

LCTCS TITLE IX FORUM: NEW REGS POLICY DISCUSSION

August 10, 2020



Louisiana's
Community & Technical Colleges

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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. §§ 1681-1688).



GOAL FOR TODAY'S FORUM

- Understand the difference between “policy” and “process.”
- Share the pearls of wisdom from ATIXA training.
- Discuss the various sections of the policy draft template.
- Questions and answers.

POLICY V. PROCESS

- What does 1P2P mean?
 - Prohibited conduct and protected class status v. grievance process
- The **Policy** covers the definitions, rationale, scope, general Title IX Coordinator role, conflicts of interest, how to file complaints, types of discrimination, general measures and expectations when a grievance is filed, and expectations for privacy, jurisdiction, training, reporting, and retaliation. The
- **Process(es)/Procedure(s)** cover(s) how institutions will respond to grievances, depending on the type of case it is now defined in the new regulations to be.
 - **Draft Process A** refers to a suggested process when a case rises to the (now more narrow) definition of a Regulatory Title IX case. Other, non-Regulatory, cases can be adjudicated in a variety of institution-specific ways, some of which will be the ways you are already adjudicating them (via HR or student conduct processes, for example).
 - If not A, then B (or C, D, E etc. 😊)



PEARLS OF WISDOM GARNERED FROM ATIXA TRAINING

General:

- New regulations have the force of law, effective and enforceable 8/14/2020.
- Events that could affect new regs:
 - Presidential Election 2020
 - Court challenges pending
- Definitions are specific and prescriptive.
 - Covered in section 106.30 of regs.
- Adds Clery definitions of stalking, domestic violence, and dating violence.
- The regs represent “a jurisdictional floor.”
 - You can establish your standards for holding someone responsible for conduct even if not a Title IX violation. (ex. Off-campus on non-institutional housing.)



PEARLS OF WISDOM GARNERED FROM ATIXA TRAINING

Notice:

- What Constitutes Notice
 - “Actual Knowledge” replaces “Actual Notice.”
 - Once an institution receives actual knowledge, they must act in a way that is not deliberately indifferent.
 - Define actual knowledge to mean notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient (can include anonymous reports).
 - “Official with Authority” replaces “Responsible Employee.”
 - Title IX Coordinators and Typically Chancellors, VCs, Deans, etc.
 - OWAs bear liability of notice.
 - All Title IX Coordinators are OWAs!
 - An Official with Authority is one who can institute corrective measures in that case. Who this is depends on facts related to the college structure.
 - A formal complaint is required to begin an investigation AND before any informal resolutions are agreed to.
 - Regs allow parents to make complaints on behalf of their children—it is NOT clear if those children have to be minors (ATIXA has sent in a question to OCR about this). If the child refuses to testify, it is likely grounds to dismiss.



PEARLS OF WISDOM GARNERED FROM ATIXA TRAINING

The Title IX Team:

- Title IX Coordinator (hostess metaphor)- Coordinates logistics, intakes, informal resolutions, no substantive role in hearing or decision, they CAN be an investigator, but not ideal.
- Deputy Title IX Coordinators (designees in HR, etc.)
- Investigators (sous chefs)
- Hearing Officers/Chairs and Decision-Makers (chefs)- Faculty not ideal because of conflict of interest.
- Advisors
- Appeal Officers
- Legal Counsel
- Community Advocates
- Mandated Reporters– Recommend that all non-confidential sources are mandated reporters (note, limits to confidentiality even for confidential sources)– Report to Title IX Coordinator and/or HR Director.



PEARLS OF WISDOM GARNERED FROM ATIXA TRAINING

The Title IX Team (continued):

- At least one Title IX Coordinator = 1
- Deputy Coordinators = 3-5 (ideally HR and student affairs)
- Investigators = 2
- Hearing Decision-Makers = 4-6 (pool) (at least 1)
- Advisors = 4-6 (pool) (at least 2)
- Appeal Decision-Makers = 1-3 (pool)
- Cross-train!
- Minimum Recommended Team Members= 10 - 15!



PEARLS OF WISDOM GARNERED FROM ATIXA TRAINING

5-Point Checklist to Meet Title IX Case Threshold:

1. Is conduct one of the Big Five Offenses, as now defined?
 2. Are both the complainant and respondent within the institutional community or seeking to be in the community AT THE TIME OF THE COMPLAINT?
 3. Is the respondent under the control of the recipient at the time of the complaint?
 4. Did the conduct occur within the US?
 5. Did the conduct occur within a program or activity of the institution?
- **If the answer to any 1 of these is “no,” must dismiss under Title IX!**
 - And move to another policy or process if necessary to adjudicate.
 - Institutions can implement the same procedures for consistency and equity across similar offenses that do not meet the Regulatory standards above (for a sex-based case that occurred in a off-campus apartment over which the institution has no control, for example).

PEARLS OF WISDOM GARNERED FROM ATIXA TRAINING

What is Sexual Harassment According to OCR Now?:

- The BIG FIVE Offenses (each with their own definition):
 - Sexual harassment (quid pro quo ***only*** where respondent is employee, conduct on the basis of sex that is severe, pervasive, and objectively offensive and denies equal access to program or activity (hostile environment)
 - Sexual Assault (6 sub offenses)
 - Domestic Violence (VAWA 304 definition)
 - Dating Violence (VAWA 304 definition)
 - Stalking (VAWA 304 definition)



PEARLS OF WISDOM GARNERED FROM ATIXA TRAINING

Training Available:

- ATIXA Title IX Coordinator training
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 - There is no mandate to train advisors, but certainly a best practice.
- Mock hearing training through ATIXA (coming in August).
- Be sure to publish information about any training received on your websites (ATIXA or other proprietary entity will provide guidance on how to do that and protect their intellectual property).



QUESTIONS?

- Policy
- Process
- Next steps



LCTCS TITLE IX FORUM: HEARING OFFICER AND DECISION-MAKER DISCUSSION

August 11, 2020



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GOAL FOR TODAY'S FORUM

- Understand requirements for Regulatory Title IX cases grievance processes v. non-Regulatory discrimination cases.
- Share the pearls of wisdom from ATIXA training related to hearing officers and decision-makers.
- Discuss the various sections of Process A draft template.
- Questions and answers.

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PEARLS OF WISDOM GARNERED FROM ATIXA TRAINING MAY-JULY, 2020

General:

- All roles except that of the Title IX Coordinator can be outsourced.
- If one of the advisors for either party is an attorney, System legal counsel (Mr. Leo Hamilton) must be notified.
- Emails can suffice as “signature” on a formal complaint request.
- Title IX Coordinators reserve the right to take action if they are on notice to protect the institutional community even without participation of the complainant.
- If a case is dismissed under Title IX, it can be adjudicated under other polices or procedures (student conduct, HR, etc.).
- A complainant can change their mind and rescind their formal complaint up to the time of the hearing.
- Need to notify respondent in writing that they are not found as responsible until a final determination is made.
- Train a pool of staff to serve in multiple roles!



PEARLS OF WISDOM GARNERED FROM ATIXA TRAINING MAY-JULY, 2020

Investigators:

- Gather, assess, synthesize information (sous chef)
- Title IX Coordinators should work closely with investigators so that they know how/if they need to work within supportive measures (no contact orders, for example).
- Investigators determine relevance of information to include in investigative report.
- Train investigators on how to ask good questions to help reduce the need for as much cross-examination.
- To improve future investigative processes, after a case ends, it is helpful if a hearing panel communicates to the investigator(s) information that would have been helpful to determine responsibility in the case.
- Investigators attend hearings.
- Investigators do NOT attend deliberations.
- To determine consent related to incapacity, the determination needs to be made whether or not the respondent had enough information to KNOW the complainant was incapacitated.
 - College example

PEARLS OF WISDOM GARNERED FROM ATIXA TRAINING MAY-JULY, 2020

Before the Hearing:

- Title IX team can have a pre-hearing meeting to work out logistics.
- You can invite notice of advance questions so that the chair/single DM can assess relevance before the hearing.



PEARLS OF WISDOM GARNERED FROM ATIXA TRAINING MAY-JULY, 2020

Live Hearings- Hearing Officers/Decision-Makers:

- Section 106.45 of regs is primary section that governs live hearings.
- The goal of a hearing is:
 - To ensure that you understand information contained in the report:
 - Relevant facts about what happened during the incident
 - Any related events
 - Any corroborating information
- Can be a single person or a panel (with a chair).
 - Chair or single DM makes ruling on EVERY question as it is asked during cross-examination on relevance before a witness responds.
- The pace of the hearing is SLOW because the chair or single DM must determine relevance of each question; no one answers until the chair or single DM says “you may answer.”
- Can be internal or external.
- Title IX Coordinator cannot be decision-maker
- Investigators may not serve as DMs.
- Appellate DM is a completely separate role.
- Follow the policy and procedures without discretion and whether or not you agree or disagree with it; Discretion can introduce bias and deviation from the policy, which can invite challenge and/or liability.
- Do NOT allow cross-examination questions already answered.
- The DMs can take a brief recess to determine how to move forward (with hostile witnesses or advisors that are not following proper procedures).
- If someone at the hearing admits to an additional violation during the hearing, you cannot address it there; it must be addressed in a separate process.
 - Due process funnel, where hearing is at the bottom of the funnel.
- Deliberations are NOT recorded.
- During deliberations DMs should discuss/consider only facts and evidence presented.
- DMs impose sanctions for responsibility.
 - Consult with appropriate Student Affairs or HR personnel in advance behind the scenes on what sanctions would be reasonable if found responsible.
- Hearings can be face-to-face or virtual.
 - Virtual hearings may offer more control over witness hostility and unpredictable behaviors, and can often be more easily recorded and shared.



PEARLS OF WISDOM GARNERED FROM ATIXA TRAINING MAY-JULY, 2020

Advisors:

- Anyone can be an advisor of choice, even a witness.
- If you train advisors, they should be trained on policy, procedures, how to assess questions for relevance, how to pose questions.
- Advisors are simply the voices of the complainant and respondent.
- Advisors can be the recipient of notices on behalf of the parties (obtain written authorization from the complainant or respondent).
 - If an advisor change is made, do not assume this authorization transfers.

PEARLS OF WISDOM GARNERED FROM ATIXA TRAINING MAY-JULY, 2020

Witnesses:

- Only witnesses who were interviewed by the investigator and whose testimony/evidence is in the investigative report can testify.
- Investigators are a type of witness to the testimony and can be cross-examined.
- If a witness starts to decline to answer questions during a hearing, the DMs must disregard ALL testimony from that witness.

PEARLS OF WISDOM GARNERED FROM ATIXA TRAINING MAY-JULY, 2020

Appeals:

- Grounds for appeal:
 - Procedural irregularity that affected the outcome of the matter
 - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
 - The 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 of the matter
 - Other additional bases (sanction?), as long as applied to the parties, equitably.
- Only 1 level of appeal is required.
 - We can add a System level as a 2nd level for colleges to assess due process from the college appeal.
- Either party can request an appeal.
- Can be a single appellate officer or a panel.
- Must not include anyone from the original investigation or hearing.
- Cannot be the TIXC.
- Helpful to have a pool from which to choose.
- All parties should be notified of an appeal request.
- It is helpful to have a clearinghouse staff member to determine if there are valid grounds for an appeal.
- Sanctions from the original hearing should not be effectuated until after the appeal window or appeal process (if requested) closes.
- Keep appeal window narrow.
- The appeals officer does NOT rehear a case; it is mostly document review
- The role of the appeal officer(s) is to determine if new evidence presented would have impacted the outcome originally.
 - If yes, they can advise the original hearing panel/officer to go back and make a determination with the new evidence (remand).



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