  - Significant staffing reductions, but increased enforcement in some areas
  - Closure of 7 of 12 OCR regional offices
  - Federal funding and oversight shifts
- Executive Order (EO): Improving Education Outcomes by Empowering Parents, States, and Communities (3/20/25)
  - Directed the Secretary of Education to "facilitate closure of the Department" and "return authority to the States and local communities"
- Civil Rights enforcement remains in Department of Education's Office for Civil Rights (OCR), but other agencies (e.g., Health and Human Services (HHS) and Department of Justice (DOJ)) appear to be ramping up enforcement in certain areas
- Increased focus on Title VI

### **Rescinded Prior Guidance**

#### Rescinds all guidance documents inconsistent with the EO or subsequent guidance including:

- White House Toolkit on Transgender Equality
- 2024 Title IX Regulations: Pointers for Implementation
- ED Toolkit: Creating Inclusive & Nondiscriminatory School Environments for LGBTQ Students
- Supporting Intersex Students
- Supporting Transgender Youth in School
- Letter of Educators on Title IX's 49<sup>th</sup> Anniversary
- Confronting LGBTQ Harassment in Schools
- Enforcement of Title IX Based on Sexual Orientation and Gender Identity in light of *Bostock v. Clayton County*
- AG's memorandum "Application of Bostock v. Clayton County to Title IX"
- EEOC's "Enforcement Guidance on Harassment in the Workplace"

#### Impact on DEI

#### Executive Order "Ending Illegal Discrimination and Restoring Merit-Based Opportunity (1/31/2025)

- The purpose of this Executive Order is to ensure that agencies work to end illegal preferences and discrimination
- "Today, 60 years after passage of the Civil Rights Act, influential institutions have adopted and actively use dangerous, demeaning and immoral race and sex-based preferences under the guise of "diversity, equity and inclusion" that violate civil rights laws."
- "These illegal DEI and DEIA policies also threaten the safety of American men, women and children by diminishing the importance of individual merit, aptitude, hard work and determination when selecting people for jobs and services."
- All executive departments and agencies are to terminate all discriminatory and illegal preferences, mandates policies, programs, activities, guidance, regulations, enforcement actions and requirements to combat DEI preferences.

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#### Dear Colleague Letter, Feb. 14, 2025

- Interpreted Students for Fair Admission v Harvard (U.S.S.Ct. 2023) to mean that any use of race must be necessary to achieve a compelling institutional interest.
- Stated that only two actions meet the compelling institutional interest:
  - Remediating past discrimination that violated the Constitution or a statute
  - Avoiding Imminent and serious risks to human safety (ex. prisons to avoid a "race riot")
- Stated: "If an educational institution treats a person of one race differently than it treats another person because of that person's race, the educational institution violates the law."

#### Dear Colleague Letter, Feb. 14, 2025

- Therefore, educational institutions are prohibited from using race in decisions pertaining to admissions, hiring, promotion, compensation, financial aid, scholarships, prizes, administrative support, discipline, housing, graduation ceremonies and all other aspects of student, academic and campus life.
- Basically, educational institutions may neither separate or segregate students based on race, nor distribute benefits or burdens based on race.
- Institutions may not rely on non-racial information as a proxy for race (such as applying racial stereotypes or arguing social justice positions).

### **Lawsuits Halting DCL**

- Federal judges in New Hampshire and Maryland imposed injunctions against enforcement of the DCL, stating that it violated procedural standards and the First Amendment by failing to appropriately define DEI.
- The judges stated that the DCL is vague about what constitutes actions that could result in loss of federal funding, suggesting that schools must eliminate all vestiges of DEI to avoid even the possibility of funding termination.
- These actions removed the requirement to list all DEI related programs and certify they were being eliminated and provide to the government.
- Many/most schools engaged in retracting or rebranding their mission policies, scrubbing websites, eliminating offices

#### What This Means for Us

- These injunctions will create a pause on the chaos and provide institutions with time for them to demonstrate clearly in court how these mandates are unconstitutional and should be permanently stopped.
- It's a best practice to assess all DEI related programs and policies and create a comprehensive list of all potentially challengeable ones, with a plan to address the title, implementation, removal if required.
- Be prepared to defend any Affirmative Action programs.
- Institutions must ensure that any race-conscious initiative do not exclude, or advantage specific groups based on race, color, or national origin

#### **Academic Freedom**

#### **AAUP and Academic Freedom 1940**

- In 1940, the AAUP refined the earlier definition in their "Statement of Principles on Academic Freedom and Tenure" to include:
  - Teachers are entitled to <u>full freedom in research and in the publication of the results</u>, subject to the adequate performance of other academic duties, but research for pecuniary return should be based on an understanding with the authorities of the institution.
  - Teachers are entitled to <u>freedom in the classroom in discussing their subject</u>, but they should be <u>careful not to introduce into their teaching controversial</u> <u>matters which has no other relation to their subject</u>.

### AAUP and Academic Freedom (con't)

- When they <u>speak or write as citizens</u>, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations.
- As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances.
- Hence, they should at all times be accurate, should exercise appropriate restraint, show respect for the opinion of others and should make every effort they are not speaking on behalf of the institution

(AAUP, 2001, pp 3-4)

The 1940 definition is retained today by the AAUP

#### **Academic Freedom and Free Speech**

- There may be a balancing test applied utilizing the First Amendment rights of the professor v the rights of the institution to maintain a non-disruptive learning environment.
- The professor may not create a hostile environment in the classroom
- Individual academic freedom remains an important protection for faculty in the performance of their role:
  - Statements made by a faculty member that create a hostile learning environment may thwart the academic process and are less likely to be protected
  - If a faculty member can show that their comments are germane to the course content and advance an academic message and are not merely gratuitous use of shocking language or concept the professor will likely be protected from challenge.

#### Considerations

- If a student or parent makes a complaint or the institution seeks to have control over the actions of faculty in terms of behavior in the classroom and curriculum the institution should look at:
  - Does the challenged behavior undermine the legitimate goals or mission of the institution?
  - Does the behavior conflict with institutional policies and standards for professional conduct?
  - Does the behavior interfere with the professor's performance of his/her duties?

### **Guidelines for Faculty**

- Ensure assignments and classroom policies have relevance to the course being taught and the learning outcomes.
- Controversial expression in the classroom is generally protected as long as there is a nexus to the course and learning outcomes.
- Do not use grading authority to coerce beliefs.
- All grades must reflect an honest, professional assessment of the student's work.
- Be able to demonstrate why protecting your Academic Freedom is important for the public good by upholding professional and ethical responsibilities of the profession.

### **Title IX Process Overview**

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#### **Title IX Grievance Process Overview**



#### **Reports, Complaints and Notice**

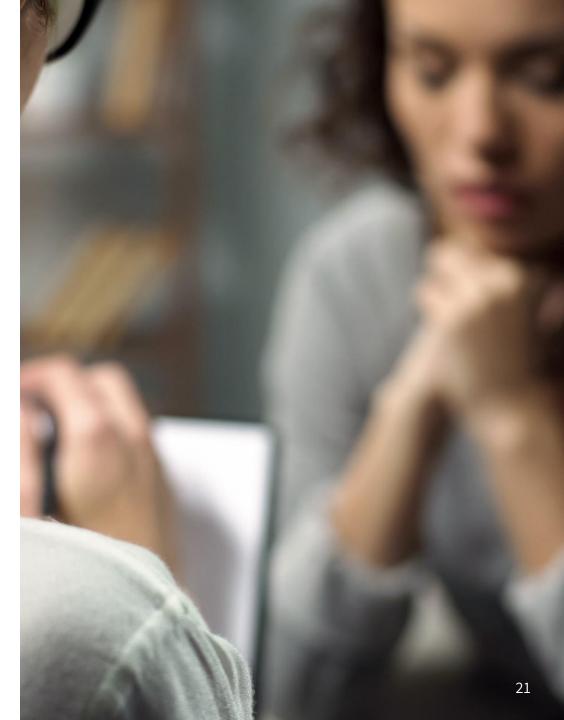
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#### When is the Institution "On Notice?"

The institution is **"on notice"** of sexual harassment when a report is made to:

- Title IX Coordinator (TIXC), or
- An Official with Authority (OWA): any official who has authority to institute corrective measures on behalf of the Institution

Being "on notice" creates an institutional obligation to respond



### **Mandatory Reporting**

- ATIXA recommends that institutions, by policy, designate all employees as mandated reporters (except for confidential resources) under Title IX
  - Ensures information gets to those trained to respond
  - Enables institution to best support individuals
  - Supports tracking patterns
  - Provides for simpler, uniform, and universal training and reporting
- Many employees will also have reporting responsibilities under other state and federal laws or institutional policy

#### **Party and Witness Privacy Concerns**

#### Privacy vs. Confidentiality vs. Privilege

1 PRIVACY

Statutory protection (FERPA) only allows disclosing records to those who need to know, but cannot guarantee confidentiality 2

#### CONFIDENTIALITY

Information protected by law as a part of the Title IX process. Information about a case only to be shared with those involved with the case

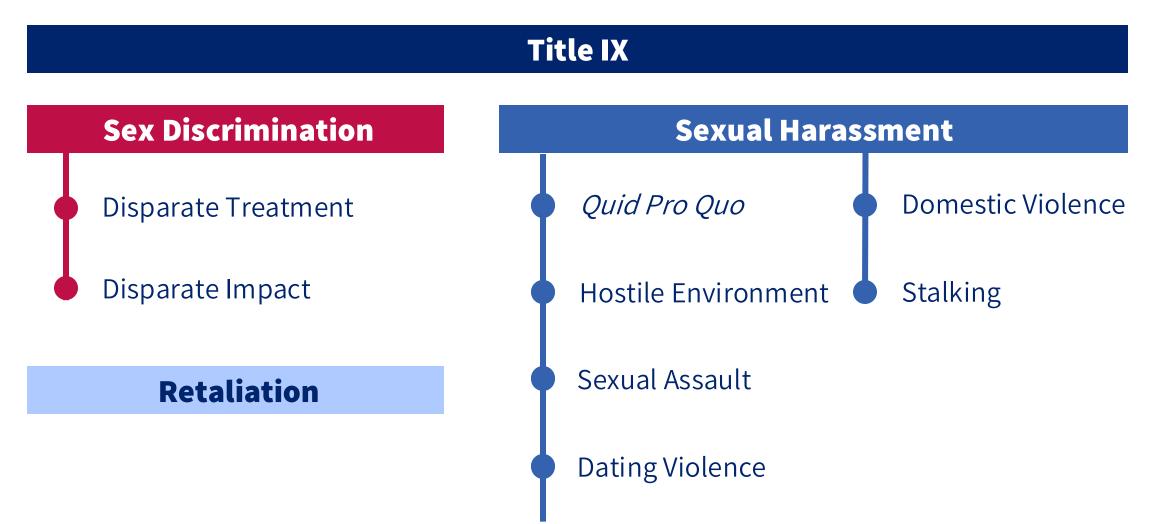
#### **3** PRIVILEGE

The highest legal protection (attorney giving advice to a client or clergy providing pastoral advice); client/ patient/parishioner controls the privilege

#### **Title IX Scope: Sexual Harassment**

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### **Title IX Scope**



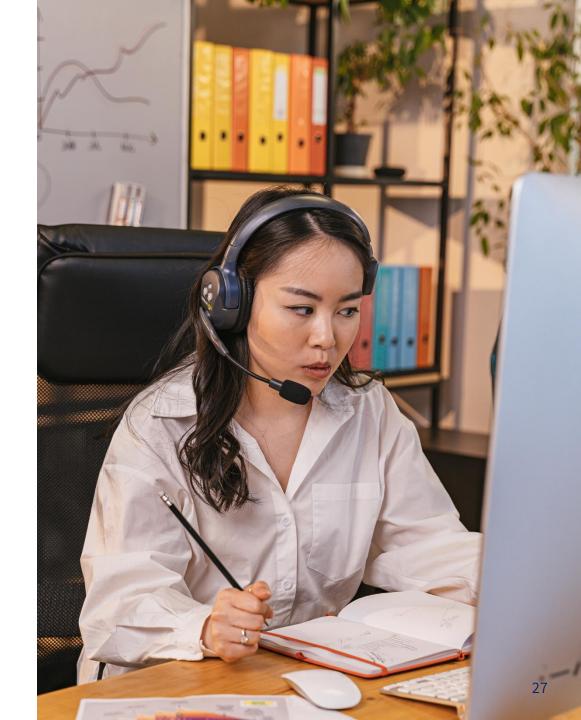
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### **Title IX Jurisdiction & Initial Assessment**

### Jurisdiction

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?
- Status of the Complainant?
  - P/ATP
- Control over the Respondent?
- Does the institution have control over the context of the alleged harassment (program or activity)?
- Did the behavior occur in the United States?



#### **Outreach and Intake**

• After receiving a report, TIXC (or designee), should always reach out to the Complainant

Best practice and regulatory requirement

Outreach includes:

- Introduction to Title IX and staff
- Reason for the outreach
- Offer to meet/speak over the phone; include right to Advisor
- Available resources and resolution options, including how to file formal complaint
- Discuss supportive measures and resources
- Explain options to report to law enforcement
- Follow up in writing with resources and information

#### **After Outreach and Intake**

- Consider if new information affects jurisdictional assessment
- Implement any requested supportive measures and/or remedies

#### If formal complaint is filed:

- Determine whether to dismiss or proceed with formal investigation
- Consider whether emergency removal is warranted
- Evaluate whether complaint is appropriate for potential Informal Resolution

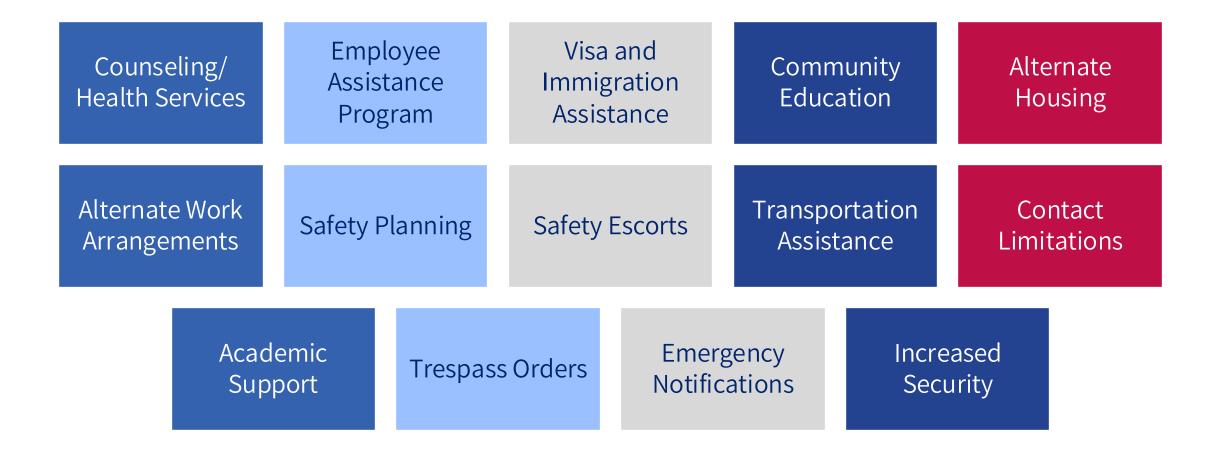
#### If no formal complaint is filed:

- Determine whether TIXC needs to sign a formal complaint
- Consider whether emergency removal is warranted

### **Supportive Measures**

- Provided to parties throughout the process:
  - At no cost to the party
  - Individualized
  - Non-disciplinary, non-punitive
  - Protect safety of parties or environment, or deter sexual harassment
  - Restore or preserve equal access
  - Without unreasonably burdening other party
- Publish the range of supportive measures
- Avoid unnecessary disclosures about supportive measures
- Consult with disability services when appropriate
- If not provided, document the rationale for refusal

#### **Supportive Measure Examples**



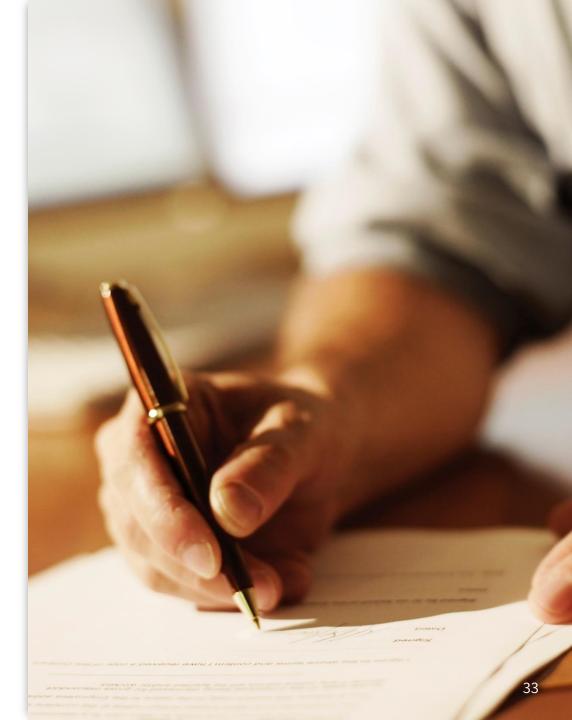
#### **Emergency Removal**

- Imposed upon Respondents on an emergency basis only
- Requires an individualized safety and risk analysis
  - Immediate threat that exists to the physical health or safety of any student or other individual
  - The threat arises from the allegations of Sexual Harassment
- Respondent entitled to immediate notice and opportunity to challenge



#### **Administrative Leave**

- May remove an employee Respondent using existing administrative leave procedures
- A lower bar than emergency removal



#### **Informal Resolution**

- Title IX permits voluntary Informal Resolution (IR)
- Not available for employee-on-student harassment
- IR is not defined by the Title IX Regulations
- At discretion of TIXC, at any time prior to a final determination
  - Likelihood of resolution
  - Power dynamics
  - Goals and motivation of the parties to participate
  - Complexity and timing of the complaint
- IR Facilitators must receive training, be free of bias or conflicts
  - ATIXA recommends IR Facilitators not serve in any other process roles

### Informal Resolution, Cont.

- Procedural requirements:
  - Formal Complaint
  - Parties must receive written notice of the allegations, IR procedures, records created, and potential consequences
  - Parties' voluntary, written consent
  - Must still stop, prevent, remedy
- May withdraw from IR to start or resume Formal Grievance Process at any time



## Investigation

## **Notice of Investigation and Allegations**

- Notice of Investigation and Allegations (NOIA) letter
  - Sent to all parties, simultaneously
  - Must be sent prior to interviewing any party

#### The NOIA includes:

- Notice of the allegations and known details, such as identities of the parties
- A description of the alleged conduct and relevant policy provisions
- The date and location of the alleged conduct
- Information about grievance procedures
- Any Informal Resolution options

## **Investigation Report**

#### Comprehensive investigation report for all Title IX complaints

- Required for all Sexual Harassment complaints
- Recommended for non-Sexual Harassment Title IX complaints (industry standard practice)
- Requires opportunity for equal access to all relevant evidence
- Shows Investigator's work
- Provides Investigators with a standard and consistent format
- Helps protect institution on complaints that may be subject to scrutiny



#### Parties' and Advisors' Review of Report and Evidence File

- Draft report summarizing all Relevant Evidence
- Directly Related evidence file must:
  - Be sent to each party and Advisor in an electronic format or hard copy
  - Include evidence upon which the institution does not intend to rely
  - Include exculpatory and inculpatory evidence
- 10 + 10 rule
  - Investigator must:
    - Allow **minimum** of 10 days for written response
    - Consider parties' feedback and incorporate where appropriate
  - Investigator sends the final investigation report to the parties and Advisors for review minimum of 10 days prior to the hearing

#### **Decision-Making and Appeals**

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## **Decision-Making Under 2020 Regulations**

- Under the 2020 Title IX Regulations, all postsecondary institutions must hold a live hearing to address Title IX Sexual Harassment allegations, unless resolved by IR
  - DM can ask relevant questions
  - Advisors can ask relevant questions on behalf of Parties
- TIXC and Investigator may not serve as DM
- Not required to use a live hearing for non-Sexual Harassment Title IX allegations (e.g., Disparate Treatment)

### **Live Hearings**

- Questions must be asked by the parties' Advisors and/or DM(s)
  - If the party does not have an Advisor, the institution **must** provide an Advisor for the purpose of asking questions during the hearing, if the party wishes to ask questions
  - DM must determine whether a proposed question is relevant and permissible
- Hearing can be in one location or virtually through technology
  - DM and parties must be able to simultaneously see a party or witness when they are speaking/communicating
- Must create an audio or video recording or transcript and make it available to parties to inspect and review
- May impose reasonable decorum rules

#### **Appeal Grounds**

Must offer appeals on the following grounds:

Procedural irregularity that affected the outcome of the matter

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New evidence that was not reasonably available at the time of the determination that could affect the outcome of the matter

Conflict of interest or bias by the TIXC, Investigator, Decision-maker that affected the outcome of the matter

#### Institutions have the discretion to add additional appeal grounds



### **Questions?**

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