



OPEN SESSION

FOR ACTION

1. **Approval of March 22, 2023 Minutes**
Rob Bryan, Committee Chair

FOR INFORMATION

1. **Title IX Compliance Presentation**
Debbie Osgood, Attorney, Hogan Marren Babbo & Rose, Ltd.

*Some of the business to be conducted is authorized by the N.C. Open Meetings Law to be conducted in closed session.

UNC-CHAPEL HILL BOARD OF TRUSTEES
UNIVERSITY AFFAIRS COMMITTEE
Open Session Minutes

March 22, 2023

Committee Chair Bryan called the meeting to order at 2:45 p.m. in the Chancellor's Ballroom at the Carolina Inn. Assistant Secretary Chris McClure called the roll. The following committee members were present:

Vice Chair Teresa Artis Neal
R. Gene Davis Jr.
Perrin W. Jones
Allie Ray McCullen
Taliajah Vann
Malcolm K. Turner
David Boliek

OPEN SESSION

The following item was presented to the committee for action.

Approval of January 25 and February 17, 2023 Minutes

The Committee reviewed and approved the open and closed session minutes of January 25 and February 17, 2023.

Trustee Preyer made a motion for approval, which was duly seconded and carried.

Committee Chair Bryan noted that without objection the item approved would be added to the Consent Agenda for the Full Board meeting.

The following item was presented for information only:

Faculty Chair Update

Mimi Chapman, Chair of the Faculty, provided the Committee with an update on the faculty.

Questions and discussion were entertained from the committee.

ADJOURNMENT

There being no further business to come before the committee in open session, Committee Chair Bryan called for a motion to adjourn and to forego the Committee's scheduled closed session in lieu of the planned discussion on the closed session agenda for the Full Board meeting on Thursday, March 23, 2023.

Trustee Davis moved to adjourn. The motion was duly seconded and carried.

The meeting adjourned at 3:26 p.m. with no objections.

Overview and Update on Current Title IX Sexual Harassment Regulations



The University of North
Carolina at Chapel Hill

May 17, 2023

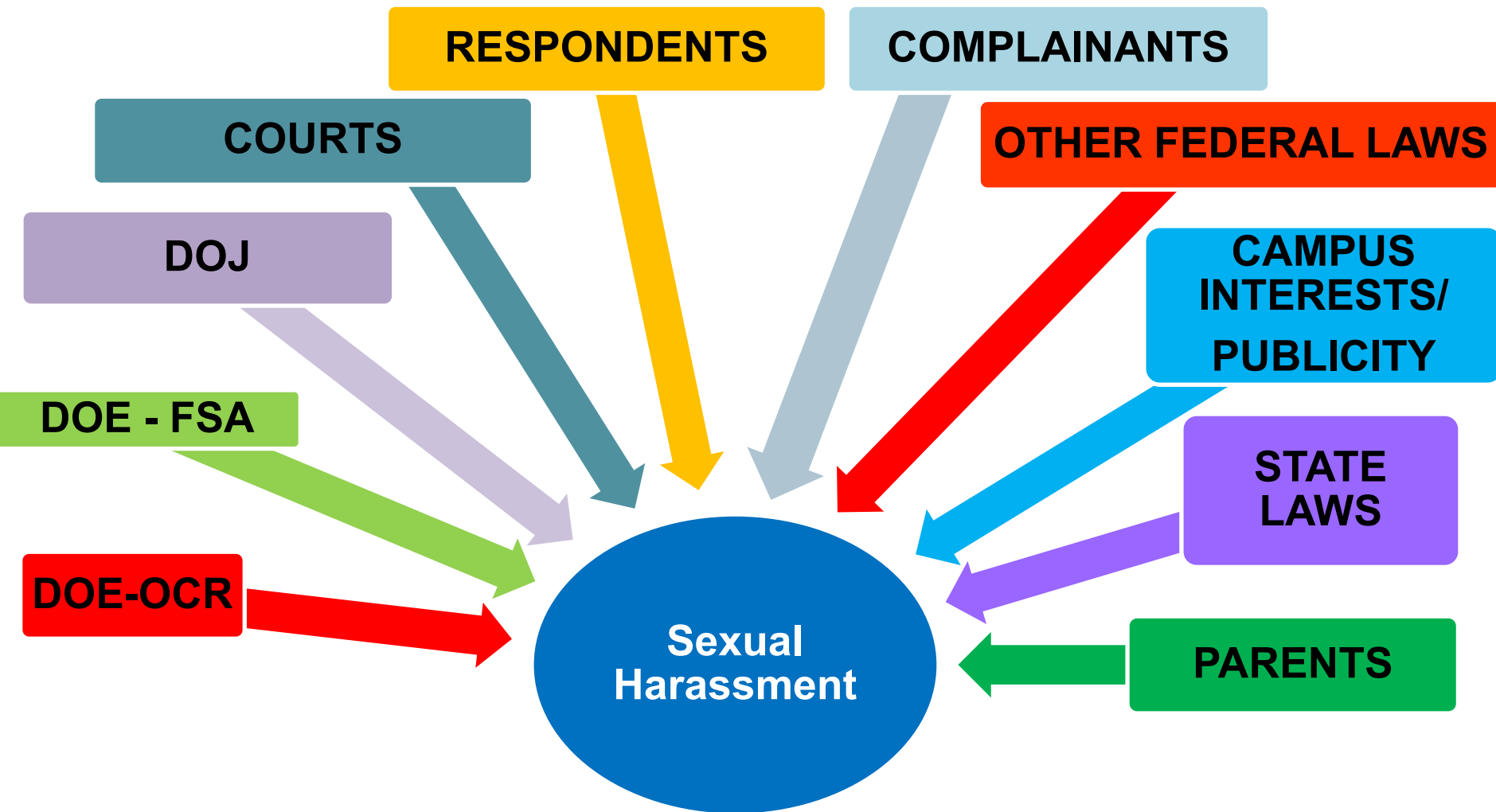
DEBBIE OSGOOD
SHAREHOLDER
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Agenda

1. Legal Landscape
2. UNC-Chapel Hill Policies and Procedures relating to Sexual Harassment
3. Specific Title IX Issues

1. LEGAL LANDSCAPE

Legal Landscape

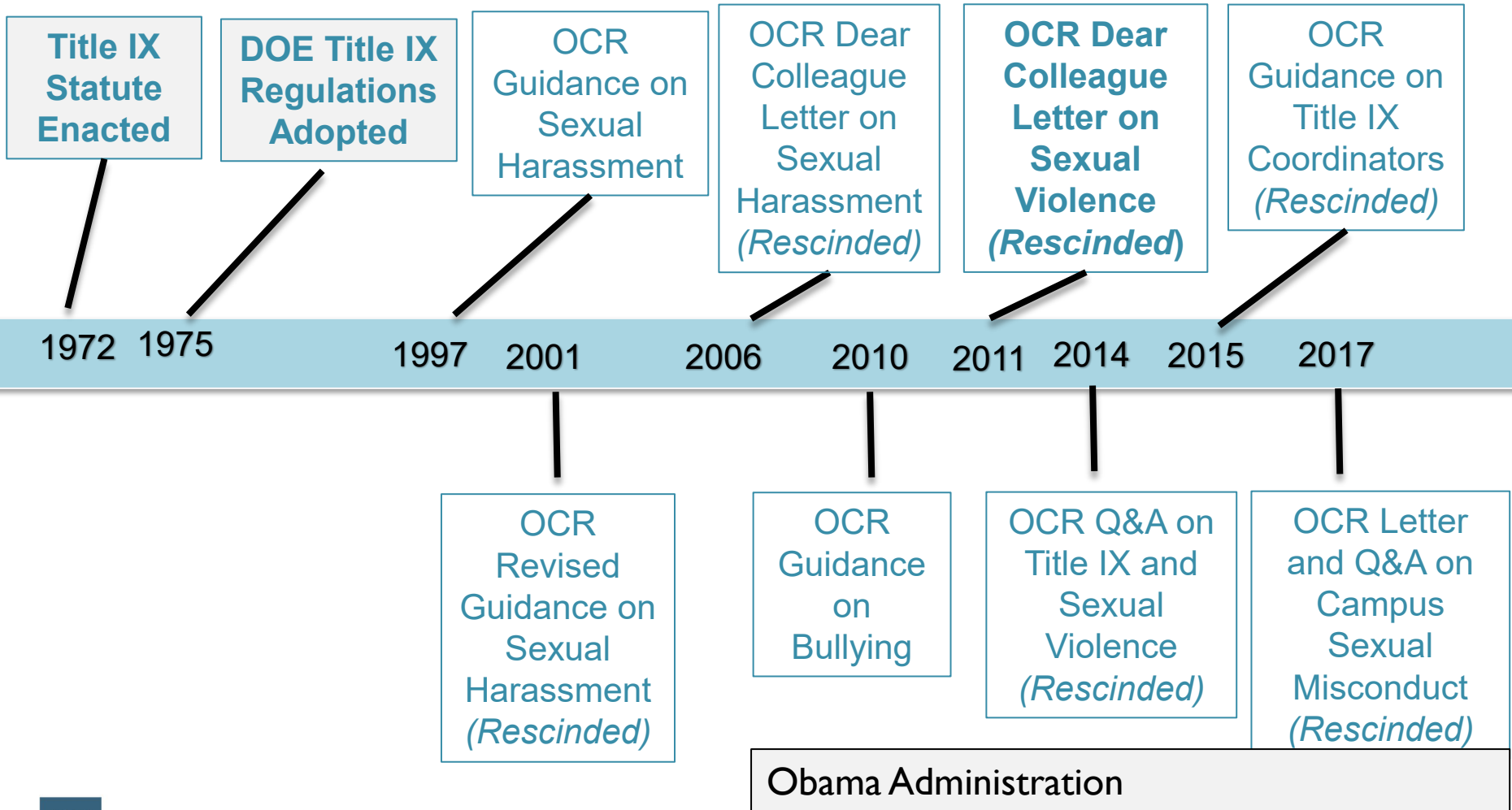


Title IX Statute

“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.”



Title IX History



Title IX History (continued)

August 2020:
Effective date of
Final Revised
Regulations

June 2022:
Proposed
Rulemaking on
Further Revisions to
Regulations

April 2023:
Proposed Separate
Rulemaking on TIX
re Athletic Teams

May/Summer
2023:
Issuance of Final
Regulations
(proposed in 2022)?

Trump Administration

Biden Administration

Current Title IX Regulations – Key Procedural Requirements

- **Notice of Nondiscrimination:**
 - Requires specific content and posting on institution’s website email address as part of contact information
- **Title IX Coordinator**
 - Requires designation of Coordinator
 - Contact information must be included on website and in policies and procedures
 - Reports may be made to Coordinator by multiple methods and at anytime
- **Grievance Procedures**
 - General provision applies to “sex discrimination” – requires “prompt and equitable” resolution
 - New Section 106.45 applies to “sexual harassment”

Current Title IX Regulations – Substantive Requirements

Response required for formal complaints of Title IX sexual harassment:

- A recipient with actual knowledge of sexual harassment in a recipient's education program or activity against a person in the United States must respond in a manner that is not deliberately indifferent.
- A recipient is deliberately indifferent if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

Current Title IX Regulations – Sexual Harassment Procedures

Basic requirements for grievance processes for formal complaints of Title IX sexual harassment:

- Treat complainants and respondents equitably
- Objective evaluation of all relevant evidence
- No bias or conflict of interest
- Training for employees involved in the process
- Presumption that the respondent is not responsible
- Reasonably prompt timeframes, extensions for good cause
- Standard of evidence (“preponderance” or “clear & convincing”)
- Possible disciplinary sanctions and remedies
- Appeal procedures (required)
- Supportive measures available to both parties
- Restrictions relating to privilege

Current Title IX Regulations – Sexual Harassment Procedures

Formal complaints of Title IX sexual harassment

- May be filed by Complainant or signed by Title IX Coordinator
- Complainant may file electronically with physical or digital signature
- Complainant – must be participating in or attempting to participate in the education program or activity
- Respondent – formal complaint may be dismissed if respondent is no longer enrolled or employed
- Title IX Coordinator is not a complainant or party to proceeding even though he/she signs complaint

Current Title IX Regulations – Sexual Harassment Procedures

Processing formal complaints of Title IX sexual harassment Notice

- Initial & continuing notice of allegations to parties

Dismissal “for Title IX purposes”

- Recipient may still address misconduct in dismissed complaint using non-Title IX policies
- *Must* dismiss formal complaint if not within scope of Title IX (does not meet definition of sexual harassment, did not occur in education program or activity, or did not occur vs. person in U.S.)
- *May* dismiss if:
 - Complainant requests to withdraw
 - Respondent is no longer enrolled or employed
 - “Specific circumstances prevent school from gathering evidence sufficient to make a determination”

Current Title IX Regulations – Sexual Harassment Procedures

Investigation of formal complaints of Title IX sexual harassment:

1. Burdens of proof & of gathering evidence rests on school
2. Equal opportunity for parties to present witnesses, including fact and expert witnesses, and inculpatory and exculpatory evidence
3. No gag orders
4. Advisor of choice
5. Written notice of hearings, interview and meetings
6. Equal opportunity to inspect and review evidence
7. Investigation report (“fairly summarizes evidence”; 10-day review and response for parties prior to hearing)
8. Hearing
9. Determination regarding responsibility

Current Title IX Regulations – Sexual Harassment Procedures

Live hearings:

- Advisors must cross examine parties and witnesses – “never by a party personally”
- Schools must provide free advisors for parties to conduct cross examination if a party does not have advisor
- Allows hearings to be in separate locations when technology allows parties to see and hear one another and witnesses
- Only relevant cross-examination and questions allowed – to be determined by decision-maker(s) and explained if not allowed
- Recording or transcript of hearing required

Current Title IX Regulations – Sexual Harassment Procedures

Written Determinations:

- Decision-maker must issue determination to parties simultaneously
- Decision-maker cannot be Title IX Coordinator or investigator(s)
- Must include:
 - Allegation(s)
 - Procedural Steps
 - Findings of fact
 - Conclusions
 - Statement and rationale for each allegation, including determination regarding responsibility, any disciplinary sanctions for respondent, and any remedies for complainant
 - Appeal procedures

Current Title IX Regulations – Sexual Harassment Procedures

Appeals:

- Opportunity to appeal required for both parties (including opportunity to submit written statement)
- Decision-maker(s) cannot be same as decision-maker regarding responsibility or dismissal, Title IX Coord. or investigator(s)
- Appeals may be made on determination of responsibility and on dismissal of case
- Bases for appeals:
 - Procedural irregularity that affected outcome
 - New evidence not reasonably available previously that could affect outcome
 - Title IX Coordinator, investigator(s) or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome

Current Title IX Regulations - Other Requirements relating to Sexual Harassment

- Supportive measures
- Extensive recordkeeping
- Retaliation

Title IX Regulations – Proposed Changes

	Current	Proposed
Response to Sexual Harassment	A recipient with actual knowledge of sexual harassment in a recipient's education program or activity against a person in the United States must respond in a manner that is not deliberately indifferent.	A recipient must take <u>prompt and effective action</u> to end any prohibited sex discrimination that has occurred in its education program or activity, <u>prevent its recurrence, and remedy its effects.</u>

Title IX Regulations -- Proposed Changes

	Current	Proposed
Education Program or Activity	<p>“[E]ducation program or activity” includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. §106.44(a).</p> <p>If the conduct alleged in the formal complaint ... did not occur in the recipient's education program or activity or did not occur against a person in the United States, then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment[.]</p>	<p>Conduct that occurs in a building owned or controlled by a student organization that is officially recognized by a postsecondary institution, and conduct that is subject to the recipient's disciplinary authority.</p> <p>A recipient has <u>an obligation to address a sex- based hostile environment under its education program or activity,</u> even if sex-based harassment contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States.</p>

Title IX Regulations -- Proposed Changes

	Current	Proposed
Sexual Harassment	<p>Sexual harassment is sexual assault and quid pro quo harassment, as well as other forms of sexual misconduct that constitute a sexually hostile environment. Added domestic violence, dating violence, and stalking to the definition of sexual harassment, as defined by reference to VAWA.</p> <p>Hostile environment is only unwelcome conduct determined by a reasonable person to be so severe and pervasive and objectively offensive that it effectively denies a person equal access to a recipient's education program or activity.</p>	<p>Employs the term "sex-based harassment" that includes sexual assault, quid pro quo harassment, dating violence, domestic violence, stalking, and hostile environment harassment.</p> <p>Hostile environment harassment is unwelcome sex-based conduct that is sufficiently severe or pervasive that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from the recipient's education program or activity.</p>

Title IX Regulations -- Proposed Changes

	Current	Proposed
LGBTQIA+ Protections	Did not address <i>but</i> in June 2021, ED issued a notice of interpretation on <i>Bostock</i> .	Discrimination on the basis of sex includes discrimination <u>on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.</u>

Title IX Regulations -- Proposed Changes

	Current	Proposed
Reporting	Complainant must be a participant or attempting to participate in the education program or activity of the recipient at the time of filing a formal complaint.	Complainants may file a complaint about sex discrimination <u>even after leaving the recipient's education program or activity.</u>

Title IX Regulations -- Proposed Changes

	2020 Final Regulations	2022 Proposed Regulations
Grievance Process	Live hearings and cross-examination by a party's advisor are required.	Recipient <u>may, but need not,</u> provide for a live hearing. If a live hearing is available, a party's advisor is allowed to ask certain relevant questions to the other party or any available witnesses. <u>If a live hearing is not available, the decision-maker is allowed to ask certain relevant questions during a meeting with the party to assess the credibility of the parties and witnesses.</u>

Title IX Regulations -- Proposed Changes

	2020 Final Regulations	2022 Proposed Regulations
Standard of Evidence	State whether the preponderance of the evidence or the clear and convincing evidence standard will be used to determine responsibility and apply the same standard for formal complaints of sexual harassment against students and employees.	<u>Use the preponderance of evidence standard of proof to determine whether sex discrimination occurred, unless the recipient uses the clear and convincing evidence standard of proof in all other comparable proceedings, including proceedings relating to other discrimination complaints</u> , in which case the recipient may elect to use that standard of proof in determining whether sex discrimination occurred.

Title IX Regulations -- Proposed Changes

2022 Proposed Title IX Regulations

Pregnant and Parenting Students

Additional protections:

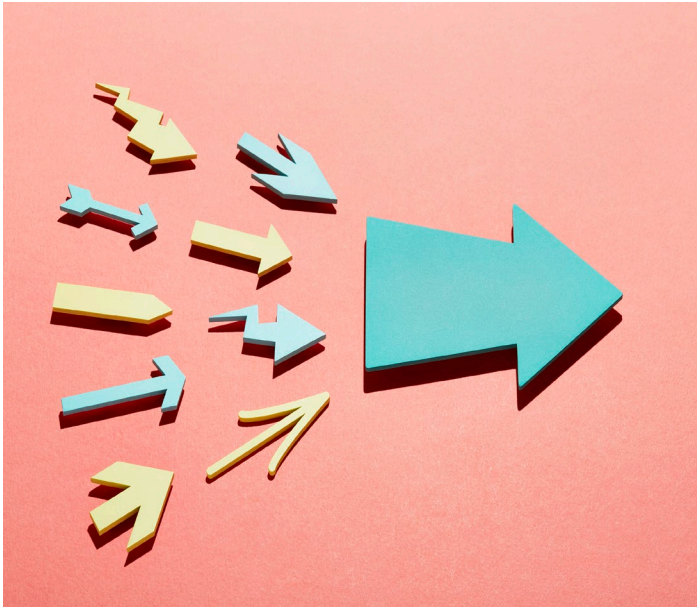
- When an employee is informed of a student's pregnancy or related conditions, the employee must promptly inform the student (or individual with the legal right to act on behalf of the student) of how they can notify and contact the Title IX Coordinator for assistance, unless the employee reasonably believes that the Coordinator is already aware.
- Requires provision and notice of availability to the student of reasonable modifications to the recipient's policies, practices, and procedures because of pregnancy or related conditions.
- Requires provision of lactation space.

2. UNC-Chapel Hill Current Policies and Procedures Relating to Sexual Harassment

University's Notice of Non-Discrimination

The University is committed to providing an inclusive and welcoming environment and to ensuring that educational and employment decisions are based on individuals' abilities and qualifications. Consistent with these principles and applicable laws, it is therefore the University's policy not to discriminate on the basis of age, color, disability, gender, gender expression, gender identity, genetic information, national origin, race, religion, sex, sexual orientation or veteran status as consistent with the *University's Policy on Prohibited Discrimination, Harassment and Related Misconduct*. No person, on the basis of protected status, shall be excluded from participation in, be denied the benefits of, or be subjected to unlawful discrimination, harassment, or retaliation under any University program or activity, including with respect to employment terms and conditions. Such a policy ensures that only relevant factors are considered and that equitable and consistent standards of conduct and performance are applied.

University's Policies and Procedures



Title IX

- [Policy on Prohibited Sexual Harassment under Title IX](#)
- [Title IX Grievance Procedures](#)

Other Discrimination/Harassment

- [The Policy on Prohibited Discrimination, Harassment and Related Misconduct](#)
- [Grievance Procedures - Student Respondent](#)
- [Grievance Procedures - Employee Respondent](#)
- [Grievance Procedures - Third Party Respondent](#)

University's Due Process Protections

FIRE: Spotlight on Campus Due Process

- Rates top 53 U.S. universities using 10 “due process” safeguards
- 2021 Report cited by OCR in Preamble to 2022 Proposed Title IX regulations
- 2021 and 2022 Reports on Title IX Policies:
 - No schools with A grade
 - No schools guaranteed “unanimity or clear and convincing standard” before sanction of student expulsion in 2021, rare in 2022
 - 2021 and 2022 UNC’s Title IX Policy: B grade – 15/20 points
 - In 2022, UNC is one of only 13 schools with 15 or 16 points (no schools with higher points)

3. SPECIFIC TITLE IX ISSUES

Specific Title IX Issues

1. Evidentiary Standard in Title IX Cases
2. Role of the Board of Trustees in the Title IX Process
3. Considering Evidence when Cross Examination of a Party or Witness is Limited or Not Available
4. Jurisdiction over Off-Campus Misconduct

Evidentiary Standard – University's Title IX Policy and Procedures

- The Hearing Officer will make a determination of responsibility using the **preponderance of the evidence standard** and will issue a written determination regarding responsibility.
- Applies to formal complaints of conduct by **University students, employees, and other persons reported** to have engaged in Title IX Sexual Harassment.

Evidentiary Standard – *Current* Title Requirements

Grievance procedures for formal complaints of Title IX sexual harassment must:

- State whether the preponderance of the evidence or the clear and convincing evidence standard will be used to determine responsibility. (Either standard “can satisfy the requirements of procedural due process and fair treatment.”)
- Apply the same standard of evidence to all formal complaints of sexual harassment – including complaints against students and complaints against employees.

Evidentiary Standard – *Proposed* Title IX Requirements

- Would allow schools to apply a different standard of proof to allegations of student misconduct than it does to allegations of employee misconduct.
- Either preponderance of evidence or clear and convincing standard may be used.

Evidentiary Standard – *Proposed Title IX Requirements*

- It is OCR’s “current view that the preponderance of the evidence is the standard of proof for complaints of sex discrimination that would best promote compliance with Title IX” and that the criminal standard (“beyond a reasonable doubt”) is never appropriate under Title IX.
- Ensures that “when a decisionmaker determines, based on evidence, that it is more likely than not that sex discrimination occurred in its program or activity, the recipient can take sufficient steps to deter the respondent from engaging in similar conduct and prevent future such violations.”
- “[E]qually balances the interests of the parties in the outcome of the proceedings by giving equal weight to the evidence of each party, and it begins proceedings without favoring the version of facts presented by either side.”
- The preponderance standard is consistent with civil litigation under Title IX, Title VII, and Title VI.

Evidentiary Standard – Best Practices

- FIRE's 2021 and 2022 surveys found that 0 of the 53 highly ranked public and private national institutions applied the clear and convincing standard or required unanimous hearing panel decisions for Title IX sexual misconduct cases.
- Some schools use clear and convincing standard for other disciplinary proceedings for students and/or employees.
- For example, the University of Wisconsin - Madison uses the clear and convincing standard for non-sexual misconduct faculty discipline cases and for suspension and expulsion in student discipline cases for non-sexual misconduct. UWM uses the preponderance standard for Title IX sexual harassment cases.

Role of the Board -- University's Discrimination Procedures for Student Respondents

- Allows “further review/appeal” to the Board of Trustees by either party in matters of suspension or expulsion
- Available appeal grounds:
 1. Violation of due process; and
 2. Material deviation from the "Policy on Minimum Substantive and Procedural Standards for Student Disciplinary Proceedings" adopted by the Board of Governors, University of North Carolina Policy Manual § 700.4.1.
- Where the Board affirms the Hearing Outcome, the decision is final and is not subject to further appeal.

Role of the Board – *Current Title IX Requirements*

- Role of a governing board for a university is not specifically addressed in Title IX regulations
- Title IX Coordinator must have the necessary authority to coordinate and oversee the school's compliance with Title IX
 - OCR has stated that to avoid potential conflicts of interest, among other reasons related to authority and awareness, the Title IX Coordinator should report directly to an institution's senior leadership, which may be the President, Chancellor or another senior official.

Cross Examination – University's Title IX Policy and Procedures

Hearing Procedures

- The Hearing Officer and the parties, through their Advocate or Hearing Advisor, may pose questions to any individual (including parties and witnesses) participating in the hearing. Each party's Advocate or Hearing Advisor will be permitted to ask the other party and any participating witnesses all relevant questions and follow-up questions, including those challenging credibility.
- This cross-examination will be conducted directly, orally, and in real time by the party's Advocate or Hearing Advisor and never by a party themselves.
- The Hearing Officer cannot draw an inference about the determination regarding responsibility based solely on a party or witness's absence from the live hearing or refusal to answer cross-examination or other questions.

Cross Examination – *Current* Title IX Requirements

- Require live hearings and cross-examination by a party's advisor.
- Prohibit the decision-maker from drawing an inference about the responsibility determination based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.

Cross Examination – *Current* Title IX Requirements

Live Hearings

- 2020 Regulations prohibited reliance on any statement of a party or witness in reaching a determination regarding responsibility if a party or witness does not submit to cross-examination at the live hearing.
- *Victim Rights Law Center et al v. Cardona (D. Mass 2021)* vacates this section of the regulations.
 - Found that prohibition was arbitrary and capricious.
- OCR announces in August 2021 it will “immediately cease enforcement” of this part of the Title IX regulations.
 - Instead, a decision-maker may 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.”

Cross Examination – *Proposed Title IX Requirements*

Process for evaluation allegations and assessing credibility:

- School must provide a process that enables the decisionmaker to adequately assess the credibility of the parties and witnesses to the extent that credibility is both in dispute and relevant to evaluation sex-based harassment allegation(s)
- Live hearings are permitted but not required.
- **“If a party does not respond to questions related to their credibility, the decisionmaker must not rely on any statement of that party that supports that party’s position.** The decisionmaker must not draw an inference about whether sex-based harassment occurred based solely on a party’s or witness’s refusal to respond questions related to their credibility.”

Cross Examination – Best Practices

- Institutions have revised procedures to comply with OCR's recommended deletion of language change relating to the use of statements when a party or witness is unavailable or declines to participate in cross-examination
- University's position is that a finding of responsibility is still possible and appropriate when a reporting party is unavailable or declines to participate in cross-examination. The University's position is:
 - Supported by applicable law and guidance
 - Consistent with the practices of other institutions

Jurisdiction over Off Campus Misconduct -- University's Policy and Procedures

Title IX Sexual Harassment:

- Applies to prohibited conduct at locations, events, or circumstances for which the University exercised substantial control over both the Respondent and the context in which the alleged harassment occurred.
- Includes any building owned or controlled by a student organization that is officially recognized by the University.
- Must occur in the United States.

Jurisdiction over Off Campus Misconduct -- University's Policy and Procedures

Discrimination/Harassment (non-Title IX):

- Applies to prohibited conduct that **occurs on and off campus**, including on-line or electronic conduct, if:
 - the conduct occurred in the context of a University employment or education program or activity,
 - had continuing adverse effects on campus, or
 - had continuing adverse effects in an off-campus employment or education program or activity of the University.
- Examples of covered off-campus conduct include University-sponsored study abroad, research, or internship programs.

Jurisdiction over Off Campus Misconduct -- University's Policy and Procedures

Discrimination/Harassment (non-Title IX):

- University assesses whether the alleged conduct has or is reasonably likely to have continuing adverse effects or to create a hostile environment for students, employees, or third parties while on campus or in any University employment or education program or activity.
- Four factors considered:
 1. the seriousness of the alleged conduct,
 2. the risk of harm involved,
 3. whether both parties are members of the campus community, and
 4. whether the off-campus conduct is part of a series of actions that occurred both on and off campus.

Jurisdiction over Off Campus Misconduct -- *Current* Title IX Requirements

- A Formal Complaint will be dismissed if the conduct reported:
 - Would not constitute Sexual Harassment under Title IX, even if proved
 - Did not occur in a University Educational Program or Activity; or
 - Was not directed against a person located in the United States.
- **Education Program or Activity:** Locations, events, or circumstances for which school exercises substantial control over both the Responding Party and the context in which the Sexual Harassment occurred at the time of the alleged incident, which includes any building owned or controlled by a student organization that is officially recognized by school.

Jurisdiction over Off-Campus Misconduct: *Proposed Title IX Regulations - Text*

- Title IX regulations apply to all sexual discrimination occurring in a school's education program or activity in the United States.
- Conduct that occurs in a school's education program or activity includes but is not limited to conduct that occurs in a building owned or controlled by a student organization and conduct that is subject to the school's disciplinary authority.
- A school has an obligation to address a sex-based hostile environment under its education program or activity, even if sex-based harassment contributing to the hostile environment occurred outside the school's education program or activity.

Jurisdiction over Off-Campus Misconduct: Best Practices

The University's statements of jurisdiction in its Title IX and Discrimination/Harassment policies and procedures are:

- Consistent with law and guidance, and
- Similar to the exercise of jurisdiction by other institutions



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