



# HIGHER EDUCATION ANNUAL CLERY TRAINING AND INTRODUCTION TO TITLE IX BASICS

Title IX Training

LEVEL 1



**Bricker & Eckler**  
ATTORNEYS AT LAW

# Disclaimer

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*We can't help ourselves. We're lawyers.*

- We are not giving you legal advice. Consult with your legal counsel regarding how best to address a specific situation.
- This training satisfies both annual Clery training and Title IX regulations training.\*
- Use the chat function to ask general questions and hypotheticals, or raise your hand—this is a meeting setting so we can discuss issues.
- This training is not being recorded, but we will provide you with a packet of the training to post on your websites for Title IX compliance.

# Presentation Rules

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- Questions are encouraged
- “For the sake of argument...” questions help to challenge the group, consider other perspectives, and move the conversation forward
- Be aware of your own responses and experiences
- Follow-up with someone if you have any questions or concerns
- Take breaks as needed

# Aspirational Agenda Day 1



Level 1: Clery Training, Title IX Training on “Education Program or Activity,” Sexual Harassment Definitions, and Avoiding Sex Stereotypes

Day 1:

- 9:00-9:10 Introduction: Overview of training requirements
- 9:10-9:20 Ethic of Care and Themes of Title IX
- 9:20-10:15 Sexual Violence Data and Statistics
- 10:15-10:30 Break
- 10:30-12:00 Law & Regulation: Overview of law, existing guidance, and the new Title IX Regulations with focus on “educational program or activities”

# Aspirational Agenda Day 2



Level 1: Clery Training, Title IX Training on “Education Program or Activity,” Sexual Harassment Definitions, and Avoiding Sex Stereotypes

Day 2:

- 9:00-10:15 **Sexual Harassment** under Title IX, employees, mandatory and discretionary definitions
- 10:15-10:30 Break
- 10:30-12:00 Continue **Sexual Harassment: Mandatory and Discretionary/ Avoiding Sex and Cultural Stereotypes**

# Posting these Training Materials

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- Yes!
- The “recipient” is required by §106.45(b)(10)(i)(D) to post materials used to train Title IX personnel on it’s website
- We know this and will make this packet available to you electronically to post.

# Training Requirements 1 of 4



“A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training of **sexual harassment in §106.30**, the scope of the recipient’s **education program or activity**, how to **conduct an investigation and grievance process including hearings, appeals, and informal resolution process, as applicable**, and how to serve **impartially, including avoiding prejudgment of the facts at issue, conflicts of interest, and bias.**”

§106.45(b)(1)(iii)

# Training Requirements 2 of 4

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Under Clery Act, must receive annual training on:

- Issues related to sexual assault, domestic violence, dating violence, stalking
- How to conduct an investigation and hearing process that protects the safety of victims and promotes accountability



# Training Requirements 3 of 4



Additional specific training requirements may apply to each of these categories. All require training on the definition of “sexual harassment” under the Regulations.

Today’s training covers:

- “educational program or activity,”
- the definitions under §106.30 for “sexual harassment,”
- annual Clery training, and
- avoiding cultural and sex stereotypes.

# Training Requirements 4 of 4

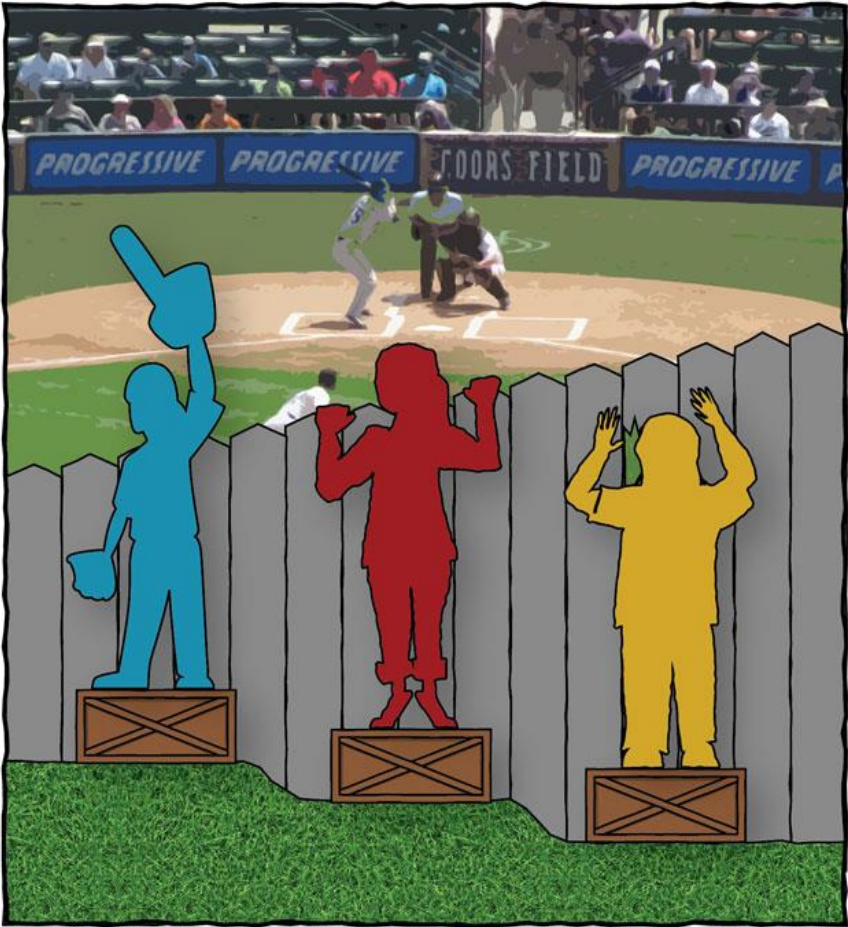
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Today will also cover an overview of the process that will have more specialized coverage in relevant Level 2 courses

# **TITLE IX TODAY: Themes**

# Title IX is an Equity Statute



**EQUALITY**



**EQUITY**

# Ethic of Care

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- What do you think are the top values of your institution's community?
- Do you think institutional values align between administration, faculty and staff?
- What about students?
- What about the town or city around your institution?

# Overview of Themes



Pie chart showing no bias, access, protect, transparency, evidence, and improvements

# Themes 1 of 6

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- It is meant to ensure ACCESS to your programs and activities, regardless of sex.
- “What we do for one, we do for the other” (or at least consider whether it is appropriate under the circumstances)
- Why are you treating someone differently?

# Themes 2 of 6



- We have an obligation to **PROTECT** our campus.
  - **“They are all our students.”**
  - Supportive measures
  - Any action by a recipient that results in changes or removal of access to education for respondents require a process to respond (if interim emergency measure) or engage in live cross-examination (if formal process that could lead to disciplinary action).



# Themes 3 of 6

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- TRANSPARENCY is key to trusting the process.
  - Know your grievance process
  - Help them understand next steps.

# Themes 4 of 6



- We base decisions on **EVIDENCE.**
  - **“Don’t weigh your gut.”**
  - We can make reasonable inferences and credibility determinations, but be mindful of implicit bias, stereotypes, and using our own behavior as a yardstick.

# Themes 5 of 6

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Always be working to **IMPROVE**:

- Yourself as a neutral
- Your campus as a healthy and fair place to be
- Your policy to provide a better process informed by case law, regulations, guidance, and experience
- Your resources for all involved

# Themes 6 of 6

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- Always be working to avoid actual or perceived:
  - Conflict of interest:
  - Bias

## **Institution Duties and Interests vs. Personal interests**

Your work can impact the lives of others: take periodic self-inventories to be mindful of your activities, involvements, social media, and biases you may have and work to reset them to neutral.

# **SEXUAL VIOLENCE:**

## **Data and statistics**

# Data and Statistics 1 of 3



- More Disclaimers
  - Should not influence your decision in any particular Title IX case
  - Included in the Preamble, but with caveats
  - We didn't do the research ourselves and can't vouch for it
  - Okay but really, this **SHOULD NOT** influence your decision in any particular Title IX case

# Data and Statistics 2 of 3



- Caveats:
  - “The Department references statistics, data, research, and studies throughout this preamble. Such references to or summarization of these items does not indicate that the Department independently has determined that the entirety of each item is accurate.”  
Preamble, p. 30031 (Official).

# Data and Statistics 3 of 3

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- More Caveats:
  - “Statistical findings can be instructive but not dispositive, and statistics cannot by themselves justify or rationalize procedural protections in a process designed to determine the truth of particular allegations involving specific individuals.” Preamble, p. 30262 (Official)



# Sexual Assault Data 1 of 3

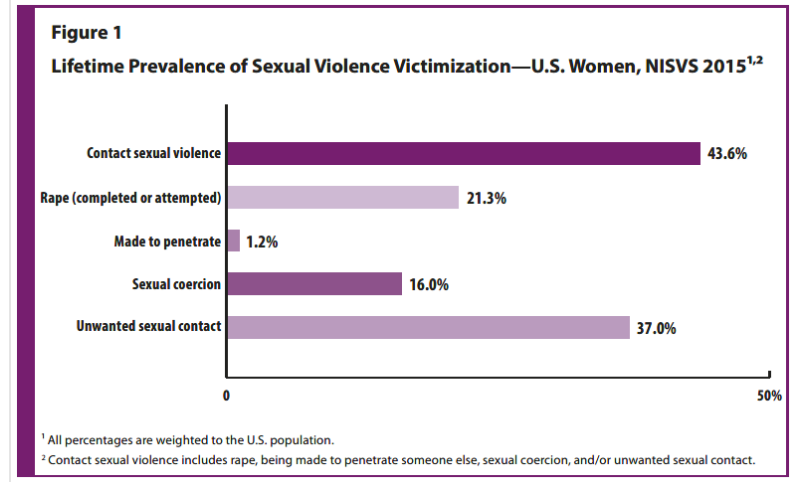


- 43.6% of women and 24.8% of men experienced some form of contact sexual violence in their lifetime, with 4.7% and 3.5% experiencing such violence in the 12 months preceding the survey.

Statistics from the National Intimate Partner and Sexual Violence Survey (NISVS), Centers for Disease Control and Prevention, 2015 Data Brief (last visited June 2020).

# Sexual Assault Data

## 2 of 3

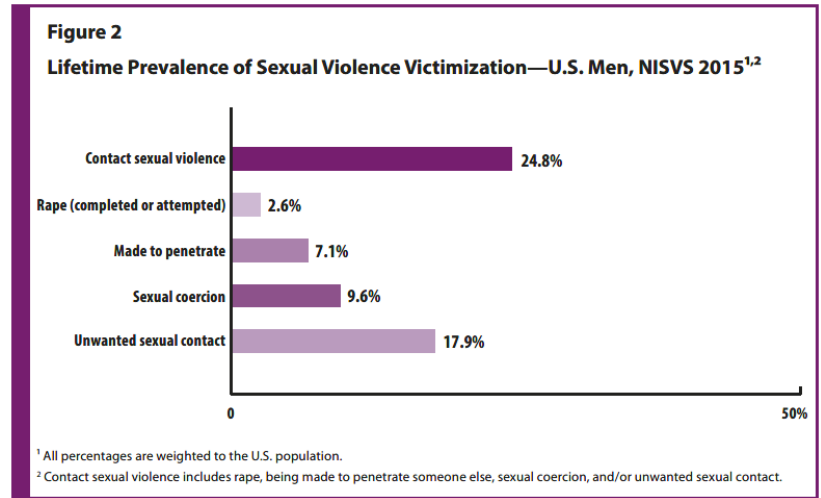


This chart breaks up that 43.6% of women who have experienced some form of contact sexual violence in their lifetime into groups based on the type of sexual contact: 21.3% experienced completed or attempted rape; 1.2% were made to penetrate another person; 16% experienced sexual coercion; and the largest group – 37% - reported experiencing some form of unwanted sexual contact other than those specifically identified elsewhere. This would presumably include non-consensual sexual touching that does not rise to the level of rape.

Statistics from the National Intimate Partner and Sexual Violence Survey (NISVS), Centers for Disease Control and Prevention, 2015 Data Brief.

# Sexual Assault Data

## 3 of 3



And this chart does the same for the 24.8% of men I mentioned earlier – against breaking them up by the type of sexual contact: 2.6% experiencing completed or attempted rape, 7.1% made to penetrate, 9.6% experiencing sexual coercion, and again the largest group is the least specific – with 17.9% experiencing some other form of unwanted sexual contact.

Statistics from the National Intimate Partner and Sexual Violence Survey (NISVS), Centers for Disease Control and Prevention, 2015 Data Brief.

# Sexual Assault Data:

## Prevalence Data for Postsecondary Institutions

### 1 of 2



- More than **50 percent** of college sexual assaults occur in **August, September, October, or November**, and students are at an increased risk during the first few months of their first and second semesters in college.

Preamble, p. 30076 (Official) notes that “Commenters cited: Rape, Abuse & Incest National Network (RAINN), *Campus Sexual Violence: Statistics*.”

# Sexual Assault Data:

## Prevalence Data for Postsecondary Institutions

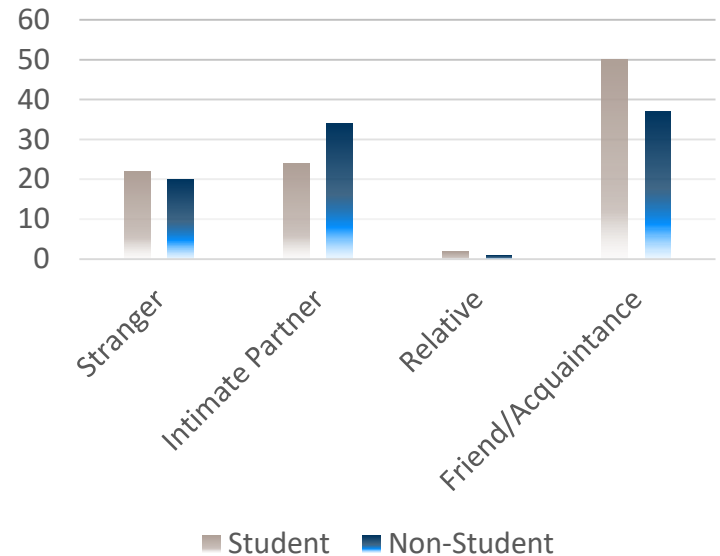
### 2 of 2



- Additional Data referenced in the Preamble for:
  - Postsecondary Institutions, p. 30076 (Official)
  - Women, p. 30077 (Official)
  - Men, p. 30077 (Official)
  - LGBTQ Persons, p. 30077 (Official)
  - Persons of Color, p. 30078 (Official)
  - Individuals with Disabilities, p. 30079 (Official)
  - Immigrants, p. 30079 (Official)

Preamble, p. 30076 (Official) notes that “Commenters cited: Rape, Abuse & Incest National Network (RAINN), *Campus Sexual Violence: Statistics*.”

# Sexual Assault Data: Identity of Perpetrator (BJS 2014)



This data comes from “Rape and Sexual Assault Victimization of College Age Females, 1995-2013”, issued in December 2014 by the Bureau of Justice Statistics, and is likely information that you recognize from your own experience working in the area of Title IX. Perpetrators of sexual assault typically are not strangers; this study showed that 78% of sexual assaults against female students were caused by perpetrators known to them, with that percentage being slightly higher (80%) for non-students. It is far more likely that the perpetrator will be a friend, roommate, or someone else known to the victim.

Preamble, p. 300767(Official) notes that “Commenters cited: U.S. Dep’t of Justice, Office of Justice Programs, *Bureau of Justice Statistics Special Report: Rape and Sexual Assault Victimization of College Age Females, 1995-2013* (2014).

# Sexual Assault Data: Alcohol/Drug Use



“About half of sexual assaults involve survivors drinking alcohol before the assault.”

“Survivors impaired by alcohol are more likely to disclose to informal, but not formal support sources than are non-impaired victims.”

Lorenz, Katherine, and Sarah E Ullman. “Exploring Correlates of Alcohol-Specific Social Reactions in Alcohol-Involved Sexual Assaults.” *Journal of aggression, maltreatment & trauma* vol. 25,10 (2016): 1058-1078. doi:10.1080/10926771.2016.1219801.

# Data and Statistics: Reporting Data



- About **65 percent** of surveyed rape victims reported the incident to a friend, a family member, or roommate but only **ten percent** reported to police or campus officials.

Preamble, p. 30082 (Official) notes that “Commenters cited: U.S. Dep’t of Justice, Office of Justice Programs, Office for Victims of Crime, 2017 *National Crime Victims’ Rights Week Resource Guide: Crime and Victimization Fact Sheets* (2017).



# Data and Statistics: Impact Data 1 of 2



- Approximately **70 percent** of rape or sexual assault victims experience moderate to severe distress, a larger percentage than for any other violent crime.

Preamble, p. 30080 (Official) notes that “Commenters cited: U.S. Dep’t of Justice, Bureau of Justice Statistics, *Special Report: Socio-emotional impact of violent crime (2014)*.”

# Data and Statistics: Impact Data 2 of 2



- 81% percent of women and 35% percent of men report significant short- or long-term impacts of sexual assault, such as post-traumatic stress disorder (PTSD).

Preamble, p. 30080 (Official) notes that “Commenters cited: Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, The National Intimate Partner and Sexual Violence Survey (NISVS); 2010 Summary Report (Nov. 2011).

# Sexual Harassment Data



Percentage of females versus males on experiencing different forms of sexual harassment:

Sexual harassment: Female Gender 62%; Male gender 61%

Sexual comments: Female gender 57%; male gender 48%

Grabbed: Female 28%; Male 22%

Called homophobic name: Female 13%; male 37%

Cornered sexually: Female 13%; male 10%

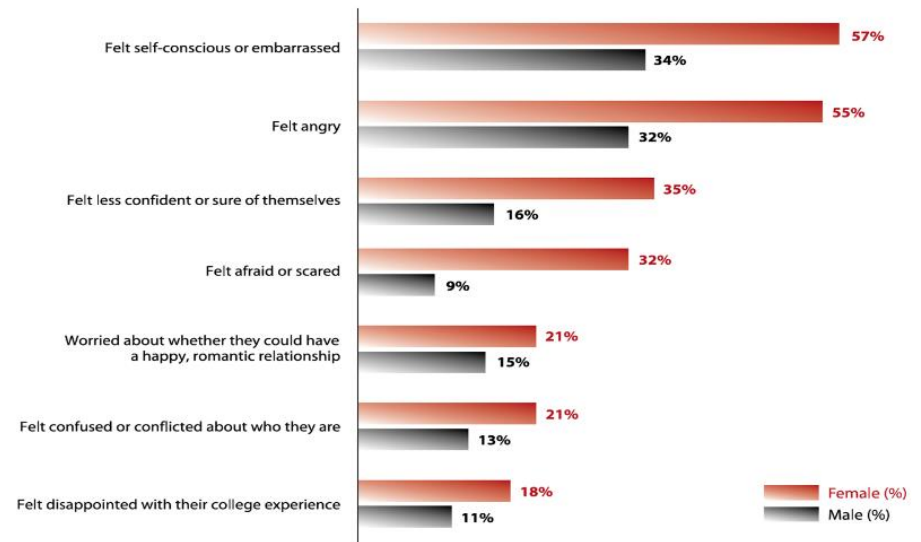
Forced to kiss: Female 7%; male 8%

Sexual postings: Female 6%; male 12%

Preamble, p. 30076 (Official) notes that “Commenters cited: American Association of University Women Educational Foundation, *Drawing the Line: Sexual Harassment on Campus* (2005).”

## Sexual harassment has a statistically significant heavier toll on female students

Figure 7. Reactions to Sexual Harassment Experiences (By Gender)



Returning to the subject of impact – this report from the American Association of University Women showed that sexual harassment has a statistically significant heavier toll on female students when it comes to feeling embarrassed, angry, less confident in themselves, afraid, worried about future relationships, confused, and disappointed with their college experience.

Preamble, p. 30076 (Official) notes that “Commenters cited: American Association of University Women Educational Foundation, *Drawing the Line: Sexual Harassment on Campus* (2005).”

# Sexual Harassment Data 1 of 2



- LGBT students are more likely to be sexually harassed and have negative emotional and behavioral responses to harassment.
- 73% of the LGBT students report harassment (versus 62% of heterosexual students).

Preamble, p. 30076 (Official) notes that “Commenters cited: American Association of University Women Educational Foundation, *Drawing the Line: Sexual Harassment on Campus* (2005).”

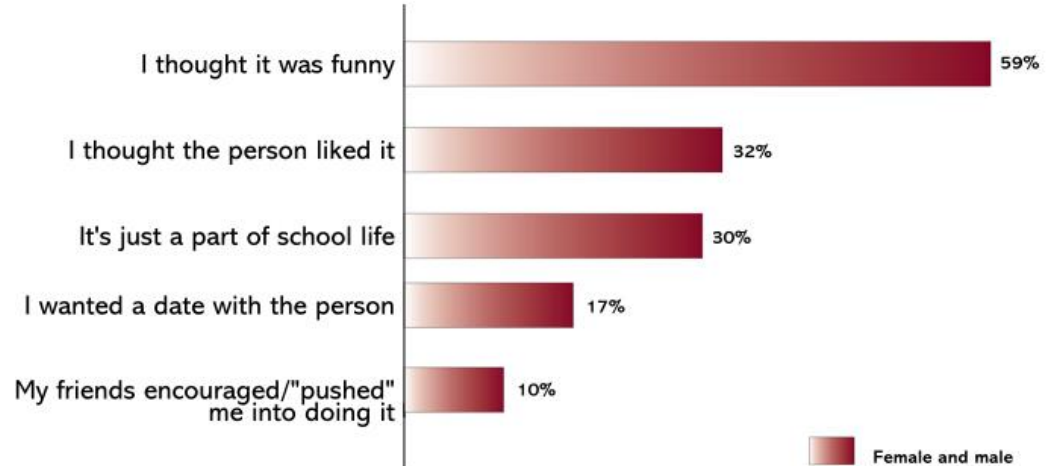
# Sexual Harassment Data 2 of 2



- LGBT students are **more likely to be harassed “often”**
  - 18% versus 7% of heterosexual students.
  - LGBT students are **more likely** than heterosexual students to be **angry** (76% versus 42%)
  - LGBT students are **more likely** than heterosexual students to be **embarrassed** (61% versus 49%)
  - LGBT students are **more likely** than heterosexual students to be **less confident** (42% versus 25%)
  - LGBT students are **more likely** than heterosexual students to be **afraid** (32% versus 20%)

Preamble, p. 30076 (Official) notes that “Commenters cited: American Association of University Women Educational Foundation, *Drawing the Line: Sexual Harassment on Campus* (2005).”

**The most common rationale for harassment (59%) is “I thought it was funny.”**



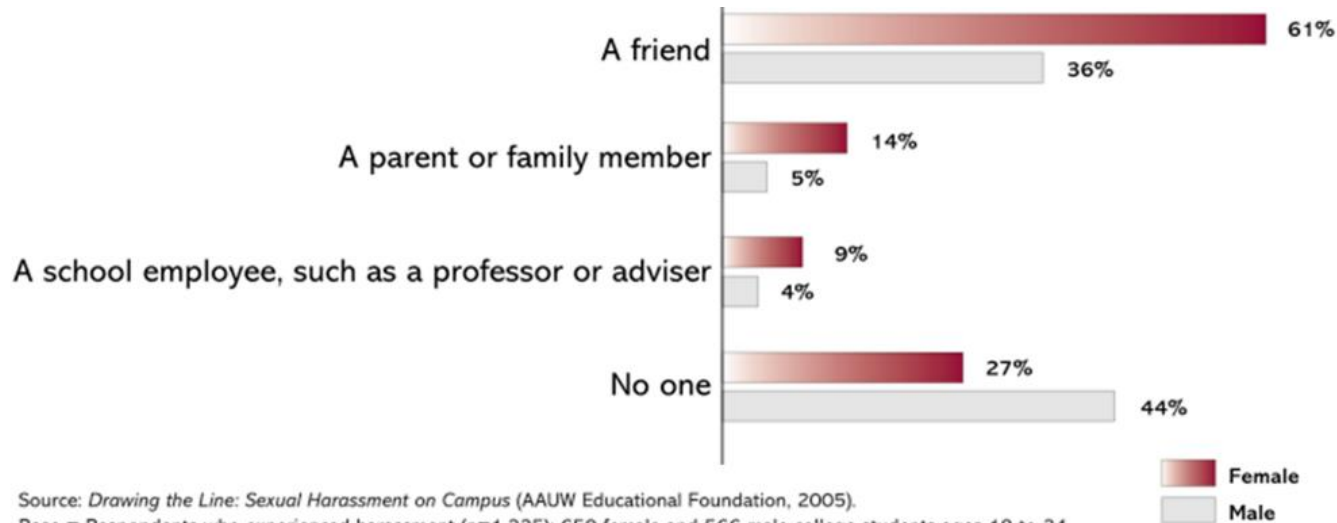
Source: *Drawing the Line: Sexual Harassment on Campus* (AAUW Educational Foundation, 2005).  
Base = Those who say they ever harassed someone (n=776); 451 male and 325 female college students ages 18 to 24.

32% said “I thought the person liked it.” 30% said “It’s just a part of school life.” 17% said “I wanted a date with the person.” and 10% said “My friends encouraged/pushed me into doing it.”

**Less than one-fifth (17%) admitted to harassing others *because they wanted a date with the person***



# Many students do not report to anyone that they have been harassed



61% of females and 36% of males report the harassment to a friend. 14% of females and 5% of males report to a parent or family member. 9% of females and 4% of males report it to a school employee such as a professor or adviser. And 27% of females and 44% of males report it to no one.

Why are males less likely to report?

# Data and Statistics: Reporting Data.



Research shows that students are deterred from reporting sexual harassment and assault for the following reasons:

- Policies that compromise or restrict the victim's ability to make informed choices about how to proceed;
- A desire to avoid public disclosure
- Concerns about confidentiality
- Uncertainty as to whether they can prove the sexual violence or whether the perpetrator will be punished
- Campus policies on drug and alcohol use
- Policies requiring victims to participate in adjudication
- Trauma response
- The desire to avoid the perceived or real stigma of having been victimized

Preamble, p. 30082 (Official) notes that "Commenters cited: U.S. Dep't of Justice, Office of Justice Programs, National Institute of Justice, *Sexual Assault on Campus: What Colleges and Universities are Doing About It* (2005)."

# Stalking Data 1 of 2



- **4.5 million** women and **2.1 million** men are stalked in one year in the United States.
- Over 85% of stalking victims are stalked **by someone they know**.
- **61%** of female victims and **44%** of male victims of stalking are stalked by a **current or former intimate partner**.
  - First statistic: National Intimate Partner and Sexual Violence Survey: 2015 Data Brief (CDC)
  - Second and third statistics: National Intimate Partner and Sexual Violence Survey: 2010-2012 State Report (CDC)

# Stalking Data 2 of 2



- **11%** of stalking victims have been **stalked for 5 years or more.**
- **46%** of stalking victims experience **at least one unwanted contact per week.**

[Matthew J. Breiding et al., "Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization – National Intimate Partner and Sexual Violence Survey, United States, 2011", (referenced in Preamble, p. 30079 fn 366 (Official))

Centers for Disease Control and Prevention Morbidity and Mortality Weekly Report, Vol. 63, No. 8 (2014): 7] (referenced in Preamble, p. 30079 fn 366 (Official))

[Katrina Baum et al., (2009). "Stalking Victimization in the United States," (Washington, DC:BJIS, 2009).]

# Impact of Stalking on Victims

## 1 of 2

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- **46%** of stalking victims fear not knowing what will happen next.

[Baum et al., (2009). "Stalking Victimization in the United States." BJS.]

- **29%** of stalking victims fear the stalking will never stop.

[Baum et al.]

# Impact of Stalking on Victims

## 2 of 2



- **1 in 8** employed stalking victims **lose time from work** as a result of their victimization and **more than half** lose **5 days of work or more**.
- 1 in 7 stalking victims move as a result of their victimization.

[Baum et al.]

- The prevalence of anxiety, insomnia, social dysfunction, and severe depression is much higher among stalking victims.

[Eric Blauuw et al. "The Toll of Stalking," Journal of Interpersonal Violence 17, no. 1(2002):50-63.]

# **LAW AND REGULATION**

# Terminology 1 of 3



- “Complainant” – “an individual who is alleged to be the victim of conduct that could constitute sexual harassment.” §106.30
  - Not just students (employees, guests, visitors)
- “Respondent” – “an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.” §106.30
  - Not just students (employees, guests, visitors)



# Terminology 2 of 3



- “Recipient” – “means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, **any public or private** agency, **institution**, or organization, or other entity, or any person, **to whom Federal financial assistance is extended** directly or through another recipient and which operates an education program or activity which receives such assistance, including any subunit, successor, assignee, or transferee thereof.”

§106.2

# Terminology 3 of 3



- “Post-secondary institution”- “an institution of graduate higher education as defined in §106.2(l), and institution of undergraduate higher education as defined in §106.2(m), an institution of professional education as defined in §106.2(n), or an institution of vocational education as defined in §106.2(o).” §106.30(b)

# What applies? 1 of 3

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- Law – 20 U.S.C. 1681 et seq.
- Regulations – 34 C.F.R. Part 106
  - Athletics, employment, admissions, housing, etc.
- Clery – 20 U.S.C. 1092(f); 34 C.F.R. 668.46

# What applies? 2 of 3

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To the extent they do not conflict with the Regulations:

- 2001 Guidance (Rescinded)
- 2015 – DCL on obligations of TIX Coordinators (Rescinded)
- 2015 – DCL on VAWA Final Regulations (Rescinded)
- 2017 – DCL and Q&A – reaffirming 2001 Guidance (Rescinded)

Rolled into or addressed in Regulations.

# What applies? 3 of 3

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- Case Law
  - Supreme Court, federal courts
  - State courts
  - Look to other court decisions for persuasive authority

# And of course...

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## The New Title IX Regulations!!

(and Title VII and your student conduct code,  
as discussed more throughout)

# New Regulations

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“Non-negotiable principles” include the right of every survivor to be taken seriously and the right of every person accused to know that guilt is not predetermined.  
(30059 and throughout)

- Training requirements
- Different definitions
- Different processes

# Overview of the Process

## 1 of 2

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- Not every employee has to be a mandatory reporter in the postsecondary institution
- This is so complainants can talk to employees without having to initiate the Title IX process



# Overview of the Process

## 2 of 2

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1. Report
2. Supportive Measures
3. Formal Complaint
4. One of three options here –
  - a. Informal resolution;
  - b. Dismissal; or
  - c. Formal grievance process
5. Formal grievance process includes investigation, hearing, determination, and appeal

# Overview of the Process: 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 (discretion of the postsecondary institution)

- Notice to employees is no longer enough to trigger actual knowledge (ability or obligation to report not enough)
- Purpose to allow complainants to speak with employees without automatically triggering process

# Overview of the Process: Formal Complaint

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A document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting the recipient investigate the allegation of sexual harassment

- In response to a formal complaint, a recipient must follow a grievance process (set by 106.45)
- Title IX Coordinator must offer complainant supportive measures (regardless if files formal complaint – if complainant does not want to file a formal complaint)

# Overview of the Process:

## Formal Grievance Process 1 of 4

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Any provisions, rules, or practices, other than those in the regulations, must apply equally to both parties.

Basic requirements:

- Treat complainants and respondents equitably
- Follow grievance process
- Only impose any disciplinary sanctions against a respondent after grievance process followed

# Overview of the Process:

## Formal Grievance Process 2 of 4

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- Requires an objective evaluation of all relevant evidence (inculpatory and exculpatory)
- Provide credibility determinations not based upon person's status as complainant, respondent, or witness
- Require individual designated by recipient as Title IX Coordinator, investigator, decision-maker, informal resolution officer, and/or appeals officer be free from conflict of interest or bias

# Overview of the Process:

## Formal Grievance Process 3 of 4

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- Include presumption that respondent is not responsible for the alleged conduct until a determination regarding responsibility is made through the grievance process
- Include prompt time frames (some discretion)
- Describes range of possible disciplinary outcomes
- States standard of evidence (preponderance of the evidence or clear and convincing)

# Overview of the Process:

## Formal Grievance Process 4 of 4

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- Include procedures and bases for complainant and respondent to appeal
- Describe range of supportive measures available to complainants and respondents
- Not require legally privileged evidence absent a voluntary written waiver by the holder of the privilege

# Overview of the Process: Written Notice 1 of 2

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- Recipient's grievance process and informal resolution process
- Allegations with sufficient time for review with sufficient detail, such as date, location if known
- Respondent presumed not responsible for alleged conduct and determination made at conclusion of grievance process
- Parties may have an advisor of choice



# Overview of the Process:

## Written Notice 2 of 2

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- Any provision in recipient's code of conduct that prohibits knowingly making false statements or providing false information during the grievance process
- Additional notification to parties if new allegations arise as apart of the investigation

# Overview of the Process: Dismissal

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- Recipient MUST investigate allegations in a formal complaint
- BUT recipient MUST dismiss
  - If conduct alleged would not constitute sexual harassment, even if proven, OR
  - Conduct did not occur within recipient's education program or activity or in the United States

# Overview of the Process: Investigation 1 of 4

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- Only of a formal complaint
- Burden of proof and evidence gathering rests with recipient
- Cannot access, require, disclose, or consider treatment records of a party without that party's voluntary, written consent
- Provide equal opportunity for parties to present witnesses (fact and expert)

# Overview of the Process:

## Investigation 2 of 4

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- Provide equal opportunity for parties to present inculpatory and exculpatory evidence
- Not restrict ability of either party to discuss or gather and present relevant evidence
- Provide parties same opportunities to have others present during the grievance process, including advisor of choice

# Overview of the Process: Investigation 3 of 4

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- Provide written notice of date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings with sufficient time to prepare
- Provide both parties equal opportunity to inspect and review any evidence obtained in the investigation – recipient must send to party and party’s advisor with at least 10 days to submit a written response before completion of investigation report

# Overview of the Process: Investigation 4 of 4

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- Recipient must make all such evidence subject to inspection and review at any hearing
- Create an investigation report at least 10 days before a hearing that fairly summarizes the relevant evidence and send to each party and party's advisor

# Overview of the Process: Hearings

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- Must provide a live, cross-examination hearing
- Parties must have an advisor and the recipient must provide an advisor for a party if the party does not have one
- Advisors ask only relevant cross-examination questions—no party-on-party questioning
- May be virtual, but must be recorded or transcribed

# Overview of the Process: Determinations 1 of 3

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- Decision-maker (not Title IX Coordinator or investigator) must issue a written determination regarding responsibility
- Must include
  - Allegations
  - Procedural steps taken from receipt of formal complaint



# Overview of the Process: Determinations 2 of 3

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- Findings of fact
- Conclusions
- Statement of and rationale for each result of each allegation, including determination of responsibility and any disciplinary imposition and whether remedies designed to restore or preserve access to educational program or activity will provided to complainant

# Overview of the Process: Determinations 3 of 3

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- Procedures and bases for appeal by both parties
- Provide written determination to parties simultaneously

# Overview of the Process:

## Appeals 1 of 2

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- Recipient must offer to both parties the following bases of appeal:
  - Procedural irregularity that affected outcome
  - New evidence not reasonably available at the time regarding responsibility or dismissal that could affect outcome
  - Conflict of interest or bias by the Title IX Coordinator, investigator, and/or decision-maker that affected the outcome

# Overview of the Process:

## Appeals 2 of 2

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- The decision-maker for the appeal cannot be the same decision-maker from the hearing, or the Title IX Coordinator or investigator
- Must provide both parties a reasonable, equal opportunity to submit a written statement in support of or challenging the determination
- Must issue a written decision describing the result of the appeal and rationale and provide the decision simultaneously to the parties

# Overview of the Process: Informal Resolution 1 of 2

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- At any time prior to the determination regarding responsibility, the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication
- Recipient cannot require this and also cannot offer unless a formal complaint is filed

# Overview of the Process: Informal Resolution 2 of 2

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- Recipient can offer informal resolution if:
  - Provides written notice to the parties
  - Obtains the parties' voluntary, written consent to the informal process
  - Does not offer for employee sexual harassment of a student

# Overview of the Process: Retaliation

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- Neither recipient nor any other person may retaliate against an individual for purpose of interfering with any right or privilege secured by Title IX or because made a report or complaint, or participated or refused to participate in the process
- (Further discussion in codes of conduct discussion at lunch)

# Overview of the Process: Confidentiality

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Recipient **must keep confidential the identity of any individual** who has made a report or complaint of sex discrimination, including any individual who made a report, any complainant, any alleged perpetrator, any respondent, and any witness, **unless required by law**, permitted by FERPA, or **for the purposes of carrying out Regulations grievance process.**



# Jurisdictional Changes

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- No obligation to address off-campus conduct that does not involve a program or activity of school  
BUT
- “Schools are responsible for redressing a hostile environment that occurs on campus even if it relates to off-campus activities.”

# Jurisdiction 1 of 2

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- A recipient with actual knowledge of sexual harassment in an educational program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.
- A recipient is only deliberately indifferent if its response to sexual harassment is unreasonable in light of known circumstances.

# Jurisdiction 2 of 2

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## “Education program or activity”

“includes 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.” §106.30(a)

# Education Program or Activity

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Locations, events, or circumstances with substantial control – the easy ones:

- Residence halls
- Classrooms
- Dining halls

# Off Campus? 1 of 2

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Any of the three conditions must apply to extend Title IX jurisdiction off campus:

- (1) Incident occurs as part of the recipient's "operations" (meaning as a "recipient" as defined in the Title IX statute or the Regs 106.2(h));
- (2) If the recipient exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus;  
and

# Off Campus? 2 of 2



(3) Incident occurred in an off-campus building owned or controlled by a student organization officially recognized by a post secondary institution

- Discussion specifically addresses off campus sorority and fraternity housing and, as long as **owned by or under control of organization that is recognized by the postsecondary institution**, it falls within Title IX jurisdiction
- Must investigate in these locations (30196-97)

# **Not an Education Program or Activity**

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Locations, events, or circumstances without substantial control:

- **Anything** outside of the United States;
- Privately-owned off campus apartments and residences that do not otherwise fall under the control of the postsecondary institution (example: privately owned apartment complex not run by a student organization)

# Education Program or Activity

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Depends on fact-analysis under “substantial control”:

- Conventions in the United States
- Holiday party for an academic department
- Professor has students over to house



# Jurisdiction and Mandatory Dismissal 1 of 3

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## Dismissal of a formal complaint— §106.45(b)(3)(i)

The recipient must investigate the allegations in a formal complaint.

(BUT) If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in §106.30 even if proved, did not occur in the recipient's **education program or activity**, ...

# **Jurisdiction and Mandatory Dismissal 2 of 3**

---



**or did not occur against a person in the  
United States, ....**

# Jurisdiction and Mandatory Dismissal 3 of 3

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then the recipient **must** dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; **such a dismissal does not preclude action under another provision of the recipient's code of conduct.**

# Study Abroad Programs



- Draws a bright line-not outside of the United States: plain text of Title IX “no person in the United States,” means no extraterritorial application. Must dismiss. (30205-06)
- Programs of college based in other countries? No jurisdiction and must dismiss.
- Foreign nationals in the United States covered.

# Online Study

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- “Operations” of the recipient may include computer and online programs and platforms “owned and operated by, or used in the operation of, the recipient.” (30202)
- Still has to occur in educational program or activity
- And in United States...

# Jurisdictional Hypotheticals

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“In an educational program or activity”?

# Jurisdictional Hypotheticals Disclaimer

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*Disclaimer: The following hypotheticals are not based on any actual cases we have handled or of which we are aware. Any similarities to actual cases are coincidental.*

# Hypothetical 1

Sarah, a student, informs the Title IX Coordinator or designee that she was sexually assaulted at a party over the weekend, by another student she knows, James. Sarah states that the party and assault occurred at Terrance Manor apartments. Sarah believes this is part of campus. Terrance Manor apartments is a complex directly behind the university and sits in between two university-owned senior apartment complexes, but Terrance Manor is owned by a private landlord.



# Hypothetical 2

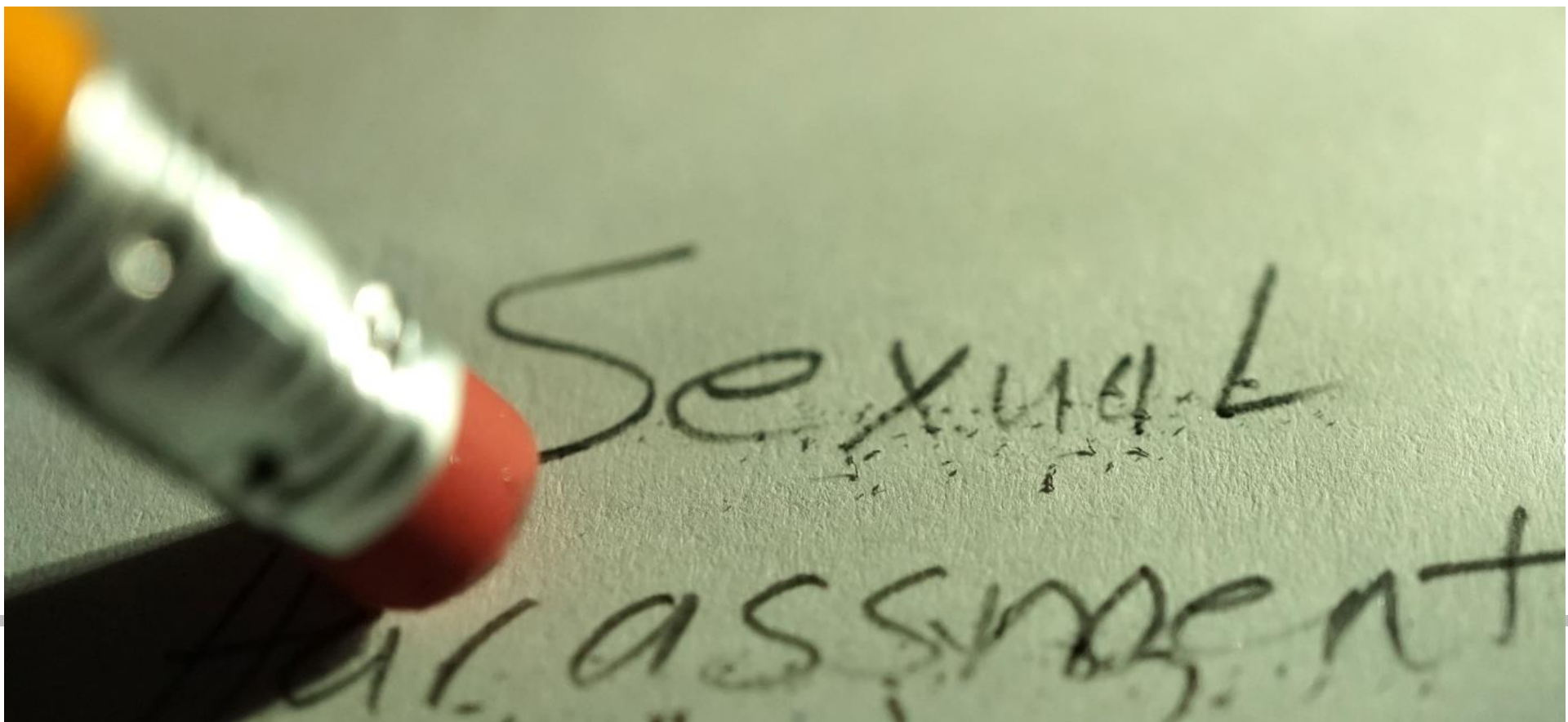
Jessi, a student, informs the Title IX Coordinator or designee that a stranger sexually assaulted him at a fraternity party over the weekend. The fraternity house is affiliated with the university, but the university does not own the house and the house is located off-campus.

# Hypothetical 3

The university has partnered with the city for an improvement district along the main street that runs through campus. The improvement district removes and rebuilds buildings on the street, oversees the cleanliness of the sidewalks, and has a task force that patrols the area on bicycles to deter crime. Alex, a student, informs the Title IX Coordinator or designee that a stranger sexually assaulted her on the main street in front of campus over the weekend.

# Hypothetical 4

Enrique, a student, calls the Title IX Coordinator or designee frantically from Italy, where he is enrolled in the university's "Italy Program," in which professors and students from the university hold courses at a sister university in Italy. Enrique states that one of the university's professor's told Enrique that he could only get an A in the course if he slept with the professor.



# **Sexual Harassment**

# Sexual Harassment.



- Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:
  - [Quid pro quo] 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;
  - [Hostile environment] 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; or
  - [Clery crimes] Sexual assault, dating violence, domestic violence, or stalking

# Sexual Harassment: *Quid Pro Quo*

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- Only applies to employee and student respondents (can be any complainant)
- DOE interprets this broadly to encompass implied *quid pro quo*
- No intent or severe or pervasive requirements, but must be unwelcome
- “[A]buse of authority is the form of even a single instance...is inherently offensive and serious enough to jeopardize educational access.”

# Sexual Harassment: Davis/Gebser

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- The second prong: severe, persistent, and objectively offensive and deny equal access (which is not the same as under Title VII)
- Does not require intent
- Reasonable person standard – means a reasonable person in the shoes of the complainant (30159)

# Severe

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- Takes into account the circumstances facing a particular complainant
- Examples: age, disability status, sex, and other characteristics
- Preamble discussion states that this removes the burden on a complainant to prove severity (30165)



# Pervasive

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- Preamble indicates pervasive must be more than once if it does not fall into the above (30165-66)
- Preamble reminds us that quid pro quo and Clery/VAWA (domestic violence, dating violence, stalking) terms do not require pervasiveness

# Objectively Offensive

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Reasonable person is very fact-specific (30167)

- Because so fact-specific, different people could reach different outcomes on similar conduct, but it would not be unreasonable to have these different outcomes
- Preamble notes that nothing in the Regulations prevents institutions from implicit bias training

# Sexual Harassment Considerations

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The preamble notes that the Regulations do not prohibit postsecondary institutions from:

- Publishing a list of situations that would violate Title IX as “sexual harassment”
- Advising when similar conduct has been found to violate Title IX
- Publishing a list of situations that would violate code of conduct (30158)

# Applies to Employees 1 of 5



- This was unsettled in most Circuits
- Enter **Title VII**
  - Commentary notes that “severe or pervasive” definition (Title VII) shouldn’t apply because elementary, secondary, and postsecondary schools are unlike the adult workplace. (Pages 43-44)
    - Davis – 5th grade students
    - Instead - “**severe, pervasive, and objectively offensive**”

# Applies to Employees 2 of 5



Near the beginning of the preamble, the Department noted:

“The Department does not wish to apply the same definition of actionable sexual harassment under Title VII to Title IX because such an application **would equate workplaces with educational environments**, whereas both the Supreme Court and Congress have noted the unique differences of educational environments from workplaces and the importance of respecting the unique nature and purpose of educational environments.”  
(30037 of preamble).

# Applies to Employees 3 of 5

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But towards the end of the preamble, the Department clarified:

- “The Department appreciates support for its final regulations, which apply to employees.” (30439)
- No “inherent conflict” between Title VII and Title IX (30439)
- Due Process protections found in § 106.45 (live hearing, advisors, cross-examination) apply to employees, not just students (30440)

# Applies to Employees 4 of 5

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The preamble clarified:

- Recipients that are subject to both Title VII and Title IX must comply with both (30440)
- “Deliberate Indifference” standard “most appropriate” for both Title VII and Title IX (30440)
- Because Title IX recipients are “in the business of education”
- “Marketplace of ideas” makes postsecondary institutions special

# Applies to Employees 5 of 5

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- Conflicts between Title VII and Title IX noted by Commenters:
  - Formal complaint requirement
  - Notice requirement
  - Deliberate Indifference Standard (noted above)
  - Definition of Sexual Harassment
  - Live hearing (as opposed to notice and opportunity to respond)



# Disclaimer.

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This section uses the terms “rape,” “victim,” and “perpetrator” -- CRIMINAL, not POLICY, from FBI Criminal Definitions (what Clery and VAWA refer to for their definitions)

# **Mandatory: Sexual Assault, Dating Violence, Domestic Violence, & Stalking**

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Third prong refers to certain statutory definitions for sexual assault, dating violence, domestic violence and stalking

- Sexual assault is defined as forcible and non-forcible sex offenses as defined in the FBI's Uniform Crime Reporting (UCR) database, which you can find in the National Incident-Based Reporting System (NIBRS) manual
- Dating violence, domestic violence, and stalking definitions are from Clery statute (not regulations) as amended by VAWA

# Sexual Harassment: Sexual Assault

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“Sexual Assault” includes:

- Rape
- Sodomy
- Sexual Assault with an Object
- Fondling
- Incest
- Statutory Rape

# Sexual Assault: Rape



“Rape” means the **carnal knowledge** of a person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity. **Carnal knowledge** is defined as the slightest penetration of the sexual organ of the female (vagina) by the sexual organ of the male (penis).

# Sexual Assault: Sodomy

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“Sodomy” means oral or anal sexual intercourse with another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

# Sexual Assault: With an Object

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“Sexual Assault with an Object” means use an object or instrument to unlawfully **penetrate**, however slightly, the **genital or anal opening** of the body of another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity. An object or instrument is anything used by the offender **other than the offender’s genitalia**, e.g., a finger, bottle, handgun, stick.

# Sexual Assault: Fondling



“Fondling” means the touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

# Sexual Assault: Incest

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“Incest” means sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.



# Sexual Assault: Statutory Rape

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“Statutory Rape” means sexual intercourse with a person who is under the statutory age of consent.

In Ohio:

- Under 13 → can't consent
- Under 16 → can't consent to those older than 18

# Sexual Harassment: Dating Violence

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“Dating Violence” means an act of violence committed by a person who is or has been in a romantic or intimate relationship with the complainant. The existence of such a romantic or intimate relationship is determined by the length of the relationship, the type of relationship, and the frequency of interactions between the individuals involved in the relationship.

# Sexual Harassment: Domestic Violence

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“Domestic violence” is an act of violence committed by:

- A current or former spouse or intimate partner of the complainant;
- A person with whom the complainant shares a child in common;
- A person who is cohabitating with, or has cohabitated with, the complainant as a spouse or intimate partner;
- A person similarly situated to a spouse of the victim under the domestic/family violence laws of the jurisdiction;
- Any other person against an adult or youth victim who is protected from that person’s acts under the domestic/family violence laws of the jurisdiction

# Sexual Harassment: Stalking

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“Stalking” is engaging in a course of conduct directed at a specific person that would cause a reasonable person with similar characteristics under similar circumstances to:

- Fear for the person’s safety or the safety of others; or
- Suffer substantial emotional distress.

As mentioned before, to qualify under Title IX, it must be sex-based stalking. (30172 fn. 772)

# Stalking: On the basis of sex



The preamble distinguishes between stalking and stalking on the basis of sex (only the latter of which falls under Title IX):

- Recognition that stalking does not always relate to sex and therefore do not always fall under Title IX (ex. celebrity stalking)
- See footnote 772 on 30172– “Stalking that does not constitute sexual harassment because it is not ‘on the basis of sex’ may be prohibited and addressed under a recipient’s non-Title IX codes of conduct”

# Stalking: Course of Conduct

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## “Course of Conduct”

- Under VAWA regulations: means **two or more acts**, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.

# Stalking: Reasonable Person

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“Reasonable person”

Under VAWA regulations: means a reasonable person under similar circumstances and with similar identities to the victim.

# Stalking: Substantial Emotional Distress

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“Substantial emotional distress”

Under VAWA regulations: means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.



# Sexual Harassment Hypotheticals

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Is this “sexual harassment”  
under Title IX?

# **Sexual Harassment Hypotheticals Disclaimer**

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*Disclaimer: The following hypotheticals are not based on any actual cases we have handled or of which we are aware. Any similarities to actual cases are coincidental.*

# Hypothetical One

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Complainant tells the Title IX Coordinator that Respondent, a fellow student in Complainant's art history class, referred to women in a painting as "fat women" in his answer about the painting.

Complainant stated that this was devastating to her because she considers herself overweight and interpreted this as an attack on her and other overweight women in the class.

# Hypothetical Two

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Complainant tells the Title IX Coordinator that her boyfriend hit her in the face and wants to file a complaint against him.

Complainant states that he hit her six months ago, but they just broke up and she felt she should report it.

# Hypothetical Three

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An anonymous letter to the Title IX Coordinator states that a video is circulating among students of Respondent, a student, having sex with Complainant, another student, who appears to be unresponsive.

# Hypothetical Four

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Complainant, a student, alleges that his boyfriend, another student, secretly took a video of them engaged in sexual intercourse. Complainant stated that he just found out about the video when a friend informed him about it.

# Hypothetical Five

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Complainant, an employee, tells the Title IX Coordinator that Respondent, an unknown person on campus who may be a student, has been following Complainant around campus. Whoever it is has key card access to buildings. Complainant states that she often catches Respondent staring at her. Complainant states she is scared because she is often alone at night on campus.

# **Combining Mandatory Regulation Language**

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**With discretionary  
policy language**



# Discretionary: Consent, Coercion, Incapacitation, Exploitation

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- Discretion is left to the institution on consent, coercion, and incapacitation, which, as we will discuss, allows institutional discretion on the extent of these violations, especially under “sexual assault”
- Exploitation/revenge porn: may be pervasive unwelcome conduct depending on widespread dissemination (30166)

# Consent: Left to the Institutions to Define

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DOE left “consent” and terms that often negate consent to the discretion of the recipients to “reflect the unique values of a recipient’s educational community.” (30159, see also 30174)

- No required definition in law, regs, or guidance
- Policy language is going to be critical to your analysis
- We will use standard language for discussion purposes

# Who Can *NEVER* Give Consent?

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- Those who are unable to consent by law (ex. minors, incarcerated persons)
- Severely cognitively disabled persons
- Those who are incapacitated

# Consent 1 of 2

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- Some policies require:
  - Clear - verbal (or non-verbal?) communication
  - Knowing - Mutually understood as willingness to participate in a sexual activity and the conditions of that sexual activity
  - Voluntary - Freely and actively given

# Consent 2 of 2

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- Some policies include:
  - May be withdrawn with clear communication
  - Consent for one activity is not consent for everything
  - Silence or failure to resist does not constitute consent
  - Previous consent does not constitute consent for future activities

# When Does Consent *NOT* Exist?

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- Use of physical force or threats of physical force,
  - Many policies also include physically intimidating behavior or coercion
- Individual from whom consent is required is incapacitated

# Evidence of Consent? 1 of 2

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- What words or actions did complainant use to convey consent/non-consent?
  - Must examine sexual contacts, acts in detail
- Was complainant capable of consenting? (Asleep? Passed out? Not understanding what was happening?)

# Evidence of Consent? 2 of 2

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- Who took off what clothes?
- Who provided the condom?
- Who initiated physical contact?
- Who touched who where?
- “They gave consent” = What did you say to them, and what did they say to you?



# Not Evidence of Consent?

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Some institutions include evidence that they do not consider evidence of consent:

- What a complainant was wearing
- Whether complainant had given prior consent in other sexual activities

# Coercion: Left to Institution to Define

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- Is this in your policy?
  - Does your TIX team, your preventive education team, and your local rape crisis center agree on a definition when working with your community?
- Often defined as unreasonable pressure for sexual activity
- Compare: “I will break up with you” versus “I will kill myself”

# Incapacitation: Left to Institution to Define

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- State of being unconscious, asleep, or under the influence of drugs and/or alcohol to such an extent that the person cannot appreciate the nature or consequences of their actions
- Intoxicated people **can** consent.  
Incapacitated people **cannot** consent.

# Incapacitation: Amnesty?

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Nothing in the Regulations precludes the postsecondary institution from providing amnesty to students for personal alcohol and/or drug use when participating in a Title IX investigation

# Incapacitation 1 of 2

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- Determined by how the alcohol (or drugs) consumed impacts a person's decision-making capacity, awareness of consequences, and ability to make informed judgments
- Beyond mere intoxication
- No requirement for incapacitation to be voluntary or involuntary on the part of the complainant

# Incapacitation 2 of 2

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- To be responsible where a complainant is incapacitated, policies typically require that the **respondent knew or reasonably should have known about the incapacitation**
- Incapacitation of the respondent is not a defense

# Productive Questioning on Gauging Intoxication

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Difficult to gauge:

- How trashed were you?
- On a scale of 1-10, how drunk were you?
- Why did you get that drunk?

Preferable approach:

- Explain why you need the information
- Don't place blame

# Any Drugs?

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- Did they take any medications that might have interacted with alcohol or otherwise affected their level of intoxication?
- Did they take any drugs that may have altered their ability to stay awake, understand what was happening, etc.?
- What, how much, and when?
- Remember: can have amnesty in your policy for personal drug and alcohol use (also a good way to avoid institutional retaliation!) at 30536



# Physical Effects

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Some policies list physical effects that are not solely indicative of, but may indicate incapacitation:

- Conscious or unconscious?
- Vomiting?
- Slurred speech
- Difficulty walking
- Difficulty holding a coherent conversation

# Blackout ≠ Incapacitation

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- Alcohol can interfere with the ability to form memories
- May be a complete lack of memory or fragmentary blackouts
- Listen carefully to the way they describe what they remember. Does it fit with what you know about intoxication and recall?

# **Myths and Stereotypes**

**KNOW THE FACTS**

**Most rapes are committed  
by perpetrators that know their  
victims**

**Rape can happen in  
a committed  
relationship**

**Rape can happen between individuals  
of any gender**

**Victims of intimate partner violence  
may return to their perpetrator  
for reasons that may not seem  
rational to others**



**Drug-facilitated sexual assault is common, and the most common drug used is alcohol**

**Being drunk doesn't  
excuse a perpetrator's own  
behavior**

A wide variety of responses are normal for victims:  
people are different and react differently—don't make  
assumptions about how they “should act”

**How people mentally process what happened to them affects the way the brain encodes and decodes memories of what occurred**

# **Why Don't People Tell Right Away**

# Why Don't People Tell Right Away

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The Regulations tell us:

- Fear of retaliation
- Fear of not being believed

# Why Don't People Always Remember

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Also need to recognize that a party should not be “unfairly judged due to inability to recount each specific detail of an incident in sequence, whether such inability is due to trauma, the effects of drugs or alcohol, or simple fallibility of human memory” (30323)

# A Note About Trauma

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- Assume all parties and witnesses may be dealing with trauma – from this or other incidents
- Meet them where they are
- Help them tell their story as part of the process
- Signs of trauma  $\neq$  policy violation
- No signs of trauma  $\neq$  no policy violation



# Stereotypes Affect Response

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Beliefs about people:

- Based on sex
- Based on race
- Based on age
- Based on disability
- Administering the Title IX process

# Avoiding Sex Stereotypes



- “Must” not rely on sex stereotypes: Also helpful to avoiding pre-judgment of facts, remaining unbiased and impartial
- Examples of sex stereotypes in comments (30253):
  - Women have regret sex and lie about sexual assaults
  - Men are sexually aggressive or likely to perpetrate sexual assault

# Sex Stereotypes Concerns in Preamble

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Examples of concerns from commentators:

More likely to punish pregnant women, people of color, people with disabilities, people from different cultures, and LGBTQ students because of harmful stereotypes

(30259-30260)

# Avoiding Sex Stereotypes.

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- Age of consent
- Dating vs. arranged marriages
- Attitudes towards homosexuality
- Attitudes towards intimate partner violence
- Cooperating with investigations
- Sharing personal information
- Reactions toward authority figures
- Reactions toward male vs. female

# Culture Affects Response

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- I won't report it if it doesn't feel wrong.
- I'll admit it because I don't understand it's prohibited.
- I won't report it if I would be a snitch.
- It's impolite to look you in the eye, so I'll look down the whole time.
- I deserved it. It's normal.
- Reporting this would result in serious consequences at home.

# Process YOUR Response

## 1 of 2

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- Is your assessment based on your culture, or theirs, or both? (It shouldn't be.)
- Is your assessment based on stereotypes you hold based on sex? Race? Culture? Yours or theirs? (It shouldn't be.)
- Is your assessment based on their role (Complainant or Respondent)? (It shouldn't be.)

# Process YOUR Response



## 2 of 2

---

- Is your assessment based on a person you like or someone you identify with? (It shouldn't be.)
- Is your assessment based on a person “acting guiltily” by not making eye contact or fidgeting? (It shouldn't be.)
- Would you have done things differently?
- If so, **SO WHAT?**

# Counterintuitive Response

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- If they didn't act they way you might have, that doesn't mean it isn't true.
- Stop and consider carefully before you decide someone is lying because they responded in a way different from how you would have responded.
- Counterintuitive response has to be measured to another's perspective. Be careful to use a valid measurement.



**Be Human and Be a  
Blank Slate**

**Questions?**

# Upcoming Trainings

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Level 2 (<https://www.bricker.com/events/title-ix-regulations-training-higher-education-57500>):

- TIX Coordinator February 3-4, 2022
- TIX Investigator February 7-8, 2022
- TIX Decision-Maker February 10-11, 2022
- TIX Appeals Officer February 21-22, 2022

# Upcoming Advanced Trainings

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Level 3 (<https://www.bricker.com/events/advanced-title-ix-regulations-training-level-3-higher-education-64900>):

- Advanced TIX Coordinator March 3-4, 2022
- Advanced TIX Investigator March 17-18, 2022
- Advanced TIX Decision-Maker March 31-April 1, 2022

# Free Webinars

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# Title IX Higher Ed Level 2

## Title IX Coordinator Training

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We can't help ourselves. We're lawyers.

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- We are not giving you legal advice
- Consult with your legal counsel regarding how best to address a specific situation
- We will send a copy of the slides after this presentation to all who registered their email address when signing in

# Presentation Rules

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- Questions are encouraged!
- “For the sake of argument...”
- Be aware of your own responses and experiences
- Follow-up with someone if you have questions and concerns
- Take breaks as needed



# Posting These Training Materials?

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- Yes!
- Your Title IX Coordinator is required by 34 C.F.R. §106.45(b)(10)(i)(D) to post materials to train Title IX personnel on its website
- We know this and will make this packet available to your institution to post
  - Watch for the “Thank you for attending” email and look for a link to download the slides

# **TIXC: Topics (1 of 2)**

---

## Expectations of the Title IX Coordinator:

- Preparing to implement the process
- Upon receipt of a report or complaint
- Understand the process from report through resolution in order to shepherd the process and coordinate efforts

Serving Impartially and without Bias

Checklist and Resources for additional information

# TIXC: Topics (2 of 2)

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## Additional Topics:

- Training
- Actual Notice
- Jurisdiction
- Mandatory and Discretionary Dismissal
- Supportive Measures
- Emergency Removal
- Formal Complaints
- Informal Resolution
- Advisors
- Recordkeeping
- Title VII

# Aspirational Agenda Day 1

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9:00 – 9:10	Introduction
9:10 – 10:15	Discussion of TIXC Expectations Overview
10:15 – 10:30	Break
10:30 – 12:00	TIX Expectations Upon Receipt of a Report and Jurisdiction/Dismissal Issues

# Aspirational Agenda Day 2

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- |               |  |
|---------------|--|
| 9:00 – 10:15  | Supportive Measures and Notice to Respondent, and the Grievance Process  |
| 10:15 – 10:30 | Break  |
| 10:30 – 12:00 | Serving Impartially and Without Bias, Title VII, and Checklist for TIXCs |



**What do Title IX Coordinators need to do to Implement New Policies?**

# **TIXC: Notice of Designation**

## **§106.8(a)**

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- Designate at least one employee to coordinate compliance – “Title IX Coordinator”
- Inform the following persons of the identity of the Title IX Coordinator(s):
  - Applicants for admission and employment
  - Students
  - Employees
  - All unions or professional organizations holding CBAs or professional agreements with the recipient

# What must notice include?

## §106.8(a)

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- Notice of the TIXC **must** include, for the employee or employees designated as the Title IX Coordinator:
  - The name or title
  - Office address
  - Electronic mail address
  - Telephone number



# TIXC: Initial Steps 1 of 5

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## Initial Compliance Steps

- Implementation Date – August 14, 2020
- Engage relevant parties
  - Human Resources
  - Unions
  - Key Administrators (Student Conduct)

# TIXC: Initial Steps 2 of 5

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## Initial Compliance Steps (Continued)

- Identify the TIX Team
  - Investigators, decision-makers, appeal entities, informal resolution facilitators
  - Define roles and identify the required separation between them
  - TIXC can serve as an investigator, but cannot serve as the initial decision-maker or the decision-maker for the appeal

# TIXC: Initial Steps 3 of 5

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- Consider your policy and procedure options
  - Standard of evidence
    - Preponderance of the evidence, or
    - Clear and convincing
      - Must be consistent across CBAs and/or Employee procedures that address sexual harassment
  - Hearing Procedures

# TIXC: Initial Steps 4 of 5

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## Initial Compliance Steps (Continued)

- Consider your policy and procedure options
  - Informal Resolution
  - Use of your Code of Conduct in cases outside of Title IX jurisdiction
  - Officials who have “authority to institute corrective measures on behalf of the recipient”
    - Formerly “Responsible Employees”

# **TIXC: Initial Steps 5 of 5**

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## Initial Compliance Steps (Continued)

- Consider your policy and procedure options
  - Training
    - Title IX Team
    - Students and Employees
    - Counselors, Athletics, Greek organizations
  - Technology

# **TIXC: Initial Steps**

## **Training 1 of 4**

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All TIX Team Members must be trained on:

- Definition of Sexual Harassment (Level 1)
- Scope of the institution's program or activity (Level 1)
- How to conduct an investigation and grievance process, including hearings, appeals, and informal resolution processes, as applicable, under YOUR policy
  - How does the TIXC fit into these roles?
    - Investigator?
    - Supervisor?

# **TIXC: Initial Steps**

## **Training 2 of 4**

---

All TIX Team Members must be trained on:

- How to serve impartially
  - Avoiding prejudgment of the facts
  - Conflicts of interest
  - Bias (use reasonable person/"common sense" approach)
  - Not relying on sex stereotypes

# TIXC: Initial Steps

## Training 3 of 4

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All TIX **Decision-Makers** must be trained on:

- Technology to be used at a live hearing
- Issues of relevance of questions and evidence
  - Including rape shield provisions in 34 C.F.R. §106.45(b)(6)



# **TIXC: Initial Steps**

## **Training 4 of 4**

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All TIX **Investigators** must be trained on:

- Issues of relevance to create an investigative report that fairly summarizes relevant evidence

# **TIXC: Initial Steps Training Materials**

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## Required to Post Training Materials

(34 C.F.R § 106.45(b)(1)(iii))

Section D. All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.

# TIXC: Process and Implementation Considerations 1 of 5

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Review your Title IX Policy for compliance

- What about cases that *were* covered by your policy but are not covered by the new Title IX regulations?
- What about conduct that *was* covered by your policy but may not be included in the new definition of Sexual Harassment?
  - Sexual Exploitation
  - Stalking that is NOT based on sex
- Use of your Student/Employee Code of Conduct in cases outside of Title IX jurisdiction?

# TIXC: Process and Implementation Considerations 2 of 5

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Review your Title IX Policy for compliance

- New Grievance Policy Requirements
  - Time for parties and their advisors to review evidence (10 days to submit a written response, “which the investigator will consider prior to completion of the investigative report”)
    - 34 C.F.R. §106.45(b)(5)(vi)
  - Time for parties and their advisors to review the investigative report and respond in writing (at least 10 days prior to the hearing)
    - 34 C.F.R. §106.45(b)(5)(vii)

# TIXC: Process and Implementation Considerations 3 of 5

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Under your new policy...

- Train your TIX Team on how to explain your process
  - This is new and confusing for everyone
  - Have your team members, particularly investigators, explain the new process to YOU
    - How did they do?
    - Would you understand if you were a participant?
    - Can they answer questions? Admit they need to get more information?

# TIXC: Process and Implementation Considerations 4 of 5

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Under your new policy...

- Make sure your TIX Team is trained on YOUR institution's policies and procedures
- Make sure you TIX Team is trained on any technology YOUR institution will be using
  - Not covered here and may not be covered by other trainings
  - Required by 34 C.F.R § 106.45(b)(1)(iii)
  - Example: break-out rooms, waiting rooms, muting attendees

# **TIXC: Process and Implementation Considerations 5 of 5**

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- Other practical tips or considerations?

# **After a Report or Complaint of Title IX Sexual Harassment**





# **TIXC: “Actual knowledge”**

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“(a) As used in this part:

*Actual knowledge* means 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. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge.

# **TIXC: “Actual Knowledge”**

## **34 C.F.R § 106.30(a)**

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Actual Knowledge definition:

(1) Notice of sexual harassment or allegations of sexual harassment

(2) To one of the following:

- Title IX Coordinator, or
- Any official of the recipient who has authority to institute corrective measures on behalf of the recipient

# **TIXC: “Actual Knowledge”**

## **34 C.F.R § 106.30(a)**

---

Notice is imputed not just when the TIXC is notified, but also when someone with authority to correct the harassment is put on notice

- Mere ability or obligation of an employee to report sexual harassment isn't enough
  - Fact-sensitive analysis
- 
- Work with legal counsel to determine who falls into this category
    - What is your institutional ethic of care?

# **TIXC: Response to “Actual Knowledge”**

## **34 C.F.R § 106.44(a)**

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The TIX Coordinator has certain **specific required responses** to “actual knowledge” sexual harassment in an education program or activity of the recipient against a person in the United States:

- Promptly contact complainant to discuss availability of supportive measures
- Consider complainant’s wishes with respect to supportive measures
- Follow a grievance process that complies with 34 C.F.R. § 106.45(b)

# TIXC: Keys to Intake 1 of 5

---

- Both parties may be emotional and may need access to supportive measures and resources.
  - “What we do for one, we do for the other”
- Be sensitive to the person making the report and refrain from comments that blame the victim, suggest disbelief, or discourage participation in the process.
- Document your interactions with each party **in writing** after you speak with them.

# TIXC: Keys to Intake (continued) 2 of 5

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- Document the supportive measures, accommodations, and resources that are provided
  - Also document supportive measures that *are requested but not provided* and the rationale (e.g., changes to housing or class schedule)
  - Also document supportive measures that are *offered by rejected* and the rationale given
- The more options you can offer the parties, the more in control they will feel about the situation.

# **TIXC: Keys to Intake (continued) 3 of 5**

---

What to do when you or someone in your office receives a report of misconduct?

- Offer a meeting and discuss the process first
  - Form letters – updated in light of your new process?
    - Right to bring an advisor
    - Availability of resources and accommodations
    - Reminder that retaliation is prohibited
- At the meeting – give the complainant a copy of the Title IX Policy
- Explain the difference between privacy and confidentiality
- Discuss Supportive Measures
- Explain what a “Formal Complaint” means under the new Title IX regulations – Give the complainant time to decide

# **TIXC: Keys to Intake (continued) 4 of 5**

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What to do when you or someone in your office receives a report of misconduct?

- Explain the Informal Resolution Process, if it's available
  - Make sure to explain that this option is only available if a Formal Complaint is filed (34 C.F.R. § 106.45(b)(9))
  - Explain the option to end the Informal Resolution Process and proceed with a hearing at any point before a determination of responsibility is made
- Explain the Hearing Process
  - Go step-by-step through your policy
  - Make sure that you and/or the investigators describing this process understands what the hearing will look like and can answer questions about it



# TIXC: Keys to Intake (continued) 5 of 5

---

What to do when you or someone in your office receives a report of misconduct?

- Determine which policy and procedure applies
  - Will depend on your Title IX Policy, Student/Employee Codes of Conduct
  - May change over time as more information comes in
  - Consider Jurisdiction and the definition of Sexual Harassment
- Does the TIXC make jurisdiction/definition decisions? What does that process look like?
  - “Exit Ramps”
  - Document, Document, Document

# Jurisdiction

## (Review from Level One) 1 of 2

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- A recipient with actual knowledge of sexual harassment in an educational program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.
- A recipient is only deliberately indifferent if its response to sexual harassment is unreasonable in light of known circumstances.

# Jurisdiction

## (Review from Level One) 2 of 2

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### “Education program or activity”

“includes 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. “ §106.30(a)

# Education Program or Activity

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Locations, events, or circumstances with substantial control – the easy ones:

- Residence halls
- Classrooms
- Dining halls

# Off Campus? 1 of 2

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Any of the three conditions must apply to extend Title IX jurisdiction off campus:

- (1) Incident occurs as part of the recipient's "operations" (meaning as a "recipient" as defined in the Title IX statute or the Regs 106.2(h));
- (2) If the recipient exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus;  
and

# Off Campus? 2 of 2



(3) Incident occurred in an off-campus building owned or controlled by a student organization officially recognized by a post secondary institution

- Discussion specifically addresses off campus sorority and fraternity housing and, as long as **owned by or under control of organization that is recognized by the postsecondary institution**, it falls within Title IX jurisdiction
- Must investigate in these locations (30196-97)

# **Not an Education Program or Activity**

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Locations, events, or circumstances without substantial control:

- **Anything** outside of the United States;
- Privately-owned off campus apartments and residences that do not otherwise fall under the control of the postsecondary institution (example: privately owned apartment complex not run by a student organization)

# Education Program or Activity

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Depends on fact-analysis under “substantial control”:

- Conventions in the United States
- Holiday party for an academic department
- Professor has students over to house



# Jurisdiction and Mandatory Dismissal 1 of 3

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## Dismissal of a formal complaint— §106.45(b)(3)(i)

The recipient must investigate the allegations in a formal complaint.

(BUT) If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in §106.30 even if proved, did not occur in the recipient's **education program or activity**, ...

# **Jurisdiction and Mandatory Dismissal 2 of 3**

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**or did not occur against a person in the  
United States, ....**

# Jurisdiction and Mandatory Dismissal 3 of 3

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then the recipient **must** dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; **such a dismissal does not preclude action under another provision of the recipient's code of conduct.**

- When and Where are your exit ramps?

# Study Abroad Programs

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- Draws a bright line-not outside of the United States: plain text of Title IX “no person in the United States,” means no extraterritorial application. Must dismiss. (30205-06)
- Programs of college based in other countries? No jurisdiction and must dismiss.
- Foreign nationals in the United States covered.

# Online Study

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- “Operations” of the recipient may include computer and online programs and platforms “owned and operated by, or used in the operation of, the recipient.” (30202)
- Still has to occur in educational program or activity
- And in United States...

# TIXC: Mandatory Dismissal

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## Mandatory Dismissals

- Would not constitute sexual harassment even if proved
  - Quid pro quo, unwelcome conduct, Clery crimes
- Did not occur in the recipient's education program or activity
- Did not occur against a person in the United States

# TIXC: Discretionary Dismissals

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- **Jurisdictional Determination § 106.45(b)(3)**
- **Discretionary Dismissals**
  - Complainant notifies TIX Coordinator in writing they would like to withdraw the formal complaint
  - Respondent is no longer enrolled or employed by the recipient
  - Specific circumstances prevent the recipient from gathering sufficient evidence

# Jurisdictional Determinations

## 34 C.F.R § 106.45(b)(3)

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- Preamble: Permitting recipient to dismiss because they deem allegation meritless or frivolous without following grievance procedure would defeat the purpose of the regulations
- Must promptly send written notice of dismissal/reasons simultaneously to the parties
- Jurisdictional issues can arise at any time, even during the investigation



# Dismissal/Exit Ramp Hypotheticals

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Each of the hypothetical facts below will build upon one another. Consider the following questions for each new fact:

- What do I do with this if it comes to the TIX Office?
- Does the conduct at issue, if true, fall under TIX's definition of Sexual Harassment?
  - If not, does it need to go somewhere else?
- Does the conduct at issue, if true, fall under TIX's jurisdiction?
  - If not, does not need to go somewhere else?

# Dismissal/Exit Ramp Hypothetical 1

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Joe and Sally are dating. Sally suspects Joe is cheating on her and calls the Title IX office to report him.

## Questions

- What do I do with this if it comes to the TIX Office?
- Does the conduct at issue, if true, fall under TIX's definition of Sexual Harassment?
  - If not, does it need to go somewhere else?
- Does the conduct at issue, if true, fall under TIX's jurisdiction?
  - If not, does not need to go somewhere else?

# Dismissal/Exit Ramp Hypothetical 2

---

Sally logs on to Joe's email account and finds an email from Becky that sets up a rendezvous in Joe's room.

## Questions

- What do I do with this if it comes to the TIX Office?
- Does the conduct at issue, if true, fall under TIX's definition of Sexual Harassment?
  - If not, does it need to go somewhere else?
- Does the conduct at issue, if true, fall under TIX's jurisdiction?
  - If not, does not need to go somewhere else?

# Dismissal/Exit Ramp Hypothetical 3

---

Sally grabs her best friend, Angela, to go confront Joe.

## Questions

- What do I do with this if it comes to the TIX Office?
- Does the conduct at issue, if true, fall under TIX's definition of Sexual Harassment?
  - If not, does it need to go somewhere else?
- Does the conduct at issue, if true, fall under TIX's jurisdiction?
  - If not, does not need to go somewhere else?

# Dismissal/Exit Ramp Hypothetical 4

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Sally is mad and busts the lock on Joe's door to get into his room.

## Questions

- What do I do with this if it comes to the TIX Office?
- Does the conduct at issue, if true, fall under TIX's definition of Sexual Harassment?
  - If not, does it need to go somewhere else?
- Does the conduct at issue, if true, fall under TIX's jurisdiction?
  - If not, does not need to go somewhere else?

# Dismissal/Exit Ramp Hypothetical 5

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Angela (Sally's friend) turns on her Go Pro to record the encounter.

## Questions

- What do I do with this if it comes to the TIX Office?
- Does the conduct at issue, if true, fall under TIX's definition of Sexual Harassment?
  - If not, does it need to go somewhere else?
- Does the conduct at issue, if true, fall under TIX's jurisdiction?
  - If not, does not need to go somewhere else?

# Dismissal/Exit Ramp Hypothetical 6

---

Joe and Becky are in bed having sex.

## Questions

- What do I do with this if it comes to the TIX Office?
- Does the conduct at issue, if true, fall under TIX's definition of Sexual Harassment?
  - If not, does it need to go somewhere else?
- Does the conduct at issue, if true, fall under TIX's jurisdiction?
  - If not, does not need to go somewhere else?

# Dismissal/Exit Ramp Hypothetical 7

---

Sally and Angela enter Joe's room.

## Questions

- What do I do with this if it comes to the TIX Office?
- Does the conduct at issue, if true, fall under TIX's definition of Sexual Harassment?
  - If not, does it need to go somewhere else?
- Does the conduct at issue, if true, fall under TIX's jurisdiction?
  - If not, does not need to go somewhere else?



# Dismissal/Exit Ramp Hypothetical 8

---

Sally screams at Joe and slaps him across the face.

## Questions

- What do I do with this if it comes to the TIX Office?
- Does the conduct at issue, if true, fall under TIX's definition of Sexual Harassment?
  - If not, does it need to go somewhere else?
- Does the conduct at issue, if true, fall under TIX's jurisdiction?
  - If not, does not need to go somewhere else?

# Dismissal/Exit Ramp Hypothetical 9

---

Sally pulls Becky out of bed, naked, and kicks her while she is on the floor.

## Questions

- What do I do with this if it comes to the TIX Office?
- Does the conduct at issue, if true, fall under TIX's definition of Sexual Harassment?
  - If not, does it need to go somewhere else?
- Does the conduct at issue, if true, fall under TIX's jurisdiction?
  - If not, does not need to go somewhere else?

# Dismissal/Exit Ramp Hypothetical 10

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When Becky tries to leave the room, Sally grabs her breast and twists it, then threatens to kill her if she comes anywhere near Joe again.

## Questions

- What do I do with this if it comes to the TIX Office?
- Does the conduct at issue, if true, fall under TIX's definition of Sexual Harassment?
  - If not, does it need to go somewhere else?
- Does the conduct at issue, if true, fall under TIX's jurisdiction?
  - If not, does not need to go somewhere else?

# Dismissal/Exit Ramp Hypothetical 11

---

Becky leaves and runs out the door naked to her room down the hall.

## Questions

- What do I do with this if it comes to the TIX Office?
- Does the conduct at issue, if true, fall under TIX's definition of Sexual Harassment?
  - If not, does it need to go somewhere else?
- Does the conduct at issue, if true, fall under TIX's jurisdiction?
  - If not, does not need to go somewhere else?

# Dismissal/Exit Ramp Hypothetical 12

---

Joe shoves Sally and Angela out of his room so he can get dressed.

## Questions

- What do I do with this if it comes to the TIX Office?
- Does the conduct at issue, if true, fall under TIX's definition of Sexual Harassment?
  - If not, does it need to go somewhere else?
- Does the conduct at issue, if true, fall under TIX's jurisdiction?
  - If not, does not need to go somewhere else?

# Dismissal/Exit Ramp Hypothetical 13

---

Angela uploads the video onto YouTube, then tweets the link and tags Joe and Becky. She titles the video, “Little Dick and the Skank.”

## Questions

- What do I do with this if it comes to the TIX Office?
- Does the conduct at issue, if true, fall under TIX’s definition of Sexual Harassment?
  - If not, does it need to go somewhere else?
- Does the conduct at issue, if true, fall under TIX’s jurisdiction?
  - If not, does not need to go somewhere else?

# Dismissal/Exit Ramp Hypothetical 14

---

Within minutes, Joe and Becky have hundreds of comments directed towards them on social media. Some are negative and some are threatening.

## Questions

- What do I do with this if it comes to the TIX Office?
- Does the conduct at issue, if true, fall under TIX's definition of Sexual Harassment?
  - If not, does it need to go somewhere else?
- Does the conduct at issue, if true, fall under TIX's jurisdiction?
  - If not, does not need to go somewhere else?

# Dismissal/Exit Ramp Hypothetical 15

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When Becky reads the messages, she begins to send texts to Sally: “I’m coming after you.” “I see you across the Quad.” “Don’t go into that room alone or I’ll get you.” Becky sends approximately fifty similar messages over the course of the next two hours.

## Questions

- What do I do with this if it comes to the TIX Office?
- Does the conduct at issue, if true, fall under TIX’s definition of Sexual Harassment?
  - If not, does it need to go somewhere else?
- Does the conduct at issue, if true, fall under TIX’s jurisdiction?
  - If not, does not need to go somewhere else?



# Dismissal/Exit Ramp Hypothetical 16

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Joe opens his closet to get dressed and lets his friend, Jim, out from where he was watching it all.

## Questions

- What do I do with this if it comes to the TIX Office?
- Does the conduct at issue, if true, fall under TIX's definition of Sexual Harassment?
  - If not, does it need to go somewhere else?
- Does the conduct at issue, if true, fall under TIX's jurisdiction?
  - If not, does not need to go somewhere else?

# **TIXC: Supportive Measures**

**34 C.F.R § 106.30(a) 1 of 5**

---

The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

# **TIXC: Supportive Measures**

## **34 C.F.R § 106.30(a) 2 of 5**

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Elements of the Definition:

- Non-disciplinary and non-punitive
- Individualized
- “as reasonably available”
- Without fee or charge to either party
- Available at any time (regardless of formal complaint)

# TIXC: Supportive Measures

34 C.F.R § 106.30(a) 3 of 5

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Designed to:

- ***restore or preserve access*** to the recipient's education program or activity, without unreasonably burdening the other party;
- protect the safety of all parties and the recipient's educational environment; and
- deter sexual harassment

# TIXC: Supportive Measures

## 34 C.F.R § 106.30(a) 4 of 5

### Examples from the Regulations:

- Counseling
  - Extensions of deadlines (course-related adjustments)
  - Modifications of work/class schedules
  - Campus escort services
  - Mutual contact restrictions
- Changes in work or housing locations
  - Leaves of absence
  - Increased security and monitoring of certain areas of the campus
  - “and other similar measures”

# **TIXC: Supportive Measures**

## **34. C.F.R § 106.44(a) 5 of 5**

---

Role of the TIXC upon receiving a report:

- promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30,
- consider the complainant's wishes with respect to supportive measures,
- inform the complainant of the availability of supportive measures with or without the filing of a formal complaint,

# **TIXC: Supportive Measures**

## **Role of the TIXC (34. C.F.R § 106.44(a))**

---

Role of the TIXC:

- Must maintain confidentiality to the greatest extent possible
  - But, shouldn't impair the ability to provide the measures at issue (may have to tell campus PD, faculty, etc. *some* information)

# TIXC: Supportive Measures

## Documentation per 34. C.F.R § 106.45(b)(10)(ii) 1 of 2

---

Section (ii) states “ (ii) For each response required under section 106.44, a recipient must create, and maintain for a period of **seven years**, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient must **document the basis for its conclusion** that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient’s education program or activity.



# **TIXC: Supportive Measures**

## **Documentation per 34. C.F.R § 106.45(b)(10)(ii) 2 of 2**

---

### Role of the TIXC:

- Your office must document the absence of deliberate indifference →→ In other words, your office's (Title IX compliant) response to a Title IX report
- Non-Provision of Supportive Measures
  - "If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken."
- Maintain documentation for 7 years

# **TIXC: Supportive Measures**

## **Role of the TIXC**

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Further Considerations:

- Must consider the complainant's wishes
- The school should follow up with both parties regarding the efficacy of the supportive measures
- Supportive measures may be appropriate to offer regardless of whether the allegation has been substantiated or fully investigated because it preserves access and deters harassment

Should supportive measures be provided in non-TIX cases?

- Are they provided for in your student code, employment policies?

# Notice of Allegations to Respondent

## 34 C.F.R § 106.45(b)(2) 1 of 3

---

- Must include sufficient details known at the time, and with sufficient time to prepare a response before any initial interview
- Sufficient details include:
  - Identities of the parties
  - Conduct allegedly constituting sexual harassment
  - Date/location of alleged incident

# Notice of Allegations to Respondent

## 34 C.F.R § 106.45(b)(2) 2 of 3

---

- Needs to be supplemented if new allegations are to be included
- Must include statement that respondent is **presumed not responsible** for alleged conduct and that determination regarding responsibility is made at the conclusion of the grievance process
- Must inform the parties that they may have advisor of their choice who may be an attorney and who may inspect and review evidence

# **Notice of Allegations to Respondent**

## **34 C.F.R § 106.45(b)(2) 3 of 3**

---

- Needs to be supplemented if new allegations are to be included
- Must include statement that respondent is presumed not responsible for alleged conduct and that determination regarding responsibility is made at the conclusion of the grievance process
- Must inform the parties that they may have advisor of their choice who may be an attorney and who may inspect and review evidence



**TIXC: Keys to Respondent Contact**  
**“What we do for one, we do for the other”**

# TIXC: Keys to Respondent Contact

## “What we do for one, we do for the other” 1 of 5

---

- Both parties may be emotional and may need access to supportive measures and resources.
  - “What we do for one, we do for the other”
- Be sensitive to both parties and refrain from comments that blame either party, suggest disbelief/prejudgment, or discourage participation in the process.
- Document your interactions with each party **in writing** after you speak with them.

# TIXC: Keys to Respondent Contact

## “What we do for one, we do for the other” 2 of 5

---

- Document the supportive measures, accommodations, and resources that are provided
  - YES! Discuss Supportive Measures with Respondent, too!
  - Document supportive measures that *are requested but not provided* and the rationale (e.g., changes to housing or class schedule)
  - Document supportive measures that are *offered by rejected* and the rationale given
- The more options you can offer the parties, the more in control they will feel about the situation.



# **TIXC: Keys to Respondent Contact**

**“What we do for one, we do for the other” 3 of 5**

---

First steps after providing notice to the Respondent?

- Offer a meeting and discuss the process first
  - Form letters – updated in light of your new process?
    - Right to bring an advisor
    - Availability of resources and accommodations
    - Reminder that retaliation is prohibited
- At the meeting – give the respondent a copy of the Title IX Policy
- Explain the difference between privacy and confidentiality
- Discuss Supportive Measures
- Explain the procedure the complainant has elected to pursue (if you know)
  - Formal Complaint, Informal Resolution, Hearing, etc.

# **TIXC: Keys to Respondent Contact**

## **“What we do for one, we do for the other” 4 of 5**

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Make sure Respondent understands the process before the meeting ends:

- Explain the Informal Resolution Process, if it's available
  - Make sure to explain that this option is only available if a Formal Complaint is filed (34 C.F.R. § 106.45(b)(9))
  - Explain the option to end the Informal Resolution Process and proceed with a hearing at any point before a determination of responsibility is made
- Explain the Hearing Process
  - Go step-by-step through your policy
  - Make sure that you and/or the investigators describing this process understands what the hearing will look like and can answer questions about it

# **TIXC: Keys to Respondent Contact**

**“What we do for one, we do for the other” 5 of 5**

---

You’ve talked to Complainant and Respondent. Now what?

- Determine which policy and procedure applies
  - Will depend on your Title IX Policy, Student/Employee Codes of Conduct
  - May change over time as more information comes in
  - Consider Jurisdiction and the definition of Sexual Harassment
- Does the TIXC make jurisdiction/definition decisions? What does that process look like?
  - “Exit Ramps”
  - Document, Document, Document

# **TIXC: Emergency Removal**

## **34. C.F.R § 106.44(c):**

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It states “(c) *Emergency Removal*. Nothing in this part precludes a recipient from removing a respondent from the recipient’s education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal.”

# **TIXC: Emergency Removal**

## **34. C.F.R § 106.44(c):**

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Does this decision fall to the TIXC at your institution?

- Current policy and practice

New Regs require:

- Individualized safety and risk analysis
- The existence of an immediate threat to the physical health or safety of any student/individual arising from the allegations

Respondent is entitled to:

- Notice, and
  - Opportunity to be heard
- 
- Does not modify Section 504 or ADA rights
  - Can place a non-student respondent on administrative leave

# **TIXC: Signing a Formal Complaint**

## **34. C.F.R § 106.30(a)**

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“...Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party under this part or under section 106.45, and must comply with the requirements of this part, including section 106.45(b)(1)(iii).”

# **TIXC: Signing a Formal Complaint**

## **Role of the TIXC 1 of 2**

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### Considerations:

- NPRM § 106.44(b)(2) – previously required Title IX Coordinators to file a formal complaint after receiving multiple reports about the same respondent.
- This provision has been removed in the final regs – Preamble, p. 30216
- “Removing this proposed revision means that Title IX Coordinators retain discretion, but are not required, to sign formal complaints after receiving multiple reports of potential sexual harassment against the same respondent.”

# **TIXC: Signing a Formal Complaint**

## **Role of the TIXC 2 of 2**

---

When a Title IX Coordinator *does* sign a formal complaint

- Doesn't act as a complainant under § 106.45 (during the grievance process)
  - Not participating in the investigation
  - Not cross-examining witnesses on behalf of the Claimant at the hearing
  - Must remain free from conflicts of interest and bias, and must serve impartially
  - Complainant is not obligated to participate in the ensuing grievance process



# TIXC: Consolidation of Formal Complaints

## 34. C.F.R § 106.45(b)(4)

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- “A recipient may consolidate formal complaints as to allegations of sexual harassment...by more than one complainant against one or more respondents... where the allegations of sexual harassment arise **out of the same facts or circumstances.**”
  - “May” = permissive, not required
  - What about similar conduct but different facts/circumstances?

# TIXC: Informal Resolution

## 34. C.F.R § 106.45(b)(9) 1 of 8

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- “I don’t want the respondent to be punished; I just want them to realize how bad this event was for me.” Preamble, p. 30399 (Official)
- Informal Resolution is permitted but not required
  - “... 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...”

# **TIXC: Informal Resolution**

## **34. C.F.R § 106.45(b)(9) 2 of 8**

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No definition

- “unnecessary”
- “Informal resolution may encompass a broad range of conflict resolution strategies, including, but not limited to, arbitration, mediation, or restorative justice.” p. 1370  
(Unofficial)

# **TIXC: Informal Resolution**

## **34. C.F.R § 106.45(b)(9) 3 of 8**

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According to the Preamble,

- The final regs do not require any recipient to offer informal resolution and preclude a party from being required to participate. Preamble, p. 30404 (Official)
- “Recipients remain free to craft or not craft an informal resolution process to address sexual misconduct incidents.” Preamble, p. 30404 (Official)
- “Nothing in 106.45(b)(9) prohibits recipients from using restorative justice as an informal resolution process to address sexual misconduct incidents.” Preamble, p. 30406 (Official)

# **TIXC: Informal Resolution**

## **34. C.F.R § 106.45(b)(9) 4 of 8**

---

### Considerations:

- How will this affect reporting?
- Is Informal Resolution appropriate for some, all, or none of the reports at your institution?
- What role will the institution play in imposing sanctions as a result of an informal resolution?
- What if a complainant wants an admission of responsibility but doesn't want the respondent to be punished?

# **TIXC: Informal Resolution**

## **34. C.F.R § 106.45(b)(9) 5 of 8**

---

### Prohibition on Informal Resolution

- Recipients are categorically prohibited from offering or facilitating an informal resolution process to resolve allegations that an employee sexually harassed a student 106.45(b)(9)(iii)

# **TIXC: Informal Resolution**

## **34. C.F.R § 106.45(b)(9) 6 of 8**

---

### Requirements:

- Formal Complaint - § 106.45(b)(9)
- Facilitators must be free from conflicts of interest and bias
- Facilitators must be trained in accordance with 106.45(b)(1)(iii)
- Reasonably prompt time frames in accordance with 106.45(b)(1)(v)

# **TIXC: Informal Resolution**

## **34. C.F.R § 106.45(b)(9) 7 of 8**

---

Requirements (continued):

- The initial written notice of allegations sent to both parties must include information about any informal resolution processes the recipient has chosen to make available – 106.45(b)(2)(i)
- Either party has the right to withdraw from informal resolution and resume a 106.45 grievance process at any time before agreeing to a resolution



# TIXC: Informal Resolution

## 34. C.F.R § 106.45(b)(9) 8 of 8

---

Different from Supportive Measures

- Supportive Measures  $\neq$  punishment
- Informal resolution *may* result in disciplinary or punitive measures
  - What role will a complainant have in disciplinary or punitive measures?

# **TIXC: Advisors**

## **During the Investigation or Informal Resolution**

---

- Role may be limited
  - “... the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties.” 34 C.F.R § 106.45(b)(5)(iv)
- Advisor may be, but is not required to be, an attorney
- Cannot limit the choice or presence of advisor for either party in any meeting or grievance proceeding
  - Witnesses may serve as advisors for interviews and the hearing
  - How should investigators CAREFULLY address that situation in real time?

# **TIXC: Advisors**

## **During the Hearing**

---

- Role includes questioning the other party and any witnesses
  - Includes challenges to credibility
  - “Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party’s advisor of choice...” 34 C.F.R. § 106.45(b)(6)(i)
- Advisor may be, but is not required to be, an attorney
- Cannot limit the choice or presence of advisor for either party
  - Witnesses may serve as advisors for the hearing
  - How should decision-makers address this situation during the hearing? During deliberation?

# **Basic Requirements for Formal Grievance Process**

## **34. C.F.R § 106.45(b)(1) 1 of 2**

---

- Treating complainants and respondents equitably
- Remedies designed to restore or preserve equal access to the institution's education program or activity
- Objective evaluation of all relevant evidence and credibility determinations
- Presumption that respondent is not responsible for alleged conduct

# Basic Requirements for Formal Grievance Process

## 34. C.F.R § 106.45(b)(1) 2 of 2

---

- Reasonably prompt timeframes for filing and resolving appeals and informal resolution processes
- Providing a list, or describing a range, of possible disciplinary sanctions and remedies
- Describing standard of evidence to be used to determine responsibility
- Describing procedures and permissible bases for appeal
- Describing range of available supportive measures

# Facilitate Inspection/Review of Evidence

## 34. C.F.R § 106.45(b)(5)(vi)

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- **During** investigation, TIX Coordinator (or Investigator) will need to facilitate parties' opportunity to inspect and review any evidence obtained as part of the investigation
- Parties are to be provided **at least 10 days** to submit a written response to the evidence before completion of report

# Grievance Process Must Include

---

## File Review

Parties and advisors review all evidence collected for 10 days and provide written response

## Report Review

Investigative report is provided to parties (not necessarily advisor) for 10 days for review and written response.

## Hearing

Hearing occurs before a decision-maker that is not the Coordinator or the investigator.

# Providing Written Investigative Report

## 34. C.F.R § 106.45(b)(5)(vii)

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- After **completion** of investigation, TIX Coordinator (or Investigator) are responsible for providing the parties a copy of the written investigative report
- Parties are to be sent the report **at least 10 days** in advance of reaching a determination of responsibility



# Live Hearing

## 34. C.F.R § 106.45(b)(6)(ii)

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- Again, TIXC cannot be the Decision-Maker in case where they have previously served as TIXC
- TIXC will need to facilitate scheduling and completion of a live hearing

# Recordkeeping

## § 106.45(b)(10)(i)(A), (B), (D)

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- TIX Coordinator will want to develop a process for required recordkeeping, including:
  - Maintaining all investigatory and appeal records for a period of seven years
  - Collecting and publicly posting on its website **all** materials used to train TIX Team

# Prohibition Against Retaliation

## § 106.71

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- Retaliation prohibited, including intimidation, threatening, coercion, or discrimination against any individual:
  - For purpose of interfering with any right or privilege secured by Title IX
  - Because an individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing
  - Includes charges for code of conduct violations that do not involve sex discrimination/harassment but arise out of the same facts/circumstances



**Being Impartial and Avoiding Bias, Conflict of Interest, and Prejudgment of Facts**

# Impartiality and Avoiding Bias, Conflict of Interest and Prejudgment of Facts 1 of 2

---

Section 106.45 **requires** that Title IX Coordinators (and investigators, decision-makers, informal resolution officers and appeals officers)

- be free from **conflict of interest, bias,** and
- be trained **to serve impartially** and **without prejudging facts.**

(30053)

# **Impartiality and Avoiding Bias, Conflict of Interest and Prejudgment of Facts 2 of 2**

---

- We will discuss each of these individually and provide examples, but some of the factors for each overlap.
- For example, being impartial is greatly aided by not pre-judging facts.

(30249-30257; 30496)

# Impartiality

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- Be neutral
- Do not be partial to a complainant or a respondent, or complainants and respondents generally
- Do not judge: memory is fallible [and it's contrary to your neutral role] (30323)

# **Bias: Concerns raised in comments in preamble**

---

- Neutrality of paid staff in Title IX positions
- Institutional history and “cover ups”
- Tweets and public comments
- Identifying as a feminist



# Perceived v. Actual Bias

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- Both can lead to the same perception (30252)
- On appeal of decisions, the Department requires the bias “that could affect the outcome of the matter”

# How the Department tried to prevent bias

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No single-investigator model (34 C.F.R. 106.45(b)(7)(i)):

- Decision-maker (or makers if a panel) must not have been the same person who served as the Title IX Coordinator or investigator (30367)
- Separating the roles protects both parties because the decision-maker may not have improperly gleaned information from the investigation that isn't relevant that an investigator might (30370)
- The institution may consider external or internal investigator or decision-maker (30370)

# Bias: Objective Rules and Discretion 1 of 2

---

“[R]ecipients *should* have objective rules for determining when an adjudicator (or Title IX Coordinator, investigator, or person who facilitates an informal resolution) is biased, and the Department leaves recipients discretion to decide how best to implement the prohibition on conflicts of interest and bias...” (30250)

# Bias: Objective Rules and Discretion 2 of 2

---

- **Discretionary**: Recipients have the discretion to have a process to raise bias during the investigation.
- **Mandatory**: Basis for appeal of decision-maker's determination per 34 C.F.R. 106.45(b)(8)(i)(C).

# **Conflict of Interest: Concerns raised in comments in preamble**

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- Financial and reputational interests of Title IX employee aligns with institution
- Past advocacy for a survivor's group
- Past advocacy for a respondent's group

# Preamble Discussion on Bias and Conflict of Interest 1 of 3

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- Final regulations “leave recipients flexibility to use their own employees, or to outsource Title IX investigation and adjudication functions, and the Department encourages recipients to pursue alternatives to the inherent difficulties that arise when a recipient’s own employees are expected to perform functions free from conflicts of interest and bias.” (30251)

# Preamble Discussion on Bias and Conflict of Interest 2 of 3

---

- No *per se* prohibited conflicts of interest in using employees or administrative staff
  - including supervisory hierarchies (but see portion about decision-makers and Title IX Coordinator as supervisor)
- No *per se* violations for conflict of interest or bias for professional experiences or affiliations of decision-makers and other roles in the grievance process

(30352-30353)

# Preamble Discussion on Bias and Conflict of Interest 3 of 3

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- Example: it is **not** a *per se* bias or conflict of interest to hire professionals with histories of working in the field of sexual violence (30252)
- Cautions against using generalizations to identify bias and conflict of interest and instead **recommends** using a **reasonable-person test** to determine whether bias exists.



# Example of Unreasonable Conclusion that Bias Exists

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- “[F]or example, **assuming** that all self-professed **feminists**, or self-described **survivors**, are biased against men, or that a **male** is incapable of being sensitive to women, or that prior work as a **victim advocate**, or as a **defense attorney**, renders the person biased for or against complainants or respondents” is **unreasonable** (30252)

# Training, Bias, and Past Professional Experience

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This required training (that you are sitting in right now) can help protect against disqualifying someone with prior professional experience

(30252)

# Department: Review of Outcomes Alone Does Not Show Bias

---

- Cautioned parties and recipients from concluding bias or possible bias “based solely on the outcomes of grievance processes decided under the final regulations.”
- Explained: the “mere fact that a certain number of outcomes result in determinations of responsibility, or non-responsibility, does not necessarily indicate bias.” (30252)

# Examples of Bias

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- An investigator used to supervise one of the parties;
- Information “gleaned” by the investigator is shared with the decision-maker outside the investigation report (in meetings to discuss pending cases, in passing while at work, etc.)

# Avoiding Prejudgment of Facts at Issue

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A good way to ensure impartiality and avoid bias:

- Keep an open mind and actively listen
- Each case is unique and different

# **Hypotheticals**

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Thinking about how to move forward with some issues of impartiality, conflict of interest and bias (perceived or actual).

# **Conflict of Interest and Bias Hypotheticals**

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Scenario for the next several hypotheticals:

You are the Title IX Coordinator and have just received a complaint. An initial review did not identify you or anyone else on your team as having any conflicts of interest. Assess the following situations based on additional information you receive.

# Hypothetical 1

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You review the report and realize that the name of the Complainant seems familiar to you from a past and unrelated investigation. You don't have any real memory of the case, but the Complainant has requested a meeting with you to discuss supportive measures.

What should you do?



# Hypothetical 2

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You have three Investigators in your office that have worked together for years and often “vent” to one another about the pressures of working in Title IX and the things that frustrate them about their cases. They also encourage one another and help troubleshoot best practices for particular cases.

Your institution does not have the budget to hire additional staff or outsource the new Title IX roles required by the final Title IX regulations. You want to use your current staff of investigators on a rotating basis, in which they sometimes serve as an informal resolution facilitator or decision-maker for cases they don't directly investigate.

Is this allowed?

# Hypothetical 3

---

After an initial review of a formal complaint, you assigned Sarah, one of your investigators to the case. You are familiar with Sarah's background as a prosecutor, but she has attended all required TIX and Clery trainings and has served as an impartial investigator for years. After you assign the case, the Respondent's representative contacts you and asks that another investigator be assigned because Sarah's background as a prosecutor makes her biased against Respondents.

What should you do?

# Hypothetical 4

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Your institution's student conduct office, Title IX office, and Greek life office meet weekly to discuss student issues and potential issues. In these meetings, you discuss specific students' names for continuity of care and to ensure everyone is on the same page. As a result, you have heard other employees discuss the parties in the case handed to you and some of it seemed to indicate that the Complainant may be dramatic.

What should you do?

# Hypothetical 5

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You assign Jessica to serve as a Decision-Maker for a particular case. Jessica has served in this role before and has issued five decisions in other cases. A few days later, Jessica contacts you to let you know that one of the witnesses in the *current* case testified in a *prior* case. In the prior case, this witness gave inconsistent statements and was often refuted by contradictory documentary evidence. While the prior decision was polite about it, Jessica ultimately found that this person's testimony was not credible. Jessica believes she can set that aside and be impartial in the new case, but wanted to alert you to the issue.

What should you do?

# Intersection of Employee Issues with Title VII 1 of 2

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- USDOE states Title IX and Title VII have “no inherent conflict” (i.e., employees have same rights as students), **but...**
- Title VII “severe **or** pervasive” vs. Title IX “severe, pervasive, **and** objectively offensive”
- Title VII doesn’t require 10 days to review evidence and 10 days to respond to report
- And what about student employees?

# Intersection of Employee Issues with Title VII 2 of 2

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- USDOE states that complaint and/or disciplinary measures in CBAs or employee handbooks may need to be revisited/renegotiated to comply with Title IX
- Board Policy may also need to be revisited

# Checklist for the Title IX Coordinator

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- Update policies/handbooks/etc.
- Distribute contact info
- Revise/adopt grievance process
- Identify team & provide training
- Coordinate response to reports and formal complaints
- Establish/facilitate informal resolution process
- Determine process for emergency removals
- Address retaliation
- Develop record-keeping protocols
- Post training materials



Questions?



# Upcoming Trainings

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Level 2 (<https://www.bricker.com/events/title-ix-regulations-training-higher-education-57500>):

- TIX Investigator February 7-8, 2022
- TIX Decision-Maker February 10-11, 2022
- TIX Appeals Officer February 21-22, 2022

Level 3 (<https://www.bricker.com/events/advanced-title-ix-regulations-training-level-3-higher-education-64900>)

- TIX Advanced Coordinator Practicum March 3-4, 2022
- TIX Advanced Investigator Practicum March 17-18, 2022
- TIX Advanced Decision-Maker Practicum March 31-April 1

# Follow us!

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Follow us on Twitter:

@BrickerHigherEd

@MCHigherEd (Melissa Carleton)

@JoshDNolan

@TheErinButcher

And...our NIL team at @BrickerLawNIL



# Level 3 Title IX Coordinator Training



**Bricker & Eckler**  
ATTORNEYS AT LAW

# Presenters - Jessica



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# Disclaimers

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## *We can't help ourselves. We're lawyers.*

- We are not giving you legal advice. Consult with your legal counsel regarding how best to address a specific situation.
- This training does not cover all of the basic subjects required for TIX Coordinators, institution-specific grievance procedures, policies, or technology.
- Use the chat function to ask general questions and hypotheticals.
- This training is not being recorded, however we will provide you with a packet of the training materials to post on your websites for Title IX compliance.

# Presentation Rules

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- Questions are encouraged!
- “For the sake of argument...”
- Be aware of your own responses and experiences
- Follow-up with someone if you have questions and concerns
- Take breaks as needed

# Posting these Training Materials?



**YES – Post away!**

- The “recipient” is required by §106.45(b)(10)(i)(D) to post materials used to train Title IX personnel on its website
- We know this and will make this packet available to you electronically to post
- Watch for the “Thank you for attending” email and look for a link to download the slides



# Training Requirements for All Title IX Team Members



Remember, this is an advanced training...

- Definition of sexual harassment
  - Scope of the institution's program or activity
  - How to conduct an investigation and grievance process, including hearings, appeals, and informal resolution processes, as applicable, under YOUR policy
- How to serve impartially
    - Avoiding prejudgment of the facts
    - Conflicts of interest
    - Bias (use reasonable person/ "common sense" approach)
    - Not relying on sex stereotypes



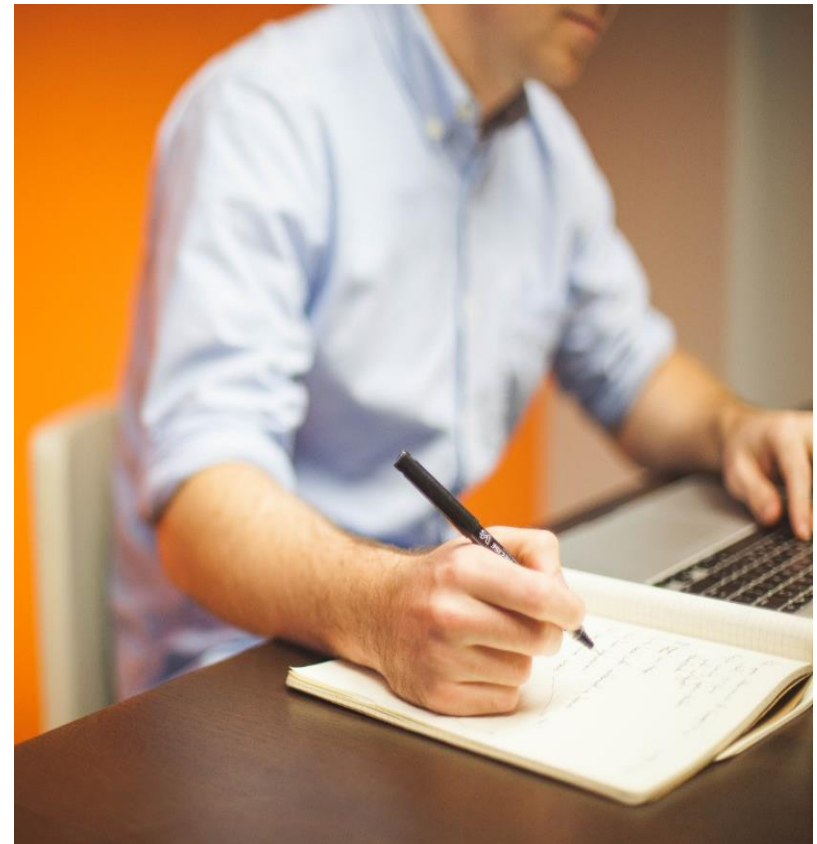
# Additional Training Requirements for Decision-Makers



- Technology to be used at a live hearing
- Issues of relevance of questions and evidence
  - Including rape shield provisions in §106.45(b)(6)

# Additional Training Requirements for Investigators

- Issues of relevance to create an investigative report that fairly summarizes relevant evidence



# Aspirational Agenda

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- 1:00-1:45 Top Ten Issues for TIXCs that aren't the “new” regs
- 1:45-2:45 Title IX updates and process potpourri
- 2:45-3:15 Preparation for Practice Session
- 3:15-3:30 Break
- 3:30-4:15 Practice session
- 4:15-5:00 Debrief and Q&A

# Expectations of the TIXC

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## Primary responsibility:

- Coordinate the recipient's efforts to comply with Title IX responsibilities

## Specific expectations during the process:

- Implement a compliant process
- Respond when there's actual knowledge
- Contact the Complainant re: Supportive Measures
- Understand the process from report through resolution in order to shepherd the process and coordinate efforts
- Serve Impartially and without Bias

# Areas of Expertise of the TIXC



New definitions, new processes, new responsibilities

- Training
  - “Actual Notice”
  - Jurisdiction
  - Mandatory and Discretionary Dismissal
  - Supportive Measures
- Emergency Removal
  - Formal Complaints
  - Informal Resolution
  - Advisors
  - Recordkeeping
  - Title VII

# Top Ten Issues for TIXCs



## That *AREN'T* the New Title IX Regulations

- Prevention Programming
  - Clery/VAWA
  - Staffing
  - Office Structure
  - Mandatory report v. mandatory support
- Working to correct known misperceptions about Title IX
  - Policy review and updates
  - Anticipating and addressing secondary effects on your campus
  - Crisis management practices
  - Working with stakeholders on your campus

# Prevention Programming

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## Prevention Education

- Electronic versus in person
  - Electronic
    - SUNY Spark, <https://system.suny.edu/sparc/>
    - ODHE resources, <https://www.ohiohighered.org/cc>
  - In Person - Staffing model, connection points

Education as outcome of informal resolution

Use Clery/VAWA education language as a core, but consider expanding

Where is conduct that now falls outside of Title IX sexual harassment going?

- What happens when jurisdiction-based TIX dismissals occur for conduct that could constitute a Clery Crime (domestic violence, dating violence, sexual assault, or stalking)?
- Moving to separate office?
  - Make sure they have required Clery/VAWA training

Are you a Campus Security Authority under Clery? How is mandatory reporting handled?



# Staffing

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Do you have the people you need?

- Volunteers and voluntolds
- Consider grant opportunities for special projects (<https://www.justice.gov/ovw/grant-programs>)
- Internal versus external
- Qualifications

Are you taking care of your people?

# TIX Office Structure

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## Reporting and organization structure

- Who should the TIXC report to? (authority, knowledge)
- Should prevention education be part of the TIX office? (continuity, independence)
- Deputy TIXCs

# Mandatory Reporting/Supporting



## Mandatory Reporting versus Mandatory Supporting

- Mandatory reporting (NOTE: OH Felony reporting requirement)
  - Risks of not doing it (liability, enforcement actions)
  - Risks of doing it (loss of trust, re-traumatization)
- Mandatory supporting
  - Risks of not doing it (cold hand, re-traumatization)
  - Risks of doing it (training, discretion)

**Do both**

# Correcting Misperceptions



- Perception that because students know what is going on, all administrators know what is going on
- Perception that the administration is using the TIX process to target/protect faculty and staff
- How do you dispel myths about TIX?
  - Not covering up complaints
  - If we don't have information, we can't use it
  - We listen, we care – Just because we don't talk about it, doesn't mean we are not doing anything
  - You don't have to participate in an investigation

# Policy Review and Updates

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When and how do I update our policy?

- Wait for new regs?
- Breaks/Summer
- Before our BOT meeting?

What do I need to know in order to update?

- Surveys
- Stakeholder meetings
- Legal Advice

Update committee

# Secondary Impact

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- Support for those who are supporting
- Support for witnesses - not getting direct supportive measures that parties are entitled to receive
- Support for reporters/employees
- Supporting change:
  - Ally with advocates

# Crisis Management

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Who will you go to first?

- Police, president, PR/spokesperson, counsel, clergy...?

Next?

- Department, development...?

Talk to the Media?

- Media training
- Protecting the institution/yourself

Weathering the storm

De-briefing and preparing for the next storm

# Identifying Stakeholders – Obvious

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## Identifying Stakeholders

- Obvious
  - Police, public safety, etc.
  - Human resources
  - Mandatory reporters
  - Student affairs/conduct
  - Residence hall staff



# Identifying Stakeholders – Not-so-obvious

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## Identifying Stakeholders

- Not-so-obvious
  - Student/faculty govt.
  - Deans/chairs/directors
  - Advocacy/support services
  - Institution's health services
  - Greek councils
  - Local attorneys/Institution's counsel
  - Athletics

# Stakeholders – Police, public safety, etc.

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## Police, public safety, etc.

- How and when will you share information?
- Mode of communication, notice
- Warrants/subpoenas
- Timely warnings
- How/when matters move to prosecutor
- Collaboration on interviews?
- Enforcement of no contact

# Stakeholders – Human Resources

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## Human resources

- How and when will you share information?
- Mode of communication, notice
- Administrative leave decisions
- Sanctioning decisions
- Non-TIX problem conduct

# Stakeholders – Mandatory Reporters

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## Mandatory reporters

- How and when will you share information?
- Mode of communication, notice
- Training
- Compliant humanity – report AND support

# Stakeholders – Student affairs/conduct

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## Student affairs/conduct

- How and when will you share information?
- Mode of communication, notice
- Hand-off procedure
- Clery training
- No contact orders

# Stakeholders – Residence hall staff

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## Residence hall staff

- How and when will you share information?
- Mode of communication, notice
- Hand-off procedure
- Supportive measures implementation, including no contact and student moves

# Stakeholders – Student/faculty govt.

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## Student/faculty govt.

- TIX initiatives
- Opportunities for partnership
- Familiarity and trust
- Transparency

# Stakeholders – Deans/chairs/directors

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## Deans/chairs/directors

- How and when will you share information?
- Mode of communication, notice
- Hand-off procedure
- Defining retaliation/interference
- Assistance with supportive measures



# Stakeholders – Advocacy/support services

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## Advocacy/support services

- Opportunities for collaboration during investigation
- Limits and boundaries
- Referral process
- Process feedback

# Stakeholders – Health services

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## Health services

- Coordination and consistency of messaging
- Coordination of campus/community services
- Process feedback

# Stakeholders – Greek councils

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## Greek councils

- TIX initiatives
- Opportunities for partnership
- Familiarity and trust
- Transparency
- Process feedback

# Stakeholders – Local attorneys/School Counsel

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## Local attorneys

- Instruction on processes
- Process feedback

## Institution's Counsel

- Instruction on processes
- Support re “what ifs”
- Process feedback

# Stakeholders – Athletics

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## Athletics

- TIX initiatives
- Opportunities for partnership
- Familiarity and trust
- Transparency
- Process feedback
- Handling supportive/interim measures



**What's  
new?**

**Recent Title IX Updates**

# Summer 2021 Title IX Updates



- July 20, 2021 Q & A on the Title IX Regulations on Sexual Harassment
  - <https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>
- *VRLC v. Cardona*
  - Decisions issued on July 28, 2021 and Aug. 10, 2021
- August 24, 2021 Letter to Students, Educators, and other Stakeholders re: VLRC v. Cardona
  - [www2.ed.gov/about/offices/list/ocr/docs/202108-titleix-VRLC.pdf](http://www2.ed.gov/about/offices/list/ocr/docs/202108-titleix-VRLC.pdf)

# Q&A #13 – Appropriate Standard

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Question 13:

What is the appropriate standard for evaluating alleged sexual harassment that occurred before the 2020 amendments took effect?



# Q.13 Background



- August 5, 2020 Blog Post – “The Rule does not apply to schools’ responses to sexual harassment that allegedly occurred prior to August 14, 2020. The Department will only enforce the Rule as to sexual harassment that allegedly occurred on or after August 14, 2020. With respect to sexual harassment that allegedly occurred prior to August 14, 2020, OCR will judge the school’s Title IX compliance against the Title IX statute and the Title IX regulations in place at the time that the alleged sexual harassment occurred.”

# Doe v. Rensselaer Polytechnic

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- 2020 WL 6118492 (Oct. 16, 2020)
- Not retroactive enforcement to require regs to be used for hearings occurring after August 14, 2020
- Blog post is not an “authoritative statement” entitled to deference
- Court not willing to let disciplinary proceedings continue unless parties agree to use new procedure

# Back to Q.13 (9 mos. after *RPA*)



- “[A] school must follow the requirements of the Title IX statute and the regulations that were in place at the time of the alleged incident.”
- 2020 amendments do not apply to SH occurring before August 14, 2020, even where the complaint is filed after that date
- Our question: is this meant to include *procedures* as well as *substance*?

# Q&A #24 – Formal Complaints



## Question 24:

If a complainant has not filed a formal complaint and is not participating in or attempting to participate in the school's education program or activity, may the school's Title IX Coordinator file a formal complaint?

- YES – it may be a violation if the Title IX Coordinator *does not do so*
- Example in the Answer:
  - Actual knowledge of a pattern of alleged SH by a perpetrator in a position of authority

# Q&A – “Put simply...”

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Per the most recent guidance:

“Put simply, there are circumstances when a Title IX Coordinator may need to sign a formal complaint that obligates the school to initiate an investigation regardless of the complainant’s relationship with the school or interest in participating in the Title IX grievance process.”

# Q&A – Support Persons? (1 of 2)



In previous trainings...

- Advised that support persons were not permitted in hearings based on Preamble
- “The sensitivity and high stakes of a Title IX sexual harassment grievance process weigh in favor of protecting the confidentiality of the identity and parties to the extent feasible (unless otherwise required by law), and the Department thus declines to authorize that parties may be accompanied to a live hearing by persons other than the parties’ advisors, or other persons for reasons ‘required by law’...” (Preamble, p. 30339)

# Q&A – Support Persons? (2 of 2)



## Example Language in July 20, 2021 Q&A (p. 46)

- Example Policy 2: The decision-maker will discuss measures available to protect the well-being of parties and witnesses at the hearing. These may include, for example, use of lived names and pronouns during the hearing, including names appearing on a screen; **a party's right to have their support person available to them at all times during the hearing (in addition to their advisor)**; and a hearing participant's ability to request a break during the hearing, except when a question is pending. (Emphasis added).

## Submission to Cross-Examination

- Aug. 2020 regs prohibited consideration of statements from parties/witnesses if not subjected to cross-examination (34 CFR 106.45(b)(6)(i))
- Sept. 4, 2020 Q&A clarified that failure to answer one question was a failure to submit to cross-examination



## Arbitrary & Capricious

- Mass. Federal decision vacated regulation requiring submission to cross-examination for consideration of statements (*VRLC v. Cardona*, June 28, 2021)
- August 24, 2021 letter providing guidance that, pursuant to *VRLC* decision, OCR will “immediately cease enforcement” of this specific provision in 34 CFR 106.45(b)(b)(i)
  - \*\*\*Work with legal counsel to assess risk\*\*\*
    - Pending cases
    - Breach of contract concerns
- Texas has been permitted to appeal this decision, along with several individuals who have an interest in the outcome



## **Process Potpourri for Title IX Coordinators**

# Jurisdiction & Mandatory Dismissal (1 of 2)



## Dismissal of a formal complaint per §106.45(b)(3)(i)

- “The recipient **must** investigate the allegations in a formal complaint.
- **[BUT]** If the conduct alleged in the formal complaint:
  - **would not constitute sexual harassment** as defined in §106.30 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, ...**

# Jurisdiction & Mandatory Dismissal (2 of 2)



(Cont.)... then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part;

- such a dismissal does not preclude action under another provision of the recipient's code of conduct.”
- **When and Where are your exit ramps?**

# Discretionary Dismissal



## Dismissal of a formal complaint per §106.45(b)(3)(ii)

- “The recipient **may** dismiss the formal complaint or any allegations therein, if at the time during the investigation or hearing:
  - A complainant notifies the TIXC in writing that **the complainant would like to withdraw the formal complaint** or any allegations therein;
  - The **respondent is no longer enrolled or employed** by the recipient; or
  - **Specific circumstances** prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

# Dismissal Considerations

(1 of 2)



- Procedural posture
  - Has a formal complaint been filed?
  - If not, how will you document the dismissal and/or referral?
- Reaction of the parties
  - Has the issue of dismissal been previewed?
  - Do you need to meet to explain the decision?

# Dismissal Considerations

(2 of 2)



- Documentation of the dismissal
  - Internal or shared with the parties?
    - Depends on FC and your process
  - Meeting with the parties to explain the dismissal
- Consistency with prior dismissals
  - Substantively and Procedurally
  - Watch for this with discretionary dismissal

# Dismissal Notice & Timing



34 CFR § 106.45(b)(3)(iii)

- Must promptly send written **notice** of dismissal/**reasons** simultaneously to the parties
- Jurisdictional issues can arise **at any time**, even during the investigation



# “Show Your Work”

(1 of 2)



- Will talk more about this during the Writing Workshop
- Places in the new regs that require a written rationale:
  - Supportive measures
  - Dismissal of a Formal Complaint
  - Determination regarding responsibility
  - Appeal decision

## Additional provisions that require documentation of decision-making:

- Demonstrating a lack of deliberate indifference generally
  - 34 CFR 106.44(a) *General response to sexual harassment*
  
- The “result” of an institutional disciplinary proceeding under Clery
  - 34 CFR § 668.46(k)(2)(v) and (k)(3)(iii)
  - “Result means any initial, interim, and final decision by any official or entity authorized to resolve disciplinary matters within the institution... the result must include the rationale for the result and the sanctions.”

# “Show Your Work” – Supportive Measures

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Must show the basis for *not* providing certain supportive measures

- 34 CFR § 106.45(b)(10)(D)(ii)
- “must document the reasons why such a response was not clearly unreasonable in light of known circumstances”

# “Show Your Work” – Dismissal

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## Dismissal of a Formal Complaint

- 34 CFR § 106.45(b)(3)(iii)
- “must promptly send written notice of the dismissal and reason(s) therefore simultaneously to the parties”

# “Show Your Work” – Decision

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## Determination Regarding Responsibility

- 34 CFR § 106.45(b)(7)(ii)(A)-(E)
- 5 topics required in order to explain the decision, including:
  - Findings of facts
  - “A statement of, and rationale for, the result as to each allegation...”

# “Show Your Work” – Appeal

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## Determination Regarding Responsibility

- 34 CFR § 106.45(b)(8)(iii)(E)
- “Issue a written decision describing the result of the appeal and the rationale for the result...”

# “Show Your Work” – Informal Resolution

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No “result” or “finding” to be explained, but...

- Best practice to document the resolution reached
- And the steps that got you there
  - Adequate notice
  - Voluntary written consent
  - Does not involve allegations that an employee sexually harassed a student

# Other requirements to “Show Your Work”

---



- Additional provisions that require documentation of decision-making:
  - Demonstrating a lack of deliberate indifference generally
    - 34 CFR 106.44(a) *General response to sexual harassment*
  - The “result” of an institutional disciplinary proceeding under Clery

Disclaimer: This is not a discussion of record-keeping, which is much broader; this discussion is focused on documenting a thought process for a particular decision



practice...  
practice...  
practice...

# Preparation for Practice Session



**Bricker & Eckler**  
ATTORNEYS AT LAW

# Tessa and Michael

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- You've received an email from Tessa
  - Formal Complaint?
  - See July 20, 2021 Q&A #22
- You schedule an intake meeting and pull out your trusty intake checklist and process flowchart

# Tessa Intake Interview

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- Goals for your intake interview?
  - Supportive Measures
  - \*\*Explanation of the Process (including jurisdiction/referral)
  - \*\*Details about the assault?
- Anyone want to practice?
  - I will play the role of Tessa

LET'S  
DO THIS

**Practice Session**



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# Debrief and Q&A



**Bricker & Eckler**  
ATTORNEYS AT LAW

# Supportive Measures

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- What did Tessa tell us?
  - Counseling
  - Housing
  - Academics
  - Work

# Process Discussion

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- What does this look like for you?
  - Taking points/checklist
  - Flowchart
  - Discussion re: dismissal **(if applicable)**
    - Determine whether this belongs in another process or office
    - If so, meet with Tessa again to discuss the referral
      - Remember, if there's a formal complaint, there must be notice of dismissal and the reason

# What Happened?

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Some details are needed to determine jurisdiction:

- Who
- What
- Where
- When
- Why
- Same level of detail as an investigative interview?
  - What if you are the TIXC *and* the investigator
  - If not, is it better to get fewer details?
    - Meet the person where they are



# Where to Find Additional Information

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Bricker's Title IX Resource Center Website:  
[www.bricker.com/titleix](http://www.bricker.com/titleix)

You can also find us on **Twitter** at  
[@BrickerHigherEd](https://twitter.com/BrickerHigherEd)



Questions?



**Level 3  
Title IX Coordinator  
Writing Workshop**



# Disclaimers



**We can't help ourselves. We're lawyers.**

- We are not giving you legal advice. Consult with your legal counsel regarding how best to address a specific situation.
- Use the chat function to ask general questions and hypotheticals.
- This training is not being recorded, however we will provide you with a packet of the training materials to post on your websites for Title IX compliance.

# Presentation Rules



**Again... we can't help ourselves. We're still lawyers.**

- Questions are encouraged!
- “For the sake of argument...”
- Be aware of your own responses and experiences
- Follow-up with someone if you have questions and concerns
- Take breaks as needed

# Can We Post these Materials?



## 34 C.F.R. §106.45(b)(10)(i)(D)

- Yes!
- The “recipient” is required by 34 C.F.R. §106.45(b)(10)(i)(D) to post materials to train Title IX personnel on its website
- We know this and will make this packet available to your institution electronically to post.
- Watch for the “Thank you for attending” email and look for a link to download the slides.

## Documentation, Investigation Reports, Decisions, & Appeals

- Recordkeeping for Supportive Measures, Dismissals, Referrals
  - Coordinating the drafting of investigation reports, decisions, informal resolution documentation, and appeals
  - Structure of reports & decisions
- Common Mistakes that Prevent Clarity in Writing
  - Best Practices for Writing Neutral Decisions on Sensitive Subjects

# Recordkeeping Basics



## 34 C.F.R. §106.45(b)(10)

- Develop a process for required recordkeeping, including:
  - Maintaining all investigatory, informal resolution, and appeal records for a period of **seven** years
  - Collecting and publicly posting all materials used to train TIX team



# Documenting Supportive Measures

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- Document all aspects
  - The offer of supportive measures (have a list that you use with everyone)
  - Discussion of specific measures
  - Basis for *not* providing a certain supportive measures to a party
- Consider sharing this documentation with the party
  - Email
  - Memo or checklist

# Supportive Measures Reminders



- What we do for one, we do for the other
  - Unless there's a reason not to, in which case – write that reason down
  - Be neutral and unbiased
  - If you are uncomfortable documenting the reason for the distinction – consider whether the rationale is truly neutral and unbiased
- Remember to continue documenting throughout the process
  - Discussions re: supportive measures may come up on multiple occasions and lead to different results

# Documenting Dismissals & Referrals



- Exit Ramps
  - Who
  - What
  - Where
  - When
  - Why
- Consider using **IRAC** style – Issue, Rule, Application, Conclusion
  - We'll look at examples in a few slides

# Mandatory Dismissal Refresher



## 36 CFR 106.45(b)(3)(i)

- “Dismissal” from Title IX does not preclude action under another provision of the recipient’s code of conduct, employee handbook, etc.
- Recipient “must promptly send written notice of the dismissal **and reason(s) therefor** simultaneously to the parties.”
  - Show your work

# Permissive Dismissal Refresher



## 36 CFR 106.45(b)(ii)

May dismiss if:

- (1) Complainant asks in writing to withdraw the Formal Complaint
- (2) Respondent is no longer enrolled or employed by the recipient
- (3) “Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the Formal Complaint or allegations therein”

# Written Notice of Dismissal

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- Explain the reasons for dismissal/referral in a readable and understandable way
- Explain the issue, the rules that apply for purposes of dismissal, your analysis applying the facts to the rules, and draw your conclusion
  - IRAC

# Rationale for Dismissal



## “Show Your Work”

### Application of Policy to Allegations

- IRAC or CRAC
  - Issue/Conclusion
  - Rule
  - Application
  - Conclusion
- “Rule” = your policy provisions
- “Application” = your explanation of whether the findings of fact amount to a policy violation
- Conclusion = the result of your analysis for each allegations

# IRAC Example #1



**Student A reported that her ex-girlfriend of three years called her disparaging names during the relationship and tried to control her interactions with others.**

- Issue:** Does the conduct alleged constitute Title IX Sexual Harassment under your Policy?
- Rule:** [Insert definitions from your policy that might address the alleged conduct]
- Application:** Explain whether the information above means that Student A has alleged conduct that meets your Policy definitions.
- Conclusion:** “For these reasons, the conduct reported by Student A does not meet the definition of Sexual Harassment or Dating Violence under the Title IX Policy. However, this matter is being referred to the Office of Student Affairs for review of potential violations of the Mutual Respect Policy.”



# IRAC Example #2

Complainant reported that Respondent, a fellow student who had asked her out on several occasions despite her explanation that she is not interested romantically, inappropriately touched her arm while the two were talking at an off-campus party last weekend. More specifically, Complainant reported that Respondent asked her to find a quiet spot where they could be alone, then put his hand on her shoulder and gradually moved it down the length of her arm in a way that “gave [her] the creeps.”

- Issue:** Does the conduct alleged constitute Title IX Sexual Harassment under your Policy?
- Rule:** [Insert definitions from your policy that might address the alleged conduct]
- Application:** Explain whether the information above means that Complainant has alleged conduct that meets your Policy definitions.
- Conclusion:** “For these reasons, the conduct reported by Complainant does not meet the definition of Sexual Harassment or Fondling under the Title IX Policy. However, this matter is being referred to the Office of Student Affairs for review of potential violations of the Mutual Respect Policy.”

# IRAC in Other Settings

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- Investigation reports
  - But remember – no conclusions as to the allegations
- Title IX Hearing Decisions
- Appeal Decisions
- Informal Resolution Documentation
  - Ex: Rationale for terminating an Informal Resolution

# Coordinating the Writing of Your Team

(1 of 2)



- Before
  - Templates, training, Q&A re: expectations
- During
  - Be available to assist with clarity, form, procedure
  - Be careful not to take over the work that's been delegated to others under your Policy or by the Regs
- After
  - Review to ensure readability, consistency, neutrality
  - Consult with GC when necessary

# Coordinating the Writing of Your Team

(2 of 2)



- Remember, you may have been separated from a writing project for a reason
  - You can't be the decision-maker, appeals officer, or informal resolution officer
    - If you aren't the investigator – don't write the investigation report
- Don't substitute your reasoning for others on your team
- Don't let your dealings with the parties affect your review of the team's work
  - Ex: Demands for supportive measures, experiences with the parties' legal counsel
  - Make sure the process was followed and documented

# Coordinating the Writing of Your Team - Investigators

(1 of 2)



- Does the report make sense?
- Does the report include enough detail for someone unfamiliar with your campus or the case to understand what is being said?
- Does the report comply with your Policy and with the Regs?
  - Ex: Was the evidence shared with the parties before the final report?
  - Ex: Were all the parties given an equal opportunity to present fact and expert witnesses, and other inculpatory and exculpatory evidence?

# Coordinating the Writing of Your Team - Investigators

(2 of 2)



- Does the report accurately describe **the information gathered** and the **process** of gathering it?
- Is the report neutral in tone? Equal opportunities for both parties?

# Coordinating the Writing of Your Team – Decision-Makers

(1 of 2)



- Does the decision make sense?
- Does the decision include enough detail for someone unfamiliar with your campus or the case to understand what is being said?
- Does the report comply with your Policy and with the Regs?
  - See next slide - 34 C.F.R. 106.45(b)(7)(ii)

# Coordinating the Writing of Your Team – Decision-Makers

(2 of 2)



- Does the decision accurately describe the process leading up to the hearing?
- Did the Decision-Maker “show their work”?
- Is the decision neutral in tone?



# Decision Checklist



## 34 C.F.R. 106.45(b)(7)(ii)(A)-(E)

- **Allegations**
- **Procedural Steps**
- **Findings of Fact**
- **Application of the Policy to the Facts**
- **A statement of, and rationale for, the result as to each allegation:**
  - a determination regarding responsibility,
  - any **disciplinary sanctions** the recipient imposes on the respondent, and
  - whether **remedies** designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant;
- **Appeal**

# Coordinating the Writing of Your Team – Appeals Officers (1 of 2)



- Does the appeal decision make sense?
- Does the appeal decision include enough detail for someone unfamiliar with your campus or the case to understand what is being said?
- Does the report comply with your Policy and with the Regs?
  - Remember the bases for appeal included in the Regs
  - Are there others in your Policy?

# Coordinating the Writing of Your Team – Appeals Officers (2 of 2)

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- Does the appeal decision accurately describe the process leading up to the hearing?
- Did the Appeals Officer “show their work”?
- Is the appeal decision neutral in tone?

# Coordinating the Writing of Your Team – Informal Resolution Officer



- Are the agreed-upon terms of the Informal Resolution in a written agreement?
  - Important if there are disputes later
  - Important if OCR reviews the matter
- Does the agreement make sense? Are the terms realistic?
- Does the agreement (or other documentation) describe the process that the parties to the resolution?
  - Specifically, does it explain that the Informal Resolution process was used instead of a formal process after the parties gave voluntary written consent to the process?

# “Storytelling”\*\*

## Best Practices for Investigators and Decision-Makers

- Each case includes at least TWO stories, maybe more
- Set the scene visually
- Be clear as to the source of information. Compare:
  - “Bob stated this happened.”
  - “This happened.”
- Make sure it is readable
  - Could someone unfamiliar with the incident pick up the decision and understand what happened?

# Story One of (at least) Two



## The Underlying Case

Each case includes at least TWO stories in one:

(1) The facts of the underlying case

- On August 25, 2020, Complainant and Respondent attended a party together at Thompson Point Residence Hall
- Complainant reports A, B, and C
- Respondent reports X, Y, and Z

# Story Two of (at least) Two



## The Investigation of the Underlying Case

Each case includes at least TWO stories in one:

(2) The process of the underlying case

- On August 30, 2020, Complainant filed a formal complaint
- On September 5, 2020, Complainant spoke with Investigator
- On December 10, 2020, Complainant shared the Investigation Report with Witnesses 1, 2, and 3

# Different Ways to Tell These Stories



## Structural Considerations

- Template
- Typical practice for your institution
- Remember the required components
- Common structural tools
  - Chronology
  - Subject Matter
  - IRAC or CRAC



# Where to Begin?



## Structuring Your Investigation Reports and Decisions

### Introduction

- Should preview both stories
  - How did the underlying story get to the Title IX Office?
  - What about the underlying story was reported?
  - What are the **allegations**?
    - Remember to use the names of violations as they existed when the conduct is reported to have occurred
    - Same policy for definitions and procedure? Or a split?

# Structuring Your Facts



## Remember – Suggestions Only

- Use the structure that works for your institution
- Use the structure that works for the particular case
  - Your structure may change depending on the case
  - Think about the following:
    - Chronology
    - When does synthesizing facts help the reader?
    - When does separating facts help the reader?
    - Where does hearing testimony fit?

# Synthesis 101

## Look for opportunities to logically combine related facts

- Undisputed facts at the beginning
  - May give a framework without creating repetition
- Disputed facts
  - Facts may be related by:
    - Timing
    - Source
    - Topic

# Synthesis Example #1 (Decision)



Logically combine related facts to tell a story

## Pre-Gaming at Apartment B

Complainant and Witnesses A, B, and C, reported that they each took 3 shots of vodka when they arrived at Apartment B. Report, pp. 3, 6-7. This was largely consistent with their hearing testimony, except for Witness C who said they misspoke during their Title IX interview. Hearing Transcript, p. 4. At the hearing, Witness C testified that they only took one shot of vodka at the party. Hearing Transcript, p. 4. Later in the evening, approximately two hours after Complainant and Witnesses A, B, and C arrived and took vodka shots, Respondent arrived at Apartment B with Witness D. During his Title IX interview and at the hearing, Respondent reported that he did not take any shots of vodka and had a clear memory of the night. Report, p. 4; Hearing Transcript, p. 6. Respondent also reported in his interview and at the hearing that he did not observe Complainant take any shots of vodka that night, did not see Complainant stumbling when she walked around the apartment, and did not hear Complainant slur her speech at any time. Report, p. 4; Hearing Transcript, p. 6.

# Synthesis Example #1 – Takeaways



Can you apply these takeaways in your cases?

Several things worth noting in this example:

- The information is presented under a topic heading
  - "Pre-Gaming at Apartment B"
- Information comes from different people and is blended together
  - Parties and witnesses
- Information comes from different documents and is blended together
  - The Investigation Report and the Hearing Transcript

# Synthesis Example #1 – Takeaways (cont).



## More takeaways

Several things worth noting in this example:

- Discrepancies between the investigation and hearing testimony are noted
  - Witness C
- Transitions to demonstrate shifts in time or topic
  - "Later in the evening, approximately two hours after Complainant and Witnesses A, B, and C arrived and took vodka shots, Respondent arrived at Apartment B with Witness D."

# Synthesis Example #2 (Decision)



## Can you apply these takeaways in your cases?

### Report that Respondent choked Complainant

As previously mentioned, Complainant reported four separate acts that might rise to the level of a policy violation. First, Complainant reported that Respondent choked her during their argument on September 1, 2020. Report, p. 1. When Complainant described this incident to the Title IX investigator, she said that Respondent used his hand to encircle her throat and then squeeze, preventing her from breathing or talking. Report, p. 4. Under cross-examination at the hearing, Complainant stated that Respondent used his left hand only, but that his hand was large enough to wrap entirely around Complainant's neck. Hearing Transcript, p. 10. Complainant submitted photographs of her neck during the Title IX investigation, which were included in the investigation report on pages 10 and 11. Two witnesses, Witness A and Witness B, reported to the Title IX investigator that they observed bruising on the Complainant's neck when they saw the Complainant the morning of September 2, 2020. Report, p. 6. Both witnesses provided testimony at the hearing that was consistent with their prior statements to investigators. Hearing Transcript, p. 12.

Respondent has consistently denied that he choked Complainant. In his statement to the Title IX Investigator...

# Synthesis Example #2 - Takeaways



Can you apply these takeaways in your cases?

Several things worth noting in this example:

- The information is presented under a topic heading
  - “Report that Respondent Choked Complainant”
- Information comes from different people and is blended together
  - Parties and witnesses
- Information comes from different documents and is blended together
  - The Investigation Report and the Hearing Transcript



# Synthesis Example #2 – Takeaways (cont.)



## More takeaways

Several things worth noting in this example:

- Discrepancies between the investigation and hearing testimony are noted
  - Complainant’s description of the choking
- Transitions to demonstrate shift from individual factual allegation to the response to that allegation
  - First discussing information supportive of Complainant’s report
  - New paragraph to discuss response from Respondent

# Common Writing Mistakes

## Consistent and Precise Language

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### Inconsistent Terminology

- Referring to individuals or locations differently in different places in the report
- May leave the reader with the impression that you are talking about different places or people
  - Tom, Tom Smith, Mr. Smith, Thomas
  - Tom's room, Room 4A, Hubbard Hall

### Word choice

- Be as precise as possible
- This can add time to the writing process, but can pay off in terms of clarity
- Avoid charged language

# Common Writing Mistakes

## Empathy and Tone

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### Empathy

- Stay away from charged words of advocacy
  - Clearly/obviously
  - Innocent/guilty
  - Victim/perpetration
- Watch your use of adjectives and adverbs – unless they are in a quote
  - “really drunk”
  - “forcefully pushed”

### Tone

- Be non-judgmental
- Recognize the impact of your words

# Common Writing Mistakes

## Cite Your Source

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Failing to include sources of information (discussed earlier)

- If explaining this in every sentence weighs down your writing, use footnotes to add clarity. (“Bob stated this happened.”)
- Citing the source of your information helps the reader and underscores your neutrality

Confusing Quotation Marks

- Is the quoted language from the interviewee or the interviewer?
- Did someone else put the language in quotation marks?
  - Footnote 4: The quoted language was attributed to Respondent on page 6 of the Investigation report.
  - Footnote 10: The quoted language was attributed to Respondent by Claimant during Claimant’s October 10, 2020 Title IX interview.

# Common Writing Mistakes

## Structure

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### Topic sentences and transitions

- Provide a roadmap in your introduction and under new headings
- Sentences should flow from one-to-another
- Remember – telling two or more stories to someone unfamiliar with the case

### Pronouns

- Be careful of pronoun usage so that the reader always knows who is saying or doing what
- When using pronouns, make sure you are using the right pronouns for the individual

# Common Writing Mistakes

## Miscellaneous

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### Typos

- They happen to everyone, but
- Typos in every sentence undermine the integrity of a decision

### Run-on sentences/Sentence fragments

- Make sure each sentence has a subject and a verb
- If combining multiple independent clauses, consider whether to separate sentences

# Editing Exercise #1



**Respondent engaged in sexual intercourse with Complainant from behind.**

Issues:

- No source of the information
- From behind what? Complainant?
- Word choice

Fix:

According to Complainant, Respondent and Complainant were both standing near the pool table at the time that Respondent began to sexually penetrate Complainant's vagina with his penis. Complainant reported that her body was facing away from Respondent at the time, towards the table, and that Respondent pushed her forward...

# Editing Exercise #2



**Complainant couldn't explain why she was sitting on the couch by herself.**

Issues:

- Pronouns are not clear

Fix:

At the hearing, Complainant testified that she observed Witness A sitting alone on the couch. Complainant said that she could not explain why Witness A was sitting alone.



# Editing Exercise #3



Respondent stated that he was uncomfortable cuddling with women that he was not close with during his freshman year.

Issues:

- Confusing
- Misplaced modifier (to what part of the sentence does “during his freshman year” refer?)

Fix:

Respondent explained that during his freshman year, he was uncomfortable cuddling with women with whom he did not have a close relationship.

# Editing Exercise #4



There was no evidence to support Complainant’s assertion that the activity occurred without her consent.

Issues:

- Sounds judgmental because the “assertion” is being disregarded
- If Complainant’s assertion is not entitled to weight, explain why

Fix:

Complainant testified that the sexual activity occurred without her consent. This assertion must be weighed against the testimony of two eyewitnesses, both of whom provided consistent accounts of their observations, and the testimony of Respondent.

# Closing Thoughts

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- Clear and consistent writing is important at every stage in the process
- Remember your role
  - Author?
  - Reviewer?
- Make sure that the documents generated by the Title IX Office comply with your policy and the Title IX regs
- All written documents may be read by others at some point

# Additional information available at:

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**Title IX Resource Center** at [www.bricker.com/titleix](http://www.bricker.com/titleix)

Find us on **Twitter** at  
**@BrickerHigherEd**

# Questions?





## Resolution Officer Training

with Josh Nolan and Melissa Carleton



**Bricker & Eckler**  
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# Our Presenter: Josh Nolan

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# Disclaimers

**We can't help ourselves. We're lawyers.**

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- We are not giving you legal advice. Consult with your legal counsel regarding how best to address a specific situation.
- This training satisfies both annual Clery training and the generally applicable topics required by the Final Title IX regulations. \*This training does not cover institution-specific grievance procedures, policies, or technology.
- Use the chat function to ask general questions and hypotheticals.
- This training is not being recorded, but we will provide you with a packet of the training materials to post on your websites for Title IX compliance.

# Presentation Rules

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- Questions are encouraged!
- “For the sake of argument...”
- Be aware of your own responses and experiences
- Follow-up with someone if you have questions and concerns
- Take breaks as needed

# Posting These Training Materials?

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- Yes!
- Your Title IX Coordinator is required by 34 C.F.R. §106.45(b)(10)(i)(D) to post materials to train Title IX personnel on its website
- We know this and will make this packet available to your institution to post electronically

Additional information  
available at:

**Title IX Resource Center**  
at [www.bricker.com/titleix](http://www.bricker.com/titleix)

Find us on **Twitter** at  
**@BrickerHigherEd**



# Required Training for Informal Resolution Officers

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- Jurisdiction (Level 1)
- Definitions of Sexual Harassment (Level 1)
- How to serve impartially, including avoiding
  - Bias
  - Conflict of Interest
  - Prejudgment of fact

# Required Training for Informal resolution Officers

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- Avoiding sex and other stereotypes (Level 1)
- The grievance process for your specific institution\* (will need to complete in-house)

# Topics

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- Impartiality, avoiding bias, conflict of interest, and prejudgment of fact
  - Informal resolution theory
  - Review of scenario and hypotheticals
  - Observe a mock informal resolution
- How to work with the parties to identify their wants, needs, and areas of compromise
  - How to work with the parties to reach a mutually beneficial plan forward
  - Documenting and maintaining plans

# Aspirational Agenda

## A little more detail on timing

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- 9:00-10:30 Impartiality, avoiding bias, conflict of interest, and prejudgment of fact
- 10:30-10:45 Break
- 10:45-12:00 Informal Resolution: Theory and Practice
- 12:00-12:30 Lunch Break
- 12:30-2:00 Best Practices and Considerations
- 2:00-2:15 Break
- 2:15-3:15 Live Informal Resolution Scenario
- 3:15-3:30 Break
- 3:30-5:00 Writing an Agreement and Related Considerations





**Being Impartial and Avoiding Bias, Conflict of Interest, and Prejudgment of Facts**

# Impartiality and Avoiding Bias, Conflict of Interest and Prejudgment of Facts

---

Section 106.45 **requires** that **informal resolution** officers (and Title IX Coordinators, investigators, decision-makers, and appeals officer)

- be free from **conflict of interest, bias,** and
- be trained **to serve impartially** and **without prejudging facts.**

(30053)

# **Impartiality and Avoiding Bias, Conflict of Interest and Prejudgment of Facts**

---

- We will discuss each of these individually and provide examples, but some of the factors for each overlap.
- For example, being impartial is greatly aided by not pre-judging facts.

(30249-30257; 30496)

# Impartiality

---

- Be neutral
- Do not be partial to a complainant or a respondent, or complainants and respondents generally
- Do not judge: memory is fallible [and judging is contrary to your neutral role] (30323)

# **Bias: Concerns raised in comments in preamble**

---

- Neutrality of paid staff in Title IX positions
- Institutional history and “cover ups”
- Tweets and public comments
- Identifying as a feminist

# Perceived v. Actual Bias

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- Both can lead to the same perception (30252)
- On appeal of decisions, the Department requires the bias “that could affect the outcome of the matter”

# How the Department tried to prevent bias

---

No single-investigator model (34 C.F.R. 106.45(b)(7)(i)):

- Decision-maker (or makers if a panel) must not have been the same person who served as the Title IX Coordinator or investigator (30367)
- Separating the roles protects both parties because the decision-maker may not have improperly gleaned information from the investigation that isn't relevant that an investigator might (30370)
- The institution may consider external or internal investigator or decision-maker (30370)

# Bias: Objective Rules and Discretion

---

“[R]ecipients *should* have objective rules for determining when an adjudicator (or Title IX Coordinator, investigator, or person who facilitates an informal resolution) is biased, and the Department leaves recipients discretion to decide how best to implement the prohibition on conflicts of interest and bias...” (30250)



# Bias: Objective Rules and Discretion

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- **Discretionary**: Recipients have the discretion to have a process to raise bias during the investigation.
- **Mandatory**: Basis for appeal of decision-maker's determination per 34 C.F.R. 106.45(b)(8)(i)(C).

## **Conflict of Interest: Concerns raised in comments in preamble**

---

- Financial and reputational interests of Title IX employee aligns with institution
- Past advocacy for a survivor's group
- Past advocacy for a respondent's group

# Preamble Discussion on Bias and Conflict of Interest

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- Final regulations “leave recipients flexibility to use their own employees, or to outsource Title IX investigation and adjudication functions, and the Department encourages recipients to pursue alternatives to the inherent difficulties that arise when a recipient’s own employees are expected to perform functions free from conflicts of interest and bias.” (30251)

# Preamble Discussion on Bias and Conflict of Interest

---

- No *per se* prohibited conflicts of interest in using employees or administrative staff
  - including supervisory hierarchies (but see portion about decision-makers and Title IX Coordinator as supervisor)
- No *per se* violations for conflict of interest or bias for professional experiences or affiliations of decision-makers and other roles in the grievance process

(30352-30353)

# Preamble Discussion on Bias and Conflict of Interest

---

- Example: it is **not** a *per se* bias or conflict of interest to hire professionals with histories of working in the field of sexual violence (30252)
- Cautions against using generalizations to identify bias and conflict of interest and instead **recommends** using a **reasonable-person test** to determine whether bias exists.

# Example of Unreasonable Conclusion that Bias Exists

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- “[F]or example, **assuming** that all self-professed **feminists**, or self-described **survivors**, are biased against men, or that a **male** is incapable of being sensitive to women, or that prior work as a **victim advocate**, or as a **defense attorney**, renders the person biased for or against complainants or respondents” is **unreasonable** (30252)

# **Training, Bias, and Past Professional Experience**

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This required training (that you are sitting in right now) can help protect against disqualifying someone with prior professional experience

(30252)

# Department: Review of Outcomes Alone Does Not Show Bias

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- Cautioned parties and recipients from concluding bias or possible bias “based solely on the outcomes of grievance processes decided under the final regulations.”
- Explained: the “mere fact that a certain number of outcomes result in determinations of responsibility, or non-responsibility, does not necessarily indicate bias.” (30252)



# Examples of Bias

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- An informal resolution officer has a relationship with one party but not the other (for example, the resolution officer also served as an RA for one party and they have a close relationship);
- Information “gleaned” by the investigator is shared with the informal resolution officer outside the investigation report (in meetings to discuss pending cases, in passing while at work, etc.)

# Avoiding Prejudgment of Facts at Issue

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A good way to ensure impartiality and avoid bias:

- Keep an open mind and actively listen
- Each case is unique and different

# Hypotheticals

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Thinking about how to move forward with some issues of impartiality, conflict of interest and bias (perceived or actual).

# Hypotheticals

---

Scenario for the next several hypotheticals:

You work in your institution's student conduct office. Your duties include investigating and overseeing student conduct matters, which includes mediation of student conduct issues that involve two or more students. Your institution's Title IX Coordinator has identified you as a person to receiving training to facilitate Title IX informal resolution.

# Hypothetical 1

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You receive an informal resolution request from the Title IX Office. In reviewing the request, you recognize the name of Complainant as a student from an unrelated student conduct matter you handled. The matter involved a fight between the Complainant and roommate two years ago. You do not remember how it resolved or recall much more about the Complainant.

What should you do?

## Hypothetical 2

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Your institution's student conduct office, Title IX office, and Greek life office meet weekly to discuss student issues and potential issues. In these meetings, you discuss specific students by name for continuity of care for students and to ensure everyone is on the same page. Now, one of the students discussed is going to be a participant in your informal resolution.

What should you do?

## Hypothetical 3

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Back to a scenario raised earlier, you are now in student conduct, but you used to work as an RA, or resident advisor, in one of the residence halls. You are handed an informal resolution to facilitate and you realize that the Respondent used to live in your residence hall when the Respondent was a first year. You really like the Respondent and consider Respondent a great person.

Conflict of interest/bias?



## **Informal Resolution: The Theory and Practice**



## **Informal Resolution: reasons parties may prefer it to formal resolution**

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- Parties to disputes may be more satisfied with outcomes they reach themselves
- They can control the outcome
- They have efficacy to tailor solutions to their needs

# Informal Resolution and Autonomy

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The option of informal resolution supports autonomy of the complainant **on how to proceed** if files a formal complaint.

(30086, 30089)

## Less Adversarial Resolution

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“Informal resolution may present a way to resolve sexual harassment allegations **in a less adversarial manner** than the investigation and adjudication procedures that comprise the 106.45 grievance process.”

(30098 FN 463)

# It Bears Repeating

---

**What you do for one,  
you do for the other.**



## **When: Threshold**

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**Only** available to the parties  
**if a formal complaint is filed.**

## When: Termination

---

Available at any time prior to  
reaching a determination.

# Caution in Approach

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# Caution in Approach

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A recipient may NOT require

- As a condition of enrollment or continuing enrollment
- As a condition of employment or continuing employment





# Caution in Approach

---

A recipient may NOT require

- As a condition of enjoyment of *any other right*
- The waiver of the right to an investigation and adjudication of formal complaints of sexual harassment



# Caution in Approach

---

A recipient may NOT require

- The parties to participate in an informal resolution process
- This is a voluntary process for both (or all ) parties!



# Caution in Approach

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Be careful NOT to:

Pressure either or any party to participate



## What can the Recipient Offer?

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An “informal resolution process, such as mediation, that does not involve a full investigation and adjudication”

## What does this mean?

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The regulations don't provide more detail on what this means. BUT... the preamble:

- Mediation
- Restorative justice (30098 FN. 463)

# Mediation

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The regulations don't provide more detail on what this means.

- “Mediation” may have legal meaning in your jurisdiction that invokes certain requirements.

# Mediation

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- For example, in Ohio (where we live), the Ohio Supreme Court and state law have provisions governing mediation and a Uniform Mediation Act.
- Jurisdiction may require specific training to be a “mediator.”

# Mediation

---

There are many definitions of mediation out there, but the Regulations anticipate a **third-party** (the informal resolution officer) **facilitated resolution** of a dispute between parties.



# Mediation

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Written agreement?

- Silent about whether required.
- Other provisions require documentation of the grievance process from formal resolution to resolution

# Mediation

---

What is a resolution of the dispute?

- Do parties need to reach an agreement about what occurred between them?
- Is it sufficient to find a way to move forward so both parties can have equal access to educational opportunities?

# Mediation

---

- Some jurisdictions consider “mediation” communications as privileged and confidential from disclosure in court or under public records disclosure (if public).
- Some jurisdictions may not have any decisive law on mediation.

# State Laws\*

- *Uniform Mediation Act* (Ohio – R.C. 2710.01-2710.10)
  - Defines “Mediation” → “any process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.”
  - Defines “Mediator” → an “individual who conducts a mediation.”
    - QUALIFICATIONS? (No conflicts of interest; disclosure of same; disclose qualifications upon request)

# State Laws

*What statutory protections are there for mediation?*

- Mediation Communications are protected as Privileged (with Exceptions: child abuse, felony reporting, etc.)
- Parties can be accompanied by an attorney (even if waived by the parties in an agreement)
  - *Consider Advisor of Choice VAWA requirements...*

**NOTE: THE PARTIES CAN AGREE IN WRITING TO WAIVE SOME OF THESE PROTECTIONS**

# Restorative Justice

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- The Regulations also do not define “restorative justice.”
- Usually aims to repair harm done to crime victims through facilitation, but will vary from program to program.

## **Restorative Justice Example**

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One example of “restorative justice” is a system of school-based, non-punitive interventions, in which students are brought together with staff to discuss differences and conflicts, often in a group setting.

## Restorative Justice Example

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But other restorative justice programs require as one of their key elements that “offenders” admit responsibility and make amends.

(Is this consistent with the Regs?)



# Restorative Justice

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## Remember:

- 1) What we do for one we do for the other.
- 2) Recipient cannot make *a finding of responsibility* without a live cross-examination hearing.

# **Can we use our pre-existing mediation or restorative justice program?**

---

## **What we do for one we do for the other.**

- Does your current program require one or both parties to admit responsibility?
- What does that look like?
- Is that going to be consistent with the new Regulations?

# Can we use our pre-existing mediation or restorative justice program?

---

## Discipline-like sanctions?

- Does your program provide only supportive measures as ways for the parties to work together?
- Does your program provide any measures that may be disciplinary or prevent one party from accessing educational opportunities?
- Preamble states that “mediation” can result in expulsion because the parties can agree to that outcome.

# **Can we use out pre-existing mediation or restorative justice program?**

---

## **Access to educational opportunities.**

- Does your program maintain (equal) access for both parties to educational opportunities?

# **What should our program look like if we have never had an informal process?**

---

- We will discuss best practices for a generic process that complies with the Regulations.
- These best practices may also be used to test pre-existing mediation and restorative justice programs for compliance.



## **Informal Resolution: How to Facilitate a Resolution with Basic Principles**

# **Initial consideration: separation of the parties**

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- When issues are very emotional, as they often are in Title IX disputes, keeping parties separate during the facilitating may be the best way for the parties to move forward.
- “Shuttle Diplomacy”

# **Overview of the process with the parties**

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Whether beginning together or separately, the facilitator should begin by providing an overview with the parties of the expectations and process for the resolution.



## **Provide opportunity for each party to tell their story**

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- Whether beginning together or separately, the facilitator should provide space for each party to tell their “story” and present their perspective on the underlying dispute.
- If haven’t separated at this point, separate parties after this point.

# Determine what each party wants

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- Often referred to as the “WIFM” – what’s in it for me?
- Ask each party what they want out of the process.
- Ask each party what they want from the other party.
- Make a list of each WIFM and try to identify the top three for each party.
- Go through the list with the party.
- Be clear with each party what you can share from the list with the other party.

# Questions Facilitator May Ask of a Party

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- What would make you feel safe?
- What do you want your day on campus to look like after this?
- What could the institution do to make you feel safer?
- What could the other party do to make you feel safer?
- What do you need and what do you want, and are those different?
- What could you live with?

# **Have ready a list of supportive measures that can be easily offered.**

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- New residence hall assignments.
- Adjusting course schedules.
- Online alternatives for courses.
- Escorts to classes.
- Counseling.
- Training.
- Apology letters (not necessarily admitting wrongdoing, but acknowledging feelings).

## **Review the WIFMs for each party and look for overlap.**

---

- Sometimes the parties want a lot of the same things.
- Sometimes the parties do not have any overlap.
- Identify with each party what they may be willing to share with the other party and that sharing may help resolve.

## **Go back and forth until a resolution agreement can be reached**

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- This may not happen. Not everyone can reach a resolution agreement in every case.
- Make sure you can get both parties to agree to the same terms and then make sure you have their agreement.

## **If agreement reached...**

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- Write it out then.
- Have the parties sign then.
- Try to finish it before the parties leave so it doesn't fall apart.

## **If agreement reached...**

---

- Parties may want time to think about the resolution—this will be up to the institution on how to proceed.
- May provide a certain deadline by which to have signed.
- May provide certain provision that it will go back to formal process by deadline.
- May choose to offer further resolution on the dispute if the parties think it would be helpful.



# **If no agreement reached...may choose a similar process as for agreement**

---

- Parties may want time to think about the resolution—this will be up to the institution on how to proceed.
- May provide a certain deadline by which to have signed.
- May provide certain provision that it will go back to formal process by deadline.
- May choose to offer further mediation on the dispute of it the parties think it would be helpful.



## **Informal Resolution: Best Practices**

# Informal Resolution Officer Goals

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Help parties find ways to **move forward** at your institution (for as long as their time together is before they graduate) with **equal access to educational opportunities**

# Resolution Framework

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## (1) Separate the People and the Issues.

- Understand the other's experiences
- Identify misconceptions
- Allow for the communication of emotions

## (2) Focus on interests.

- "Your position is something you have decided upon. Your interests are what caused you to so decide." [Fisher & Ury, *Getting to Yes*, 3d. p. 42]
- Parties need to share interests with one another

## (3) Generate Options to address interests.

- ✓ best alternative to a negotiated agreement?
- ✓ Brainstorm as many options as possible...

## (4) What are the Objective Measures of outcomes?

# **What could our process look like?**

## **Prompt Timeframe**

---

(1) The recipient (your institution) should decide what “prompt” timeframe to set to resolve the informal resolution.

Remember: An informal resolution could move back to the formal process if it does not succeed, so consider this in setting a timeframe.

# Prompt Timeframe

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## Considerations:

- Stop the clock for exams or breaks-so that students are not required to participate during exams or breaks or have that time count against resolving
- Have the ability to extend timeframe if close to resolving but need a few extra days.

## **What could the process look like?**

---

(2) The informal resolution officer should contact each party individually to initiate the process.

Consideration: Does the recipient want a timeframe within which the informal resolution officer contacts the parties?

## **What could the process look like?**

---

(3) Select setup or setups:

- In person in same room?
- In person but in separate rooms with informal resolution officer going between (sometimes called shuttle mediation)?



# **What could the process look like?**

## **Setup**

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- Through email?
- Through Zoom?

# **What could the process look like?**

## **Setup**

---

### Considerations:

- Each matter is different, so providing multiple manners to conduct a resolution may be helpful to provide the parties
- Should the parties be in a room together?

# **What could the process look like?**

## **Setup**

---

### Considerations:

- Should the parties communicate directly with each other?
- Are there attorneys or parents involved?
- What setup will help the parties best reach a resolution?

# **What could the process look like?**

## **Setup -Example**

---

Both parties are near graduation, very emotional about the situation, and very far apart on what they believe occurred.

- Perhaps the parties do not need to see each other to come to a resolution to get through the rest of school in a mutually agreeable way...

# **What could the process look like?**

## **Setup -Example**

---

The parties were close friends before the incident and you (the informal resolution officer) believe they could resolve the matter if they could each understand the other's perspective.

- Perhaps meeting in person would best help them resolve.

# **What could the process look like?**

## **Setup**

---

Consideration on discretion of setup:

- Providing the informal resolution officer with the decision on how to structure the setup.
- Providing the parties with input or decision.
- Providing the informal resolution officer with discretion to consider input from parties.

# What could the process look like?

---

(3) Finding out what the parties want or need to resolve the matter.

- Meet with each party individually to find out what they:
  - State they want
  - State they need

***Determine what the interests are behind the position...***

## What could the process look like?

---

- Are willing to accept as a resolution.
- Are not willing to accept.

**Note:** these all may shift during the process as they learn more information from the other party during the resolution process.



## **What could the process look like?**

### **Finding out what the parties want.**

---

Example: A complainant may tell you they want the respondent to admit wrong doing. However, the complainant may be willing to accept that respondent sees the underlying interaction differently but apologizes for the resulting harm to the complainant.

## **What could the process look like?**

---

(4) Identify any overlap between what the parties want, need, or are willing to accept.

Note: There could be no overlap.

## **What could the process look like?**

---

(5) Identify supportive measures you could propose to the parties individually that also protect their individual access to educational activities.

# **What could the process look like? Supportive Measures as a Solution**

---

Supportive measures to consider:

- Alternative schedules
- Individual study
- Online alternatives to courses
- Counseling

# **What could the process look like? Supportive Measures as a Solution**

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- Safety escort for one or both parties
- Reassignment of seating
- Reassignment of housing
- Individualized Title IX training
- Apologies

## **What could the process look like?**

---

(5) How to get the parties to work towards a solution:

- May require back and forth by the informal resolution officer
- May require reality checking: the alternative to resolution will be the formal process

## **What could the process look like?**

---

- May require some time from the parties to reset their expectations.

## What could the process look like?

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- **Hypo:** Both students agree, after a lengthy resolution process, that the Respondent will accept disciplinary probation for a reported sexual assault. Your policy articulates a minimum sanction of suspension.
- **How does your institution proceed?**



# **What could the process look like?**

## **Reality checking**

---

Reality checking: a helpful tool, but be cautious

- It may be helpful to remind one or both parties the limitation of informal resolution requires agreement to complete
- It may be helpful to remind one or both parties that the alternative may be a return to the formal process

# **What could the process look like?**

## **Reality checking**

---

- It may be helpful to remind one or both parties that they can control the outcome in the informal process, but not the formal process

# **What could the process look like?**

## **Reality checking**

---

BUT...

- Be careful to remain neutral and not push a party to do something the party does not really want to do

# **What could the process look like?**

## **Reality checking**

---

Example of a neutral reality check:

“If this goes back to the formal process, you will not have control over the outcome, and it is a possibility that a decision-maker could find you in violation of policy.”

# **What could the process look like?**

## **Reality checking**

---

Example of a biased/pushy reality check:

“I’ve seen cases like yours and it’s not looking good for you. You should take the informal resolution option offered by the other party.”

## **What could the process look like?**

---

### (6) Resolution agreements.

- If the parties reach a resolution, document the terms.
- Have both parties review the terms.
- Have both parties sign the agreement.

# **What could the process look like?**

## **Resolution Agreements**

---

Considerations:

- Include in an agreement a way for the parties to revisit terms if there is change.

Example: What worked for one academic year may not work for the next.

# **What could the process look like?**

## **Resolution Agreements**

---

### Considerations:

- Include any confidentiality provisions for the informal resolution process and agreement in the text of the agreement (and any consequences for violating those provisions).
- Provide each party with a copy of the agreement.



# **What could the process look like? Resolution Agreements**

---

## Considerations:

- Maintain a copy of the agreement in the Title IX office pursuant to the Regulations for seven years.

## **What could the process look like?**

---

If the resolution is not successful:

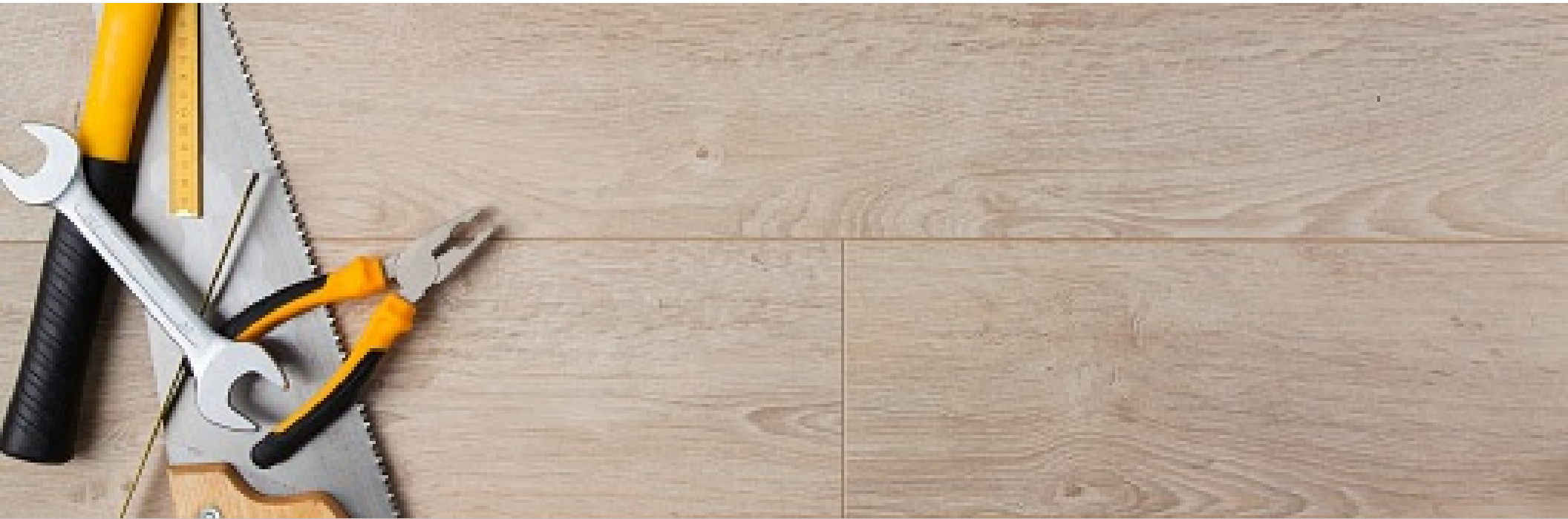
Maintain any records of the process and it's result for seven years.



## Informal Resolution: Scenario Review



## Informal Resolution: Live Example



## **Informal Resolution: Toolbox/Checklist**

# Script of overview of process

---

As you saw in our live scenario, a script is helpful to ensure:

1. You approach each facilitation consistently
2. Overview of your process
3. Don't forget anything you needed to say

# **Make sure each party feels heard**

---

Whether you include this in your script, this is not only a step of the process, but a tool to empower the parties to:

1. Identify what is important to them
2. Identify what they may be able to be flexible on
3. Feel like they are engaging in and trusting the process

# Identify what each party wants

---

Regardless of the type of resolution process, ensure that you identify with each party:

1. What they want
2. What they can live with



## **Have a list of your institution's supportive measures available**

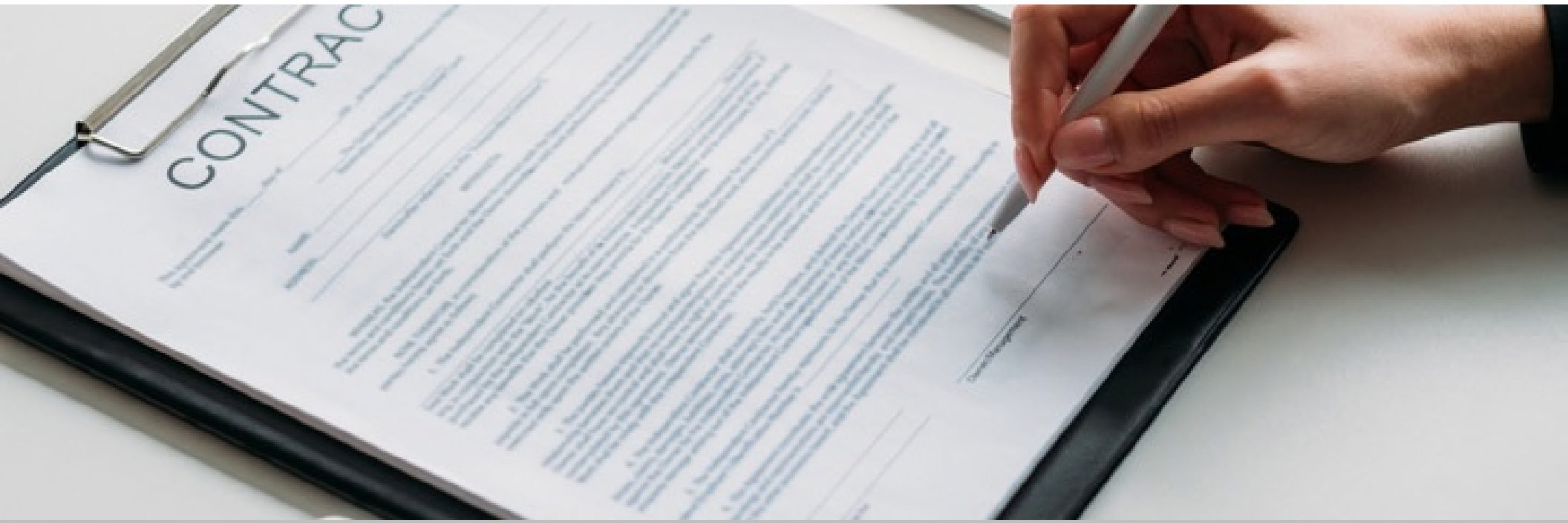
---

Be ready to easily provide each party with a list of supportive measures and other ideas that may help them think about moving forward

# Have a form or template for resolution agreements

---

- If the parties agree, you will want to be able to quickly pull together an agreement.
- Having a form or template easily accessible that you can add the provisions to is more likely to allow you to have the parties sign that day—you don't want your delay to make the agreement fall apart



## The Agreement

## **Why commit the agreement in writing?**

---

- While some jurisdictions will not allow any discussions or documents from mediation to be relied upon outside of mediation, many do allow a carve out for final agreements to be the only memorialization of the mediation.

# Why commit the agreement in writing?

---

- It is important to have the terms of any agreement in writing, in case there are later disagreements.
- Documentation of the agreement is important if DOE reviews the informal resolutions.
- What about confidentiality? (next slide)

# What about confidentiality?

---

- The terms of the agreement should be on a need-to-know basis.
- The agreement itself should include penalties for a party or recipient from publishing or sharing the agreement.
- Agreements relating to students are student records protected by FERPA; kept in student file

## **What about confidentiality?**

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- For employees, these may have different considerations and may be public record, depending on your jurisdiction.
- May be contained in a separate file personnel file.

# **The problem with “gag” orders or non - disparagement agreements.**

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- Could be contrary to the First Amendment if a public institution
- Could be contrary to academic freedom if faculty member
- Could be contrary to public records laws in your jurisdiction



# **The problem with “gag” orders or non - disparagement agreements.**

---

- What happens if a party breaks the order?
- What if it's years later?
- What if it's a conversation with a family member vs. journalist?
- What if it seems like the institution is trying to bury information?
- How will you enforce it?

## **What any agreement (or form or template) should include**

---

- Names of any parties, representatives, and informal resolution officer
- The specific terms of the agreement, with as much specificity as possible for each term.

## **What any agreement (or form or template) should include**

---

- General description of the process that led the parties to the resolution.
- Specifically that the process was instead of a formal process, that it was agreed to by both parties voluntarily and in writing.

## **What any agreement (or form or template) should include**

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- Acknowledgement of all the terms in the agreement by the parties and the consequences of signing.

## **What any agreement (or form or template) should include**

---

- How to resolve any future disputes arising out of the underlying facts of the agreement or the agreement itself.
- Who to contact with questions or concerns about the agreement.

## **What any agreement (or form or template) should include**

---

- Future periods of checking on how the agreement is going?
- Pros: helps the institution monitor the situation
- Cons: may be poking a sleeping bear

# LEVEL 2

## HIGHER EDUCATION TITLE IX

## DECISION-MAKER TRAINING



# Disclaimer



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*We can't help ourselves. We're lawyers.*

- We are not giving you legal advice. Consult with your legal counsel regarding how best to address a specific situation.
- This training satisfies both annual Clery training and the generally applicable topics required by the Final Title IX regulations. \*This training does not cover institution-specific grievance procedures, policies, or technology.
- Use the chat function to ask general questions and hypotheticals.
- This training is not being recorded, but we will provide you with a packet of the training materials to post on your websites for Title IX compliance.



# Presentation Rules

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- Questions are encouraged
- “For the sake of argument...” questions help to challenge the group, consider other perspectives, and move the conversation forward
- Be aware of your own responses and experiences
- Follow-up with someone if you have any questions or concerns
- Take breaks as needed

# Aspirational Agenda



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9:00-10:30      Intro & Being Impartial, Avoiding Bias, and Conflict of Interest  
10:30-10:45      Break  
10:45-12:00      Live Cross-Examination Theory & Practice; Issues of Relevancy  
12:00-12:30      Lunch  
12:30-1:45      Issues of Relevancy, Hypotheticals  
1:45-2:00      Break  
2:00-3:00      Observe a Live Cross-Examination Hearing  
3:00-3:30      Debrief/Hearing  
3:30-3:45      Break  
3:45-5:00      Hearing/Objectively Evaluating Evidence/Written Decision

# Posting these Training Materials

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- Yes!
- The “recipient” is required by §106.45(b)(10)(i)(D) to post materials used to train Title IX personnel on it’s website
- We know this and will make this packet available to you electronically to post.

# Training Requirements

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Under the new Title IX regulations, recipients who receive federal funds must provide live cross-examination hearings before any determination and discipline can be issued against a respondent for sexual harassment accusations under Title IX

# Training Requirements for Decision Makers

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Specifically, the new Title IX regulations require training of decision-makers on the following, which we will be discussing throughout this training in 106.45(b)(1)(iii):

- Jurisdiction: understanding “the scope of the recipient’s education program or activity” (Level1)
- Definitions of “sexual harassment” under the new Title IX regulations (Level1)
- How to conduct a live cross-examining hearing. (30320)

# Training Requirements

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- How to serve impartially, including by avoiding prejudgment of the facts at issue, bias and conflicts of interest
  - Avoiding stereotypes (Level 1 and review here)
- Training on any technology to be used at a live hearing\*
- The grievance process for the decision-maker's institution\*

# Training Requirements

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- **Relevance** determinations (not Rules of Evidence)
  - knowing and applying remaining requirements and other specific exclusions from the Regulations
    - Rape shield law and its two narrow exceptions
    - legally privileged information absent voluntary written waiver of party holding privilege
  - *must make a relevancy determination before each question can be answered* (30324)

# Training Requirements

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- How to objectively evaluate all relevant evidence, including inculpatory and exculpatory and make decisions on relevancy (30320)
  - Inculpatory: evidence that tends to prove the violation of a policy
  - Exculpatory: evidence that tends to exonerate the accused



# Training Requirements

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- That a decision-maker cannot draw inferences about failure to appear or answer questions in live cross-examination hearing
- How to determine weight , persuasiveness, and/or credibility in an objective evaluation

# Training Requirements

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Under Clery Act, must receive annual training on:

- Issues related to sexual assault, domestic violence, dating violence, stalking (Level 1)
- How to conduct an investigation and hearing process that protects the safety of victims and promotes accountability (Level 1 and today)

# **MAKE NO ASSUMPTIONS**

**Being impartial, avoiding bias  
and conflict of interest**

# Being Impartial

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A decision-maker needs to recognize that a party **should not be** “unfairly judged due to inability to recount each specific detail of an incident *in sequence*, whether such inability is due to trauma, the effects of drugs or alcohol, or simple fallibility of human memory.”

(30323)

# Bias: Concerns raised in comments in preamble

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- Are all **paid staff members biased** in favor of the institution that employs them?
- Was an institutional **history of covering up issues** enough for bias?
- Were **past tweets or public comments** that appear to support complainants or respondents sufficient to show bias?
- Is identifying as a **feminist** enough to show bias?
- Should bias extend to “perceived bias” or did it require actual bias?

# Bias: Response of Department to Perceived v. Actual Bias

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- Department declined to determine whether bias has to be actual or if perceived is sufficient to create an issue
- Each specific bias issue requires a fact-specific analysis

(30252)

# Bias: How the Department tried to minimize bias

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## No single-investigator model for Title IX

- Decision-maker (or makers if a panel) cannot have been the same person who served as the Title IX Coordinator or investigator (30367)
- Prevents the decision-maker from **improperly gleaning information from the investigation** that isn't relevant that an investigator might be aware of from gathering evidence (30370)
- The institution may consider external or internal investigator or decision-maker (30370)

# Bias: Objective Rules and Discretion



- “[R]ecipients **should have objective rules** for determining when an adjudicator (or Title IX Coordinator, investigator, or person who facilitates an informal resolution) is **biased**, and the Department **leaves recipients discretion to decide how best to implement the prohibition on conflicts of interest and bias...**” (30250)
- Recipients have the discretion to have a process to raise bias during the investigation
- Bias is a basis for appeal of decision-maker’s determination (34 C.F.R. 106.45(b)(8)(i)(C))



# Conflict of Interest: Concerns raised in comments in preamble

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Similar to those raised regarding bias:

- Does a decision-maker **with financial and reputational interests aligned with institution** create a conflict?
- Would the **Title IX Coordinator directly supervising the decision-maker** create a conflict?
- Does **past advocacy** for a survivor's or respondent's rights group create conflict (also comes up in bias)?
- Are perceived conflicts of interest sufficient or do the conflicts have to be actual conflicts?

# Preamble Discussion: Bias and Conflict of Interest

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- No *per se* prohibited conflicts of interest from using employees and administrative staff, including supervisory hierarchies (30352)
  - but see portion about decision-makers and Title IX Coordinator as supervisor
- No *per se* conflict of interest or bias for professional experiences or affiliations of decision-makers and other roles in the grievance process (30353)

# Preamble Discussion: Bias and Conflict of Interest

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The preamble discussion:

- Provides as an example that it is **not a *per se* bias or conflict of interest to hire professionals with histories of working in the field of sexual violence** (30252)
- Cautions against using generalizations to identify bias and conflict of interest and instead recommends **using a reasonable-person test** to determine whether bias exists

## Example in Discussion for Unreasonable Conclusion that Bias Exist



“[F]or example, **assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents” is **unreasonable** (30252)**

# Discussion Regarding Training's Role



“[T]he **very training required by 106.45(b)(1)(iii)** [that you are sitting in right now] is intended to

- provide Title IX personnel with the tools needed to serve impartially and without bias
- such that the prior professional experience of a person whom a recipient would like to have in a Title IX role
- need not disqualify the person from obtaining the requisite training to serve impartially in a Title IX role.”

(30252)

# Examples in Discussion for Unreasonable Conclusion that Bias Exist: Review of Outcomes



- Department also cautioned parties and recipients from concluding bias or possible bias “based solely on the outcomes of grievance processes decided under the final regulations.” (30252)
- Explained that this means, the “mere fact that a certain number of outcomes result in determinations of responsibility, or non-responsibility, does not necessarily indicate bias.” (30252)

# Examples of Bias

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- Situations where a decision-maker has already heard from a witness or party in a prior case and has made a credibility determination re: that person;
- Situations where information “gleaned” by the investigator is shared with the decision-maker outside the investigation report (in meetings to discuss pending cases, in passing while at work, etc.)

# Avoiding Pre-Judgment of Facts at Issue

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A good way to avoid bias and ensure impartiality:  
avoiding prejudgment of facts

Remember:

- **Keep an open mind** as a decision-maker and actively listen to all the facts presented as subjected to cross-examination
- If a party or witness does not submit to cross-examination, may not be able to consider statements in the record
- Each case is unique and different



# Being impartial: Avoiding Sex Stereotypes



Decision-makers are trained to avoid bias and sex stereotypes—

- “such that even if a cross-examination question impermissibly relies on **bias or sex stereotypes** while attempting to challenge a party’s plausibility, credibility, reliability, or consistency,
- **it is the trained decision-maker**, and not the party advisor asking a question,
- **who determines whether the question is relevant if it is relevant**, then evaluates the question and any resulting testimony in order to reach a determination on responsibility” (30325)

# Avoiding Sex Stereotypes: Quick Recap

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- “Must” not rely on sex stereotypes: Also helpful to avoiding pre-judgment of facts, remaining unbiased and impartial
- Examples of sex stereotypes in comments (30253):
  - Women have regret sex and lie about sexual assaults
  - Men are sexually aggressive or likely to perpetrate sexual assault
  - Consideration of marginalized groups: people with disabilities, people of color, people who identify in the “LGBTQ” community (30259-30260)

# Sex Stereotypes: Rape Myths

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The preamble discussed a particular study referred to by commenters about a “common tactic” in defense of sexual assault remains the “leveraging rape myths” when cross-examining rape victims (30325)

- However, the preamble discussion determines that this is a broader societal issue, a not an issue with cross-examination as a tool for truth-seeking

# **LIVE CROSS-EXAMINATION: Theory and Practice**

# Cross Examination

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Traditionally, cross examination questions are those that try to elicit “yes” or “no” answers, not explanations.

Examples:

- You were at the party that night, weren't you?
- You'd agree with me that you had three beers, wouldn't you?
- You didn't call an Uber, did you?

# Live Cross-Examination: Theory

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- Essential for truth seeking (30313)
- Provides opportunity of both parties to **test “consistency, accuracy, memory, and credibility** so that the decision-maker can better assess whether a [party’s] narrative should be believed” (30315)

# Live Cross-Examination: Theory

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- Provides parties with the opportunity to “direct the decision-maker’s attention to **implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility**” in the other party’s statements. (30330)
- Promotes transparency and equal access (30389)

# Live Cross-Examination: Theory

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According to the Department, the process in 106.45 best achieves the purposes of:

- (1) effectuating Title IX's non-discrimination mandate by ensuring **fair, reliable outcomes** viewed as **legitimate** in resolution of formal complaints of sexual harassment so that victims receive remedies
- (2) **reducing and preventing sex bias** from affecting outcomes; and
- (3) ensuring that Title IX regulations are consistent with **constitutional due process and fundamental fairness**  
(30327)



# Live Cross-Examination: How it should look

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“[C]onducting cross-examination consists simply of posing questions intended to advance the asking party’s perspective with respect to the specific allegation at issue.” (30319)

# Live Cross-Examination: Regulations

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In this process:

- Decision-maker must permit each party's advisor to ask the other party and any witnesses **all relevant** questions and follow-up questions, including those challenging **credibility**
- Must be conducted directly, orally, and in real time by the party's advisor, but never party personally
- Only relevant cross-examination and other questions may be asked of a party or witness

# Live Cross-Examination: Regulations

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- Before a party or witness may answer a question, the decision-maker must first determine whether the question is relevant and explain the reason if not relevant
- Must audio record, audio-video record or provide a transcript of the hearing

# Role of Decision-Maker/questioning by



The preamble discussion provides some additional information on protecting neutrality of the **decision-maker**:

“To the extent that **a party wants the other party questioned in an adversarial manner** in order to further the asking party’s views and interests, that questioning is conducted by the party’s own advisor, **and not by the recipient**. Thus, no complainant (or respondent) need feel as though the recipient is “taking sides” or otherwise engaging in cross-examination to make a complainant feel as though the recipient is blaming or disbelieving the complainant.” (30316)

# Role of Decision-Maker/questioning by



So take that into consideration if eliciting questions:

- “[O]n the decision-maker’s initiative [can] ask questions and elicit testimony from parties and witnesses,
- as part of the recipient’s **burden** to reach a determination regarding responsibility based on objective evaluation of all relevant evidence including inculpatory and exculpatory evidence.
- Thus , the skill of a party’s advisor is not the only factor in bringing evidence to light for a decision-maker’s consideration.” (30332)

# Confidentiality

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- 106.71 requires recipients to keep party and witness identities confidential except as permitted by law or FERPA, and as needed to conduct an investigation or hearing (30316)
- Prevents anyone in addition to the advisor to attend the hearing with the party, unless otherwise required by law (30339)

# Reminders

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- Individual cases are not about statistics
- Decision in every case must be based on preponderance of evidence or clear and convincing evidence presented
- Cannot fill in evidentiary gaps with statistics, personal beliefs or information about trauma
- Process must be fair and impartial to each party
- Institution may proceed without active involvement of one or both parties; base conclusions on impartial view of evidence presented

# Reminders

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- **Withhold pre-judgment:** The parties may not act as you expect them to
- Be aware of your own biases as well as those of the complainant, respondent, and witnesses
- Let the available facts and standard of proof guide your role in overseeing the live cross-examination hearing, not unfair victim-blaming or societal/personal biases



# Reminders

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- Burden of gathering the evidence on the recipient, not the parties (30333)
- should be an issue with investigation, but might be something you see as the decision-maker

# ISSUES OF RELEVANCY: Not Rules of Evidence

# Relevancy



- Per 34 C.F.R. 106. 45(b)(6)(i):
  - “Only **relevant** cross-examination and other questions may be asked of a party or witness.”

“[C]ross examination **must focus only on questions that are relevant to the allegations in dispute.**” (30319)

# Relevancy

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Party or witness **cannot** answer a question until the decision-maker determines whether it is relevant.

- Requires decision-makers to make “on the spot” determinations and explain the “why” if a question or evidence is not relevant (30343)

# What is Relevant?

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Decisions regarding relevancy do not have to be lengthy or complicated:

“... it is sufficient... to explain that a question is irrelevant because it calls for prior sexual behavior information without meeting one of the two exceptions, or because the question asks about a detail that is not **probative** of any **material fact** concerning the **allegations**.” (30343)

# What is Relevant?

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## Questions to consider:

- Does this question, topic, evidence help move the dial under the standard of evidence?
  - **Preponderance of the evidence**: a fact is more likely than not to be true (30373 fn. 1409)
  - **Clear and convincing**: a fact is highly probable to be true (30373 fn. 1409)

# What is Relevant?

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Under the **preponderance of the evidence** standard:

- Does this help me in deciding if there was more likely than not a violation?
- Does it make it more or less likely?
- Why or why not?

If it doesn't move this dial: likely not relevant.

# What is Relevant?

---

Under the **clear and convincing** standard of evidence:

- Does this help me in deciding if a fact is highly probable to be true?
- Does it make it more or less probable?
- Why or why not?

If it doesn't move this dial: likely not relevant.



# Not Governed by Rules of Evidence



The Rules of Evidence do NOT apply and CANNOT apply

“[T]he decision-maker’s only evidentiary threshold for admissibility or exclusion of questions and evidence is not whether it would then still be excluded under the myriad of other evidentiary rules and exceptions that apply under, for example, the Federal Rules of Evidence.” (30343)

# Not Governed by Rules of Evidence

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## Examples:

- No reliance of statement against a party interest (30345)
- No reliance on statement of deceased party (30348)
- A recipient may not adopt a rule excluding relevant evidence whose **probative value is substantially outweighed by the danger of unfair prejudice** (30294)

# Relevancy



Recipient must ensure that “all *relevant* questions and evidence are admitted and considered (though varying weight or credibility may of course be given to particular evidence by the decision-maker).” (30331)

- A recipient may not adopt rules excluding certain types of relevant evidence (**lie detector** or rape kits) where that type of evidence is not labeled irrelevant in the regulations (e.g., sexual history) or otherwise barred for use under 106.56 (privileged) and must allow fact and **expert witnesses**. (30294)

# Relevancy: Not Relevant

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The Department has determined that recipients must consider relevant evidence with the following exceptions:

- (1) Complainant's sexual behavior (except for two narrow exceptions)
- (2) information protected by a legal privilege
- (3) party's treatment records (absent voluntary written waiver by the party) (30337)

# Relevancy: Regulations' Rape Shield Law-Complainants

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- According to 34 C.F.R. 106. 45(b)(6)(i), Cross-examination **must exclude** evidence of the Complainant's "sexual behavior or predisposition" **UNLESS**
  - its use is to prove that someone other than the Respondent committed the conduct, OR
  - it concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent

# Relevancy: Regulations' Rape Shield Law - Respondents

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- Rape shield protections **do not apply to Respondents**
- “The Department reiterates that the rape shield language . . . does not pertain to the sexual predisposition or sexual behavior of respondents, so **evidence of a pattern** of inappropriate behavior by an alleged harasser must be judged for relevance as any other evidence must be.”

# Relevancy: Treatment Records



“[C]annot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and **which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party’s voluntary, written consent** to do so for a grievance process under this section.”

Section 106.45(b)(5)(i) (see also 30317).

# Relevancy: Legally Privileged Information

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Section 106.45(b)(1)(x):

A recipient's grievance process **must...not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of**, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.



# Relevancy: Legally Privileged Information

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Other typical privileges recognized across jurisdictions but with variations (will want to **involve your legal counsel for definitions in your jurisdiction**):

- Attorney-client communications
- Implicating oneself in a crime
- Confessions to a clergy member or other religious figures
- Spousal testimony in criminal matters
- Some confidentiality/trade secrets

# Relevancy: Improper Inference



When parties do not participate:

- “If a party or witness does not submit to cross-examination at the live hearing...the decision-maker(s) cannot draw an inference about the determination regarding responsibility **based solely** on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions.” 34 C.F.R. 106.45(b)(6)(i).

# Relevancy: No Reliance on Prior Statements

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When parties elect not to participate, a recipient cannot retaliate against them (30322)

What if a party or witness gave a statement during the investigation but is not participating in cross-examination?

- “Must not rely on any statement of that party or witness in reaching a determination”

# Relevancy: No Reliance on Prior Statements - Theory

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If parties do not testify about their own statement and submit to cross-examination, **the decision-maker will not have the appropriate context for the statement,** which is why the decision-maker cannot consider that party's statement.

(30349)

# Relevancy: When Parties or Witnesses Do Not Participate

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The preamble recognizes that there are many reasons a party or witness may not elect not to participate in the live cross-examination hearing or answer a question or set of questions

- The decision-maker cannot make inferences from non-participation or compel participation (retaliation) (30322)
- Relevant questioning by advisor along these lines?

# Relevancy: No Reliance on Prior Statements

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“[A] party’s advisor may appear and conduct cross-examination **even when the party whom they are advising does not appear.**” (30346)

“Similarly, where one party does not appear and that party’s advisor does not appear, **a recipient-provided advisor must still cross-examine the other, appearing party,** resulting in consideration of the appearing party’s statements (without any inference being drawn based on the non-appearance).” (30346)

# Relevancy: No Reliance on Prior Statements

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Third party cross-examination of what a non-appearing party stated **does not count** as statements tested on cross-examination. (30347)  
(provides examples of family and friends showing up on behalf of the non-appearing party)

“[A] rule of non-reliance on untested statements is more likely to lead to reliable outcomes than a rule of reliance on untested statements.” (30347)

# Relevancy: No Reliance on Prior Statements

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When statement IS the sexual harassment...

“One question that a postsecondary institution may have is whether not relying on a party’s statement—because that party has not submitted to cross-examination —means not relying on a description of the words allegedly used by a respondent if those words constitute part of the alleged sexual harassment at issue.

The answer to that question is ‘no’...”

May 22, 2020 OCR blog



# Relevancy: No Reliance on Prior Statements

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“[E]ven though the refusing party’s statement cannot be considered, the decision-maker may reach a determination based on the remaining evidence so long as no inference is drawn based on the party or witness’s absence from the hearing or refusal to answer cross-examination (or other) questions.” (30322)

Example: “[W]here a complainant refuses to answer cross-examination questions but video evidence exists showing the underlying incident, a decision-maker may still consider the available evidence and make a determination” (30328)

# Relevancy: No Reliance on Prior Statements

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“Thus, a respondent’s alleged verbal conduct, that itself constitutes the sexual harassment at issue, is not the respondent’s “statement” as that word is used in § 106.45(b)(6)(i), because the verbal conduct does not constitute the making of a factual assertion to prove or disprove the allegations of sexual harassment; instead, the verbal conduct constitutes part or all of the underlying allegation of sexual harassment itself.”

- If you don’t already follow the blog, add it to your favorites bar: <https://www2.ed.gov/about/offices/list/ocr/blog/index.html>

# Relevancy: No Reliance on Prior Statements- Examples

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- But, if a party or witness does not submit to cross examination and makes a statement in a video, cannot consider that statement in the video to reach a decision on responsibility (30346)
- Remember: No rules of evidence can be imported

# Relevancy: No Reliance on Prior Statements – SANE and Police Reports

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- This expressly means no statements in police reports, no SANE reports, medical reports, or other documents to the extent they contain statements of parties or witnesses who do not submit to cross examination(30349)
- If non-cross-examined statements are intertwined with statements tested by cross-examination, can only consider those that have been cross-examined (30349)

# Issues of Relevancy

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“[D]oes not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by recipient’s decision-maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with 106.45 and apply equally to both parties.” (30294)

**BUT**

“[I]f a recipient trains Title IX personnel to evaluate, credit, or assign weight to types of relevant, admissible evidence, that topic will be reflected in the recipient’s training materials.” (30293)

# Other Considerations

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- What about sex stereotyping questions?
- What about questions by advisor about why a party isn't participating?
- What about decorum?

# Decorum

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The preamble to the Title IX Regulations contains many discussions of an institution's discretion to set rules to maintain decorum throughout hearings and to remove non-complying advisors, parties, or witnesses.

Note: In our experience, we have seen decorum issues more commonly with advisors than parties...and have seen this equally on both sides. This is more likely to be an issue when family members serve as advisors, because, understandably, these can be emotional matters.

# Decorum

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“Recipients may adopt rules that govern the **conduct and decorum of participants at live hearings** so long as such rules comply with these final regulations and **apply equally to both parties**... These final regulations aim to ensure that the truth-seeking value and function of cross-examination applies for the benefit of both parties while minimizing the discomfort or traumatic impact of answer questions about sexual harassment.”  
(30315)



# Decorum

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“[W]here the **substance of a question is relevant**, but the manner in which an advisor attempts to ask the question is **harassing, intimidating, or abusive (for example, the advisor yells, screams, or physically ‘leans in’ to the witness’s personal space)**, the recipient may appropriately, evenhandedly enforce rules of decorum that require relevant questions to be asked in a respectful, non-abusive manner.”  
(30331)

# Decorum

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“The Department acknowledges that predictions of **harsh, aggressive, victim-blaming** cross-examination may dissuade complainants from pursuing a formal complaint out of fear of undergoing questioning that could be perceived as interrogation. However, recipients retain discretion under the final regulations to educate a recipient’s community about what cross-examination during a Title IX grievance process will look like, including developing rules and practices (**that apply equally to both parties**) to oversee cross-examination to **ensure that questioning is relevant, respectful, and non-abusive.**” (30316 see also 30315; 30340)

# Decorum



- “[T]he essential function of cross-examination is **not to embarrass, blame, humiliate, or emotionally berate a party**, but rather to ask questions that probe a party’s narrative in order to give the decision-maker the fullest view possible of the evidence relevant to the allegations at issue.” (30319)
- Nothing in this rule prevents recipient from enforcing decorum rules in the hearing and “the recipient may require the party to use a different advisor” if the advisor does not comply and may provide a different advisor to conduct cross examination on behalf of that party (30320)

# Practice Making Relevancy Determinations

# Relevancy Determination Hypotheticals

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Okay, decision-maker, is this question relevant?

For practice, we will pose these in cross-examination format. As discussed before, the traditional cross-examination style is aimed at eliciting a short response, or a “yes” or “no,” as opposed to open-ended question which could seek a narrative (longer) response.

For example, instead of, “How old are you?” the question would be, “You’re 21 years old, aren’t you?”

# Relevancy Determination Hypotheticals

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For each practice hypothetical, ask yourself:

**Is this question relevant or seeking relevant information?**

- Why or why not?
- Does the answer to this depend on additional information?
- If it so, what types of additional information would you need to make a relevancy determination?

# Relevancy Determination Hypotheticals Disclaimer

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*Disclaimer: The following hypotheticals are not based on any actual cases we have handled or of which we are aware. Any similarities to actual cases are coincidental.*

**Slide 81**

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**MMC14**

Most of your questions are attacking the complainant. You may want to think about adding more questions for the respondent to even things out.

Carleton, Melissa, 6/14/2020



# Practice Hypothetical #1

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“Cameron, texted Riley the week before telling Riley that you wanted to have sex with them, didn’t you?”

# Practice Hypothetical #2

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“Cameron, isn’t it true you usually have sex with Riley while intoxicated?”

# Practice Hypothetical #3

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“Riley, did your attorney tell you not to answer that question?”

# Practice Hypothetical #4

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“Riley, did your counselor tell you that you have anger issues?”

# Practice Hypothetical #5

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“Cameron, you didn’t see who was allegedly sexually assaulting you during the alleged attack, did you?”

# Practice Hypothetical #6

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“Cameron, are you choosing not to answer my questions because you lied to investigators?”

# Practice Hypothetical #7

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“Riley, you’re not answering my questions because you don’t want criminal implications, right?”

# Practice Hypothetical #8

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“Cameron, isn’t it true you asked Riley to put on a condom before what you now claim is a sexual assault?”



# Practice Hypothetical #9

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“Riley, have you tested positive for sexually-transmitted diseases?”

# Practice Hypothetical #10

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“Riley, isn’t it true you texted Cameron the next day to see if Cameron was mad at you?”

# Practice Hypothetical #11

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“Cameron, if you were as drunk you just stated you were, you can’t even be sure whether you had sex with Riley or, say, Wyatt, can you?”

# Practice Hypothetical #12

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“Cameron, did a doctor diagnose you with anxiety?”

# Practice Hypothetical #13

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“Riley, isn’t it true you tried to kill yourself the next day because you knew you did something wrong?”

# Practice Hypothetical #14

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“Cameron, you’ve had sex with Riley after drinking before, though, haven’t you?”

# Practice Hypothetical #15

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“Cameron, you could be wrong about that timeline, right?”

# Practice Hypothetical #16

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“Riley, this isn’t the only Title IX complaint against you right now, is it?”



# Practice Hypothetical #17

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“Cameron, you had consensual sex with Riley the next night, didn’t you?”

# Practice Hypothetical #18

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“Riley, didn’t the police question you for three hours about your assault of Cameron?”

# Practice Hypothetical #19

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“Cameron, your witness, Wyatt, didn’t even show up today, right?”

# Practice Hypothetical #20

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“Riley, you’re even paying for a criminal defense attorney instead of a free advisor, right?”

# The Hearing

# The Setup

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- Can have in one room if a party doesn't request separate rooms and recipient chooses to do so.
- Separate rooms with technology allowing live cross examination at the request of either party
- “At recipient’s discretion, can allow any or all participants to participate in the live hearing virtually” (30332, see also 30333, 30346) explaining 106.45(b)(6)(i)

# Process

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- Discretion to provide opportunity for opening or closing statements
- Discretion to provide direct questioning (open-ended, non-cross questions)
- Cross-examination must to be done by the party's "advisor of choice and never by a party personally."

# Process

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- An advisor of choice may be an attorney or a parent (or witness) (30319) MMC15
- Discretion to require advisors to be “potted plants” outside of their roles cross-examining parties and witnesses. (30312)



**Slide 105**

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**MMC15**

What is the reference to the official regs here?

Carleton, Melissa, 6/14/2020

# Advisors

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If a party does not have an advisor present at the live hearing, the recipient **must provide** without fee or charge to that party, an advisor **of the recipient's choice**, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.  
(106.45(b)(6)(i) and preamble 30339)

# Advisors

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- Advisors do not require Title IX Training, however a recipient may train its own employees whom the recipient chooses to appoint as party advisors (30342)
- A party cannot “fire” an appointed advisor (30342)
- “But, if the party correctly asserts that the assigned advisor is refusing to ‘conduct cross-examination on the party’s behalf’ then the recipient is obligated to provide the party an advisor to perform that function, whether counseling the advisor to perform the role or stopping the hearing to assign a different advisor” (30342)

# Advisors

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- Regulations permit a recipient to adopt rules that (applied equally) do or do not give parties or advisors the right to discuss relevance determinations with the decision-maker during the hearing. (30343)
- “If a recipient believes that arguments about a relevance determination during a hearing would unnecessarily protract the hearing or become uncomfortable for parties, the recipient may adopt a rule that prevents parties and advisors from challenging the relevance determination (after receiving the decision-maker’s explanation) during the hearing.” (30343)

# Advisors: But Other Support People?

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- Not in the hearing, unless required by law (30339)
- “These confidentiality obligations may affect a recipient’s ability to offer parties a recipient-provided advisor to conduct cross-examination in addition to allowing the parties’ advisors of choice to appear at the hearing.”
- ADA accommodations-required by law
- CBA require advisor and attorney?

# Recording the Hearing

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- Now required to be audio, audio visual, or in transcript form
- Decision-makers have to know how to use any technology you have

# The Hearing

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- Order of questioning parties and witnesses – not in regulations
  - Consider time restraints on witnesses
  - Questioning of Complainant
  - Questioning of Respondent

# Questioning by the Decision-Maker



- The neutrality of the decision-maker role is and the role of the advisor to ask adversarial questions, protects the decision-maker from having to be neutral while also taking on an adversarial role (30330)
- “[P]recisely because the recipient must provide a neutral, impartial decision-maker, the function of adversarial questioning must be undertaken by persons who owe no duty of impartiality to the parties” (30330)



# Questioning by the Decision-Maker



- BUT “the decision-maker has the right and responsibility to ask questions and elicit information from parties and witnesses on the decision-makers own initiative to aid the decision-maker in obtaining relevant evidence both inculpatory and exculpatory, and the parties also have equal rights to present evidence in front of the decision-maker so the decision-maker has the benefit of perceiving each party’s unique perspective about the evidence.” (30331)

# The Hearing

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- Ruling on relevancy between every question and answer by a witness or party
  - Assumption that all questions are relevant unless decision-maker otherwise states irrelevant? Risky.
  - Set expectation that party or witness cannot answer question before decision-maker decides if relevant.
    - Pros: helps diffuse any overly aggressive or abusive questions/resets tone
    - Cons: may lengthen hearing

# The Hearing

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- “[N]othing in the final regulations precludes a recipient from adopting a rule that the decision-maker will, for example, send to the parties after the hearing any revisions to the decision-maker’s explanation that was provided during the hearing.” (30343)

# The Hearing

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- Confidentiality appears to preclude support persons other than the advisor from participating in the live-cross examination hearing
  - Perhaps allow support person to meet in waiting rooms or before and after hearing
  - Consistent with providing supportive services to both parties – hearings can be very stressful for both parties

# Hearing Toolbox

# Hearing Toolbox: Prehearing Conference

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- Pre-hearing conference – helps inform parties and set expectations – have one separate with each party and the party’s advisor
- Provides opportunity to address issues common to both parties:
  - Parties and their representatives will often not understand the process: help educate and answer questions (again, know your institution’s grievance process)
  - Jurisdictional challenges: perhaps less of an issue with new jurisdictional terms—many issues were related to off-campus extension of jurisdiction (may tell advisor that you will provide the opportunity for advisor to state on the record at the hearing)

# Hearing Toolbox: the Pre-Hearing Conference

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- Parties may want to add evidence and witnesses that were not in the investigation for the first time at the hearing (perhaps outside of the process).

# Hearing Toolbox: Use of a Script

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- Responsible for running an orderly and fair hearing.
- A script can serve as a checklist of everything the decision-maker wants to cover and a cheat sheet for reminders of allegations, alleged policy violations, and elements of the alleged policy violations
- Helps ensure rights, responsibilities, and expectations are set
- Helps provide consistency between one hearing and the another
- Helps provide transparency
- Can even have a separate one for prehearings



# Hearing Toolbox: Decorum

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- Evaluating each question for relevancy before a party or witness can answer can help set the tone
- Remind parties about expectations of decorum

# Hearing Toolbox: Breaks

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- Preamble discusses the use of breaks to allow parties to recover from panic attacks or emotional questioning
- Also helpful to reset tone and reduce emotion and tension
- Can use to review policy and procedures to address relevancy issues that arise

# Hearing Toolbox: Questions

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- Do you have the information you need on each element to be able to evaluate the claims?
- Consider neutral phrasing of questions:
  - “In the report you said... Help me understand...”
  - “You stated... Tell me more about that.”
  - “Could you give more information about what happened before/after...”

# Hearing Toolbox: Considerations for Panels

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Hearing panel:

- Identify one person on the panel to make relevancy rulings
- Identify one person to draft the decision (for review of other panel members)
- Determine how panel members will ask questions (e.g., will only one person ask the questions or will panelists take turns?)

# **Objectively Evaluating Evidence and Resolving Credibility Disputes**

# Objectively Evaluating Relevant Evidence



- As addressed in the preamble and discussed earlier, the decision-maker should evaluate:
- **“consistency, accuracy, memory, and credibility”** (30315)
- **“implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility”** (030330)
- Standard of proof and using it to guide decision

# Standard of Proof

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- Standard of Evidence: Preponderance of the Evidence or Clear & Convincing
- Must use same standard for formal Title IX complaints against both students and employees (including faculty) for all policies and procedures with adjudication for sexual harassment complaints (e.g., union grievance procedures, faculty conduct)
- Must begin with a presumption of no violation by Respondent.

# Making credibility decisions

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The preamble discussion includes the following additional information on credibility:

- “Studies demonstrate that inconsistency is correlated with deception” (30321)
- Credibility decisions consider “plausibility and consistency” (30322)



# Resolving Disputes

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OCR 2001 Guidance recommends considering the following when resolving the conflict:

- Statements by any witnesses to the alleged incident (Regs: only when subjected to cross-examination)
- Evidence about the relative credibility of the complainant/respondent
  - The level of detail and consistency of each person's account should be compared in an attempt to determine who is telling the truth
  - Is corroborative evidence lacking where it should logically exist?

# Resolving Disputes

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OCR 2001 Guidance recommends considering the following when resolving the conflict and consistent with Regulations:

- Evidence of the complainant's reaction or behavior after the alleged harassment
  - Were there witnesses who saw that the complainant was upset?
  - Changes in behaviors? Work-related? School? Concerns from friends and family? Avoiding certain places?
    - May not manifest until later

# Resolving Disputes

---



OCR 2001 Guidance recommends considering the following when resolving the conflict and consistent with Regulations:

- Evidence about whether the complainant filed the complaint or took other action to protest the conduct soon after the alleged incident occurred
  - But: failure to immediately complain may merely reflect a fear of retaliation, a fear that the complainant may not be believed, etc. rather than that the alleged harassment did not occur

# Resolving Disputes

---



OCR 2001 Guidance recommends considering the following when resolving the conflict:

- Other contemporaneous evidence:
  - Did the complainant write about the conduct and reaction to it soon after it occurred (e.g. in a diary, email, blog, social media post)?
  - Did the student tell others (friends, parents) about the conduct and their reaction soon after it occurred?
- **Again, only if subjected to cross-examination**

# #1 Keep an Open Mind

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- Keep an open mind until all statements have been tested at the live hearing
- Don't come to any judgment, opinion, conclusion or belief about any aspect of this matter until you've reviewed or heard all of the evidence AND consider only the evidence that can remain (statements in the record might have to be removed from consideration if not tested in live-hearing)

## #2 Sound, Reasoned Decision

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- You must render a sound, reasoned decision on every charge
- You must determine the facts in this case based on the information presented
- You must determine what evidence to believe, the importance of the evidence, and the conclusions to draw from that evidence

# #3 Consider All/Only Evidence

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- You must make a decision based solely on the relevant evidence obtained in this matter and only statements in the record that have been tested in cross-examination
- You may consider nothing but this evidence

## #4 Be Reasonable and Impartial

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- You must be impartial when considering evidence and weighing the credibility of parties and witnesses
- You should not be swayed by prejudice, sympathy, or a personal view that you may have of the claim or any party
- Identify any actual or perceived conflict of interest



# #5 Weight of Evidence

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- The quality of evidence is not determined by the volume of evidence or the number of witnesses or exhibits.
- It is the weight of the evidence, or its strength in tending to prove the issue at stake that is important.
- You must evaluate the evidence as a whole based on your own judgment.

# #5 Weight of Evidence

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- Decision-makers who are trained to perform that role means that the same well-trained decision-maker will determine the weight or credibility to be given to each piece of evidence, and how to assign weight (30331)

# Weight of Evidence Example

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The preamble provides in the discussion:

“[W]here a cross-examination question or piece of evidence is relevant, but concerns a party’s character or prior bad acts, under the final regulations the decision-maker cannot exclude or refuse to consider the relevant evidence, but may proceed to objectively evaluate that relevant evidence by analyzing whether that evidence warrants a high or low level weight or credibility, so long as the decision-maker’s evaluation treats both parties equally by not, for instance, automatically assigning higher weight to exculpatory character evidence than to inculpatory character evidence.” (30337)

# #6 Evaluate Witness Credibility

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- You must give the testimony and information of each party or witness the degree of importance you reasonably believe it is entitled to receive.
- Identify all conflicts and attempt to resolve those conflicts and determine where the truth (standard or review/proof) lies.

# #6 Evaluate Witness Credibility

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- Consider the reasonableness or unreasonableness, or probability or improbability, of the testimony.
- Does the witness have any motive?
- Is there any bias?

# #6 Evaluate Witness Credibility

---



- Credibility is determined fact by fact, not witness by witness
  - The most earnest and honest witness may share information that turns out not to be true

# #7 Draw Reasonable Inferences

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- Inferences are sometimes called “circumstantial evidence.”
- It is the evidence that you infer from direct evidence that you reviewed during the course of reviewing the evidence.
- Inferences only as warranted and reasonable and not due to decision to opt out of cross-examination or questioning.

# #8 Standard of Evidence

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Use the your standard of evidence as defined by your policy when evaluating whether someone is responsible for each policy violation and ALWAYS start with presumption of no violation.

- Preponderance of the evidence: a fact is more likely than not to be true (30373 fn. 1409)
- Clear and convincing: a fact is highly probable to be true (30373 fn. 1409)



## #8 Standard of Evidence

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- Look to all the evidence in total, and make judgments about the weight and credibility, and then determine whether or not the burden has been met.
- Any time you make a decision, use your standard of evidence

## #9 Don't Consider Impact

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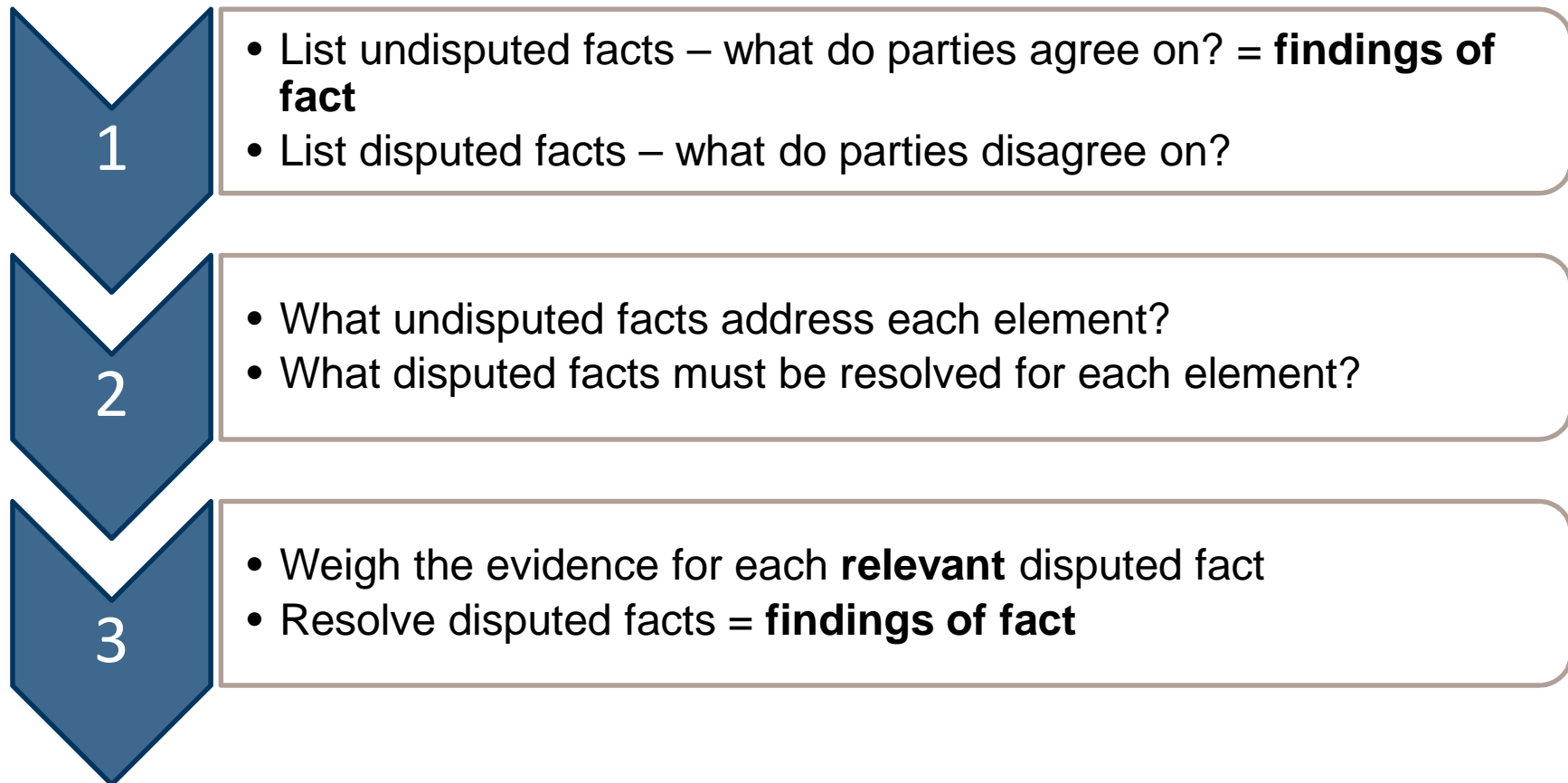
- Don't consider the potential impact of your decision on either party when determining if the charges have been proven.
- Focus only on the charge or charges brought in the case and whether the evidence presented to you is sufficient to persuade you that the respondent is responsible for the charges.
- **Do not consider the impact of your decision.**

# The Written Decision

# Resolving Disputes



## Fact Finding Process:



# Written Determination in 106.45(b)(7)(ii)

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Written determination must include:

- Identification of the allegations potentially constituting sexual harassment;
- A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence; and hearings held;

# Written Determination in 106.45(b)(7)(ii)

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Include key elements of any potential policy violation so parties have a complete understanding of the process and information considered by the recipient to reach its decision (30391) – should “match up” with decision (30391)

# Written Determination in 106.45(b)(7)(ii)

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Purpose of key elements of procedural steps  
“so the parties have a thorough  
understanding of the investigative process  
and information considered by the recipient  
in reaching conclusions.” (30389)

# Written Determination in 106.45(b)(7)(ii) Continued

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- A statement of, and rationale for, the results as to each allegation, including determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and



# Written Determination in 106.45(b)(7)(ii) Continued

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- Statement of rationale: requiring recipients to describe, in writing, conclusions (and reasons for those conclusions) will help prevent confusion about how and why a recipient reaches determinations regarding responsibility (30389)
- The requirement of “Transparent descriptions of the steps taken in an investigation and explanations of the reasons why objective evaluation of the evidence supports findings of facts and conclusions of facts” helps prevent injection of bias (30389)

# Written Determination in 106.45(b)(7)(ii) Continued

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- Institution's procedures and permissible bases for complainant and respondent to appeal
- Provided to both parties in writing contemporaneously (106.45(b)(7)(ii))

# Written Determination in 106.45(b)(7)(ii) Continued

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- Receiving decision simultaneously will ensure both parties have relevant information about the resolution of the allegations

# Written Determination in 106.45(b)(7)(ii) Continued

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Reference to code of conduct not prohibited:

“Recipients retain discretion to also refer to in the written determination to any provision of the recipient’s own code of conduct that prohibits conduct meeting the [Title IX definition] of sexual harassment; however” the final regulations apply to recipient’s response to Title IX portion only.  
(30389)

# Written Determination in 106.45(b)(7)(ii) Continued

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The preamble discussion notes that it does not “expressly require the written determination to address evaluation of contradictory facts, exculpatory evidence, all evidence presented at a hearing, or how credibility assessments were reached, because the decision-maker is obligated to objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence (and to avoid credibility inferences based on a person’s status as a complainant, respondent, or witness.”

**Note:** Consider including these anyway for a more thorough determination.

# Goals

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- Be consistent in terminology
- Be clear as to the source of information.  
Compare:
  - “Bob stated that this happened.”
  - “This happened.”

# Unambiguous

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- Could someone unfamiliar with the incident pick up the decision and understand what happened?
- Make no assumptions that the reader will understand certain aspects of the community
- Write for a judge and jury to understand with no prior background

# Relevancy

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- Include any decisions made that exclude information as not relevant and the explanation given in hearing
- Check to ensure that your report does not contain any information you are prohibited from including?



# Sensitive

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- Will the parties feel heard?
- Will the parties feel blamed?
- Will the parties feel vilified?
- Will the tone otherwise inflame the parties unnecessarily?
- Maintain neutral, evidence-driven tone.

# Empathetic

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- Maintain a non-judgmental tone
- Stay away from charged words of advocacy:
  - Clearly/obviously
  - Innocent/guilty
  - Victim/perpetrator
- Watch your adjectives and adverbs – unless they are in a quote
- Recognize the impact of your words

# Specific

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- Set the scene visually (will help identify inconsistencies in stories)
- Use quotation marks carefully
- Include details to the level that you can thoroughly understand what it looked like
- Be careful of pronoun usage so that we always know who is saying or doing what

# Editing Exercises: Disclaimer

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*The next few editing exercises are examples of bad—perhaps truly terrible—sentences that you might find in a written decision.*

*They do nearly everything wrong. Let's discuss how to make them right.*

*As always, these are not taken from real reports.*

# Editing Exercises

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Respondent engaged in sexual intercourse with Complainant from behind.

# Editing Exercises

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Complainant couldn't explain why she was sitting on the couch by herself.

# Editing Exercises

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Complainant stated that  
Respondent jacked himself off,  
then gave him a blow job.

# Editing Exercises

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Respondent visibly winced when  
Complainant said “no.”



# Editing Exercises

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John stated that Alice told him to  
“knock it off.”

# Editing Exercises

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On a scale of 1 to 10,  
Respondent was a “level 4 kind  
of drunk.”

# Editing Exercises

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There was no evidence to support Complainant's assertion that the activity was without consent.

# Editing Exercises

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During the mediation,  
Respondent admitted to the  
misconduct and promised not to  
do it again.

# Editing Exercises

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Professor Clark indicated that he had never known Respondent to commit sexual misconduct at 2:00 in the morning in the back of a bar before.

# Editing Exercises

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Respondent stated that Complainant was diagnosed with bipolar disorder and that the complaint was “all in his head.”

# Editing Exercises

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When Respondent asked if Complainant wanted oral sex and Complainant said, “That’s OK,” that was clear indication of the Complainant’s consent.

# Questions?



# HIGHER EDUCATION TITLE IX

## ADVISOR TRAINING



# Disclaimer



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*We can't help ourselves. We're lawyers.*

- We are not giving you legal advice. Consult with your legal counsel regarding how best to address a specific situation.
- This training satisfies both annual Clery training and the generally applicable topics required by the Final Title IX regulations. \*This training does not cover institution-specific grievance procedures, policies, or technology.
- Use the chat function to ask general questions and hypotheticals.
- This training is not being recorded, but we will provide you with a packet of the training materials to post on your websites for Title IX compliance.

Additional information  
available at:

**Title IX Resource Center**  
at [www.bricker.com/titleix](http://www.bricker.com/titleix)

Find us on **Twitter** at  
**@BrickerHigherEd**



# Presentation Rules

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- Questions are encouraged
- “For the sake of argument...” questions help to challenge the group, consider other perspectives, and move the conversation forward
- Be aware of your own responses and experiences
- Follow-up with someone if you have any questions or concerns
- Take breaks as needed

# Aspirational Agenda



Josh Nolan [jnolan@bricker.com](mailto:jnolan@bricker.com)

- 9:00-10:30 Intro & Overview of the Grievance Process
- 10:30-10:45 Break
- 10:45-12:00 Understanding the Grievance Process and the Advisor's Role
- 12:00-12:30 Lunch
- 12:30-1:45 Issues of Relevancy, Hypotheticals
- 1:45-2:00 Break
- 2:00-3:00 The Live Cross-Examination Hearing
- 3:00-3:30 Debrief/Hearing
- 3:30-3:45 Break
- 3:45-5:00 Hearing/Objectively Evaluating Evidence/Written Decision

# Training Requirements



The new Title IX regulations require training for:

- Title IX Coordinators
- Investigators
- Decision-Makers
- Informal Resolution Officers
- Appeals Officers

Under the new Title IX regulations, **there are NO training requirements for advisors** in the grievance process.

# Training Requirements for Title IX Officials

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Generally, the new Title IX regulations require training of an institution's Title IX officials on:

- Jurisdiction: understanding “the scope of the recipient’s education program or activity”
- Definitions of “sexual harassment” under the new Title IX regulations
- How to serve impartially, without bias, free from conflict of interest, and without prejudgment of the facts
- Their individual roles in the process

# What's Going On?

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**BUT...**It helps the party and the process if an **advisor** understands:

- Title IX jurisdiction
- Title IX definitions of sexual harassment
- The grievance process
- The roles of the Title IX officials in the grievance process



# What's Going On?

---



**BUT...**It helps the party and the process if an **advisor** understands:

- The hearing and the **advisor's** role in the hearing
- The bases for appeal

# **Overview of Jurisdiction and Definitions of Sexual Harassment**

# Jurisdictional Changes



The new Title IX regulations contain changes in what we commonly refer to as Title IX's jurisdiction over sexual harassment claims. It is helpful for advisors to know:

- Title IX jurisdiction will look differently this academic year compared to the last academic year
- Title IX regulations include employees now
- Conduct codes can be run concurrently and through the same process as Title IX (and may be)

# Jurisdictional Changes

- No obligation to address off-campus conduct that does not involve a program or activity of school  
BUT
- “Schools are responsible for redressing a hostile environment that occurs on campus even if it relates to off-campus activities.”



# Jurisdiction



- A recipient with actual knowledge of sexual harassment in an educational program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.
- A recipient is only deliberately indifferent if its response to sexual harassment is unreasonable in light of known circumstances.

# Jurisdiction

“Education program or activity”



“includes 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. “ §106.30(a)

# Education Program or Activity

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Locations, events, or circumstances with substantial control – the easy ones:

- Residence halls
- Classrooms
- Dining halls

# Off Campus?

Any of the three conditions must apply to extend Title IX jurisdiction off campus:

- 📍 (1) Incident occurs as part of the recipient's "operations" (meaning as a "recipient" as defined in the Title IX statute or the Regs 106.2(h));
- 📍 (2) If the recipient exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus;  
and



# Off Campus?



- 📍 (3) Incident occurred in an off-campus building owned or controlled by a student organization officially recognized by a post secondary institution
  - Discussion specifically addresses off campus sorority and fraternity housing and, as long as **owned by or under control of organization that is recognized by the postsecondary institution**, it falls within Title IX jurisdiction
  - Must investigate in these locations (30196-97)

# Not an Education Program or Activity



Locations, events, or circumstances without substantial control:

- Anything outside of the United States;
- Privately-owned off campus apartments and residences that do not otherwise fall under the control of the postsecondary institution (example: privately owned apartment complex not run by a student organization)

# Education Program or Activity



Depends on fact-analysis under “substantial control”:

- Conventions in the United States
- Holiday party for an academic department
- Professor has students over to house

# Jurisdiction and Mandatory Dismissal

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## Dismissal of a formal complaint— §106.45(b)(3)(i)

The recipient must investigate the allegations in a formal complaint.

(BUT) If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in §106.30 even if proved, did not occur in the recipient's **education program or activity**, ...

# Jurisdiction and Mandatory Dismissal

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or did not occur against a person in the United States, ....




# Jurisdiction and Mandatory Dismissal

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then the recipient **must** dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; **such a dismissal does not preclude action under another provision of the recipient's code of conduct.**

# Study Abroad Programs

- Draws a bright line-not outside of the United States: plain text of Title IX “no person in the United States,” means no extraterritorial application. Must dismiss. (30205-06) 
- Programs of college based in other countries? No jurisdiction and must dismiss.
- Foreign nationals in the United States covered.

# Online Study

- “Operations” of the recipient may include computer and online programs and platforms “owned and operated by, or used in the operation of, the recipient.” (30202)
- Still has to occur in educational program or activity
- And in United States...





# Sexual Harassment Definition Changes



The new Title IX regulations contain changes to definitions that will be in the institution's policy. It is helpful for advisors to:

- Know the institution's specific policy (for variance)
- Know the Title IX required definitions and elements to make your party's case
- Know the discretionary definitions that the institution can define and how the institution is defined

# Sexual Harassment



- Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:
  - [Quid pro quo] 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;
  - [Hostile environment] 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; or
  - [Clery crimes] Sexual assault, dating violence, domestic violence, or stalking

# Sexual Harassment: *Quid Pro Quo*

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- Only applies to employee to student
- DOE interprets this broadly to encompass implied *quid pro quo*
- No intent or severe or pervasive requirements, but must be unwelcome
- “[A]buse of authority is the form of even a single instance...is inherently offensive and serious enough to jeopardize educational access.”

# Sexual Harassment: Davis/Gebser

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- The second prong: severe, persistent, and objectively offensive and deny equal access (which is not the same as under Title VII)
- Does not require intent
- Reasonable person standard – means a reasonable person in the shoes of the complainant (30159)

# Severe

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- Takes into account the circumstances facing a particular complainant
- Examples: age, disability status, sex, and other characteristics
- Preamble discussion states that this removes the burden on a complainant to prove severity (30165)

# Pervasive

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- Preamble indicates pervasive must be more than once if it does not fall into the above (30165-66)
- Preamble reminds us that quid pro quo and Clery/VAWA (domestic violence, dating violence, stalking) terms do not require pervasiveness

# Objectively Offensive



Reasonable person is very fact-specific (30167)

- Because so fact-specific, different people could reach different outcomes on similar conduct, but it would not be unreasonable to have these different outcomes
- Preamble notes that nothing in the Regulations prevents institutions from implicit bias training

# Disclaimer

- This section uses the terms “rape,” “victim,” and “perpetrator” -- CRIMINAL, not POLICY, from FBI Criminal Definitions (what Clery and VAWA refer to for their definitions)



# Mandatory: Sexual Assault, Dating Violence, Domestic Violence, & Stalking

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Third prong refers to certain statutory definitions for sexual assault, dating violence, domestic violence and stalking

- Sexual assault is defined as forcible and non-forcible sex offenses as defined in the FBI's Uniform Crime Reporting (UCR) database, which you can find in the National Incident-Based Reporting System (NIBRS) manual
- Dating violence, domestic violence, and stalking definitions are from Clery statute (not regulations) as amended by VAWA

# Sexual Harassment: Sexual Assault

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“Sexual Assault” includes:

- Rape
- Sodomy
- Sexual Assault with an Object
- Fondling
- Incest
- Statutory Rape

# Sexual Assault: Rape



“Rape” means the **carnal knowledge** of a person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity. **Carnal knowledge** is defined as the slightest penetration of the sexual organ of the female (vagina) by the sexual organ of the male (penis).

# Sexual Assault: Sodomy



“Sodomy” means oral or anal sexual intercourse with another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

# Sexual Assault: With an Object



“Sexual Assault with an Object” means use an object or instrument to unlawfully **penetrate**, however slightly, the **genital or anal opening** of the body of another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity. An object or instrument is anything used by the offender **other than the offender’s genitalia**, e.g., a finger, bottle, handgun, stick.

# Sexual Assault: Fondling



“Fondling” means the touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

# Sexual Assault: Incest



“Incest” means sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

# Sexual Assault: Statutory Rape

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“Statutory Rape” means sexual intercourse with a person who is under the statutory age of consent.

In Ohio:

- Under 13 → can't consent
- Under 16 → can't consent to those older than 18



# Sexual Harassment: Dating Violence

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“Dating Violence” means an act of violence committed by a person who is or has been in a romantic or intimate relationship with the complainant. The existence of such a romantic or intimate relationship is determined by the length of the relationship, the type of relationship, and the frequency of interactions between the individuals involved in the relationship.

# Sexual Harassment: Domestic Violence



“Domestic violence” is an act of violence committed by:

- A current or former spouse or intimate partner of the complainant;
- A person with whom the complainant shares a child in common;
- A person who is cohabitating with, or has cohabitated with, the complainant as a spouse or intimate partner;
- A person similarly situated to a spouse of the victim under the domestic/family violence laws of the jurisdiction;
- Any other person against an adult or youth victim who is protected from that person’s acts under the domestic/family violence laws of the jurisdiction

# Sexual Harassment: Stalking

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“Stalking” is engaging in a course of conduct directed at a specific person that would cause a reasonable person with similar characteristics under similar circumstances to:

- Fear for the person’s safety or the safety of others; or
- Suffer substantial emotional distress.

As mentioned before, to qualify under Title IX, it must be sex-based stalking. (30172 fn. 772)

# Stalking: Course of Conduct



## “Course of Conduct”

- Under VAWA regulations: means **two or more acts**, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.

# Stalking: Reasonable Person

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“Reasonable person”

Under VAWA regulations: means a reasonable person under similar circumstances and with similar identities to the victim.

# Stalking: Substantial Emotional Distress

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“Substantial emotional distress”

Under VAWA regulations: means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

# Discretionary: Consent, Coercion, Incapacitation, Exploitation



- Discretion is left to the institution on consent, coercion, and incapacitation, which, as we will discuss, allows institutional discretion on the extent of these violations, especially under “sexual assault”
- Exploitation/revenge porn: may be pervasive unwelcome conduct depending on widespread dissemination (30166)

# Consent: Left to the Institutions to Define



DOE left “consent” and terms that often negate consent to the discretion of the recipients to “reflect the unique values of a recipient’s educational community.” (30159, see also 30174)

- No required definition in law, regs, or guidance
- Policy language is going to be critical to your analysis
- We will use standard language for discussion purposes



# Who Can *NEVER* Give Consent?



- Those who are unable to consent by law (ex. minors, incarcerated persons)
- Severely cognitively disabled persons
- Those who are incapacitated

# Consent

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- Some policies require:
  - Clear - verbal (or non-verbal?) communication
  - Knowing - Mutually understood as willingness to participate in a sexual activity and the conditions of that sexual activity
  - Voluntary - Freely and actively given

# Consent



- Some policies include:
  - May be withdrawn with clear communication
  - Consent for one activity is not consent for everything
  - Silence or failure to resist does not constitute consent
  - Previous consent does not constitute consent for future activities

# When Does Consent *NOT* Exist?



- Use of physical force or threats of physical force,
  - Many policies also include physically intimidating behavior or coercion
- Individual from whom consent is required is incapacitated

# Evidence of Consent?

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- What words or actions did complainant use to convey consent/non-consent?
  - Must examine sexual contacts, acts in detail
- Was complainant capable of consenting? (Asleep? Passed out? Not understanding what was happening?)

# Evidence of Consent?

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- Who took off what clothes?
- Who provided the condom?
- Who initiated physical contact?
- Who touched who where?
- “They gave consent” = What did you say to them, and what did they say to you?

# Not Evidence of Consent?

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Some institutions include evidence that they do not consider evidence of consent:

- What a complainant was wearing
- Whether complainant had given prior consent in other sexual activities

# Coercion: Left to Institution to Define

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- Is this in your policy?
  - Does your TIX team, your preventive education team, and your local rape crisis center agree on a definition when working with your community?
- Often defined as unreasonable pressure for sexual activity
- Compare: “I will break up with you” versus “I will kill myself”



# Incapacitation: Left to Institution to Define

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- State of being unconscious, asleep, or under the influence of drugs and/or alcohol to such an extent that the person cannot appreciate the nature or consequences of their actions
- Intoxicated people **can** consent.  
Incapacitated people **cannot** consent.

# Incapacitation: Amnesty?

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Nothing in the Regulations precludes the postsecondary institution from providing amnesty to students for personal alcohol and/or drug use when participating in a Title IX investigation

# Incapacitation

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- Determined by how the alcohol (or drugs) consumed impacts a person's decision-making capacity, awareness of consequences, and ability to make informed judgments
- Beyond mere intoxication
- No requirement for incapacitation to be voluntary or involuntary on the part of the complainant

# Incapacitation

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- To be responsible where a complainant is incapacitated, policies typically require that the **respondent knew or reasonably should have known about the incapacitation**
- Incapacitation of the respondent is not a defense

# Physical Effects

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Some policies list physical effects that are not solely indicative of, but may indicate incapacitation:

- Conscious or unconscious?
- Vomiting?
- Slurred speech
- Difficulty walking
- Difficulty holding a coherent conversation

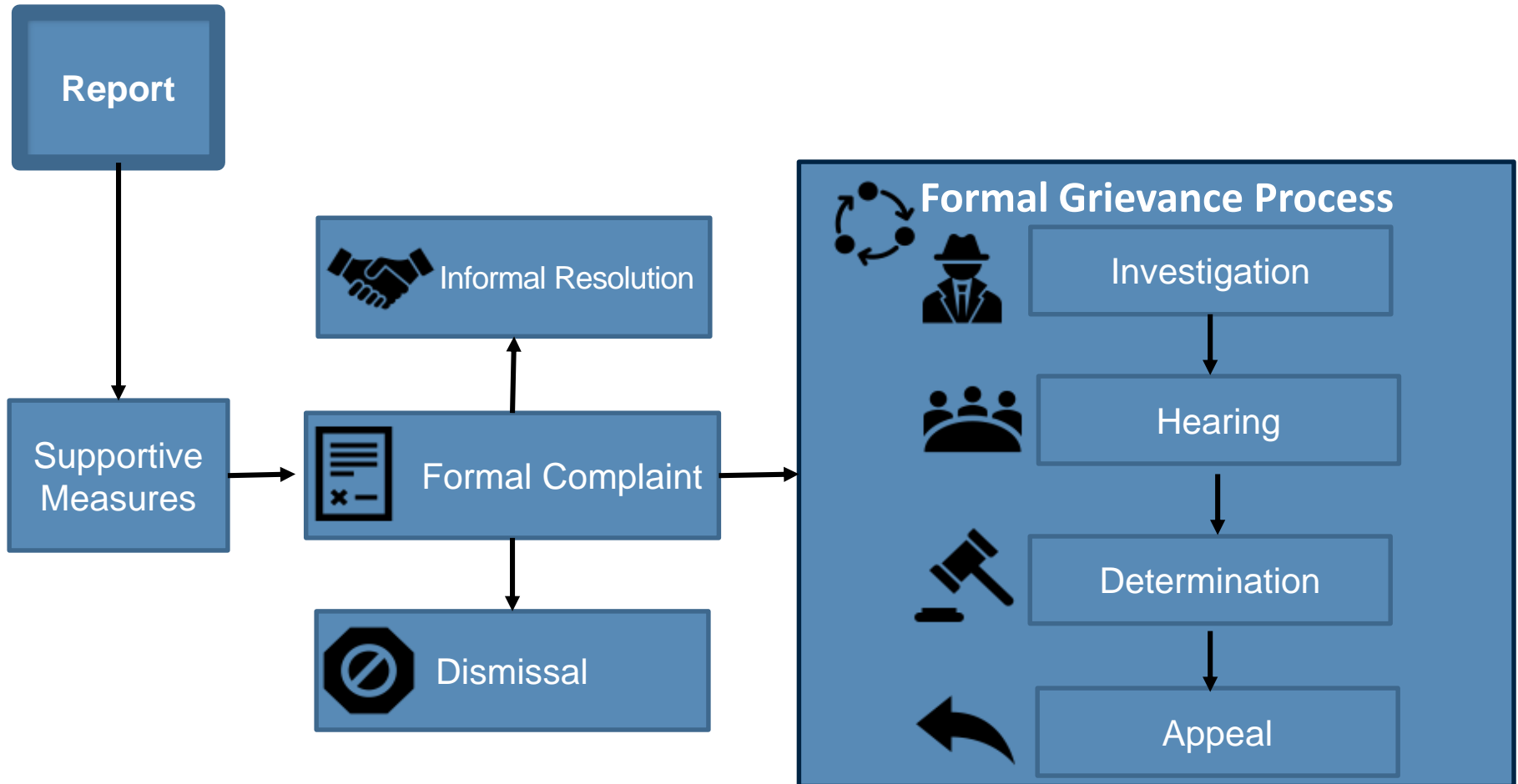
# Blackout ≠ Incapacitation



- Alcohol can interfere with the ability to form memories
- May be a complete lack of memory or fragmentary blackouts
- Listen carefully to the way they describe what they remember. Does it fit with what you know about intoxication and recall?

# Overview of the Grievance Process

# Overview of the Process





# Overview of the Process: 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 (discretion of the postsecondary institution)

- Notice to employees is no longer enough to trigger actual knowledge (ability or obligation to report not enough)
- Purpose to allow complainants to speak with employees without automatically triggering process



# Overview of the Process: Formal Complaint



A document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting the recipient investigate the allegation of sexual harassment

- In response to a formal complaint, a recipient must follow a grievance process (set by 106.45)
- Title IX Coordinator must offer complainant supportive measures (regardless if files formal complaint – if complainant does not want to file a formal complaint)



# Overview of the Process: Formal Grievance Process



Any provisions, rules, or practices, other than those in the regulations, must apply equally to both parties.

Basic requirements:

- Treat complainants and respondents equitably
- Follow grievance process
- Only impose any disciplinary sanctions against a respondent after grievance process followed



# Overview of the Process: Formal Grievance Process



- Requires an objective evaluation of all relevant evidence (inculpatory and exculpatory)
- Provide credibility determinations not based upon person's status as complainant, respondent, or witness
- Require individual designated by recipient as Title IX Coordinator, investigator, decision-maker, informal resolution officer, and/or appeals officer be free from conflict of interest or bias



# Overview of the Process: Formal Grievance Process



- Include presumption that respondent is not responsible for the alleged conduct until a determination regarding responsibility is made through the grievance process
- Include prompt time frames (some discretion)
- Describes range of possible disciplinary outcomes
- States standard of evidence (preponderance of the evidence or clear and convincing)



# Overview of the Process: Formal Grievance Process



- Include procedures and bases for complainant and respondent to appeal
- Describe range of supportive measures available to complainants and respondents
- Not require legally privileged evidence absent a voluntary written waiver by the holder of the privilege



# Overview of the Process: Written Notice



- Recipient's grievance process and informal resolution process
- Allegations with sufficient time for review with sufficient detail, such as date, location if known
- Respondent presumed not responsible for alleged conduct and determination made at conclusion of grievance process
- Parties may have an advisor of choice



# Overview of the Process: Written Notice



- Any provision in recipient's code of conduct that prohibits knowingly making false statements or providing false information during the grievance process
- Additional notification to parties if new allegations arise as apart of the investigation





# Overview of the Process: Dismissal



- Recipient MUST investigate allegations in a formal complaint
- BUT recipient MUST dismiss
  - if conduct alleged would not constitute sexual harassment, even if proven, OR
  - Conduct did not occur within recipient's education program or activity or in the United States



# Overview of the Process: Investigation

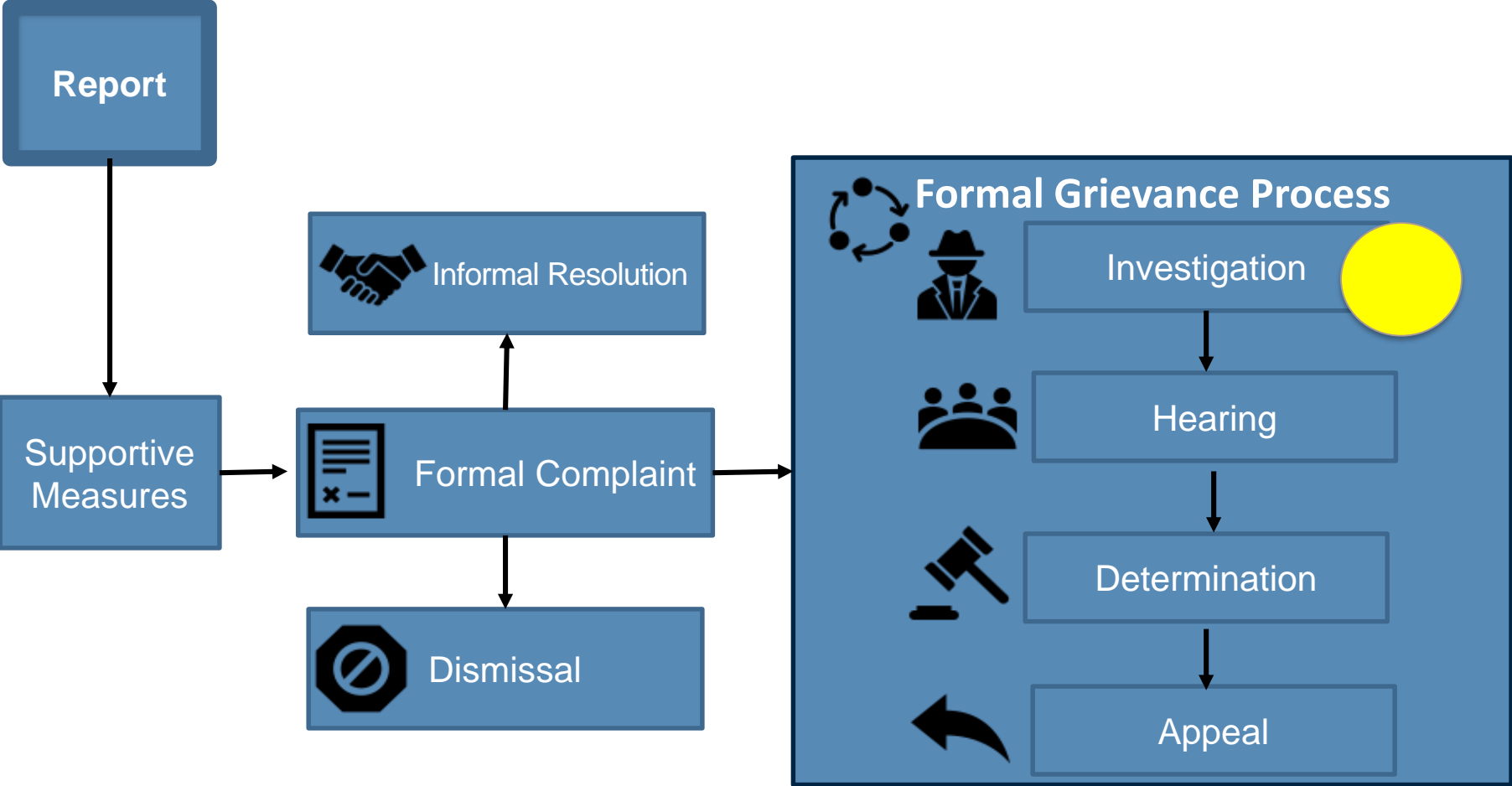
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- Only of a formal complaint
- Burden of proof and evidence gathering rests with recipient
- Cannot access, require, disclose, or consider treatment records of a party without that party's voluntary, written consent
- Provide equal opportunity for parties to present witnesses (fact and expert)



# Advisor May be Included



# Overview of the Process: Investigation

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- Provide equal opportunity for parties to present inculpatory and exculpatory evidence
- Not restrict ability of either party to discuss or gather and present relevant evidence
- Provide parties same opportunities to have others present during the grievance process, including advisor of choice



# Overview of the Process: Investigation



- Provide written notice of date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings with sufficient time to prepare
- Provide both parties equal opportunity to inspect and review any evidence obtained in the investigation – recipient must send to party and party’s advisor with at least 10 days to submit a written response before completion of investigation report



# Overview of the Process: Investigation

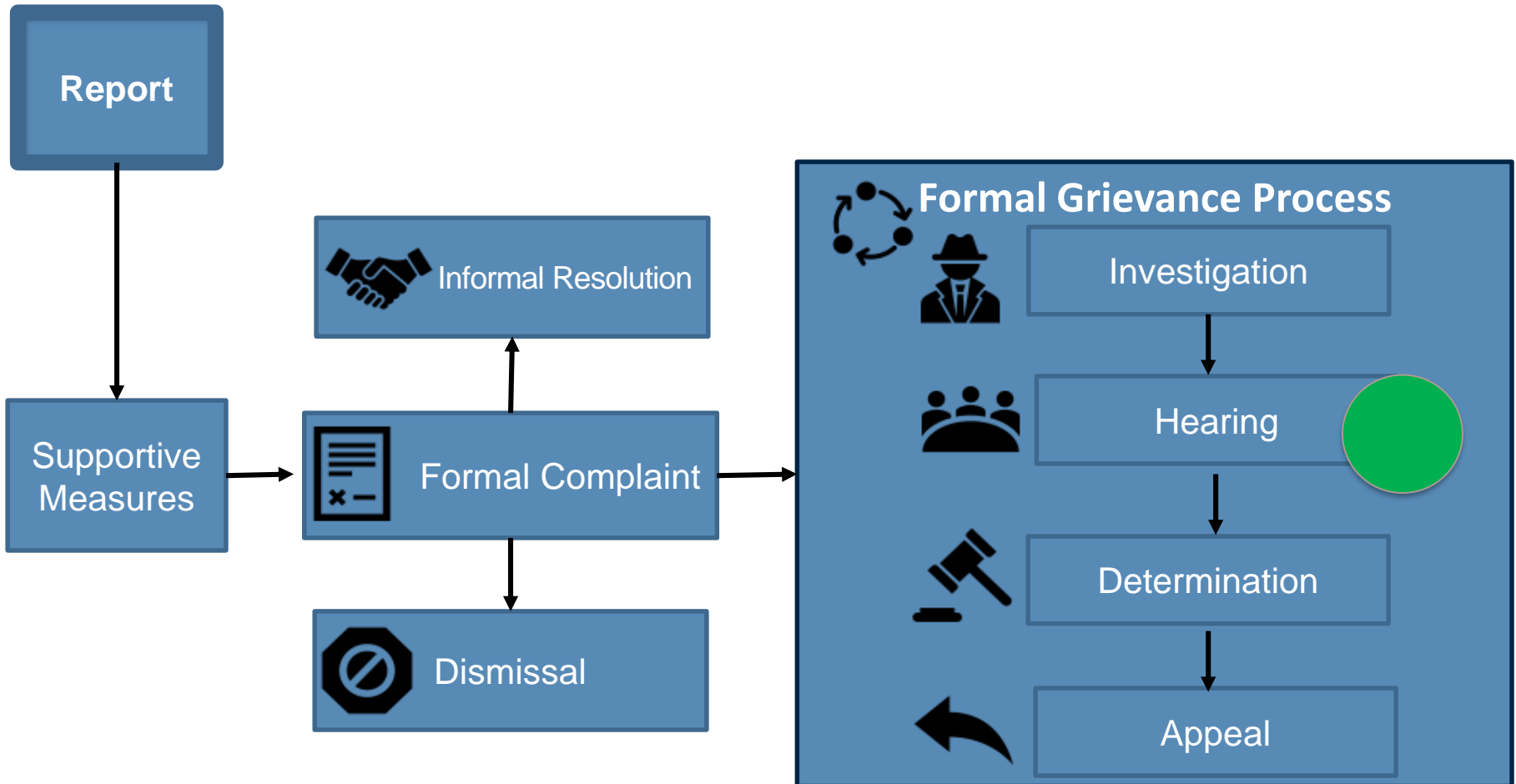
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- Recipient must make all such evidence subject to inspection and review at any hearing
- Create an investigation report at least 10 days before a hearing that fairly summarizes the relevant evidence and send to each party and party's advisor



# Advisors Must be Included



# Overview of the Process: Hearings



- Must provide a live, cross-examination hearing
- Parties must have an **advisor** and the recipient must provide an advisor for a party if the party does not have one
- **Advisors** ask **only relevant cross-examination questions**—no party-on-party questioning
- May be virtual, but must be recorded or transcribed





# Overview of the Process: Determinations

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- Decision-maker (not Title IX Coordinator or investigator) must issue a written determination regarding responsibility
- Must include
  - Allegations
  - Procedural steps taken from receipt of formal complaint



# Overview of the Process: Determinations

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- Findings of fact
- Conclusions
- Statement of and rationale for each result of each allegation, including determination of responsibility and any disciplinary imposition and whether remedies designed to restore or preserve access to educational program or activity will provided to complainant



# Overview of the Process: Determinations

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- Procedures and bases for appeal by both parties
- Provide written determination to parties simultaneously



# Overview of the Process: Appeals



- Recipient must offer to both parties the following bases of appeal:
  - Procedural irregularity that affected outcome
  - New evidence not reasonably available at the time regarding responsibility or dismissal that could affect outcome
  - Conflict of interest or bias by the Title IX Coordinator, investigator, and/or decision-maker that affected the outcome



# Overview of the Process: Appeals



- The decision-maker for the appeal cannot be the same decision-maker from the hearing, or the Title IX Coordinator or investigator
- Must provide both parties a reasonable, equal opportunity to submit a written statement in support of or challenging the determination
- Must issue a written decision describing the result of the appeal and rationale and provide the decision simultaneously to the parties



# Overview of the Process: Informal Resolution

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- At any time prior to the determination regarding responsibility, the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication
- Recipient cannot require this and also cannot offer unless a formal complaint is filed



# Overview of the Process: Informal Resolution

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- Recipient can offer informal resolution if:
  - Provides written notice to the parties
  - Obtains the parties' voluntary, written consent to the informal process
  - Does not offer for employee sexual harassment of a student



# Overview of the Process: Retaliation

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- Neither recipient nor any other person may retaliate against an individual for purpose of interfering with any right or privilege secured by Title IX or because made a report or complaint, or participated or refused to participate in the process
- (Further discussion in codes of conduct discussion at lunch)





# Overview of the Process: Confidentiality



Recipient **must keep confidential the identity of any individual** who has made a report or complaint of sex discrimination, including any individual who made a report, any complainant, any alleged perpetrator, any respondent, and any witness, **unless required by law**, permitted by FERPA, or **for the purposes of carrying out Regulations grievance process.**



# **Understanding the Roles of the Title IX Officials**



## **Understanding the Process: The Title IX Coordinator's Role**

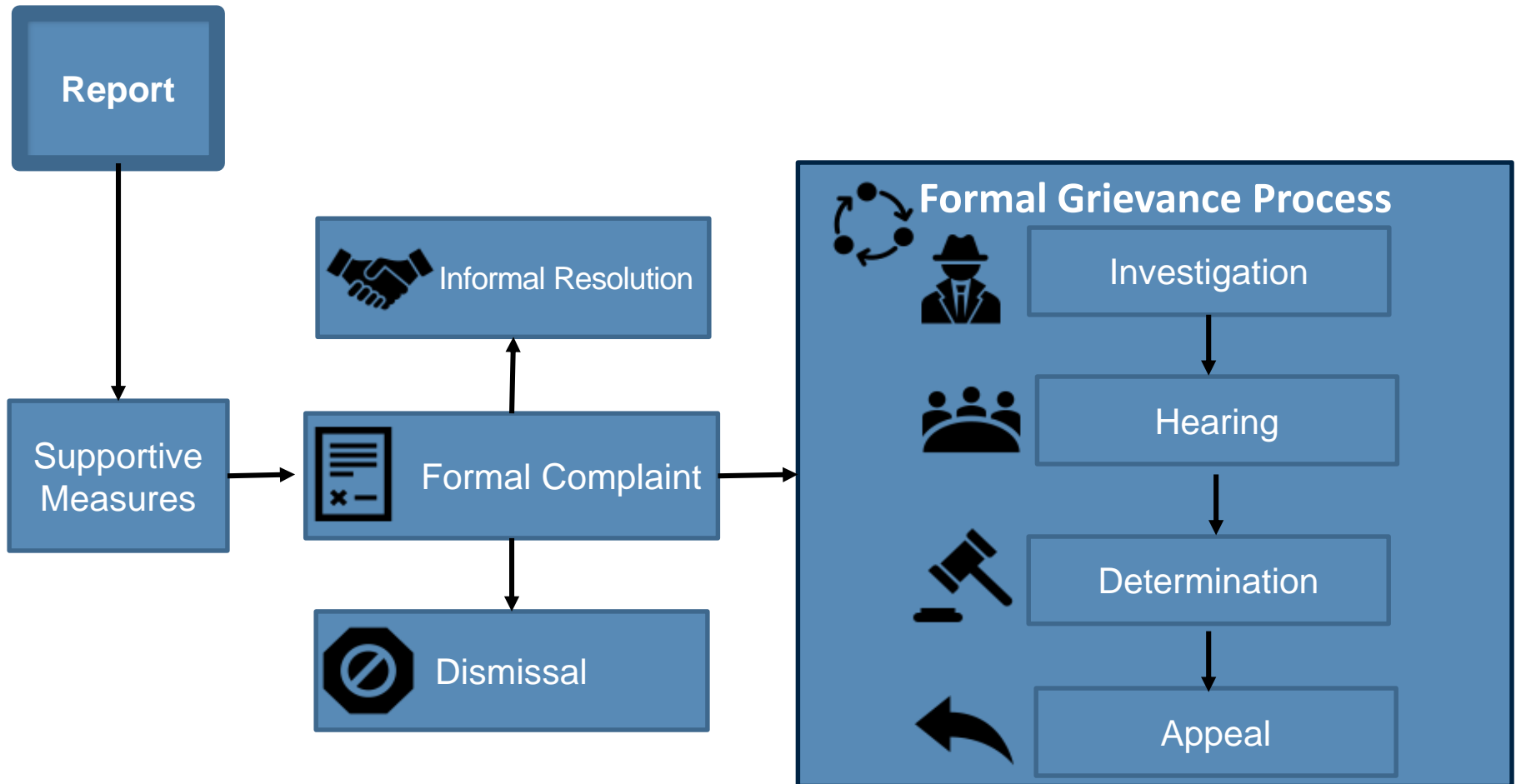
# The Title IX Coordinator

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## Oversees procedural integrity

- Oversees the whole process and helps to ensure the written process and the as applied process are the same
- Often is the person who ensures the investigators, decision-makers, informal resolution officers and appeals officers are properly trained
- Often is the person who ensures advisors are available for hearings
- Makes decisions on new issues that arise to keep them in compliance with the policy

# Overview of the Process



# The Title IX Coordinator

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For **advisor** purposes, should understand the intake process (so you know if it was done correctly).

- Title IX Coordinator (or deputy) will receive a report (this may also come in through another individual with the ability to give sanctions) Title IX Coordinator will provide supportive measures to a Complainant
- Title IX Coordinator will determine if the report falls within the “education program or activity” of the institution If not, Title IX Coordinator **MUST** dismiss from Title IX process

# The Title IX Coordinator

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When a Title IX Coordinator may elect to sign and issue a formal complaint without a complainant:

- Complainant has not yet been identified or cannot be identified, but evidence indicates that sexual harassment took place within the institution's jurisdiction (e.g., video, multiple student reports, anonymous social media allegations)

# The Title IX Coordinator

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For **advisor** purposes, must understand the that the Title IX Coordinator:

- Often is the person who selects and assigns a specific investigator, decision-maker, and appeals officer to a matter
- May be the person who supervises the Title IX Office
- May be the investigator





## The Investigator's Role

# The Investigator

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1. The gatherer of all relevant evidence.
2. The organizer of all relevant evidence

# The Investigator

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- Does not make a determination on the facts
- Determines some level of whether evidence is relevant.



## The Decision-Maker's Role

# The Decision-Maker's Role

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1. Make relevancy determinations...before any question at the live cross-examination hearing can be answered
2. Run an orderly and truth-seeking live cross-examination hearing
3. Write a decision: apply the policy, use standard of review, and evaluate relevant evidence still in the record after the hearing

# The Decision-Maker's Role

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The **advisor** will interact most with the decision-maker during the grievance process.

The live cross-examination hearing is where the **advisor** has the most active role.

# **LIVE CROSS-EXAMINATION: Theory and Practice**

# Cross Examination



Traditionally, cross examination questions are those that try to elicit “yes” or “no” answers, not explanations.

Examples:

- You were at the party that night, weren't you?
- You'd agree with me that you had three beers, wouldn't you?
- You didn't call an Uber, did you?



# Live Cross-Examination: Theory

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- Essential for truth seeking (30313)
- Provides opportunity of both parties to **test “consistency, accuracy, memory, and credibility”** so that the decision-maker can better assess whether a [party’s] narrative should be believed” (30315)

# Live Cross-Examination: Theory

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- Provides parties with the opportunity to “direct the decision-maker’s attention to **implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility**” in the other party’s statements. (30330)
- Promotes transparency and equal access (30389)

# Live Cross-Examination: Theory

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According to the Department, the process in 106.45 best achieves the purposes of:

- (1) effectuating Title IX's non-discrimination mandate by ensuring **fair, reliable outcomes** viewed as **legitimate** in resolution of formal complaints of sexual harassment so that victims receive remedies
- (2) **reducing and preventing sex bias** from affecting outcomes; and
- (3) ensuring that Title IX regulations are consistent with **constitutional due process and fundamental fairness**  
(30327)

# Live Cross-Examination: How it should look

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“[C]onducting cross-examination consists simply of posing questions intended to advance the asking party’s perspective with respect to the specific allegation at issue.” (30319)

# Live Cross-Examination: Regulations

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In this process:

- Decision-maker must permit each party's advisor to ask the other party and any witnesses **all relevant** questions and follow-up questions, including those challenging **credibility**
- Must be conducted directly, orally, and in real time by the party's advisor, but never party personally
- Only relevant cross-examination and other questions may be asked of a party or witness

# Live Cross-Examination: Regulations

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- Before a party or witness may answer a question, the decision-maker must first determine whether the question is relevant and explain the reason if not relevant
- Must audio record, audio-video record or provide a transcript of the hearing

# Role of Decision-Maker/questioning by



The preamble discussion provides some additional information on protecting neutrality of the **decision-maker**:

“To the extent that **a party wants the other party questioned in an adversarial manner** in order to further the asking party’s views and interests, that questioning is conducted by the party’s own advisor, **and not by the recipient**. Thus, no complainant (or respondent) need feel as though the recipient is “taking sides” or otherwise engaging in cross-examination to make a complainant feel as though the recipient is blaming or disbelieving the complainant.” (30316)

# Role of Decision-Maker/questioning by



So take that into consideration if eliciting questions:

- “[O]n the decision-maker’s initiative [can] ask questions and elicit testimony from parties and witnesses,
- as part of the recipient’s **burden** to reach a determination regarding responsibility based on objective evaluation of all relevant evidence including inculpatory and exculpatory evidence.
- Thus , the skill of a party’s advisor is not the only factor in bringing evidence to light for a decision-maker’s consideration.” (30332)



# Confidentiality

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- 106.71 requires recipients to keep party and witness identities confidential except as permitted by law or FERPA, and as needed to conduct an investigation or hearing (30316)
- Prevents anyone in addition to the advisor to attend the hearing with the party, unless otherwise required by law (30339)

# **ISSUES OF RELEVANCY: Not Rules of Evidence**

# Relevancy

- Per 34 C.F.R. 106. 45(b)(6)(i):
  - “Only **relevant** cross-examination and other questions may be asked of a party or witness.”

“[C]ross examination **must focus only on questions that are relevant to the allegations in dispute.**” (30319)

# Relevancy

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Party or witness **cannot** answer a question until the decision-maker determines whether it is relevant.

- Requires decision-makers to make “on the spot” determinations and explain the “why” if a question or evidence is not relevant (30343)

# What is Relevant?



Decisions regarding relevancy do not have to be lengthy or complicated:

“... it is sufficient... to explain that a question is irrelevant because it calls for prior sexual behavior information without meeting one of the two exceptions, or because the question asks about a detail that is not probative of any material fact concerning the allegations.” (30343)

# What is Relevant?



## Questions to consider:

- Does this question, topic, evidence help move the dial under the standard of evidence?
  - **Preponderance of the evidence**: a fact is more likely than not to be true (30373 fn. 1409)
  - **Clear and convincing**: a fact is highly probable to be true (30373 fn. 1409)

# What is Relevant?



Under the **preponderance of the evidence** standard:

- Does this help me in deciding if there was more likely than not a violation?
- Does it make it more or less likely?
- Why or why not?

If it doesn't move this dial: likely not relevant.

# What is Relevant?

---



Under the **clear and convincing** standard of evidence:

- Does this help me in deciding if a fact is highly probable to be true?
- Does it make it more or less probable?
- Why or why not?

If it doesn't move this dial: likely not relevant.



# Not Governed by Rules of Evidence



The Rules of Evidence do NOT apply and CANNOT apply

“[T]he decision-maker’s only evidentiary threshold for admissibility or exclusion of questions and evidence is not whether it would then still be excluded under the myriad of other evidentiary rules and exceptions that apply under, for example, the Federal Rules of Evidence.” (30343)

# Not Governed by Rules of Evidence

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## Examples:

- No reliance of statement against a party interest (30345)
- No reliance on statement of deceased party (30348)
- A recipient may not adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice (30294)

# Relevancy



Recipient must ensure that “all *relevant* questions and evidence are admitted and considered (though varying weight or credibility may of course be given to particular evidence by the decision-maker).” (30331)

- A recipient may not adopt rules excluding certain types of relevant evidence (**lie detector** or rape kits) where that type of evidence is not labeled irrelevant in the regulations (e.g., sexual history) or otherwise barred for use under 106.56 (privileged) and must allow fact and **expert witnesses**. (30294)

# Relevancy: Not Relevant

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The Department has determined that recipients must consider relevant evidence with the following exceptions:

- (1) Complainant's sexual behavior (except for two narrow exceptions)
- (2) information protected by a legal privilege
- (3) party's treatment records (absent voluntary written waiver by the party) (30337)

# Relevancy: Regulations' Rape Shield Law-Complainants



- According to 34 C.F.R. 106. 45(b)(6)(i), Cross-examination **must exclude** evidence of the Complainant's "sexual behavior or predisposition" **UNLESS**
  - its use is to prove that someone other than the Respondent committed the conduct, OR
  - it concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent

# Relevancy: Regulations' Rape Shield Law - Respondents



- Rape shield protections **do not apply to Respondents**
- “The Department reiterates that the rape shield language . . . does not pertain to the sexual predisposition or sexual behavior of respondents, so **evidence of a pattern** of inappropriate behavior by an alleged harasser must be judged for relevance as any other evidence must be.”

# Relevancy: Treatment Records



“[C]annot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and **which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party’s voluntary, written consent** to do so for a grievance process under this section.”

Section 106.45(b)(5)(i) (see also 30317).

# Relevancy: Legally Privileged Information

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Section 106.45(b)(1)(x):

A recipient's grievance process **must...not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of**, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.



# Relevancy: Legally Privileged Information

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Other typical privileges recognized across jurisdictions but with variations (will want to **involve your legal counsel for definitions in your jurisdiction**):

- Attorney-client communications
- Implicating oneself in a crime
- Confessions to a clergy member or other religious figures
- Spousal testimony in criminal matters
- Some confidentiality/trade secrets

# Relevancy: Improper Inference



When parties do not participate:

- “If a party or witness does not submit to cross-examination at the live hearing...the decision-maker(s) cannot draw an inference about the determination regarding responsibility **based solely** on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions.” 34 C.F.R. 106.45(b)(6)(i).

# Relevancy: No Reliance on Prior Statements

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When parties elect not to participate, a recipient cannot retaliate against them (30322)

What if a party or witness gave a statement during the investigation but is not participating in cross-examination?

- “Must not rely on any statement of that party or witness in reaching a determination”

# Relevancy: No Reliance on Prior Statements - Theory

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If parties do not testify about their own statement and submit to cross-examination, **the decision-maker will not have the appropriate context for the statement,** which is why the decision-maker cannot consider that party's statement.

(30349)

# Relevancy: When Parties or Witnesses Do Not Participate

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The preamble recognizes that there are many reasons a party or witness may not elect not to participate in the live cross-examination hearing or answer a question or set of questions

- The decision-maker cannot make inferences from non-participation or compel participation (retaliation) (30322)
- Relevant questioning by advisor along these lines?

# Relevancy: No Reliance on Prior Statements



“[A] party’s advisor may appear and conduct cross-examination **even when the party whom they are advising does not appear.**” (30346)

“Similarly, where one party does not appear and that party’s advisor does not appear, **a recipient-provided advisor must still cross-examine the other, appearing party,** resulting in consideration of the appearing party’s statements (without any inference being drawn based on the non-appearance).” (30346)

# Relevancy: No Reliance on Prior Statements

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Third party cross-examination of what a non-appearing party stated **does not count** as statements tested on cross-examination. (30347)  
(provides examples of family and friends showing up on behalf of the non-appearing party)

“[A] rule of non-reliance on untested statements is more likely to lead to reliable outcomes than a rule of reliance on untested statements.” (30347)

# Relevancy: No Reliance on Prior Statements



When statement IS the sexual harassment...

“One question that a postsecondary institution may have is whether not relying on a party’s **statement**—because that party has not submitted to cross-examination —**means not relying on a description of the words allegedly used by a respondent if those words constitute part of the alleged sexual harassment at issue.**”

The answer to that question is ‘no’...”

May 22, 2020 OCR blog



# Relevancy: No Reliance on Prior Statements

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“[E]ven though the refusing party’s statement cannot be considered, the decision-maker may reach a determination based on the remaining evidence so long as no inference is drawn based on the party or witness’s absence from the hearing or refusal to answer cross-examination (or other) questions.” (30322)

Example: “[W]here a complainant refuses to answer cross-examination questions but video evidence exists showing the underlying incident, a decision-maker may still consider the available evidence and make a determination” (30328)

# Relevancy: No Reliance on Prior Statements

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“Thus, a respondent’s alleged verbal conduct, that itself constitutes the sexual harassment at issue, is not the respondent’s “statement” as that word is used in § 106.45(b)(6)(i), because the verbal conduct does not constitute the making of a factual assertion to prove or disprove the allegations of sexual harassment; instead, the verbal conduct constitutes part or all of the underlying allegation of sexual harassment itself.”

- If you don’t already follow the blog, add it to your favorites bar: <https://www2.ed.gov/about/offices/list/ocr/blog/index.html>

# Relevancy: No Reliance on Prior Statements- Examples

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- But, if a party or witness does not submit to cross examination and makes a statement in a video, cannot consider that statement in the video to reach a decision on responsibility (30346)
- Remember: No rules of evidence can be imported

# Relevancy: No Reliance on Prior Statements – SANE and Police Reports

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- This expressly means no statements in police reports, no SANE reports, medical reports, or other documents to the extent they contain statements of parties or witnesses who do not submit to cross examination(30349)
- If non-cross-examined statements are intertwined with statements tested by cross-examination, can only consider those that have been cross-examined (30349)

# Issues of Relevancy



“[D]oes not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by recipient’s decision-maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with 106.45 and apply equally to both parties.” (30294)

**BUT**

“[I]f a recipient trains Title IX personnel to evaluate, credit, or assign weight to types of relevant, admissible evidence, that topic will be reflected in the recipient’s training materials.” (30293)

# Other Considerations

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- What about sex stereotyping questions?
- What about questions by advisor about why a party isn't participating?
- What about decorum?

# Relevancy Determinations

# Relevancy Determination Hypotheticals

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Okay, decision-maker, is this question relevant?

For practice, we will pose these in cross-examination format. As discussed before, the traditional cross-examination style is aimed at eliciting a short response, or a “yes” or “no,” as opposed to open-ended question which could seek a narrative (longer) response.

For example, instead of, “How old are you?” the question would be, “You’re 21 years old, aren’t you?”



# Relevancy Determination Hypotheticals

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For each practice hypothetical, ask yourself:

**Is this question relevant or seeking relevant information?**

- Why or why not?
- Does the answer to this depend on additional information?
- If it so, what types of additional information would you need to make a relevancy determination?

# Relevancy Determination Hypotheticals Disclaimer

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*Disclaimer: The following hypotheticals are not based on any actual cases we have handled or of which we are aware. Any similarities to actual cases are coincidental.*

# Practice Hypothetical #1

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“Cameron, texted Riley the week before telling Riley that you wanted to have sex with them, didn’t you?”

# Practice Hypothetical #2

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“Cameron, isn’t it true you usually have sex with Riley while intoxicated?”

# Practice Hypothetical #3

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“Riley, did your attorney tell you not to answer that question?”

# Practice Hypothetical #4

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“Riley, did your counselor tell you that you have anger issues?”

# Practice Hypothetical #5

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“Cameron, you didn’t see who was allegedly sexually assaulting you during the alleged attack, did you?”

# Practice Hypothetical #6

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“Cameron, are you choosing not to answer my questions because you lied to investigators?”



# Practice Hypothetical #7

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“Riley, you’re not answering my questions because you don’t want criminal implications, right?”

# Practice Hypothetical #8

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“Cameron, isn’t it true you asked Riley to put on a condom before what you now claim is a sexual assault?”

# Practice Hypothetical #9

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“Riley, have you tested positive for sexually-transmitted diseases?”

# Practice Hypothetical #10

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“Riley, isn’t it true you texted Cameron the next day to see if Cameron was mad at you?”

# Practice Hypothetical #11

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“Cameron, if you were as drunk you just stated you were, you can’t even be sure whether you had sex with Riley or, say, Wyatt, can you?”

# Practice Hypothetical #12

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“Cameron, did a doctor diagnose you with anxiety?”

# Practice Hypothetical #13

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“Riley, isn’t it true you tried to kill yourself the next day because you knew you did something wrong?”

# Practice Hypothetical #14

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“Cameron, you’ve had sex with Riley after drinking before, though, haven’t you?”



# Practice Hypothetical #15

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“Cameron, you could be wrong about that timeline, right?”

# Practice Hypothetical #16

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“Riley, this isn’t the only Title IX complaint against you right now, is it?”

# Practice Hypothetical #17

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“Cameron, you had consensual sex with Riley the next night, didn’t you?”

# Practice Hypothetical #18

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“Riley, didn’t the police question you for three hours about your assault of Cameron?”

# Practice Hypothetical #19

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“Cameron, your witness, Wyatt, didn’t even show up today, right?”

# Practice Hypothetical #20

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“Riley, you’re even paying for a criminal defense attorney instead of a free advisor, right?”

# The Hearing

# The Setup



- Can have in one room if a party doesn't request separate rooms and recipient chooses to do so.
- Separate rooms with technology allowing live cross examination at the request of either party
- “At recipient’s discretion, can allow any or all participants to participate in the live hearing virtually” (30332, see also 30333, 30346) explaining 106.45(b)(6)(i)



# Process

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- Discretion to provide opportunity for opening or closing statements
- Discretion to provide direct questioning (open-ended, non-cross questions)
- Cross-examination must to be done by the party's "advisor of choice and never by a party personally."

# Process

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- An advisor of choice may be an attorney or a parent (or witness) (30319)
- Discretion to require advisors to be “potted plants” outside of their roles cross-examining parties and witnesses. (30312)

# Advisors

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If a party does not have an advisor present at the live hearing, the recipient **must provide** without fee or charge to that party, an advisor **of the recipient's choice**, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.  
(106.45(b)(6)(i) and preamble 30339)

# Advisors



- Advisors do not require Title IX Training, however a recipient may train its own employees whom the recipient chooses to appoint as party advisors (30342)
- A party cannot “fire” an appointed advisor (30342)
- “But, if the party correctly asserts that the assigned advisor is refusing to ‘conduct cross-examination on the party’s behalf’ then the recipient is obligated to provide the party an advisor to perform that function, whether counseling the advisor to perform the role or stopping the hearing to assign a different advisor” (30342)

# Advisors



- Regulations permit a recipient to adopt rules that (applied equally) do or do not give parties or advisors the right to discuss relevance determinations with the decision-maker during the hearing. (30343)
- “If a recipient believes that arguments about a relevance determination during a hearing would unnecessarily protract the hearing or become uncomfortable for parties, the recipient may adopt a rule that prevents parties and advisors from challenging the relevance determination (after receiving the decision-maker’s explanation) during the hearing.” (30343)

# Advisors: But Other Support People?



- Not in the hearing, unless required by law (30339)
- “These confidentiality obligations may affect a recipient’s ability to offer parties a recipient-provided advisor to conduct cross-examination in addition to allowing the parties’ advisors of choice to appear at the hearing.”
- ADA accommodations-required by law
- CBA require advisor and attorney?

# Recording the Hearing

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- Now required to be audio, audio visual, or in transcript form
- Decision-makers have to know how to use any technology you have

# The Hearing

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- Order of questioning parties and witnesses – not in regulations
  - Consider time restraints on witnesses
  - Questioning of Complainant
  - Questioning of Respondent



# Questioning by the Decision-Maker



- The neutrality of the decision-maker role is and the role of the advisor to ask adversarial questions, protects the decision-maker from having to be neutral while also taking on an adversarial role (30330)
- “[P]recisely because the recipient must provide a neutral, impartial decision-maker, the function of adversarial questioning must be undertaken by persons who owe no duty of impartiality to the parties” (30330)

# Questioning by the Decision-Maker



- BUT “the decision-maker has the right and responsibility to ask questions and elicit information from parties and witnesses on the decision-makers own initiative to aid the decision-maker in obtaining relevant evidence both inculpatory and exculpatory, and the parties also have equal rights to present evidence in front of the decision-maker so the decision-maker has the benefit of perceiving each party’s unique perspective about the evidence.” (30331)

# The Hearing



- Ruling on relevancy between every question and answer by a witness or party
  - Assumption that all questions are relevant unless decision-maker otherwise states irrelevant? Risky.
  - Set expectation that party or witness cannot answer question before decision-maker decides if relevant.
    - Pros: helps diffuse any overly aggressive or abusive questions/resets tone
    - Cons: may lengthen hearing

# The Hearing

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- “[N]othing in the final regulations precludes a recipient from adopting a rule that the decision-maker will, for example, send to the parties after the hearing any revisions to the decision-maker’s explanation that was provided during the hearing.” (30343)

# The Hearing

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- Confidentiality appears to preclude support persons other than the advisor from participating in the live-cross examination hearing
  - Perhaps allow support person to meet in waiting rooms or before and after hearing
  - Consistent with providing supportive services to both parties – hearings can be very stressful for both parties

# Decorum

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The preamble to the Title IX Regulations contains many discussions of an institution's discretion to set rules to maintain decorum throughout hearings and to remove non-complying advisors, parties, or witnesses.

Note: In our experience, we have seen decorum issues more commonly with advisors than parties...and have seen this equally on both sides. This is more likely to be an issue when family members serve as advisors, because, understandably, these can be emotional matters.

# Decorum

“Recipients may adopt rules that govern the **conduct and decorum of participants at live hearings** so long as such rules comply with these final regulations and **apply equally to both parties**... These final regulations aim to ensure that the truth-seeking value and function of cross-examination applies for the benefit of both parties while minimizing the discomfort or traumatic impact of answer questions about sexual harassment.”  
(30315)

# Decorum



“[W]here the **substance of a question is relevant**, but the manner in which an advisor attempts to ask the question is **harassing, intimidating, or abusive** (for example, the advisor yells, screams, or physically ‘leans in’ to the **witness’s personal space**), the recipient may appropriately, evenhandedly enforce rules of decorum that require relevant questions to be asked in a respectful, non-abusive manner.”  
(30331)



# Decorum



“The Department acknowledges that predictions of **harsh, aggressive, victim-blaming** cross-examination may dissuade complainants from pursuing a formal complaint out of fear of undergoing questioning that could be perceived as interrogation. However, recipients retain discretion under the final regulations to educate a recipient’s community about what cross-examination during a Title IX grievance process will look like, including developing rules and practices (**that apply equally to both parties**) to oversee cross-examination to **ensure that questioning is relevant, respectful, and non-abusive.**” (30316 see also 30315; 30340)

# Decorum



- “[T]he essential function of cross-examination is **not to embarrass, blame, humiliate, or emotionally berate a party**, but rather to ask questions that probe a party’s narrative in order to give the decision-maker the fullest view possible of the evidence relevant to the allegations at issue.” (30319)
- Nothing in this rule prevents recipient from enforcing decorum rules in the hearing and “the recipient may require the party to use a different advisor” if the advisor does not comply and may provide a different advisor to conduct cross examination on behalf of that party (30320)

# Understanding the Bases for Appeal

# Understanding the Bases for Appeal

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As an advisor, these can inform your approach at the hearing – especially regarding relevancy determinations that you disagree with as the advisor.

- Whether you are involved at the appeal level or not (again, regulations only require appointed advisor during the hearing process) - will need to think about how to set up those relevancy challenges for appeal while in the hearing

# Bases for appeal: Procedural Integrity

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The three required base for appeals are (your institution can add to this):

1. **Procedural integrity** that affected the outcome of the matter
- Does the process in policy align with process as applied?

# Bases for appeal: Procedural Integrity

---

What you need to know to answer this question:

- The process in your specific policy (to the extent it adds to the detailed process in the Regulations)
- The Title IX Coordinator's role
- The Investigator's role
- The Decision-Maker's role (relevancy determinations)
- How to determine if any deviation from the process actually affected the outcome

# Bases for appeal: New Evidence

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2. **New evidence** that was *not reasonably available* at the time the determination regarding responsibility or dismissal was made, *that could affect the outcome* of the matter

# Bases for appeal: Conflict of Interest or Bias

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**3. Conflict of interest or bias** against a party by the Title IX Coordinator, investigator(s) or decision maker(s) that affected *the outcome of the matter*

This will require the appeals officer to be able to make determinations on bias and conflict of interest, usually on peers and understand the case to know if any bias or conflict of interest would impact the outcome of the matter



# Bases for appeal: Conflict of Interest or Bias

---

- How do you make these determinations of conflict of interest or bias, especially with coworkers or supervisors?
- How do you determine if this actually affected the outcome?

# Bases for appeal: Dealer's Choice

---

4. Any other bases the recipient establishes provided it is equally available or applies equally to both parties.
- This will require the appeals officer to understand the institution's specific bases for appeals.
  - Many institutions provide a basis for appeal for arbitrary and capricious outcomes or sanctions not proportionate to the findings

# Tips for Advocating for Your Party

# Advocating for your party in the Hearing



## Preparation

- Review the entire investigation hearing report
- Review all evidence (some may have non-relevant evidence also—know if you disagree with any relevancy determinations made by the investigator)
- Meet with your party to review what your party thinks and wants
- Discuss strategy

# Advocating for your party in the Hearing



## Preparation

- Realize that your party may want to take a more aggressive approach – If you are not comfortable with the approach, discuss it with the party and check to see if you can advise your party
- Discuss the expectations of decorum vs. the expectations of questioning the other party and witness

# Advocating for your party in the Hearing



## Preparation

- Determine who your witnesses are and whether your party thinks they will show up to the hearing
- Be careful of the line between asking a party to participate and explain the importance of their statements vs. coercing a party to participate who has the right not to participate

# Advocating for your party in the Hearing



## Preparation

- Consider a script
  - List each allegation and policy definition/elements for the policy violation (e.g., sexual assault—know which definition and what must be met to show sexual assault under the policy)
  - Standard of review: this can be helpful to have written out so that you can support relevancy determinations for your questions to show why relevant

# Advocating for your party in the Hearing



## Preparation

- Consider a script
  - List your questions you plan to ask for your party for each other party and witness AND be prepared to answer why each is relevant
  - Have a list of relevancy definitions to refer to if they come up
    - Rape shield law and two exceptions
    - Privileged information in your jurisdiction
    - Language on treatment records



# Advocating for your party in the Hearing



## The Hearing

- Ask one question at a time and wait for the Decision-Maker to determine if it is relevant
- If the Decision-Maker has a question about why the question is relevant, be prepared to answer that question (see preparation)
- Be respectful of the process so that you can effectively ask your party's questions – if you think you or someone else is becoming too heated, ask for a break to regroup

# Advocating for your party in the Hearing



## The Hearing

- Be aware that the other advisor may not be as prepared as you are and the decision-maker has a duty to ask questions the advisor does not—this doesn't mean the decision-maker is biased or trying to help the other side – you may not like it, but it's a requirement for the decision-maker

# Advocating for your party in the Hearing



## Post-hearing

- The decision-maker will issue a decision to both parties at the same time.
- Under the regulations, the advisor is not required to have any further role in the process (this may be especially true if the advisor is appointed by the institution)
- Other advisors (attorney or parent), may choose to work with the party to appeal on the bases listed in the decision

# Questions?



# Title IX Higher Ed Level 2

Appeals Officer Training



**Bricker & Eckler**  
ATTORNEYS AT LAW

# Disclaimers

We can't help ourselves. We're lawyers.

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- We are not giving you legal advice
- Consult with your legal counsel regarding how best to address a specific situation
- We will send a copy of the slides after this presentation to all who registered their email address when signing in
- We will take questions at the end as time permits

# Presentation Rules

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- Questions are encouraged!
- “For the sake of argument...”
- Be aware of your own responses and experiences
- Follow-up with someone if you have questions and concerns
- Take breaks as needed

# Posting These Training Materials?

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- Yes!
- Your Title IX Coordinator is required by 34 C.F.R. §106.45(b)(10)(i)(D) to post materials to train Title IX personnel on its website
- We know this and will make this packet available to your district electronically to post



Additional information  
available at:

**Title IX Resource Center**  
at [www.bricker.com/titleix](http://www.bricker.com/titleix)

Find us on **Twitter** at  
**@BrickerHigherEd**



# Required Training for Appeals Officers

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The new Title IX regulations require specific training for the Title IX Coordinator, investigator, decision-maker, and any other person designated to facilitate an informal resolution process.

- Section 106.45(b)(8)(iii)(C) clarifies that the **appeal “decision-maker”** has to have some of the same training, as set forth 106.45(b)(1)(iiii)

# Required Training for Appeals Officers

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An appeals officer must be trained on:

- Jurisdiction: understanding “the scope of the recipient’s education program or activity” (Level 1)
- Definitions of “sexual harassment” under the new Title IX regulations (Level 1)
- Serving impartially, and without bias, conflict of interest or pre-judgment of fact
- Issues of relevance (not Rules of Evidence)
- How to conduct appeals

# Topics

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- The role of the Appeals Officer
  - Understanding the process: the Title IX Coordinator's role
  - Understanding the process: the Investigator's role
  - Understanding the process: the Decision-Maker's role
- Bias and conflicts of interest
  - Relevancy
  - How and what to review on appeal.
  - The written decision on appeal.

# Aspirational Agenda

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9:00-10:30	Introduction and Understanding Title IX Process and Roles
10:30-10:45	Break
10:45-12:00	Continue with Understanding Title IX Process and Roles
12:00-12:30	Lunch Break
12:30-2:00	Impartiality, Bias, and Conflict of Interest
2:00-2:15	Break
2:15-5:00	Appeals Officer Determinations



## **The Appeals Officer's Role**

# The Appeals Officer's Role(s)

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## Be able to see the forest and the trees

- **Know the process in your policy** (how it should function) and **know the process as applied** (how it actually functioned in each case) from intake to the time it hits your desk.
- **Know your big picture role** (the limited scope of your review) and **know the specific details of your case** (the often think and detailed case file) and be able to move back forth between these perspectives

# Bases for appeal: Procedural Integrity

---

The three required base for appeals are (your institution can add to this):

**1. Procedural integrity** that affected *the outcome of the matter*

- Does the process in policy align with process as applied?



# Bases for appeal: Procedural Integrity

---

What you need to know to answer this question:

- The process in your specific policy (to the extent it adds to the detailed process in the Regulations)
- The Title IX Coordinator's role
- The Investigator's role
- The Decision-Maker's role (relevancy determinations)
- How to determine if any deviation from the process *actually affected the outcome*

# Bases for appeal: New Evidence

---

2. **New evidence** that was *not reasonably available* at the time the determination regarding responsibility or dismissal was made, *that could affect the outcome* of the matter

# Bases for appeal: Conflict of Interest or Bias

---

3. **Conflict of interest or bias** against a party by the Title IX Coordinator, investigator(s) or decision maker(s) that affected the outcome of the matter

This will require the appeals officer to be able to make determinations on bias and conflict of interest, usually on peers and understand the case to know if any bias or conflict of interest would impact the outcome of the matter

## **Bases for appeal: Conflict of Interest or Bias**

---

- How do you make these determinations of conflict of interest or bias, especially with coworkers or supervisors?
- How do you determine if this *actually affected* the outcome?

# Bases for appeal: Dealer's Choice

---

4. Any other bases the recipient establishes provided it is equally available or applies equally to both parties.
- This will require the appeals officer to understand the institution's specific bases for appeals.
  - Many institutions provide a basis for appeal for arbitrary and capricious outcomes or sanctions not proportionate to the findings



## **Understanding the Process: The Title IX Coordinator's Role**

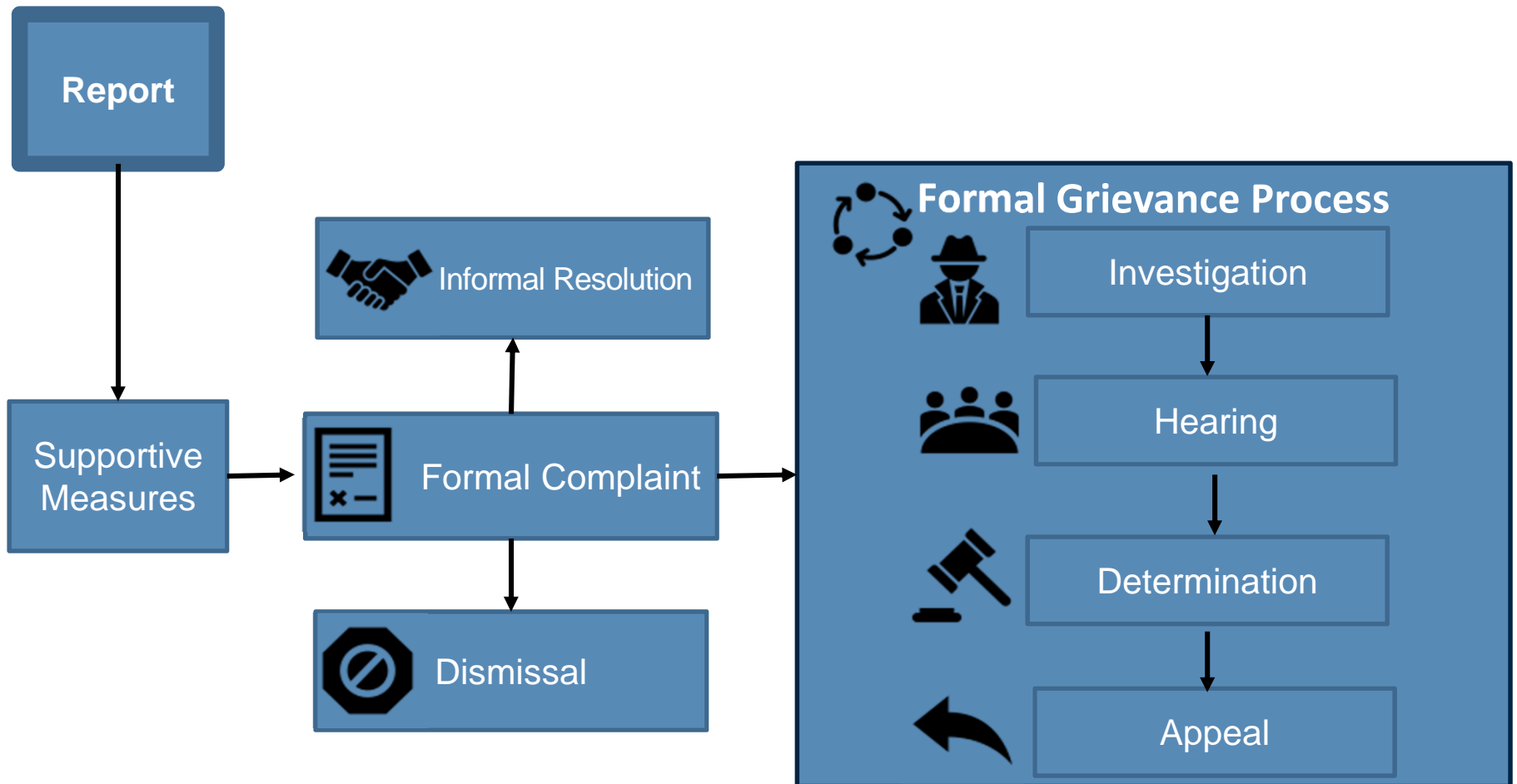
# The Title IX Coordinator

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## Oversees procedural integrity

- Oversees the whole process and helps to ensure the written process and the as applied process are the same (and you, as the Appeals Officer, are a part of this).
- Often is the person who ensures the investigators, decision-makers, informal resolution officers and appeals officers are properly trained
- Often is the person who ensures advisors are available for hearings
- Makes decisions on new issues that arise to keep them in compliance with the policy

# Overview of the Process





# The Title IX Coordinator

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For Appeals Officer purposes, must understand the intake process.

- Title IX Coordinator (or deputy) will receive a report (this may also come in through another individual with the ability to give sanctions) (Level 1 actual knowledge)
- Title IX Coordinator will provide supportive measures to a Complainant
- Title IX Coordinator will determine if the report falls within the “education program or activity” of the institution (Level 1)
  - If not, Title IX Coordinator MUST dismiss from Title IX process

# The Title IX Coordinator

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For Appeals Officer purposes, must understand the intake process.

- Title IX Coordinator will determine if a report (that satisfied jurisdiction) includes a claim of “sexual harassment” under Title IX (Level 1)
  - If not, Title IX Coordinator **MUST** dismiss from Title IX process
- If it passes these tests, Title IX Coordinator will determine if Complainant wishes to file a formal complaint by signing or by a verifiable email **OR** if the Title IX Coordinator will sign a formal complaint without a complainant.

# The Title IX Coordinator

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When a Title IX Coordinator may elect to sign and issue a formal complaint without a complainant:

- Complainant has not yet been identified or cannot be identified, but evidence indicates that sexual harassment took place within the institution's jurisdiction (e.g., video, multiple student reports, anonymous social media allegations)

# The Title IX Coordinator

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For Appeals Officer purposes, must understand the intake process.

- Often is the person who selects and assigns a specific investigator, decision-maker, and appeals officer to a matter
- May be the person who supervises the Title IX Office
- May be the investigator



## The Investigator's Role

# The Investigator

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1. The gatherer of all relevant evidence.
2. The organizer of all relevant evidence

# The Investigator

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- Does not make a determination on the facts
- Determines some level of whether evidence is relevant.



## Issues of Relevance for the Investigator



# What is Relevant?

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The new regulations don't really tell us directly.

The preamble discussion indicates that it may include: evidence that is “probative of any material fact concerning the allegations.”

(30343)

# What is Relevant?

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The preamble also tells us:

“evidence pertinent to proving whether **facts material to the allegations** under investigation are **more or less likely to be true** (*i.e.*, on what is relevant)” (30294)

# What is Relevant?

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Does this question, topic, evidence help **move the dial** under the standard of evidence?

- **Preponderance of the evidence**: a fact is more likely than not to be true (30373 fn. 1409)
- **Clear and convincing**: a fact is highly probable to be true (30373 fn. 1409)

# Issues of Relevancy (NOT Rules of Evidence)

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- The Rules of Evidence do **NOT** apply and **CANNOT** apply
- “The Department appreciates the opportunity to clarify here that the final regulations **do not allow a recipient to impose rules of evidence that result in the exclusion of relevant evidence**; the decision-maker must consider relevant evidence and must not consider irrelevant evidence.” (30336-37)

## **This means:**

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- Cannot exclude redundant evidence
- Cannot exclude character evidence
- Cannot exclude hearsay
- Cannot exclude evidence where the probative value is substantially outweighed by the danger of unfair prejudice (30294)

## **This means:**

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- Cannot rely on a statement against a party interest (30345)
- Cannot rely on a statement of deceased party (30348)

## Issues of Relevancy (NOT Rules of Evidence)

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“[A] **recipient** may **not** adopt rules **excluding** certain types of **relevant evidence** (e.g., **lie detector test results**, or rape kits) where the type of evidence is not either deemed “not relevant” (as is, for instance, evidence concerning a complainant’s prior sexual history) or otherwise barred for use under 106.45 (as is, for instance, information protected by a legally recognized privilege).”

# Issues of Relevancy: What isn't relevant?

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1. **Privileged:** Information protected by a legally recognized privilege
2. **Treatment:** Party's medical, psychological, and similar records unless voluntary written consent
3. **Rape Shield:** Sexual history of complainant subject to two exceptions
4. **Cross-Examined:** Party or witness statements that have not been subjected to cross-examination at a live hearing\*



# Relevancy: Legally Privileged Information

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## Section 106.45(b)(1)(x):

- A **recipient's** grievance process **must...not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of,** information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

# Relevancy: Legally Privileged Information – What does this include?

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- Preamble identifies medical and treatment records.
- Jurisdiction-dependent
  - Attorney-client communications
  - Implicating oneself in a crime
  - Confessions to a clergy member or other religious figures
  - Spousal testimony in criminal matters
  - Some confidentiality/trade secrets

# Relevancy: Medical treatment and Investigations

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Section 106.45(b)(5)(i): when investigating a formal complaint, recipient:

- “[C]annot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, **unless the recipient obtains that party’s voluntary, written consent to do so for a grievance process under this section.**”

# Issues of Relevancy: What isn't relevant? – Rape Shield Provision

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- Evidence about **complainant's** prior sexual history (must exclude) unless such questions/ evidence:
  - are offered to prove that someone other than the respondent committed the conduct, or
  - if the questions/evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

# Issues of Relevancy: What isn't relevant? – Rape Shield Provision

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- Rape shield protections do not apply to Respondents
- “The Department reiterates that the rape shield language . . . does not pertain to the sexual predisposition or sexual behavior of respondents, so **evidence of a pattern** of inappropriate behavior by an alleged harasser **must be judged for relevance as any other evidence must be.**”

# **Additional information for the Investigator regarding relevancy**

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- There are more considerations for decision-makers regarding relevancy that are not an issue for investigators.
- Of note, if a party or witness's statement is not subject to cross-examination at the hearing, the decision-maker cannot consider that statement

# Retaliation

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When parties elect not to participate, a recipient cannot retaliate against them (30322)

- It is the right of any party or witness not to participate in the investigation

# Relevancy and the Investigator

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## The gatherer of all relevant evidence

- **Recipient** must ensure that “all *relevant* questions and evidence are admitted and considered (though varying weight or credibility may of course be given to particular evidence by the decision-maker).” (30331)



# Relevancy and the Investigation and Report

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“The requirement for **recipients** to **summarize** and evaluate **relevant evidence**, and specification of certain types of evidence that must be deemed not relevant or are otherwise inadmissible in a grievance process pursuant to section 106.45, appropriately direct **recipients** to **focus investigations** and adjudications **on evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true** (i.e., on that is relevant.)” (30294)



## The Decision-Maker's Role

# The Decision-Maker's Role

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1. Make relevancy determinations...before any question at the live cross-examination hearing can be answered
2. Run an orderly and truth-seeking live cross-examination hearing
3. Write a decision: apply the policy, use standard of review, and evaluate relevant evidence still in the record after the hearing



## Issues of Relevance for the Decision-Maker

# Everything the Investigator Had to Consider + More!

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- The decision-Maker has to consider all of the relevance issues the investigator did
- And has additional considerations that come into play at the hearing and decision-writing level

# Relevancy: Improper Inference

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When parties do not participate:

“If a party or witness does not submit to cross-examination at the live hearing...the **decision-maker(s) cannot draw an inference about** the determination regarding **responsibility based solely on a party’s or witness’s absence** from the live hearing **or refusal to answer** cross-examination **or other** questions.” 34 C.F.R. 106.45(b)(6)(i).

# Relevancy: No Reliance on Prior Statements

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What if a party or witness gave a statement during the investigation but is not participating in cross-examination?

- “Must not rely on any statement of that party or witness in reaching a determination”

## **Relevancy: No Reliance on Prior Statements – The Theory**

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If parties do not testify about their own statement and submit to cross-examination, **the decision-maker will not have the appropriate context for the statement**, which is why the decision-maker cannot consider that party's statement.

(30349)



# Relevancy: No Reliance on Prior Statements – The Theory

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In a blog post on May 22, 2020, OCR clarified:

**“One question that a postsecondary institution may have is whether *not* relying on a party’s statement—because that party has not submitted to cross-examination —means not relying on a description of the words allegedly used by a respondent if those words constitute part of the alleged sexual harassment at issue.**

The answer to that question is ‘no’...”

# Relevancy: No Reliance on Prior Statements

- No party, no problem: “[A] party’s advisor may appear and conduct cross-examination **even when the party whom they are advising does not appear.**” (30346)
- Only one side appears? Recipient must provide an advisor to cross examine the party that shows up. (30346)

# Relevancy: No Reliance on Prior Statements

- Cross-examination of a third party of what a non-appearing party stated does not count as statements tested on cross-examination. (30347) (provides examples of family and friends showing up on behalf of the non-appearing party)
- “[A] rule of non-reliance on untested statements is more likely to lead to reliable outcomes than a rule of reliance on untested statements.” (30347)



## The Live Cross-Examination Hearing

# More Responsibilities of the Decision-Maker

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- Must determine relevance after each individual question asked and provide an explanation if determine it is not relevant
- Has leverage to control decorum of the hearing and can ultimately remove individuals that do not respect decorum of the process

# Process: The Set up

## The setup

- Can have hearing in one room if a party doesn't request separate rooms and recipient chooses to do so.
- Separate rooms with technology allowing live cross examination at the request of either party
- Can be fully virtual.
- Must be recorded or transcribed

(30332, see also 30333, 30346) explaining 106.45(b)(6)(i)

## Process

Cross-examination must to be done by the party's **“advisor of choice and never by a party personally.”**

## Advisor of Choice

- May be an attorney or a parent (or witness) (30319)
- Can prohibit speaking other than when questioning. (30312)
- If party does not have an advisor present at the hearing, the **recipient** “**must provide** without fee or charge to that party, an advisor **of the recipient’s choice**, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.”  
(106.45(b)(6)(i) and preamble 30339)



# Advisors

- Title IX Training not required (however a recipient may train its own employees whom the recipient chooses to appoint as party advisors) (30342)
- A party cannot “fire” an appointed advisor (30342)

“But, **if** the party correctly asserts that the **assigned advisor is refusing to ‘conduct cross-examination on the party’s behalf’** then **the recipient is obligated to provide the party an advisor to perform that function**, whether counseling the advisor to perform the role or stopping the hearing to assign a different advisor” (30342)

# **No Support People, Unless Required by Law**

Not in the hearing, unless required by law (30339)

- ADA accommodations-required by law
- CBA require advisor and attorney?

# Questioning by the Decision-Maker and Neutrality

- The **neutrality** of the **decision-maker** role, and the role of the advisor to ask adversarial questions, protects the decision-maker from having to be neutral while also taking on an adversarial role (30330)
- “[P]recisely because the recipient must provide a neutral, impartial decision-maker, the function of adversarial questioning must be undertaken by persons who owe no duty of impartiality to the parties” (30330)

# Questioning by the Decision-Maker: Responsibility

BUT “the **decision-maker** has the right and responsibility to ask questions and elicit information from parties and witnesses on the decision-makers own initiative to aid the decision-maker in obtaining relevant evidence both inculpatory and exculpatory, and the parties also have equal rights to present evidence in front of the decision-maker so the decision-maker has the benefit of perceiving each party’s unique perspective about the evidence.” (30331)



## **The Decision-Maker's Written Determination**

# More Responsibilities of the Decision-Maker – The Written Determination

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The decision-maker's written determination **MUST** include:

- **Identification** of the **allegations** potentially constituting sexual harassment;
- **A description of the procedural steps taken** from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence; and hearings held;

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# More Responsibilities of the Decision-Maker – The Written Determination

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The decision-maker's written determination **MUST** include:

- **Key elements of any potential policy violation** so parties have a complete understanding of the process and information considered by the recipient to reach its decision (30391) – should “match up” with decision (30391)

# **More Responsibilities of the Decision-Maker – The Written Determination**

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The decision-maker's written determination **MUST** include:

- A statement of each allegation
- The result of each allegation
- The rationale for each allegation
- A determination regarding responsibility
- Any sanctions
- Bases for appeal

# **More Responsibilities of the Decision-Maker – The Written Determination**

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Written decision **MUST** be provided to parties simultaneously.



**Being Impartial and Avoiding Bias, Conflict of Interest, and Prejudgment of Facts for the Appeals Officer**

# Impartiality and Avoiding Bias, Conflict of Interest and Prejudgment of Facts

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Section 106.45 **requires** that investigators (and Title IX Coordinators, decision-makers, informal resolution officers, and appeals officers)

- be free from **conflict of interest, bias,** and
- be trained **to serve impartially** and **without prejudging facts.**

(30053)

# Impartiality and Avoiding Bias, Conflict of Interest and Prejudgment of Facts

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For the Appeals Officer, this means that not only do **you** have to be free from **partiality, bias, conflict of interest, and avoid prejudgment of facts**, but **ALSO**:

You must be able to assess whether the Title IX Coordinator, investigator, and decision-maker on each case you review was free from ***bias*** and ***conflict of interest*** (as a basis for appeal).

# **Impartiality and Avoiding Bias, Conflict of Interest and Prejudgment of Facts**

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- We will discuss each of these individually and provide examples, but some of the factors for each overlap.
- For example, being impartial is greatly aided by not pre-judging facts.

(30249-30257; 30496)

# Impartiality

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- Be neutral
- Do not be partial to a complainant or a respondent, or complainants and respondents generally
- Do not judge: memory is fallible [and it's contrary to your neutral role] (30323)



# **Bias: Concerns raised in comments in preamble**

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- Neutrality of paid staff in Title IX positions
- Institutional history and “cover ups”
- Tweets and public comments
- Identifying as a feminist

# Perceived v. Actual Bias

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- Both can lead to the same perception (30252)
- On appeal of decisions, the Department requires the bias “that could affect the outcome of the matter”

# How the Department tried to prevent bias

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No single-investigator model (34 C.F.R. 106.45(b)(7)(i)):

- Decision-maker (or makers if a panel) must not have been the same person who served as the Title IX Coordinator or investigator (30367)
- Separating the roles protects both parties because the decision-maker may not have improperly gleaned information from the investigation that isn't relevant that an investigator might (30370)
- The institution may consider external or internal investigator or decision-maker (30370)

# Bias: Objective Rules and Discretion

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“[R]ecipients *should* have objective rules for determining when an adjudicator (or Title IX Coordinator, investigator, or person who facilitates an informal resolution) is biased, and the Department leaves recipients discretion to decide how best to implement the prohibition on conflicts of interest and bias...” (30250)

# Bias: Objective Rules and Discretion

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- **Discretionary**: Recipients have the discretion to have a process to raise bias during the investigation.
- **Mandatory**: Basis for appeal of decision-maker's determination per 34 C.F.R. 106.45(b)(8)(i)(C).

## **Conflict of Interest: Concerns raised in comments in preamble**

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- Financial and reputational interests of Title IX employee aligns with institution
- Past advocacy for a survivor's group
- Past advocacy for a respondent's group

# Preamble Discussion on Bias and Conflict of Interest

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Final regulations “leave recipients **flexibility to use their own employees, or to outsource** Title IX investigation and adjudication functions, and the Department encourages recipients to pursue alternatives to the inherent difficulties that arise when a recipient’s own employees are expected to perform functions free from conflicts of interest and bias.” (30251)

# Preamble Discussion on Bias and Conflict of Interest

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- No *per se* prohibited conflicts of interest in using employees or administrative staff
  - including supervisory hierarchies (but see portion about decision-makers and Title IX Coordinator as supervisor)
- No *per se* violations for conflict of interest or bias for professional experiences or affiliations of decision-makers and other roles in the grievance process

(30352-30353)



# Preamble Discussion on Bias and Conflict of Interest

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- Example: it is **not** a ***per se bias*** or **conflict of interest** to hire professionals with **histories of working in the field of sexual violence** (30252)
- Cautions against using generalizations to identify bias and conflict of interest and instead **recommends** using a **reasonable-person test** to determine whether bias exists.

# Example of Unreasonable Conclusion that Bias Exists

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“[F]or example, **assuming** that all self-professed **feminists**, or self-described **survivors**, are biased against men, or that a **male** is incapable of being sensitive to women, or that prior work as a **victim advocate**, or as a **defense attorney**, renders the person biased for or against complainants or respondents” is **unreasonable** (30252)

# **Training, Bias, and Past Professional Experience**

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This required training (that you are sitting in right now) can help protect against disqualifying someone with prior professional experience

(30252)

# Department: Review of Outcomes Alone Does Not Show Bias

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- Cautioned parties and recipients from concluding bias or possible bias “based solely on the outcomes of grievance processes decided under the final regulations.”
- Explained: the “mere fact that a certain number of outcomes result in determinations of responsibility, or non-responsibility, does not necessarily indicate bias.” (30252)

# Examples of Bias

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- An investigator used to supervise one of the parties;
- Information “gleaned” by the investigator is shared with the decision-maker outside the investigation report (in meetings to discuss pending cases, in passing while at work, etc.)

# Avoiding Prejudgment of Facts at Issue

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A good way to ensure impartiality and avoid bias:

- Keep an open mind and actively listen
- Each case is unique and different

## **Appeals Officer's role in review**

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A good way to ensure impartiality and avoid bias:

- Keep an open mind and actively listen
- Each case is unique and different

## **Appeals Officer's role in review**

---

### **Be able to see the forest and the trees**

- You may otherwise respect or be friends with your coworker, but be able to check your own bias on determining whether they were biased or had a conflict of interest (check yourself and your Title IX peer)



# Hypotheticals Disclaimer

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**⚠** *Disclaimer: The following hypotheticals are not based on any actual cases we have handled or of which we are aware. Any similarities to actual cases are coincidental.*

# Hypotheticals on Bias and Conflict of Interest

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You are the Appeals Officer for a matter in which you were not the investigator, decision-maker, or Title IX Coordinator. You have been handed the investigator report, the decision of the decision-maker, the bases for appeal, and the written responses of the parties on appeal. All of the appeals raise bias and conflict of interest.

# Hypotheticals on Bias and Conflict of Interest

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For each hypothetical, there will be a series of three polls. You will need to determine by polling if there if (1) there was bias or conflict of interest, and if so (2) whether it affected the outcome of the matter... (this is so case-by-case, we'll do it to learn it!)

# Hypothetical 1

Respondent appeals stating that the decision-maker was biased against them. Respondent states that information the investigator knew, but that was not in the investigator's report or disclosed in the hearing, somehow made it into the decision-maker's written decision. Specifically, Respondent wore a shirt with a Playboy symbol on it to the investigation interview. In finding against Respondent, the decision-maker noted that Respondent's actions were consistent with someone who devalued women by reading Playboy magazine.

# Hypothetical 2

Complainant appeals alleging bias in the whole Title IX process. Specifically, Complainant alleges that the TIXC's prior work as the TIXC at another school that did not properly investigate complaints has been carried over here and cites news articles critical of the TIXC. The TIXC has previously shared with you personal frustrations she had at the other school and feeling like her hands were tied by the administration. The process and outcome before you in Complainant's matter seems otherwise to have followed procedures. The decision ultimately determined that there was no violation against the Respondent in Complainant's matter.

# Hypothetical 3

You have concerns about some comments one of your investigators made to you that he believes a woman cannot rape a man. You've shared this with your TIXC, but you don't know if anything came of it. You receive an appeal from a male Complainant in a sexual assault matter that he felt the decision-maker was biased in the decision that did not find a violation of policy against a female Respondent. You know that the decision-maker and investigator are close friends outside of work. On the face of the file on appeal, everything appears to have otherwise followed process.

# Hypothetical 4

You receive an appeal from a male Respondent with an attorney challenging the bias of the decision-maker for her prior work as a rape crisis counselor. The decision-maker is a good friend of yours and shared with you before you were assigned to the appeal that Respondent's case was one of the worst she had ever reviewed and wished the Complainant had pursued a criminal charge against Respondent because he shouldn't be on the streets. You believe her because she would know, she's seen a lot. You review the decision and decide that it is supported by the record.

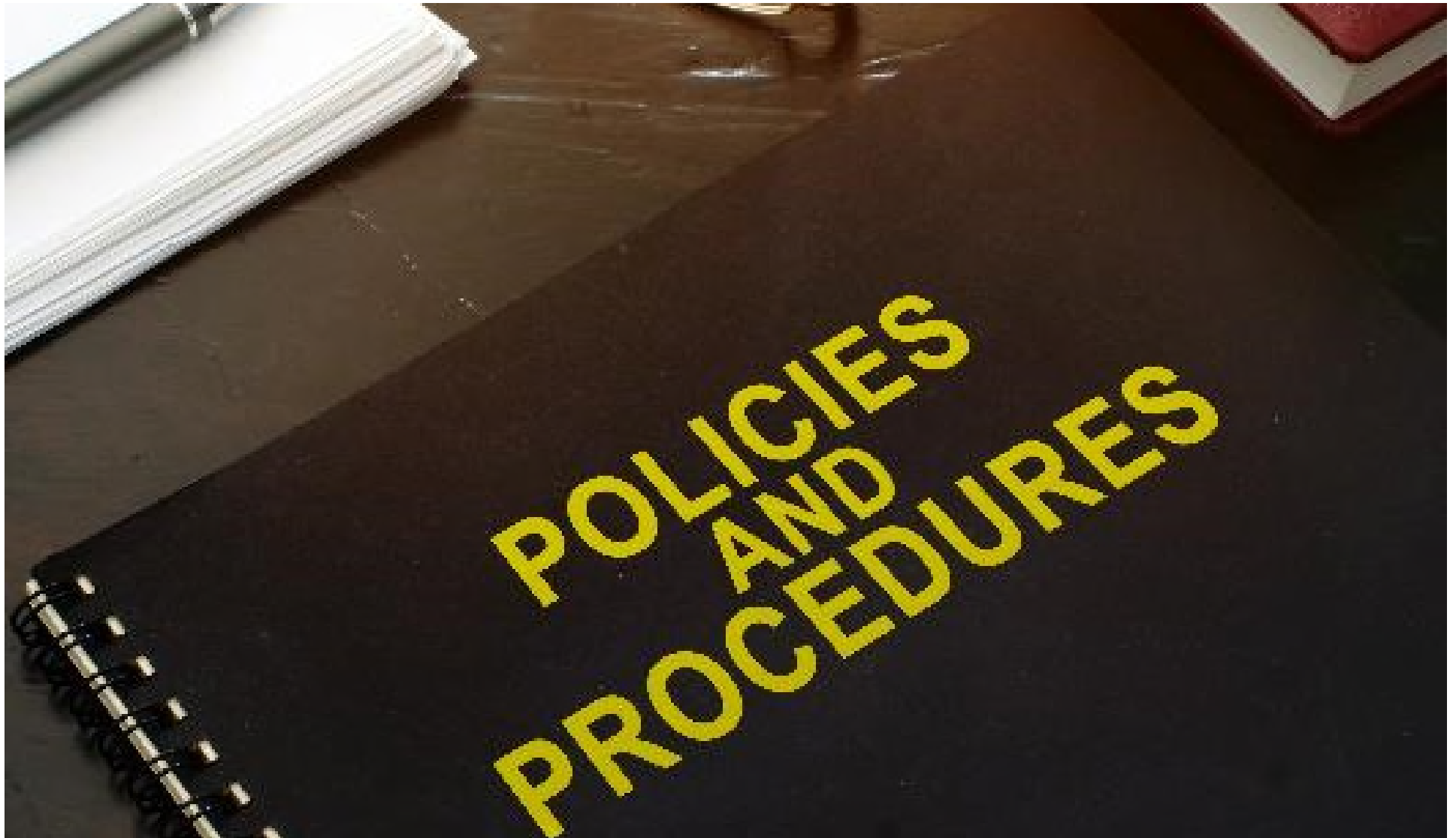
# Hypothetical 5

You receive an appeal from a male Respondent with an attorney challenging the bias of the decision-maker for her prior work as a rape crisis counselor. The decision-maker handles Title IX decisions all the time and has been fully trained in compliance with the new regulations. The decision appears to be fully supported by the record, but it did find against Respondent in a sexual assault violation of policy. The decision-maker's record does indicate that, of the twenty cases she issued decisions on last year, eighteen of them found a violation of by the Respondent and that all but one of those Respondents were male.



# Hypothetical 6

You receive an appeal from a Respondent alleging bias and conflict of interest against the decision-maker. The decision-maker also serves as a Dean your institution's law school. Respondent alleges that Complainant was a student in one of the Dean's law courses last summer and the class only had ten students enrolled. Your review of the decision by the Dean makes you question how the Dean got through law school, let alone teaches future attorneys because it is full of poor grammar and irrelevant references to archaic case law. However, the decision does appear to be supported by the record, although you would have come out differently.



## The Appeal

# The Appeal Process

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- Again, know your own policy—have your Title IX Coordinator train you—sign it in writing and have it on record.
- Regulations require an appeals process if formal complaint dismissed or after responsibility determined following a live cross-examination hearing and written determination from that decision-maker.

# The Appeal Process

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## MUST:

- Notify the other party in writing when an appeal is filed and implement procedures equally for both parties
- Ensure that you were not also the decision-maker below, investigator, or Title IX Coordinator
- Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome
- Issue and provide to both parties simultaneously a written decision “describing the result of the appeal and the rationale for the result”

# Standard of Review of Appeal

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- Not expressly stated in the Regulations, so discretion left to institutions
- But, with the required bases of appeal, none of them require the appeal decision-maker to reexamine all of the evidence to see if they would reach the same conclusion (known as a *de novo* review)

# Standard of Review of Appeal

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The bases the Regulations set are very limited and don't necessarily require a "standard of review":

- Was there a procedural issue? If yes, did it affect the outcome of the matter?
- Is there new evidence? If yes, was the evidence reasonably available at the time of the determination regarding responsibility or dismissal? If not, could its inclusion affect the outcome of the matter?

# Standard of Review of Appeal

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- Did the Title IX Coordinator, investigator(s), decision-maker(s) have a conflict of interest or bias? If yes, was it for or against a party generally or specifically? If yes, did it affect the outcome of the matter?
- Additional grounds at the institution's discretion....select own standard of review? Abuse of discretion?

# **The Difficult Issue on Appeal: Relevancy Determinations**

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- There will be challenges on appeal to relevancy decisions made by the decision-maker at the live cross-examination hearing. The argument will be that, had that decision been different, the outcome would have been different.
- How do you handle these?



# **The Difficult Issue on Appeal: Relevancy Determinations**

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- Ask, does this fit into one of the bases for appeal? Does this constitute a procedural issue if you would have made a different relevancy determination? What if it is just wrong and contrary to the Title IX regulations?
- Can a relevancy determination by a decision-maker at the live-cross examination hearing a sign of conflict of interest or bias?

# Considerations for Additional Grounds for Appeal

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- Do you want a control valve for an decision that has the record wrong?
- If so, you must make such grounds available evenly to parties.

# Considerations for Additional Grounds for Appeal

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You agree with a ground for appeal.  
What do you do?

- Send it back to the decision-maker below?
- Overturn the decision below?
- Remand to the Investigator (or a new Investigator)?

# Written Appeal Decision

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The Regulations do not detail what must be included in the written appeal decision in the same way that they detail what must be included in the decision-maker's determination after the live cross-examination hearing.

# Written Appeal Decision


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Regulations are clear that must describe the result and rationale for the result

# Written Decision: Best Practices

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- Address each basis for appeal individually, with a result and rationale for that result
- Refer back to the policy for support
- Be clear and transparent in the rationale for the result



practice...  
practice...  
practice...

## Appeal Hypotheticals

## Does the hypothetical fall into one of the bases of appeal?

### Procedural Issue?

Was there a procedural issue?

If yes, did it affect the outcome of the matter?

### New Evidence?

Is there new evidence?

If yes, was the evidence reasonably available at the time of the determination regarding responsibility or dismissal?

If not, could its inclusion affect the outcome of the matter?

### Conflict of Interest or Bias?

Did the Title IX Coordinator, investigator(s), decision-maker(s) have a conflict of interest or bias?

If yes, was it for or against a party generally or specifically?

If yes, did it affect the outcome of the matter?



# Determinations from Written Decision for Hypotheticals

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1. Respondent violated the College's policy on sexual harassment. Specifically, the record supports by a preponderance of the evidence that Respondent committed rape on account of Complainant's incapacitation, thereby negating her ability to consent to sexual activity.

# Determinations from Written Decision for Hypotheticals

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2. Respondent did not violate the College's policy on sexual harassment with respect to his video-recording, and sharing of said recording, because the record did not support that it was "objectively severe, persistent, and pervasive." Specifically, the record contains no evidence that anyone other than Wyatt saw the video. Additionally, the record demonstrates that neither Complainant nor Respondent were identified in the video and neither Complainant nor Respondent admitted to being present in the video.

# Appeal Hypothetical 1

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## *Procedural Irregularity*

I (Complainant Cameron) asked the Investigator to speak to my roommate because she saw the video of me and Riley that Riley posted on Snapchat and she could have verified that it was me in the video. Despite my asking, and the Investigator agreeing to do so, the Investigator did not speak to my roommate.

# Appeal Hypothetical 2

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## *Procedural Irregularity/Bias*

The decision-maker engaged in procedural irregularity and bias for excluding relevant evidence that affected the outcome of the matter. At the hearing, Respondent Riley's advisor appropriately asked Complainant Cameron a question about her sexual behavior that was relevant and met the Rape Shield exception. Had this questioning been allowed further, Riley would not have been exonerated.

# Appeal Hypothetical 3 Part 1

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## *Procedural Irregularity/Bias*

The investigator exhibited bias against Respondent Riley when he refused to answer relevant questions at the hearing that affected the outcome. Specifically, Riley's advisor called the investigator to question the investigator about statements made to him by the rideshare driver who drove Cameron and Riley home from the restaurant, Lucca, on the night of the alleged sexual assault.

## **Appeal Hypothetical 3 Part 2**

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The rideshare driver, Chris Clay, a witness, who did not appear at the hearing was interviewed by the investigator. Chris's statements prove that Cameron was not incapacitated. The investigator's refusal to answer questions on cross-examination regarding Chris's statements to the investigator and refusal to answer questions about Chris's credibility and lack of motive to lie were biased against Riley.

## Appeal Hypothetical 3 Part 3

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The decision-maker is also biased and should have ordered the investigator to answer questions about Chris's statements. The decision-maker also improperly did not consider Chris's statement in the investigation report because the investigator did not answer questions on cross-examination. This is proof Corona College works to discriminate against men like Riley.

## Appeal Hypothetical 4

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Respondent: The Title IX Coordinator is biased against respondents in general and has controlled this whole process. Last year, she posted on Twitter that she believed survivors of sexual assault. This entire process has been a sham. The finding that Respondent violated Title IX is part of this biased and illegal process and the decision should be overturned.



## **Appeal Hypothetical 5: Arbitrary and Capricious**

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For this next hypo only: Assume that your institution allows an additional basis of appeal for both parties for where the decision-maker's determination is arbitrary and capricious.

# Appeal Hypothetical 5: Arbitrary and Capricious

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**Arbitrary and capricious:** There are many definitions—but usually include the following elements in a decision context:

- the decision was not based on the facts or evidence in the record
- was not consistent with the law, and/or
- was outside the power or jurisdiction of the decision-maker.



Questions?

**Thank you for attending!**

Remember – additional  
information available at:

**Title IX Resource Center**  
at [www.bricker.com/titleix](http://www.bricker.com/titleix)

Find us on **Twitter** at  
**@BrickerEdLaw**

