



Association of
Title IX Administrators

Investigating Sex Discrimination & Disparate Treatment

An ATIXA Best Practices Workshop

Laredo College

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The content and discussion in this training will necessarily engage with sexual harassment, violence, sex discrimination, 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.



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 and Equity

- Title IX is a sex equality law
 - 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 discrimination
- Title IX imposes a duty to stop, prevent, and remedy sex discrimination

Essential Compliance Elements

The requirements to **Stop, Prevent,** and **Remedy** guide Title IX Coordinators in their compliance work

1

STOP discriminatory conduct

2

PREVENT recurrence, on both individual and institutional levels

3

REMEDY the effects of discrimination, on both individual and institutional levels

Evolving Title IX Compliance

Update on the 2024 Title IX Regulations

- **January 9, 2025:** a federal district court in Kentucky vacated the 2024 Title IX Regulations in their entirety
 - The 2024 Title IX Regulations are now “off the books” and **not** in effect for **any** state, institution, or school effective immediately
- Implications:
 - All federal funding recipients are now subject to the 2020 Title IX Regulations
 - Revert to **2020-compliant** policies for sexual harassment
 - Ensure sex discrimination is covered under policy
 - Consult with legal counsel on strategies for handling completed and ongoing complaints initiated under the 2024 Regulations
 - Ensure compliance with all 1975 and 2020 regulatory requirements

Executive Orders (EOs)

- Defending Women from Gender Ideology Extremism
 - Defines sex as a binary concept – man or woman
 - Awaiting ED guidance re: implementing this EO
 - Limits *Bostock*'s holding, says it only applies to Title VII
 - Prohibits federal funds and grants from promoting gender ideology
- Keeping Men out of Women's Sports
 - Prohibits transgender women from playing women's sports
 - Threatens withdrawal of federal funds
 - Take enforcement actions under Title IX
- Courts have paused or may pause some of these elements from enforcement and it remains an evolving situation

Executive Order re: Sex & Gender

- The Executive Order (EO) defines sex as binary – male or female
 - Detaches the notion of gender or gender identity from the term “sex”
- Directs all federal agencies to enforce civil rights laws in alignment with the EO
 - The Dept of Education will **not** interpret Title IX to protect gender identity
 - The Dept of Justice will issue guidance that *Bostock* does **not** apply to Title IX
 - All agencies must ensure that intimate spaces are designated by sex, not identity
 - All Biden administration EOs addressing gender identity are revoked
- Prioritize investigations/litigation to enforce rights and freedoms to express binary nature of sex
- Prohibits grant funding from promoting gender ideology
- Foreshadows attempts to codify EO’s definitions into law
- Notably, the EO does **not** address sexual orientation

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 LGBTQI+ Students
- Supporting Intersex Students
- Supporting Transgender Youth in School
- Letter of Educators on Title IX's 49th Anniversary
- Confronting LGBTQI+ 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"

OCR Guidance

- Dear Colleague Letter: February 14, 2025
 - ED interprets *Students for Fair Admissions v. Harvard* to bar institutions from using race in decisions pertaining not only to admissions, but also:
 - Financial aid and scholarships
 - Administrative support
 - Discipline
 - Housing
 - Graduation ceremonies
 - All other aspects of student, academic, and campus life
 - Relying on non-facial information as a proxy violates the law, too
 - ED gave a deadline of 14 days from the date of the letter to comply

Considerations for Compliance

- State law
- Appetite for litigation
- Institutional and community values
- Physical layout of buildings and capacity for capital improvements
- Athletics conference rules



Types of Discrimination

Discrimination Defined

- The act of treating an individual differently, or less favorably, based upon specific or perceived protected characteristics
 - Discomfort vs. discrimination

1

Can be connected to prejudice

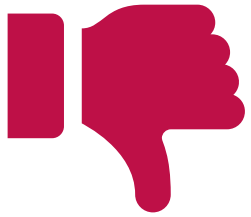
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Can be intentional or unintentional

3

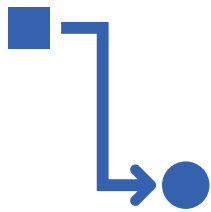
Always based on a protected characteristic

Distinguishing Types of Discrimination



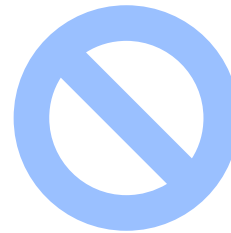
Disparate Treatment

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



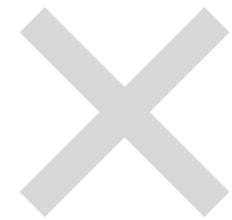
Disparate Impact

- 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



Types of Discrimination: Disparate Treatment

Disparate Treatment

Disparate Treatment exists when an individual treats another person **differently**, or takes an **adverse action**, because of that person's identity, such as sex

Examples:

- Hiring
- Promotion/Performance reviews
- Pay
- Responsibilities/Job assignments
- Shifts
- Access to resources
- Athletics
- Grading
- Program access
- Student conduct outcomes

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
- Denial of leadership opportunity
- Unfair grading
- Pay and compensation disparity
- Resource inaccessibility
- Remedy inaccessibility
- Opportunity denial

ATIXA's Model Policy Definition

Disparate Treatment Discrimination:

- Any intentional differential treatment of a person or persons that is based on a person's actual or perceived Protected Characteristic and that:
 - Excludes a person from participation in;
 - Denies the person benefits of; or
 - Otherwise adversely affects a term or condition of a person's participation in a Recipient program or activity

Disparate Treatment Construct

Disparate Treatment Construct

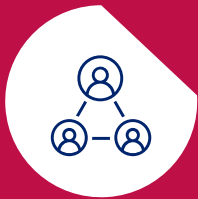
Step 1: Does the complaint satisfy the required elements for a disparate treatment complaint?

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?



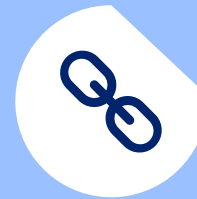
1(a)

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.”

- 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 than those in the protected group
 - Any individual is “**similarly situated**” if it is reasonable to expect that they would receive the same treatment as the Complainant, within 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
 - 75% of applicants are male identifying but comprise only 25% of hires



Initiating a Complaint

- 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 initiate a complaint and 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
 - Use 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

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



Putting It All Together: Michelle & Tim

- Michelle, a Black woman currently employed at State University (SU), applied for the new Chief Information Officer (CIO) role at SU
- The job posting required experience with a 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 left 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
 - Michelle initiated a complaint, arguing she was discriminated against on the basis of sex

Did she 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 SU's AVP for administration 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?

Putting It All Together: 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?

Special Considerations in Resolving Disparate Treatment Complaints

Intake

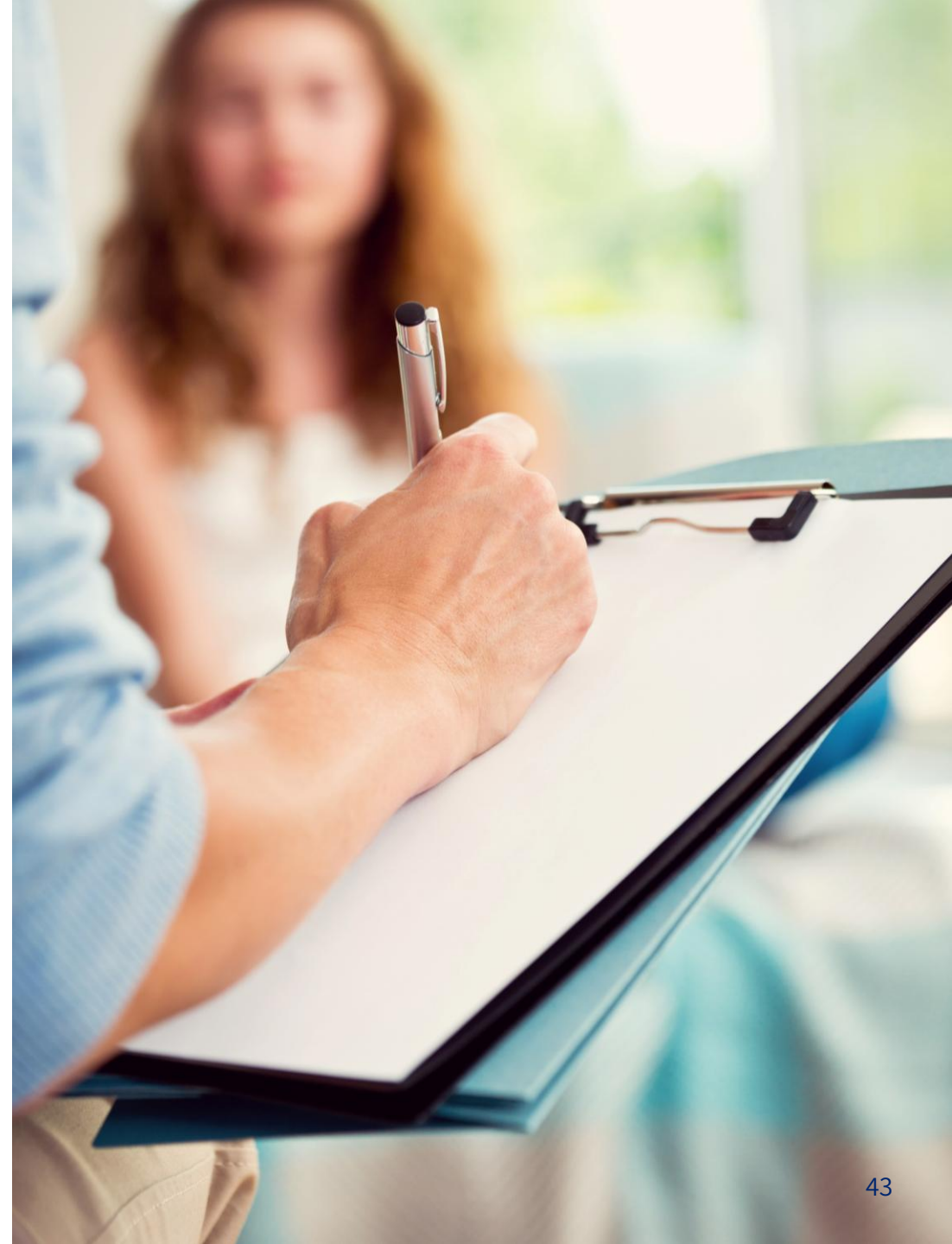
- Disparate treatment complaints require very specific elements
 - May need to tweak intake approach to elicit key information to fill in the blanks
 - Who is alleged to have done what, precisely?
 - Be transparent with the Complainant about the reasons for your questions
 - Intake meeting is usually **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

- Investigator should 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
- Discriminatory motive may be inferred from similarly situated individuals who do not identify with the protected characteristic being treated differently
- Previous satisfactory job performance can also support an inference of discrimination

Direct Motive Examples

- Facilities and Maintenance refuses to hire women because the director does not believe women can perform all aspects of the job
- A student supervisor regularly refers to males with derogatory statements
- A Resident Assistant told another student that he likes to file disciplinary reports against women who do not behave “lady-like”



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



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”
- Before annual evaluations, the Director shares with her supervisor that she's pregnant
- After evaluations, the Director was given a PIP instead of a promotion

This set of facts could raise an inference, meriting further investigation

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
- 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 one sex 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
 - Respondent treated Complainant the same as a member of a **different** sex
 - 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

Types of Discrimination: Disparate Impact

Disparate Impact

- Disparate impact exists when “neutral” policies and practices have 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 Impact

- Disparate impact exists when “neutral” policies and practices have discriminatory effects or impact
 - Focus on results, rather than intent
- Complex investigations
 - Often examines culture/climate
- May involve high level statistical analysis
 - Validity studies
 - Programmatic necessity



ATIXA's Model Policy Definition

Disparate Impact Discrimination:

- Disparate impact occurs when policies or practices that appear to be neutral unintentionally result in a disproportionate impact on a protected group or person that:
 - Excludes a person from participation in;
 - Denies the person benefits of; or
 - Otherwise adversely affects a term or condition of a person's participation in a Recipient program or activity

Disparate Impact Complaints

- First, determine whether adverse outcomes of a policy or practice have a disproportional impact on members of a certain group
- Second, determine whether there is an educational necessity for the policy or practice and no alternative could have achieved the same goal without having a discriminatory impact
- Common Examples:
 - Student or employee discipline processes
 - Hiring processes
 - Housing policies

Disparate Impact Complaints

- Often disparate impact complaints will not have an identifiable Respondent
 - Usually, the institution or a proxy will be the named Respondent
- If a disparate impact is identified, consider whether the Title IX Coordinator can take direct action to resolve the problem
- Focuses on remedies, not sanctions



Applied Learning



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