



Interim Policy and Procedures Prohibiting Discrimination, Harassment and Misconduct

[OCRTIX TRAINING]

- Helpful Reminders
- Hybrid of Regs
- Compliant Materials & Training
- Speaking the New Language
- Overlap with First Amendment/Expressive Activity
- Legal Hot Topics



Helpful Reminders

- One Policy, One Procedure for all forms of discrimination, harassment, and misconduct (No matter what type of allegations, you get the same options and treatment; Mandatory Reporting applies to everyone for all policy violations, which will need to be emphasized in University Training)
- Added protections for gender expression, sexual orientation, disabilities and pregnancy
- Added protections for discrimination, harassment and misconduct beyond concerns that are sexual in nature
- GVSU will address off-campus conduct that affects anyone's ability to enjoy GVSU programs and activities and online conduct if it affects a substantial GVSU interest (as defined).
- Allows OCRTIX to address campus-wide climate concerns by itself initiating a Resolution Process
- Dismissals are Permissible and Appealable
- Informal Resolution will not be an option for Employees. Supportive Measures could resolve at Initial Evaluation or Report stage.
- Reports do not initiate resolution procedures such as investigation, informal resolution and/or hearings, but do provide opportunities for Supportive Measures.
- Complaints guarantee a formal investigation and hearing unless both parties agree to Informal Resolution
- False Allegations and Evidence, Unauthorized Disclosure, Process Interference, and any other violation of the Policy that is not considered discrimination, harassment or listed under misconduct would be referred to other processes (HR or Student Conduct)
- If GVSU has knowledge, it must act on it (not just when a Complainant brings a Report or Complaint), which we do by requiring Mandatory Reporters to advise OCRTIX and by allowing OCRTIX to initiate its own proceedings and investigations



Hybrid of Regulations

What do we keep from 2020 Regs?

- All of the protections previously provided
- Notice, Investigation, Grievance Procedures remain for sexual harassment claims
- Investigation process (witness questions, notice) largely the same
- No need to worry that protections have been removed
- Informal Resolution not permitted for employees (2024 made optional)
- Informal Resolution not permitted without Complaint filing (2024 made that optional)

What do we add from 2024 Regs (and Title VI concerns)?

- Expanded protections for all protected classes
- A Title IX process for all other discriminatory conduct
- Expanded jurisdiction to off campus conduct if it creates hostile environment on campus
- Methods to address campus-wide concerns through risk assessment and mandatory reporting for all discrimination
- Following specific outline for prompt and effective response to allegations
- Expanded protections for the rights of the Respondent (supportive measures), for persons with disabilities, and pregnancy related conditions

- Defining retaliation and peer to peer retaliation

What did we leave out/modify from 2024 Regs?

- The final regulations redefine sex discrimination to include discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity. We do not redefine sex discrimination but do add these protections. We are able to do this because we have one policy and one procedure for all forms, so it does not need to fit under a statutory definition of sex to be prohibited under our policy.
- Added “objective” throughout the policy and definitions within the policy to better match with the 6th circuit case law against vague policies and to better explain the standard to the reader
- We do not use two different grievance procedures for students vs others. We provide for expanded protections for all.



Compliant Materials & Training

COMPLIANT MATERIALS

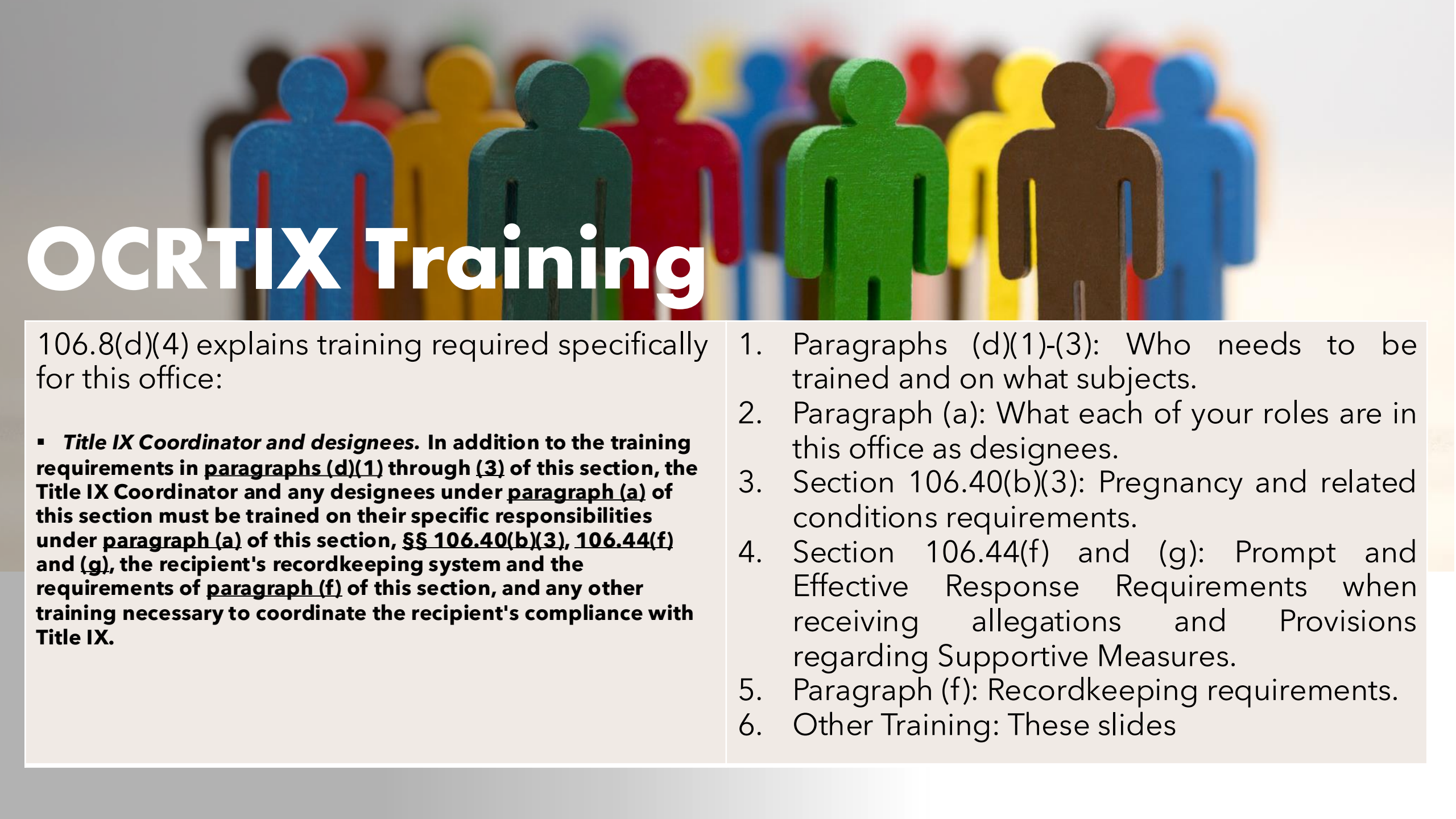
OCRTIX must compare materials to new policy and procedures to ensure consistency

- Prepare updated pamphlets, cards, and other community-wide awareness materials
- Prepare new NOIA and NOIR templates
- Prepare new Notice of Hearing template
- Prepare updated training materials
- Prepare NDA templates
- Prepare Risk Assessment Guidelines
- All materials must make clear how to get help

COMPLIANT TRAINING

OCRTIX must ensure training on new policy and procedures for to the GVSU community as follows: (CFR 34 106.8(d) plus the following)

- Mandatory Reporters (University-wide Communications re how to report and what to report)
- Confidential Employees (notice required)
- Investigator (keep underlying evidence)
- Decision-Maker(s) (impartiality)
- Other Pool Members (impartiality), including Facilitators of Informal Resolution

A background image showing a row of colorful human figures in various colors (blue, yellow, green, red, brown) standing in a line, slightly out of focus, creating a sense of a diverse group of people.

OCRTIX Training

106.8(d)(4) explains training required specifically for this office:

- ***Title IX Coordinator and designees.*** In addition to the training requirements in paragraphs (d)(1) through (3) of this section, the Title IX Coordinator and any designees under paragraph (a) of this section must be trained on their specific responsibilities under paragraph (a) of this section, §§ 106.40(b)(3), 106.44(f) and (g), the recipient's recordkeeping system and the requirements of paragraph (f) of this section, and any other training necessary to coordinate the recipient's compliance with Title IX.

1. Paragraphs (d)(1)-(3): Who needs to be trained and on what subjects.
2. Paragraph (a): What each of your roles are in this office as designees.
3. Section 106.40(b)(3): Pregnancy and related conditions requirements.
4. Section 106.44(f) and (g): Prompt and Effective Response Requirements when receiving allegations and Provisions regarding Supportive Measures.
5. Paragraph (f): Recordkeeping requirements.
6. Other Training: These slides



Speaking the Language

- Notice vs Report vs Complaint
- Supportive Measures vs Informal Resolution or Formal Resolution
- Harassment vs Discriminatory Harassment (Par. 18 B, C and D note the difference and that GVSU may address offensive conduct or harassment that is not based on a protected characteristic not in a pecuniary manner but in an informational and remedial manner)
- Discrimination, Harassment, and Misconduct (a lot more than Retaliation is captured under Misconduct)
- Preponderance of the Evidence Standard (more likely than not)

First Amendment and Title IX

- Pg 3 of the policy notes that GVSU departments will share information and combine efforts to provide uniform and effective responses to alleged discrimination, harassment and misconduct. (When the free speech or religious expression is alleged to be discriminatory and to interfere with another's right to access GVSU's programs or activities, all involved departments must collaborate. Mandatory Reporting requires such information to be passed on to OCRTIX to determine whether further investigation or action should be taken).
- Paragraph 13 states the Policy is not meant to inhibit or prohibit educational content or discussions inside or outside of the classroom that include, germane, but controversial or sensitive, subject matters protected by academic freedom. (For example, discussing the fact that derogatory terms for certain religious groups or races exists and have existed over time. If the discussion is relevant to the course and promotes the educational purpose of allowing the free exchange of ideas, it is not unprotected or discriminatory speech).
- Paragraph 18 provides that "when speech or conduct is constitutionally protected, it will not be considered a violation of GVSU policy, though Supportive Measures will be offered to those impacted." (This is consistent with the Grounds and Facilities Use policy which allows expression of protected speech and prohibits unprotected speech. If OCRTIX learns of allegations that involve speech which do not arise to the level of a violation of this Policy, best practice would be to dismiss the matter and notify Dean of Students or HR of their finding).

- Paragraph 22 provides that exercising protected first amendment rights does not constitute retaliation and links to the Grounds policy. Again, the key here is protected rights. If we're properly applying the definitions and undergoing the proper legal analysis, there will be no punishments under this policy that violate protected First Amendment rights.
- Paragraph 23 defines bullying and includes that it does not refer to speech or conduct that is otherwise protected by the First Amendment. So, if the conduct is speech and meets this definition (or other prohibited conduct definition under the Policy), you must first refer to Grounds policy to determine if it meets the definition there.
- Paragraph 31 provides that when conflicts arise between the right of the GVSU community to be free from discrimination, harassment and misconduct and the right to exercise religious freedom or freedom of expression, GVSU will balance rights and interests to find mutually agreeable outcomes, and if that is not possible, enforce its policies and/or implement remedial solutions while respecting rights of all members.
- **It is important to consult with Legal when questions arise regarding GVSU balancing its need to prohibit a hostile environment and carry out its educational interests with the need to respect constitutional freedoms. Don't wait to consult. Do so in the Early Actions portion of the review process.**

Legal Hot Topics

What's the status of litigation on the issue and how is GVSU affected?

- Twenty-six states and counting have filed suit against the DOE because of these regulations arguing the redefining of sex infringes on their and their children's constitutional rights (freedom of religion and freedom of expression)
- Plaintiffs are often concerned with no proofs required to show gender identity coupled with the permitted use of gender-based bathrooms. (GVSU has gender inclusive restrooms)
- Plaintiffs argue that their religion says marriage/relationships are only between a man a woman and forcing them to say or do things inconsistent with this (i.e., punishing them for speaking out) would infringe on their constitutional rights. (We balance the rights in each case)
- GVSU is not in one of the 26 states, but was listed by Moms for Liberty as a school that educates one or more of its members or members' children. GVSU is not enjoined from enacting a 2024 compliant policy, but DOE is enjoined from enforcing it here.

What will happen if/when the new regulations are enforceable?

- October is the earliest any DOE appeal would be heard (and it would not be surprising if it's held off until long after the election).
- We will review our policies where we may slightly veer off from the 2024 regs to see if there is a need to amend our policy language or procedures to align with the court's interpretation of the applicability of the regs.

Legal Pitfalls to Avoid

- Vague policies are unenforceable and often are deemed to be chilling free speech (i.e., if the policy is not clear on what type of conduct is unprotected/violates the policy. GVSU's policy makes things clear).
- Using names like "Bias Response Team" can have the effect of chilling speech just by ever being contacted in response to allegations. Whereas, being contacted by OCRTIX does not carry that same connotation, and the policy notes that the office will balance the rights of all involved.
- Ignoring clear climate concerns out of fear of a constitutional rights arguments (Title VI, Resolution Agreements show that DOE is expecting robust protections and response to discrimination on campus, pushing requirements closer to Title IX in its Resolutions. GVSU has adopted a Title IX type process for all discrimination to address this).
- Check in with Athletics on its periodic Title IX audits to ensure compliance
- Remain in regular and prompt communication with GVPD on Clery compliance
- Evidence rulings must be unbiased based only on what is relevant and not impermissible as stated in the policy.
- Ensure due process before any pecuniary action is taken.