



Association of
Title IX Administrators

Time with IX: Navigating the Complexities of Retaliation in Civil Rights Investigations

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Strategic Risk
Management Solutions



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Defining Retaliation

Regulatory Definition

No institution, student, employee, or other person authorized by the institution to provide aid, benefit, or service under the institution's education program or activity may:

- Intimidate, threaten, coerce, or discriminate against
- any person

For the purpose of interfering with any Title IX right or privilege

OR

Because the individual has made a report or complaint

OR

Testified, assisted, participated, or refused to participate in any manner in an investigation, proceeding, or hearing under Title IX

Regulatory Definition

- Initiating a **disciplinary process** for a code of conduct violation that does not involve sex discrimination but arises out of the **same facts and circumstances** as a complaint or report of sex discrimination, for the **purpose** of interfering with the exercise of Title IX rights is retaliatory.
- Requiring an employee or other person authorized by an institution to provide aid, benefit, or service under the institution's education program or activity to participate as a witness in, or otherwise assist with, an investigation, proceeding, or hearing is **permissible**.
- Includes new definition of "peer retaliation," retaliation by a **student** against another **student**.

Investigating Retaliation Claims: Keys to Understanding

- Establishing retaliation, unlike establishing sexual harassment, requires proving motive – the intent to retaliate.
- Someone's intention is rarely displayed openly. Therefore, the legal framework is about whether a retaliatory motive can be inferred from the evidence.
- Gathering details of what occurred is critical.

Narrowly Defined

- The Title IX definition of retaliation is typically **not as broad** as what community members may consider to be retaliatory
 - Complaints alleging “retaliation” may not meet the definition
 - Social media gossip **without adverse action** is not retaliation
 - First Amendment concerns
- Helpful to have a general retaliation provision in codes of conduct in addition to your Title IX policies



Retaliation Construct

Retaliation Construct

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

Step 2: Does the Respondent offer a non-retaliatory 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 retaliation complaint?



1(a)

Does the complaint implicate a protected activity?



1(b)

Does the complaint identify an adverse action?



1(c)

Does the complaint assert that the adverse action was because of the protected activity?

Step Two: Non-Retaliatory Reason

- If the initial assessment in Step One does not establish the required complaint elements, end the inquiry
 - Consider dismissal
 - Consider appropriateness for referral to a different process or office
- If an initial case of retaliation is established, the complaint moves forward
 - Step Two and Step Three roughly correspond to the investigation phase
 - “Big I” investigation



Step Two: Non-Retaliatory Reason

- Interview the Respondent about the allegations:
 - Ask about the **why** behind the adverse action
 - “Why didn’t Sally get tenure?”
 - “Why did the student receive a C+ in your class?”
 - Gather any evidence that supports their rationale
 - May include directing the Investigator to potential sources for that evidence rather than providing it
- Investigator should seek corroboration of any offered non-retaliatory reason(s)
 - Analyze the Respondent’s offered reason(s) in light of relevant evidence

Step Three: Pretext Analysis

- **Pretext** occurs when an adverse action occurred for retaliatory reasons but an individual nonetheless asserts that there was a legitimate reason for the action
- When determining whether an alternative explanation for the adverse action is pretextual, consider whether:
 - The explanation makes sense
 - Other actions taken are inconsistent with the explanation
 - The explanation is inconsistent with past policy or practice
 - There is evidence of other individuals being treated differently in similar situations
 - There is witness testimony, including experts
 - The timeline of events aligns

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

Evidence Considerations

- The burden of proof remains on the **school, district, or institution**, though the burden shifts to the Respondent if they wish to proffer a non-retaliatory reason
 - The Investigator must be thorough in collecting evidence of protected activity, adverse action, a causal connection, non-retaliatory reason, and pretext
- Use the same standard of evidence
 - To find a policy violation, the Decision-maker must establish the adverse action was retaliatory according to the standard stated in policy – typically **preponderance of evidence**
 - Investigators and Decision-makers must adapt their approaches to analyzing evidence in retaliation cases

Best Practices

Communication with Parties & Witnesses

- Communicate the prohibition on retaliation at every opportunity
 - Intake, NOIA, outreach emails, recap emails, interviews, Informal Resolution, and hearings
 - Train Title IX team about identifying and reporting retaliation
 - Intake staff screen for it
 - Be prepared to answer questions, including how to report retaliation
 - Retaliation is often a concern for reluctant Complainants and witnesses
- In addition to **encouraging reporting**, also remind each person **not to retaliate**
- No guarantee someone will not be retaliated against, but TIX staff should assure them any retaliation will be addressed

Investigation Timing

- Retaliation allegations often arise during an ongoing grievance process
- May address in a consolidated investigation with the original allegations
 - Always update NOIA
- May address separately at the end of the original grievance process
- Consider approach on case-by-case basis:
 - Timing
 - Complexity



Investigation Considerations

- There are very specific steps to investigating a retaliation claim
 - Plan investigation with framework in mind, especially gathering evidence as to whether the **protected activity** and **adverse action** were connected
 - Track framework when drafting investigation report
- Build a timeline
 - When did the protected activity take place? The adverse action?
 - Who knew what, when?
 - When were key statements made?
 - When were key documents created?

Decision-Making

- Decision-maker determines whether the alleged retaliation meets each element in the framework
 - Significant focus on an **objective analysis** of the Complainant's allegations
 - Whether a reasonable person would believe the action to be adverse
 - Whether the alleged non-retaliatory reason for the adverse action was legitimate or pretextual
- Evidence relevant to each element of the retaliation framework is weighed and applied using the **standard of evidence**

Supportive Measures & Remedies

Students

- No Contact Orders
- Residence hall relocation
- Class section or lunch period changes
- Designated routes for moving around the school
- Increased monitoring
- Revised grade

Employees

- No Contact Orders
- Change in supervisory structure
- Change in physical workspace
- Restoration of responsibilities
- Change in shifts
- Leave of absence
- Access to employee benefits or union benefits

Counter-Complaint Considerations

- Imagine counter-complaints where each party alleges sexual harassment by the other
 - Complainant files a complaint of sexual harassment (A)
 - Respondent files a counter-complaint of sexual harassment (B)
 - Complainant alleges that B's counter-complaint is retaliatory (C)
- Need final determination of (A) and (B) to determine whether (B) could be retaliatory
- Alleging retaliation is sufficient
 - ATIXA does not recommend requiring the Complainant to file an additional formal complaint regarding retaliation
- Always screen for retaliatory animus
 - Consult with legal counsel on any new allegations that seem retaliatory

Avoiding Abuse of Process

- Be cautious that individuals do not use the Title IX process in retaliatory ways
 - When potential abuse of process concerns arise, consult with legal counsel
 - Also known as “Cat’s Paw” theory of liability

Example: A new coach refused to honor an agreement between the former coach and a student-athlete to increase the player’s scholarship

- The student’s father threatened that trouble “would come back to him”
 - The student athlete brought a sexual harassment complaint against the coach
 - An investigation ensued and the coach was terminated
- Sexual harassment claim was later found to be baseless
- Institution was “negligent or reckless” for acting on the student’s accusations

Training and Prevention

- Build awareness of retaliation definition, prohibitions, and protections
- Key constituencies include:
 - Title IX team
 - Supervisors
 - Student Leaders
 - Student Affairs/Services, Human Resources, Provost's office
 - Other anti-discrimination professionals (Title VI, Title VII, ADA/Section 504)
- Provide training widely
 - New student/employee orientation
- Focused education for areas/departments of concern



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