

# TITLE IX IN MOTION

Level II: Comprehensive Title IX Training



# Course Goals

- Recognize potential changes to the Title IX Regulations and define possible paths forward
- Identify strategies to prepare for each step of the Title IX process, including intake of complaints, investigations, informal resolution processes, and hearings
- Identify nuanced approaches to investigations, hearings, and restorative justice processes and discuss unanticipated challenges for Title IX administrators
- Explore risk-reduction strategies aimed at creating compliant policies and procedures





# Course Overview

- An Introduction to Title IX (optional foundational chapter)
- Overview of the Title IX Regulations (optional foundational chapter)
- Title IX: A New Era
- Emphasizing Support and Prevention: A Different Direction for Title IX
- The Road Less Traveled: Using Restorative Justice to Achieve a Resolution
- Plotting the Course: Title IX Investigation Preparation
- Laying the Groundwork: The Importance of Pre-Hearing Strategizing
- Uncharted Territory: Navigating Live Hearings
- Risk Management and Litigation Analysis
- Speaker Roundtable

# Lesson Completion

Title IX Solutions, LLC

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## Title IX in Motion

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Search by lesson title

○ Title IX in Motion Sessions 1/8 ^

- ✓ Title IX: A New Era  
VIDEO · 126 MIN
- Emphasizing Support and Prevention: A New Direction for Title IX  
VIDEO · 60 MIN
- The Road Less Traveled: Using Restorative Justice to Achieve a Resolution  
VIDEO · 64 MIN
- Plotting the Course: Title IX Investigation Preparation  
VIDEO · 69 MIN
- Laying the Groundwork: The Importance of

### Title IX: A New Era


Up next

#### Emphasizing Support and Prevention: A New Direction for Title IX

CONTINUE → CANCEL

In this session, TIXS Co-founder Patrick B. Mathis, JD, and Executive Director, Adrienne Mathis, dive into the challenges, triumphs, and lessons learned from schools and court systems nationwide after implementing the 2020 Title IX Regulations for two years. They then highlight specific proposed changes to Title IX contained in the recently released Notice of Proposed Rulemaking which may alter the way every school approaches the Title IX grievance process.

MARK INCOMPLETE CONTINUE →



# Course Completion



THIS CERTIFICATE OF COMPLETION IS AWARDED TO

# Tucker Wood

FOR SUCCESSFULLY COMPLETING NINE HOURS OF TRAINING DURING

## Title IX in Motion

### Level II: Comprehensive Title IX Training

Learning Objectives:

- Recognize potential changes to the Title IX Regulations and define possible paths forward.
- Identify strategies to prepare for each step of the Title IX process, including intake of complaints, investigations, informal resolution processes, and hearings.
- Identify nuanced approaches to investigations, hearings, and restorative justice processes and discuss unanticipated challenges for Title IX administrators.
- Explore risk-reduction strategies aimed at creating compliant policies and procedures



# Title IX Posting Requirements

IN ACCORDANCE WITH THE 2020 TITLE IX REGULATIONS, INSTITUTIONS MUST POST "ALL MATERIALS USED TO TRAIN TITLE IX COORDINATORS, INVESTIGATORS, DECISION-MAKERS, AND ANY PERSON WHO FACILITATES AN INFORMAL RESOLUTION PROCESS."  
34 C.F.R. 106.45(B)(10)(I)(D).

SUCH TRAINING MATERIALS MUST ALSO BE KEPT FOR SEVEN YEARS.

# Title IX Posting Requirements

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## Title IX in Motion

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Search by lesson title ▼

- Title IX in Motion Lessons 0/8 ▼
- Title IX Training Requirement- Posting and Final Combined Materials 0/2 ▲
- Instructions for Posting Title IX Solutions Training Materials on Institutional Websites INSTRUCTIONS
- Title IX in Motion Final Combined Course Materials DOWNLOAD

### Instructions for Posting Title IX Solutions Training Materials on Institutional Websites

Thank you for participating in a Title IX Solutions training event!

Please follow these instructions as you post the training materials to your school's website to comply with Title IX Regulation 106.45(b)(10)(i)(d).

Contact [adrienne@titleixsolutions.com](mailto:adrienne@titleixsolutions.com) with any questions regarding the posting of Title IX Solutions' training materials.

**Program materials available for download:**

If you haven't done so already, you can find and download the program materials for the Title IX in Motion by click on the next lesson named "Title IX in Motion Final Combined Course Materials".

**the above training program materials are outlined below:**

Step 1: Publish Authorization & Disclaimer

COMPLETE & CONTINUE →



# Course Support

- Admin
- My Account
- Support ↗
- Sign Out

Welcome to the



Institute

Title IX training on your time.

Taught by Title IX experts and practitioners, the IX Institute offers comprehensive trainings to



# THANK YOU!



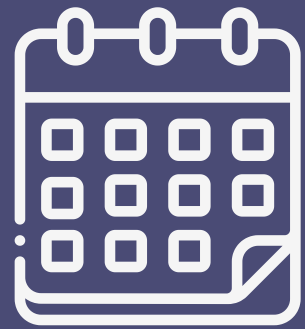


An  
Introduction  
to Title IX





# IN THIS CHAPTER



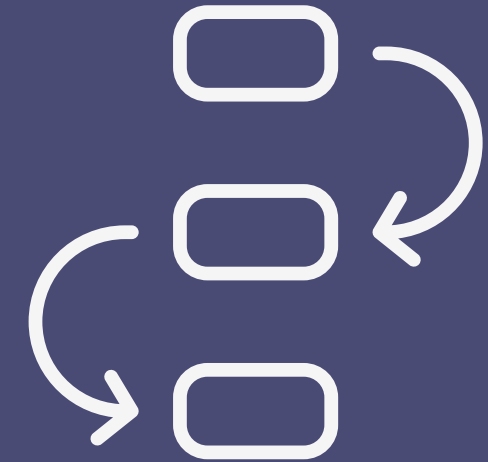
HISTORY OF  
TITLE IX



TITLE IX  
DEFINITIONS



PARTICIPANTS IN  
THE TITLE IX  
PROCESS



OVERVIEW OF THE  
TITLE IX PROCESS

# History of Title IX



# Title IX of the Education Amendments of 1972

“

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]”

”

# Creation of Title IX

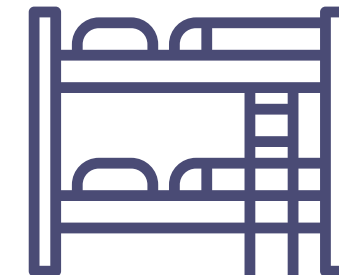
Followed Civil Rights Act of 1964 to address discrimination on the basis of sex

Created and enacted for educational institutions (K to Postsecondary)

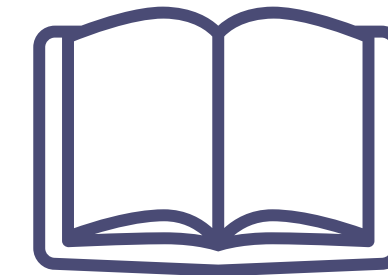
Initially designed to address inequity in:



Admissions



Residence  
Life



Academic  
Opportunities



Extracurricular  
Activities



# Who is protected?

- ALL students regardless of:
  - Sexual orientation
  - Gender identity
  - Nationality
  - Immigration status
  - Race
  - Ability
- Boys and men as well as girls and women
- Employees, such as teachers, staff, and administrators
- Recipients include approximately 17,600 local school districts, over 5,000 postsecondary institutions, and charter schools, for-profit schools, libraries, and museums.

# Evolution of Title IX



**JUNE 23, 1972**

Title IX becomes law and addresses sex-based discrimination



**APRIL 4, 2011**

Guidance expands Title IX to include sexual harassment, dating and domestic violence, sexual assault, and stalking



**AUGUST 14, 2020**

Newest guidance changes the way schools respond to incidents of discrimination and harassment





# Title IX Today

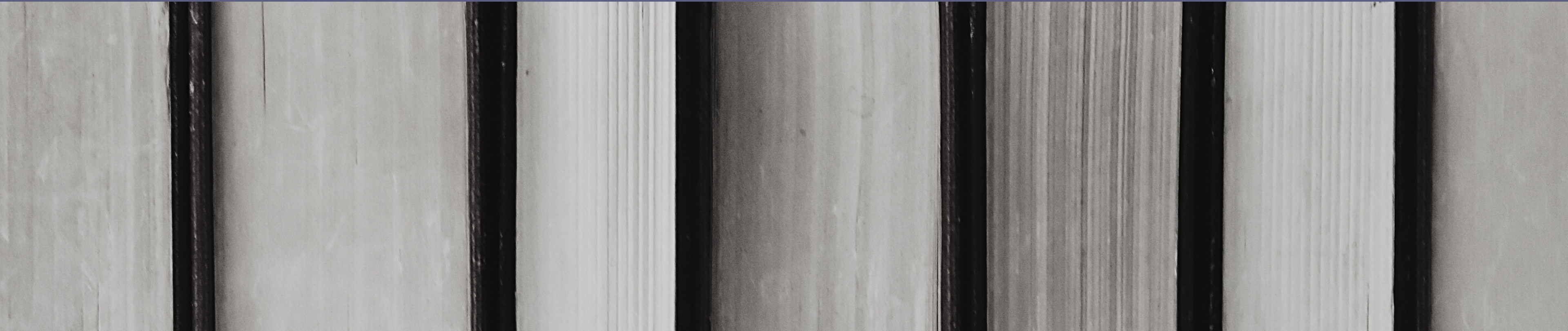


**JUNE 23, 2022**

Department of Education releases Title IX Notice of Proposed Rulemaking proposing expanded scope and revised guidelines



# Title IX Definitions



# Actual Knowledge

- "[N]otice 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" (Postsecondary)
- Notice of sexual harassment or allegations by ANY employee of an elementary or secondary school
- Includes reports sent to the Title IX Coordinator in person, by mail, by telephone, by email, or by any other means that results in the Title IX Coordinator receiving a person's written or oral report

# Report vs. Formal Complaint

## Report

- Alleges sexual harassment, sex discrimination, or sexual misconduct
- Written or oral
- Submitted by any person, not just the alleged victim
- Can be anonymous
- May be made at any time
- May be made in person or by mail, phone, email or any other means

## Formal Complaint

- Alleges Title IX sexual harassment
- Submission required to initiate the Title IX grievance process
- Must be filed and signed by the Complainant (or Title IX Coordinator in certain instances)
- Cannot be filed anonymously or by a third-party



# Report vs. Formal Complaint

**Both reports and formal complaints are:**



A means for the school to obtain "actual knowledge"



NOT equivalent to filing charges with law enforcement

# Supportive Measures

## What?

- Non-disciplinary, non-punitive services offered to the Complainant & Respondent
- Includes measures designed to protect the safety of all parties or the school's educational environment, or deter sexual harassment

## When?

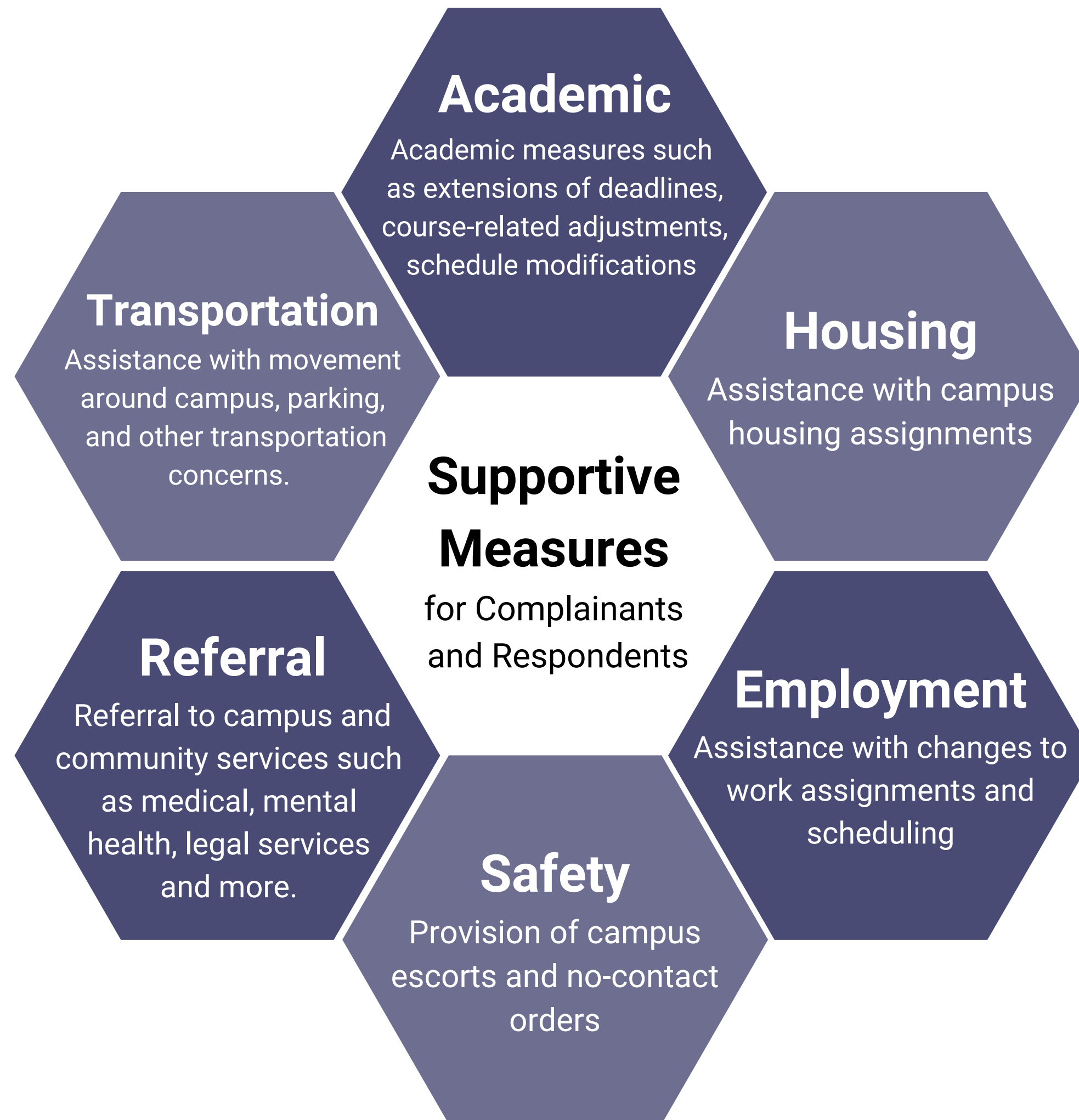
- Available before or after filing a formal complaint or where no formal complaint has been filed

## Why?

- Offered without fee or charge to the complainant or respondent; as appropriate and reasonably available

## How?

- Designed to restore or preserve equal access to the school's education program or activity without unreasonably burdening the other party



# Amnesty Provision

- Not required under Title IX but often included in the policy to encourage reporting
- Means that individuals may not be subject to disciplinary action for a minor violation of other school policies (e.g., Code of Conduct) when participating in a Title IX investigation

## SCENARIO



Sam is a college freshman and was sexually assaulted at a house party. Sam had been drinking heavily and is scared to report the assault as they are underage.

# Confidentiality

- Explicitly stated in Title IX
- Identities of the reporting parties, Complainants, Respondents, and witnesses are to remain confidential
  - Identities of these individuals will be known to the individuals conducting the Title IX process

# Retaliation

- Intimidating, threatening, coercing, or discriminating against any individual for either of the following reasons:
  - Intention to interfere with the individual's rights under Title IX; or
  - Because an individual has submitted a report or formal complaint, testified, assisted, or participated or refused to participate in the investigation, proceeding, or hearing under Title IX



# Retaliation

**All persons are prohibited from retaliating against reporting parties, Complainants, Respondents, witnesses, and others who participate in the Title IX process.**



Example One: Friends of the Complainant intimidating the Respondent, or vice versa.



Example Two: School personnel discriminating against an individual for refusing to participate in the Title IX process.

# Remedies and Sanctions

## REMEDIES

- Offered to Complainants
- Designed to restore or preserve equal access to the school's education program or activity
- May be the same as supportive measures
- DO NOT need to be "non-punitive" or avoid burdening the respondent

## SANCTIONS

- Available after the grievance process is complete
- List or range of remedies and sanctions should be listed in policy
- Issued to Respondents found responsible for violating the school's sexual harassment policy

# Education Program or Activity

- All of the operations of the school
  - May be on or off campus
  - Locations, events, or circumstances over which the school exercises substantial control over both:
    - The Respondent, and
    - The context in which an incident of sexual harassment occurs.
  - Any building owned or controlled by student organizations which are officially recognized by the school
    - Includes fraternity & sorority houses
- Computer and internet networks, digital platforms and computer hardware or software owned or operated by, or used in the operations of the school



# Standard of Evidence

## Standard used to determine whether or not a sexual harassment policy violation occurred

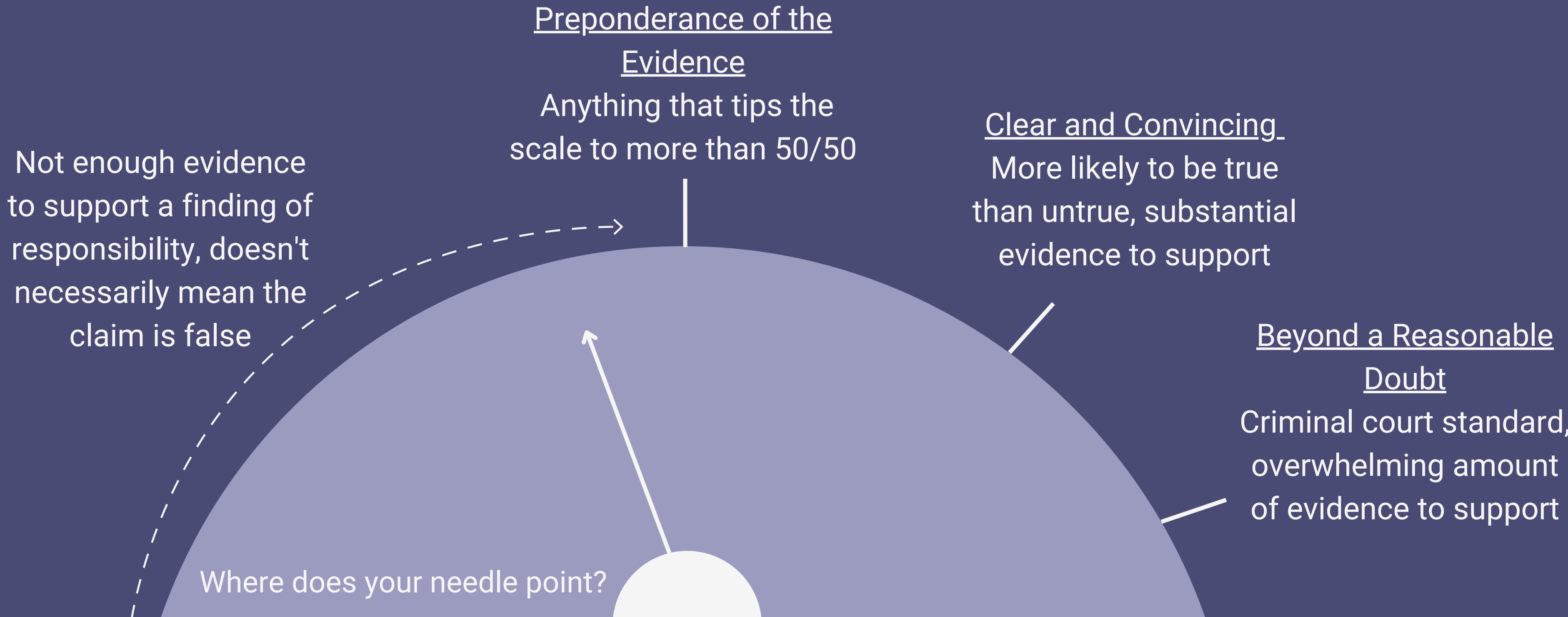
### Preponderance of the Evidence

- Evidence demonstrates that it is “more likely than not” that the alleged conduct or policy violation occurred
- Greater than 50% chance that a policy violation occurred

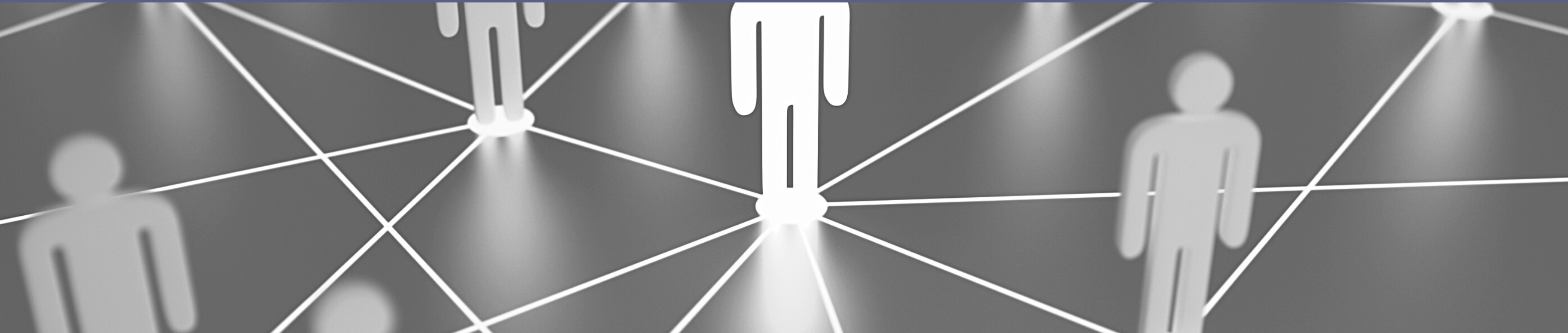
### Clear and Convincing

- Evidence is highly and substantially more likely to be true than untrue
- A higher standard of evidence to meet when compared to the “preponderance of the evidence” standard

# Standard of Evidence



# Participants in the Title IX Process





# Overview

## **Title IX personnel vary depending upon several factors:**

- Institution size
- Institution type
  - K-12
  - Community/two-year colleges
  - Four year colleges and universities
  - Public/private
- Institution structure and resources
  - Organizational charts and reporting
  - Full-time/part-time
  - Budget

# Title IX Personnel

**Except for the Title IX Coordinator, Title IX personnel may be internal (from the campus community) or external (local attorneys, consultants, etc.)**



Title IX  
Coordinator



Deputy  
Coordinators



Title IX  
Investigator



Decision-  
Maker



Informal Resolution  
Facilitator



Advisor



Appellate  
Decision-Maker

# Title IX Coordinator

Every school must have a Title IX Coordinator

## CAN

- Serve as the Title IX Investigator
- Serve as the Informal Resolution Facilitator
- Have other roles on campus
  - Dean of Students, Director of Human Resources, etc.

## CANNOT

- Serve as the Title IX Decision-Maker
- Serve as the Appeals Decision-Maker



# Title IX Coordinator

## Responsibilities:

- Ensures compliance with federal, state, and local law, as well as other school policies
- Receives reports of sexual harassment
- Creates, reviews, and implements policy and procedures
- Facilitates and oversees grievance process including hearings, informal resolution processes, and appeals
- Creates/monitors training of Title IX staff and campus community

# Title IX Investigator

**May be Title IX Coordinator, other school employee, or independent contractor.**

## Responsibilities:

- Collects evidence and interviews the parties and witnesses
- Provides all evidence to the parties and their advisors for inspection and review
- Creates an investigative report that fairly summarizes relevant evidence
- Sends the investigative report to the Complainant, Respondent, Advisor, and Decision-Maker

# Decision-Maker

**May be a single Decision-Maker or a hearing panel, school employees or independent contractors.**

**May NOT be the Title IX Coordinator or Title IX Investigator.**

## Responsibilities:

- Oversees and facilitates the Title IX hearing
- Supervises the conduct of the involved parties and their advisors
- Determines the relevance of evidence and questions presented during the hearing
- Drafts and issues the written determination regarding responsibility
- May issue sanctions



# Decision-Maker

**May be a single Appellate Decision-Maker or Appellate Panel, school employees or independent contractors.**

**May NOT be the Title IX Coordinator, Investigator, or Decision-Maker.**

## Responsibilities:

- Reviews the appeal from the party & the other party's response (if any)
- Drafts and issues the final determination

Specific appellate procedures vary at every school, so refer to the school's policy for details.

# Informal Resolution Facilitator

**May be the Title IX Coordinator, school employees or independent contractors.**

## Responsibilities:

- Provides information to the parties and Advisors about the informal resolution process
- Various forms of informal resolution may be available
- Facilitates the informal resolution process
- Drafts informal resolution settlement agreements at the conclusion of the process (if the complaint is resolved)

# Advisor

## Complainant and Respondent have the right to an Advisor of their choice.



An Advisor may be, but is not required to be, an attorney.



A party's Advisor may be a friend, teacher, parent, professor, etc.

- School must provide an Advisor for the live hearing if a Party does not select one
- School cannot limit the choice or presence of the advisor for either party in any meeting.
- Parties have the option to include the Advisor in any meeting or investigative interview.
- Schools may set specific expectations or provide guidelines for Advisors to follow during meetings, investigative interviews, and the hearing.

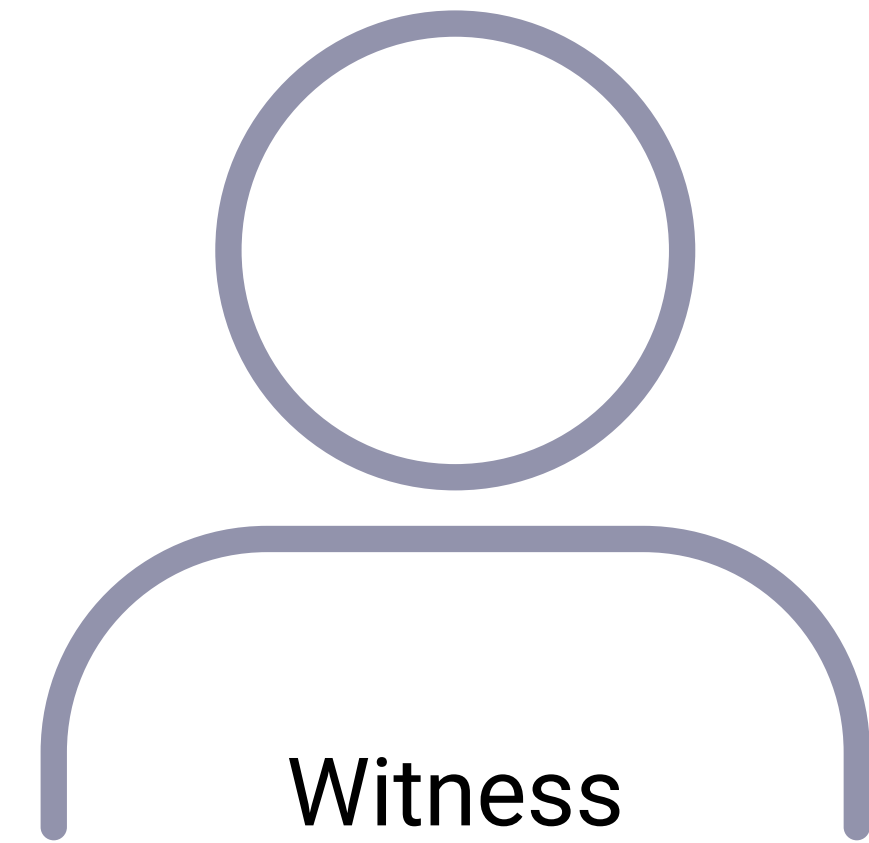
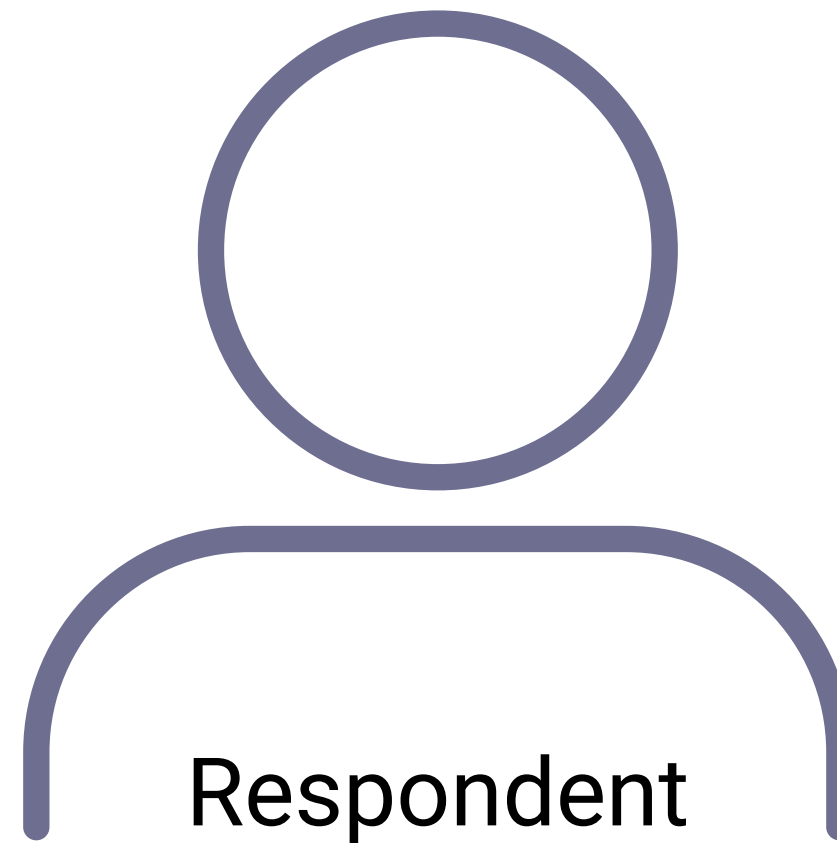
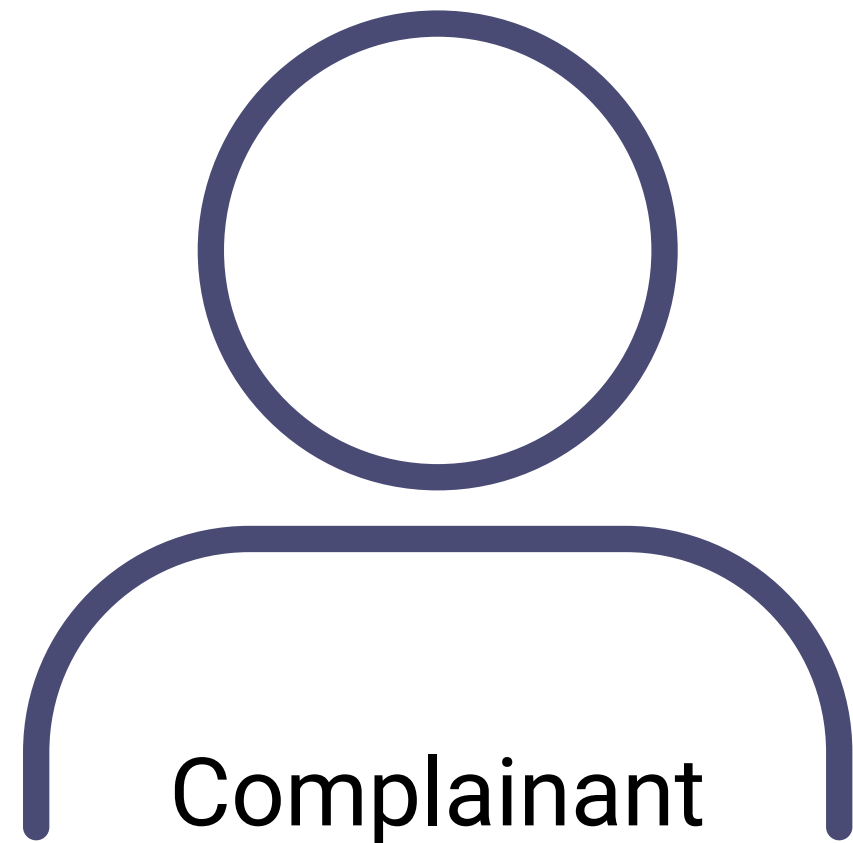


## Responsibilities:

- Supports their Party by accompanying them during interviews, meetings, and the hearing
- Provide information regarding the Title IX process and resources available
- Reviews the investigative report and all evidence, as well as help craft a response
- Participates in the hearing and conducts cross-examination

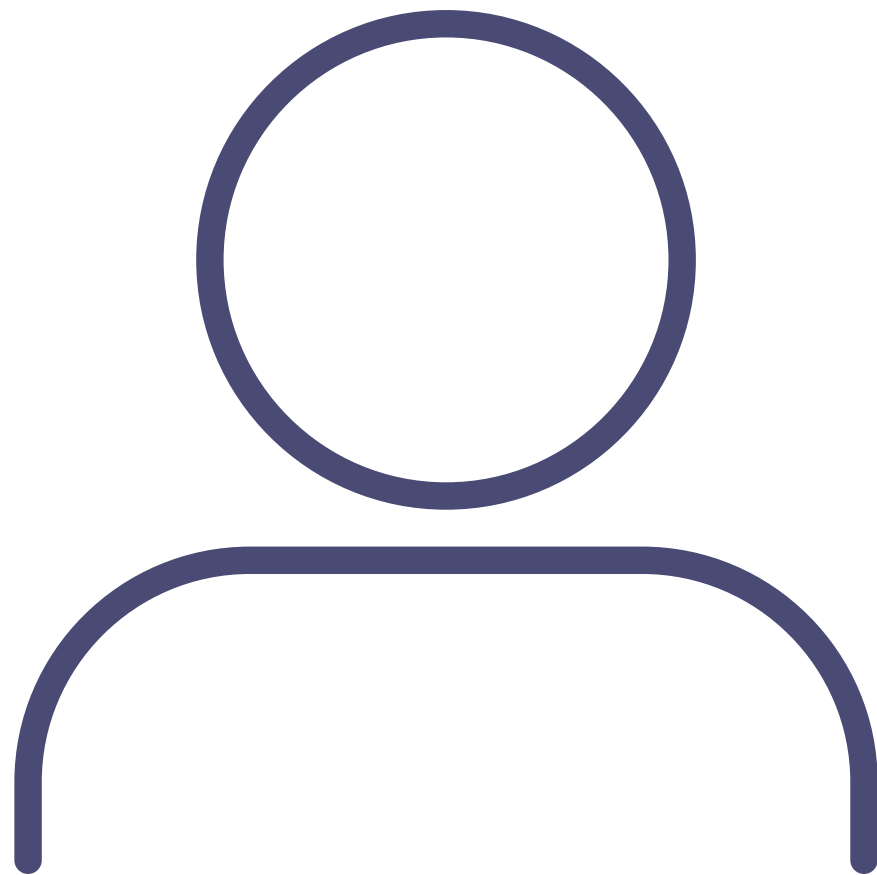
# Parties in the Process

**Aside from the Title IX personnel who take part in the facilitation of the grievance process, we will also see these individuals involved:**



# Complainant

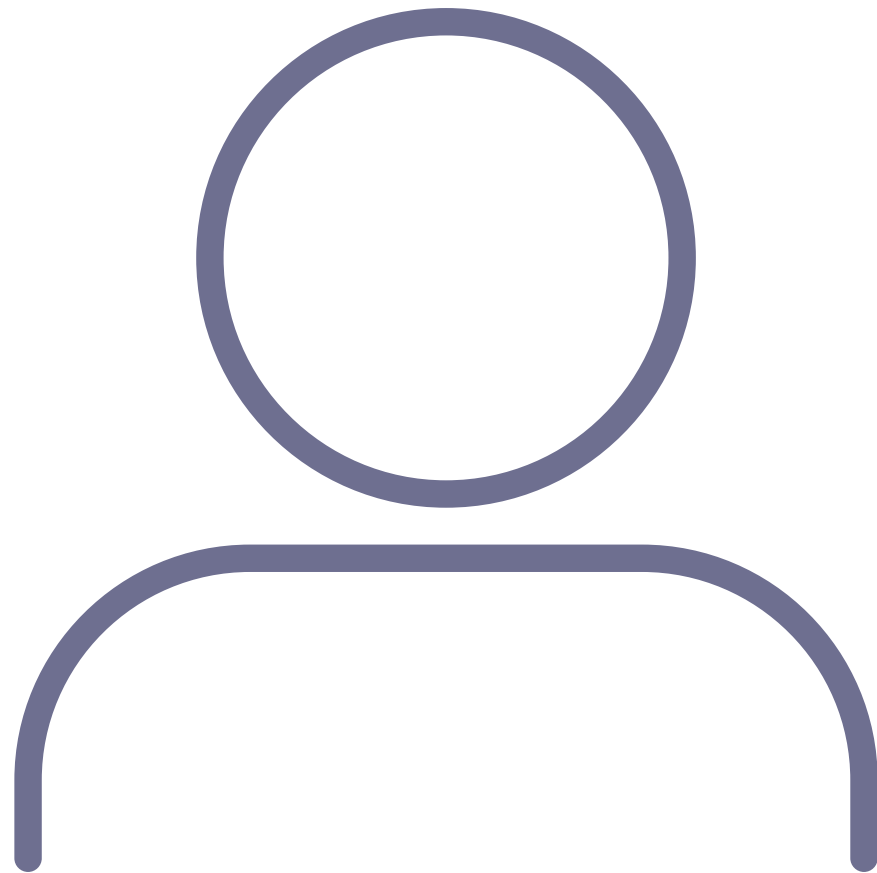
**Alleged to be the victim of conduct that could constitute sexual harassment.**



- May be a student, employee, or other community member.
- Must be participating in or attempting to participate in the school's education program or activity with which the formal complaint is filed.
- There may be more than one Complainant in a case

# Respondent

**Reported to be the alleged perpetrator of conduct that could constitute sexual harassment.**

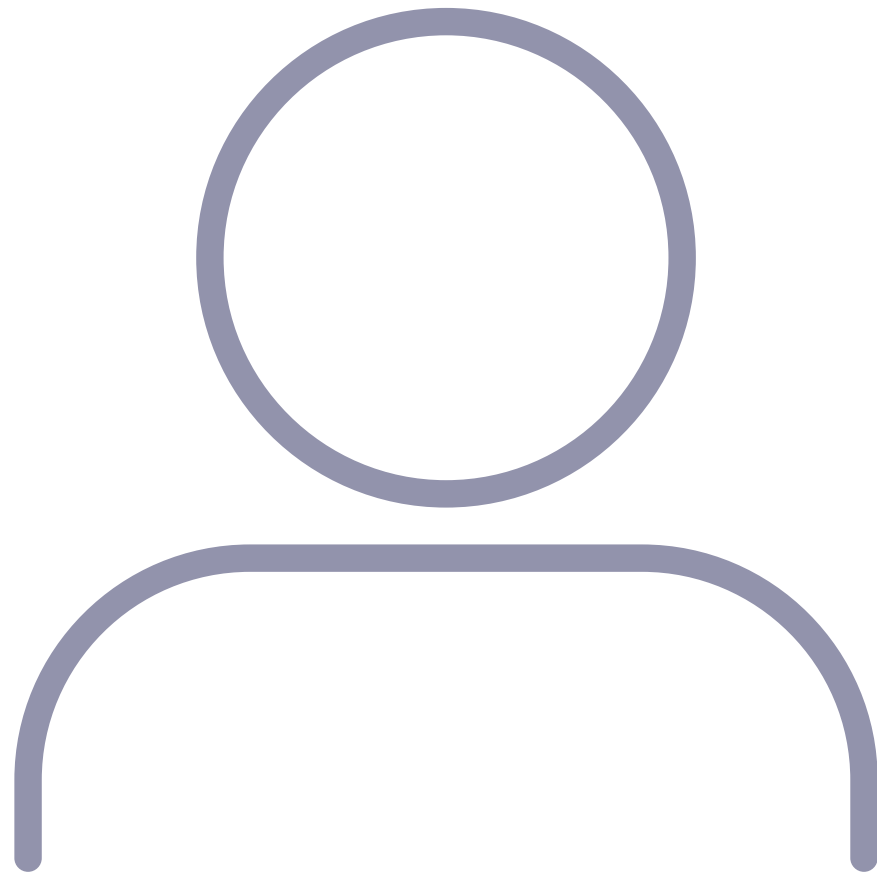


- May be a student, employee, community member, or non-community member.
  - The school's ability to respond to incidents perpetrated by non-community member Respondents may be limited.
- School may dismiss the complaint if the Respondent is no longer enrolled or employed by the school.
- There may be more than one Respondent in a case.



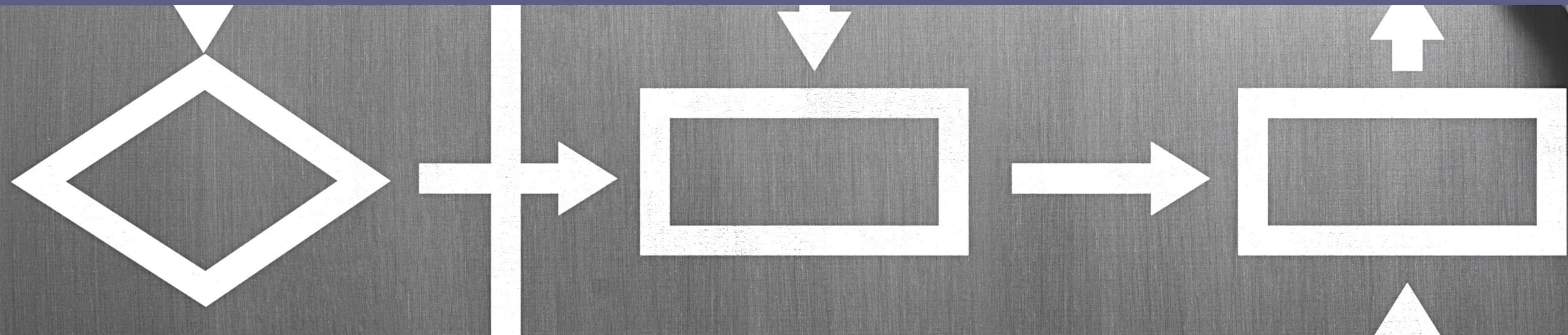
# Witness

**Individuals that are identified in the grievance process as having information that may support or refute allegations of sexual harassment.**



- May be identified by the Complainant, Respondent, or institution.
- Could have first-hand knowledge regarding allegations or may have other information that could be helpful in an investigation.
- There may be multiple witnesses in a case.

# Overview of the Title IX Process



In the Title IX  
Grievance  
Process a  
School Must:

- Treat Complainants and Respondents equitably
- Require objective review of all relevant evidence
- Train Coordinators, Investigators, Decision-Makers, and Informal Resolution Facilitators and ensure they are free of conflicts of interest and bias
- Include a presumption that Respondent is not responsible for allegations until determination is reached at conclusion of grievance process



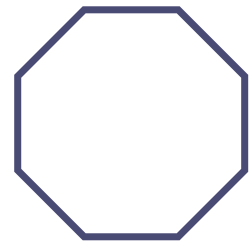
# In the Title IX Grievance Process a School Must:

- Include reasonably prompt time frames for the conclusion of the grievance process
- Describe the range of possible disciplinary sanctions and remedies
- State the standard of evidence
- Describe the range of supportive measures available to Complainants and Respondents
- Not require or seek the disclosure of information protected under a legally recognized privilege



# Title IX Requirements

Ultimately, the goal is to:



Stop the harassment or discrimination



Prevent further recurrence of harassment or discrimination



Remedy the effects of harassment or discrimination

# Leading up to the Title IX Process

1

## **Report is submitted to the Title IX Coordinator**

- Any person may report sexual harassment
- Responsible employees and mandatory reporting

2

## **Upon receipt of a report, Title IX Coordinator must:**

- Respond in a manner that is not deliberately indifferent
- Contact and attempt to meet with the Complainant (if known)
- Discuss the availability of supportive measures and consider the Complainant's wishes with respect to them and explain the process for a formal complaint.



### They may also:

- Conduct a safety and risk analysis
- Assess information from the report and conversation with the Complainant to determine if the alleged incident would be considered sexual harassment under Title IX

# Leading up to the Title IX Process

**3**

## **If the alleged incident is preliminarily determined to violate Title IX:**

- Complainant or Title IX Coordinator may file a formal complaint
- If a Complainant does not wish to file a formal complaint, but a risk assessment determined the potential for more harm to the Complainant or greater campus community, the Title IX Coordinator may choose to file
- Note- If the alleged incident does not potentially violate Title IX on it's face, it may be adjudicated under a different institutional policy

**4**

**After a formal complaint is filed, the Title IX grievance process begins.**

# Title IX Grievance Process

INTAKE/  
REVIEW

NOTICE OF  
ALLEGATIONS  
SENT TO  
PARTIES

INVESTIGATION

HEARING

WRITTEN  
DETERMINATION

APPEAL  
PROCESS

INFORMAL RESOLUTION  
(OPTIONAL, BUT MAY BE INITIATED IN THIS WINDOW)



# Title IX Grievance Process

## INTAKE/ REVIEW

- Title IX Coordinator provides a gatekeeping function
  - Conducts a jurisdictional review to decide whether a report falls under Title IX or another policy
- Conversations with Reporting Party and/or Complainant
- Information-giving stage
- Supportive measures may be implemented

# Title IX Grievance Process

## NOTICE OF ALLEGATIONS SENT TO PARTIES

- Title IX Coordinator notifies parties of allegations that may constitute Title IX sexual harassment
  - Informs parties of rights and options under the grievance process
  - Presumption that the Respondent is not responsible
- Preparation for the investigation stage

# Title IX Grievance Process

## INVESTIGATION

- Title IX Investigator's primary function
- Information-gathering stage which includes:
  - Interviews of witnesses and parties
  - Gathering of evidence
  - Inspection and review of evidence
  - Drafting of investigation report
- Could potentially be the longest timeframe

# Title IX Grievance Process



## INFORMAL RESOLUTION

(OPTIONAL, BUT MAY BE INITIATED IN THIS WINDOW)

- Informal process of resolving a complaint, that must be agreed upon by both parties
- Could include:
  - Mediation
  - Restorative Justice
  - Education
  - Acceptance of Responsibility
- Cannot be used for employee on student complaints



# Title IX Grievance Process

## HEARING

- The decision-making stage of the grievance process
- Facilitated by the Decision-Maker
  - Either a single Decision-Maker or panel
- Includes:
  - Pre-hearing meeting
  - Live hearing or written decision-making process with cross-examination by the parties Advisor
- Must be provided in postsecondary, may be provided in elementary and secondary, but not required

# Title IX Grievance Process

## WRITTEN DETERMINATION

- Prepared by the Decision-Maker(s)
- Determination of a Title IX sexual harassment policy violation using the standard of evidence outlines
  - Responsible or not responsible
  - May address multiple allegations
  - Could include sanctions

# Title IX Grievance Process

APPEAL  
PROCESS

- Allowed under the Title IX Regulations for the following reasons:
  - Procedural irregularity
  - New evidence not available during the investigation
  - Conflict of interest or bias by Title IX Coordinator, Investigator, or Decision-Maker(s)



# Overview of the Title IX Regulations



# IN THIS CHAPTER



INTRODUCTION TO  
THE TITLE IX  
REGULATIONS

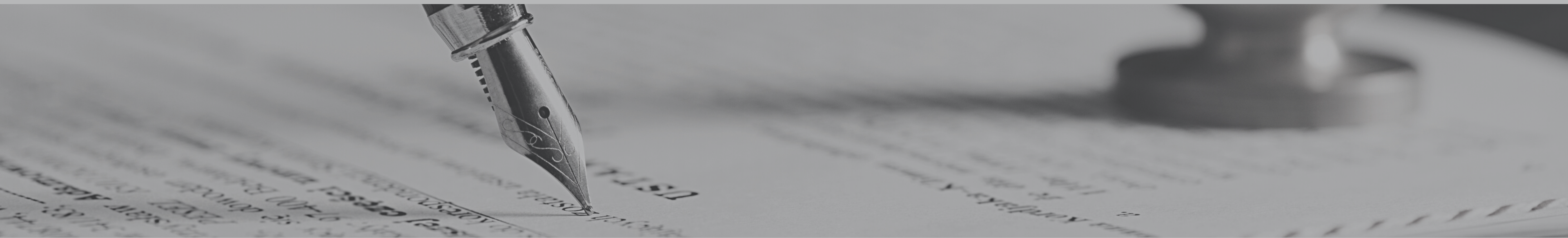


SEXUAL  
HARASSMENT AND  
RECIPIENT RESPONSE



TITLE IX GRIEVANCE  
PROCESS FOR  
FORMAL COMPLAINTS

# Introduction to the Title IX Regulations



# Title IX Coverage

- Postsecondary institutions
  - Including undergraduate, graduate, vocational, and professional schools
- Elementary and secondary schools
  - Including preschools and private elementary and secondary schools

# What is a Recipient?

A recipient of Federal financial assistance covered by Title IX of the Education Amendments of 1972 ("Title IX")

# Compliance with the Regulations

Recipients must comply with the requirements of Title IX as outlined under the regulations

Recipients may:

- provide guidelines, policies or protocols through their codes of conduct beyond the scope of the regulations

and/or

- provide details regarding policies or procedures which are not addressed in the regulations



# Compliance with the Regulations

Recipients must:

- have “prompt and equitable” grievance procedures for complaints of sex discrimination

and

- have in place a grievance process that complies with § 106.45 for formal complaints of sexual harassment

# When is sexual harassment actionable?



Denies a person equal  
access to education

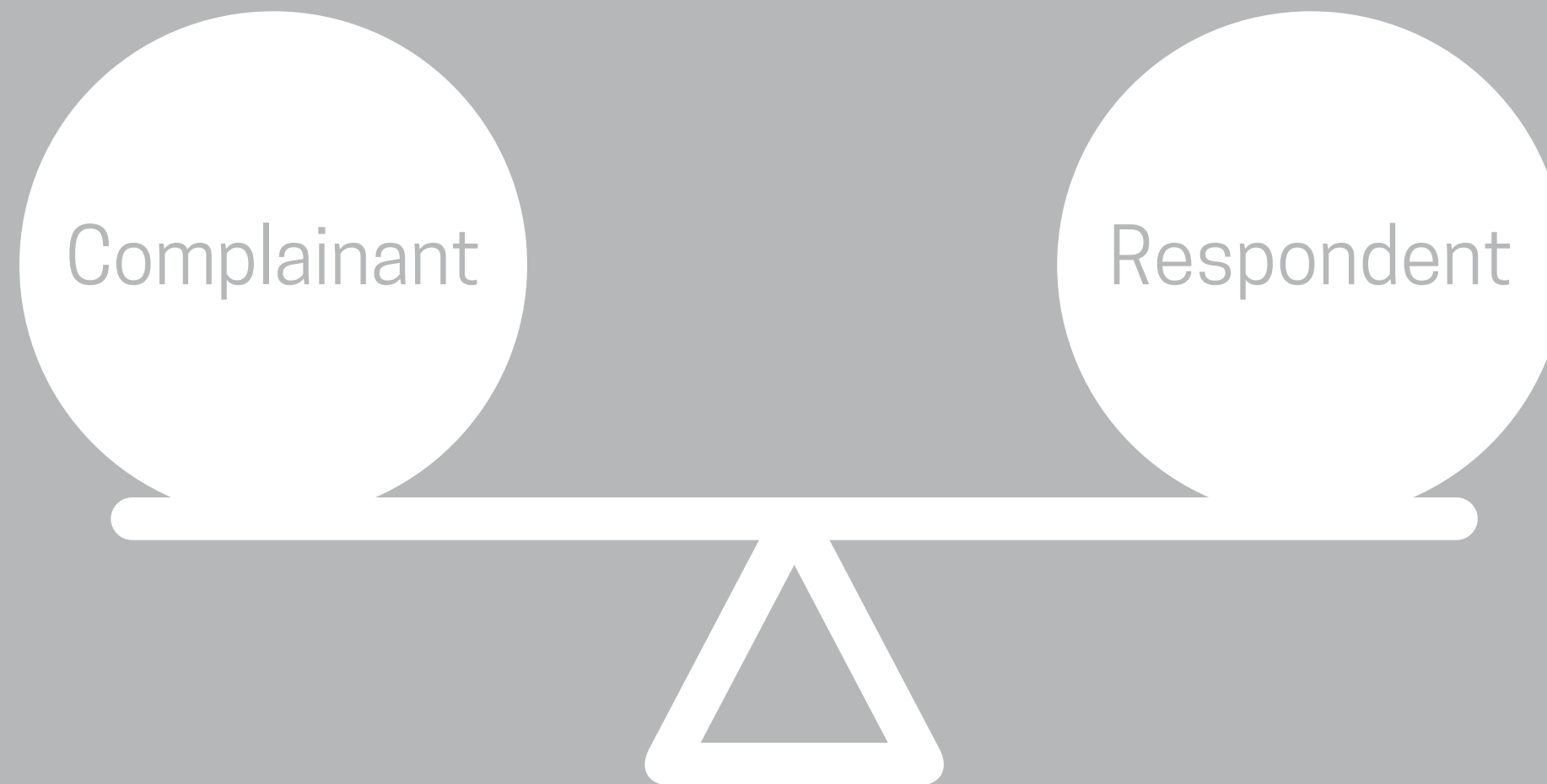
# Title IX's Application

Regulations apply equally to all persons, regardless of:

- Gender identity
- Sexual orientation

# Treatment of the Parties

A school must treat both parties equitably and equally throughout the process including supportive measures, investigations, and the grievance process.



# Bias and Conflict of Interest

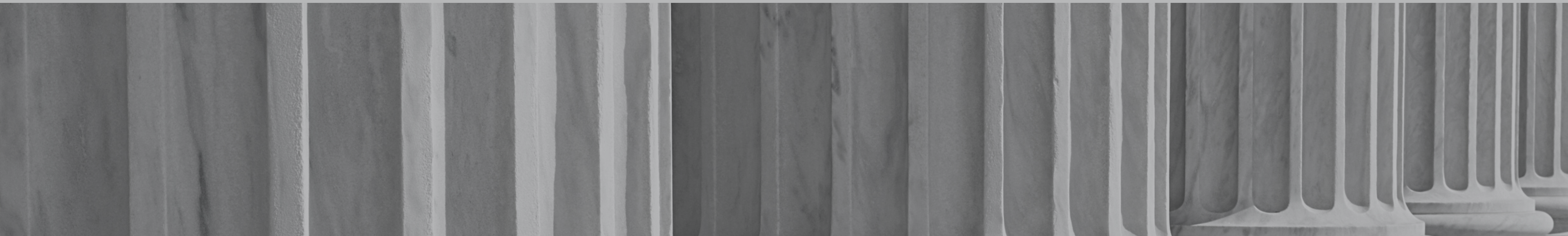
“...that any individual designated by a recipient as a Title IX Coordinator, Investigator, Decision-Maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.”



# Title IX Personnel

Recipients have the flexibility to use their own employees or external Title IX investigators, adjudicators, or informal resolution facilitators

# Sexual Harassment and Recipient Response



# DEFINITIONS OF SEXUAL HARASSMENT

Conduct on the basis of sex that satisfies one or more of three types of behavior::

1

QUID  
PRO  
QUO

2

“SEVERE,  
PERVASIVE  
AND  
OBJECTIVELY  
OFFENSIVE”

3

SEXUAL  
ASSAULT,  
DATING  
VIOLENCE,  
DOMESTIC  
VIOLENCE, OR  
STALKING

1

QUID  
PRO  
QUO

- May be express or implied
- Need not be “severe” or “pervasive” as a single incident
- Considered inherently “offensive” and jeopardizes equal educational access.

2

“SEVERE,  
PERVASIVE  
AND  
OBJECTIVELY  
OFFENSIVE”

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



3

SEXUAL  
ASSAULT,  
DATING  
VIOLENCE,  
DOMESTIC  
VIOLENCE, OR  
STALKING

Specific offenses defined under the FBI's  
Uniform Crime Reporting (U.C.R) program.  
U.S.C. 1092 (f)(6)(A)(v)

# Sexual Assault

1) Sex Offenses, Forcible: Any sexual act directed against another person, without the consent of the victim including instances where the victim is incapable of giving consent.

- Forcible Rape
- Forcible Sodomy
- Sexual Assault with an Object
- Forcible Fondling

2) Sex Offenses, Nonforcible: (Except Prostitution Offenses) Unlawful, nonforcible sexual intercourse.

- Incest
- Statutory Rape

# Dating Violence

Violence committed by a person:

- a. who is or has been in a social relationship of a romantic or intimate nature with the victim; and
- b. where the existence of such a relationship shall be determined based on a consideration of the following factors:
  - i. The length of the relationship.
  - ii. The type of relationship.
  - iii. The frequency of interaction between the persons involved in the relationship. 34 U.S.C. 12291 (a)(10)

# Domestic Violence

Felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.

# Stalking

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

- a. Fear for his or her safety or the safety of others; or
- b. Suffer substantial emotional distress



# Consent



The regulations do not include a definition of consent and do not require recipients to adopt a particular definition of consent, including “affirmative consent,” with respect to sexual assault.

# Recipient's Response

THRESHOLD CRITERIA- MUST MEET ALL FOUR

Incident constitutes sexual harassment as previously defined

School must have “actual knowledge” of an allegation of the incident of sexual harassment

Conduct must have occurred within the school’s own education program or activity

Alleged harassment must have occurred within the United States

# Actual Knowledge Defined

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.

- Does not need to be a written statement or a formal complaint
- May be conveyed by any person, not just the complainant
- May be "written or oral, by observation, via a newspaper article or other means"
- Postsecondary- reporting to Title IX Coordinator always constitutes actual knowledge
- Elementary and Secondary- reporting to ANY employee constitutes actual knowledge

# Educational Program or Activity Defined

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.

- School may offer supportive measures if harassment occurred outside of the educational program or activity
- School's responsibility is limited under Title IX regulations, though conduct outside of this jurisdiction may be addressed by Code of Conduct or other policies
- Schools must make fact-specific determinations regarding substantial control over the respondent and the context

# Recipient's Response

## DELIBERATELY INDIFFERENT

- Schools must not act in a manner that is deliberately indifferent
- What does this mean?
  - "...clearly unreasonable in light of the known circumstances"



# Recipient's Response

## QUALIFYING INCIDENTS OF SEXUAL HARASSMENT

- Treat complainants and respondents equitably by offering supportive measures
  - When do they apply?
  - What do they include?
- Follow a grievance process that complies with §106.45 of the Title IX Regulations
- The Title IX Coordinator must 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;
  - Explain to the complainant the process for filing a formal complaint.

# Recipient's Response

## EMERGENCY REMOVAL

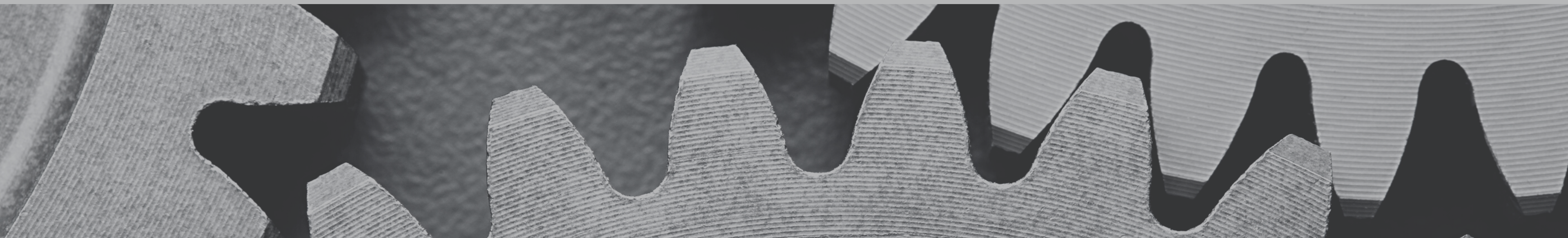
- Safety and risk analysis
- Immediate threat to physical health or safety
- Provide respondent with notice and opportunity to challenge the decision

# Recipient's Response

## ADMINISTRATIVE LEAVE

- Applies to non-student employees

# Title IX Grievance Process for Formal Complaints



# Formal Complaint Defined

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

- May be filed by parent or guardian who has a legal right to act on behalf of an individual
- At the time of filing, complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed
- May be filed in person, by mail, or by electronic mail,
  - Can use the contact information required to be listed for the Title IX Coordinator or any additional method designated by the school
- Must contain the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint
- If Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party



# Dismissal of a Formal Complaint

School MUST dismiss 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

Did not occur against a person in the United States

*Dismissal does not preclude the school from investigating and adjudicating under another provision of the school's Code of Conduct*

# Dismissal of a Formal Complaint

School MAY dismiss if the conduct alleged in the formal complaint:

Complainant notifies the Title IX Coordinator 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

Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein

*A complaint will not be dismissed because a complainant remains or leaves the school*

# Consolidation of Formal Complaints

Schools may consolidate formal complaints:

- Against more than one respondent
- By more than one complainant against one or more respondents
- By one party against the other, where the allegations arise out of the same facts or circumstances

# Grievance Process

A recipient's grievance process must:

- Treat complainants and respondents equally
- Require objective evaluation of relevant evidence
- No conflict of interest
- Presume respondent is not responsible for the alleged conduct until a determination is made
- Reasonably prompt time frame
- Describe range of possible disciplinary sanctions and remedies
- State standard of evidence
- Appeals
- “Presumption” guideline

# Grievance Process

## NOTICE OF ALLEGATIONS

Must contain:

- Notice of the school's grievance process
- Sufficient details of the allegations, including:
  - Identities of the parties involved;
  - The conduct allegedly constituting sexual harassment;
  - The date and location of the alleged incident(s)
- Sufficient time period for the parties to prepare a response before interview
- Presumption of not responsible
- Determination of responsibility at the conclusion of the grievance process
- Allowance of an advisor
- Right to inspect and review all evidence gathered during the investigation
- Reference to any policy in the school's code of conduct which prohibits knowingly making false statements



# Grievance Process

## INVESTIGATION OF FORMAL COMPLAINTS

- A recipient must investigate a formal complaint
- The Title IX Coordinator also may serve as the Investigator
- Burden of proof and gathering of evidence is on the school
- Medical and similar privileged records are not available unless the party (or parent/guardian) provides written consent for release
- Both parties must be given the equal opportunity to present witnesses and evidence
- Neither party may be restricted in their ability to discuss the allegations or gather and present relevant evidence

# Grievance Process

## INVESTIGATION OF FORMAL COMPLAINTS

- Both parties have the right to an advisor throughout the grievance process
- School must give written notice of any interview, meeting or hearing at which a party is to participate
- Parties and their advisors must be given equal access to inspect and review all evidence gathered during the investigation
- Parties must be given at least 10 days to file a written response regarding the investigation evidence, responses considered prior to completion of the investigative report
- School may require the parties to submit any additional evidence prior to the investigator finalizing the investigator report

# Grievance Process

## INVESTIGATION OF FORMAL COMPLAINTS

- Evidence provided to the parties must also be available at the hearing with each party having equal access to refer to the evidence or use it in cross examination
- Investigator must complete an report that fairly summarizes relevant information at least 10 days prior to a scheduled hearing and provide copies to each party and their advisors
- The investigator may include recommended findings or conclusion in the investigative report, but the decision-maker is under an independent obligation to objectively evaluate relevant evidence in making a determination.

# Grievance Process

## HEARINGS

- The decision-maker(s) in a hearing cannot be the same person(s) as the Title IX Coordinator or the investigator(s)
- A postsecondary school must provide for a live hearing
- A live hearing is optional for elementary and secondary schools, though the parties must be given the opportunity to:
  - Review the investigative report
  - Submit written relevant questions of any party or witness to the decision-maker
  - Receive answers to those questions
  - Submit limited follow-up questions prior to a determination by the decision-maker

# Grievance Process

## HEARINGS

- Consolidation of cases
- Hearing logistics
- Participation of advisors, parents/guardians
- Relevancy
- Cross-examination



# Grievance Process

## WRITTEN DETERMINATION

- Made by a decision-maker(s) who is/are not the Title IX Coordinator or Investigator
  - Must not have bias or conflict of interest.
- Determination reached by applying standard of evidence adopted by the school
- Written determination must include:
  - Identification of the allegations
  - Description of the procedural steps taken
  - Findings of fact supporting the determination
  - Conclusions regarding the application of the recipient's code of conduct to the facts
  - Statement of, and rationale for, the result as to each allegation, including:
    - a determination regarding responsibility
    - any disciplinary sanctions the recipient imposes on the respondent
    - whether remedies designed to restore or preserve equal access to education program
  - Bases for appeal

# Grievance Process

## WRITTEN DETERMINATION

- Providing determination simultaneously
- Finality
- Remedies provided

# Grievance Process

## STANDARD OF EVIDENCE

- A school may elect to apply either:
  - The preponderance of evidence (“more likely than not”); or
  - The clear and convincing evidence (“highly probable”) standard
- The same standard of evidence must be used for
  - formal complaints against students as is used for formal complaints against employees, including faculty
  - all formal complaints of sexual harassment

# Grievance Process

## APPEALS

- Must offer an appeal process
  - Procedural irregularity that affected the outcome
  - New evidence that was not reasonably available at the time of the determination or the dismissal, that could affect the outcome of the matter
  - The Title IX Coordinator, investigator or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or in the case that affected the outcome.
  - Can provide additional bases, but must do so equally to both parties
- Appeal Decision-Maker cannot have a conflict of interest and cannot be the Title IX Coordinator, Investigator, or Decision-Maker, must be trained
- Parties must be notified in writing of
  - other party's appeal
  - decision rendered
- Parties must be offered opportunity to provide written argument

# Grievance Process

## INFORMAL RESOLUTION

- School may offer informal resolutions of alleged incidents
  - Mediation, restorative justice, or other forms of alternative dispute resolution
- Does not require a full investigation or adjudication
- Must be voluntary, with the parties being fully informed of the process and options and the parties must consent in writing to the process
- Informal resolutions cannot be offered or facilitated by a recipient in a case involving an employee's sexual harassment of a student



TITLE IX SOLUTIONS, LLC

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# TITLE IX: A New Era

*Patrick Mathis, JD LLM MBA*

*Adrienne Mathis*





# Patrick Mathis, JD LLM MBA

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CO-FOUNDER AND MANAGING MEMBER



# Adrienne Mathis

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EXECUTIVE DIRECTOR

# Learning Objectives

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Review key elements of the 2020 Title IX Regulations.

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

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

# Title IX Statute

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"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."



# Title IX of the Education Amendments of 1972

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## 1972: TITLE IX OF THE EDUCATION AMENDMENTS

Addresses sex discrimination generally

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

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

## 2022: NOTICE OF PROPOSED RULEMAKING (NPRM)

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



# 2022 NPRM

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

Includes discrimination and harassment on the basis of:

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

Sex Discrimination

**1972 Title IX of the Education  
Amendments of 1972**

Sexual Harassment

2020 Regulations

# Practical Points

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## **NONDISCRIMINATION POLICIES**

How might the NPRM impact these policies?



## **SEXUAL HARASSMENT POLICIES**

How might the NPRM impact these policies?



## **FEDERAL, STATE, AND LOCAL LAWS**

How might other laws impact your policies?





# Sexual Harassment vs. Sex-Based Harassment

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*Understanding the differences between the  
2020 and 2022 terms*



## Sexual Harassment (2020)

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

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

## Sex-Based Harassment (2022)

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

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

## ***2020 Regulations***

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

## ***2022 Regulations***

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

# Quid Pro Quo Harassment



# Davis Standard Harassment

VS.

# Hostile Environment Harassment

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## *2020 Regulations*

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

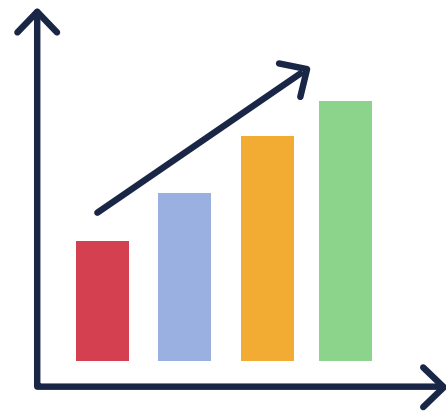
## *2022 Regulations*

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

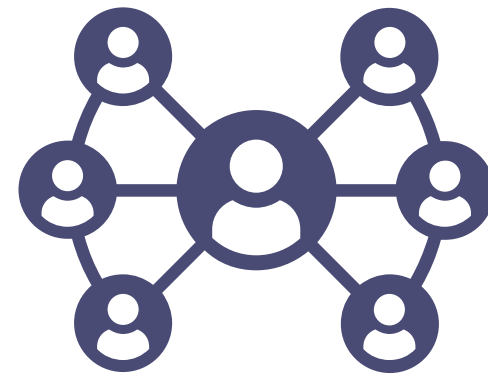
# Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following:



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



The type, frequency, and duration of the conduct



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



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



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

# Specific Offenses

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## *2020 Regulations*

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

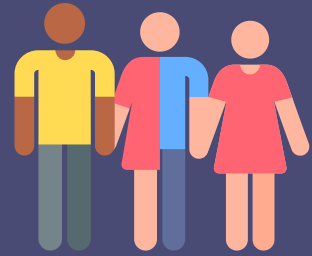
## *2022 Regulations*

- Sexual assault
- Dating violence
- Domestic violence
- Stalking

\*As defined under the 2022 NPRM



**Sex Stereotypes**



**Sex Characteristics**



**Pregnancy or  
Related Conditions**



**Sexual Orientation**



**Gender Identity**

# **Additional bases of sex-based harassment**

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*ALSO CONSIDERED BASES OF SEX  
DISCRIMINATION (2022)*





# Application of Title IX

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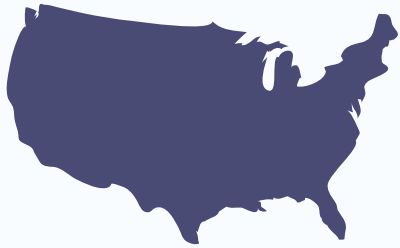
*Defining "Education Program or Activity"*



# 2020 Regulations



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



Sexual harassment occurred against a person in the United States.

# 2022 Regulations

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



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



# Practical Points

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## **DISCIPLINARY AUTHORITY**

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



## **STUDY ABROAD PROGRAMS**

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



## **FACT-SPECIFIC INQUIRIES**

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



# Responding to Sexual Harassment & Sex Discrimination

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



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

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

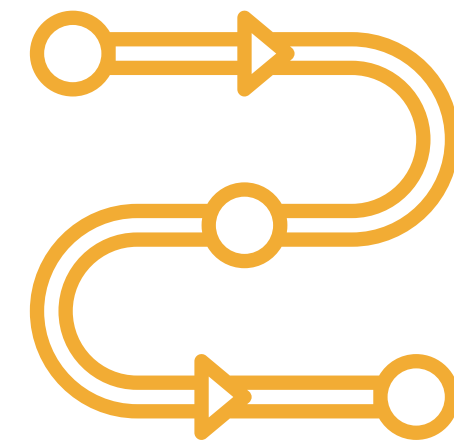
Additional requirements:



Treat Complainants  
and Respondents  
equitably



Offer supportive  
measures to  
Complainants



Follow  
grievance process before  
imposing sanctions

# Practical Point

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## UNDER 2020 REGULATIONS

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





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

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

## ➤ **Monitoring**

- Barriers to reporting

## ➤ **Notification requirements**

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

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

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

# Practical Point

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## UNDER 2022 NPRM

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





# Role of the Title IX Coordinator

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*Understanding what is required of a Title IX Coordinator*



## 2020 Requirements

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

## 2022 Requirements

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



# Title IX Grievance Procedures

*Highlighting key elements of the 2020 and 2022 grievance procedures*



## ***2020 Regulations***

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

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

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

# Formal Complaint of Sexual Harassment

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*2020 Title IX Regulations*

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

*Alleges sexual harassment against a respondent*

*Requests the recipient investigate the allegation of sexual harassment*

*Contains complainant's physical or digital signature*

Unless signed by the Title IX Coordinator





# 2022 NPRM Grievance Procedures

## **§106.45**

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

## **§106.46**

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

# § 106.45

Applies to all complaints of sex discrimination

Includes complaints involving:

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

## § 106.46

Applies to complaints of:

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

**\$106.45**

**Grievance  
Procedures for All  
Sex Discrimination  
Complaints under  
Title IX**

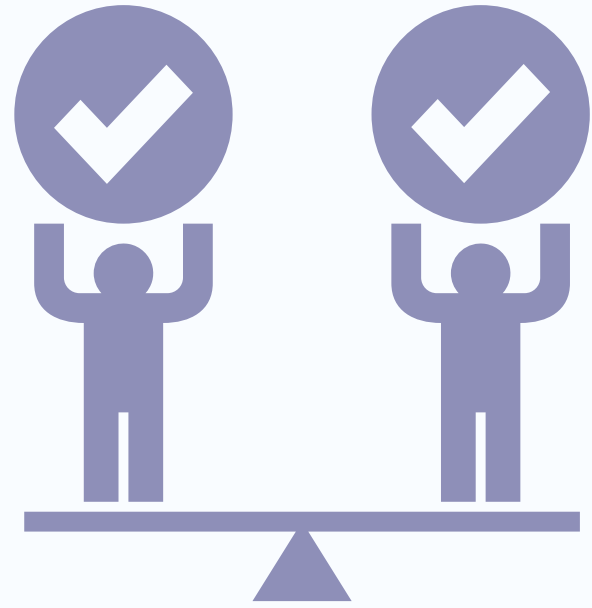
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Proposes changes to the overall grievance procedures for all K-12 complaints and postsecondary complaints not involving students

***Complaint***

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

# Purpose of Grievance Procedures in §106.45



Foundation for a prompt, fair & equitable process



Transparent and reliable outcomes



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



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



**\$106.46**

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

---

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

***Student Employees***

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

# Purpose of Grievance Procedures in §106.46

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Maturity, independence and needs of postsecondary students are unique



Complaints are highly personal



Requires greater participation by complainant and respondent



Potential disciplinary sanctions necessitates additional procedural protections

## ***2020 Regulations***

Reasonably prompt time frames for conclusion of the grievance process.

## ***2022 Regulations***

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

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

# Timelines

# Practical Point

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## UNDER 2022 NPRM

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





# Title IX Personnel

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

## *2020 Regulations*

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

## *2022 Regulations*

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

# Practical Point

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## UNDER 2022 NPRM

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



# Notice of Allegations

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## *2020 Regulations*

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

## *2022 NPRM - §106.45*

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

## *2022 NPRM - §106.46*

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

# Practical Point

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## **NOTICE OF ALLEGATIONS**

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

Include specific policy violations in question in this notice.



***Recipient MUST dismiss the formal complaint:***

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

***Recipient MAY dismiss the formal complaint:***

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

***Written notice of dismissal***

# Dismissal of Formal Complaints (2020)



# Dismissal of Complaints (2022)

## ***§106.45 Dismissal***

A recipient MAY dismiss a complaint:

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

## ***§106.46 Dismissal***

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

# Investigations

---

## 2020 REGULATIONS

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

# Practical Points

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## TEMPLATES

Have you created templates for investigators?



## RECORDINGS & TRANSCRIPTS

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



## INTERSECTING INVESTIGATIONS

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



# ***§106.45 Complaint Investigation***

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

# ***§106.46 Complaint Investigation***

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

# § 106.46 Complaint Investigation

A postsecondary institution must provide either:

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

**OR**

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

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

# Hearings

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2020 Title IX Regulations

*Required at postsecondary institutions*

*Cross-examination conducted by advisors*

*Relevance determinations during questioning*

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



# Submitting to Cross-examination (2020)

---

## 2020 REGULATIONS

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

## 2021: DEPARTMENT OF EDUCATION CEASES TO ENFORCE THIS POINT

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

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

# Distinct decision- making process

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

# K-12 Decision- Making Process

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

# Practical Points

---



## HEARING PROCEDURES

Are these outlined in the policy or internal?




## PRE-HEARING MEETINGS

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



## REFUSAL TO PARTICIPATE

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



**2022 NPRM  
Evaluating  
Allegations &  
Assessing  
Credibility**

## **§106.45**

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



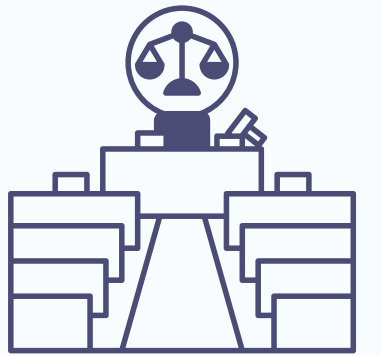
# §106.46

- 1
- 2
- 3

Outlines process for evaluating allegations and assessing credibility



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



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



Relevance determinations during questioning

# 2022 NPRM Evaluating Allegations & Assessing Credibility



# Submitting to Credibility Assessment (2022)

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## 2022 NPRM - §106.46

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



# Determinations

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## *2020 Regulations*

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

## *2022 NPRM - §106.45*

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

## *2022 NPRM - §106.46*

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

# Practical Point

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## 2020 REGULATIONS

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

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



# Relevance

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## ***2020 Regulations***

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

## ***2022 NPRM***

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

## **2020 Regulations**

*Preponderance of the evidence standard or clear and convincing evidence standard*

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

## **2022 NPRM**

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

**Standard of  
Proof**

# Informal Resolution

---

## *2020 Regulations*

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

## *2022 Regulations*

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

# Discretion to offer informal resolution in some circumstances

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

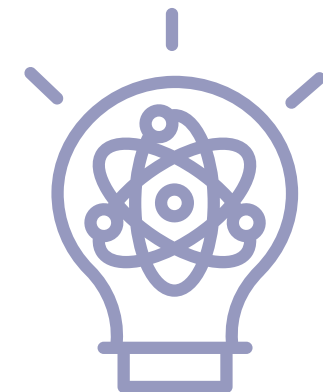
Therefore, the recipient may need to:



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



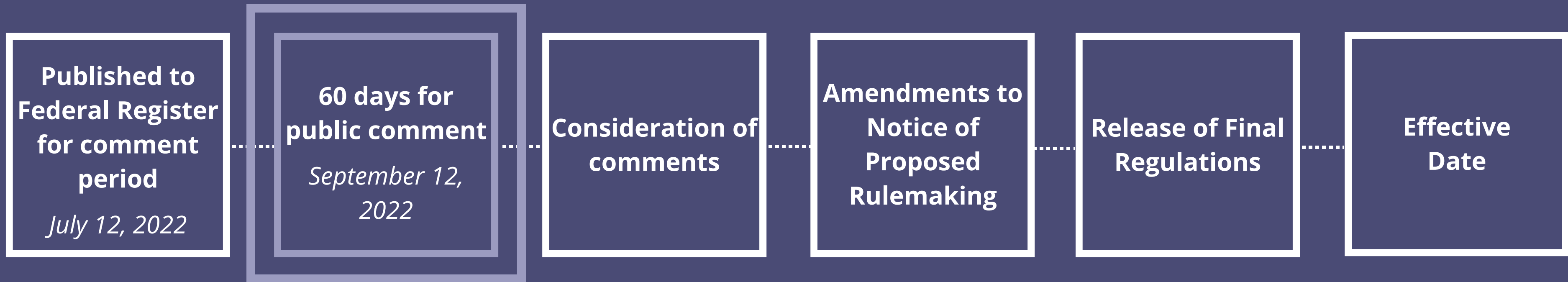
Monitor known risks of sex discrimination in programs and activities in which sex discrimination has been reported in the past



Pursue strategies other than discipline to address the conduct



# Timeline for Implementation



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

Spring 2023?

# Public Comment Period- Open Now

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





EMPHASIZING SUPPORT AND  
PREVENTION:

# A NEW DIRECTION FOR TITLE IX

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# TAWNY ALONZO

---

## Director of Training



# LEARNING OBJECTIVES

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1

Critically examine proposed changes to Title IX institutional response

2

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

3

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



# TITLE IX CURRENT REGS

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2020-TODAY



# TITLE IX: 2020-TODAY

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## INSTITUTIONAL RESPONSE

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



# TITLE IX: 2020-TODAY

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## KEY TERMS

Actual knowledge: "notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school"

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



# TITLE IX: 2020-TODAY

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



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



# TITLE IX: 2020-TODAY

## TITLE IX REPORTING



K-12

Actual knowledge: ALL  
Employees



Postsecondary

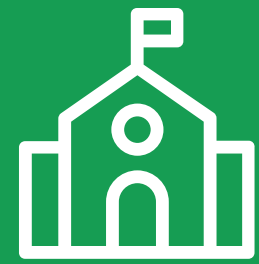
Actual knowledge: TIX  
Coordinator or authority to  
institute corrective  
measures

Any person may report sex  
discrimination, including  
sexual harassment



# TITLE IX: 2020-TODAY

## WHAT DOES THIS MEAN?



K-12

Actual knowledge: ALL  
Employees

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



# TITLE IX: 2020-TODAY

## WHAT DOES THIS MEAN?

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



### Postsecondary

Actual knowledge: TIX  
Coordinator or authority to  
institute corrective  
measures

Any person may report sex  
discrimination, including  
sexual harassment



# TITLE IX: 2020-TODAY

## CURRENT TITLE IX WORKFLOW

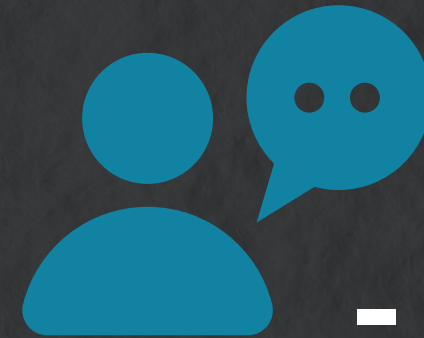


Student tells professor about sexual harassment



Professor notifies TIXC

*Actual knowledge*



Title IX Coordinator must:




Professor does not notify TIXC



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



# TITLE IX: 2020-TODAY

 = availability of supportive measures



Student files **formal** complaint



Grievance process begins

*Informal Resolution may be available*



Informal resolution or determination achieved



Student does not file\*

\*in some cases, TIXC may file complaint on behalf



Student withdraws complaint or TIXC dismisses





# TITLE IX: 2020-TODAY

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



# TITLE IX PROPOSED CHANGES

---

2023? and Beyond



# TITLE IX: PROPOSED CHANGES

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## INSTITUTIONAL RESPONSE

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



# TITLE IX: PROPOSED CHANGES

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## LANGUAGE SHIFT

Removal of  
actual  
knowledge

Emphasis on ending  
discrimination,  
preventing  
recurrence, and  
providing remedies



# TITLE IX: PROPOSED CHANGES

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



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

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



# TITLE IX: PROPOSED CHANGES

## TITLE IX REPORTING



### K-12

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



### Postsecondary

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

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



# TITLE IX: PROPOSED CHANGES

## WHAT DOES THIS MEAN?



K-12

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

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



# TITLE IX: PROPOSED CHANGES

## WHAT DOES THIS MEAN?

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



### Postsecondary

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

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



# TITLE IX: PROPOSED CHANGES

## PROPOSED TITLE IX WORKFLOW



Student tells professor about sexual harassment



Professor must notify TIXC



Title IX Coordinator must:



# TITLE IX: PROPOSED CHANGES

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



# TITLE IX: PROPOSED CHANGES



Student moves forward with complaint



Grievance process begins

*Informal Resolution may be available*



Informal resolution or determination achieved



Steps to end/prevent recurrence of discrimination



Supportive Measures/ Remedies



Student does not file complaint



Steps to end/prevent recurrence of discrimination



*Informal Resolution*



Supportive Measures/ Remedies



# TITLE IX: PROPOSED CHANGES

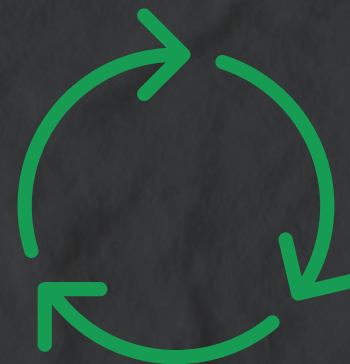
## A NEW FOCUS:

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

Harassment/  
discrimination  
ends



Harassment/  
discrimination  
continues



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



# VISUALIZING THE SHIFT

---

## 2020 FINAL RULE

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

## PROPOSED CHANGES

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



# A COMMUNITY APPROACH

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

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

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

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

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

(p. 211)



# MONITORING

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

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

Climate  
Surveys

Targeted  
Feedback

Anonymous  
Mechanisms

Public  
Awareness  
Events



# MONITORING

---

## Lack of Confidence

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

## Fear

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

## Lack of Information

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

## Perceptions of Title IX

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



# PUBLIC AWARENESS EVENTS

---

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

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



# PUBLIC AWARENESS EVENTS

---

EXAMPLES INCLUDE:

Increased  
Security at  
Physical  
Locations

Targeted  
Training

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



# COMPLAINANT AUTONOMY

2020

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

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

*\*2020 Title IX Final Rule*



# COMPLAINANT AUTONOMY

---

2020

Narrowing of  
mandated  
reporters

No action taken  
without formal  
complaint\*

Provision of  
information  
regarding  
supportive  
measures

Option for  
informal after  
formal complaint  
filed

\*in some cases, TIXC  
may file complaint



# COMPLAINANT AUTONOMY

2022 proposed

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

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



# COMPLAINANT AUTONOMY

---

2022 proposed

Expansion of  
mandated  
reporters\*

Informal  
resolution may  
be offered at any  
point

Coordination of  
supportive  
measures

Focus on restoring  
or preserving  
access to  
education program  
or activity

\*with extensive  
education about the  
designations



# PREGNANCY, PARENTING, LACTATION

Student  
discloses  
pregnancy

ANY employee  
must provide  
TIX  
Coordinator  
information

If student  
contacts TIX  
Coordinator,  
Coordinator  
must:

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



# PRACTICAL APPLICATION

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# A CASE STUDY

Jacob



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



# A CASE STUDY

Jacob



## Response under current Title IX Regs:

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



# A CASE STUDY

Jacob



Ending harassment could be dependent upon:

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

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

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



# A CASE STUDY

## Response under proposed Title IX Regs:

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

Jacob





# A CASE STUDY

Jacob



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

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

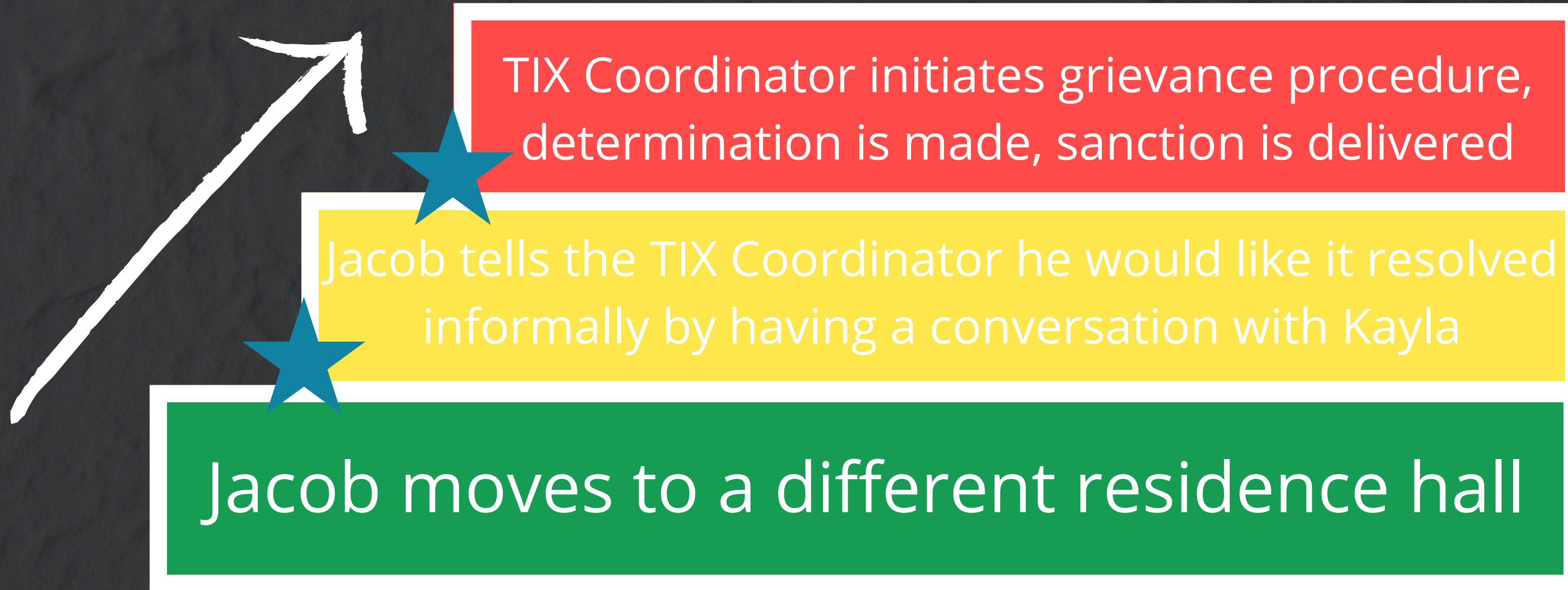
**TIX Coordinator's explanation of options**

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



# A CASE STUDY

---





# RANGE OF OPTIONS

In short, what  
will stop the  
harassment or  
discrimination?

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



Grievance procedure  
w/sanctions

Informal resolution

Education

Supportive measures



# QUESTIONS?



# THE ROAD LESS TRAVELED

USING RESTORATIVE JUSTICE TO ACHIEVE A RESOLUTION

C.J. Larkin, JD  
Jim Reeves, JD



**C.J. LARKIN, JD**





**JIM REEVES, JD**





# SESSION

# LEARNING

# OBJECTIVES

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



# What is Restorative Justice?

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

# SHIFTING FOCUS

From this

A violation against the school and its policy

Can create adversarial relationships and focus on a process

Accountability in the form of punishment

Justice is school making determination and sanctioning, if needed

A violation of a person, trust, and responsibility

Can create dialogue and focus on people

Accountability in the form of accepting responsibility

Justice is all affected parties coming together to repair harm

To this



# IS RESTORATIVE JUSTICE ALLOWED UNDER TITLE IX?

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

# TITLE IX LANGUAGE

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

Sec. 106.45 (a)(9)



1

Provides party a written notice with

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

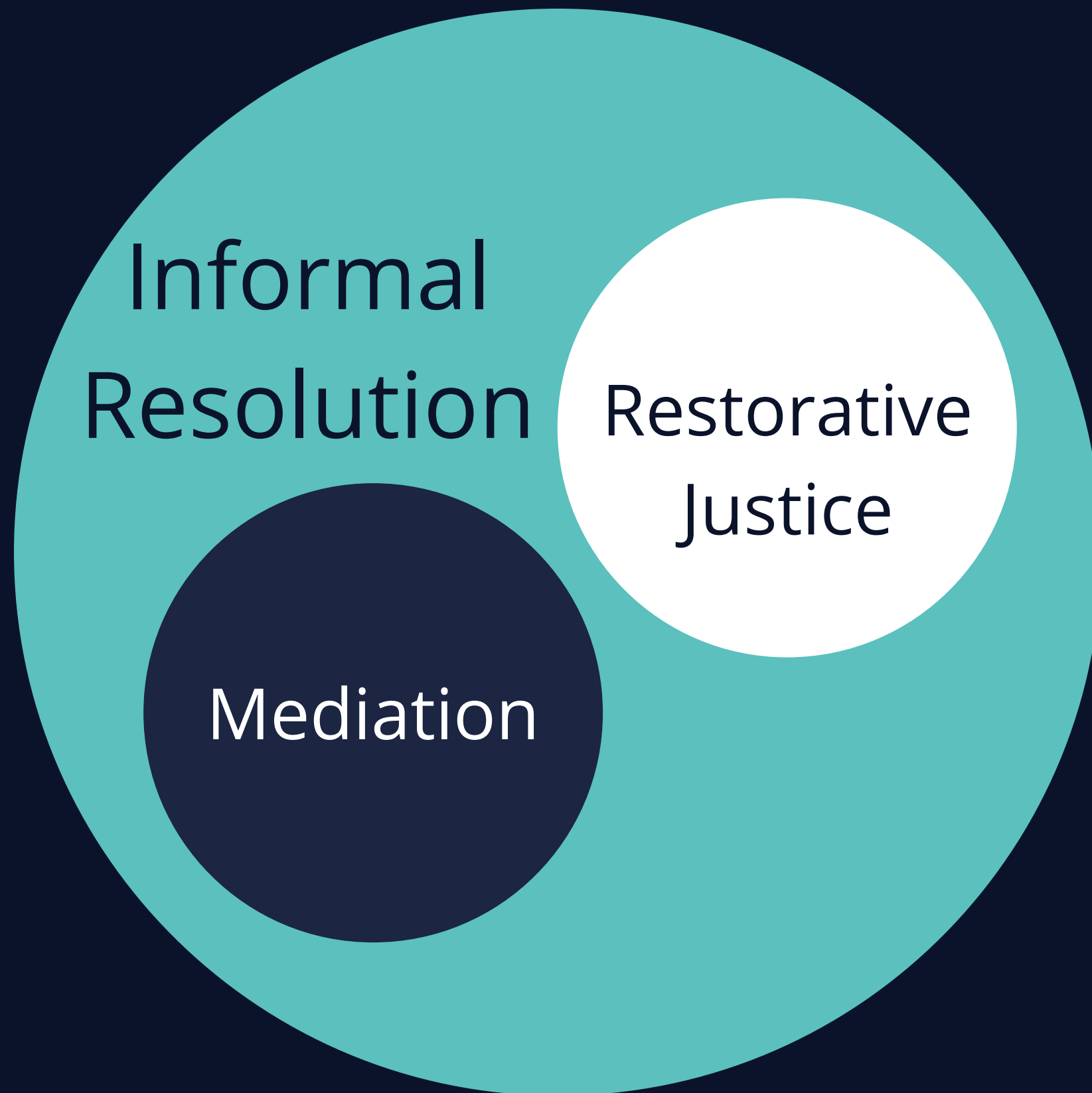
2

Obtains voluntary, written consent from both parties

3

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

# RESTORATIVE JUSTICE VS. MEDIATION



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



# THE RIPPLE EFFECT

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

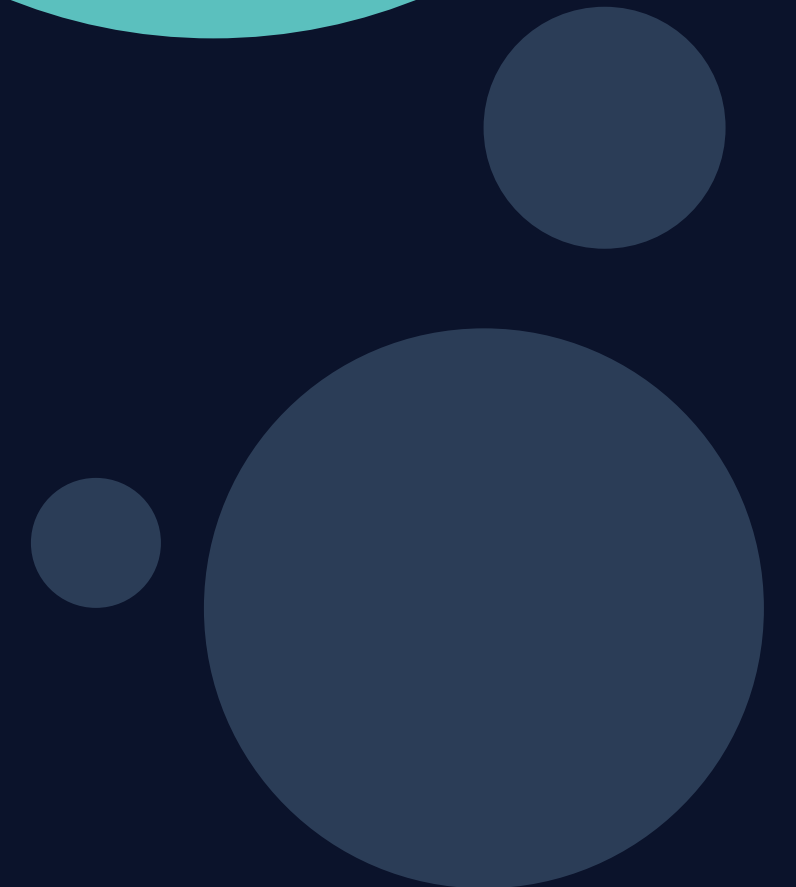


# CORNERSTONES OF RESTORATIVE JUSTICE

EMOTIONAL SAFETY



PHYSICAL SAFETY





# WHY CHOOSE RESTORATIVE JUSTICE?



14% reduction  
in rate of  
reoffending



85% of victims  
were satisfied  
with the  
process



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

# HAVE YOU HEARD THESE WORDS?

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

I wish we could just fix this.

I love them, but they hurt me.

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





**R**elationship

**R**espect

**R**esponsibility

**R**epair

**R**eintegration

# CORE QUESTIONS IN RESTORATIVE JUSTICE

Who was  
harmed?

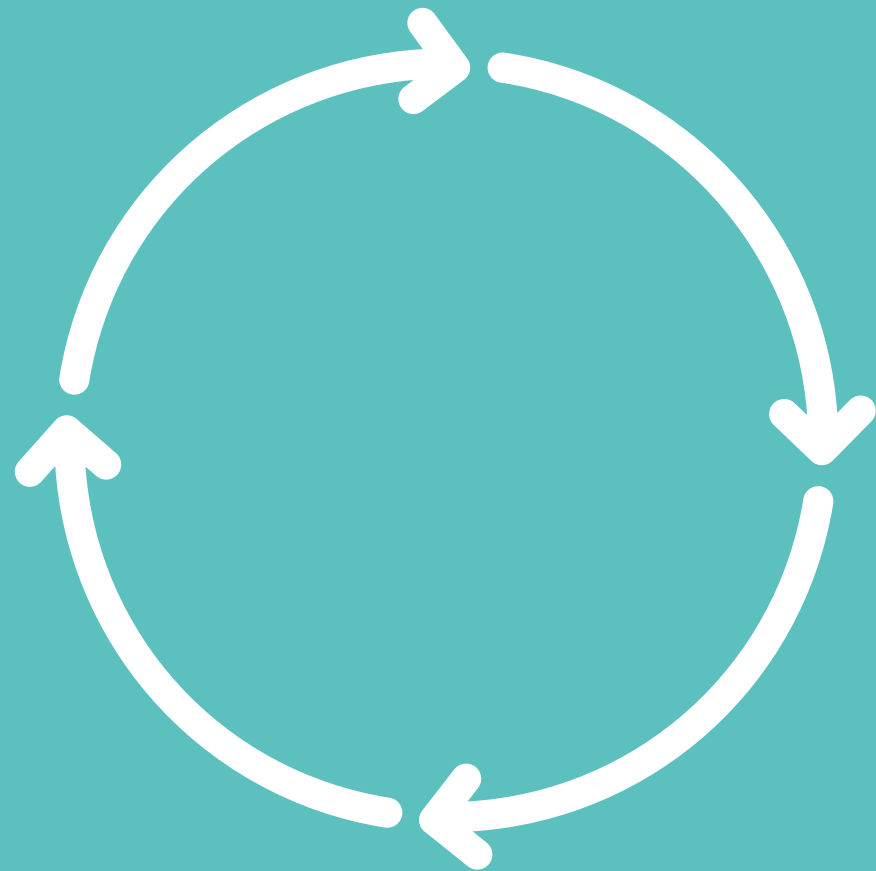
What was  
the impact of  
the harm?

Who is  
responsible  
for repairing  
the harm?

What is  
needed to  
repair the  
harm?



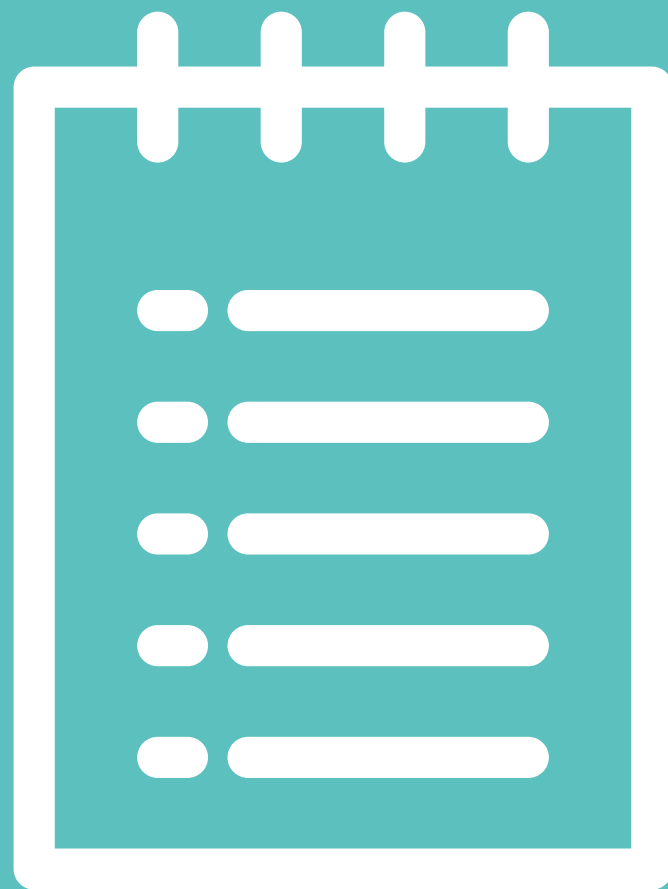
# RESTORATIVE JUSTICE PRACTICES



## GROUP "CIRCLES"

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

# RESTORATIVE JUSTICE PRACTICES



## IMPACT STATEMENTS

- Creates empowerment
- Can provide closure



# RESTORATIVE JUSTICE PRACTICES



## COMPLAINANT/ RESPONDENT DIALOGUES

- Questions are answered
- Leads to understanding

# THE PROCESS FOR COMPLAINANT-RESPONDENT DIALOGUE

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

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



# THE PROCESS FOR COMPLAINANT-RESPONDENT DIALOGUE

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

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

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



# PREPARATION FOR DIALOGUE



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



# PREPARATION FOR DIALOGUE

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

# KEY CONSIDERATIONS

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

Is the Respondent going to accept responsibility?

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



# WHEN IS THE USE OF RESTORATIVE JUSTICE INAPPROPRIATE?

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

# CASE STUDY 1 - ETHAN AND ABBY

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

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

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





# CASE STUDY 1 - ETHAN AND ABBY

In considering IR in this case:

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



# CASE STUDY 2- LOGAN AND CHLOE

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

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

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

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

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

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





# CASE STUDY 2- LOGAN AND CHLOE

In considering IR in this case:

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



# BENEFITS OF RESTORATIVE JUSTICE



1

Through facilitated dialogue, the parties get their questions answered

2

Provides a “safe” space for communication

3

Avoids “re-victimizing” the Complainant



# BENEFITS OF RESTORATIVE JUSTICE



4

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

5

Allows the parties to have control over the outcomes

6

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





# QUESTIONS



# PLOTTING THE COURSE

Title IX Investigation Preparation

Elizabeth Abdnour, JD



# Today's Speaker

Elizabeth Abdnour, JD



# Learning Objectives

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

Identify strategies for mapping out Title IX investigations

Recognize the importance of an investigation timeline and advanced planning





# Investigation Planning Considerations



## Today's Talking Points

01

**Understanding Response to Allegations**

02

**Pre-Investigation Matters**

03

**Key Questions in the Grievance Process**

04

**Conducting the Investigation**

05

**Tips to Remember**

# QUESTIONS





# Plotting the Course: Investigation Preparation

Speaker: Elizabeth Abdnour, JD

## I. How must a school respond to allegations of sexual harassment?<sup>1,2</sup>

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

## II. Pre-investigation matters

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

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<sup>1</sup> 34 C.F.R. § 106.44(a).

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

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

<sup>4</sup> 34 C.F.R. § 106.45(b)(1)(iv).

<sup>5</sup> 85 Fed. Reg. at 30,259.

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

### III. Investigation

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

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<sup>6</sup> 34 C.F.R. § 106.44(a).

<sup>7</sup> 34 C.F.R § 106.30(a).

<sup>8</sup> 34 C.F.R. §§ 106.44(c)-(d).



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

#### IV. Important tips:

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

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<sup>9</sup> 34 C.F.R. § 106.45(b)(1)(v).

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



# LAYING THE GROUNDWORK

The Importance of Pre-Hearing Strategizing

Hon. Patricia Riehl and Kenneth Chackes, JD



# Hon. Patricia Riehl





# Kenneth Chackes, JD





# Learning Objectives



Develop strategies for reviewing investigation reports and evidence



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



Identify how to conduct an effective pre-hearing meeting



# REVIEWING THE INVESTIGATIVE REPORT AND FILE



# What is an Investigative Report?



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



Required Contents:

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





## Might include some or all of the following:

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

# What is an Investigative File?

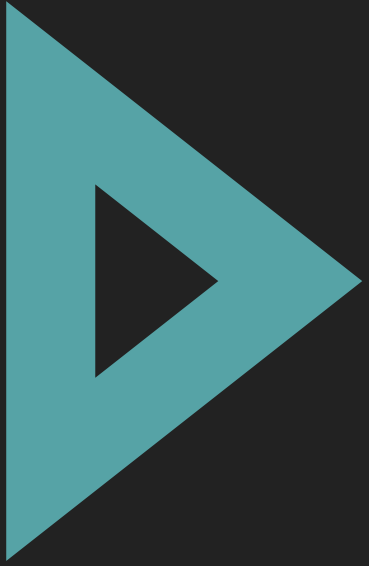
- ▶ Contains all evidence obtained during the investigation
- ▶ Could include the following and more:
  - Interview summaries, interview transcripts, communication between the parties such as text messages, emails, direct messages via social media, photos, videos
- ▶ May also include evidence collected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



# REVIEWING THE INFORMATION

Read the investigative report and entire investigative file CAREFULLY.

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





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



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



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





Review ALL evidence, even if it seems irrelevant or insignificant



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

# REVIEWING THE INFORMATION



Consider key facts needed to determine responsibility.



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

Do they support or refute?

Inculpatory

Any evidence favoring the Complainant

Exculpatory

Any evidence favoring the Respondent

# ELEMENTS OF THE OFFENSE

CONDUCT  
ON THE  
BASIS OF  
SEX

+

UNWELCOME

+

SEVERE,  
PERVASIVE,  
OFFENSIVE

+

DENIES A  
PERSON  
EQUAL  
ACCESS TO AN  
EDUCATIONAL  
OPPORTUNITY



# REVIEW THE ELEMENTS

Determine what facts (elements) are in dispute

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

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

*The Investigator was not the Decision-Maker!*

# WHAT IF...

we have these...

CONDUCT  
ON THE  
BASIS OF  
SEX

+ UNWELCOME

~~SEVERE,  
PERVASIVE,  
OFFENSIVE~~

+ DENIES A  
PERSON  
EQUAL  
ACCESS TO AN  
EDUCATIONAL  
OPPORTUNITY

but not this?



# GOALS FOR THE REVIEW PROCESS



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



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



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

# PRE-HEARING MEETING





# WHAT IS THE PRE-HEARING MEETING?

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

# INVESTIGATION TIMELINE



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



# PRE-HEARING CHECKLIST



Clarify purpose of hearing



Reiterate standard of evidence



Discuss hearing procedure



Review rights and responsibilities



# PRE-HEARING CHECKLIST



Confirm witness attendance



Explain relevancy of evidence



Review logistics and needs

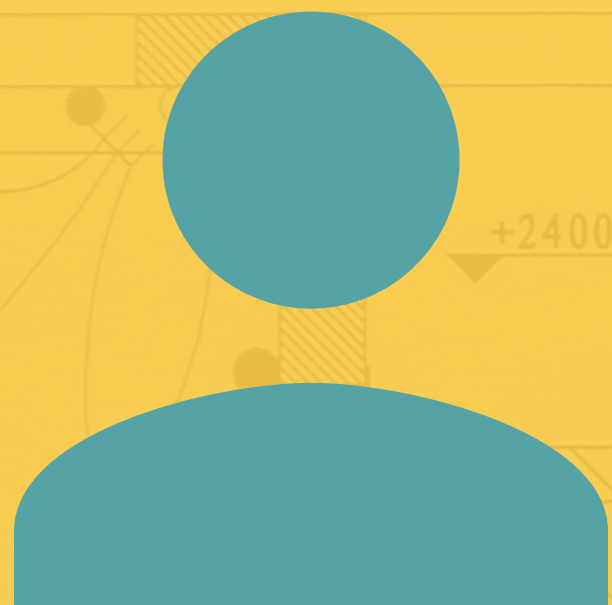


Answer parties' questions





# WHO IS SEATED AT THE TABLE?



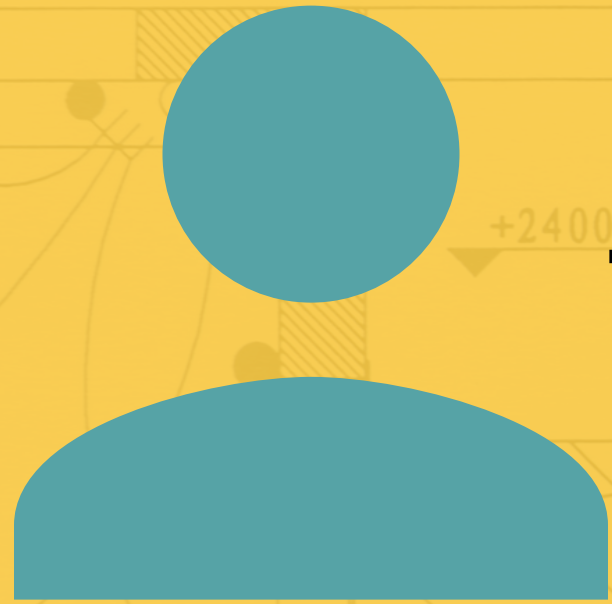
## Hearing Officer

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

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



# WHO IS SEATED AT THE TABLE?



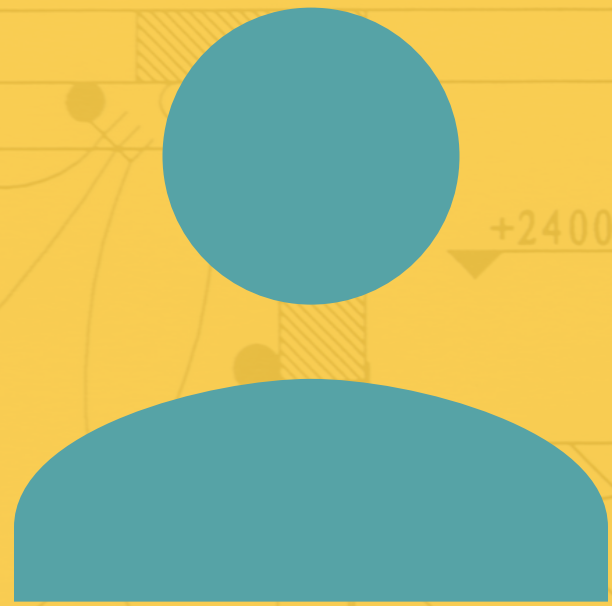
## Title IX Coordinator

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

**The TIX Coordinator is the overseer of the process.**



# WHO IS SEATED AT THE TABLE?

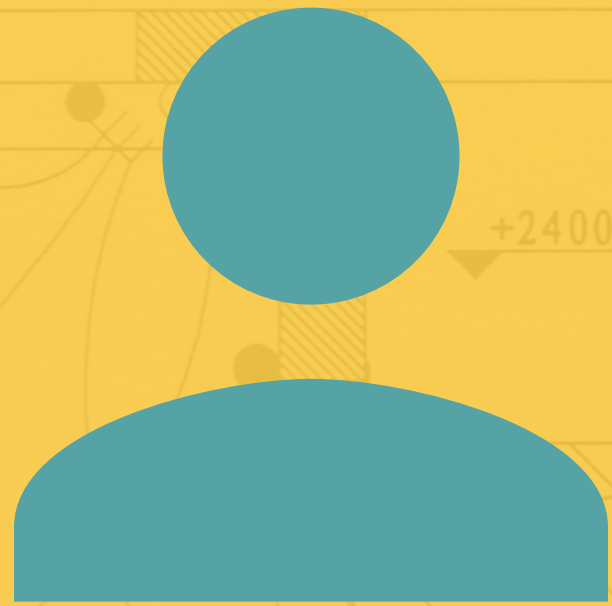


## Complainant

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



# WHO IS SEATED AT THE TABLE?



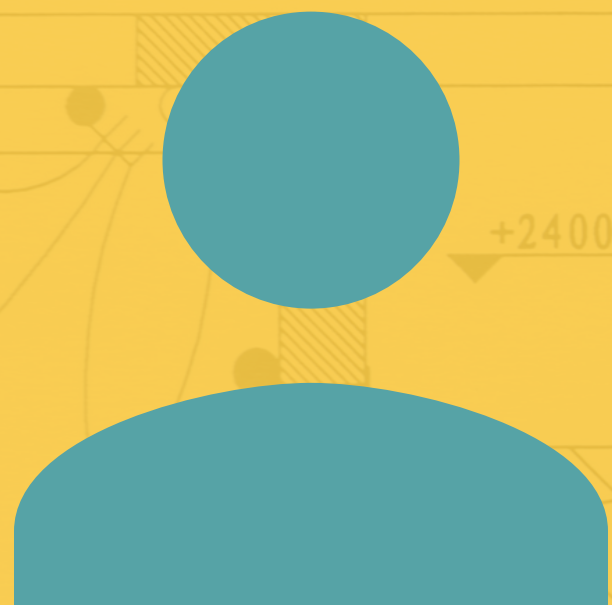
## Complainant's Advisor

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

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



# WHO IS SEATED AT THE TABLE?

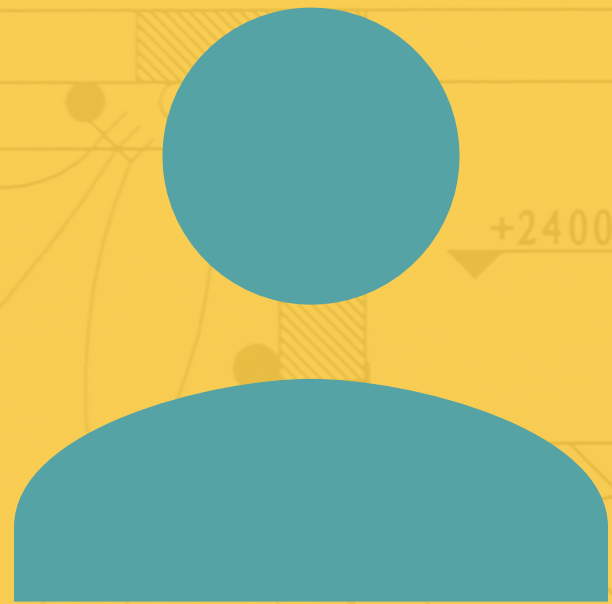


## Respondent

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



# WHO IS SEATED AT THE TABLE?



## Respondent's Advisor

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

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





Be aware that parties may select  
non-attorney advisors.

Acknowledge power imbalances  
that might be created.

# IMPORTANCE OF THE PRE-HEARING MEETING

Most individuals have not participated in this type of hearing

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



# BENEFIT TO THE PARTIES AND ADVISORS

Allows parties to put a face with a name

Parties begin to fully understand hearing process and what it entails

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

# BENEFIT TO THE PARTIES AND ADVISORS

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

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



# BENEFIT TO THE HEARING OFFICER

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

# COORDINATING THE PRE-HEARING MEETING

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

# SAMPLE MEETING AGENDA

1

## Introductions

- Parties
- Advisors
- Title IX Team

2

## Hearing preparation

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

3

## Review procedure

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



# SAMPLE MEETING AGENDA

4

## Outline live hearing rules

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

# SAMPLE MEETING AGENDA

5

## Establish timeframe

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

6

## Answer Questions

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



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



# NAVIGATING CHALLENGES





# QUESTIONS?



UNCHARTED TERRITORY:

**NAVIGATING  
LIVE HEARINGS**

Hon. Michael T. Jamison and Susanna Murphy, JD





**HON. MICHAEL T. JAMISON**



**SUSANNA MURPHY, JD**

# LEARNING OBJECTIVES

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

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

Describe how to determine the relevance of questions and evidence.

Illustrate the procedural flow of a live hearing.

# EXAMINING THE ROLES

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# ROLE OF THE DECISION-MAKER

## Responsibilities:



Determines relevancy



Facilitates live hearing



Makes determination of (non)responsibility

## Expectations:

Independent, unbiased, equitable, transparent, confidential



# DECISION-MAKER QUALITIES

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

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



# ADDRESSING BIAS

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

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




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

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





## Responsibilities:

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

# ROLE OF THE ADVISOR

## Expectations:

Professional, knowledgeable, thorough, empathetic



# ADVISOR QUALITIES

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

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



# DISTINCTION OF THE ROLE

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

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

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

Assign a new Advisor if they cannot fulfill their role



# CRAFTING QUESTIONS

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## REVIEW OF FILE

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

## CRAFTING OF QUESTIONS

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

## LIVE HEARING

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

# STARTING POINT

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

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

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

Who has this information?

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



# CONSIDER THE DISPUTED FACTS

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

# MORE QUESTIONS TO ASK

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

# GUIDING PRINCIPLES

## EMPATHY

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

## DE-ESCALATION

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

## RESPECT

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



# CREATING QUESTIONS

Good questions are:

Open-  
ended

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

Non-leading  
vs. Leading

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

Singular

Avoid complicated, multi-part questions.

Clear

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

Sensitive

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

# LEADING QUESTIONS

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

# OPINION QUESTIONS

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

LEADING	NON-LEADING	OPINION	ALTERNATIVE
"You told John you didn't want to have sex, right?"	"What did you say to John about having sex with him?"	"Was John frustrated when you told him you didn't want to have sex with him?"	"What did John say or do when you told him you didn't want to have sex with him?"

# HEARSAY QUESTIONS

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

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



# UNDERSTANDING RELEVANCE

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# DECISION-MAKER'S PERSPECTIVE

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

This may be accomplished in one of two ways:

①

Questions may be submitted to the Decision-Maker to review prior to the hearing.

②

Decision-Makers may rule of each question before a Witness or Party answers at the hearing.

# ADVISOR'S PERSPECTIVE

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

Advisors typically object for one of two reasons

①

The question is not relevant under Title IX Regulations

②

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



# WHAT IS NOT RELEVANT UNDER TITLE IX?



Questions about a Complainant's sexual predisposition



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

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



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

# RELEVANT vs. NON-RELEVANT



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



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

## PROBABLY RELEVANT

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

## PROBABLY NOT RELEVANT

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

# CHARACTER WITNESSES

Are character witnesses relevant or irrelevant?

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



# THE LIVE HEARING

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# HEARING AGENDA

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

# OPENING OF THE HEARING

Facilitated by the Decision-Maker who will:

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



# OPENING STATEMENTS

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

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

\*Parties may waive their opening statement\*

# TESTIMONIAL EVIDENCE: DIRECT & CROSS EXAMINATION



# DIRECT AND CROSS-EXAMINATION

## Complainant's Case

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



# DIRECT AND CROSS-EXAMINATION

## Respondent's Case

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

# DIRECT AND CROSS-EXAMINATION

## Decision-Maker's Examination

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

# CLOSING STATEMENTS

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

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

\*Parties may waive their closing statement\*



# CLOSING OF THE HEARING

Facilitated by the Decision-Maker who will:

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

**QUESTIONS?**

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# Risk Management and Litigation Analysis

**WHITNEY DOWDY, JD**

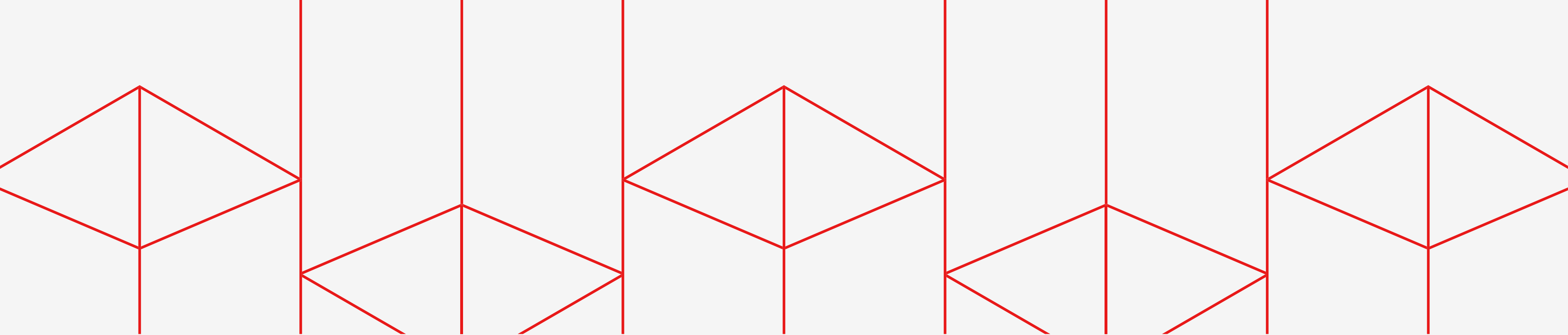




# Our Speaker

**Whitney Dowdy, JD**





# LEARNING OBJECTIVES

## IDENTIFY

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

## EXPLORE

risk-reduction strategies aimed at creating compliant policies and procedures

## STUDY

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

# Agenda


## Let's explore Title IX risk areas

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

## Best practices to reduce risks

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





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

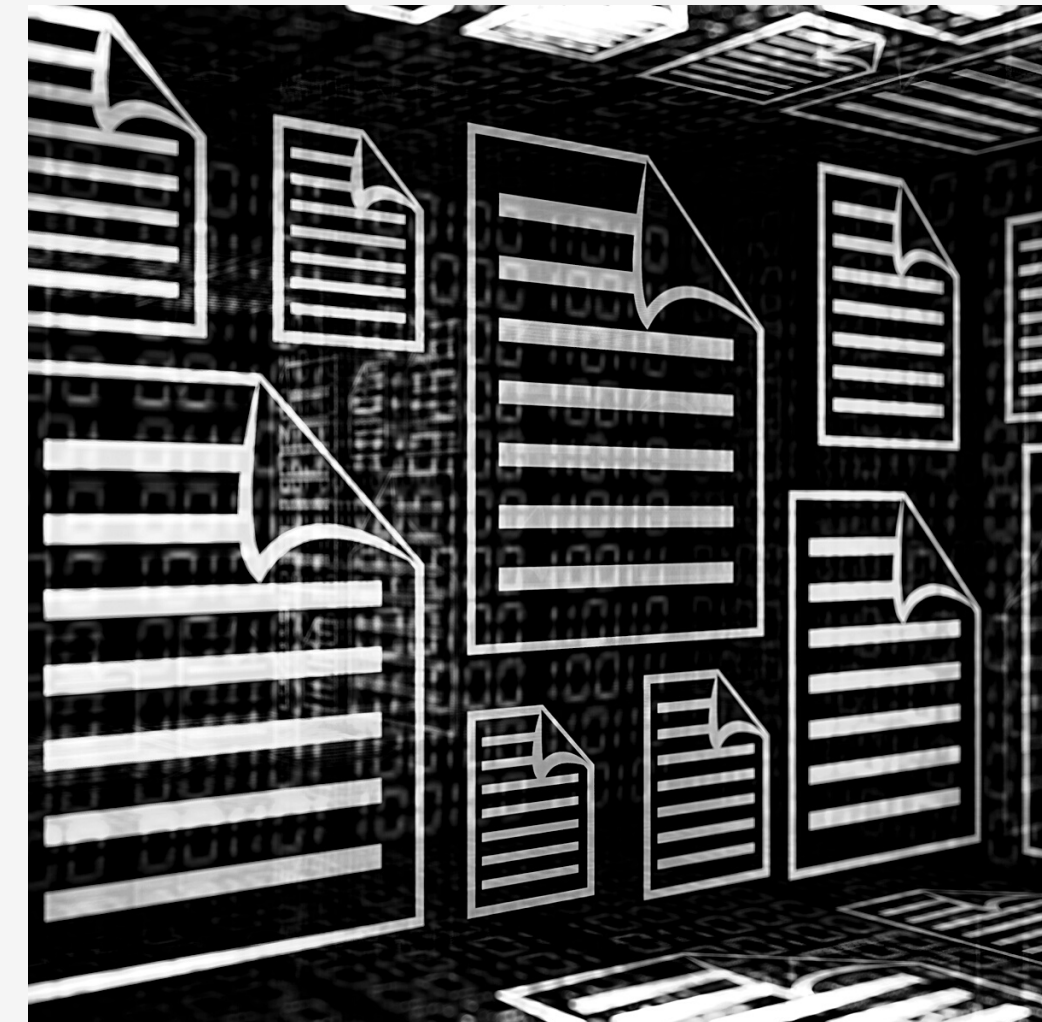
Peter Lake, Director of Stetson University's Center for Excellence in Higher Education Law and Policy

# Title IX Risks

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

# Title IX Risks

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





# Best Practices to Minimize Risk

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



# Best Practices to Minimize Risk

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



# Best Practices to Minimize Risk

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





# Best Practices to Minimize Risk

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





## Title IX Enforcement and Litigation Trends

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

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





# Case Notes: Due Process



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

# Case Notes: Due Process/Unfair Treatment

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

# Case Notes: Due Process/Unfair Treatment

Let's discuss a few scenarios







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

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–Third Circuit’s decision serves as a reminder for schools and universities to respond promptly to any and all reports of sexual harassment, regardless of the status of the respondent, and to make sure to follow the Title IX regulations and your own policies and procedures in responding to and addressing allegations of sexual misconduct.

–Failure to react, failure to follow policies and procedure, failure to meet expectations = liability!

# Case Notes: Deliberate Indifference

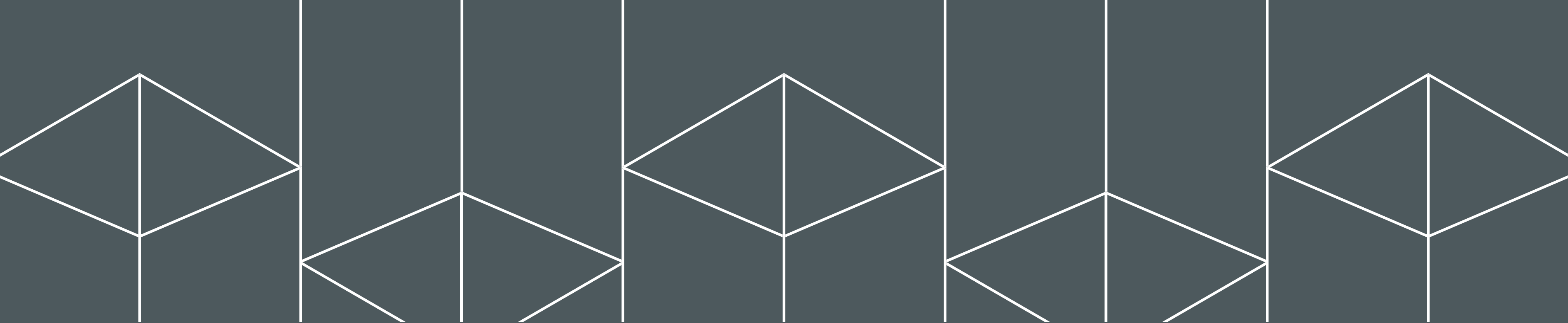


Let's discuss a  
few more

# Practical Takeaways

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





# Thank you!

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