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TITLE IX SOLUTIONS, LLC

TITLE IX: A New Era

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Learning Objectives

Review key elements of the 2020 Title IX Regulations.

Analyze lessons learned and best practices related to the Title IX grievance process.

Examine the 2022 Notice of Proposed Rulemaking (NPRM) and highlight key proposed changes for Title IX practitioners to consider.

Title IX Statute

"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."

Title IX of the Education Amendments of 1972

1972: TITLE IX OF THE EDUCATION AMENDMENTS

Addresses sex discrimination generally

2020: TITLE IX REGULATIONS ON SEXUAL HARASSMENT ("FINAL RULE")

Specifically outlines a recipient's required response to sexual harassment as a form of sex discrimination

2022: NOTICE OF PROPOSED RULEMAKING (NPRM)

Aims to address a recipient's response to all forms of sex discrimination, including sex-based harassment

2022 NPRM

The purpose of this part is to effectuate Title IX, which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. (106.1)

Includes discrimination and harassment on the basis of:

- Sex stereotypes
- Sex characteristics
- Pregnancy or related conditions
- Sexual orientation
- Gender identity

Sex Discrimination
1972 Title IX of the Education
Amendments of 1972

Sexual Harassment
2020 Regulations

Practical Points



NONDISCRIMINATION POLICIES

How might the NPRM impact these policies?



SEXUAL HARASSMENT POLICIES

How might the NPRM impact these policies?



FEDERAL, STATE, AND LOCAL LAWS

How might other laws impact your policies?



Sexual Harassment vs. Sex-Based Harassment

*Understanding the differences between the
2020 and 2022 terms*

Sexual Harassment (2020)

Conduct on the basis of sex that satisfies one or more of the following:

- *Quid Pro Quo Harassment*
- *"Severe, pervasive and objectively offensive" conduct (Davis Standard Harassment)*
- *Sexual assault, dating violence, domestic violence and stalking*

Sex-Based Harassment (2022)

Sexual harassment, harassment on the bases described in 106.10* and other conduct on the basis of sex that is:

- *Quid Pro Quo Harassment*
- *Hostile Environment Harassment*
- *Sexual assault, dating violence, domestic violence and stalking*
- **Sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation and gender identity*

2020 Regulations

An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;

2022 Regulations

An employee, **agent, or other person authorized by the recipient** to provide an aid, benefit, or service under the recipient's education program or activity **explicitly or impliedly** conditioning the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct;

Quid Pro Quo Harassment



Davis Standard Harassment

VS.

Hostile Environment Harassment

2020 Regulations

Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity.

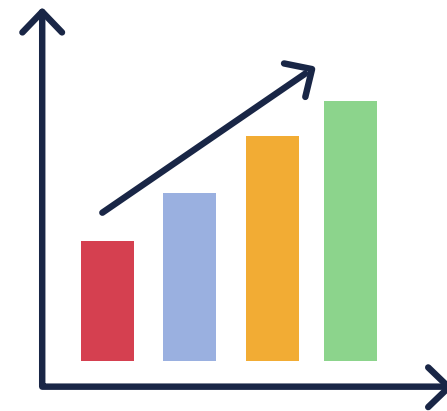
2022 Regulations

Unwelcome sex-based conduct that is **sufficiently** severe **or** pervasive, that, **based on the totality of the circumstances and evaluated subjectively and objectively**, denies **or limits** a person's ability to **participate in or benefit** from the recipient's education program or activity (i.e., creates a hostile environment).

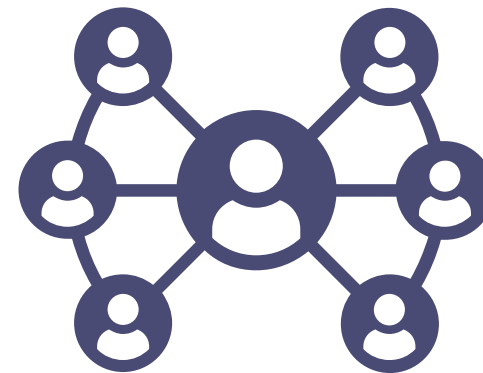
Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following:



Degree to which the conduct affected the complainant's ability to access the education programs or activities



The type, frequency, and duration of the conduct



Parties' ages, roles, previous interactions, and other factors



Location and context of the conduct, and the control the recipient has over the respondent



Other sex-based harassment in the recipient's education program or activity

Specific Offenses

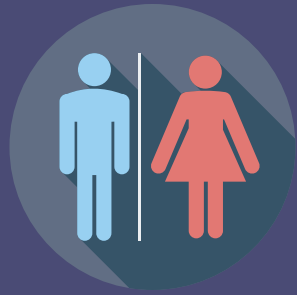
2020 Regulations

- “Sexual assault” as defined in 20 U.S.C. 1092(f)(6)(A)(v)
- “Dating violence” as defined in 34 U.S.C. 12291(a)(10)
- “Domestic violence” as defined in 34 U.S.C. 12291(a)(8), or
- “Stalking” as defined in 34 U.S.C. 12291(a)(30)

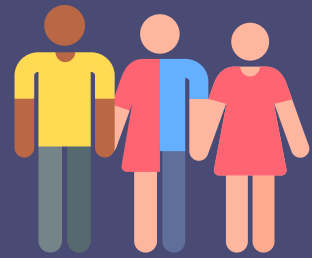
2022 Regulations

- Sexual assault
- Dating violence
- Domestic violence
- Stalking

*As defined under the 2022 NPRM



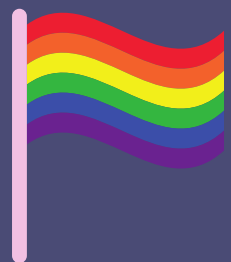
Sex Stereotypes



Sex Characteristics



**Pregnancy or
Related Conditions**



Sexual Orientation



Gender Identity

Additional bases of sex-based harassment

*ALSO CONSIDERED BASES OF SEX
DISCRIMINATION (2022)*



Application of Title IX

Defining "Education Program or Activity"

2020 Regulations



Locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.



Sexual harassment occurred against a person in the United States.

2022 Regulations

A building owned or controlled by a student organization that is officially recognized by a postsecondary institution, and **conduct that is subject to the recipient's disciplinary authority.**



A recipient has an obligation to address a sex-based hostile environment under its education program or activity, **even if sex-based harassment contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States.**



Practical Points



DISCIPLINARY AUTHORITY

Sex discrimination should be addressed in the same way as other code of conduct violations that occur off campus.



STUDY ABROAD PROGRAMS

Incidents abroad MAY fall under Title IX if they create a hostile environment on campus.



FACT-SPECIFIC INQUIRIES

If sex-based harassment occurred outside of a school's education program or activity and outside of the US, and the harassment does not contribute to a hostile environment, Title IX does not apply.

Responding to Sexual Harassment & Sex Discrimination

Outlining what is required to respond to sexual harassment (2020) or sex discrimination (2022)

106.44. Recipient's Response to Sexual Harassment (2020)

A recipient with *actual knowledge* of sexual harassment *in an education program or activity* of the recipient against a person *in the United States*, must respond promptly in a manner that is ***not deliberately indifferent***.

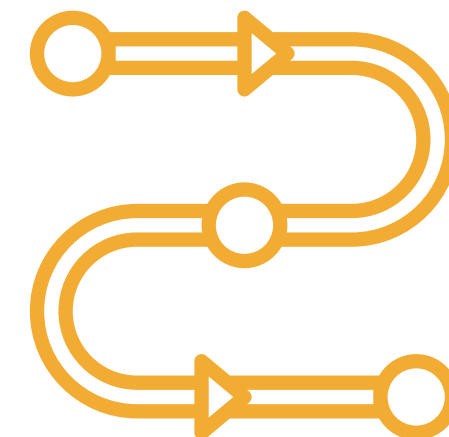
Additional requirements:



Treat Complainants
and Respondents
equitably



Offer supportive
measures to
Complainants



Follow
grievance process before
imposing sanctions

Practical Point

UNDER 2020 REGULATIONS

A school's required response focuses on addressing specific incidents and responding to the individuals or involved parties.



106.44. Action by a Recipient to Operate its Education Program or Activity Free from Sex Discrimination (2022)

A recipient must take prompt and effective action to **end any sex discrimination** that has occurred in its education program or activity, **prevent its recurrence**, and **remedy its effects**. To ensure that it can satisfy this obligation, a recipient must comply with this section.

➤ **Monitoring**

- Barriers to reporting

➤ **Notification requirements**

- Elementary and secondary school employee requirements
- Notify the Title IX Coordinator of conduct that may constitute sex discrimination
- Provide the contact information of the Title IX Coordinator and information about how to report sex discrimination

106.44. Action by a Recipient to Operate its Education Program or Activity Free from Sex Discrimination (2022)

- › Confidential Employee Requirements
- › Public Awareness Events
- › Title IX Coordinator Requirements

Practical Point

UNDER 2022 NPRM

A school's required response focuses on the broader community and campus environment.



The background of the slide is a photograph of several people's hands clasped together in a supportive grip, suggesting a meeting or a collaborative effort. The image is split vertically: the left half is overlaid with a dark blue semi-transparent filter, while the right half remains in its original, lighter color. The text is positioned on the left, over the blue filter.

Role of the Title IX Coordinator

Understanding what is required of a Title IX Coordinator

2020 Requirements

- Promptly contact the complainant to discuss the availability of supportive measures
- Consider the complainant's wishes with respect to supportive measures
- Inform the complainant of the availability of supportive measures with or without filing a formal complaint
- Explain to the complainant the process for filing a formal complaint
- Coordinating the effective implementation of supportive measures
- Implement remedies

2022 Requirements

- Treat the complainant and respondent equitably;
- Notify the complainant of the grievance procedures
- If a complaint is made, notify the respondent of the applicable grievance procedures and notify the parties of the informal resolution process if available and appropriate;
- Offer and coordinate supportive measures to the complainant and respondent
- In response to a complaint, initiate the grievance procedures or informal resolution process
- In the absence of a complaint or informal resolution process, determine whether to initiate a complaint of sex discrimination
- Take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient's education program or activity, in addition to remedies provided to an individual complainant.

Title IX Grievance Procedures

Highlighting key elements of the 2020 and 2022 grievance procedures

2020 Regulations

Discrimination on the basis of sex. A recipient's treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under Title IX.

Grievance process. For the purpose of addressing **formal complaints of sexual harassment**, a recipient's grievance process must comply with the requirements of this section.

**Grievance
process for formal
complaints of
sexual
harassment
(\$106.45)**

Formal Complaint of Sexual Harassment

2020 Title IX Regulations

Document filed by a complainant or signed by the Title IX Coordinator

Alleges sexual harassment against a respondent

Requests the recipient investigate the allegation of sexual harassment

Contains complainant's physical or digital signature

Unless signed by the Title IX Coordinator



2022 NPRM Grievance Procedures

§106.45

Grievance procedures for the prompt and equitable resolution of **complaints of sex discrimination**

§106.46

Grievance procedures for the prompt and equitable resolution of **complaints of sex-based harassment involving student complainants or student respondents at postsecondary institutions**

§ 106.45

Applies to all complaints of sex discrimination

Includes complaints involving:

- Sex discrimination and sex-based harassment in the K-12 environment
 - Employee, students, and third-parties
- Sex discrimination and sex-based harassment in postsecondary institutions
 - Employees and third-parties
- Sex discrimination in postsecondary institutions
 - Students

§ 106.46

Applies to complaints of:

- Sex-based harassment
- Postsecondary institutions
- Involving students
(complainant or respondent)

\$106.45

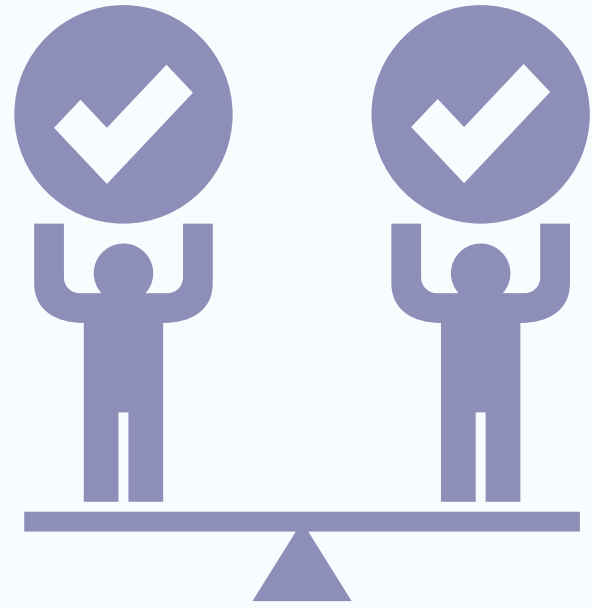
Grievance Procedures for All Sex Discrimination Complaints under Title IX

Proposes changes to the overall grievance procedures for all K-12 complaints and postsecondary complaints not involving students

Complaint

- May be written or oral
- May be filed by complainant, person who has a right to make a complaint on behalf of a complainant, or the Title IX Coordinator
 - Any student or employee; or third-party participating or attempting to participate in the recipient's education program or activity when the alleged sex discrimination occurred (non sex-based harassment complaints only)

Purpose of Grievance Procedures in §106.45



Foundation for a
prompt, fair &
equitable process



Transparent
and reliable
outcomes



Consistent approach to
all complaints of sex
discrimination, including
sex-based harassment



Schools may adopt additional provisions (including the more prescriptive §106.46) as part of their grievance procedures as long as they apply equally to the parties

\$106.46

**Additional grievance
procedures for
complaints of sex-
based harassment
involving
postsecondary
students**

Applies to incidents of sex-based harassment when a student is a complainant or respondent at a postsecondary institution

Student Employees

- When a complainant or respondent is both a student and an employee of a postsecondary institution, the postsecondary institution must make a fact-specific inquiry to determine whether 106.46 applies. For example:
 - Is the party's primary relationship with the postsecondary institution to receive an education?
 - Did the alleged sex-based harassment occur while the party was performing employment-related work?

Purpose of Grievance Procedures in §106.46



Maturity,
independence and
needs of
postsecondary
students are unique



Complaints
are highly
personal



Requires greater
participation by
complainant and
respondent



Potential disciplinary
sanctions necessitates
additional procedural
protections

2020 Regulations

Reasonably prompt time frames for conclusion of the grievance process.

2022 Regulations

Reasonably prompt timeframes for the **major stages** of the grievance procedures.

Major stages: evaluation, investigation, determination, appeal, etc.

Timelines

Practical Point

UNDER 2022 NPRM

Schools may be able to complete the 2022 NPRM grievance procedures in a significantly shorter amount of time than the 2020 grievance procedures.



Title IX Personnel

Any Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process cannot have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent

2020 Regulations

- Title IX Coordinator may serve as the coordinator, investigator, hearing facilitator, and/or informal resolution facilitator
- Title IX Coordinator cannot be a decision-maker

2022 Regulations

- Title IX Coordinator may serve as the coordinator, investigator, **decision-maker**, and/or informal resolution facilitator (in some cases)
- Single-investigator model permitted

Practical Point

UNDER 2022 NPRM

Share your thoughts with the Department of Education regarding the single-investigator model during this comment period.



Notice of Allegations

2020 Regulations

- Written notice
- Grievance process
- Allegations with sufficient details and time
- Respondent presumed not responsible
- Right to an advisor
- May inspect and review evidence
- False statements and information

2022 NPRM - §106.45

- Grievance procedures
- Sufficient information to allow the parties to respond
- Retaliation is prohibited

2022 NPRM - §106.46

- Written Notice
- 106.45 Requirements
- Allegations with sufficient time
- Respondent presumed not responsible
- Right to an advisor
- Right to access evidence or investigative report
- False statements and information

Practical Point

NOTICE OF ALLEGATIONS

These notices can serve as a guide for Title IX investigators and decision-makers as they conduct their fact-finding responsibilities.

Include specific policy violations in question in this notice.

Recipient MUST dismiss the formal complaint:

Alleged conduct would not constitute sexual harassment even if proved, did not occur in the recipient's education program or activity, or did not occur against a person in the United States

Recipient MAY dismiss the formal complaint:

Complainant withdraws complaint in writing, respondent is no longer enrolled or employed by the recipient, or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination

Written notice of dismissal

Dismissal of Formal Complaints (2020)

Dismissal of Complaints (2022)

§106.45 Dismissal

A recipient MAY dismiss a complaint:

- Unable to identify respondent after taking reasonable steps to do so
- Respondent is not participating in the recipient's education program or activity and is not employed by the recipient
- Complainant voluntarily withdraws allegations
- Conduct alleged in the complaint, even if proven, would not constitute sex discrimination under Title IX

§106.46 Dismissal

Written Notice of Dismissal and complainant's withdrawal of allegations in writing

Investigations

2020 REGULATIONS

- ◆ Burden of proof and gathering evidence on recipient
- ◆ Parties may present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;
- ◆ Right to have others present during any grievance proceeding, including the right to an advisor of their choice
- ◆ Written invitation to interviews
- ◆ Right to inspect, review and respond to all directly related evidence before completion of the investigative report (10 days to respond)
- ◆ Investigative report that fairly summarizes relevant evidence (issued 10 days prior to hearing)

Practical Points



TEMPLATES

Have you created templates for investigators?



RECORDINGS & TRANSCRIPTS

Is this permitted or required under your school's policy?



INTERSECTING INVESTIGATIONS

What happens when a Title VII or criminal investigation is also occurring?

\$106.45 Complaint Investigation

- Burden is on the recipient to gather sufficient evidence
- Right to present relevant fact witnesses and other inculpatory and exculpatory evidence
- Review all evidence gathered through the investigation and determine what evidence is relevant and what evidence is impermissible regardless of relevance
- Provide each party with a description of the evidence that is relevant to the allegations of sex discrimination and not otherwise impermissible, as well as a reasonable opportunity to respond.

\$106.46 Complaint Investigation

- Written invitation to interviews and meetings
- Right to an advisor during meetings and grievance proceedings
- Right to have persons other than the advisor of the parties' choice present during any meeting or proceeding
- Discretion to determine whether the parties may present expert witnesses as long as the determination applies equally to the parties
- Provide each party a reasonable opportunity to review evidence in advance of the hearing and respond to the evidence prior to, during or both prior to and during the live hearing

§ 106.46 Complaint Investigation

A postsecondary institution must provide either:

**Access to the relevant and
not otherwise
impermissible evidence**

OR

**The same written investigative report that
accurately summarizes the relevant and not
otherwise impermissible evidence**

If a postsecondary institution chooses to provide an investigative report and a party requests access to the evidence, the institution would be required to provide access to the relevant and not otherwise impermissible evidence to all parties.

Hearings

2020 Title IX Regulations

Required at postsecondary institutions

Cross-examination conducted by advisors

Relevance determinations during questioning

Recipient must provide an advisor to conduct cross-examination, if necessary

Submitting to Cross-examination (2020)

2020 REGULATIONS

If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility

2021: DEPARTMENT OF EDUCATION CEASES TO ENFORCE THIS POINT

"A decision-maker at a postsecondary institution may now consider statements made by parties or witnesses that are otherwise permitted under the regulations, even if those parties or witnesses do not participate in cross-examination at the live hearing, in reaching a determination regarding responsibility in a Title IX grievance process."

-Letter to Students Educators and other Stakeholders re Victims Rights Law Center et al. v. Cardona

Distinct decision- making process

*Relevant questions for parties
and witnesses are submitted to
the decision-maker in writing*

K-12 Decision- Making Process

*Hearings are not required in
elementary and secondary
schools (2020)*

Practical Points



HEARING PROCEDURES

Are these outlined in the policy or internal?




PRE-HEARING MEETINGS

Are they permitted or required under your school's policy?



REFUSAL TO PARTICIPATE

Does the school have protocols in place should a party refuse to participate in the hearing?

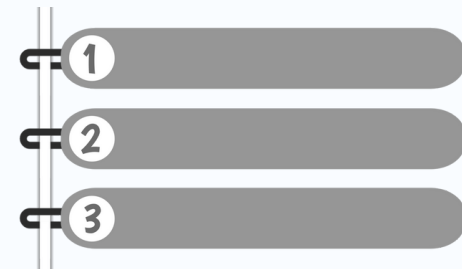


2022 NPRM Evaluating Allegations & Assessing Credibility

§106.45

A recipient must provide a process that enables the decisionmaker to adequately assess the credibility of the parties and witnesses to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination

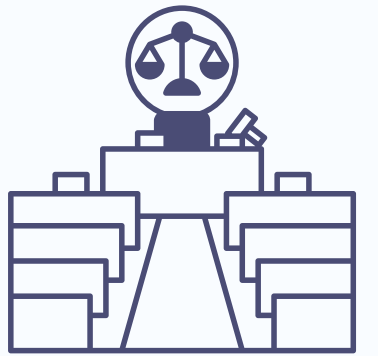
§106.46



Outlines process for evaluating allegations and assessing credibility



Decision-maker asks parties and witnesses questions during individual meetings or a live hearing



Parties may propose relevant questions (advisors must conduct questioning during live hearing)



Relevance determinations during questioning

2022 NPRM Evaluating Allegations & Assessing Credibility

Submitting to Credibility Assessment (2022)

2022 NPRM - §106.46

If a party does not respond to questions related to their credibility, the decisionmaker must not rely on any statement of that party that supports that party's position.

Determinations

2020 Regulations

- Written Determination of Responsibility
- Allegations
- Procedural Steps
- Findings of Fact
- Conclusions regarding code of conduct
- Statement of and rationale for each allegation
- Disciplinary sanctions
- Whether remedies provided
- Appeal procedures

2022 NPRM - §106.45

- Determination of Whether Sex Discrimination Occurred
- Outcome of complaint
- Appeal procedures

2022 NPRM - §106.46

- Written Determination of Whether Sex-Based Harassment Occurred
- Allegations
- Policies and procedures
- Evaluation of evidence
- Determination of whether sex-based harassment occurred
- Disciplinary sanctions
- Whether remedies provided
- Appeal procedures

Practical Point

2020 REGULATIONS

It is permitted to have one decision-maker reach the determination regarding responsibility and one decision-maker determine the appropriate remedies and sanctions.

However, a single written determination must include the determination regarding responsibility and the remedies and sanctions.

Relevance

2020 Regulations

“The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied.”

2022 NPRM

Relevant means related to the allegations of sex discrimination under investigation as part of the grievance procedures under § 106.45, and if applicable § 106.46. Questions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred, and evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred.

2020 Regulations

Preponderance of the evidence standard or clear and convincing evidence standard

Apply the same standard of evidence for formal complaints against students and employees

2022 NPRM

Preponderance of the evidence standard of proof to determine whether sex discrimination occurred, unless the recipient uses the clear and convincing evidence standard of proof in all other comparable proceedings, including proceedings relating to other discrimination complaints, in which case the recipient may elect to use that standard of proof in determining whether sex discrimination occurred.



Standard of Proof

Informal Resolution

2020 Regulations

- Formal complaint required
- Written notice
- Voluntary process
- Written consent
- Not available if employee allegedly sexually harassed a student

2022 Regulations

- School has discretion to offer informal resolution and may decline to offer informal resolution despite parties' wishes
- Voluntary process, consent required
- Complaint not required
- Notice to parties (written under 106.46)
- Facilitator cannot be the investigator or decision-maker
- Potential terms outlined

Discretion to offer informal resolution in some circumstances

Even if the parties reach an informal resolution, sex discrimination the recipient's education program or activity may impact individuals beyond the parties.

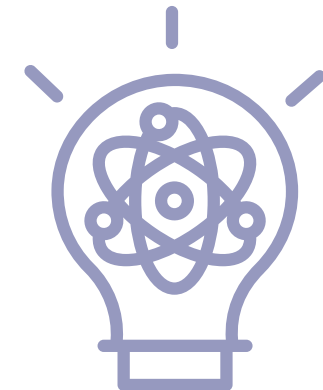
Therefore, the recipient may need to:



Provide additional training for staff on how to respond appropriately to sex discrimination

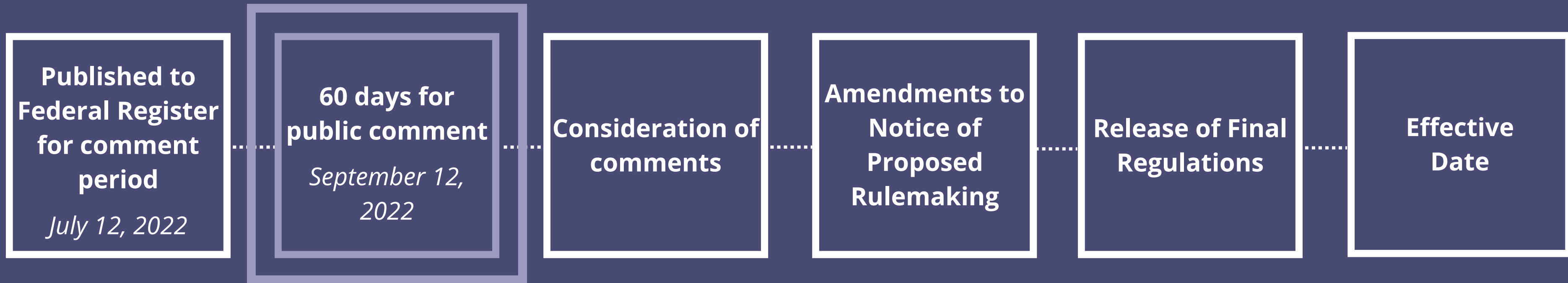


Monitor known risks of sex discrimination in programs and activities in which sex discrimination has been reported in the past



Pursue strategies other than discipline to address the conduct

Timeline for Implementation



For reference, the previous NPRM was published on November 29, 2018, comments closed January 28, 2019, Final Rule was released May 6, 2020, effective date of August 14, 2020.

Spring 2023?

Public Comment Period- Open Now

- 60 day comment period (following publication in Federal Register)
- Can submit at <http://www.regulations.gov>
 - Select Docket ID Number *ED 2021-OCR-0166*
 - Encouraged to use Microsoft Word
 - Comments are made available for public viewing, so only include information you are comfortable with being made public
- Comment on those proposed changes you believe will affect your students/employees, role, budget, time, or other resources
- ANYONE can provide comment



EMPHASIZING SUPPORT AND
PREVENTION:
**A NEW DIRECTION
FOR TITLE IX**



TAWNY ALONZO

Director of Training

LEARNING OBJECTIVES

1

Critically examine proposed changes to Title IX institutional response

2

Understand the balance of Complainant autonomy and the need to prevent further recurrence of sex discrimination

3

Identify proposed options in responding to reports of sex discrimination, supporting, and providing remedies

TITLE IX CURRENT REGS

2020-TODAY

TITLE IX: 2020-TODAY

INSTITUTIONAL RESPONSE

"106.44(a) General response to sexual harassment. A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent."

TITLE IX: 2020-TODAY

KEY TERMS

Actual knowledge: "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, or to any employee of an elementary and secondary school"

Deliberate indifference: "respond[ing] to sexual harassment in a manner that is 'clearly unreasonable in light of the known circumstances'"

TITLE IX: 2020-TODAY



Actual knowledge: What about reports to individuals who do not have authority to institute corrective measures? (Postsecondary)



Deliberate indifference: Is it enough to simply not be deliberately indifferent?

TITLE IX: 2020-TODAY

TITLE IX REPORTING



K-12

Actual knowledge: ALL
Employees



Postsecondary

Actual knowledge: TIX
Coordinator or authority to
institute corrective
measures

Any person may report sex
discrimination, including
sexual harassment

TITLE IX: 2020-TODAY

WHAT DOES THIS MEAN?



K-12

Actual knowledge: ALL
Employees

- The school has actual knowledge when ANYONE learns of potential discrimination or harassment
- This automatically obligates the school to respond

TITLE IX: 2020-TODAY

WHAT DOES THIS MEAN?

- Currently is no requirement for certain employees to report (may, not must)
- The obligation for an institution to respond does not activate until the TIXC or authority to institute corrective measures are notified of potential discrimination or harassment



Postsecondary.

Actual knowledge: TIX
Coordinator or authority to
institute corrective
measures

Any person may report sex
discrimination, including
sexual harassment

TITLE IX: 2020-TODAY

CURRENT TITLE IX WORKFLOW

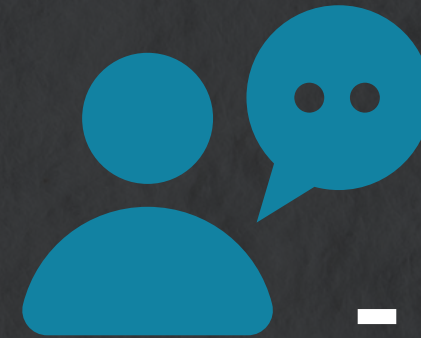


Student tells professor about sexual harassment



Professor notifies TIXC

Actual knowledge



Title IX Coordinator must:




Professor does not notify TIXC



- 1) Promptly contact the complainant to discuss the availability of supportive measures,
- 2) Consider the complainant's wishes with respect to supportive measures,
- 3) Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint,
- 4) Explain to the complainant the process for filing a formal complaint

TITLE IX: 2020-TODAY

 = availability
of supportive
measures



Student files
formal
complaint



Grievance
process
begins

*Informal
Resolution may
be available*



Informal
resolution or
determination
achieved



Student does
not file*

*in some cases,
TIXC may file
complaint on
behalf



Student withdraws
complaint or
TIXC dismisses



TITLE IX: 2020-TODAY



AT THESE VARIOUS STOPPING POINTS, CAN WE SAY WE HAVE WE ENDED THE DISCRIMINATION/HARASSMENT, PREVENTED RECURRENCE AND REMEDIED EFFECTS?

TITLE IX PROPOSED CHANGES

2023? and Beyond

TITLE IX: PROPOSED CHANGES

INSTITUTIONAL RESPONSE

"106.44(a) General response to sexual harassment. (a) General. A recipient must take prompt and effective action to end any sex discrimination that has occurred in its education program or activity, prevent its recurrence, and remedy its effects."

TITLE IX: PROPOSED CHANGES

LANGUAGE SHIFT

Removal of
actual
knowledge

Emphasis on ending
discrimination,
preventing
recurrence, and
providing remedies

TITLE IX: PROPOSED CHANGES



"The goal of the Department's proposed regulations is thus to fully effectuate Title IX by clarifying and specifying the scope and application of Title IX protections and recipients' obligation not to discriminate on the basis of sex."



"None of these steps* requires the recipient to ensure continued equal access to its education program or activity for the parties and more broadly for a recipient's educational community or otherwise ensures that a recipient meets its legal duty under Title IX to operate its education program or activity free from sex discrimination."

*Current 106.44(a): 1) Promptly contact the Complainant, 2) Discuss availability of supportive measures, 3) Explain process for filing a formal complaint

TITLE IX: PROPOSED CHANGES

TITLE IX REPORTING



K-12

ALL employees, except those who have been designated as confidential, must report to the TIX Coordinator



Postsecondary

Those with 1) authority to institute corrective measures or 2) responsibility for administrative leadership, teaching, or advising, except confidential employees, must report to the TIX Coordinator

All other employees must either notify TIXC or provide TIXC information.

TITLE IX: PROPOSED CHANGES

WHAT DOES THIS MEAN?



K-12

ALL employees, except those who have been designated as confidential, must report to the TIX Coordinator

- Though actual knowledge language has been removed, the expectation of reporting extends to all employees (except confidential)
- A new definition of who can be designated as confidential may provide clarity on these roles

TITLE IX: PROPOSED CHANGES

WHAT DOES THIS MEAN?

- Schools will need to designate and train individuals as to their specific reporting requirements
- All employees must do SOMETHING (even confidential must provide TIXC information)
- School must inform students who confidential employees are



Postsecondary.

Those with 1) authority to institute corrective measures or 2) responsibility for administrative leadership, teaching, or advising, except confidential employees, must report to the TIX Coordinator

All other employees must, at a minimum, provide TIXC information.

TITLE IX: PROPOSED CHANGES

PROPOSED TITLE IX WORKFLOW



Student tells
professor
about sexual
harassment



Professor
must notify
TIXC

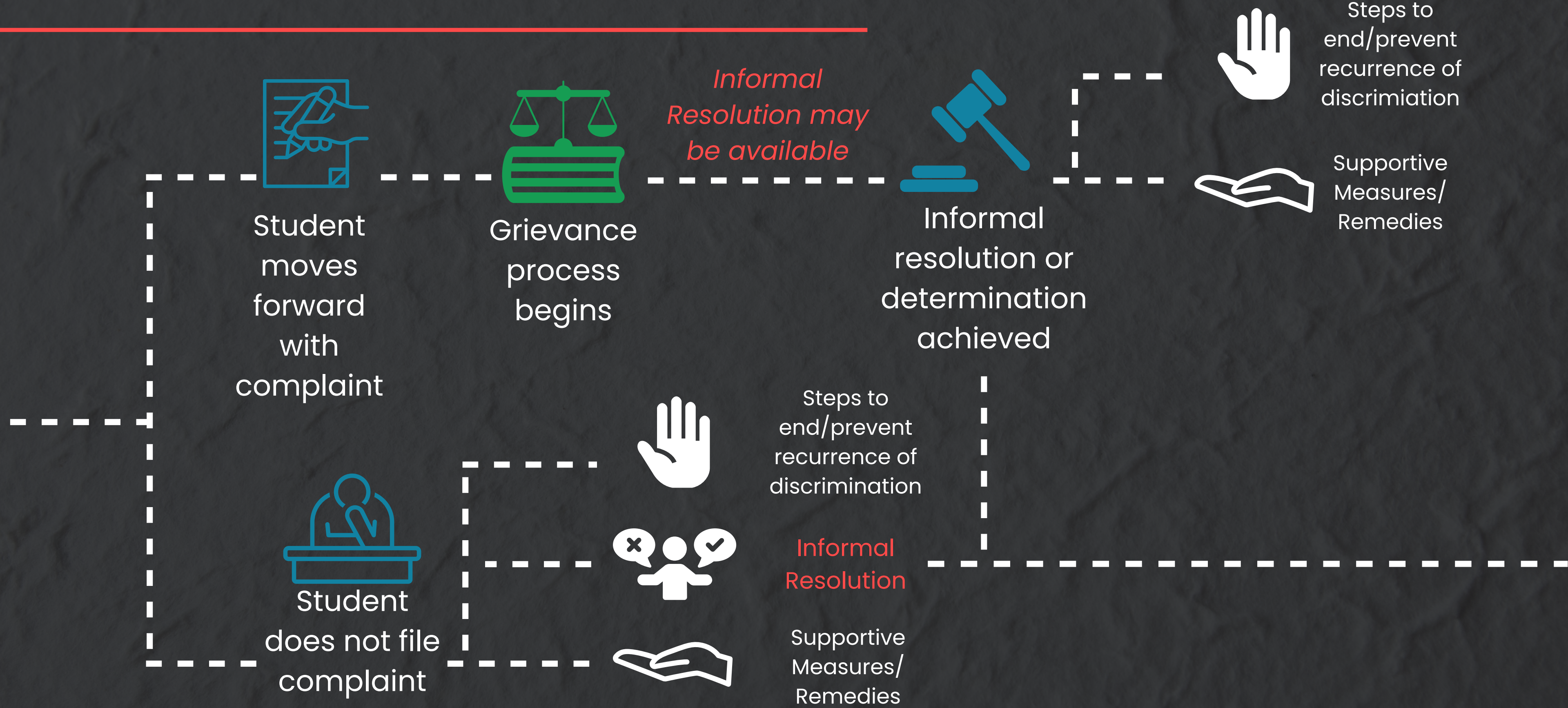


Title IX
Coordinator
must:

TITLE IX: PROPOSED CHANGES

- 1) Treat Complainant and Respondent equitably
- 2) (i) Notify Complainant of grievance procedures, (ii) If a complaint is made, notify Respondent of grievance procedures and notify both Parties of informal resolution options, if available
- 3) Offer and coordinate supportive measures to Complainant and Respondent to restore or preserve access to education program or activity.
- 4) In response to a complaint, initiate grievance procedures
- 5) In the absence of a complaint or informal resolution process, determine whether to initiate a complaint of sex discrimination that complies with the grievance procedures
- 6) Take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient's education program or activity, in addition to remedies provided to an individual complainant.

TITLE IX: PROPOSED CHANGES



TITLE IX: PROPOSED CHANGES

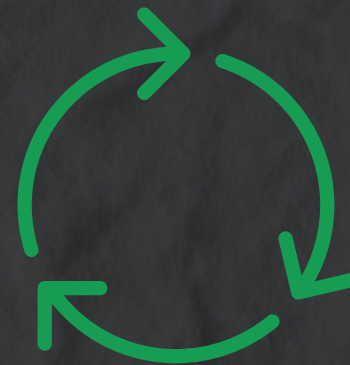
A NEW FOCUS:

IF THE DISCRIMINATION HAS NOT ENDED, RECURRENCE HAS NOT BEEN PREVENTED, AND EFFECTS NOT REMEDIED AS A RESULT OF ANY ACTIONS TAKEN, YOU MUST TAKE NEW STEPS TO DO SO.

Harassment/
discrimination
ends



Harassment/
discrimination
continues



"...in all cases, when a recipient's response to sex discrimination is not effective to end the sex discrimination and prevent the recurrence of discrimination for the complainant or the recipient's broader educational community, under the proposed regulations, a Title IX Coordinator must reevaluate the recipient's response and implement other approaches." (p.209)

VISUALIZING THE SHIFT

2020 FINAL RULE

- Framework from private litigation for monetary damages applied to the context of administrative enforcement of Title IX (*Gebser/Davis*)
- No duty to end the discrimination without formal complaint

PROPOSED CHANGES

- Return to administrative standard
- Duty from start to finish to end the discrimination
- Removal of formal complaint requirement

A COMMUNITY APPROACH

PROPOSED CHANGES INCLUDE EXTENDING RESPONSE IF THE IMPACT OF THE HARM WAS FELT OUTSIDE OF THE PARTIES

"additional training for staff on how to respond appropriately to sex discrimination"

"monitor known risks of sex discrimination in programs and activities in which sex discrimination has been reported in the past"

"take steps to repair an educational environment in which sex discrimination occurred, such as within a specific class, department, athletic team, or program"

"consider providing educational programming aimed at the prevention of sex discrimination"

(p. 211)

MONITORING

PROPOSED CHANGES INCLUDE NEW REQUIREMENT FOR TITLE IX COORDINATOR TO MONITOR FOR BARRIERS TO REPORTING

106.44(b)(1) Require its Title IX Coordinator to monitor the recipient's education program or activity for barriers to reporting information about conduct that may constitute sex discrimination under Title IX; and (2) Take steps reasonably calculated to address such barriers.

Climate
Surveys

Targeted
Feedback

Anonymous
Mechanisms

Public
Awareness
Events

MONITORING

Lack of Confidence

"You didn't help my friend with his problem, so..."

Fear

"That is a powerful group on campus. I can't speak up about this."

Lack of Information

"I didn't know where or how to report this."

Perceptions of Title IX

"That process is going to take too long. I don't want to deal with it."

PUBLIC AWARENESS EVENTS

PROPOSED CHANGES REQUIRE SCHOOLS (POSTSECONDARY) TO USE INFORMATION LEARNED AT PUBLIC AWARENESS EVENTS TO INFORM PREVENTION EFFORTS

"106.44(e) ...in all cases the postsecondary institution must use this information to inform its efforts to prevent sex-based harassment, including by providing tailored training to address alleged sex-based harassment in a particular part of its education program or activity or at a specific location when information indicates there may be multiple incidents of sex-based harassment."

PUBLIC AWARENESS EVENTS

EXAMPLES INCLUDE:

Increased
Security at
Physical
Locations

Targeted
Training

Schools will
have discretion
as to how they
integrate this
information
into its
prevention plan

COMPLAINANT AUTONOMY

2020

"respecting an alleged victim's autonomy, giving alleged victims control over how official systems respond to an alleged victim, and offering clear options to alleged victims are critical aspects of helping an alleged victim recover from sexual harassment." (p. 60*)

"the Department aims to respect the autonomy of complainants and to recognize the importance of a complainant retaining as much control as possible over their own circumstances following a sexual harassment experience, while also ensuring that complainants have clear information about how to access the supportive measures a recipient has available (and how to file a formal complaint initiating a grievance process against a respondent if the complainant chooses to do so) if and when the complainant desires for a recipient to respond to the complainant's situation." (p.63*)

**2020 Title IX Final Rule*

COMPLAINANT AUTONOMY

2020

Narrowing of
mandated
reporters

No action taken
without formal
complaint*

Provision of
information
regarding
supportive
measures

Option for
informal after
formal complaint
filed

*in some cases, TIXC
may file complaint

COMPLAINANT AUTONOMY

2022 proposed

"The Department remains committed to these objectives: respect for freedom of speech and academic freedom; respect for complainants' autonomy; protection of complainants' equal educational access while respecting the decisions of recipients to determine appropriate supportive measures, remedies, and disciplinary sanctions; consistency with constitutional due process and fundamental fairness; and clear legal obligations that enable robust administrative enforcement of Title IX violations" (p. 158)

"As explained in the discussion of proposed § 106.44(c), the Department continues to recognize the importance of complainant autonomy in decision-making about whether to request that the recipient initiate its grievance procedures or participate in the recipient's grievance procedures. Therefore, the Department currently believes a recipient should honor a complainant's request not to proceed with a complaint investigation when doing so is consistent with a recipient's obligation to ensure it operates its education program or activity free from sex discrimination." (p. 203)

COMPLAINANT AUTONOMY

2022 proposed

Expansion of
mandated
reporters*

Informal
resolution may
be offered at any
point

Coordination of
supportive
measures

Focus on restoring
or preserving
access to
education program
or activity

*with extensive
education about the
designations

PREGNANCY, PARENTING, LACTATION

Student
discloses
pregnancy

ANY employee
must provide
TIX
Coordinator
information

If student
contacts TIX
Coordinator,
Coordinator
must:

- 1) Inform the student of the school's obligation to prohibit sex discrimination
- 2) Provide the student with the option of reasonable modifications to the recipient's policies, practices, or procedures afforded by Title IX
- 3) Allow the student to take a voluntary leave of absence from the recipient's education program or activity to cover, at minimum, the period of time deemed medically necessary by the student's physician or other licensed healthcare provider
- 4) Ensure the availability of a lactation space, which must be a space other than a bathroom

PRACTICAL APPLICATION

A CASE STUDY

Jacob



- Jacob went on a date with another first-year student who lives in his residence hall, Kayla. He had a nice time, but declined seeing her further.
- Kayla continued to text Jacob multiple times throughout the next week, sending him sexually explicit messages and nude photos. She showed up at his door unannounced, kissed him without his consent, and told him she wanted to sleep with him.
- Jacob told her no, firmly, to which Kayla said, "What are you, gay? You're supposed to like this."
- Jacob started sleeping on a couch at the student center after Kayla continuously cornered him on his floor.
- When he was a week late turning in a major assignment for Sociology 101, he told his professor he was exhausted and shared what had been going on.

A CASE STUDY

Jacob



Response under current Title IX Regs:

- Possibility that the concern never makes it to the TIX office
- If it does, the TIXC would inform Jacob on how to file a formal complaint, as well as the availability of supportive measures
- If Jacob does not file a formal complaint and the harassment continues, there is no obligation for the TIXC to end the harassment, potentially no follow-up
- If Jacob pursues supportive measures (e.g. moving his residence) and the harassment does not end, there is no obligation for the TIXC to end the harassment

A CASE STUDY

Jacob



Ending harassment could be dependent upon:

**Professor's
decision to
report
(or not to report)**

**Jacob's
decision to
file a formal
complaint**

**TIX
Coordinator's
explanation
of supportive
measures**

A CASE STUDY

Response under proposed Title IX Regs:

- The professor would be responsible for informing the TIXC of the concern
- The TIXC would have a more involved role in providing options and coordinating them
- If Jacob does not respond to the TIXC and the harassment continues, the TIXC would still need to take what steps they can end the harassment
- If Jacob pursues supportive measures (e.g. moving his residence) and the harassment does not end, the TIXC would need to try something else
- Jacob could look at informal options without the grievance process being initiated

Jacob



A CASE STUDY

Jacob



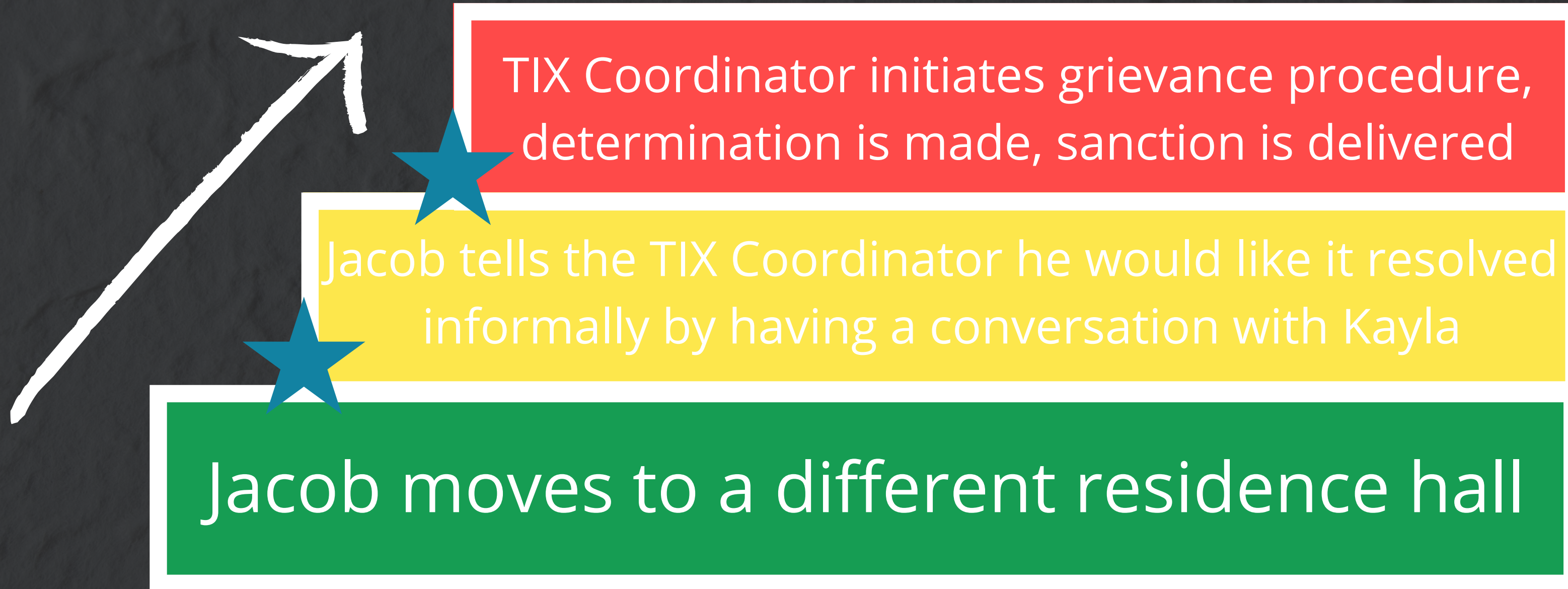
Ending harassment is a must and will happen with the following in mind:

**Complainant's
desires to
address the
issue**

**TIX
Coordinator's
explanation
of options**

**Escalation or
differentiation
when other
methods don't
solve the issue**


A CASE STUDY



RANGE OF OPTIONS

In short, what
will stop the
harassment or
discrimination?

Consider totality of the
circumstances,
Complainant's wishes,
information known,
possibility for continued
harm to Complainant or
campus community



Grievance procedure
w/sanctions

Informal resolution

Education

Supportive measures

QUESTIONS?

THE ROAD LESS TRAVELED

USING RESTORATIVE JUSTICE TO ACHIEVE A RESOLUTION

C.J. Larkin, JD
Jim Reeves, JD

C.J. LARKIN, JD



JIM REEVES, JD





SESSION LEARNING OBJECTIVES

- Explore the foundational principles of restorative justice
- Analyze the effectiveness of restorative justice practices
- Evaluate when restorative justice is an appropriate process

What is Restorative Justice?

- Restorative Justice is a general term that encompasses various forms and practices
- The focus of Restorative Justice is the “harm” caused by one’s conduct and how to repair that “harm”
- Less focus on punitive results, and more on educating the participants of the impacts of their behavior, reach resolution, and perhaps reconciliation

SHIFTING FOCUS

From this

A violation against the school and its policy

Can create adversarial relationships and focus on a process

Accountability in the form of punishment

Justice is school making determination and sanctioning, if needed

A violation of a person, trust, and responsibility

Can create dialogue and focus on people

Accountability in the form of accepting responsibility

Justice is all affected parties coming together to repair harm

To this

IS RESTORATIVE JUSTICE ALLOWED UNDER TITLE IX?

- Short answer, yes
- In Title IX cases, restorative justice falls within the informal resolution section of the regulations (See Sec. 106.45 (a)(9))

TITLE IX LANGUAGE

“ At any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient - ”

Sec. 106.45 (a)(9)

1

Provides party a written notice with

- The allegations
- Requirements of the informal resolution
- Language about the right to withdraw at any time and re-enter the grievance process under the formal complaint
- Consequence of participating in informal resolution, including record-sharing

2

Obtains voluntary, written consent from both parties

3

Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student

RESTORATIVE JUSTICE VS. MEDIATION



- Restorative justice and mediation are both types of informal resolution
- Restorative justice requires acceptance of responsibility by the party who caused harm, mediation does not
- Restorative justice requires a significant amount of preparation to ready all impacted parties

THE RIPPLE EFFECT

Restorative Justice takes into account the “ripple effect” of one’s actions. Many people are often harmed by an offense, some of whom may not have been directly involved:



CORNERSTONES OF RESTORATIVE JUSTICE

EMOTIONAL SAFETY



PHYSICAL SAFETY



WHY CHOOSE RESTORATIVE JUSTICE?



14% reduction
in rate of
reoffending



85% of victims
were satisfied
with the
process



62% of victims felt
restorative justice
had made them
feel better after an
incident of crime

HAVE YOU HEARD THESE WORDS?

I want them to be held accountable, but I don't want to ruin their life.

I wish we could just fix this.

I love them,
but they hurt me.

I don't want to get them kicked out of school, but something needs to happen.



Relationship

Respect

Responsibility

Repair

Reintegration

CORE QUESTIONS IN RESTORATIVE JUSTICE

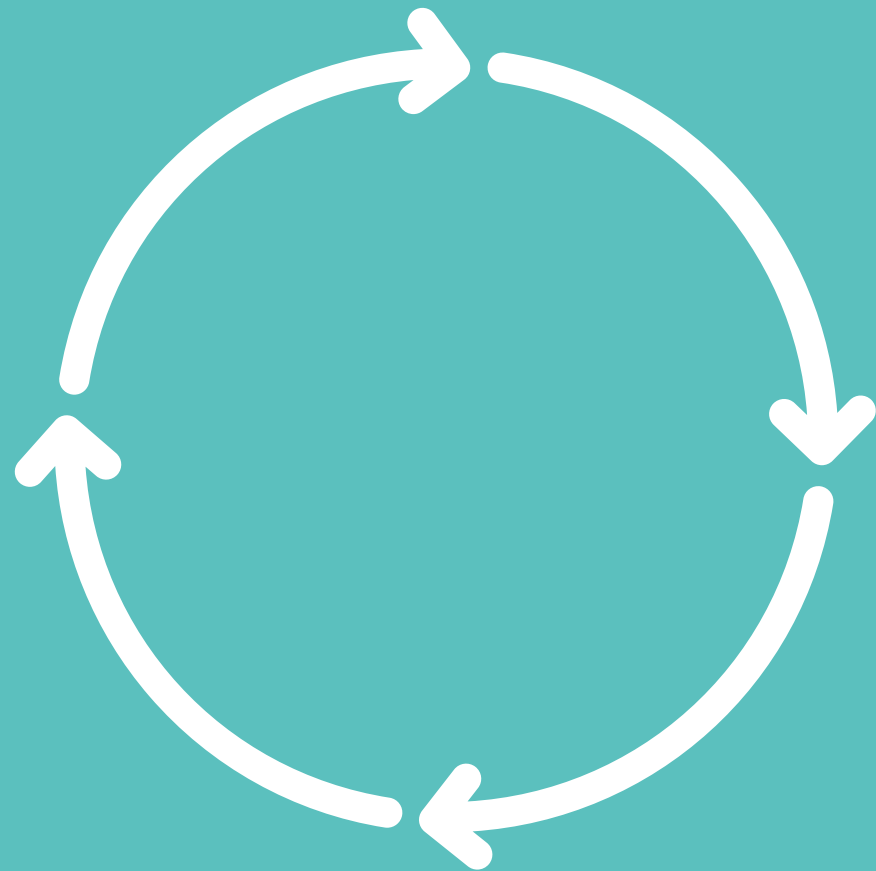
Who was
harmed?

What was
the impact of
the harm?

Who is
responsible
for repairing
the harm?

What is
needed to
repair the
harm?

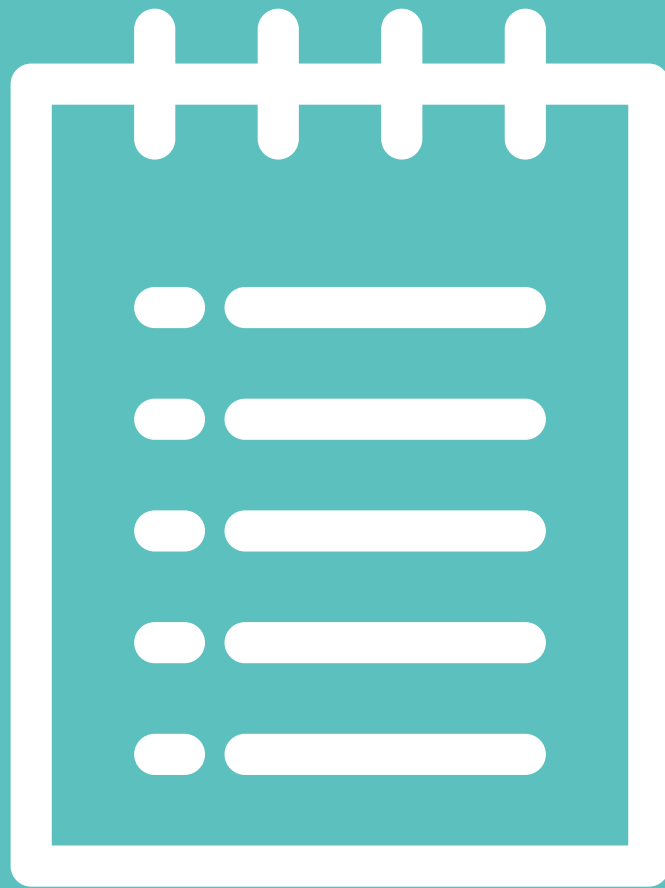
RESTORATIVE JUSTICE PRACTICES



GROUP "CIRCLES"

- Involves multiple stakeholders
- Allows individuals to share impact of harm
- Creates connections

RESTORATIVE JUSTICE PRACTICES



IMPACT STATEMENTS

- Creates empowerment
- Can provide closure

RESTORATIVE JUSTICE PRACTICES



COMPLAINANT/ RESPONDENT DIALOGUES

- Questions are answered
- Leads to understanding

THE PROCESS FOR COMPLAINANT-RESPONDENT DIALOGUE

Follow regulatory requirements for informal resolutions, ensure there is informed consent from both parties

Present restorative justice dialogue with other options, such as formal hearing and mediation, so the parties have choices

THE PROCESS FOR COMPLAINANT-RESPONDENT DIALOGUE

Conduct a pre-dialogue session with each party – a critical step to be conducted by a trained facilitator

**THE
DIALOGUE
MEETING**
conducted by a
trained facilitator

If an agreement is reached, document the agreement, implementation, provide follow up

PREPARATION FOR DIALOGUE




- Advisor and facilitator meet separately and privately with each of the parties
- Talk about how the dialogue will typically unfold
- Listen to the stories – What happened?
- Is the Respondent willing to accept responsibility for their actions?
- Review and discuss each of the “harm” questions - help them to think broadly in answering the questions

PREPARATION FOR DIALOGUE

- What do you need/want to come out of the dialogue?
- What do you think the other party needs?
- What if they say . . . ?
- What if they ask you . . . ?
- What do you want to say to them?
- What do you want to ask them?
- If an apology may be involved, what will that sound like?
- What ideas do you have to repair the harm? What would you like to see happen?



KEY CONSIDERATIONS



Is the
Respondent
going to
accept
responsibility?

Throughout the
preparation, the
advisor and facilitator
assess each party for
any concerns around
emotional and
physical safety

Are the parties
going to be able to
communicate
effectively and
sincerely?

WHEN IS THE USE OF RESTORATIVE JUSTICE INAPPROPRIATE?

- The cornerstones of emotional and physical safety for the parties cannot be guaranteed
- There is a greater concern for campus safety
- It is clear the Respondent will not take responsibility

CASE STUDY 1 - ETHAN AND ABBY

Ethan (he/him/his) and Abby (she/her/hers) (both Juniors) are cheerleaders and were friendly colleagues. They traveled by bus with the football team to away games.

On the way home two weeks ago, everyone on the bus was drinking “punch” from a huge orange cooler. It was spiked with three kinds of hard alcohol. After an hour or so, Abby had fallen asleep on Ethan’s shoulder. She woke up suddenly because his hand was inside her sweater. She told him to stop but he pushed her against the window. Ethan tried to kiss her while putting his hand on her inner thigh. Abby shoved him away and went to sit in the front of the bus.

When Ethan was contacted by the Title IX office, he admitted what had happened and said he was very sorry. He explained that he had been very drunk and misunderstood Abby putting her head on his shoulder.



CASE STUDY 1 - ETHAN AND ABBY

In considering IR in this case:

- As fellow cheerleaders, they will likely have continuing contact.
- Ethan has admitted the behavior and is remorseful.
- IR provides the opportunity to talk about what happened, the harm caused, who is responsible for repairing the harm, and how to repair the harm.
- IR can allow the parties to decide the outcome that works best for them and their relationships with their teammates and friends.



CASE STUDY 2- LOGAN AND CHLOE

Logan (he/him/his) a Sophomore) and Chloe (she/her/hers) a Freshman) had been in a consensual sexual relationship.

After they broke up, Chloe leaked some nude photos of Logan on TikTok.

She described Logan's preferred sexual practices, including group sex. She provided Logan's contact info.

Logan did not know about nor approve of any of this. His family, friends and the college community could have access to Chloe's posts.

When he confronted her about it, she told him she was doing him a favor. A friend told him that someone had posted one of the photos with his contact information in a freshman residence hall.

When the Title IX office contacted Chloe, she denied that the online postings were done by her. She then stated she and Logan had talked about posting for partners on TikTok and she thought he was okay with it. She denied putting up the photo/information in the residence hall.



CASE STUDY 2- LOGAN AND CHLOE

In considering IR in this case:

- Clearly, there is harm to Logan, and perhaps family, friends.
- Chloe has denied posting the pictures. Is she willing to accept some responsibility/contribution for causing harm?
- What's the nature of the parties' relationship post breakup? Are able to meet and talk safely (emotionally and physically) or are there potential threats to safety?
- A review of the investigative report, if any, may be helpful to understand the current status of their relationship.
- Careful screening is in order.



BENEFITS OF RESTORATIVE JUSTICE



1

Through facilitated dialogue, the parties get their questions answered

2

Provides a “safe” space for communication

3

Avoids “re-victimizing” the Complainant

BENEFITS OF RESTORATIVE JUSTICE



4

Builds awareness of the impact of one's actions, including the "ripple effect"

5

Allows the parties to have control over the outcomes

6

Outcomes can be whatever the parties agree to so long as the solution is legal and not violative of policy or regulations



QUESTIONS



AUTHORIZATION & DISCLAIMER

FOR SCHOOLS POSTING TRAINING PROGRAM MATERIALS ON INSTITUTIONAL WEBSITES

Schools must post the following authorization and disclaimer language on their websites alongside *Title IX in Motion* training program materials:

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The information and materials provided during this program were for educational purposes only and not intended to be legal advice. Attendees should seek independent legal advice concerning the issues presented.

PLOTTING THE COURSE

Title IX Investigation Preparation

Elizabeth Abdnour, JD

Today's Speaker

Elizabeth Abdnour, JD



Learning Objectives

Understand the workflow of an investigation following the receipt of a formal complaint

Identify strategies for mapping out Title IX investigations

Recognize the importance of an investigation timeline and advanced planning



Investigation Planning Considerations



Today's Talking Points

- 01** Understanding Response to Allegations
- 02** Pre-Investigation Matters
- 03** Key Questions in the Grievance Process
- 04** Conducting the Investigation
- 05** Tips to Remember

QUESTIONS



Plotting the Course: Investigation Preparation

Speaker: Elizabeth Abdnour, JD

I. How must a school respond to allegations of sexual harassment?^{1,2}

1. Schools must “respond promptly in a manner that is not deliberately indifferent.”
2. The Title IX Coordinator or designee must promptly contact the complainant to discuss the availability of supportive measures, regardless of whether a formal complaint is filed, and to explain the process for filing a formal complaint.
3. In addition, if a formal complaint is filed, either by the complainant or the Title IX Coordinator, a school must:
 - a. Offer supportive measures to the respondent, and
 - b. Follow the Title IX grievance process specified by the 2020 amendments.
4. In addition to setting out these requirements, the Title IX regulations provide that a school is deliberately indifferent “only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.”

II. Pre-investigation matters

1. Investigators must be impartial, unbiased, and free of conflict.
 - a. Conflict of Interest check: you will know the names of the Complainant and Respondent based on the Notice of Investigation.
2. Trauma-informed interviewing:
 - a. A school may use trauma-informed approaches to respond to a formal complaint of sexual harassment. The preamble clarifies that the 2020 amendments do not preclude a school “from applying trauma-informed techniques, practices, or approaches,” but notes that the use of such approaches must be consistent with the requirements of 34 C.F.R. § 106.45, particularly 34 C.F.R. § 106.45(b)(1)(iii).³
3. Presumption of non-responsibility:
 - a. The 2020 amendments require a school to include in its Title IX grievance process “a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.”⁴
 - b. “The presumption does not imply that the alleged harassment did not occur,” or that the respondent is truthful, or a complainant is untruthful.⁵ Instead, the preamble says that the

¹ 34 C.F.R. § 106.44(a).

² <https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>

³ <https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>

⁴ 34 C.F.R. § 106.45(b)(1)(iv).

⁵ 85 Fed. Reg. at 30,259.

- presumption is designed to ensure that investigators and decision-makers serve impartially and do not prejudge that the respondent is responsible for the alleged harassment.
- c. Schools that have relied on this presumption to decline services to a complainant or to make assumptions about a complainant's credibility have done so in error.
4. Key Questions of the Title IX Grievance Process
- a. What is the alleged conduct?
 - b. Does the evidence support a finding that it occurred (preponderance of the evidence or clear and convincing evidence – your policy will define standard)
 - c. If it occurred, was the conduct a policy violation?
 - d. You will ask the parties and identify information and evidence that answers these questions.
5. Understand parties' rights and responsibilities in the process.
- a. Neither party is required to participate in the investigation.
 - b. Parties have the right to an advisor during interviews.
 - c. Parties have the right to provide their account of the alleged misconduct and have that account be on the record.

III. Investigation

1. Receive formal complaint (process should be outlined in school policy)
2. Assess for conflict & notify Title IX Coordinator immediately in case of conflict.
3. Jurisdiction determination
4. Prompt notice to both parties of allegations
 - a. Provide updated notice if additional allegations come out during investigation.
5. Assess for supportive measures.
 - a. The school must contact the complainant to discuss the availability of, and to offer, supportive measures, regardless of whether a formal complaint is filed. A school must also consider the complainant's wishes with respect to supportive measures.⁶
 - b. Supportive measures “are designed to restore or preserve equal access to the [school's] education program or activity,” “protect the safety of all parties or the [school's] educational environment, or deter sexual harassment,” do not “unreasonably burden [] the other party.”⁷
 - c. Can include removal from campus or administrative leave.⁸
6. Investigation plan: Create a template with timelines for your entire team to start from.

⁶ 34 C.F.R. § 106.44(a).

⁷ 34 C.F.R § 106.30(a).

⁸ 34 C.F.R. §§ 106.44(c)-(d).

- a. Witness List & Order of Interviews for all Witnesses and Parties
 - b. Evidence List
 - c. Investigation Timeline
 - i. Per law/regulations, there is no set timeline – but timeline must be:⁹
 1. Defined in policy
 2. Reasonably prompt
 - ii. Best practices:
 1. Official TIX policy statement about overall timeline
 2. Internal policy or procedures outlining detailed timelines
 3. Emails to parties regularly with updates
 4. Notify parties immediately in case of delay beyond original timeline & include reason for delay
7. Teams of two or more investigators:
- a. Communicate with your co-investigator & delegate tasks.
8. Brainstorm interview questions based on policy violations.
- a. Do not be shy about asking personal and intimate questions. Details are important!
 - b. If you feel like the interviewee may perceive the question as harsh or biased, it may be helpful to explain WHY you are asking a specific question.
9. Interview parties and witnesses.
- a. General order of interviews: Complainant → Respondent → Witnesses
 - b. Interview anyone named (or who you discover in your investigation) who may have relevant information.
 - c. Ask all questions requested by parties unless clearly not relevant. Relevance should be defined in your policy.
 - d. Know your policy – this will guide what facts you need to gather.
10. Prepare the report.

IV. Important tips:

1. Be Flexible!
 - a. You will likely have to modify/update your investigation plan and timeline as the investigation goes on – communicate with parties so their expectations are realistic.
2. Understand the time commitment.
3. You must be impartial, unbiased, and free of conflict, but there is no requirement of “neutrality.”
 - a. You can and should be empathetic to both parties and provide resources, support information, flexibility, etc.
 - b. You cannot favor one party over the other.

⁹ 34 C.F.R. § 106.45(b)(1)(v).

- c. If a party feels heard and respected by you, there is a higher chance of satisfaction with the process even if they disagree with the outcome.
- 4. Investigations are stressful and require you to listen carefully to, process, and rehash over and over very difficult and painful facts about rape, sexual abuse, harassment, stalking, and/or relationship violence.
 - a. Self-care is crucial!
 - b. Community care is also crucial.

LAYING THE GROUNDWORK

The Importance of Pre-Hearing Strategizing

Hon. Patricia Riehl and Kenneth Chackes, JD

Hon. Patricia Riehl



Kenneth Chackes, JD



Learning Objectives



Develop strategies
for reviewing
investigation
reports and
evidence



Define the role of
each individual
involved in the
pre-hearing
meeting



Identify how to
conduct an
effective
pre-hearing
meeting

REVIEWING THE INVESTIGATIVE REPORT AND FILE



What is an Investigative Report?



Fairly summarizes relevant evidence and facts of the case, as well as the procedural steps taken by the institution



Required Contents:

- Title IX Regulations (§ 106.45 Grievance process for formal complaints of sexual harassment)
- “Create an investigative report that fairly summarizes relevant evidence (§ 106.45(b)(5)(vii))
- Each school’s Policy might require additional contents



Might include some or all of the following:

- Introduction: name of Investigator and dates of investigation
- Individuals involved: Complainant, Respondent, Advisors, Witnesses
- Date of reported incident
- Summary of reported incident
- Applicable policy and alleged policy violation
- Case history/Procedures followed
- Summary of the Parties' interviews
- Summary of Witnesses' interviews
- Description of other evidence (documents)
- Disputed v. undisputed facts
- Evaluation of relevant evidence
- Determination of credibility
- Parties' responses to evidence

What is an Investigative File?

- ▶ Contains all evidence obtained during the investigation
- ▶ Could include the following and more:
Interview summaries, interview transcripts, communication between the parties such as text messages, emails, direct messages via social media, photos, videos
- ▶ May also include evidence collected from individuals aside from the Parties such as security footage, call logs, police reports, etc.

REVIEWING THE INFORMATION

Read the investigative report and entire investigative file CAREFULLY.

The report and evidence can be the primary basis for the decision of the hearing officer - the contents may not be repeated at the hearing itself



Ideally, all information gathered by the investigator should be discussed in the report and included in the file



At some schools, however, the Investigator might exclude from the report and file information that the investigator deemed irrelevant



Best practice - the Hearing Officer should determine what is and what is not relevant, not the Investigator



Review ALL evidence, even if it seems irrelevant or insignificant



Organize the information in a way that will allow for easy access during the pre-hearing meeting and the hearing

REVIEWING THE INFORMATION



Consider key facts needed to determine responsibility.

Review statements and evidence and compare
against the elements of the offense.

Do they support or refute?

<u>Inculpatory</u>	<u>Exculpatory</u>
Any evidence favoring the Complainant	Any evidence favoring the Respondent

ELEMENTS OF THE OFFENSE

CONDUCT
ON THE
BASIS OF
SEX

+

UNWELCOME

+

SEVERE,
PERVASIVE,
OFFENSIVE

+

DENIES A
PERSON
EQUAL
ACCESS TO AN
EDUCATIONAL
OPPORTUNITY

REVIEW THE ELEMENTS

Determine what facts (elements) are in dispute

Carefully study the evidence that is relevant to each disputed fact (element). In other words, what would prove or disprove the fact (element)?

If the investigation report contains conclusions regarding disputed issues or credibility, determine if the evidence clearly supports those conclusions.

The Investigator was not the Decision-Maker!

WHAT IF...

we have these...

CONDUCT
ON THE
BASIS OF
SEX

+

UNWELCOME

+

SEVERE,
PERVASIVE,
OFFENSIVE

+

DENIES A
PERSON
EQUAL
ACCESS TO AN
EDUCATIONAL
OPPORTUNITY

but not this?

GOALS FOR THE REVIEW PROCESS



**DETERMINE
WHAT NEEDS TO
BE ASKED AT
THE HEARING**



**DETERMINE
WHAT
INFORMATION IS
MISSING
(if any)**



**IN ADDITION TO
PARTIES, WHAT
WITNESSES NEED
TO APPEAR AT
THE HEARING**

PRE-HEARING MEETING



WHAT IS THE PRE-HEARING MEETING?

- Meeting before the hearing to walk through guidelines, expectations, and more
- Led by the Title IX Coordinator or Decision-maker(s)
- Not mandated by Title IX regulations, but permitted
- Prepares all parties (including the hearing officer) for what is ahead
- Seen as a best practice in Title IX

INVESTIGATION TIMELINE



Should be held following issuance of investigation report and after parties and their advisors have had the opportunity to review and respond to evidence

PRE-HEARING CHECKLIST



Clarify purpose of hearing



Reiterate standard of evidence



Discuss hearing procedure



Review rights and responsibilities



PRE-HEARING CHECKLIST



Confirm witness attendance



Explain relevancy of evidence



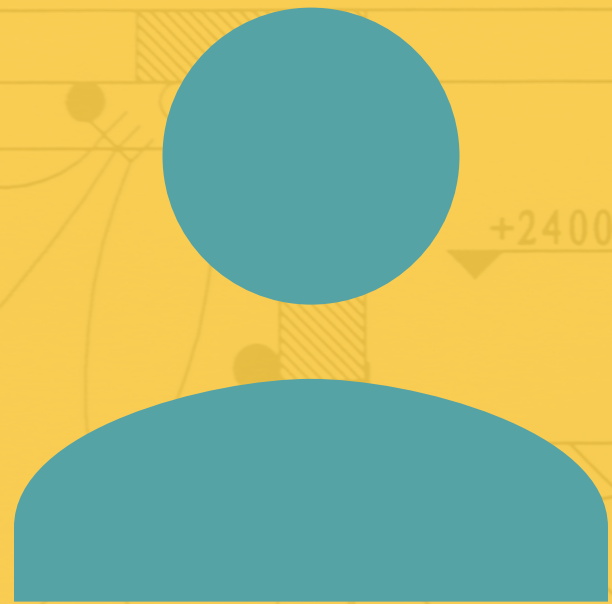
Review logistics and needs



Answer parties' questions



WHO IS SEATED AT THE TABLE?

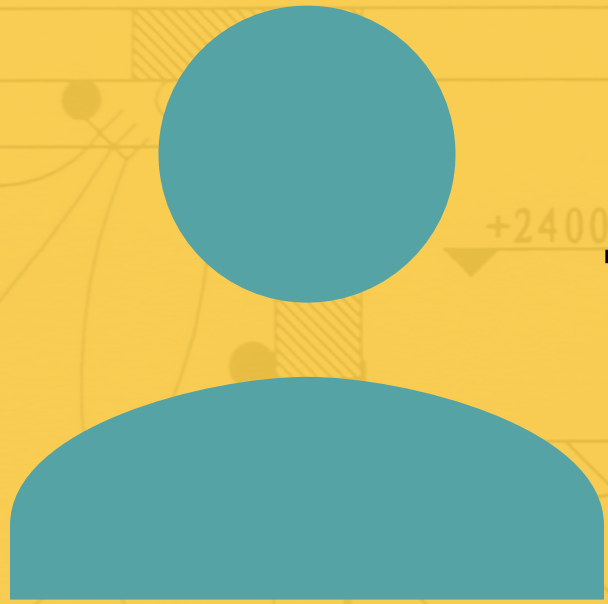


Hearing Officer

- Conducts the pre-hearing conference
- Sets datelines for witness disclosures
- Sets the hearing date
- Advises all present of the rules and procedures to be followed at the hearing

The Hearing Officer sets the “rules of the road”.

WHO IS SEATED AT THE TABLE?

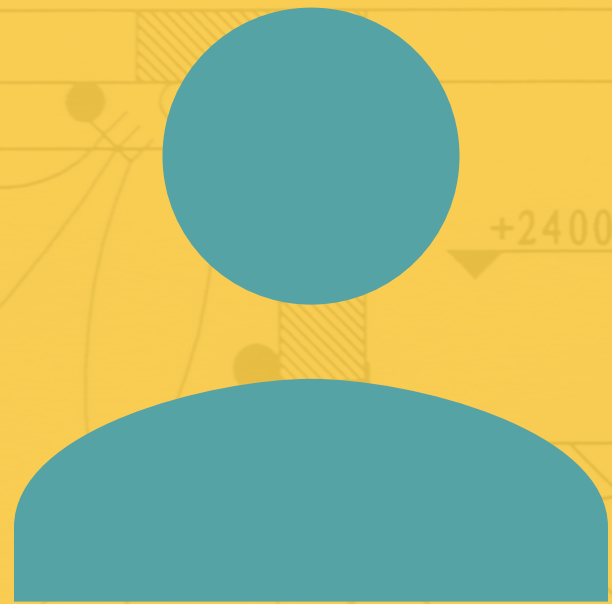


Title IX Coordinator

- Have the burden of proof in any hearing
- Request witness' to appear for the hearing
- Facilitate the hearing itself
- They are the record keeper of the hearing

The TIX Coordinator is the overseer of the process.

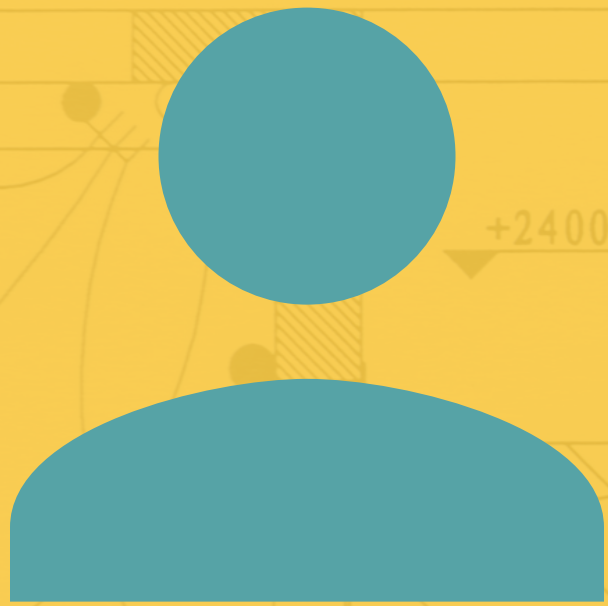
WHO IS SEATED AT THE TABLE?



Complainant

- The reporting party
- May have questions about the process and how it works
- Pre-hearing conference allows them to "put a face" to the Hearing Officer

WHO IS SEATED AT THE TABLE?

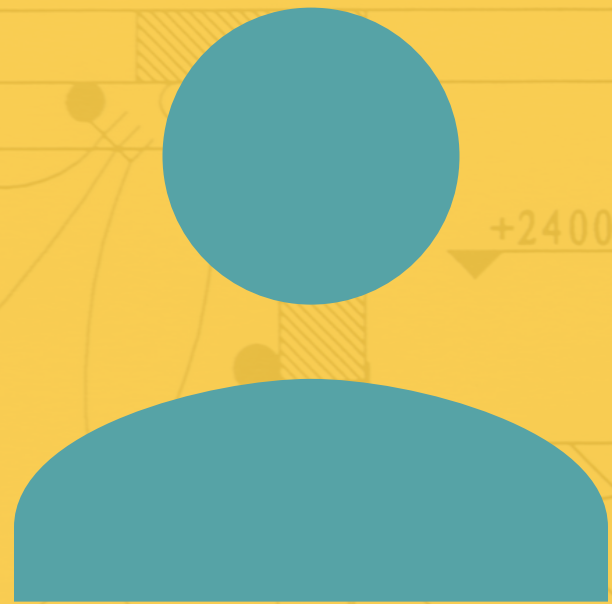


Complainant's Advisor

- Represents the interests of the Complainant
- Only individuals allowed to cross-exam witnesses, as the Complainant is prohibited from doing their own cross-examination
- Pre-hearing conference is the time to iron out any evidentiary issues
- Establish the witnesses expected to be called for the hearing
- Acquaints them with the rules and procedures of the hearing

Remember an advisor can be an attorney or not, it is the Complainant's choice.

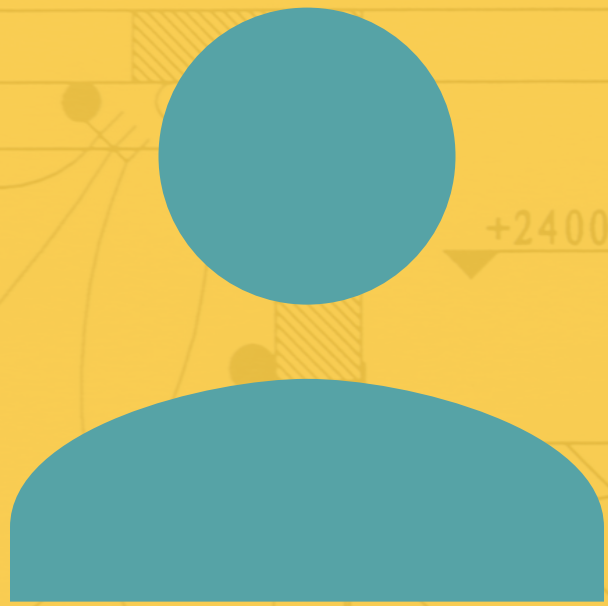
WHO IS SEATED AT THE TABLE?



Respondent

- The responding party
- May have questions about the process and how it works
- Pre-hearing conference allows them to "put a face" to the Hearing Officer

WHO IS SEATED AT THE TABLE?



Respondent's Advisor

- Represents the interests of the Respondent
- Only individuals allowed to cross-exam witnesses, as the Respondent is prohibited from doing their own cross-examination
- Pre-hearing conference is the time to iron out any evidentiary issues
- Establish the witnesses expected to be called for the hearing
- Acquaints them with the rules and procedures of the hearing

Remember an advisor can be an attorney or not, it is the Respondent's choice.



Be aware that parties may select
non-attorney advisors.

Acknowledge power imbalances
that might be created.

IMPORTANCE OF THE PRE-HEARING MEETING

Most individuals have not participated in this type of hearing

- The many “unknowns” surrounding the live hearing may be anxiety-inducing for the parties
- Pre-hearing meetings may help ease some anxiety because the Hearing Officer addresses many of those “unknowns”
- Unfortunately, this does not mean that the parties will not be anxious during the hearing

BENEFIT TO THE PARTIES AND ADVISORS

Allows parties to put a face with a name

Parties begin to fully understand hearing process and what it entails

Process and potential consequences of the TIX process become "real"

BENEFIT TO THE PARTIES AND ADVISORS

After the pre-hearing meeting, some parties may decide to move forward with informal resolution (if permitted)

Can help make the live hearing more efficient, focused, and effective

BENEFIT TO THE HEARING OFFICER

- Clarify the authority of the Decision-Maker(s) in front of the Advisors and Parties
- Ensure Parties and Advisors have the same understanding of and expectations for the live hearing
- Anticipate any issues and troubleshoot before the hearing begins
- Slow the process down to allow more thoughtful decision-making

COORDINATING THE PRE-HEARING MEETING

- Schedule parties separately
- Ensure the meeting occurs well before the anticipated hearing date to accommodate any requests for changes or special needs
- If either party does not have an advisor, now is the time to provide one
- Ask parties to bring their list of cross-examination questions for review
- Select your videoconferencing platform for the hearing

SAMPLE MEETING AGENDA

1

Introductions

- Parties
- Advisors
- Title IX Team

2

Hearing preparation

- Confirm Parties' access to investigative report and evidence
- Confirm witness participation

3

Review procedure

- Consult your school policy
- If your policy does not establish procedure, create a flow for the hearing

SAMPLE MEETING AGENDA

4

Outline live hearing rules

- Authority of the decision-maker at the hearing
 - Permission to speak, requests for breaks, etc.
- Consequences of not submitting to cross-examination
- Expectations of rules and decorum
 - Punctuality, inclusive language, prohibited behavior, etc.
- Relevance under Title IX

SAMPLE MEETING AGENDA

5

Establish timeframe

- Share date and time for live hearing
- Explain potential length of hearing
- Discuss technology logistics

6

Answer Questions

- Discuss any barriers, concerns, needs, or worries
- Ensure no questions are left unanswered, this is the time to clarify for all parties



Remind the parties one final time about informal resolution options. This may be the last chance to explore them.

NAVIGATING CHALLENGES



QUESTIONS?

AUTHORIZATION & DISCLAIMER

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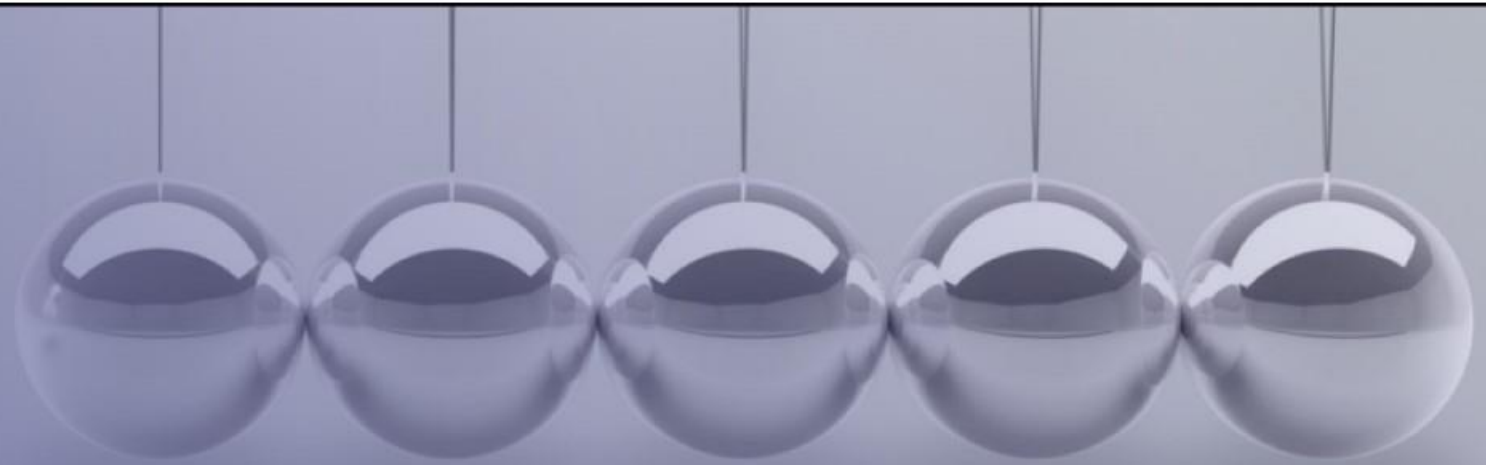
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Title IX in Motion

August 2-4, 2022

12:00PM – 5:15PM EDT



Trauma-Informed Victim / Complainant Interview

August 3, 2022



Chief Tom Tremblay (Ret)
Thomas Tremblay Consulting & Training
www.tomtremblayconsulting.com



Training and Guidance for Consideration

This presentation was designed based on experience and input from multi-disciplinary partners to reflect examples of promising practices, alternative approaches, and lessons learned. It is not intended to constitute legal advice, or to create a legal standard of care. Participants should follow their own policies, procedures, and guidance from their respective institution's legal counsel.

Chief Tom Tremblay (Ret), Tom Tremblay Consulting & Training

Learning Objectives:

1. Recognize trauma in the context of sexual assault / misconduct to assist in preparing for the victim / complainant interview;
2. Identify helpful communication strategies to promote victim / complainant empowerment and encourage continuation in the administrative and / or criminal justice process;
3. Develop trauma-informed victim / complainant interview skills to help capture and consider potentially compelling evidence of the victim's / complainant's experience.

Trauma-Informed Approach: Presumption of Innocence & Due Process

- We can be trauma-informed and still ensure the critical rights of those who have been reported to have committed an offense;
- Trauma-informed approach means understanding victim trauma and developing strategic approaches in an effort to minimize trauma throughout the reporting / investigative process;
- The trauma-informed approach is about being more objective in our response to sexual assault / misconduct – including adherence to the presumption of innocence and due process rights of respondents who are reported to have committed an offense.

Terminology During This Session:

Complainant / Reporting Party: Title IX language;

- Victim: referencing the trauma that a victim of sexual assault or sexual misconduct may experience during and after an assault;
- Survivor: referencing the trauma and recovery of a victim following sexual assault or sexual misconduct.

Respondent / Responding Party: Title IX language

- Suspect: referencing a person suspected of a criminal offense;
- Offender: referencing a person who has been adjudicated or convicted of sexual misconduct or criminal sexual offense.

My Journey: Understanding Trauma

- 1970s Ann Burgess (Psychiatric Nurse) and Lynda Holmstrom (Sociology Professor) *“Rape Trauma Syndrome”*
- 1980: American Psychiatric Assoc: *“PTSD.” “Rape Related PTSD”* followed
- 2000: Dr. David Lisak is credited with coining the phrase *“Neurobiology of Trauma”*
- 2012: Dr. Rebecca Campbell, promoted *“Neurobiology of Trauma,” trauma-informed approaches”*
- 2017: Dr. Jim Hopper, *“Brain Based Response” / Survival Reflexes & Self-Protection Habits*

My Journey: Understanding Trauma



The research and science is consistent with what I learned through my own trauma, and from listening to and investigating the experiences of victims and survivors.

Is your response Trauma Informed?

Trauma Informed Care: Strengths-based service delivery grounded in responsiveness to the **impact of trauma**, emphasizing **physical, psychological, and emotional safety for survivors and providers**, and promoting **survivor empowerment**.

From Hopper, E.K., Bassuk, E.L., Ollivet, J. (2010). Shelter from the Storm: Trauma-Informed Care in Homelessness Services Settings. The Open Health Services and Policy Journal, 3, 80-100.

Defining Trauma

A traumatic event either witnessed or experienced, representing a fundamental threat to one's physical integrity or survival

- Responses involve intense fear, helplessness or horror
- The meaning of the event may be as important as the actual physical act/experience

(Lisa Ferentz, 2008)

Credit Dave Thomas M.S., Johns Hopkins University

Potential Impacts of Victim Trauma

Post Traumatic Stress Disorder: 4 major symptoms:

1. Re-experiencing the trauma
2. Social withdrawal
3. Avoidance behavior and actions
4. Increased physiological arousal characteristics

National Center for Victims of Crime

Overview: Trauma-Informed Victim / Complainant Interview

The interview is a way to allow the victim to express what their **experience was** rather than just what they remember or don't remember. Capturing the **trauma** and exploring **sensory details** of the event can lead to potentially **compelling evidence of the victim's experience**.

Victim / Complainant Interview

Trauma-Informed Interview Recognizes:

- Traumatic memory may be stored in the brain differently...
- Don't demand or expect a chronological narrative...
- Delayed reporting, inability to recall details and sequence of events can be common as a result of **victim trauma**
- Disclosure is a process, not an event...
- Complainant may remember additional details over time, keep options open for continued disclosures

Building Trust: Providing Physical, Psychological, and Emotional Safety

- **Before we ask a single question about the incident:**
Providing physical, psychological, and emotional safety
- The need for a consistent and supportive institutional message (What is your institutional message?)
- Use victim empowerment: **Ask – don't tell**
- Where would you like to sit? Is it okay if I sit here?
- May I introduce myself and my role (professional, compassionate tone and demeanor)?

Building Trust: Providing Physical, Psychological, and Emotional Safety

Ask – don't tell...

- Would it be helpful if I briefly explain the statement process? (in accordance with your policy)
- Can I answer any other questions about the process?
- Communicate empathy / demonstrate active listening
- Address complainant's concerns

Preparing the Complainant for the Interview

- Acknowledge difficulty disclosure, establish common language
- Permission to recall additional details later
- Importance of being accurate / truthful: don't hold back, its okay if you don't remember...
- Amnesty – *“our focus is on what you are reporting”*
- Note taking / recording (Institutional Policy)
- Introduce clarifying questions (*“Ice Breaker”*)

Starting the Interview

- What are you able to tell me about your experience?
Where would you like to begin?
- Allow victim to give uninterrupted statement (*Patience*)
- Demonstrate empathy and active listening

Capturing the Experience

Following the complainant's uninterrupted narrative:

- Commend and reassure (thank you...)
- Seek clarifying information (avoid leading questions)
 - What are you able to tell me more about... ?
 - Can you tell me more about...?
 - It would be helpful to hear more about...

Exploring / Seeking Details from the 5 Senses

- What are you able to tell me about...
 - What did you see?
 - What did you hear?
 - What did you taste?
 - What did you smell?
 - What did you feel?

Avoid “Victim Blaming”

Questions to avoid:

~~Why~~ did you...?

~~Why~~ didn't you...?

We can find a better way to ask “why” by reframing with “thinking, “feeling, and “experiencing” questions.

Capturing the Victim's Experience: Thinking and Feeling Questions

“Thinking and feeling questions” can take the place of

“why did you...” “why didn’t you...”

- Can you help me understand what your thought process was when...?
- Can you help me understand how that made you feel when...?

Capturing the Victim's Experience: Thinking and Feeling Questions

“Thinking and feeling questions” take the place of:

“why did you...” “why didn’t you...”

- What are you able to tell me about what you were experiencing when...?
- Are there other things about that moment that stand out in your mind?

Capturing the Experience

Document traumatic impact:

What are you able to tell me about...

- ...What you were thinking..., feeling..., experiencing...?
- ...your reactions to this experience physically? (During / After)
- ...your reactions to this experience emotionally? (During / After)
- ...anything that may have changed for you since this experience?
- ...what has been the most difficult part of the experience for you / ...is there anything that you can't forget?

Capturing the Experience

Document traumatic Impact:

What are you able to tell me about...

- ... any images, smells, or sounds that keep coming back?
- ... any re-occurring thoughts?
- ... your sleep now compared to before? Eating? Drinking?
- ... anything you avoid now that you didn't before?
- ... if your friends / family expressed concern about you, observations, changes, etc...

Complainant Interview

After collecting the complainant's experience:

- Seek clarification, facts and information pertaining to elements of misconduct and other potential evidence (Who, What, Where, When)

Explain All Your Questions – Reframing Questions

WHAT YOU SAY...

Are those the clothes you were wearing when this happened?

Were you drinking or doing any drugs?

Why did you go to the respondent's room?

Why didn't you report this immediately after it happened?

WHAT THE COMPLAINANT HEARS...

The investigator thinks it is my fault because of what I was wearing!

This is my fault for drinking, the investigator thinks so too!

The investigator thinks I deserved this because I went to the room!

There is nothing they can do, I knew I shouldn't bother reporting

Interview for Clarification

Some victims may provide information that is incomplete, inaccurate, or untrue: (avoiding trauma /“face-saving” / recantation)

- **Interview for clarification, don't interrogate**
- What are you able to tell me about that?
- Can you help me understand...?
- Can you tell me what your thought process was when...?

Interview for Clarification

Interview for clarification, don't interrogate:

- Can you tell me what you were feeling at that point?
- Can you tell me more about that?
- Are there other things about that moment that stand out in your mind?
- **Acknowledge difficulty of disclosure... importance of not holding back / accuracy**

Complainant Interview

What are you **able** to tell me about...

- ...what did respondent say; threats, language, tone?
- ...how did respondent appear; facial expressions, posture, demeanor?
- ...communication after; calls, texts, social media?

Explore Potential Serial Nature of Some Offenders

What are you able to tell me about...

- ...any previous conduct?
 - controlling, threatening, frightening behavior
 - abuse, harassment, stalking
 - physical assault, injury, strangulation
- ...Respondent's conduct with other potential victims?

Prior to concluding interview...

Is there any additional information you think would be helpful for me to know?

Is there anything you thought that we would discuss that we didn't discuss?

Is there anything else you want to add before we end the interview?

Managing Expectations and Outcomes

Come to **Agreement** with the Complainant

- Interview is a process, write down new details as they come
- Next steps, follow-up questions, time line
- Contact details and information?
- How would you to be kept informed?
- Is it okay to leave messages?
- Safety planning / interim actions
- Work with advocate: resources and referrals

What About Follow-up or Clarifying Questions Following the Complainant Interview?

- Maybe you are unclear about something from the original statement
- New witness information or new evidence comes to light
- Responding Party provides additional information or potentially exculpatory evidence (e.g. alibi, photos, videos, messages...)

Trauma-Informed Approach

- Consider use of experts to help understand trauma and impact;
- Evidence of victim trauma by itself does not prove sexual assault / misconduct;
- The absence of victim trauma does not disprove sexual assault / misconduct;
- Victim trauma should be carefully considered along with all other evidence, taking into account the totality of circumstances for each investigation.

Trauma-Informed Approach

Being Trauma-Informed and Balancing Equitable, Reliable and Impartial Investigations:

- understanding victim trauma and impact;
- developing approaches designed to minimize trauma for victims / complainants in the process;
- support services and compassionate response are necessary for the Respondent;
- ensuring equitable, reliable, and impartial investigations for all involved.

Are You Working Together?

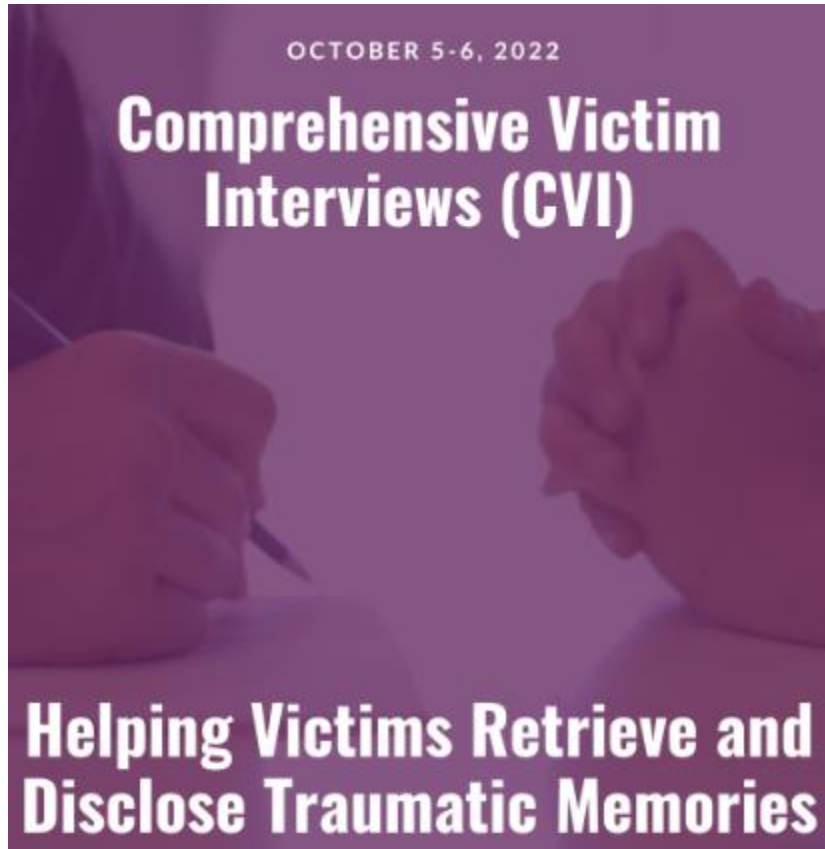
Table Top Exercise with All Partners



Identify potential conflict points, gaps in service, benefits of collaboration and information sharing



Interview Training Resource



October 5 – 6, 2022, Registration: \$299

Offered through a high-performance technology platform, participants will have plenty of opportunities to interact and review videorecorded interviews with survivors conducted by skilled investigators following best practices, including accompaniment by a victim advocate. Register now, to join CVI and enhance your skills!

<https://evawintl.org/victim-interviewing/>

Trauma-Informed Victim / Complainant Interview

Q & A



Chief Tom Tremblay (Ret)
Tom Tremblay Consulting & Training
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UNCHARTED TERRITORY:

**NAVIGATING
LIVE HEARINGS**

Hon. Michael T. Jamison and Susanna Murphy, JD



HON. MICHAEL T. JAMISON



SUSANNA MURPHY, JD

LEARNING OBJECTIVES

Examine the role of a hearing officer and advisor during the hearing.

Identify strategies for crafting clear direct and cross-examination questions.

Describe how to determine the relevance of questions and evidence.

Illustrate the procedural flow of a live hearing.

EXAMINING THE ROLES



ROLE OF THE DECISION-MAKER

Responsibilities:



Determines
relevancy



Facilitates
live hearing



Makes
determination of
(non)responsibility

Expectations:

Independent, unbiased, equitable,
transparent, confidential



DECISION-MAKER QUALITIES

Despite similarities, the Decision-Maker is not a Judge. However, many of the same attributes are needed to carry out the role, especially as it relates to conducting the hearing itself.

- Understand Title IX law and institutional/district policy, and apply it to decision-making
- Carefully evaluate evidence
- Communicate effectively with Parties and Advisors
- Use critical thinking to determine relevance of evidence and questions, sometimes quickly
- Craft professional and thorough written determinations
- Be comfortable making tough, but equitable decisions



ADDRESSING BIAS

INDEPENDENT so no claim can be made of bias. A legitimate claim of bias can be a basis for a successful appeal and the basis for a do-over.




Coordinators should anticipate potential conflicts of interest when assigning the Decision-Maker

Allow a time prior to questioning for Parties to disclose potential conflicts of interest

Evaluate and assign a new Decision-Maker if conflicts are present, recuse if you can't serve impartially



Responsibilities:

-  Provides support during meetings
-  Reviews investigation report and file
-  Conducts cross-examination during the live hearing

ROLE OF THE ADVISOR

Expectations:

Professional, knowledgeable, thorough, empathetic



ADVISOR QUALITIES

Though Parties are able to select any individual to serve as their advisor (and many may not possess these qualities), an institutionally-provided advisor should have the following attributes.

- Understand Title IX law and institutional/district policy, how to serve during each step of the grievance process, and the rights of the Parties
- Carefully evaluate evidence to understand the Parties' positions
- Communicate effectively and professionally with Parties and Decision-Maker
- Use critical thinking to craft questions that support your Parties' position
- Be comfortable supporting a Party through a difficult time



DISTINCTION OF THE ROLE

The conflict of interest and bias requirements placed on other Title IX roles do not apply to Advisors.

The only role that is allowed to represent only one Party's interests

May consider conflicts of interest if you serve in another campus role (e.g. Dean or professor)

Assign a new Advisor if they cannot fulfill their role

CRAFTING QUESTIONS



REVIEW OF FILE

Decision-Makers, Advisors, and Parties will all have the opportunity to review the same information

CRAFTING OF QUESTIONS

Decision-Makers, Advisors, and Parties can create questions following this review to ask during direct or cross-examination. These can provide clarity, support, or refute positions.

LIVE HEARING

Decision-Maker and Advisors will conduct direct and cross-examination of Complainant, Respondent, and Witnesses, Decision-Maker determines relevancy of all questions.

STARTING POINT

Both Decision-Makers and Advisors can use this starting point to formulate questions

What information do I need to know to prove or disprove an element of the policy violated?

What is the best question to ask to generate an informative answer?

Who has this information?

Can this information be found anywhere in the Investigation Report or File?

CONSIDER THE DISPUTED FACTS

- Questions will depend on what facts are in dispute
- Could be clear conflict between the parties, for example, “he said, she said”
- Parties might agree on what happened but dispute whether it was based on sex or sufficiently severe, pervasive and objectively offensive
- If students are legally old enough to consent to sexual contact, dispute might center on consent

MORE QUESTIONS TO ASK

- ✓ Will these questions help reach the goal of supporting or refuting the Investigative Report? *(If not, consider skipping it)*
- ✓ Will any of these questions generate an unpredictable response that does more harm than good?
- ✓ Who is being questioned and is there an element of their credibility that needs to be challenged?
- ✓ Are these questions posed in a respectful, non-confrontational way? *(Remember, this is not a courtroom...no "gotcha" moments)*

GUIDING PRINCIPLES

EMPATHY

Complainants, Respondents, and Witnesses may be bringing previous trauma to the hearing. Keep this in mind as you develop your questions.

DE-ESCALATION

Knowing there may be potential for adversarial and confrontational reactions, aim to de-escalate by creating questions that minimize strong responses.

RESPECT

The Parties and Witnesses are members of your school community. Remember this as you outline your approach.

CREATING QUESTIONS

Good questions are:

Open-
ended

Open-ended questions prompt the Party to share more broadly.

Non-leading
vs. Leading

Do not guide your own Parties to the answer you want to hear.

Singular

Avoid complicated, multi-part questions.

Clear

Ensure questions use the most clear, concise language aimed at arriving at the information needed.

Sensitive

Though questions need to be direct, consider emotions that may be evoked by asking. Practice empathy.

LEADING QUESTIONS

- Suggest the desired answer
- Prompt the witness or party's response

LEADING

"You told John you didn't want to have sex, right?"

NON-LEADING

"What did you say to John about having sex with him?"

OPINION QUESTIONS

- Outside of someone's scope of knowledge
- Do not produce fact-based answers

OPINION

"Was John frustrated when you told him you didn't want to have sex with him?"

ALTERNATIVE

"What did John say or do when you told him you didn't want to have sex with him?"

HEARSAY QUESTIONS

- Generally, witnesses may not be asked about what other people have said about a topic if the purpose of the question is to prove that the other person's statement is true
- Example hearsay question to a friend of Complainant (Sam):

“What did Sam tell you about John’s conduct on the night of the alleged incident?”

UNDERSTANDING RELEVANCE

DECISION-MAKER'S PERSPECTIVE

- Only relevant questions may be asked during the hearing process
- Before a witness or party answers the question, the Decision-Maker must first determine whether the question is relevant
- The Decision-Maker must explain any decision to exclude a question as irrelevant

This may be accomplished in one of two ways:

- ① Questions may be submitted to the Decision-Maker to review prior to the hearing.
- ② Decision-Makers may rule of each question before a Witness or Party answers at the hearing.

ADVISOR'S PERSPECTIVE

- Advisors may respectfully object to questions asked by the other Party's Advisor or asked by the Decision-Maker
- They are not determining relevance, but instead asking for a review of the question by the Decision-Maker

Advisors typically object for one of two reasons

①

The question is not relevant under Title IX Regulations

②

The question is leading, calls for opinion, or constitutes hearsay

WHAT IS NOT RELEVANT UNDER TITLE IX?



Questions about a Complainant's sexual predisposition



Questions about a Complainant's prior sexual history, except when:

- a) Questions are offered to prove someone other than the Respondent committed the alleged conduct
- b) Questions concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent are offered to prove consent



Privileged records and communication (*unless the Party or parent waived in writing*)

RELEVANT vs. NON-RELEVANT



Question or evidence that is likely to prove or disprove allegations made, something of consequence



Question or evidence that is not of consequence in proving or disproving alleged conduct occurred

PROBABLY RELEVANT

- A receipt from a restaurant showing the number of drinks consumed on the evening of an alleged sexual assault
- A question regarding an Respondent's prior arrests for Domestic Violence perpetrated against the Complainant

PROBABLY NOT RELEVANT

- A receipt from a restaurant showing a lunch order the Complainant had two weeks before an alleged sexual assault
- A question regarding an Respondent's prior arrests for Possession of Marijuana

CHARACTER WITNESSES

Are character witnesses relevant or irrelevant?

- They may be relevant, but their purpose is limited.
- Character witnesses typically speak to the credibility of a party.
 - Advisors can consider calling character witnesses that speak to the credibility of their own Party.
 - Advisors may challenge the credibility and/or scope of knowledge of the other Party's character witnesses during cross-examination.
- The Decision-Maker should know how to weigh the relevance of a character witness's statement while reviewing the Investigative Report and/or during the hearing.

THE LIVE HEARING

HEARING AGENDA

- Opening of the Hearing (Decision-Maker)
- Opening Statements (Party or Advisor)
- Introduction of Testimonial Evidence
 - Complainant's case
 - Respondent's case
 - Decision-Maker's examination of Parties and Witnesses
- Closing Arguments or Statements (Party or Advisor)
- Closing of the Hearing

OPENING OF THE HEARING

Facilitated by the Decision-Maker who will:

- Welcome Parties and Advisors to the hearing
- Discuss rules and decorum for all individuals involved in the hearing
- State the time
- Answer any procedural questions prior to the start of the hearing
- Proceed to opening statements

OPENING STATEMENTS

The Decision-Maker may ask the Parties or their Advisors for an opening statement

- Outlines the issues that the Party & their Advisor would like to refute
- Provides an overview of the facts & evidence
- Describes the evidence that supports their statements (or their Party's statements)
- Presents what the Party and their Advisor expect to prove during the hearing
- Typically, the Complainant gives the first opening statement, followed by the Respondent

Parties may waive their opening statement

TESTIMONIAL EVIDENCE: DIRECT & CROSS EXAMINATION



DIRECT AND CROSS-EXAMINATION

Complainant's Case

- Typically, the Decision-Maker will ask the Complainant to provide testimonial evidence first.
- Opportunity to present witnesses & party for direct examination
- Present new evidence (if any)
- Cross-examination of the Complainant & witnesses by the Respondent's advisor
- Advisors- Be alert & watch for irrelevant questions asked of your party or witnesses

DIRECT AND CROSS-EXAMINATION

Respondent's Case

- Opportunity to present Witnesses and Party for direct examination
- Present new evidence (if any)
- Cross-examination of the Respondent and Witnesses by the Complainant's advisor
- Advisors– Be alert and watch for irrelevant questions asked of your Party or Witnesses

DIRECT AND CROSS-EXAMINATION

Decision-Maker's Examination

- Opportunity for Decision-Maker to ask questions of the Parties and Witnesses
- Provides time for any clarification needed

CLOSING STATEMENTS

The Decision-Maker may ask the Parties or their Advisors for a closing statement

- Final statement by the parties or their advisors to the Decision-Maker
- Summarizes the relevant evidence & arguments
- Asks the Decision-Maker to find that the evidence will support the determination in that party's favor
- Typically, the Complainant gives the first closing, followed by the Respondent

Parties may waive their closing statement

CLOSING OF THE HEARING

Facilitated by the Decision-Maker who will:

- Announce that the parties have completed the submission of all evidence
- State the time
- Announce the hearing is closed
- Explain next steps and timeline
- Leave the hearing & prepare the written determination of responsibility

QUESTIONS?

TITLE IX SOLUTIONS: SEXUAL VIOLENCE AND LGBTQ COMMUNITIES SUPPLEMENT

August 4, 2022

DEFINITIONS & TERMINOLOGY

- **Gender**: A social construct, or idea, created by people to categorize and explain the world around them
- **The gender binary**: A system of viewing gender as consisting solely of two, opposite categories, termed “male or female” or “man or woman”
- **Gender identity**: An individual’s personal or internal sense of their gender
- **Gender expression**: The way an individual chooses to communicate their gender in public, e.g., clothing, hair, or voice characteristics
- **Cisgender**: A term that describes an individual whose gender identity aligns with the sex they were assigned at birth
- **Transgender/Trans**: An umbrella term for people whose gender identity is different from the sex they were assigned at birth
- **Nonbinary**: An umbrella term that describes someone who experiences their gender identity as outside of the male-female/man-woman gender binary

Other terms and definitions can be found in these glossaries created by the [Human Rights Campaign](#) and in the [GLAAD Media Reference Guide](#).

Terms to Avoid	Reason	Better Terms
“Homosexual”	Has historically been used to pathologize LGBTQ people	Gay, lesbian, bisexual LGBTQ
“Normal”	Implies that transgender people are outliers and/or that there is something wrong with anyone who is not cis	Cisgender Cis
“Transsexual; cross-dresser”	Dated terms that originated in medical and psychological communities; often considered offensive	Transgender Trans
“Tranny”	Derogatory slur that dehumanizes transgender people	Transgender Trans
“A transgender; bisexuals; etc.”	Most descriptors should be used as an adjective, not a noun	A transgender person Bisexual people
“Biologically male/female”	Oversimplifies a complex subject; a person's biology does not overrule their gender identity.	Assigned male/female at birth

RESPONDING TO SEXUAL MISCONDUCT

UNDERSTAND THE IMPORTANCE OF TRAUMA-INFORMED PRACTICES

- All forms of sexual misconduct are **boundary violations** driven by power and control—perpetrators violate boundaries by taking away a victim’s autonomy, choice, and ability to consent
- Trauma describes a response to an overwhelming experience where someone felt **powerless** and/or **unprepared**
- Victims may react in a variety of ways—many experience lingering feelings of helplessness, powerlessness, isolation, and hopelessness

Most of RAINN's hotline visitors who are survivors have never previously disclosed their experience to anyone. Common barriers to reporting include:

- Shame and self-blame
- Stigma
- Fear of retaliation
- Complexity of sexual misconduct

- Distrust in system
- Trauma reactions
- Lack of power
- Victim-blaming
- Fear of not being believed
- Fear of getting in trouble
- Not wanting others to find out
- “Reporting won’t achieve anything.”

Additionally, LGBTQ survivors may also be navigating:

- Perpetrator power and control tactics, such as situational privilege or identity abuse
- Being outed, or fear of being outed
- Discrimination
- Stigma
- Bullying
- Fear of retaliation from their community

RESPOND IN AN UNBIASED, TRAUMA-INFORMED MANNER

Combat common stereotypes about LGBTQ people, such as:

- LGBTQ relationship violence is less harmful than heterosexual violence
- Sexual violence is about desire or attraction
- LGBTQ people (and especially bisexual people or gay men) are hypersexual
- LGBTQ people are deviant or immoral
- Transgender people are deceptive
- LGBTQ young adults are confused about or experimenting with their identity

APPLY TRAUMA-INFORMED PRINCIPLES

- Convey understanding
- Express empathy
- Earn trust
- Prioritize safety

PRIORITIZE SAFETY WITH LGBTQ SURVIVORS

Safety is about creating *agency* and *predictability* wherever possible:

- Mirror the language of the person you’re speaking with and ask for clarification when necessary
- Display and/or share your pronouns when meeting for the first time, and offer the opportunity for others to share their pronouns with you
 - If you make a mistake, apologize briefly, correct yourself, and move on promptly
- Consider when someone actually needs to be asked about sensitive information such as legal name, sex assigned at birth, or gender identity

- *“Am I asking this question because I need to know the information to do my job to the best of my ability, or am I just curious?”*
- If someone *must* share that information, provide opportunities for them to share how they want to be referred to as well
- Reduce the number of times a survivor must “come out” or share personal information by streamlining systems while maintaining privacy
- Be transparent about the limitations of inclusion, and provide notice when a survivor may need to prepare for a distressing experience
 - *“Our meeting with the dean tomorrow is in Crouse Hall. As a heads up, the closest gender-neutral bathroom is across the quad.”*
- Identify and offer LGBTQ-affirming resources

PITFALLS

Avoid the following pitfalls in order to foster an trauma-informed, inclusive environment:

- Making light of or dismissing pronouns
- “I treat everyone the same here, I don’t see gender.”
- Unnecessarily sharing personal information with others
- Referring to pronouns as “preferred” or to sexual orientation as a “preference” or “lifestyle”
- Asking unnecessary or invasive questions for your own curiosity
- Failing to recognize abuse in LGBTQ relationships
- Over-apologizing
- Making assumptions
- Relying on the LGBTQ person you’re speaking with to educate you
- Questioning someone’s identity

RESOURCES

RAINN National Sexual Assault Hotline:

Free | Confidential | Anonymous

Available 24/7/365 in English and Spanish to anyone affected by sexual violence in any way.

- Call: (800) 656.HOPE (4673)
- Chat: hotline.rainn.org (accessible worldwide)
- Website: www.rainn.org
- For more information, visit the following pages on RAINN’s website:
 - [LGBTQ Survivors of Sexual Violence](#)
 - [Tips for Talking with Survivors of Sexual Assault](#)
 - [Types of Sexual Violence](#)
 - [Local resources and sexual assault service providers](#)
 - [Laws in your state](#)

- [Key Terms and Phrases](#)
- [Sexual Harassment](#)

RAINN-Operated Resources:

- DoD Safe Helpline for the military community: 877.995.5247: www.safehelpline.org
- In6 Support Line Online Chat Services for male survivors, ages 18+: www.lin6.org

Other Hotline Resources:

- National Suicide Prevention Lifeline: 988: 988lifeline.org
- DoD Safe Helpline for the military community: 877.995.5247: www.safehelpline.org
- The Trevor Project: 866.488.7386; www.thetrevorproject.org
- Trans Lifeline: 877.565.8860: www.translifeline.org
- National Domestic Violence Hotline: 800.799.7233: www.thehotline.org
- LGBT National Help Center: 888.THE.GLNH (843.4564); www.glbtnationalhelpcenter.org

Online Resources:

- **FORGE:** www.forge-forward.org
FORGE reduces the impact of trauma on trans/non-binary survivors and communities by empowering service providers, advocating for systems reform, and connecting survivors to healing possibilities.
- **National Coalition of Anti-Violence Programs:** www.avp.org
AVP empowers lesbian, gay, bisexual, transgender, queer, and HIV-affected communities and allies to end all forms of violence through organizing and education, and supports survivors through counseling and advocacy.
- **The Network/La Red:** www.tnlr.org
The Network/La Red is a survivor-led, social justice organization that works to end partner abuse in lesbian, gay, bisexual, transgender, SM, polyamorous, and queer communities.
- **Trans Student Educational Resources:** www.transstudent.org
Trans Student Educational Resources is a youth-led organization dedicated to transforming the educational environment for trans and gender non-conforming students through advocacy and empowerment.

Risk Management and Litigation Analysis

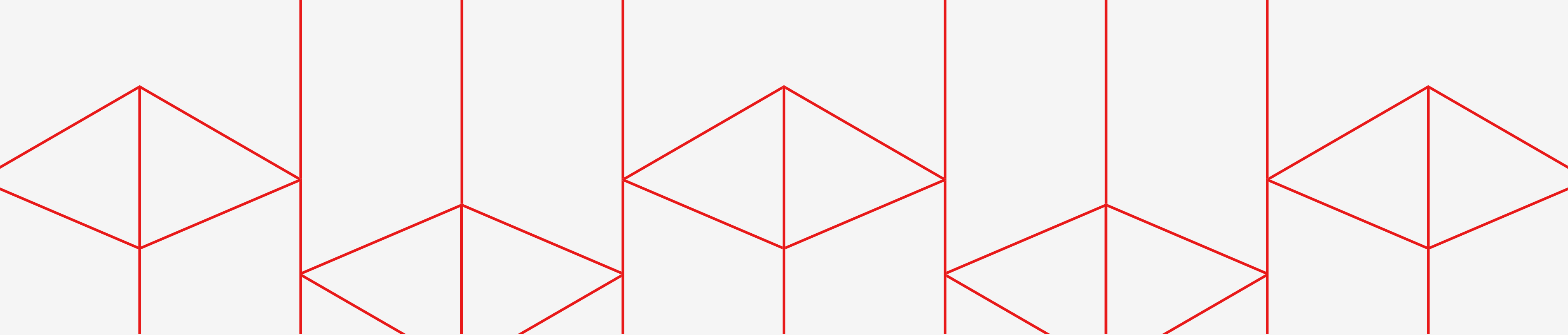
WHITNEY DOWDY, JD



Our Speaker

Whitney Dowdy, JD





LEARNING OBJECTIVES

IDENTIFY

potential exposures
to risk which may be
created by confusing
or poorly-written
policy

EXPLORE

risk-reduction
strategies aimed at
creating compliant
policies and
procedures

STUDY

case studies and
scenarios to illustrate
potential litigation
which may arise from
ignored or
unanticipated risks


Agenda

Let's explore Title IX risk areas

- Failure to Focus on Policy and Procedure
- Incomplete Investigation
- Unreasonable Delays
- Imbalanced Investigation – Due Process
- Failure to Communicate
- Retaliation

Best practices to reduce risks

- Policy
 - Procedure
 - Understanding Rights and Responsibilities – training and more!
 - Above all – communicate!
-
- What did COVID teach us in the Title IX context?
 - Case Studies and Litigation Trends



“If you don’t deal with sexual violence, you are going to get sued. If you deal with sexual violence, you are going to be sued.”

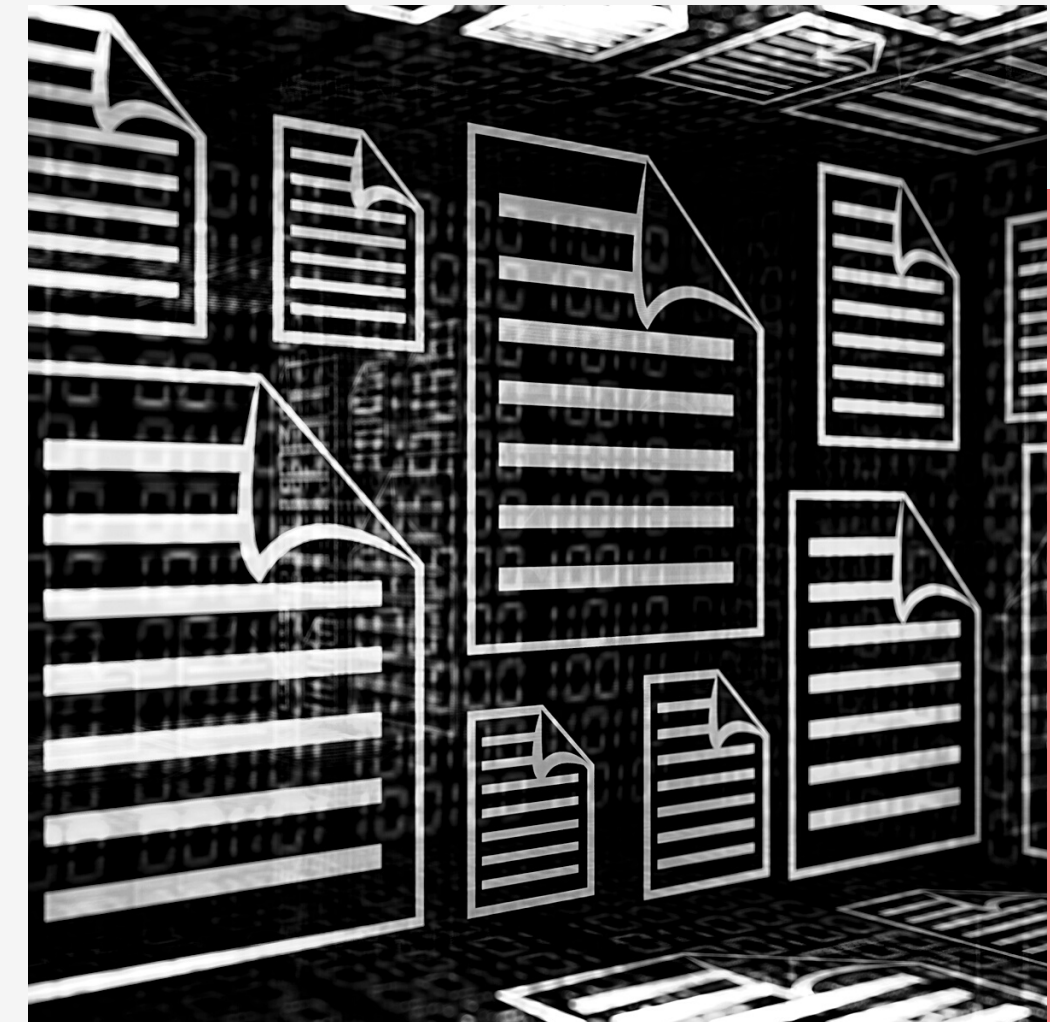
Peter Lake, Director of Stetson University's Center for Excellence in Higher Education Law and Policy

Title IX Risks

- Failing to draft comprehensive Title IX Policy and Procedure.
 - Set clear expectations
 - Strong line of defense
- Failing to understand, follow, and enforce your Title IX Policy.
- Failing to understand the roles each individual plays in a Title IX matter.
 - Coordinator, Investigator, Decision Maker
- The goal of any investigation procedure should be promptness, thoroughness, and impartiality.
 - Anything less is a risk
- Conduct a thorough investigation before reaching any conclusions.
- DO NOT promise confidentiality but be mindful of restrictions!

Title IX Risks

- Failure to honor due process or fairness in the process.
- RETALIATION, real or perceived.
- Not investigating when you had the chance.
- Failing to thoroughly and properly document the process.
- Going too far... crossing the line into invasion of privacy, intimidation, false imprisonment, etc.



Best Practices to Minimize Risk

- Familiarity with the Title IX Policy is key! Everyone in the process must commit to this. Enforcement and compliance with your policies and procedures is part of your obligation and best practice to avoid liability.
- Familiarity with any FERPA policy and confidentiality considerations that may prohibit you from sharing student's information.
- **TRAINING!** Not just your Title IX team. Educate as many people as possible, as often as possible.



Best Practices to Minimize Risk

- Be thorough and patient, while being as prompt as possible. Don't leave leads unchecked or make assumptions before seeing evidence or meeting witnesses.
- Communicate with parties about how long you expect the investigation to take and when you will get back to him or her so as to set reasonable expectations. And DO it!
- Make sure you ask all witnesses for any physical evidence that might exist, including texts, photos, documents, emails, or voicemail messages.



Best Practices to Minimize Risk

- Ask the parties regarding desired interim measures and other support needed.
- Document any unsuccessful attempts to interview potential witnesses.
- Inform all parties and witnesses that retaliation directed at anyone who participates in the investigation should be reported immediately and appropriate action will be taken if retaliation is demonstrated.



Best Practices to Minimize Risk

- Don't prevent an interviewee from leaving the meeting if he or she chooses to leave.
- Avoid leading questions that suggest an answer to the witness or suggest impartiality.
- Avoid ask questions that call for a legal conclusion.
- Understand and honor due process or fairness rights of both parties.





Title IX Enforcement and Litigation Trends

- Per OCR's 2020 Annual Report OCR resolved 10,185 complaints, with more than 2,000 of these resolutions requiring the school to make substantive changes to better protect their students' civil rights.
- Litigation Trends: students are increasingly claiming flawed hearings or unfair disciplinary sanctions as a result of procedural failings at their universities; courts are also addressing deliberate indifference claims for failure to respond (see case notes).
- In 2018 United Educators reported that sexual assault was the top liability for colleges and universities.

"A lot of criminal defense lawyers are specifically advertising that they represent the accused in Title IX cases...Pick any university in the country and go five miles from there, and you will find lawyers who advertise defending the accused. That wasn't the case 10 years ago."



Case Notes: Due Process



- Claims of violation of due process rights. Due process requires fair notice and an opportunity to be heard.
 - Regulations and caselaw outline the requirements.
- Due process arguments come up in many Title IX cases.
 - Cross-examination
 - Notice of charges and grounds
 - Adequate, in-person hearing (free of bias, well-trained panel)
 - Public v. Private actors – what are students entitled to with respect to due process

Case Notes: Due Process/Unfair Treatment

- While COVID slowed the filing of cases they did not stop.
 - What due process issues did COVID present?
- Due process claims are here to stay – some commentators are concerned that the proposed regulations will undermine critical due process protections for students accused of sexual misconduct.
 - Hearings
 - Single-investigator model
- In response to the proposed regulations some observers, predict the proposed regulation changes will result in a legal environment where precedent set by courts will shape different rules and outcomes based on where colleges fall geographically. Therefore, it is important to know how the courts are addressing these cases and issues!

Case Notes: Due Process/Unfair Treatment

Let's discuss a
few scenarios





John J. Hall, et al. v. Millersville University, et al. and similar cases in higher education and K-12:

- Third Circuit's decision serves as a reminder for schools and universities to respond promptly to any and all reports of sexual harassment, regardless of the status of the respondent, and to make sure to follow the Title IX regulations and your own policies and procedures in responding to and addressing allegations of sexual misconduct.
- Failure to react, failure to follow policies and procedure, failure to meet expectations = liability!

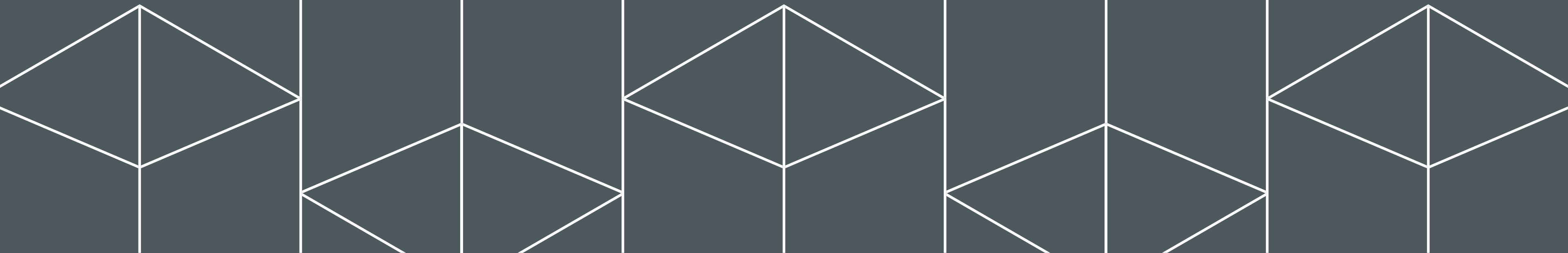
Case Notes: Deliberate Indifference



Let's discuss a
few more

Practical Takeaways

- Carefully draft policy and procedures – make sure updates are incorporated and in line with the regulations, decide whether you want to go beyond the regulations in light of potential liabilities discussed.
- TRAIN on your policy – Title IX process participants – Coordinators, hearing board members, advisors, mandatory reporters, etc. Ask who else might benefit from training?
- Share the policy – complainants, respondents, witnesses, hearing board members, etc.
- FOLLOW the policy – in each case. Do not deviate from the policy and procedure!
- COMMUNICATE! Manage expectations, be clear, keep parties informed, but be mindful of restrictions.



Thank you!

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