



Association of  
Title IX Administrators

# Investigating Sex/Gender Discrimination & Disparate Treatment

An ATIXA Best Practices Workshop

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# Content Advisory

The content and discussion in this course will necessarily engage with sex- and gender-based harassment, discrimination, violence, and associated sensitive topics that can evoke strong emotional responses.

ATIXA faculty members may offer examples that emulate the language and vocabulary that Title IX practitioners may encounter in their roles including slang, profanity, and other graphic or offensive language. It is not used gratuitously, and no offense is intended.

# Workshop Introduction



The primary focus of this workshop is to explore the framework for investigating allegations of discriminatory treatment, often called “disparate treatment,” because of someone’s sex or gender.



Sex discrimination complaints often involve issues of climate, culture, policies, or practices, which in turn require a specific investigative framework and investigation skills.



Our goal is to provide practitioners with an opportunity to sharpen skills for investigating complaints of sex discrimination through applied learning exercises.

# Title IX, Discrimination, and Disparate Treatment

# Title IX and Equity

- Title IX is a sex and gender equity law
- Equity refers to the understanding that not all individuals have access to the same resources and opportunities
  - Equity focuses on providing support and resources to reduce disparities in access to the education program
  - Title IX seeks to remedy the inequities created by sex and gender discrimination
- Title IX imposes a duty to stop, prevent, and remedy sex and gender discrimination

# 2024 Regulations

The 2024 Regulations apply to sex discrimination complaints, including disparate treatment

- The strategies and constructs in this workshop are consistent with the regulatory Resolution Process
- Apply strategies and constructs in the **Evaluation** and **Investigation** “major stages” of the Resolution Process





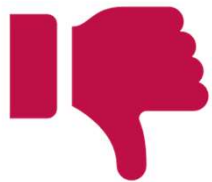
# Regulatory Application

- The 2020 Regulations did **not** apply to sex discrimination complaints based on sexual orientation (SO), gender identity (GI), sex stereotypes, etc.
  - No need to worry about retroactively applying the 2020 Regulations to disparate treatment complaints
  - May apply 2024 Regulations beginning **August 1, 2024**
- **Note:** State laws vary significantly on these issues
  - Incorporation of SO and GI into state civil rights laws, usually restrictive
  - Distinctions based on “biological sex”
  - Although Title IX overrides state law, legal challenges are evolving

# Institution as Respondent

- Under the 2024 Regulations, when a complaint alleges an institution's **policy or practice** discriminates on the basis of sex, the Resolution Process still applies, but some Respondent rights will **not** apply
  - Certain procedural rights that would not make sense to afford to an institution
    - OCR did not provide guidance on the procedural rights not owed to institutional respondents
  - Preamble suggests a Title IX Coordinator (TIXC) could take action to stop, prevent, and remedy a discriminatory policy and practice in lieu of Informal Resolution (IR)

# Distinguishing Types of Discrimination



## Disparate Treatment

- Intentional
- Usually requires adverse action
- Affiliated with or perception of affiliation to protected class



## Disparate Impact

- Occurs with unintentional discrimination
- Impact disadvantages certain groups



## Harassment

- Quid Pro Quo
- Hostile Environment
- Sexual Assault
- Dating/Domestic Violence
- Stalking



## Retaliation

- Suffered adverse academic or employment action based on participation in a protected activity

# Examples of Disparate Treatment

## Employees

- Hiring
- Promotion/Performance reviews
- Pay
- Responsibilities/Job assignments
- Shifts
- Access to resources

## Students

- Athletics
- Grading
- Program access
- Student conduct outcomes
- Housing access
- Guest visitation policies

# Adverse Action Examples

- Not hiring/demotion/termination
- Promotion/Tenure denial
- Poor performance reviews
- Less desirable work assignments
- Work-related threats
- Supervisory responsibility removal
- Abusive verbal or physical behavior
- Discipline
- Student leadership opportunity denial
- Unfair grading
- Pay and compensation disparity
- Resource inaccessibility
- Remedy inaccessibility
- Opportunity denial

# Disparate Impact

- Stems from “neutral” policies and practices applied evenhandedly, but that allegedly have a discriminatory impact
- Complex investigations
  - Often examines culture/climate
- High level statistical analysis
  - Validity studies
  - Programmatic necessity
- Examples: effect of hiring, admissions, or disciplinary processes, even when conducted in a facially neutral way
- Focuses on remedies, not sanctions



# Disparate Treatment Construct

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# Disparate Treatment Construct

**Step 1:** Does the complaint satisfy the required elements for a disparate treatment complaint?

**Step 2:** Does the Respondent offer a non-discriminatory reason for the adverse action?

**Step 3:** Is there evidence that the offered reason is pretext for discrimination?



# Step One: Complaint

**Step 1:** Does the complaint satisfy the required elements for a disparate treatment complaint?



1(a)

Does the complaint implicate a protected characteristic?



1(b)

Does the complaint identify an adverse action?



1(c)

Does the complaint assert that the protected characteristic status caused the adverse action?

# Step One: Initial Allegation Assessment

- When receiving a report or complaint of disparate treatment:
  - Determine whether the allegations, if proven, have all three elements
  - If not, conduct an evaluation or “small i” investigation
- Cannot disregard because the Complainant’s initial report does not “check all the boxes”
- Examples:
  - Meet with the Complainant to learn additional information
  - Consult with human resources or a department chair (if appropriate)
  - Perform a preliminary employment data review

# Step One: Examples

“The College of Engineering hates women!”

- No specific discriminatory treatment alleged
- Meet with the Complainant to get additional information; may not ultimately result in an investigation

“I’m not getting paid enough because the College of Engineering hates women!”

- Discriminatory treatment alleged, but need additional information
- Meet with the Complainant, possibly request human resources records about relevant salaries to get started

# Step One: Examples

The College of Engineering denied my tenure application because I am a woman. All male candidates who applied, even those who had less experience and had worse evaluations, were promoted. All the female candidates were denied tenure.

- Complaint identifies a protected characteristic, an adverse action, and points to comparators to connect the tenure decisions to the alleged disparate treatment
- Establishes all three required elements of disparate treatment for Step One

# Step One: Initial Allegation Assessment

## Some evidence must connect the adverse action to the protected characteristic

- Examples:
  - “Similarly situated individuals” outside the protected characteristic group are treated differently
    - Any individual is “**similarly situated**” if it is reasonable to expect that they would receive the same treatment within the context
    - Fact-specific analysis
  - Direct evidence of a connection
    - Documents or witnesses who have evidence of discriminatory intent/animus
    - Can also be circumstantial or indirect evidence
  - Satisfactory job performance data or academic performance data

# Gathering Evidence

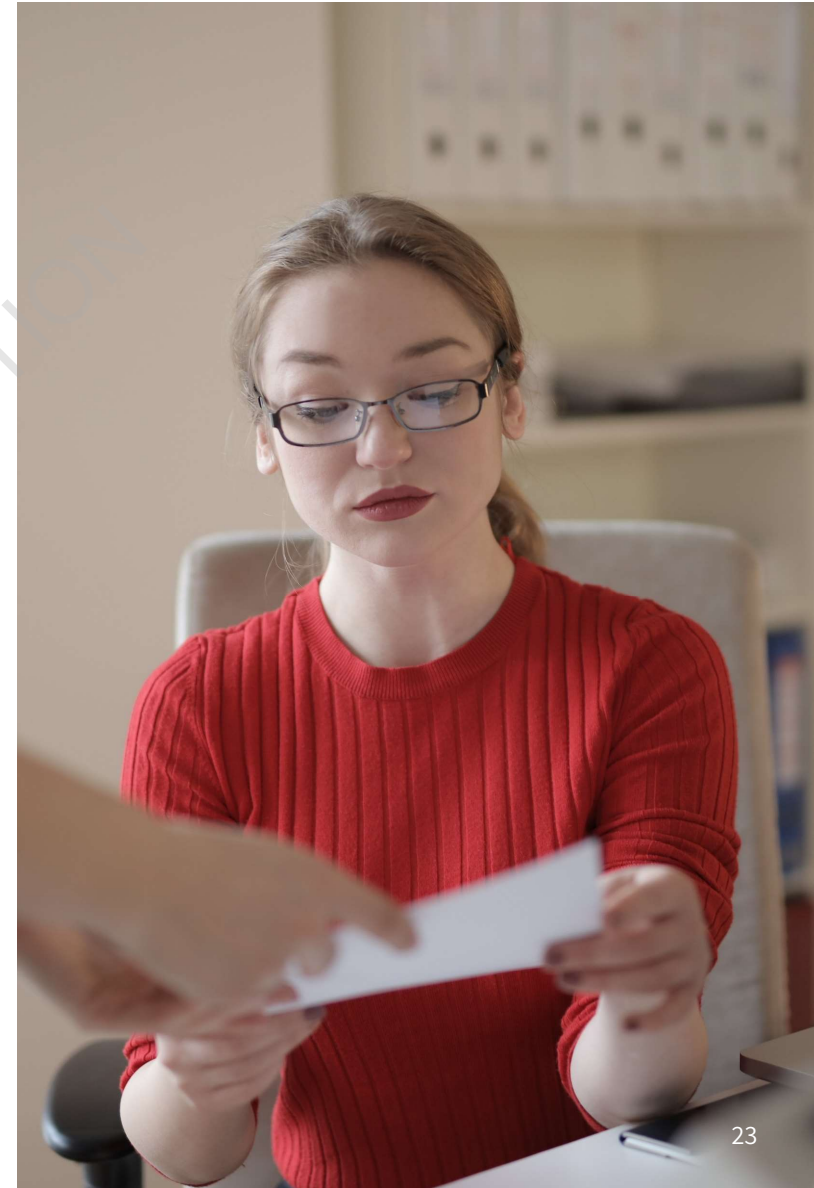
- Similarly situated does not mean identically situated
  - **Most relevant** comparisons based on the available evidence
  - Evidence of differential treatment of similarly situated individuals creates an inference of the presence of a discriminatory motive
- It is the responsibility of the institution to gather relevant evidence once an initial showing of disparate treatment has been made



# Statistical Evidence

## Statistical evidence could be important for an alleged pattern or practice of discrimination

- Example: A professor alleges his department chair implemented a hiring process that is biased against males
  - Consider the identities of the department chair's hires against the overall applicant pools in those hiring cycles
  - If 75% of applicants are male identifying but comprise only 25% of hires



## Step Two: Non-Discriminatory Reason

- If the initial assessment in Step One **does not** establish the required complaint elements, end the inquiry
  - Consider appropriateness for referral to a different process or office
    - Under the 2024 Regulations, discretionary dismissal #4 would apply
- If an initial showing of disparate treatment is made, the complaint moves forward
  - Follow institutional policy to file a complaint and initiate the Resolution Process
  - Step Two and Step Three roughly correspond to the investigation phase





# Step Two: Non-Discriminatory Reason

- Interview the Respondent about the allegations to elicit an explanation:
  - Ask about the **why** behind the adverse action or disparate treatment
    - “Why didn’t Sally get tenure?”
    - “Why did John get tenure when Sally didn’t?”
  - Gather any evidence that supports the stated reason(s)
- Investigator should seek corroboration of any offered non-discriminatory reason(s)
  - Analyze the Respondent’s offered reason in light of relevant evidence
    - Statistical evidence may also be used to rebut a discriminatory motive
- A complaint may implicate multiple Respondents, a department, a division, or an entire institution/district

# Step Three: Pretext Analysis

- If the Respondent offers a non-discriminatory reason for the adverse action, the Investigator must then seek relevant evidence to determine if that reason is “legitimate”
  - Is the Respondent’s stated reason just pretext for discrimination?
  - **Pretext** occurs when an adverse action occurred for discriminatory reasons, but an individual nonetheless asserts that there was a legitimate reason for the action
- Provide the Complainant with an opportunity to respond to the Respondent’s reasoning
  - Follow-up interview to identify any evidence to rebut the Respondent’s reasoning
    - Direct evidence
    - Other witnesses or documents
- Consider other sources to thoroughly investigate whether the reasoning is pretextual

# Michelle & Tim

- Michelle, a Black woman currently employed at the high school, applied for the new Chief Information Officer (CIO) role in the school district
- The job posting required experience with specific student information software, as well as a minimum of three years of supervising other IT professionals
  - Michelle met all the requirements for the position but was not hired
  - The district hired Tim, a Black male
  - Tim previously worked at the district before Michelle arrived and before leaving for a tech start-up in the finance sector
  - Tim had no experience with the specific student information software and hadn't yet supervised other IT professionals

**Did Michelle allege all the elements of a disparate treatment complaint?**

# Michelle & Tim

- Tyrone, who supervises the CIO role, asserts that he offered Tim the job because they're friends from when Tyrone was the district business director and Tim worked in the IT office
  - Tyrone never worked directly with Michelle and opted to hire his friend

Has Tyrone provided a **non-discriminatory** reason for not hiring Michelle?



# Michelle & Tim

- Tyrone claimed his decision was based on favoritism for his friendship with Tim
- Michelle responds that Tyrone's argument is pretext
- Michelle offers two coworkers as witnesses to Tyrone's statements about how he does not trust women in IT roles because his mother is completely inept when it comes to technology
  - Tyrone counters that these comments were made in jest
  - Witnesses provide evidence that Tyrone made such comments more than once

**Does the evidence suggest that Tyrone's offered reason was pretext?**

# Rory

- Rory is a high school student and works at her school's gym checking student and staff ID cards. She attends class from 8:30am to 3:00pm and usually works at the desk from 3:00pm-5:00pm.
- Rory joined the basketball team, requiring her to be at practice from 3:00pm-4:30pm each day. Rory asked her supervisor to change her shift to 5:00pm – 7:00pm, when the gym closes each night.
- Her supervisor said he could not accommodate her request for a shift that late, but Rory knows others with that shift assignment – however, they are all boys. Rory ended up making a complaint to the Principal.

**Has Rory alleged all the elements of a disparate treatment complaint?**

# Rory

- The supervisor responded that he does not assign girls to the closing shift during the winter months because it is dark out by closing time
  - He said he would not want his daughters closing alone and waiting for a ride when it is dark and cold outside
  - He said he was not trying to keep Rory from her hours, he was just trying to look out for her

**Has the supervisor provided a non-discriminatory reason for the shift assignment practice?**

**If not, what may next steps look like?**

# Making a Determination

- After completing Steps One, Two, and Three, a Decision-maker applies the standard of evidence to determine whether a violation occurred
  - May involve credibility analysis
- If a violation occurred, consider appropriate sanctions and/or remedies





# Special Considerations in Resolving Disparate Treatment Complaints

# Intake

- Disparate treatment complaints require very specific elements
  - May need to tweak intake approach to elicit key information to fill in the blanks
    - Who is alleged to have done what, precisely?
  - Be transparent with the Complainant about the reasons for your questions
    - Intake meeting is usually **not** an interview, but can help to flesh out the Step One allegation elements
  - Intake meeting can also help to set expectations about the investigation
  - Explain the process and the Disparate Treatment construct

# Techniques for Assessing Motive

- Discriminatory motive may be inferred from similarly situated individuals who do not identify with the protected characteristic being treated differently
- Investigator should still look for direct evidence of a motive
  - Respondent statements or statements made on Respondent's behalf indicating bias
    - Can include evidence that Respondent failed to take appropriate corrective actions to resolve known discriminatory practices or policies
  - Documentary evidence
    - Emails, performance reviews, text messages, grading patterns, etc.
  - Testimonial evidence
    - Party statements, witness statements
- Previous satisfactory job performance can also support an inference of discrimination

# Similarly Situated Individuals

“**Similarly situated**” is not precisely defined

- Individuals may be similarly situated in one context but not another
- Investigators must determine which individuals, in the same context as the Complainant, should receive the same treatment as the Complainant
- Consider the scope of the complaint
  - If a student is reporting an individual faculty member, similarly situated students may be the other students in that course and students in the faculty member’s other courses
  - If an employee is reporting a vice president’s bias in hiring/promotion, similarly situated employees may be other divisional employees

# Similarly Situated Individuals

- If there are no individuals in the same position as the Complainant, the Investigator should consider other individuals in the most similar situations
  - Make the **most relevant comparisons possible** based on the available evidence
  - Do not force a comparison where there really is no comparator
- Generally, the similarly situated comparison is most useful if the similarly situated individuals **are not** part of the Complainant's protected group



# Comparative Evidence

Investigators may use a variety of tools to obtain comparative evidence from similarly situated individuals

- Surveys
- Focus groups
- Policy reviews
- Performance reviews/other evaluations
- Previous complaints
- Grading records/reviews
- Expert witnesses to analyze complex cases such as compensation/experience



# Direct Motive Examples

- A student supervisor regularly refers to LGBTQIA+ individuals with a slur
- Facilities and Maintenance refuses to hire women because the director does not believe women can perform all aspects of the job
- A Resident Assistant told another student that he likes to file disciplinary reports against transgender residents because they are just looking for attention



# Satisfactory Job Performance Example

- Discriminatory intent may also be identified by viewing the adverse action in relation to a person's prior performance
  - This is not fool-proof
    - Past performance does not guarantee future performance, but it's an indicator

## Example:

- In each of the past three years, the Director has gotten rave reviews during her annual evaluation
- She has previously been told that she will be up for a promotion during her fourth year and is a “shoe-in”
- One month before evaluations and promotions occur, the Director shares with her supervisor that she's pregnant
- After evaluations, the Director was given a Performance Improvement Plan instead of a promotion



# Assessing Rationale

- Investigator should ask the Respondent for any rationale for their actions
  - Seek corroborating evidence from other sources
  - Look for evidentiary consistency
  - Consider pre-existing relationships among parties and witnesses
  - Be mindful that decisions may have more than one reason
- Similar to assessing credibility in other contexts



# Common Rebuttal Arguments

## Respondent may provide evidence that:

- Complainant's allegations are **factually incorrect**
  - Ex: A Complainant's pay disparity allegations are based on inaccurate compensation information
  - Ex: Elliott was offered housing with private bathrooms at no additional cost and chose their room
- Complainant has been **improperly compared** to individuals not similarly situated
  - Ex: A Complainant alleges student conduct outcome disparities, but Complainant had previous violations, while comparators did not
- Complainant was compared to **some**, but not **all**, similarly situated individuals

# Common Rebuttal Arguments

## Respondent may offer evidence that:

- Actions were based on **favoritism**
  - Investigator should consider if favoritism is **pretext** for discrimination
  - Ex: Consider Michelle's hiring allegations
- Any statistical evidence the Complainant relies upon that **does not raise an inference** of disparate treatment
  - Comparison group in the statistical data is not appropriate
  - Disparity is not statistically significant enough to derive conclusions
    - Ex: The hiring pool is 50/50 but successful candidates are 55/45

# Common Rebuttal Arguments

## Respondent may offer evidence that:

- Not **all** members of a sex or gender group have received disparate treatment
  - This could be a red herring
  - The question is whether the **Complainant** was treated less favorably than similarly situated persons of a different sex or gender group
- Respondent treated Complainant the same as a member of a **different** sex or gender group
  - Unless that other individual is **similarly situated**, this is not a justification

# Common Rebuttal Arguments

## Respondent may offer evidence that:

- A Complainant was qualified for a position but asserts that another person was selected because that person was **better qualified or a better fit**
  - This type of argument requires close examination
  - Respondents should articulate why the other person was more qualified than the Complainant
  - An expert witness may be helpful in these situations
  - Qualifications can be multifaceted and subjective

## Mixed motives for adverse actions are possible

- If any one of the motives is discriminatory, even if other motives are non-discriminatory, a policy violation occurred

# Techniques for Assessing Pretext

- Always provide the Complainant with the **opportunity to respond**
  - Complainant may have evidence or be able to suggest evidence to rebut Respondent's position as **pretext**
  - Investigator's responsibility to investigate pretext
- When a conflict between Respondent's position and Complainant's position arises, seek corroborating evidence
  - Coworkers or other students may be able to verify
  - Documents or testimony of senior officials may verify a policy or practice
- Perform a credibility analysis of all parties' positions and their respective arguments concerning the allegations

# Questioning Guidelines

- Investigating a disparate treatment complaint is different from investigating a sex-based harassment complaint
- Investigators should:
  - Start with broad questions
  - Follow up to explore gaps
  - Use policy definitions to drive questioning
  - Use trauma-informed questioning skills where appropriate
- Investigators should avoid:
  - Accusatory or argumentative questions
  - Confusing questions



# Questioning Guidelines

- Investigator may be more direct than in a sex-based harassment complaint
  - “Why do you feel like you have been subjected to sex discrimination?”
  - “Could there be any other possible reasons for your treatment?”
  - “If your professor were to provide one of the reasons you described, how would you respond to that?”
  - “Why did you say that in front of the department?”



# Questioning Guidelines

- Be transparent when being direct
  - Explain the Disparate Treatment construct, in comprehensible terms
  - “I need to establish some of these facts before we can move forward”
  - “These types of complaints focus on whether there is a legitimate, non-discriminatory reason for the action, so I am trying to gather insight and facts from all parties in that regard”
- Structure questioning and evidence gathering based on Disparate Treatment construct

# Applied Learning

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**Questions?**

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