



GRAND RIVER | SOLUTIONS

From One Title IX Coordinator to Another: A Practical Approach to Navigating Beyond Compliance in a Post Regulatory World

Chantelle Cleary Botticelli & Emma Hempel

Meet Your Facilitators



Chantelle Cleary Botticelli, J.D.

She/Her/Hers

Director of Strategic Partnerships
and Client Relations



Emma Hempel

She/Her/Hers

Senior Solutions Specialist

About Us

Vision

We exist to help create safe and equitable work and educational environments.

Mission

Bring systemic change to how school districts and institutions of higher education address their Clery Act & Title IX obligations.

Core Values

- Responsive Partnership
- Innovation
- Accountability
- Transformation
- Integrity



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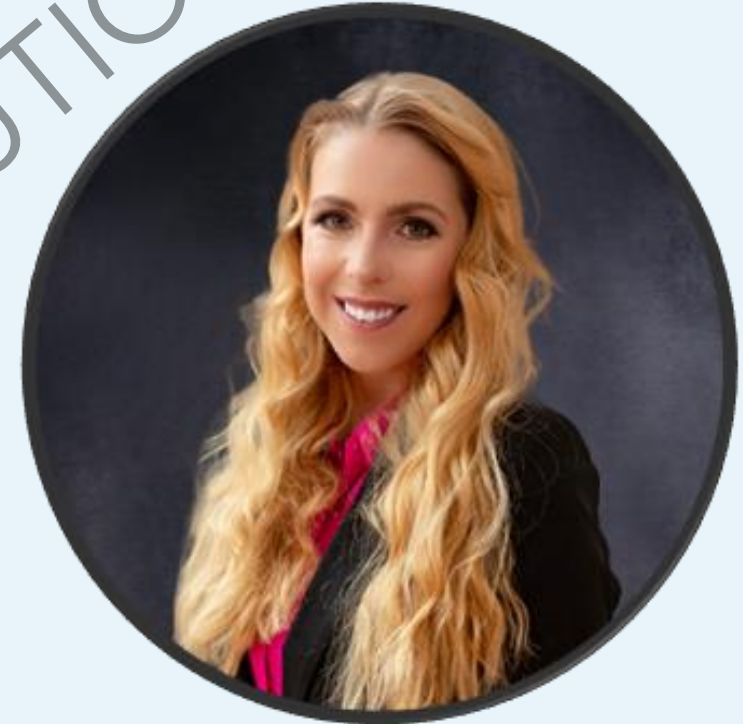
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Let's Take a
Moment.
Title IX
Coordinator
to Title IX
Coordinator.

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A group of people are gathered in a meeting room, appearing to be in a discussion. A large blue circle is overlaid on the image, containing white text. The background is a warm, orange-toned photograph of the meeting. The text inside the circle reads: "Let's Take a Moment. Title IX Coordinator to Title IX Coordinator."

Let's Take a
Moment.
Title IX
Coordinator
to Title IX
Coordinator.

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Agenda

1

**The Ever-Evolving
Jurisprudence of Title IX**

2

**Building a Foundation
of Success**

3

Compliance

4

**Education and
Training**

5

Receipt of Reports

Actual Knowledge, Report
Response, Initial Assessments, &
Supportive Measures

6

**Complainant Intake &
Supportive Measures**

7

Report Resolution

Remedies Based, Informal,
or Formal



The Ever-Evolving Jurisprudence of Title IX

"If nothing else, Title IX Coordinators are experts at adapting."

01

Title IX of the Education Amendments Act 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."

20 U.S.C. § 1681 (1972).



Title IX Applies to All Forms of Sex Discrimination

- Sexual Harassment
- Achievement Awards
- Athletics
- Benefits
- Financial Aid
- Leaves of absence and re-entry policies
- Opportunities to join groups
- Pay rates
- Recruitment
- Retention Rates
- Safety
- Screening Exams
- Sign-on Bonuses
- Student and Employee Benefits
- Thesis Approvals
- Vocational or College Counseling
- Research opportunities



The History of Title IX

A TIMELINE



The Title IX Regulations

Sexual Harassment Only

1. Narrows the definition of sexual harassment;
2. Narrows the scope of the institution's educational program or activity;
3. Narrows eligibility to file a complaint;
4. Develops procedural requirements for the investigation and adjudication of sexual harassment complaints, only.



Sexual Harassment: *Defined in 1996, 2001, & 2011 Guidance*

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

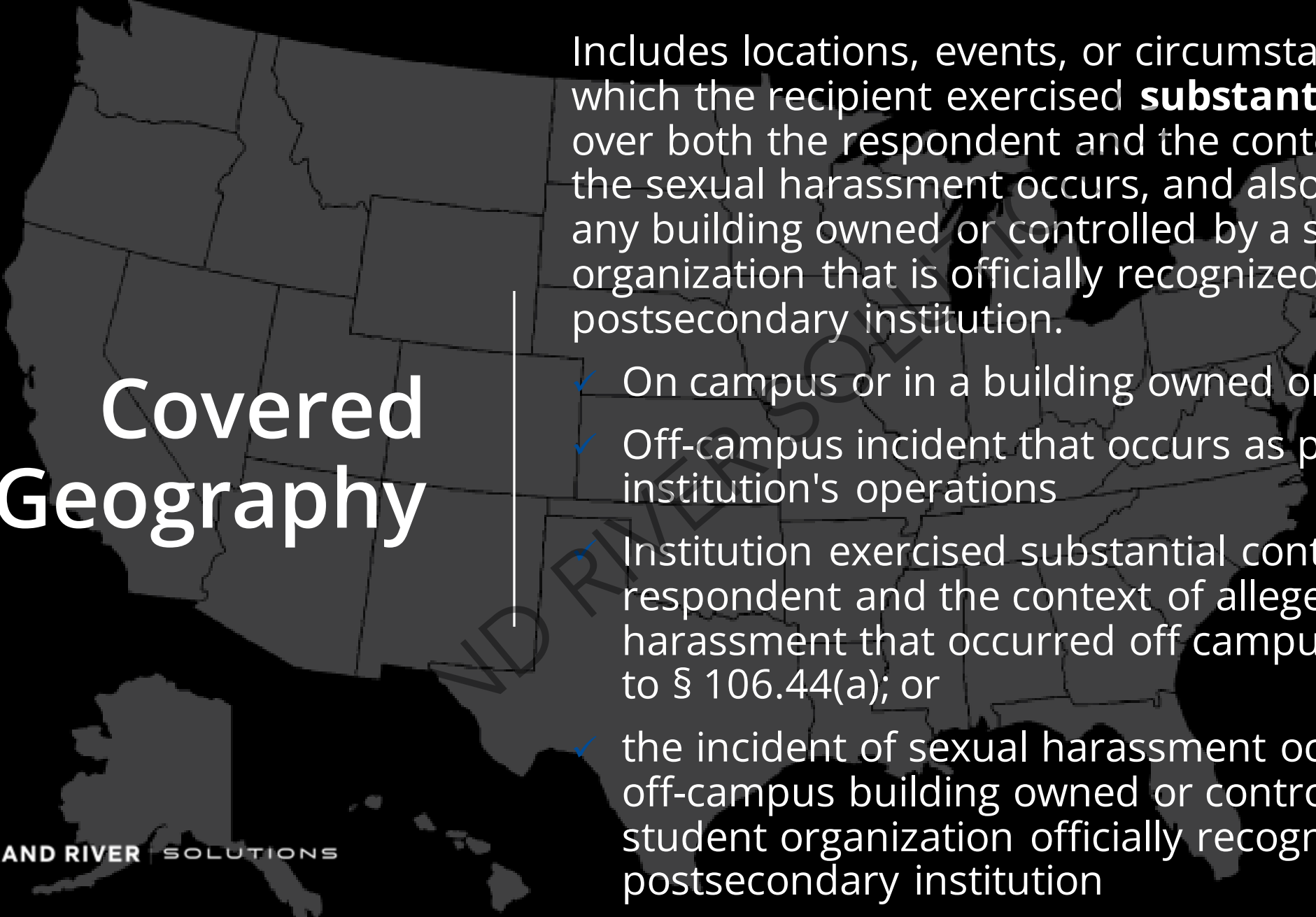
- (1) Conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) Unwelcome conduct determined by a reasonable person to be so **severe, pervasive, OR objectively offensive** that it **effectively denies** a person equal access to the recipient's education program or activity; or
- (3) Sexual assault is a form of sexual harassment

*Dating Violence, Domestic Violence, Stalking not included pre 2020 regulations

Sexual Harassment: *Section 106.30*

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- (1) 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;
- (2) Unwelcome conduct determined by a reasonable person to be so **severe, pervasive, and objectively offensive** that it **effectively denies** a person equal access to the recipient's education program or activity; or
- (3) "**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).

A dark gray map of the United States, including Alaska and Hawaii, serves as the background for the slide. The text is overlaid on this map.

Covered Geography

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

- ✓ On campus or in a building owned or controlled
- ✓ Off-campus incident that occurs as part of the institution's operations
- ✓ Institution exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus pursuant to § 106.44(a); or
- ✓ the incident of sexual harassment occurs at an off-campus building owned or controlled by a student organization officially recognized by a postsecondary institution



A dark gray map of the United States with white state borders. The text "Not Covered" is overlaid on the western half of the map.

Not Covered

- Off campus conduct, even if it has an impact on the educational program or activity;
Conduct that occurs outside of the United States.



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Covered Individuals

Eligibility for Title IX's Protections

"At the time of filing a formal complaint, a 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." 34 C.F.R. § 106.30

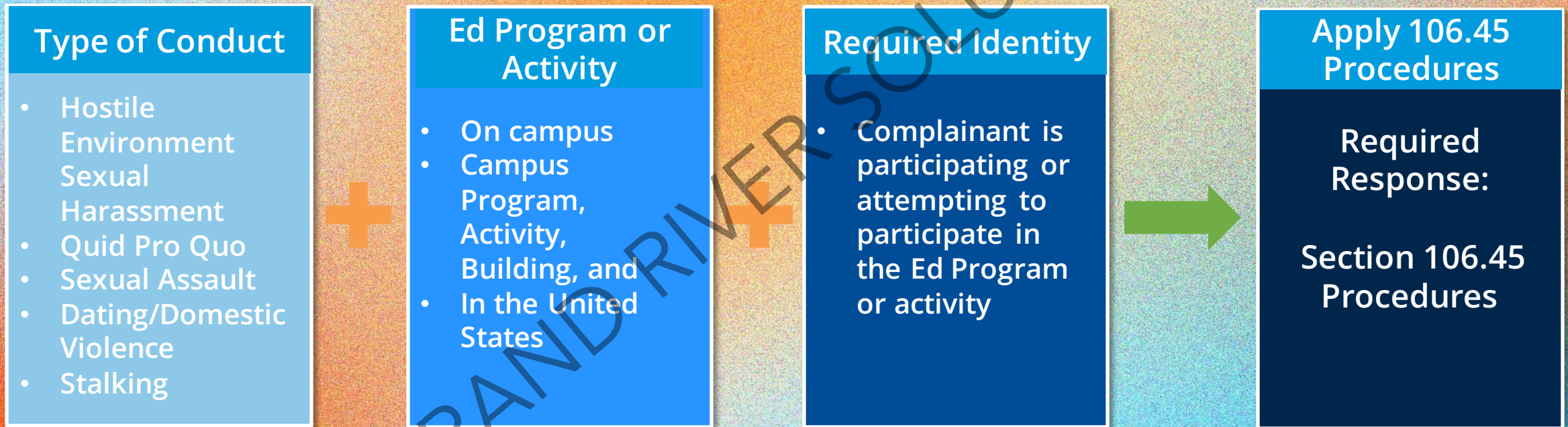
Applicant

Accepted/Hired

Enrolled/Employed



Title IX Application Post May 2020 Regulations



Conduct Falling Outside the Scope of Title IX

- Apply other institutional policies and procedures
- Ensure that those policies and procedures are compliant with VAWA/Clery, other intersecting federal and state laws



Actual Notice

A Narrowed Scope of Institutional Responsibility

Institution
must
respond
when it
has:

“Actual knowledge”

When “an official of the recipient who has authority to institute corrective measures” has notice, e.g., Title IX Coordinator

**of “sexual harassment”
(as newly defined)**

**that occurred within the
school’s “education
program or activity”**

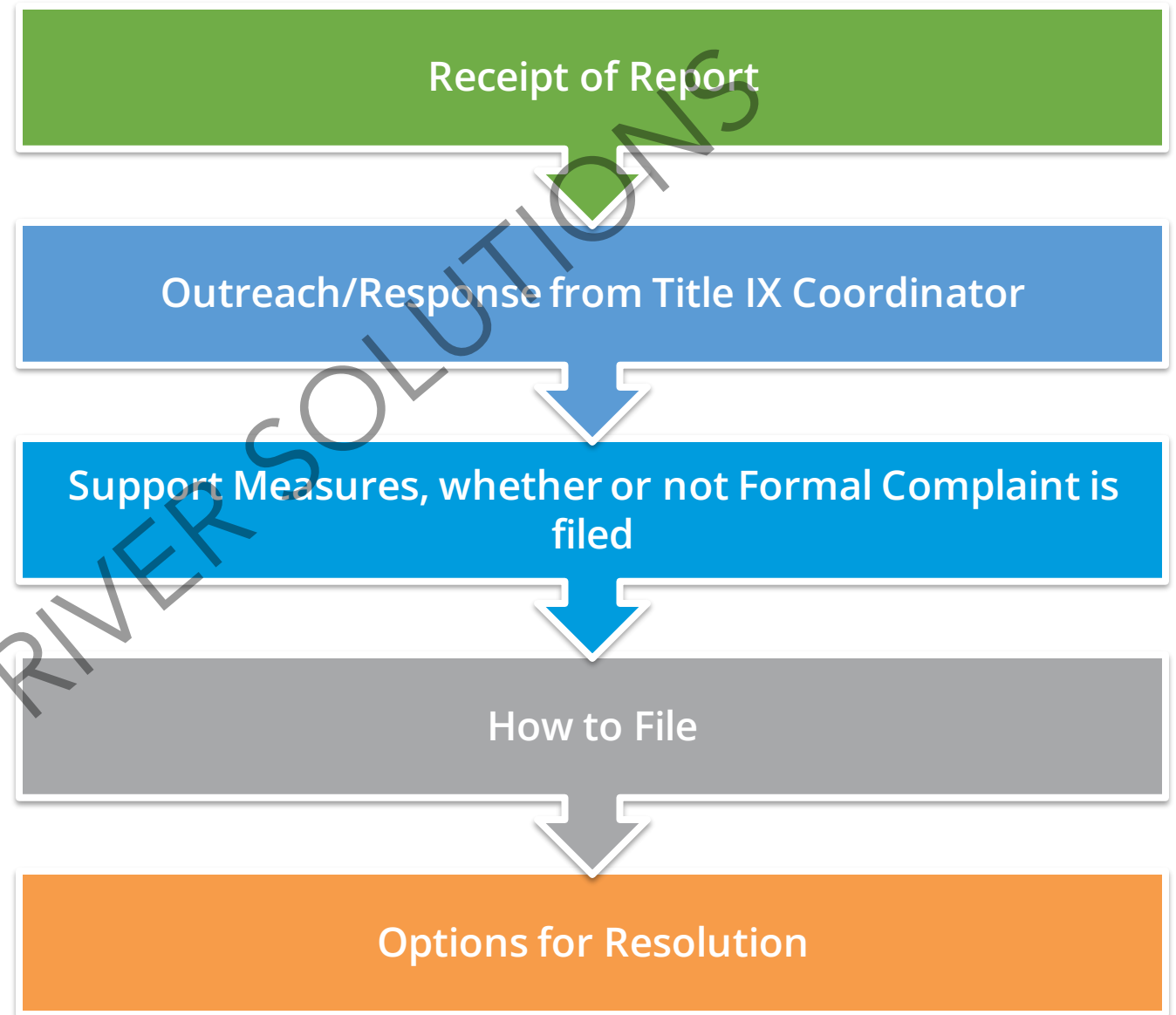
“includes locations, events, or circumstances over which the recipient exercised substantial control” over the respondent and the context in which the sexual harassment occurred

Fact specific inquiry focused on control, sponsorship, applicable rules, etc.

**against a “person in the
United States” (so, not in
study abroad context)**



Initial Response Requirements



Procedural Requirements for Investigations

Notice to both parties

Equal opportunity to
present evidence

An advisor of choice

Written notification of
meetings, etc., and
sufficient time to prepare

Opportunity to review all
evidence, and 10 days to
submit a written response
to the evidence prior to
completion of the report

Report summarizing
relevant evidence and 10
day review of report prior
to hearing

Procedural Requirements for Hearings

Must be live, but can be conducted remotely

Cannot compel participation of parties or witnesses

Standard of proof used may be preponderance of the evidence or clear and convincing; standard must be the same for student and employee matters

Cross examination must be permitted and must be conducted by advisor of choice or provided by the institution

Decision maker determines relevancy of questions and evidence offered

Written decision must be issued that includes finding and sanction

“

Final Rule § 106.45(b)(8)

[I]nstitutions must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein.

”



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Appeals: Mandatory Grounds

(A) Procedural irregularity that affected the outcome of the matter;

(B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and/or

(C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.



Other Requirements of the Regulations

Designation of
a Title IX
Coordinator

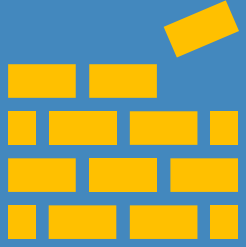
Dissemination
of policy

Separation of
Responsibilities

Training and
posting of
training

Impartiality

Record
Keeping



Building a Foundation of Success

02

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Final Rule, Section 106.8(a)

The institution must notify applicants and all members of the community of the Title IX Coordinators

1. Name or Title
2. Office address
3. Email address
4. Phone number

Any person may report , at any time, sex discrimination, including sexual harassment in person, by mail, by telephone, by email, or any other means using the contact information listed

“Responsibilities Required Under Title IX and the Regulations”

- Serve as the primary pathway for receipt of reports of sex discrimination and sexual harassment;
- Upon receipt of a report, promptly contact the complainant to discuss the availability of supportive measures and to explain the process of filing a formal complaint;
- Coordinate the effective implementation of supportive measures;
- Where a report is made, but a formal complaint is not filed by the complainant, determine whether a formal complaint should be filed and sign that formal complaint;
- Effective implementation of any remedies imposed by a decision maker at the conclusion of a grievance process.

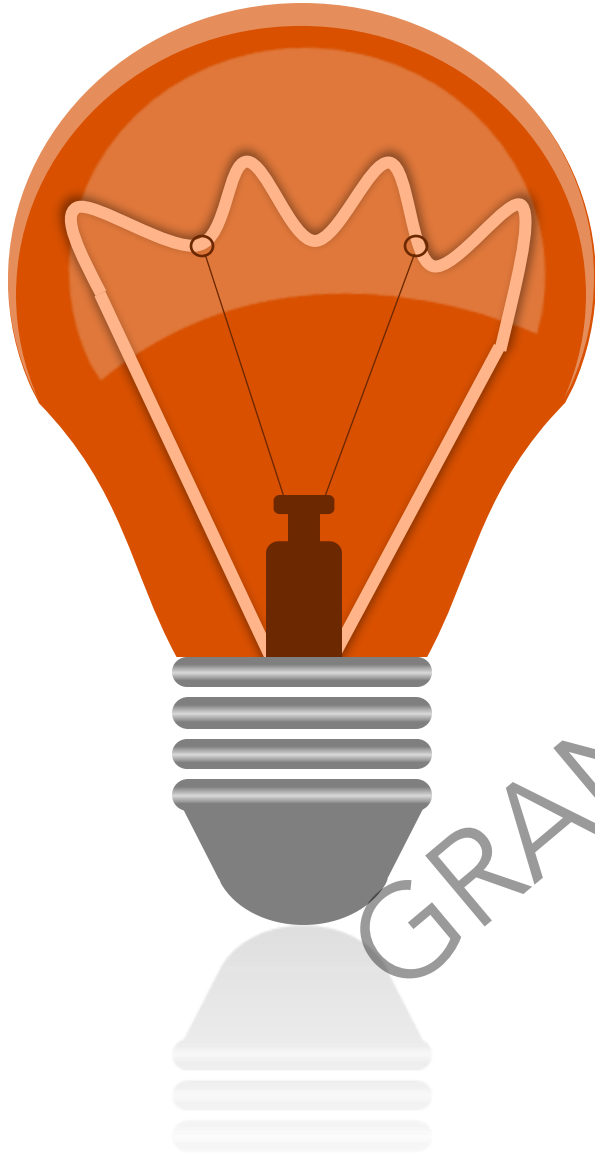


Responsibilities Often Delegated to the Title IX Coordinator

- Ensuring that the institutional policies and procedures are compliant with Title IX
- Ensuring dissemination of the policy
- Overseeing the grievance process to ensure it is compliant
- Coordinating a compliant grievance process
- Staffing various roles
- Ensuring training requirements are met
- Record keeping
- Compliance with intersecting federal and state laws
- Education and prevention efforts



The Three Essential Functions of Title IX Compliance



01

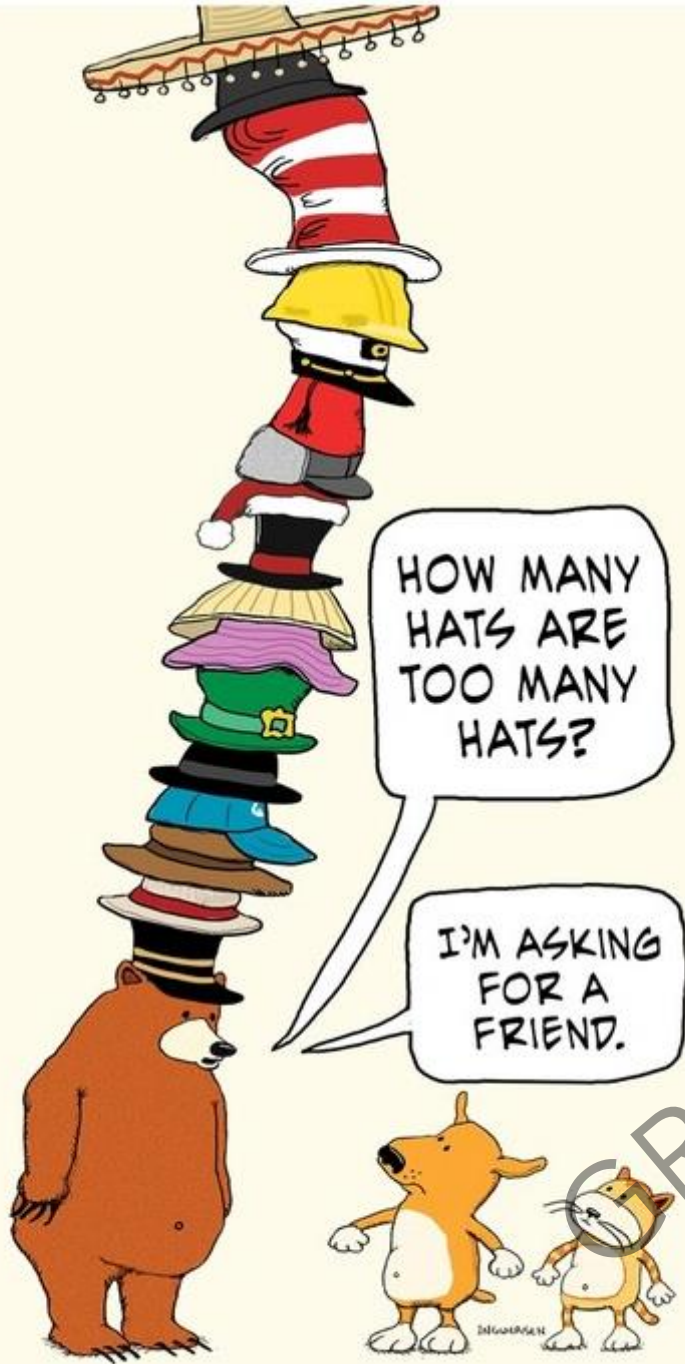
Response

02

Education & Prevention

03

Compliance



HOW MANY
HATS ARE
TOO MANY
HATS?

I'M ASKING
FOR A
FRIEND.

Another
moment,
please.

A Successful Title IX Coordinator...

C

Understands the Importance
of Consistency

A

Adheres to policies and
procedures

R

Records or documents
everything

E

Engages meaningfully with the
community

S

Strategically plans for success



Strategic

- Conduct your own review: Evaluate the institution's state of compliance, strengths, and opportunities in all areas
- Develop plans for success in every area
- Prioritize the implementation and execution of those plans

Engage

- Understand the needs of the community you serve
- Build awareness
- Build trust
- When you engage, others engage
- Can assist with workload

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Adhere

- Adhere to policies and procedures
- Implement training plans
- Stick to compliance plans
- Use the forms that are developed



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Consistency



Creation of Forms
& Templates



Development of Annual
Plans for Compliance



Development of Annual
Plans for Training



Comprehensive
Policies &
Procedures

Record

Document, Document, Document!

1. Compliance
 1. Maintain old policies
 2. Keep records of all responses to reporting requirement
2. Training
 1. Dates, times, locations
 2. Attendees
 3. Training materials
 4. Reason for the training
3. Response
 1. EVERYTHING



Successful Coordinators Approach all Aspects of the Work



The Requirement of Impartiality

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Section 106.45(b)(1)(iii)

The grievance process must require that any individual designated by the recipient as Title IX Coordinator, investigator, decision maker, or facilitator of informal resolution not to have a conflict of interest or bias

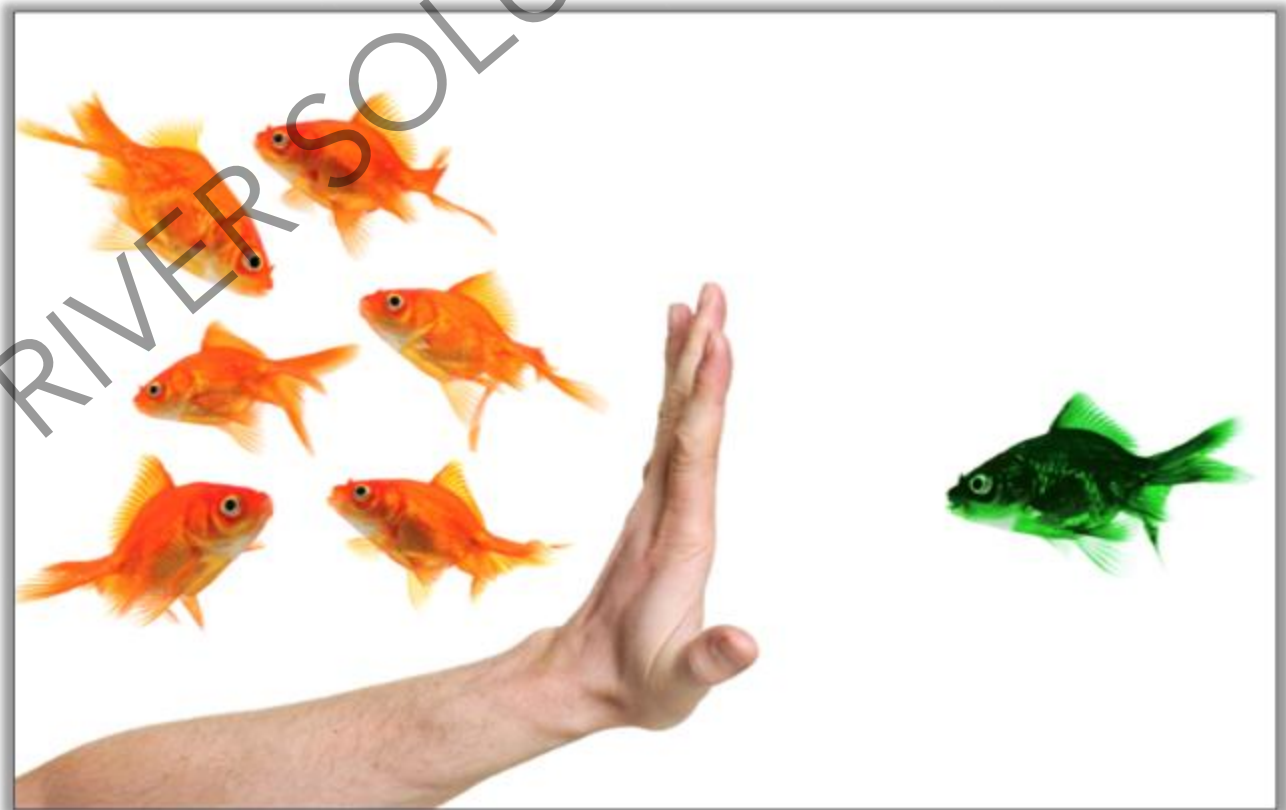
1. For or against complainants or respondents generally, or
2. An individual complainant or respondent

What Constitutes Bias?

Conduct a fact-specific, objective inquiry based in common sense to determine bias.

Includes:

- Decision-making that is grounded in stereotypes
- Different treatment based on a person's sex or other protected characteristic
- A decision based on something other than the facts



Impermissible Bias

Making a decision, determination, or finding that is based on something other than the evidence and specific facts of the case.



Conflict of Interest

A black silhouette of a person's head and hand in profile, facing right. The person's index finger is pressed against their lips in a 'shh' or 'thinking' gesture.

Avoiding Prejudgment of the Facts

Requires that the Title IX professional refrain from making a judgement on individual facts, the allegations, or whether a policy violation occurred until they have had the opportunity to consider all of the evidence.

An Impartial Response is...

Not influenced by bias or conflict of interest.

Committed to decisions based on an objective view of the facts as you know them and as they evolve.

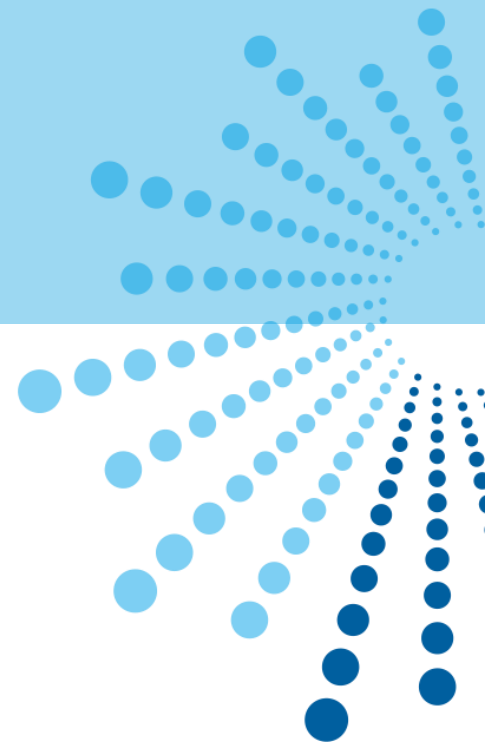
Information seeking, not confirming.



03

Compliance

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Sources of Compliance Obligations

Title IX Final
Regulations

Violence
Against
Women Act

Other,
Intersecting
Federal Laws

State Law:
MD Educ
Code 11-601

Legal
Precedent

Institutional
Policies

Resolution
Agreements

Title IX Compliance Obligations

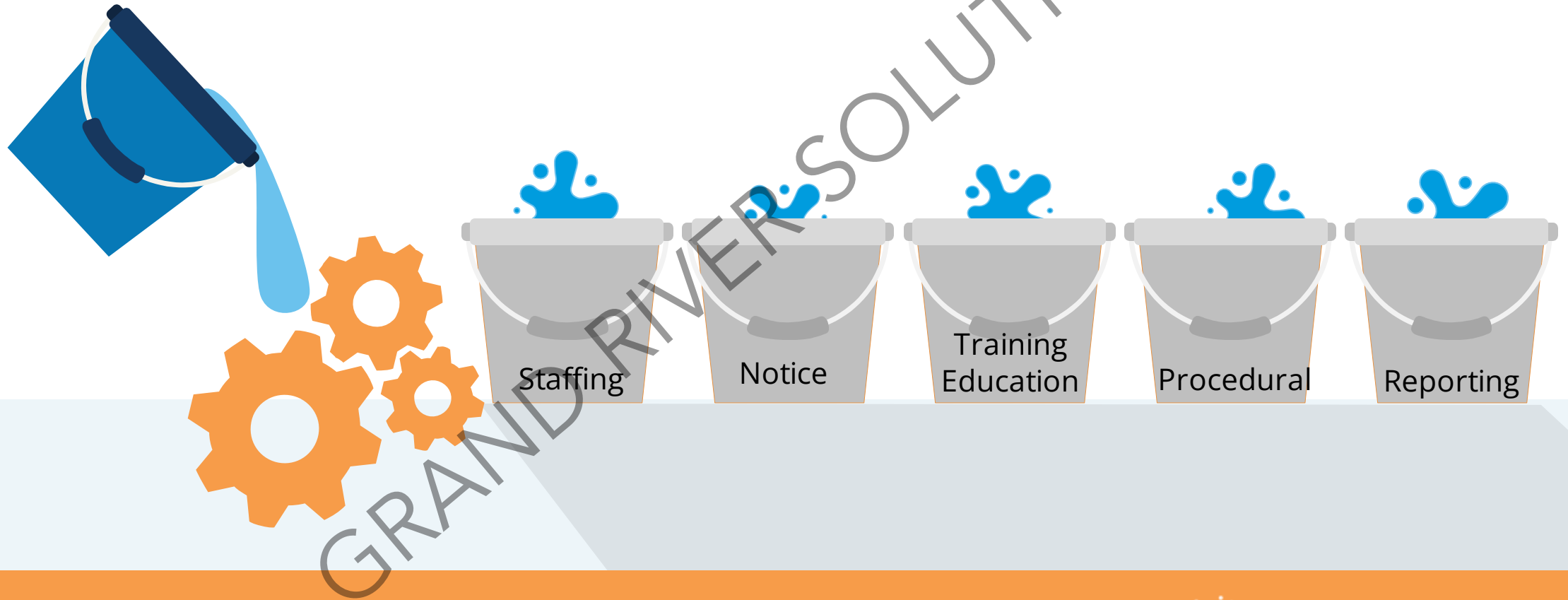
Designate	Designate a Title IX Coordinator
Disseminate	Disseminate Policy <ul style="list-style-type: none">•Notification•Publications
Respond	Promptly respond to instances of sexual harassment occurring within the educational program or activity of which the institution has actual knowledge in a manner that is not deliberately indifferent;
Provide	Provide supportive measures in accordance with the requirements of section 160.30
Utilize	For reports of sexual harassment utilize grievance procedures that comply with section 160.45
Require	Require that individuals participating in the grievance process do so impartially and that they are trained in accordance with the 160.45(b)(1)(iii).
Maintain	Maintain records response to sexual harassment in accordance with 160.45 (10)
Comply	Comply with 160.71 prohibition against retaliation

Maryland Education Code

Section 11-601

1. Adopt, disseminate and post, a policy compliant with the provisions of this law;
2. The policy must include procedures for reporting and taking disciplinary action;
3. Parties going through an administrative adjudication process are entitled to assistance of an attorney paid for by MHEC;
4. Administer and report results of a campus climate survey, every two years.

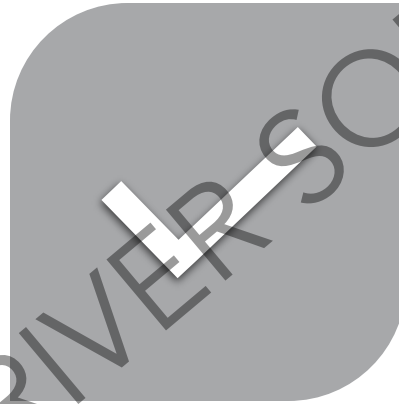
Categories of Compliance Requirements



Developing a Strategy for Compliance



IDENTIFY COMPLIANCE
OBLIGATIONS



HOW WILL YOU PROVE
THAT YOU ARE COMPLIANT



RECORD KEEPING



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Implementing the Strategy for Compliance



Partnerships



Record Keeping Databases



Calendar



Training & Education

Educating ourselves and our communities in a post-regulatory world

04



Sources of Training Requirements



Title IX Final
Regulations

VAWA

Violence
Against
Women Act



MD Educ
Code 11-
601



Resolution
Agreements



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Training and Education

Two Areas of Focus

1

Institutional
Response to Sex
Discrimination

2

Prevention
Education



Institutional Response Training

1. Institutional Policies and Procedures
2. Prohibited Conduct
3. Options for Confidential Support
4. The Identify, Role, and Requirements of the Responsible Employee
5. Options and methods for Reporting
6. The Grievance Process
7. The Role of the Title IX Coordinator



A Really Important Moment. Listen Up. It's Okay...



To not know the answer to every question thrown your way



To say,

"I don't know"

"I'd like to think about that"

"I'll get back to you"

"Thank you for sharing your perspective"



To decline to answer a question



To recognize and assert your expertise

Title IX Staff

- Coordinators
- Investigators
- Decision Makers (hearings and appeals)
- Facilitators of Informal Resolution
- “Those who are charged with ensuring a prompt, fair, and impartial investigation and result.” (VAWA)

Students

- New Students
- Existing Students
- Specialized populations
- Student staff

Faculty

- New faculty
- Existing faculty
- Adjunct Faculty
- Supervising faculty

Staff

- Senior leadership
- Public Safety/campus law enforcement
- Health care workers

Who Must
Receive
Training?

Community Partners?

Boards of
Trustees

Law
Enforcement

Advocacy
Groups

Health Care
Providers

Attorneys

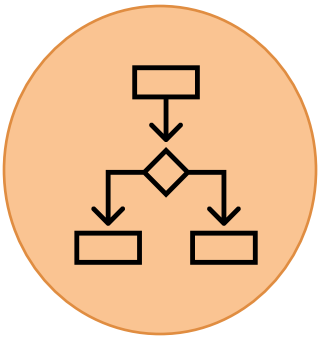
Media



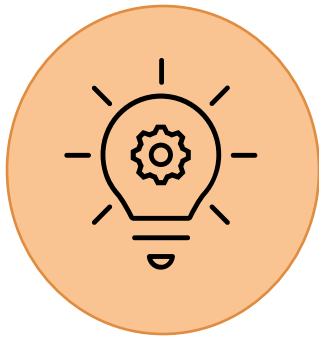
Training for Title IX Staff



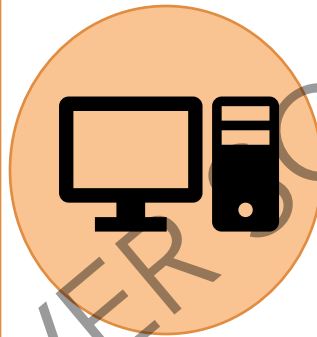
The scope of the institution's education program or activity (i.e., its Title IX "jurisdiction")



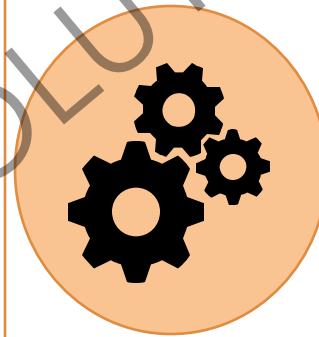
How to conduct the grievance process



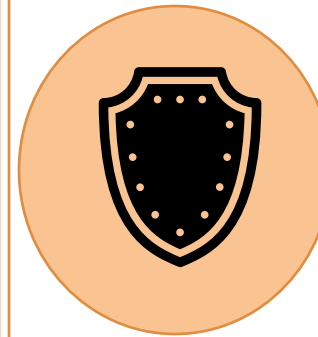
How to serve impartially



The technology to be used at a live hearing



Issues of relevance of questions and evidence



Rape shield protections; and,



Issues of relevance in creating an investigative report.



Responsible Employees/ Officials with Authority



Responsible Employee Training: Additional Areas of Focus

Take time to explain the reason for and importance of Responsible Employee reporting

Provide advice on how to receive a report

Provide suggestions on how to share their obligation to report with the reporting individual

Instruct on their options for reporting to the Title IX Coordinator

Fully explain what happens after they report a disclosure

Special Considerations for Training & Education in the Post Regulatory Landscape



Explaining the narrowed scope of Title IX



Explaining the institutional decision for two processes/procedures



Responsible Employee challenges



Burden of proof challenges



Length of Training



Time for questions/community processing



Prevention Education: Title IX Regulations

"The Department understands commenters' beliefs that the Department should create rules that monitor drinking, teach about interpersonal boundaries, sexuality, bystander intervention, and sexual consent communication. . . . [A]nd while the Department does not mandate educational curricula, nothing in the final regulations impedes recipients' discretion to provide students (or employees) with educational information." 85 Fed. Reg. 30063 (May 19, 2020).

Prevention Education: Violence Against Women Act (VAWA)



A primary prevention and awareness program [which includes bystander intervention] aims to prevent dating violence, domestic violence, sexual assault, and stalking.

Ongoing prevention and awareness campaigns.

Elements of Annual Training Strategy

Identify population to be trained

Determine topic

Schedule the training

How will you deliver the training

Partnerships

Communications

Community input/feedback

Engagement as passive education

Ongoing Assessment of Trainings



PRE AND POST
SURVEYS



OBSERVATION



OPPORTUNITIES
FOR FEEDBACK &
SUGGESTIONS



ENGAGE AND
LISTEN



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Communicate Training Successes



**Annual
Report**



**On your
website**



When training



In conversations



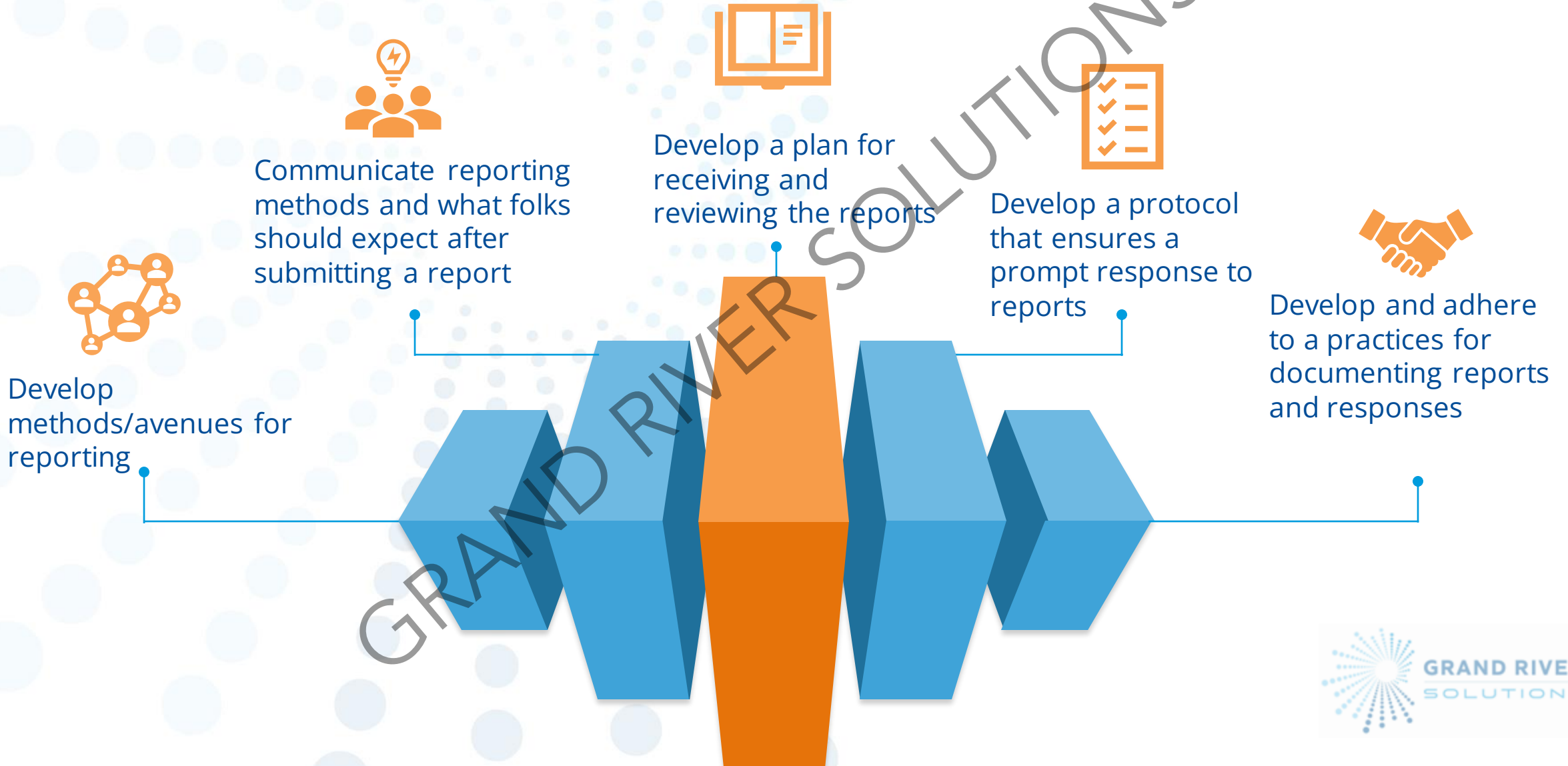
Receipt of Reports

Actual Knowledge, Report Response,
Initial Assessments, and Supportive Measures

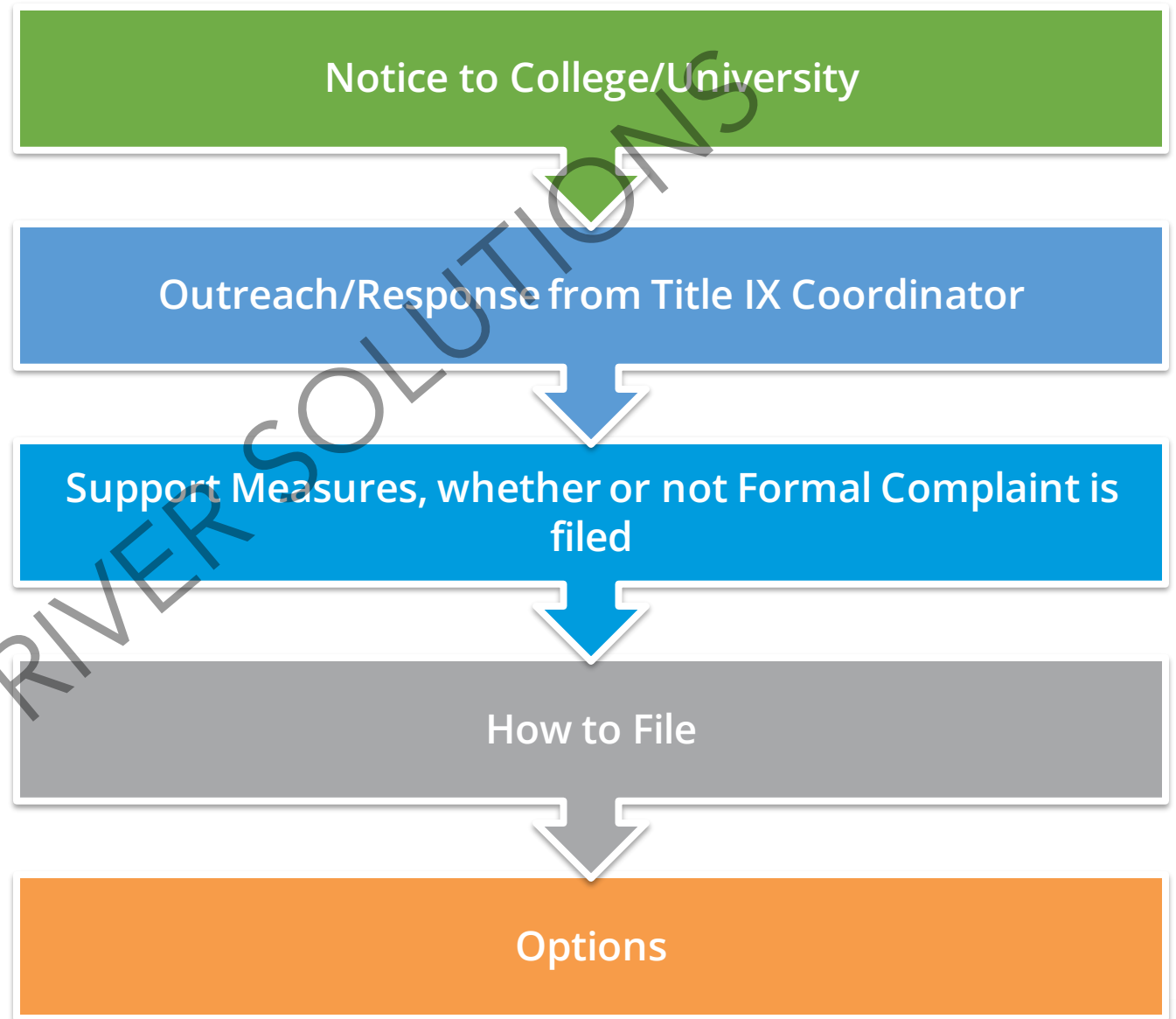
05



Infrastructure for Reporting



Regulatory Requirements



Receiving Reports and Initiating the Response



1. REVIEW THE
REPORT



2. DETERMINE THE
APPROPRIATE INITIAL
RESPONSE



3. PROMPTLY
INITIATE THAT
RESPONSE



4. DOCUMENT/RECORD
THE RECEIPT OF THE
REPORT AND THE
RESPONSE THERETO



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Initial Outreach

FIRST — SAFETY

Email

- Create forms

Phone

In person

- Use RA
- Campus safety

Follow up emails



Emergency Removal of Student

- High threshold
- Not a determination of responsibility
- Whether or not grievance is underway
- Individualized
- Immediate threat (physical)
- Opportunity to challenge



The Title IX Office receives the following anonymous report via your institution's online reporting form:

Riley Smith is in trouble. I live on their floor in River Hall and I constantly hear fighting and crying coming from their room at night. Every time I see Riley with their partner, they seem really submissive and nervous and I have noticed bruises on Riley the mornings after the biggest fights. The RA and Riley's partner are friend and so the RA doesn't do anything about it. It's getting so bad that some of the other people on the floor are talking about intervening, but we are afraid of Riley's partner too.

The Title IX Office is contact by a professor who forwards the following email from a student to you:

I really don't want to bother you but I'm in a really hard situation.

I and my boyfriend had a row for these days. And he beated me yesterday and this morning that I attached some pictures before XXXX final starts this afternoon because I found out I couldn't hold pencil because of trembling and I couldn't even think in the first thirty minutes. These pictures shows my arms after he twisting them, which doesn't look violent but feel hurt. One hour before lab final started, I told him I'm going to call police after he beated me, then he dragged me from bed to the floor and threatened to kill me if I call police. It was horrible and hard to reminisce. I knew he tends to use violence before and I forgave him some times when he just pinched my chin and dragged my arm. But this time it is too bad. So he took my phone away and restrain me in my room, not letting me go because I told him I would tell my TA about this whole thing after the final. So he just let me go to final after I promised I won't tell school and police.

When I go to two finals today (XXXX and XXXX, especially the latter), I really couldn't think and even hold pen (and I grabbed my bag but almost nothing in it) for the first thirty minutes. Now everything is done, he promised not to show up in my life nor my room, which is good because I don't want to take penalty on anyone. But I couldn't predict what my final shows out. It won't match my work for the whole semester. I don't expect any makeup chance. I just want to let you know since I barely know any American women here, am I doing wrong? Is there anything I can do to fix anything from academics or life?

Sorry for bothering.

The Title IX Office receives the following email from a responsible employee:

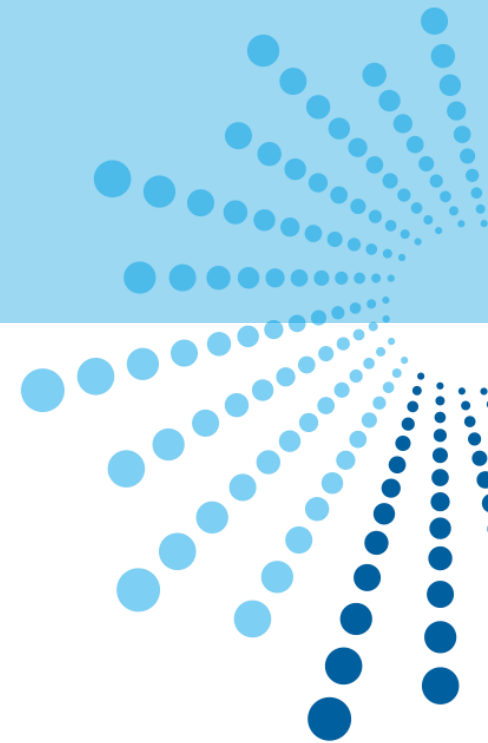
My name is Professor Jones. One of my students shared that they were raped last weekend at a party by another student. They don't want the school starting an investigation, and so I am not going to share their name or the details with you. They are thinking about talking to the police but are not sure who to contact. Can you please provide me with information that I can share with the student?



Complainant Intake & Supportive Measures

06

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Initial Meeting with the Complainant

- Prepare for the meeting
- Select appropriate space
- Build trust and rapport; empower
- Explain your role
- Discuss available support
- Options for reporting
- Answer questions
- Evidence collection/preservation
- Conclude with a discussion of next steps



Supportive Measures

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May not
unreasonably
burden the
other party

Non-
Disciplinary

Non-
punitive

Supportive
Measures

Designed to
restore or
preserve
equal access

As
appropriate
and
reasonably
available

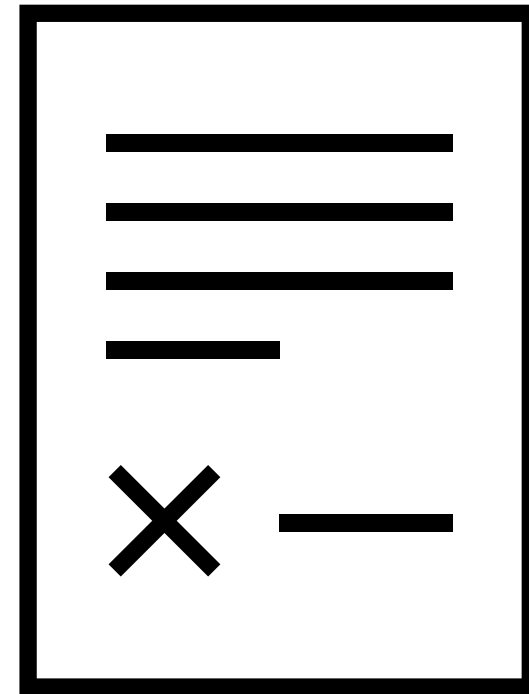
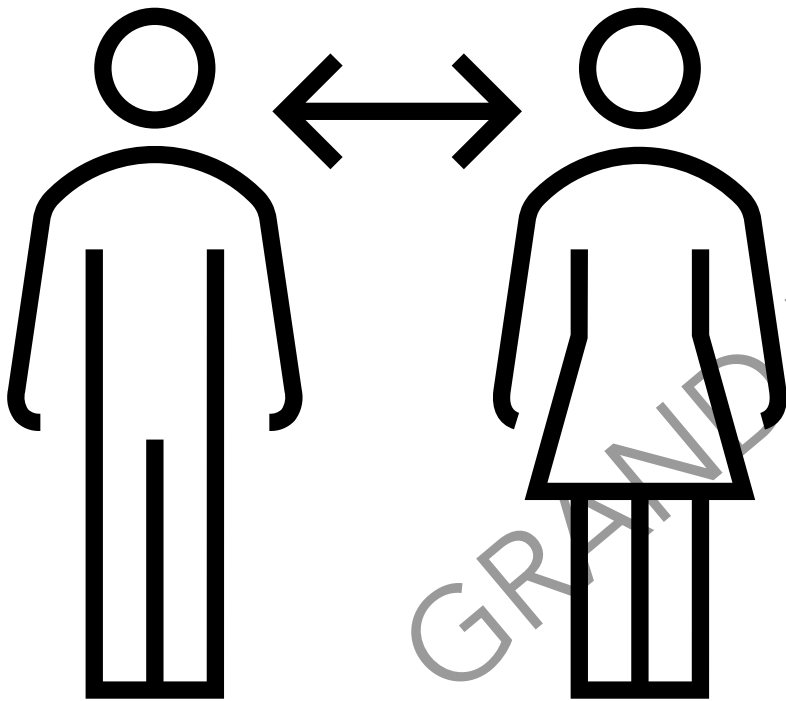
Confidential

Examples of Supportive Measures

- Assistance obtaining access to counseling, advocacy, or medical services;
- Assistance obtaining access to academic support and requesting academic accommodations;
- Changes in class schedules;
- Assistance requesting changes in work schedules, job assignments, or other work accommodations;
- Changes in campus housing;
- Safety escorts;
- Leaves of absence;
- Mutual restrictions on contact between the Parties ("No-contact" orders).



"Mutual Restrictions On Contact Between the Parties"



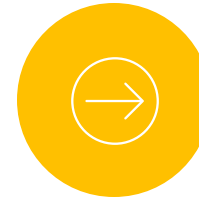
Post Meeting Tasks



Document the meeting



Send a summary email with resources, options, next steps



Follow up



Make connections



Provide the supportive measures



Document supportive measures requested, provided, and not provided. Where not provided, indicate why.

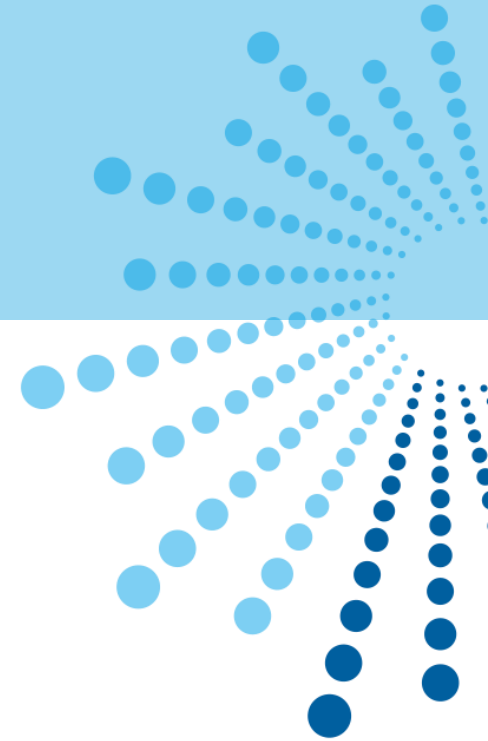




Report Resolution

Remedies Based, Informal, or Formal

07

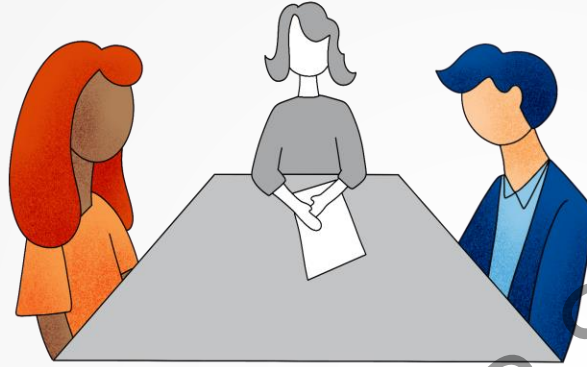


How to Proceed?



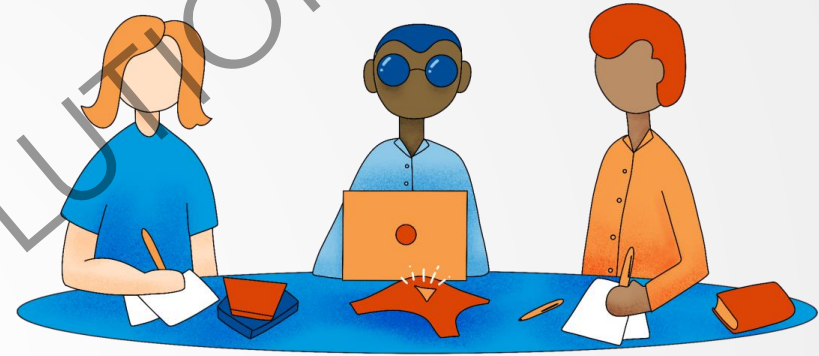
Remedies-based

No formal process



Alternative/Informal

Signed agreement;
Voluntary;
What records?



Formal/ Investigation/ Hearing

All requirements of 106.45





Remedies Based Resolution

07(a)

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Remedies Based Resolutions

- Supportive Measures
- Educational Conversations
- Targeted Education



Formal Complaint & Notice Requirements

07(b)

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Formal Complaint Filed

By
Complainant

By the Title IX
Coordinator



Factors to Consider When Determining Whether to File a Formal Complaint

Allegations
of Violence

Threats

Use of
weapons

Serial
predation



Formal Complaint

A Formal Complaint must include:

The Complainant's digital or physical signature, or an indication that the Complainant is the person filing the Formal Complaint;

An allegation of Prohibited Conduct as defined under this Policy. This may include:

- Where the incident(s) occurred; what incident(s) occurred; when the incident(s) occurred;

Identity of Respondent, if known;

A request for a resolution.

Formal Complaints may be made to the Title IX Coordinator by US Mail, email, or in person.

Dismissing Complaints

MANDATORY

- Not sexual harassment
- Did not occur in program or activity
- Not against person in the U.S.

DISCRETIONARY

- Complainant withdraws complaint
- Respondent no longer enrolled/employed
- School unable to collect sufficient info



Can Proceed Under Other Policy



Notifying the Respondent



FIRST—SAFETY

Don't send on a Friday

Don't send at 5pm

How will you notify

Consider impact of notification on Respondent

Make sure support available

Written Notification Meetings and Sufficient Time to Prepare

Notice of Allegation Requirements

- Notice of the allegations, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include:
 - the identities of the parties involved in the incident, if known,
 - the conduct allegedly constituting sexual harassment under § 106.30,
 - and the date and location of the alleged incident, if known.
- The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.
- The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section.
- The written notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process

Advisor of Choice

The advisor can be anyone, including an attorney;

Institutions cannot place restrictions on who can serve

No training required

Institution must provide advisor for the purposes of cross examination, only.

Initial Meeting with Respondent



- Prepare for the meeting
- Select appropriate space
- Build trust and rapport; empower
- Explain your role
- Discuss available supportive measures
- Supportive measures that provided to complainant that impact them
- Answer questions
- Evidence collection/preservation
- Conclude with a discussion of next steps



Post Meeting Tasks



Document the meeting



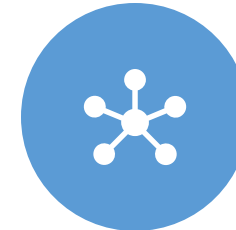
Send a summary email with resources, options, next steps



Follow up



Provide the supportive measures



Make connections



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Formal Complaint Resolution

Informal Resolution

- Formal Complaint Required
- Parties must agree
- Can withdraw from process
- Alternate Resolution/Mediation
- No appeal

Formal Resolution

- Investigation and Adjudication process in compliance with Section 106.45

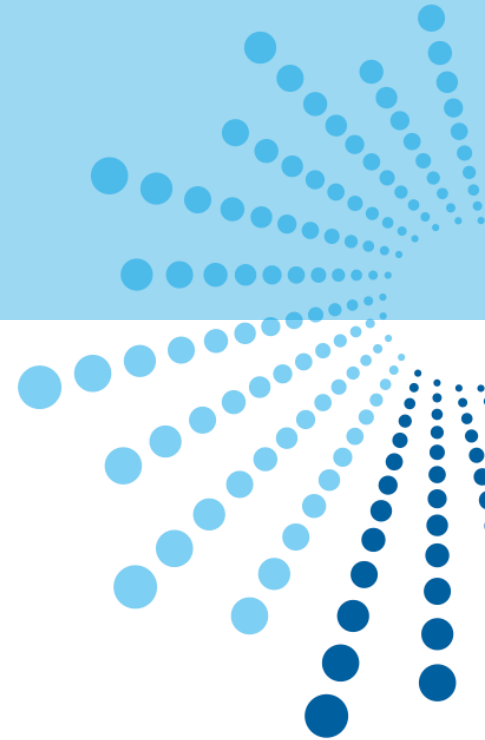




Informal Resolution

07(c)

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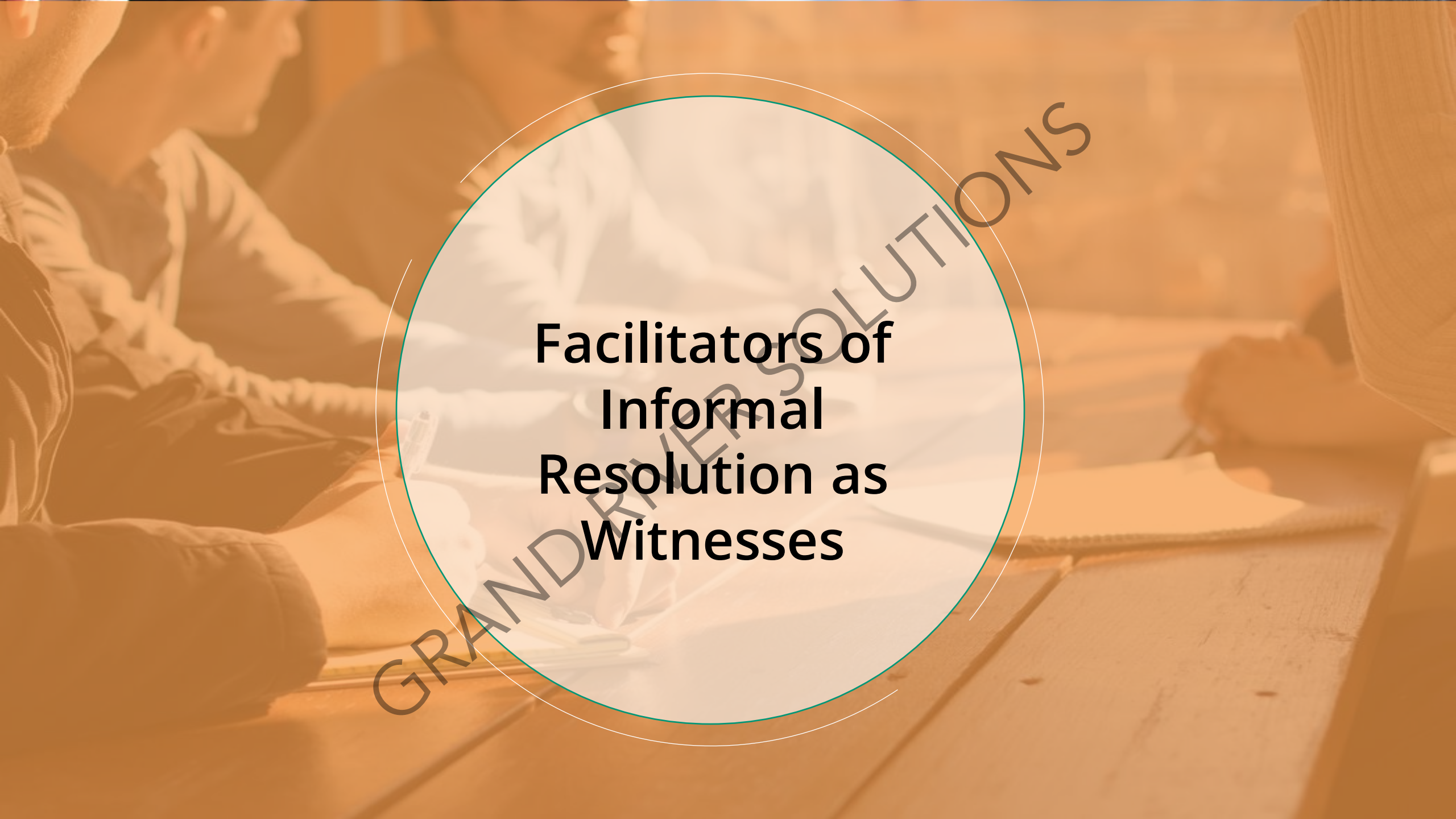


Informal Resolution Requirements

- Formal Complaint must be filed
- Participation in an informal resolution must be voluntary
- Must occur prior to resolution via a formal process
- Parties must be permitted to withdraw and seek formal resolution
- Voluntary, written consent to the informal resolution must be obtained
- Facilitators of informal resolution must be trained

Informal Resolution Notice Requirements

- the allegations,
- the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process
- and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;

The background of the slide is a warm, orange-toned photograph of several people sitting around a table in what appears to be a meeting or workshop. A large, light-colored circle with a thin teal border is centered over the image. Inside this circle, the title text is displayed. A faint, diagonal watermark reading "GRAND RIVER SOLUTIONS" is visible across the entire slide.

Facilitators of Informal Resolution as Witnesses

Informal
Resolution is
prohibited to
resolve
allegations that
an employee
sexually harassed
a student.

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Formal Resolution

07(d)

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Procedural Requirements for Investigations

Notice to both parties

Equal opportunity to
present evidence

An advisor of choice

Written notification of
meetings, etc., and
sufficient time to prepare

Opportunity to review all
evidence, and 10 days to
submit a written response
to the evidence prior to
completion of the report

Report summarizing
relevant evidence and 10
day review of report prior
to hearing



Title IX Coordinator's Role

In the Investigation

- Title IX Coordinator is permitted to conduct the investigation, though this is not favored
- If conducting the investigation, do so in accordance with the applicable institutional policy
- If not conducting the investigation, may serve as a support to the investigators
- May serve as a resource to the parties

Procedural Requirements for Hearings

Must be live, but can be conducted remotely

No Compelling participation

Standard of proof used may be preponderance of the evidence or clear and convincing; standard must be the same for student and employee matters

Cross examination must be permitted and must be conducted by advisor of choice or provided by the institution

Decision maker determines relevancy of questions and evidence offered

Exclusion of Evidence if no cross examination

Written decision must be issued that includes finding and sanction

Title IX Coordinator's Role

In the Adjudication

- Title IX Coordinator may not serve as the decision maker
- May serve to support the decision maker(s)
- May participate in the hearing to provide logistical support to decision makers
- Responsible for effective implementation of remedies imposed





“

Final Rule § 106.45(b)(8)

[I]nstitutions must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein.

”



Title IX Coordinator's Role

In the Appeal

- Title IX Coordinator may not serve as an appellate reviewer
- May serve to support the appellate reviewer/panel
- May provide logistical support
- May coordinate implementation of appellate findings, where appropriate.
- Responsible for effective implementation of remedies imposed

Feedback?

Send Feedback



Email Us

info@grandriversolutions.com

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Hearings in a Post Regulatory World

SWACC

Martha Compton | May 2022



Martha Compton

She/her

Director of Strategic Partnerships and
Client Relations

Meet Your Facilitator

Martha consults and trains nationally on Title IX and student conduct and has previously served as a technical trainer for Department of Justice VAWA campus grantees. Martha is a former President of the Association for Student Conduct Administration, has been a faculty member for ASCA's Gehring Academy, and was part of the core team that developed ASCA's Sexual Misconduct Institute. A student conduct professional for over 20 years, Martha is also a former dean of students and has extensive experience in residence life, behavior intervention, emergency services, orientation, leadership, and working with student organizations.

About Us

Vision

We exist to help create safe and equitable work and educational environments.

Mission

Bring systemic change to how school districts and institutions of higher education address their Clery Act & Title IX obligations.

Core Values

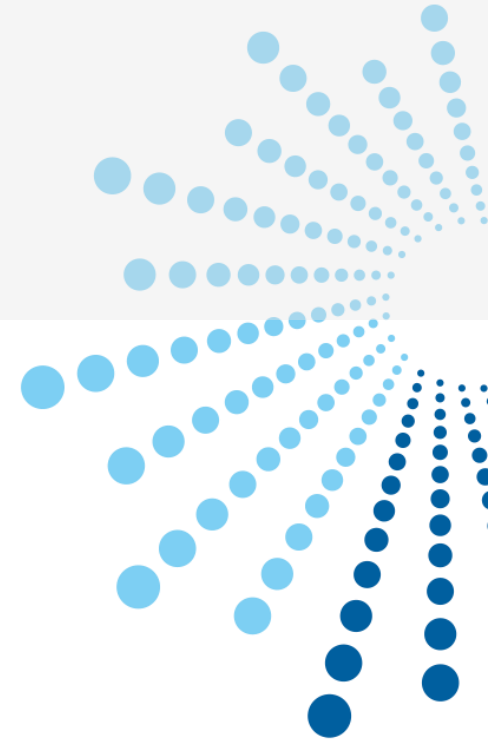
- Responsive Partnership
- Innovation
- Accountability
- Transformation
- Integrity

Agenda

- 1** Title IX Requirements for Hearings
- 2** Process Participants
- 3** Pre-Hearing Tasks
- 4** The Hearing
- 5** After The Hearing
- 6** Practical Application



Title IX Requirements For Hearings



01

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Title IX of the Education Amendments Act 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."

Section 106.30: Sexual Harassment

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- (1) 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;
- (2) Unwelcome conduct determined by a reasonable person to be so **severe, pervasive, and objectively offensive** that it **effectively denies** a person equal access to the recipient's education program or activity; or
- (3) "**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).

AND... Only Covered, IF:

Place of Conduct

- On campus
- Campus Program, Activity, Building, and
- In the United States

Required Identity

- Complainant participating/attempting to participate in Program or Activity, AND
- Control over Respondent

Procedural Requirements for Investigations

Notice to both parties

Equal opportunity to
present evidence

An advisor of choice

Written notification of
meetings, etc., and
sufficient time to prepare

Opportunity to review all
evidence, and 10 days to
submit a written response
to the evidence prior to
completion of the report

Report summarizing
relevant evidence and 10
day review of report prior
to hearing

Procedural Requirements for Hearings

Must be live, but can be conducted remotely

Cannot compel participation of parties or witnesses

Standard of proof used may be preponderance of the evidence or clear and convincing; standard must be the same for student and employee matters

Cross examination must be permitted and must be conducted by advisor of choice or provided by the institution

Decision maker determines relevancy of questions and evidence offered

Written decision must be issued that includes finding and sanction

The Requirement of Impartiality

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The Requirement of Impartiality

“

The Department's interest in ensuring impartial Title IX proceedings that avoid prejudgment of the facts at issue necessitates a broad prohibition on sex stereotypes so that decisions are made on the basis of individualized facts and not on stereotypical notions of what “men” or “women” do or do not do.

”

85 Fed. Reg. 30254 (May 19, 2020).

Section 106.45(b)(1)(iii)

The Title IX Coordinator, investigator, **decision maker**, or facilitator of informal resolution must receive training on how to serve impartially, including avoiding prejudgment of the facts at issue, conflict of interest, and bias

This training material may not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.



Section 106.45(b)(1)(iii)

The Grievance Process requires that any individual designated as a Title IX Coordinator, Investigator, Decision-Maker, Appeal Officer, or Informal Resolution Facilitator not have a conflict of interest or bias:

For or against Complainants or Respondents generally, or

An individual Complainant or Respondent.

In Summary...



Do not rely on cultural “rape myths”



Do not rely on cultural stereotypes about how men or women purportedly behave



Do not rely on gender-specific research data or theories to decide or make inferences of relevance or credibility in particular cases



Recognize that anyone, regardless of sex, gender, gender identity or sexual orientation, can be a victim or perpetrator of sexual assault or other violence



Avoid any perception of bias in favor of or against complainants or respondents generally



Employ interview and investigation approaches that demonstrate a commitment to impartiality

Bias

“Department also rejected commenters’ arguments that individuals should be disqualified from serving as investigators because of past personal or professional experience”

“Department encourages [schools] to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased” WHILE ALSO

“exercising caution not to apply generalizations that might unreasonably conclude that bias exists (for example, assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents”

Conflicts of Interest

Commenters argued that investigators and hearing officers employed by schools have an “inherent conflict of interest” because of their affiliation with the school, so Department should require investigations and hearings to be conducted by external contractors

Department noted that some of those commenters argued that this resulted in bias against complainants, and some argued that this resulted in bias against respondents

Department's response: Department's authority is over schools, not individual investigators and other personnel, so Department will focus on holding school's responsible for impartial end result of the process, without labeling certain administrative relationships as per se involving conflicts of interest

Avoiding Conflicts of Interest and Bias

Ask these questions:

- Do I know any of these individuals?
 - If so, what is the nature of the relationship?
- Am I likely to have to work with or teach them in the future?
- Do I hold any bias against any of these individuals for any reason?
 - Could there be a reasonable perception that I do?
- Have I been adequately distanced from the investigation process?



Hearing Technology: Requirements and Considerations



If hearings cannot be in person, or if someone chooses to participate remotely, must have a remote participation platform available.



All hearings must be recorded.



Participants must be able to communicate during the hearing

The parties with the decision maker(s)
The parties with their advisors

Purpose of the Hearing

1

Review and
Assess
Evidence

2

Make Findings
of Fact

3

Determine
Responsibility/
Findings of
Responsibility

4

Determine
Sanction and
Remedy

Evaluating the Evidence

Is it relevant?

Evidence is relevant if it has a tendency to make a material fact more or less likely to be true.



Is it authentic?

Is the item what it purports to be?



Is it credible?

Is it convincing?



Is it reliable?

Can you trust it or rely on it?



What weight, if any, should it be given?

Weight is determined by the finder of fact!

Trauma-informed practices provide tools/techniques for engaging with the Complainant, Respondent, and Witnesses.



Format/Structure of the Hearing



Format of Questions



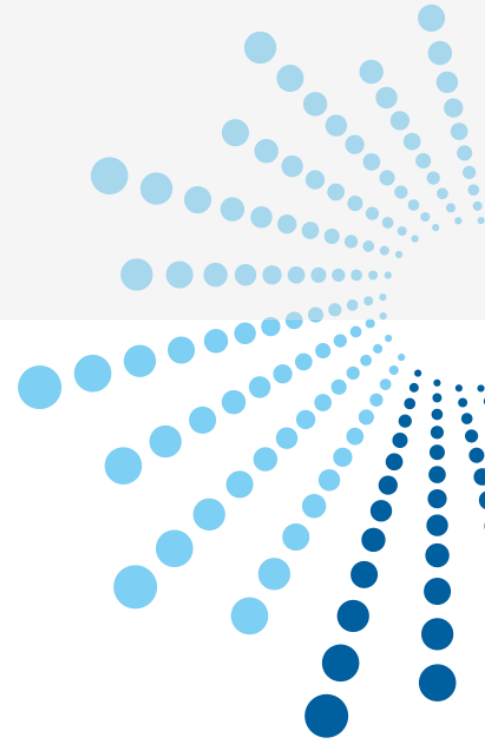
Approach to Clarification



Process Participants

02

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The Participants

The Parties

Complainant	Respondent
<p>An individual who is alleged to be the victim of conduct that could constitute sexual harassment.</p>	<p>An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.</p>

The Participants

The Investigator

- Can present a summary of the final investigation report, including items that are contested and those that are not;
- Submits to questioning by the Decisionmaker(s) and the parties (through their Advisors).
- Can be present during the entire hearing process, but not during deliberations.
- Questions about their opinions on credibility, recommended findings, or determinations, are prohibited. If such information is introduced, the Chair will direct that it be disregarded.



The Participants

The Investigator

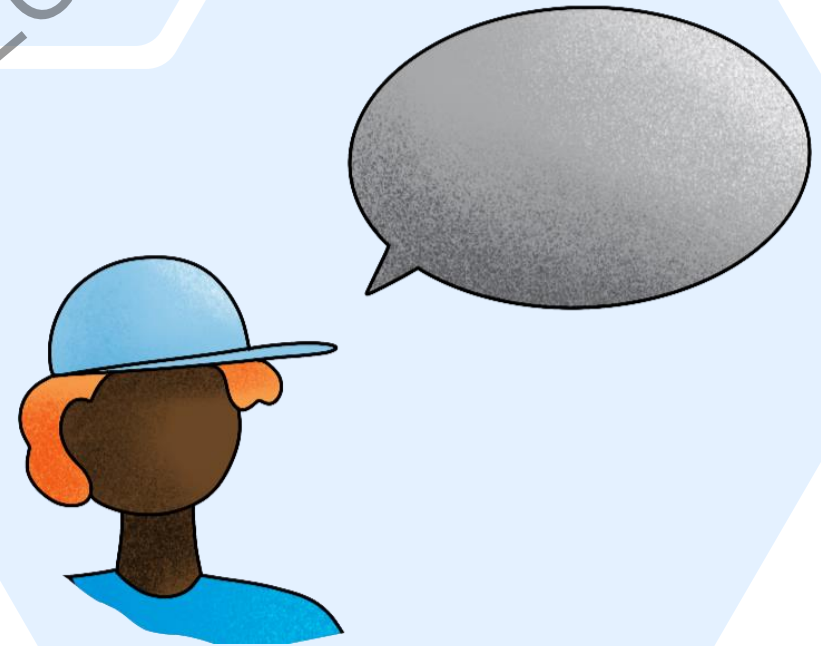
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- Submits to questioning by the Decisionmaker(s) and the parties (through their Advisors).
- Can be present during the entire hearing process, but not during deliberations.
- Questions about their opinions on credibility, recommended findings, or determinations, are prohibited. If such information is introduced, the Chair will direct that it be disregarded.



- Can be anyone, including a lawyer, a parent, a friend, and a witness
- No particular training or experience required (institution appointed advisors should be trained)
- Can accompany their advisees at all meetings, interviews, and the hearing
- Advisors should help the Parties prepare for each meeting and are expected to advise ethically, with integrity, and in good faith
- May not speak on behalf of their advisee or otherwise participate, except that the advisor will conduct cross examination at the hearing.
- Advisors are expected to advise their advisees without disrupting proceedings

The Participants

Advisors



The Participants

Advisors: Prohibited Behavior

An Advisor who oversteps their role as defined by the policy should be warned once. If the Advisor continues to disrupt or otherwise fails to respect the limits of the Advisor role, the meeting may be ended, or other appropriate measures implemented. Subsequently, the Title IX Coordinator has the ability determine how to address the Advisor's non-compliance and future role.



The Participants

The Hearing Facilitator/Coordinator

- Manages the recording, witness logistics, party logistics, curation of documents, separation of the parties, and other administrative elements of the hearing process
- Non-Voting
- Optional, not required



The Participants

The Decision-Maker

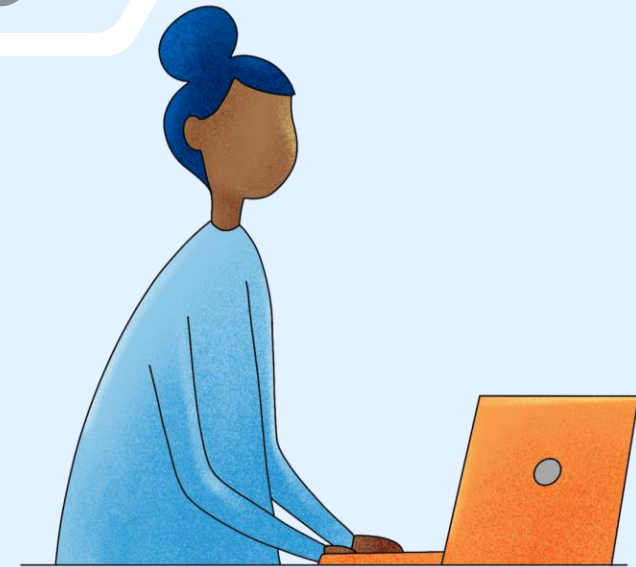
- Regulations permit one person or a panel
 - University uses a single decision maker
- Questions the parties and witnesses at the hearing
- Determines responsibility
- Determines sanction, where appropriate



The Participants

The Decision-Maker

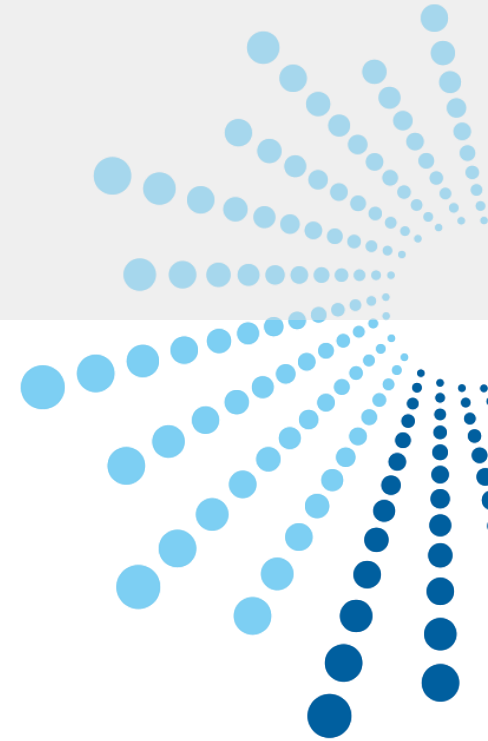
- Answers all procedural questions
- Makes rulings regarding relevancy of evidence, questions posed during cross examination
- Maintains decorum
- Prepares the written deliberation statement
- May assist in other tasks such as preparing the Notice of Outcome





Decision Maker Pre-Hearing Tasks

What should be done in advance
of the hearing



03

Pre-Hearing Meetings

Review the Logistics for the Hearing

Set expectations

- Format
- Roles of the parties
- Participation
- Decorum
- Impact of not following rules

Cross Examination/Questioning Format & Expectations

Decision-Maker



Review evidence and report



Review applicable policy and procedures



Preliminary analysis of the evidence



Determine areas for further exploration



Develop questions of your own



Anticipate the party's questions



May convene a pre-hearing meeting



Anticipate challenges or issues



Prepare the script

Common Areas of Exploration



Credibility?



Clarification on timeline?



Thought process?



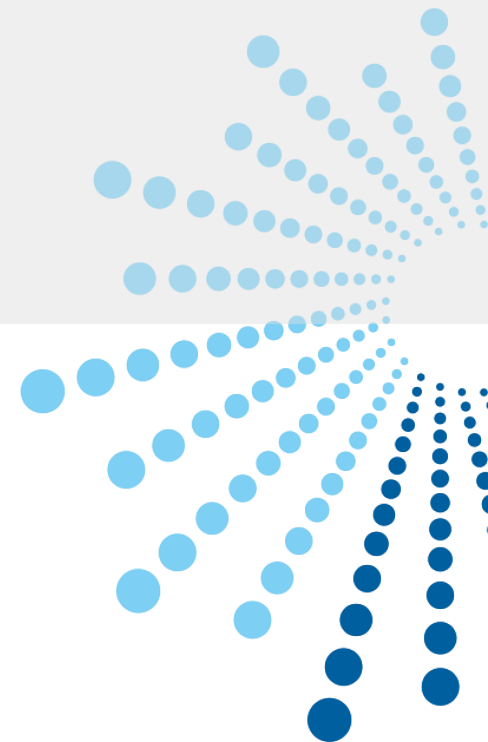
Inconsistencies?



04

The Hearing

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Order of the Proceedings

01

Introductions
and instructions
by the Decision
Maker; Opening
Statements

02

Presentation by
Investigator

03

Presentation of
information and
questioning of
the parties and
witnesses

04

Closing
Statements

05

Deliberation &
Determination

Opening Introductions and Instructions by the Chair

- The College should have a script for this portion of the proceedings, and it should be used consistently.
- Introduction of the participants.
- Overview of the procedures.
- Overall goal: manage expectations.
- Be prepared to answer questions.



Opening Statements

Optional: Not required by the regulations; institution may choose to allow.

- Prior to questioning beginning during the hearing, each party may be given the opportunity to make an opening statement.
- Intended to be a brief summary of the points the party would like to highlight.
- Directed to the Decision Maker and only the Decision Maker.
- Both parties should give opening statement before either is questioned.
- Typically, the complainant goes first.



Presentation of Information

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A man in a brown jacket is shouting into a megaphone. The image is overlaid with a semi-transparent teal background and a diagonal watermark that reads "GRAND RIVER SOLUTIONS".

Presentation of Information & Questioning of the Parties

01

The Decision Maker will question Complainant first

02

Cross examination of Complainant will occur next

03

Follow up by the Decision Maker

04

The Decision Maker will question Respondent second

05

Cross examination of Respondent will occur next

06

Follow up by the Decision Maker

Questioning of the Witnesses

01

The Decision Maker will determine the order of questioning of witnesses

02

The Decision Maker will question first

03

Advisor cross-examination will occur next (suggested: Complainant's advisor followed by Respondent's advisor)

04

Follow up by the Decision Maker

Closing Statements

Optional: Not required by the regulations; institution may choose to allow.

- Prior to the conclusion of the hearing, each party may have the opportunity to make a closing statement.
- Intended to be a brief summary of the points the party would like to highlight.
- Directed to the Decision Maker and only the Decision Maker.
- Not a time to introduce new information or evidence.

General Questioning Guidelines

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Format of Questioning



The Hearing Panel or the advisor will remain seated during questioning



Questions will be posed orally



Questions must be relevant

What constitutes a relevant question?

The Department declines to define “relevant”, indicating that term “should be interpreted using [its] plain and ordinary meaning.”

See, e.g., Federal Rule of Evidence 401 Test for Relevant Evidence:

“Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action.”

When is evidence relevant?

Logical connection between the evidence and facts at issue

Assists in coming to the conclusion – it is “of consequence”

Tends to make a fact more or less probable than it would be without that evidence



Information
protected by an
un-waived legal
privilege

Medical treatment
and care

Unduly repetitious
or duplicative
questions

Information that
otherwise
irrelevant

Complainant's
prior sexual
history, with
limited exceptions.

**Irrelevant and
Impermissible
Questions**

When Questioning....



Be efficient.



Explore areas where additional information or clarity is needed.



Listen to the answers.



Be prepared to go down a road that you hadn't considered or anticipated exploring.



Take your time. Be thoughtful. Take breaks if you need it.

Foundational Questions to Consider

Were you interviewed?

Did you see the interview notes?

Did the notes reflect your recollection at the time?

As you sit here today, has anything changed?

Did you review your notes before coming to this hearing?

Did you speak with any one about your testimony today prior to this hearing?

Common Areas of Where Clarity or Additional Information is Needed

Details about the
alleged
misconduct

Facts related to the
elements of the
alleged policy
violation

Relevancy of
Certain Items of
Evidence

Factual Basis for
Opinions

Credibility

Reliability

Timelines

Inconsistencies

Questioning to Assess Reliability

Inherent plausibility

Logic

Corroboration

Other indicia of reliability

Questioning to Assess Credibility

No formula exists, but consider asking questions about the following:

opportunity to view

ability to recall

motive to fabricate

plausibility

consistency

character, background, experience, and training

coaching

Credibility Versus Reliability

Reliability

- I can trust the consistency of the person's account of their truth.
- It is probably true and I can rely on it.

Credibility

- I trust their account based on their tone and reliability.
- They are honest and believable.
- It might not be true, but it is worthy of belief.
- It is convincingly true.
- The witness is sincere and speaking their real truth.



Opinion Evidence

When might it be relevant?

How do you establish a foundation for opinion evidence so that the reliability of the opinion can be assessed?

Asking Questions to Assess Authenticity

Investigating the Products of the Investigation



Never assume that an item of evidence is authentic.



Ask questions, request proof.



Request further investigation of the authenticity if necessary.

Is it authentic?



QUESTION THE
PERSON WHO
OFFERED THE
EVIDENCE



REQUEST
ORIGINALS



OBTAIN
ORIGINALS FROM
THE SOURCE



HAVE OTHERS
REVIEW AND
COMMENT ON
AUTHENTICITY



ARE THERE
OTHER RECORDS
THAT WOULD
CORROBORATE?

What are the “Hard” Questions

Details about the sexual contact

Seemingly inconsistent behaviors

Inconsistent evidence/information

What they were wearing

Alcohol or drug consumption

Probing into reports of lack of memory

How to Ask the Hard Questions

Lay a foundation for the questions

- Explain why you are asking it
- Share the evidence that you are asking about, or that you are seeking a response to

Be deliberate and mindful in your questions:

- Can you tell me what you were thinking when....
- Help me understand what you were feeling when...
- Are you able to tell me more about...

Special Considerations for Questioning the Investigator

- The Investigator's participation in the hearing is as a fact witness;
- Questions directed towards the Investigator shall be limited to facts collected by the Investigator pertinent to the Investigation;
- Neither the Advisors nor the Decision-maker(s) should ask the Investigator(s) their opinions on credibility, recommended findings, or determinations;
- The Investigators, Advisors, and parties will refrain from discussion of or questions about these assessments. If such information is introduced, the Chair will direct that it be disregarded.

Special Considerations for Questioning the Investigator



Ask questions about how they conducted their investigation



Explore the investigator's decision making



Seek clarity about evidence collected

Where it came from
Authenticity of the evidence



Ask factual questions that will assist in evaluation of the evidence



If bias is not in issue at the hearing, the Chair should not permit irrelevant questions of the investigator that probe for bias.

Special Considerations for Panels

Must appoint a chair

If a panel, decide in advance who will take the lead on questioning

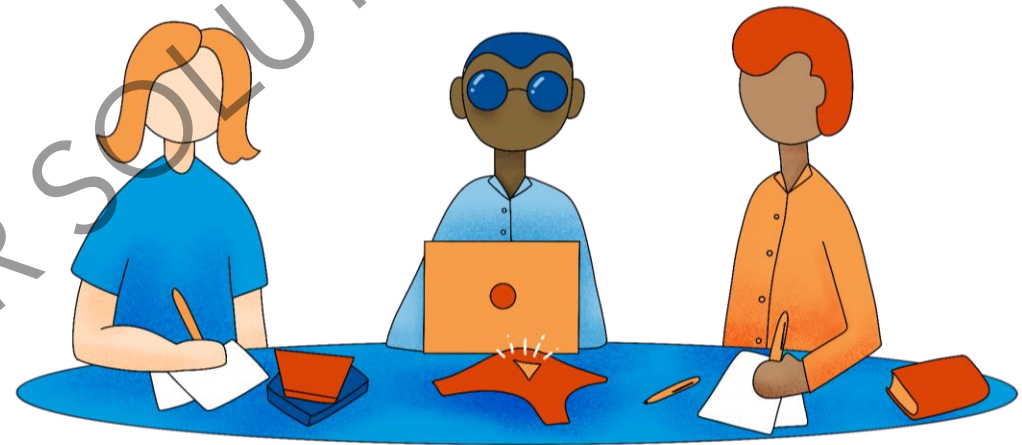
Go topic by topic

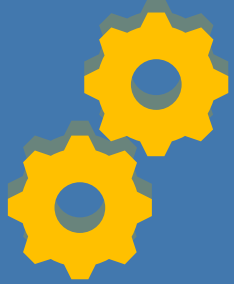
Ask other panelists if they have questions before moving on

Do not speak over each other

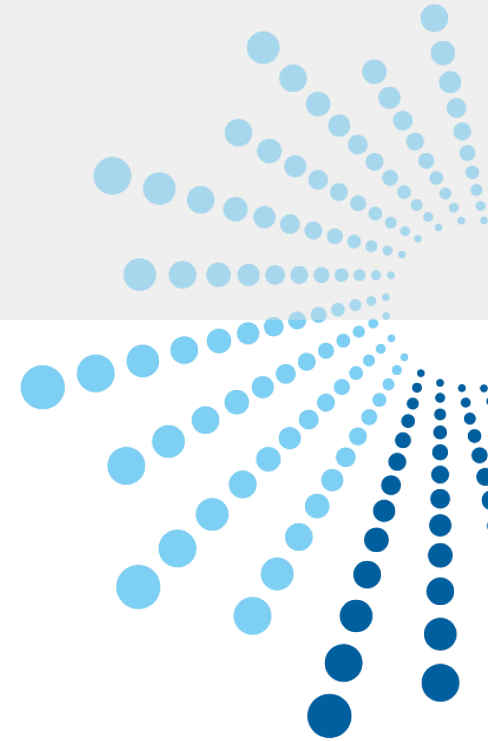
Pay attention to the questions of other panelists

Ok to take breaks to consult with each other, to reflect, to consult with the TIXC or counsel





The Decision Maker's Role in Advisor Questioning



05

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Cross Examination

Who does it?

Must be conducted
by the advisor

If party does not
appear or does not
participate, advisor
can appear and cross

If party does not
have an advisor,
institution must
provide one

The Role of the Decision Maker During Questioning by the Advisors

After the Advisor poses a question, the proceeding will pause to allow the Chair to consider it.

Chair will determine whether the question will be permitted, disallowed, or rephrased. The Chair may explore arguments regarding relevance with the Advisors.

The Chair will limit or disallow questions on the basis that they are irrelevant, unduly repetitious (and thus irrelevant), or abusive.

The Chair will state their decision on the question for the record and advise the Party/Witness to whom the question was directed, accordingly. The Chair will explain any decision to exclude a question as not relevant, or to reframe it for relevance.

The Chair has final say on all questions and determinations of relevance. The parties and their advisors are not permitted to make objections during the hearing. If they feel that ruling is incorrect, the proper forum to raise that objection is on appeal.

When Assessing Relevance, the Decision Maker Can:

Ask the Advisor or why their question is relevant

Take a break

Ask their own questions of the party/witness

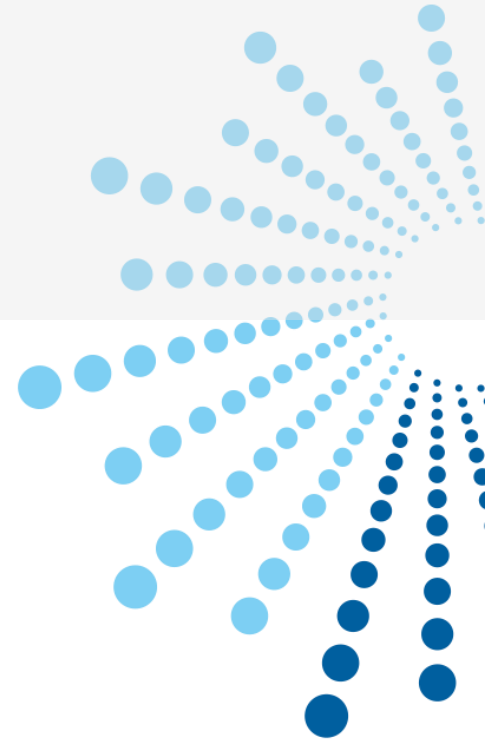
Review the hearing record



After The Hearing

06

GRAND RIVER SOLUTIONS



GRAND RIVER SOLUTIONS

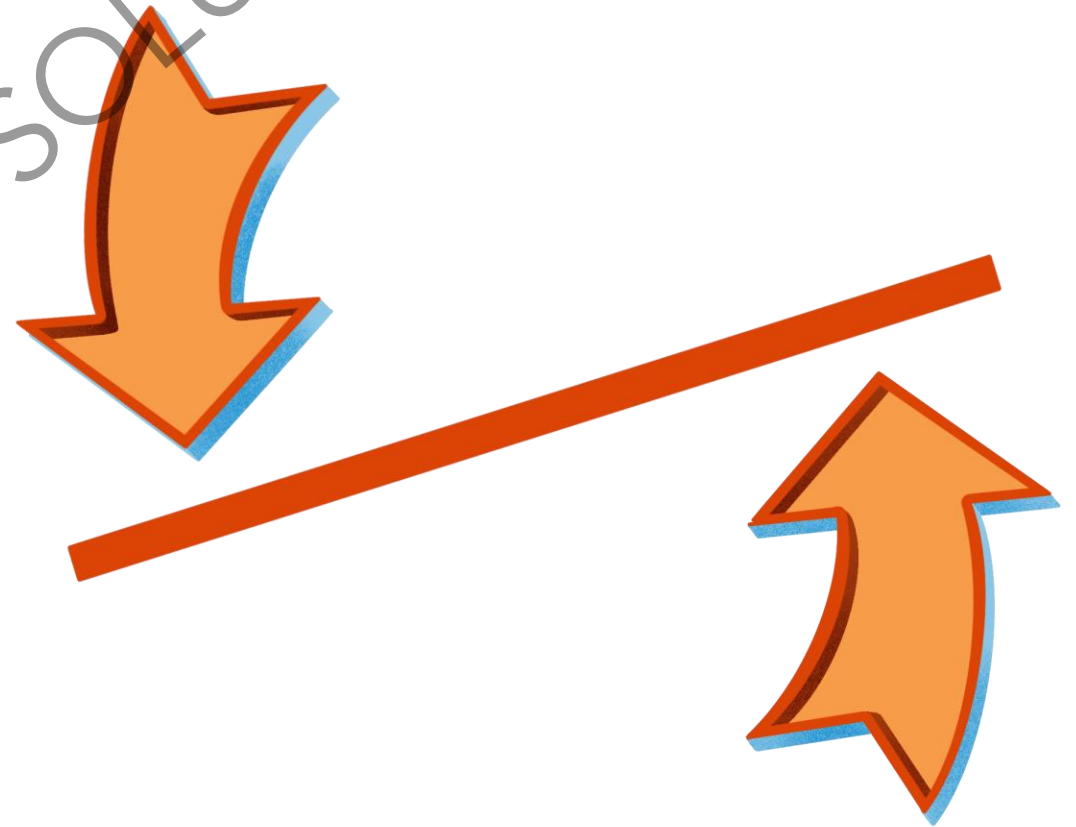
Deliberations

Preponderance of the Evidence

- Standard of proof by which determinations of responsibility are made
- "More likely than not"
- It does not mean that an allegation must be found to be 100% true or accurate
- A finding of responsibility = There was sufficient reliable, credible evidence to support a finding, by a preponderance of the evidence, that the policy was violated
- A finding of not responsible = There was not sufficient reliable, credible evidence to support a finding, by a preponderance of the evidence, that the policy was violated

Weighing the Evidence & Making a Determination

1. Evaluate the relevant evidence collected to determine what weight, if any, you will afford that item of evidence in your final determination;
2. Apply the standard of proof and the evidence to each element of the alleged policy violation;
3. Make a determination as to whether or not there has been a policy violation.





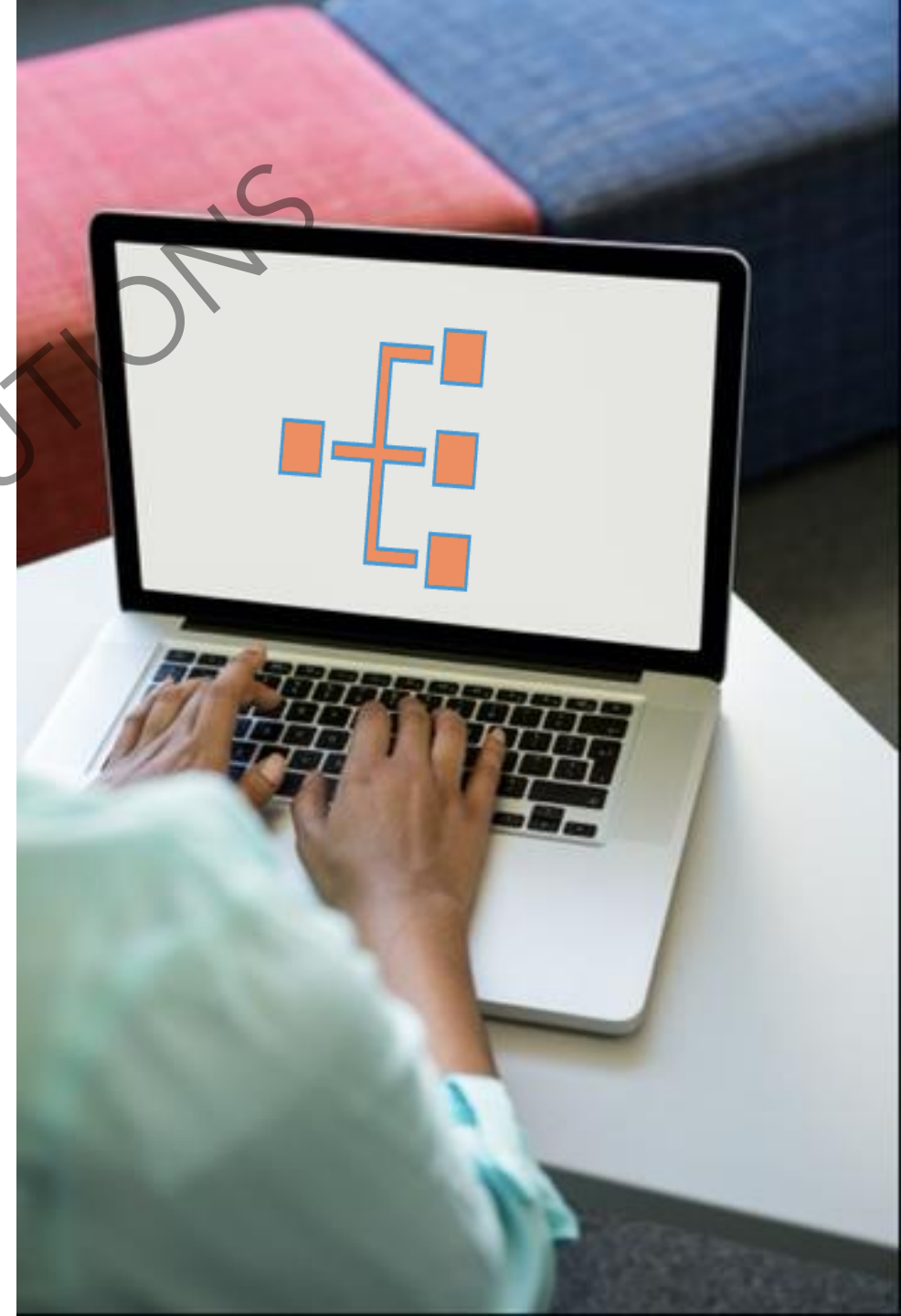
Findings of Fact

- **A "finding of fact"**
 - The decision whether events, actions, or conduct occurred, **or** a piece of evidence is what it purports to be
 - Based on available evidence and information
 - Determined by a preponderance of evidence standard
 - Determined by the fact finder(s)
- **For example...**
 - Complainant reports that they and Respondent ate ice cream prior to the incident
 - Respondent says that they did not eat ice cream
 - Witness 1 produces a timestamped photo of Respondent eating ice cream
- **Next steps?**

Policy Analysis

- Break down the policy into elements
- Organize the facts by the element to which they relate

GRAND RIVER SOLUTIONS



Allegation: Fondling



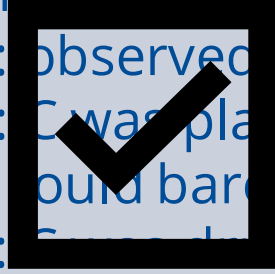
Fondling is the:

- ❑ touching of the private body parts of another person
- ❑ for the purpose of sexual gratification,
- ❑ Forcibly and/or without the consent of the Complainant,
 - ❑ including instances where the Complainant is incapable of giving consent because of their age or **because of their temporary or permanent mental or physical incapacity.**

Analysis Grid

Touching of the private body parts of another person	For the purpose of sexual gratification	Without consent due to lack of capacity
Undisputed: Complainant and Respondent agree that there was contact between Respondent's hand and Complainant's vagina.	<p>Respondent acknowledges and admits this element in their statement with investigators.</p> <p>"We were hooking up. Complainant started kissing me and was really into it. It went from there. Complainant guided my hand down her pants..."</p>	<p>Complainant: drank more than 12 drinks, vomited, no recall</p> <p>Respondent: C was aware and participating</p> <p>Witness 1: observed C vomit</p> <p>Witness 2: C was playing beer pong and could barely stand</p> <p>Witness 3: C was drunk but seemed fine</p> <p>Witness 4: carried C to the basement couch and left her there to sleep it off.</p>

Apply Preponderance Standard to Each Element

Touching of the private body parts of another person	For the purpose of sexual gratification	Without consent due to lack of capacity
<p>Undisputed: Complainant and Respondent agree that there was contact between Respondent's hand and Complainant's vagina.</p> 	<p>Respondent acknowledges and admits this element in their statement with investigators.</p>  <p>"We were hooking up. Complainant started kissing me and was really into it. It went from there. Complainant guided my hand down her pants..."</p>	<p>Complainant: drank more than 12 drinks, vomited, no recall Respondent: C was aware and participating</p>  <p>Witness 1: observed C vomit Witness 2: C was playing beer pong and could barely stand Witness 3: C drank but seemed fine Witness 4: carried C to the basement couch and left her there to sleep it off.</p>

Did You Also Analyze...?

(if required by policy)

- ☐ On campus?
- ☐ Program or Activity?
- ☐ In a building owned/controlled by a recognized student organization?
- ☐ Substantial control over respondent and context?
- ☐ Complainant was attempting to access program/activity?

Sanctioning

- Primary Goals:
 - End the harassment
 - Prevent its recurrence
 - Remedy the harm
- What steps would be reasonably calculated to end harassment and prevent recurrence?



Sanctioning Considerations



State law



System policy



Learning
environment



Measures
available

The sanctioning officer ***must*** assume the finding is correct.

No lesser sanction if you disagree with findings

REMINDER

The sanction does not “undo” the finding.

Determining Sanctions

- Precedent/Consistency
- Past conduct
- Foreseeability of repeated conduct
- Availability of measures
- Does bias creep in?
- Remorse?
- Victim impact or request?



Aggravating Circumstances

Premeditation

Predation

Physical violence

Repeated violation

Multiple policy violations in one incident

Harm to others, impact on complainant and/or community

Did the behavior continue after intervention?

Effort to conceal or hide the incident?

Refusal to attend past trainings

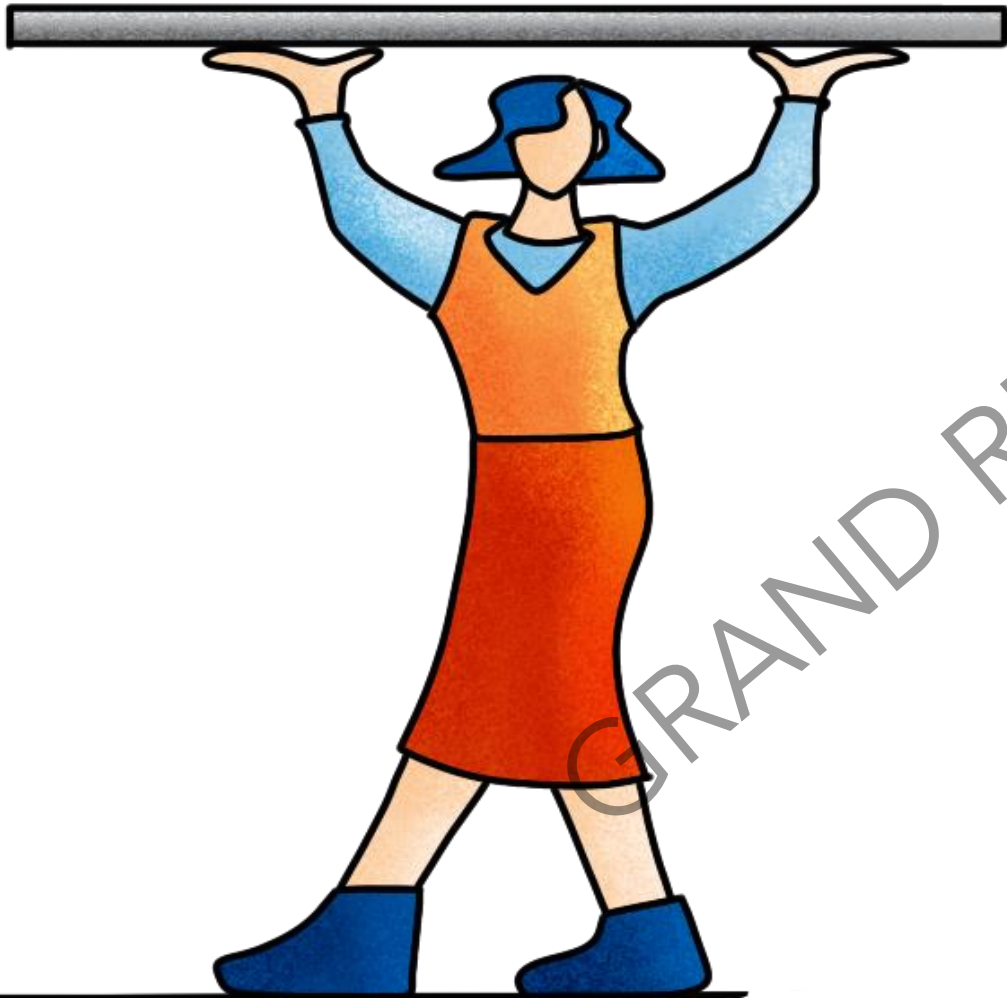
Past failures to comply with directives

Final Report

- The allegations
- Description of all procedural steps
- Findings of fact
- Conclusion of application of facts to the policy
- Rationale for each allegation
- Sanctions and remedies
- Procedure for appeal



The Final Determination Should **STAND** On Its Own



S

Simple and Easy to Comprehend

T

Transparent/Clear

A

Accurate

N

Neutral/Unbiased

D

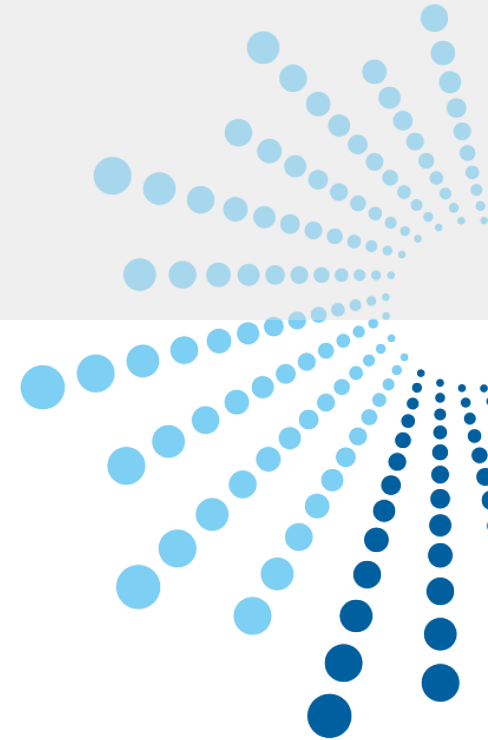
Draw Attention to Significant
Evidence and Issues



Practical Application

06

GRAND RIVER SOLUTIONS





Scenario 1

Respondent appears at the hearing with Witness 7. Respondent would like Witness 7 to provide information testimony about text messages between them and Complainant that indicate that Complainant has made the allegations up.

- **Can the HP hear from Witness 7 at the hearing?**



Scenario 2A

Respondent provides a polygraph report to investigators wherein it is concluded that Respondent is not being deceptive when denying the allegations.

- **The Investigator determines the report is irrelevant. Must the Investigator share the report with the decision maker?**



Scenario 2B

Respondent provides a polygraph report to Investigators wherein it is concluded that Respondent is not being deceptive when denying the allegations. The polygrapher appears and answers all relevant questions on cross.

- **Must the Hearing Panel find Respondent not responsible because of the findings in the report?**

Case Study

“

The Formal Complaint charges Respondent with sexual assault for engaging in sexual contact with Complainant when she was incapacitated by alcohol. Specifically, Complainant alleges that she was at a party with friends when they met Respondent. Complainant reported that prior to the party she pre-gamed with Witness 1 and they split a bottle of prosecco. Complainant stated that while at the party, Respondent and Witness 2 approached her and her friend, Witness 3, and asked if they would be their partners in a round of beer pong. Complainant reported that she paired up with Respondent and they played several rounds. She further alleged that that Respondent was the one who filled their cups. Complainant stated that she “got drunk fast” and her last memory was of Respondent handing her a celebratory shot because they had won the tournament. Her next memory was waking up on a couch in a bedroom that was unfamiliar to her, naked from the waist down. Respondent was on the floor next to her, asleep. He was under a blanket but was also naked.

”

Witness 1

Witness 1 was interviewed by the investigator and reported that she and Complainant are roommates, but they are not close. Witness 1 is an athlete and tends to hang out with her teammates. She stated that for this reason, they rarely hang-out, but that the night of the alleged incident they did because they were planning on going to the same party. Witness 1 stated that they split a bottle of prosecco, but that Complainant drank most of it because Witness 1 had an early practice the next morning and didn't want to get "too messed up." Witness 1 said that they went to the party together, but then went their separate ways. Witness 1 stated that towards the end of the night, she saw Complainant and described her as "a disaster." She also reported that Respondent was "practically carrying her" and she approached them and offered to take Complainant home. According to Witness 1, Complainant said she was fine, but her words were slurred, and she could barely stand. Witness 1 told Respondent to take care of her and he said, "I'm just going to put her to bed." She didn't see either party again that night.

At the hearing, Witness 1 gave testimony that was substantially the same as what she told the investigator.

Witness 2

Witness 2 told the investigators that he is Respondent's best friend and teammate. Witness 2 stated that when looking for partners for the beer pong tournament, Respondent saw Complainant and Witness 3 and suggested that they approach them because Complainant "was hot" and Witness 3 "looked drunk enough to be a good time." Witness 2 said that Complainant was fine and didn't appear to be that drunk. He also stated that she made most of the winning shots after several rounds of the game so she couldn't have been too messed up. When asked who was filling the cups, he said that he wasn't sure who did it each round, but he definitely saw Complainant fill them on two occasions. After the tournament was over, he helped Witness 3 get home and so didn't see Complainant and Respondent again that night. He also mentioned that he and Witness 3 are now dating.

At the hearing, Witness 2 testified that Complainant was fine. He also stated that Respondent never filled Complainant's cup and that Complainant was all over Respondent the entire night.

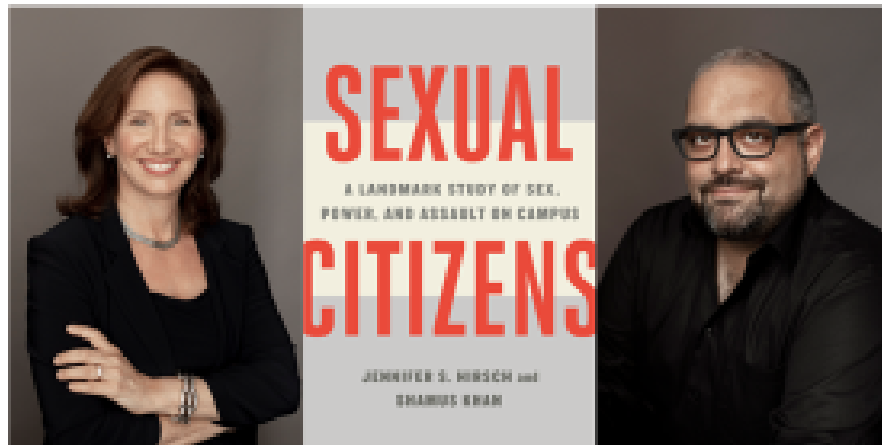
Witness 3

Witness 3 was Complainant's best friend at the time of the incident. They are no longer close and Witness 3 is now dating Witness 2.

Immediately following the alleged incident, Witness 3 told the investigators that Complainant was already drunk when she got to the party. She stated that Respondent and Witness 2 asked them to play beer pong and they agreed. She stated that the parties seemed to hit it off immediately. She stated that they won the tournament and so played at least five rounds and that by the end of the game Complainant was the "drunkest she had ever seen her." Witness 3 stated that Complainant was slurring her words, couldn't stand on her own, and was really loud, which is not like her. Witness 3 stated that that she was pretty drunk too, but not as bad as Complainant. Witness 3 stated that she left the party with Witness 2.

At the hearing, Witness 3 stated that she may have exaggerated her description of Complainant when she spoke to the investigators. She told the decision makers that although Complainant drank a lot, she wasn't that out of it, because she had a high tolerance and drank a lot all the time.

Save the Date!



Sexual Citizens SPACE Toolkit: A Discussion with the Authors

Hosted by Grand River

May 31, 2022, 2 PM Eastern

Register here!



Upcoming Trainings

Clery Act Training: Higher Education Act Campus Safety Obligations

May 10, 12, 17 & 19, 2022, noon eastern

June 8 & 9, 2022, noon eastern

From One Title IX Coordinator to Another

September 6 & 7, 2022, noon Eastern

Decision Makers: Conducting Fair, Equitable, and Compliant Title IX Hearings

October 25 & 26, 2022, noon Eastern

Title IX Investigative Report Writing Workshop

Classes in April, August, and November

Conducting Fair, Thorough, and Trauma-Informed Sexual Violence Investigations

Classes in August and October

Driving Down the 493: A Deep Dive into a California Law and Its Overlap with Title IX

June 24, 2022 noon Pacific

Questions?

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CLERY ACT TRAINING: HIGHER EDUCATION ACT CAMPUS SAFETY OBLIGATIONS

DAY 1

Joseph C. Storch



**Senior Director of Compliance
& Innovation Solutions**

he/him/his

MEET YOUR FACILITATOR

Joseph Storch

Joseph Storch is the Senior Director of Compliance and Innovation Solutions for Grand River Solutions where he concentrates on developing new solutions for safety and equity challenges. He previously served as Associate Counsel at SUNY where, in addition to his legal work, he raised more than \$20 million in external funding for legal and compliance innovations. Joe twice served as an expert witness before the United States Senate, drafted bipartisan federal and state campus safety legislation, received the NACUA First Decade and City & State 40 Under 40 awards, and is the author of more than 75 articles and book chapters, most centering around campus safety and copyright law.

ABOUT US

Vision

We exist to create safe and equitable work and educational environments.

Mission

To bring systemic change to how school districts and institutions of higher education address their Clery Act & Title IX obligations.

Core Values

- Responsive Partnership
- Innovation
- Accountability
- Transformation
- Integrity

AGENDA Clery Act

- Brief History of the Clery Act
- How the Clery Act is regulated and recent changes
- The Clery Act and Title IX
- Geography
 - On Campus
 - Residential
 - Public Property
 - Non-Campus
 - Separate and Distant Locations
- Crime Definitions
 - Primary Crimes
 - Drug, Alcohol, and Weapons
 - Hate Crimes
 - VAWA Crimes
 - Overlaps and Hierarchy Considerations
- Security Authorities The Annual Security Report (ASR)
- The VAWA Amendments to the Clery Act
- Accountability and Prevention
- The Crime Log
- Timely Warnings and Emergency Notifications
- The ASR Versus Immediate/Timely Notifications (Applying the Factors)
- Missing Persons
- Fire Reporting
- Clery Act Program Reviews
- Putting It All Together

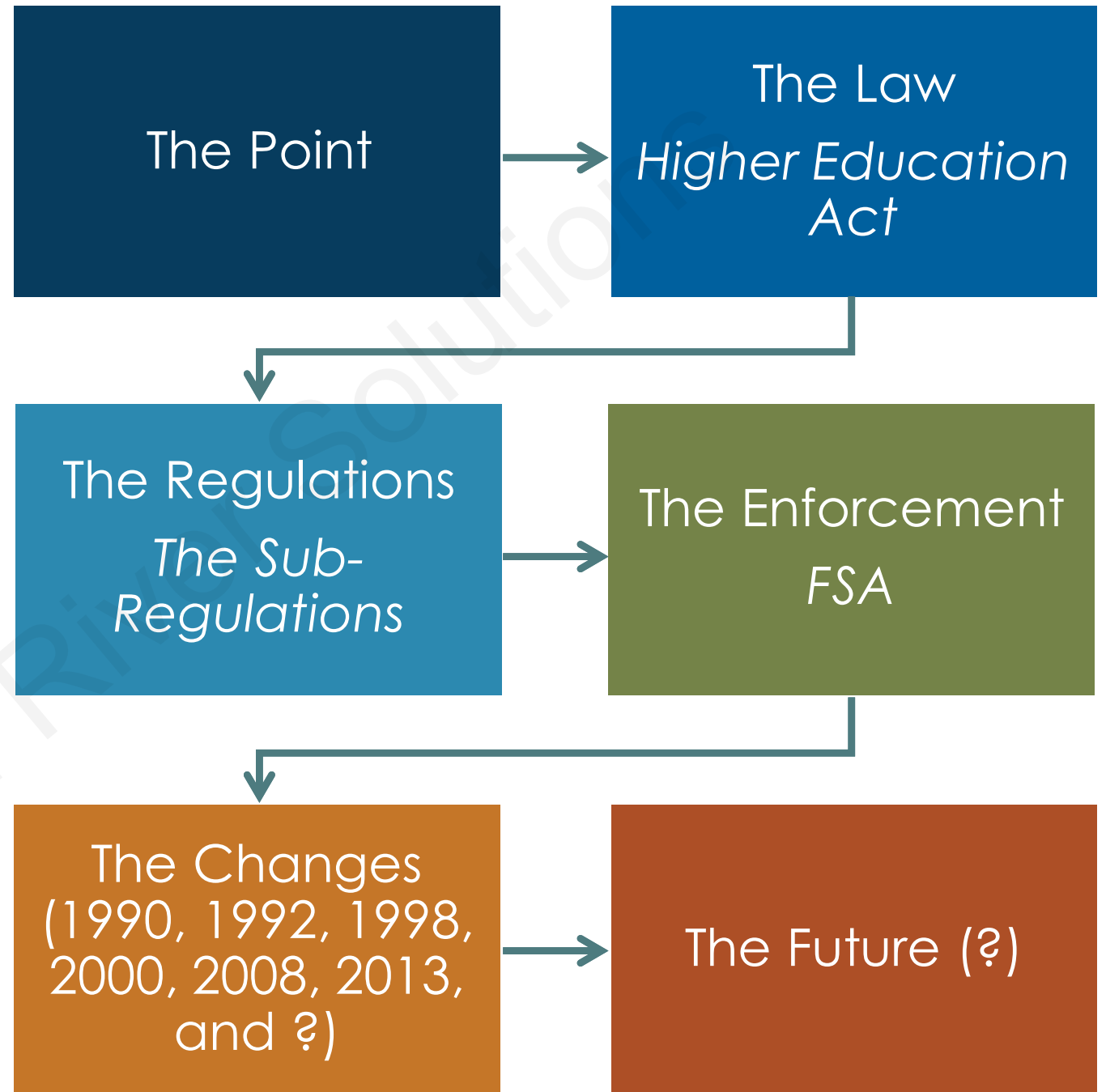
HISTORY OF THE CLERY ACT



01

Grand River

HISTORY

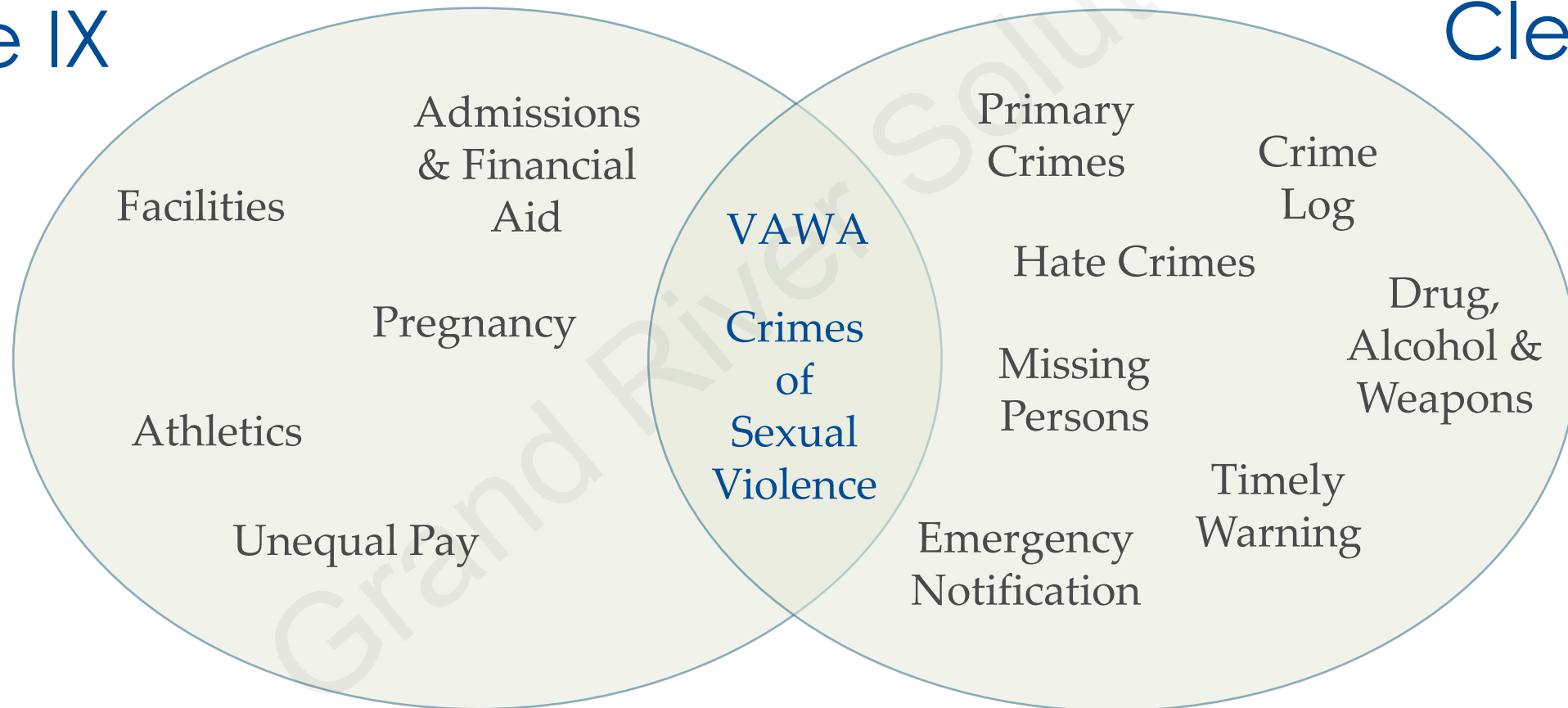


OVERLAPS

The Clery Act is not Title IX
2013 VAWA amended the Clery Act (they are not separate).

Title IX

Clery Act



(CERTAIN) STATE LAW, VAWA RESPONSE, AND TITLE IX

- Significant overlap on the response requirements after sexual and interpersonal violence.
- Federal law > state law.
 - Different states have very different approaches—this will continue
- Different coverage.
- Different definitions.
- Different requirements in process.

CLERY HANDBOOK (REST IN PEACE?)

A brief history:

- Law passes in 1990
 - First Handbook in 2005 (200 pages)
 - Second Handbook in 2011 (285 pages)
 - Latest Handbook in 2016 (265...?)
- Was the Handbook “law?” No, but...
- Some major 2016 Handbook Changes
 - Some required by statutory/regulatory changes; some not

CLERY HANDBOOK (REST IN PEACE)

- October 2020, Handbook withdrawn

[Knowledge Center Home](#) > [Library](#) > [Electronic Announcements](#) > Rescission of and Replacement for the 2016 Handbook for Campus Safety and Security Reporting

Rescission of and Replacement for the 2016 Handbook for Campus Safety and Security Reporting (Updated Jan. 19, 2021)

 Print

POSTED DATE: October 09, 2020

AUTHOR: Office of Postsecondary Education

SUBJECT: Rescission of and Replacement for the 2016 Handbook for Campus Safety and Security Reporting (Updated Jan. 19, 2021)

Note: On Jan. 19, 2021, we replaced the “Clery Act Appendix for FSA Handbook” attachment to this announcement.

This electronic announcement addresses the rescission of and replacement for the 2016 Handbook for Campus Safety and Security Reporting (“2016 edition”). This announcement also identifies and explains the significant changes between the 2016 edition and the new Clery-related Appendix of the Federal Student Aid (FSA) Handbook.

LET'S TALK STATUTE/REGS

- These are the authoritative obligations under the Clery Act
- Statute (part of Higher Education Act): 20 U.S.C. §1092(f)
- Regulations: 34 C.F.R. § 668.46
 - Everything else is guidance (that doesn't mean we don't take it seriously)
 - I am still going to use the Handbook for some aspects of this training.
 - Rescinded but not repudiated
 - What this means...
 - Be careful with the Appendix!

HOW I THINK ABOUT THE CLERY ACT...

- The Community
 - Core Actors
 - Information Feeders
- Which is the most important role?

Compliance  **The Point of the Law**

WHERE: GEOGRAPHY

02

GEOGRAPHY

Clery does
not require
you to report
crimes based
on WHO

Clery requires
you to report
crimes based
on WHERE

VAWA
Response is
different

LOCATION, LOCATION, LOCATION

Four Geographic Locations:

1

On Campus

2

On Campus Residential

3

Public Property (adjacent to
AND accessible from)

4

Non Campus

(note the distinction between
Clery and Title IX Final Rule)

ON CAMPUS

- Standard On Campus
- If institution owns/controls property adjacent to campus, count as on campus



ON CAMPUS

- ED's Handbook take on control for buildings owned by an associated entity (foundation, holding company, subsidiary, alumni association, athletic booster club, etc.) if is used to support educational purposes (2-3, 26).
- Institution owned or controlled hospital or medical centers
 - “overlapping faculty/doctors, overlapping boards of directors or officers, use of the hospital or medical center as part of the institution's educational program, geographic proximity, an ongoing relationship between the institution and the hospital, and whether students consider the hospital or medical center to be part of the campus” (2-3, 26).

ON CAMPUS

- What is reasonably contiguous?
- One mile rule???
- Handbook v. Appendix



ON CAMPUS

- Branch and Separate Campuses (Handbook)
 - Branch Campus Definition- useless; any branch campus is a separate campus
- Separate Campus Definition:
 - Organized Program of Study
 - Administrative Personnel on Site
- Some thoughts...

ON CAMPUS RESIDENTIAL

Reportable crimes in residence halls are
“always” counted twice, once in On Campus,
once in Residential

Handbook versus Regs

This is important

PUBLIC PROPERTY (ADJACENT TO AND ACCESSIBLE FROM)

- Public Property
- **Statute:** “Public property. All public property, including thoroughfares, streets, sidewalks, and parking facilities, that is within the campus, or immediately adjacent to and accessible from the campus.”



PUBLIC PROPERTY (ADJACENT TO AND ACCESSIBLE FROM)

- Public Property
 - Sidewalk, Street, Sidewalk
 - One mile into the water (maybe)
- *But...*

LOCATION, LOCATION, LOCATION

Specifically disclaimed in October 2020

“As an example of our revised approach, the Department will no longer apply any specific measurable distance definition to “reasonably contiguous” geographic area. For example, the 2016 edition states that, with some exceptions, “generally speaking, it is reasonable to consider locations within one mile of your campus border to be reasonably contiguous with your campus.” (Pg. 2-3) The 2016 edition similarly advises that, with limited exceptions, institutions “extend the reporting area one mile into the area of” a public park and “a river, lake, ocean, etc., that borders your campus.” (Pg. 2-15) This is an expansion of the scope of the Clery Act and goes beyond any reasonable expectation a student or parent might have regarding the institution’s responsibility for ensuring student safety.”

NON CAMPUS

- Applies whether 10 miles away or 1,000 miles away
- Two types of Non Campus property (that have nothing to do with each other). This is in the Regulations.
- *Any building or property owned or controlled by a student organization that is officially recognized by the institution; or Any building or property owned or controlled by an institution that is used in direct support of, or in relation to, the institution's educational purposes, is frequently used by students, and is not within the same reasonably contiguous geographic area of the institution.*



NON CAMPUS: TWO TYPES

1

Any building or property owned or controlled by a student organization that is officially recognized by the institution; or

2

Any building or property owned or controlled by an institution that is used in direct support of, or in relation to, the institution's educational purposes, is frequently used by students, and is not within the same reasonably contiguous geographic area of the institution.

NON CAMPUS

Examples of Non Campus buildings:

- Research facilities (only if frequently used by students).
- An off-campus student housing facility owned by a third party (e.g. hotel or apartment complex) that has a written contract with your campus to provide student housing or one owned by the institution but not within the same “reasonable contiguous geographic area” as the institution.
- A publicly owned athletic stadium that is leased by the campus.
- Classes for students in an owned, rented, or leased location.
- Institutionally owned research boats/ships/vans carrying students participating in institutional programs (Handbook).

NON CAMPUS- AHOY!

•Examples of Non Campus buildings:

- 2005 Handbook- Ships
- 2011 Handbook- Ships and Boats (research vessels)
- 2016 Handbook- Ships, Boats, and Vans (carrying students who are participating in institutional programs)
- Not in Regs or Statute



NON CAMPUS- INTERNATIONAL

•Examples of Non Campus buildings:

- 2005 Handbook- essentially silent
- 2011 Handbook- Hotels
- 2016 Handbook- Expanded
- October 2020- disclaimed (some relevant Court cases)
- Not in Regs or Statute
- But...what ED currently says...



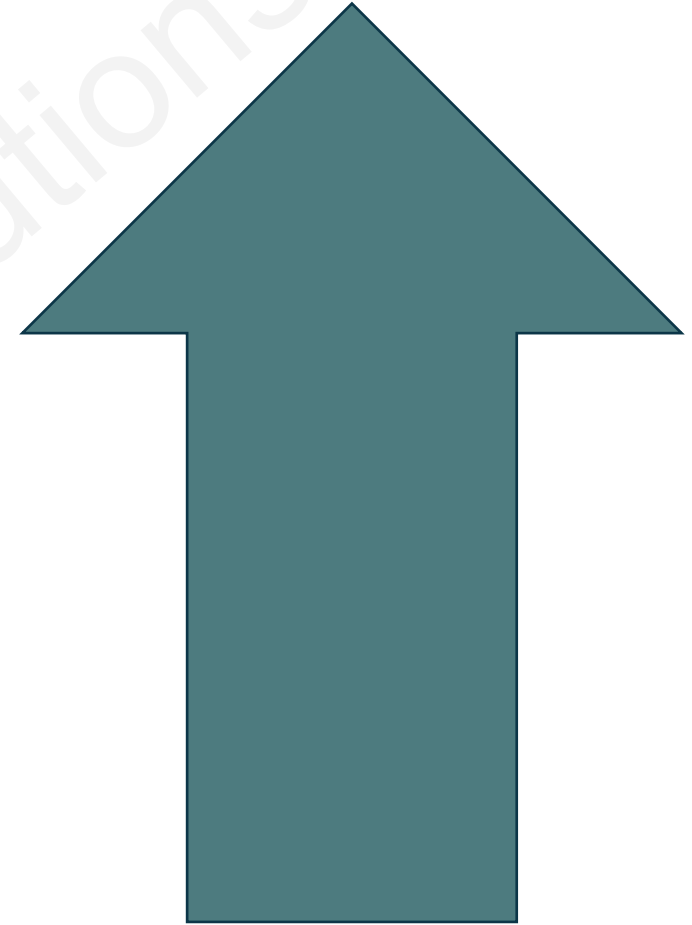
NON CAMPUS- DOMESTIC DISTANCE

- Not as clear, gray area
- Some considerations:
 - Hotels
 - Field Trips, student-organized, one overnight
 - Whose trip is it anyway?
- Tracking?



THE UPSHOT?

- Clergy only takes notice (for reporting and notification purposes) of crimes that occur in certain geographic locations.
- **But...**



WHAT: CRIME DEFINITIONS



03

Grand River

WHAT WE REPORT (HANDBOOK)

- Statistics that count Clery reportable crimes and certain referrals (not everything that happens).
- Crimes disclosed based on year crime is reported
 - Regardless of what year or when in the year the crime occurred
- Status of victim and perpetrator is irrelevant
- Do not differentiate between attempted and completed crimes
 - Conviction or plea (or even arrest) or finding of responsibility is not necessary

WHAT WE REPORT

- The Clery Act sets a floor...but be cautious about going above and beyond... (at least formally in the ASR)
- ED can audit on the contents of the ASR, even if not required...



WHAT WE REPORT

- **Report Crimes**
 - Federal definitions
 - UCR and NIBRS as “influencers”
 - Hierarchy rule applies (with exceptions)
- **Referrals for drugs/weapons/alcohol**
 - Local jurisdiction definitions
 - Has to be a crime (not just a violation of institutional policy)
 - Cannabis violation
 - Weapons violation
 - Alcohol possession by an of age student
- **Some overlaps (be aware)**

REPORTABLE PART I CRIMES – POST VAWA

**Note loss of forcible/ non-forcible
language
(good riddance)**

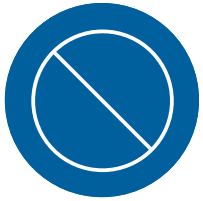
- **Criminal homicide:**
 - Murder and non-negligent manslaughter,
 - Negligent Manslaughter/Manslaughter by Negligence.
- **Sex offenses:**
 - Rape,
 - Fondling,
 - Incest, and
 - Statutory rape.
- **Robbery.**
- **Aggravated assault.**
- **Burglary.**
- **Motor vehicle theft.**
- **Arson.**

PART II ARRESTS/REFERRALS

Use:

Local definitions:

Must be an **actual violation** of local law



Illegal
Weapons
Possession



Drug Law



Liquor Law

PART II ARRESTS/REFERRALS HIERARCHY (HANDBOOK)

1. Weapons Arrest
2. Drug Arrest
3. Alcohol Arrest
4. Weapons Referral
5. Drug Referral
6. Alcohol Referral

- If concurrently arrested and referred for same crime or for different crimes, count arrest (per regulations).
- If arrested or referred for multiple counts of drug and/or alcohol and/or weapons at same time, count only one.
- If arrested or referred at different times, count each separate time.
- Count number of people arrested/referred for violation of law.
- Do not count based on institutional policy.

REFERRAL FOR DISCIPLINE

- **Referred for disciplinary action is defined as:** *“the referral of any person to any campus official who initiates a disciplinary action of which a record is kept and which may result in the imposition of a sanction.”*
- Might be called: **“disciplinary action,” “mediation,” “judicial process”**, etc.
- The referral may, but doesn’t have to, originate with the police.
- Regardless of what you call it, if the process involves the following three criteria, it’s a disciplinary action under Clery:
 1. The official receiving the referral must initiate a disciplinary action,
 2. A record of the action must be kept, and
 3. The action may, but does not have to, result in a sanction.
 - Note that a disciplinary action can be initiated in an informal as well as a formal manner. It can include an interview or an initial review of names submitted to an official.

PART III

HATE CRIME REPORTING

All Part I crimes, plus new four Hate Crimes counted as hate crimes if motivated by bias and recorded by category of bias.

1. Larceny-theft
2. Simple assault;
3. Intimidation; and
4. Destruction, damage, or vandalism of property

REGULATIONS

Hate crime.

“A crime reported to local police agencies or to a campus security authority that manifests evidence that the victim was intentionally selected because of the perpetrator's bias against the victim. For the purposes of this section, the categories of bias include the victim's actual or perceived race, religion, gender, gender identity, sexual orientation, ethnicity, national origin, and disability.”

HATE CRIME REPORTING

Hate Crimes are
a Part III

Part I crimes
motivated by bias
counted at least
twice, once in Part
I and once in Hate
Crime (can be
more than twice
depending on
facts).

Can report in
table or narrative

1. LARCENY-THEFT

“the unlawful taking, carrying, leading, or riding away of property from the possession or constructive possession of another.”



2. SIMPLE ASSAULT

“an unlawful physical attack by one person upon another where neither the offender displays a weapon, nor the victim suffers obvious severe or aggravated bodily injury involving apparent broken bones, loss of teeth, possible internal injury, severe laceration, or loss of consciousness.”

- Different from aggravated assault

3. INTIMIDATION

“to unlawfully place another person in reasonable fear of bodily harm through the use of threatening words and/or other conduct, but without displaying a weapon or subjecting the victim to actual physical attack.”

Reasonable fear: presumed if reported, can be denied (ask the question).
Victims need not be intended target of the offender.

Includes cyber-intimidation if victim is threatened on Clery geography.

4. DESTRUCTION, DAMAGE OR VANDALISM OF PROPERTY

“to willfully or maliciously destroy, damage, deface, or otherwise injure real or personal property without the consent of the owner or the person having custody or control of it.”

Examples: cutting tires, obscene graffiti, smashing windows, defacing library books (when in context of a hate crime)



CATEGORIES OF BIAS

Only count if it fits these groups.
The categories of bias were initiated in HEOA and changed by VAWA.

Race (2008 HEOA)

Gender (2008 HEOA)

Religion (2008 HEOA)

Sexual Orientation (2008 HEOA)

Ethnicity (2008) & National Origin (2011 Handbook)

Disability (2008 HEOA)

Gender Identity (2013 VAWA)

National Origin (2013 VAWA)

HATE CRIMES REPORTING IN PRACTICE

Attempted or completed crimes count equally.

Actual or perceived member of the protected group.

Perception of the offender, not the victim, makes it qualify as a Hate Crime.

Evidence of prejudice insufficient; must have evidence that prejudice motivated **this** crime.

Case-by-case assessment of the facts (every case must be investigated).

Some overlaps



HATE CRIMES REPORTING IN PRACTICE

THE UPSHOT
(AND HOW TO THINK
ABOUT OVERLAPS)

THE VAWA AMENDMENTS TO THE CLERY ACT: REPORTABLE INCIDENTS

VAWA Amendments (2013-14)

- VAWA was a vehicle to amend Higher Education Act
- These definitions do not rely on VAWA being reauthorized
- But, the definitions are pulled from VAWA
 - So are the Title IX VAWA definitions
 - But not exactly in the same way
 - In 2020, this got weird
- Notification in ASR (state) versus counting and response (federal)

THE VAWA AMENDMENTS TO THE CLERY ACT: REPORTABLE INCIDENTS

VAWA Amendments (2013-14)

- Hierarchy rule doesn't apply to Part IV
- Mini-hierarchy:
 - Domestic Violence
 - Dating Violence
- Stalking not included in mini-hierarchy



VAWA REPORTABLE INCIDENTS

Dating Violence

The term dating violence means “violence committed by a person—

- A. who is or has been in a social relationship of a romantic or intimate nature with the victim;
- B. the existence of such a relationship shall be determined based on the reporting party's statement and with consideration of:
 - I. The length of the relationship;
 - II. The type of relationship; and
 - III. The frequency of interaction between the persons involved in the relationship”

DATING VIOLENCE

For the purpose of this definition:

- Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
- Dating violence does not include acts covered under the definition of domestic violence.

VAWA REPORTABLE INCIDENTS

Domestic Violence (Regulations, Appendix A)

The term domestic violence is a “felony or misdemeanor crimes of violence committed

- A. by a current or former spouse of the victim,
- B. by a person with whom the victim shares a child in common,
- C. by a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner,
- D. by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the violence occurred, or
- E. 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 in which the crime of violence occurred.

SEXUAL ASSAULT

“An offense that meets the definition of rape, fondling, incest, or statutory rape as used in the FBI’s UCR program and included in Appendix A of this subpart.”

SEX OFFENSES

- Any sexual act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent.
- Consent is NOT defined in the regulations

SEX OFFENSES

A. Rape — The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.

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

C. Sexual Assault With an Object — The use of an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

SEX OFFENSES

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

E. Incest — Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

F. Statutory Rape — Nonforcible sexual intercourse with a person who is under the statutory age of consent.

Forcible/Non-Forcible language is out (good riddance).

VAWA REPORTABLE INCIDENTS

STALKING

- The term stalking means “engaging in a course of conduct directed at a specific person that would cause a reasonable person to—
 - A. fear for the person’s safety or the safety of others; or
 - B. suffer substantial emotional distress.

STALKING

- **Pattern of incidents**
 - Course of conduct means two or more acts
- **Substantial emotional distress**- significant mental suffering or anguish that may, but does not necessarily, require medical or professional treatment or counseling.
- Reasonable person in the situation and identities of the victim.
- Count based on location that victim first becomes *aware* or incident was perpetrated (if known)
- Count in year first reported (this seems obvious)
- Count again if the behavior continues after an official intervention by the college or by a court

VAWA CRIMES, TITLE IX, AND STATE LAW

- Thinking about overlaps: some state laws and Title IX adopt Clery definitions (sort of)
- Multiple obligations stemming from a specific report
- We can meet these differing obligations
- Overlap with hate crime definitions
- Importance of record-keeping, information-sharing, and getting on same page

A NATIONAL SURVEY

As part of the **2022 Omnibus bill**, Congress will require the Department of Education to create and administer a survey of all students at all colleges and universities receiving federal funds.

- Institutions can customize
- Created with input from experts
- National and institution-specific reports

10 is authorized to be appropriated to carry out this section
11 \$10,000,000 for fiscal years 2023 through 2027.”.

12 **SEC. 1507. ONLINE SURVEY TOOL FOR CAMPUS SAFETY.**

13 (a) IN GENERAL.—The Secretary of Education, in
14 consultation with the Attorney General, the Director of
15 the Centers for Disease Control and Prevention, the Sec-
16 retary of Health and Human Services, and experts in do-
17 mestic violence, dating violence, sexual assault, sexual har-
18 assment, and stalking, shall develop, design, and make
19 available through a secure and accessible online portal, a
20 standardized online survey tool regarding postsecondary
21 student experiences with domestic violence, dating vio-

BUT THERE'S A PROBLEM

As part of the **2022 Omnibus bill**, Congress will require the Department of Education to create and administer a survey of all students at all colleges and universities receiving federal funds.

- Sexual and interpersonal violence and harassment cannot be measured in “restaurant sanitation grades” comparative safety



A NATIONAL SURVEY?

Taking Stock of the Survey – Advantages and Challenges of a National Climate Survey

A National Climate Survey Requirement

The 2022 federal Omnibus legislation¹ included a new requirement that the U.S. Department of Education (the Department) develop and administer a climate survey of college student experiences with domestic violence, dating violence, sexual assault, sexual harassment, and stalking at all colleges and universities that accept federal funds.

This lofty goal may prove challenging, however. The actual timeline of the development and administration of the survey is unclear. The Department must assemble specialists to research, develop the survey, provide an

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Federal Climate Survey Could Be Counterproductive

While campus-level climate surveys are important, a new national survey mandated by Congress could undermine the goal of creating safer campuses, Joseph Storch writes.

By Joseph Storch
Published July 19, 2022

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VAWA CRIME RESPONSE

05

Grand River

MERGING TITLE IX INTO CLERY

- Violence Against Women Act Legislative History
- 2013 – Passed in February and signed by the President on March 7
- Regulatory History
 - June 2014 – proposed regulations issued
 - October 2014 – final regulations
 - July 1, 2015 – regulations in effect
- 2022 VAWA History
 - Passed as part of Omnibus — some potential changes
- **VAWA and HEA are separate**

VAWA AND CLERY REPORTING

stalking, as required by paragraph (k) of this section; and

(vii) A statement that, when a student or employee reports to the institution that the student or employee has been a victim of dating violence, domestic violence, sexual assault, or stalking, whether the offense occurred on or off campus, the institution will provide the student or employee a written explanation of the student's or employee's rights and options, as described in paragraphs (b)(11)(ii) through (vi) of this section.

(12) A statement advising the campus community where law enforcement

- Title IX (historically) and VAWA response are not based on geography, they are based on identity (usually).
- Title IX (current) response and Clery counting are based on geography

VAWA EXTRAS – NEW OBLIGATIONS BEYOND COUNTING CRIMES.

- Policy statements, which include new obligations:
- Encouraging prompt reporting
- Fair disciplinary procedures (institutional response)
 - Advisors of choice
 - Standard of evidence
 - List all sanctions for VAWA crimes
 - Information and notice in writing to reporting individuals, to all parties, and to the entire community
- Training (education programs re VAWA crimes)

VAWA DISCIPLINARY PROCEDURES MUST:

- Produce a fair, prompt, and impartial investigation and resolution;
- Be conducted by “officials” who receive “annual training.”



ACCESS TO AN ADVISOR OF CHOICE, WHO MAY BE AN ATTORNEY

- Only required to allow the advisor to be an attorney in cases of
 - Sexual assault
 - Dating violence
 - Domestic violence
 - Stalking
- Consider and implement permitted restrictions
 - “Potted plant” (*But see Title IX Final Rule)
 - Scheduling conflicts/extensions



REQUIRES PUBLICATION OF ALL AVAILABLE SANCTIONS

- *Not a range* (ignore prior OCR statements, since withdrawn, that institutions can use a range).
- Must specifically list all available sanctions for:
 - Domestic violence; Dating violence; Sexual assault; Stalking
- **For suspension, list ALL possible suspension lengths.**
- **These standards apply to student discipline and faculty/staff discipline.**

PUBLISH THE STANDARD OF EVIDENCE (WHATEVER IT IS)

- Clery Handbook says:
Publish a statement of the standard of evidence that will be used (2016 Handbook 8-16).
- OCR Title IX standards.*
- All or nearly all institutions use
 - Preponderance of the Evidence
- **But...**



PROVIDING WRITTEN NOTICE

- Institutions must provide written information to all students and employees;
 - Certain information must be provided in writing to victims*;
and
 - Certain information must be provided in writing to both the accused and the victim.
- *Regulatory language



PROVIDING WRITTEN NOTICE

Written policy provided to all students and employees must include everything in Victim Notification (forthcoming slides), and information regarding:

Education programs to promote awareness about these crimes;

Confidentiality available for victims;

Existing health, victim advocacy, counseling, and other services;

Disciplinary procedures; and

Equitable opportunities for victim and accused.

PROVIDING WRITTEN NOTICE

Written policy provided to all students and employees must include everything in Victim Notification (forthcoming slides), and also information regarding:

- **Disciplinary procedures**

- Fair, prompt, impartial investigation and resolution;
- Conducted by “officials” who receive “annual training.”
- A note on “official”:
 - *We believe this does not exclude students from serving. Regulations and oral ED guidance are consistent with our interpretation (Title IX consistent).*

PROVIDING WRITTEN NOTICE

Written policy provided to all students and employees must include everything in Victim Notification (forthcoming slides), and also information regarding:

- **Equitable opportunities for victim and accused**
 - Accused and victim are entitled to the same opportunities to have others present during the institutional disciplinary process (hearing and other meetings).
 - Regulations make clear that all parties must have the right to have any advisor, including an attorney, present at the hearing and related meetings.

PROVIDING WRITTEN NOTICE

Must notify victim in writing about:

Sanctions, protective measures;

Evidence preservation;

How to report the offense, on and off campus, and assistance with reporting;

Availability of orders of protection, no contact orders, etc.;

Interim remedies, including options for and assistance with changing academic, living, transportation, and working situations, if requested and reasonably available;

Procedures for institutional disciplinary proceedings.

PROVIDING WRITTEN NOTICE

Notify the parties simultaneously and in writing about:

- The outcome of an institutional disciplinary proceeding;
- Procedures for appealing the results, if any;
- Any interim results (pre-appeal);
- When the results become final.

PROVIDING WRITTEN NOTICE

Note: *Title IX Final Rules don't change these Clery policies.*

- Belt and suspenders (ish)
 - May change approach within rules
 - May change nomenclature

MORE FROM THE POLICY STATEMENTS

- **Education programs shall include “primary prevention and awareness programs for all incoming students and new employees,” which shall include:**
 - statement prohibiting domestic violence, dating violence, sexual assault, & stalking;
 - definition of domestic violence, dating violence, sexual assault, & stalking in the applicable jurisdiction;
 - definition of consent, in reference to sexual activity, in the applicable jurisdiction;
 - safe and positive options for bystander intervention that may be carried out by an individual to prevent harm or intervene in cases of a risk of domestic violence, dating violence, sexual assault, or stalking;

MORE FROM THE POLICY STATEMENTS

- **Education programs shall include “primary prevention and awareness programs for all incoming students and new employees,” which shall include:**
 - safe and positive options for bystander intervention that may be carried out by an individual to prevent harm or intervene in cases of a risk of domestic violence, dating violence, sexual assault, or stalking;
 - information on risk reduction to recognize warning signs of abusive behavior and how to avoid potential attacks; and
 - ongoing prevention and awareness campaigns for students and faculty on all of the above (subject to regulations and ED guidance).

MORE FROM THE POLICY STATEMENTS

- Can use programs “informed by research” (8-4, 165; VAWA regs).
- Can meet more than one requirement in a single training.
- **Note:**
 - There is no requirement that you use or buy any specific program, software, or “solution.”
 - There is no requirement that you spend at least \$X.
 - More expensive ≠ better for students.
 - Proven or promising. There is really good work being done by great, deeply dedicated organizations.

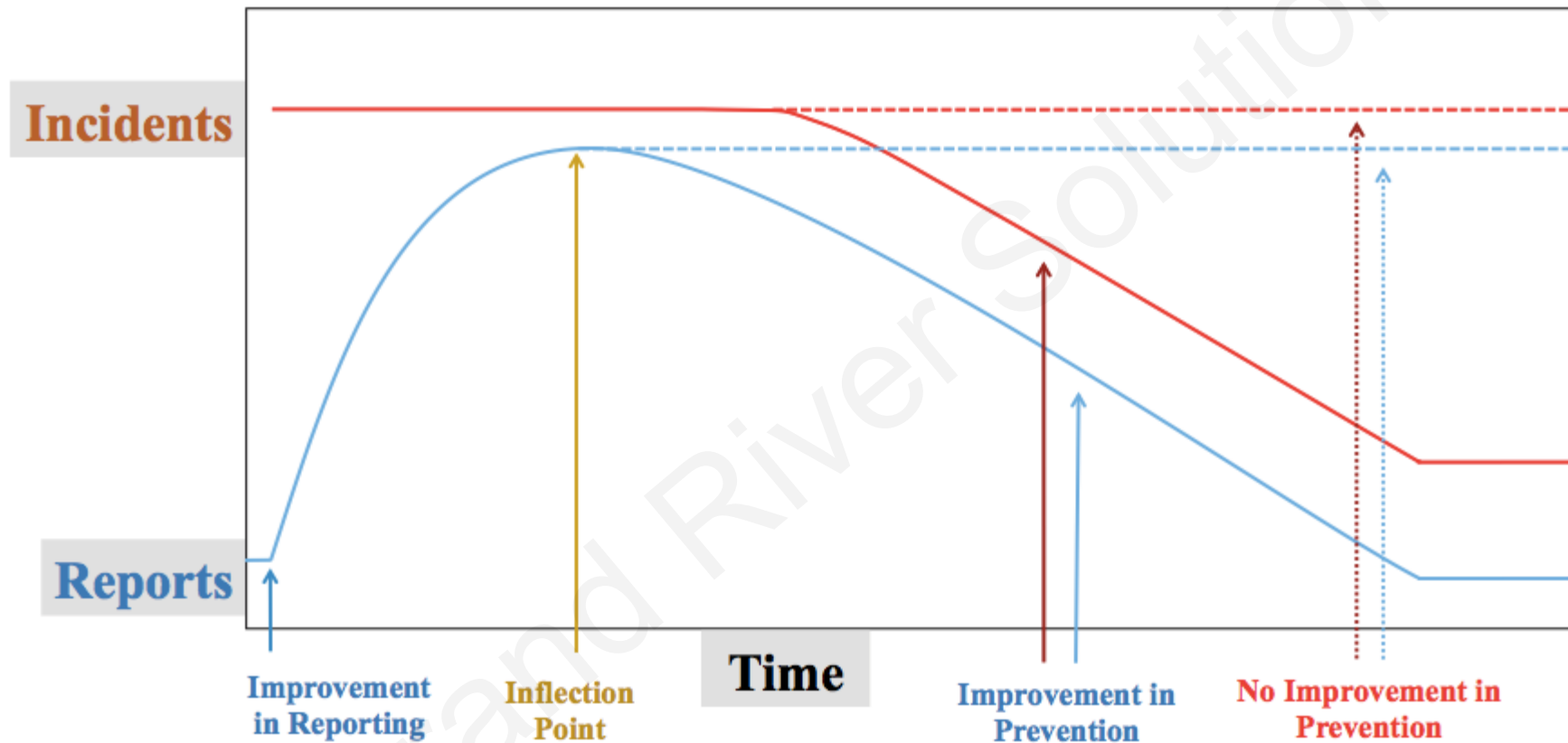
VIOLENCE AGAINST WOMEN ACT

In short:

- Training, training, training...
- Awareness programs
- Bystander intervention training
- Ongoing prevention and awareness campaigns
- Primary prevention programs
- Risk reduction training (this is the one I often see not included)



ONBOARDING/TRAINING



Inside Higher Ed Article: <https://www.insidehighered.com/views/2016/03/14/colleges-must-not-only-respond-reports-sexual-violence-also-prevent-it-essay>

***Stream Model of
Sexual and
Interpersonal
Violence Prevention
and Response***

Upstream

- Culture of Respect
- Green Dot/Bringing in the Bystander/MVP
- Orientation/Policy Training
- VAWA Campaign and Prevention Programming;
Programming such as One Love Campaign
- Students Run Bystanders Intervention
at Parties (Cornell's Cayuga's Watchers)

Incident Occurs

— Response: Disclosure (confidential and private),
Health, Mental Health, Housing Accommodations,
Academic Accommodations.

Downstream

- Reporting to Title IX, Conduct
and/or Law Enforcement
- Investigation and college and/or criminal justice process,
resolution and further training or policy changes
- Clery Act Reporting, if applicable

Inside Higher Ed Article: <https://www.insidehighered.com/views/2016/03/14/colleges-must-not-only-respond-reports-sexual-violence-also-prevent-it-essay>

EDUCATING CSAS (REDUX)

- Must have policies encouraging accurate and prompt reporting of all crimes to campus police and appropriate law enforcement when the victim of such crimes wants to or is unable to make such a report.
- Colleges should train on new incidents and definitions or include new information in routine Clery CSA training.

ACCOUNTABILITY & REMEDIAL ACTIONS

Why do we address sexual and interpersonal violence?

Grand River Solutions

ACCOUNTABILITY & REMEDIAL ACTIONS

Why do we address sexual and interpersonal violence?

ACCOUNTABILITY & REMEDIAL ACTIONS

Why do we address sexual and interpersonal violence?

- For those who experience violence/harassment
- For those who might experience if left unchecked
- For societal and institutional standards
- Because our institutions do not seek the minimum for behavioral standards

HOW: LEARNING ABOUT CRIMES

04

HOW WE LEARN OF CRIMES

We learn of Clery reportable crimes in two ways



Campus Security
Authorities



Statistics provided by
local law
enforcement

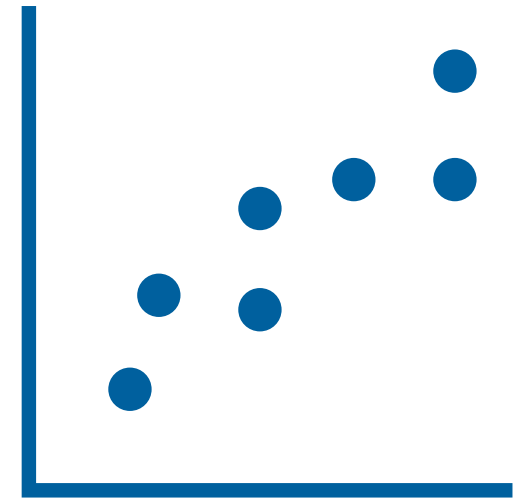
DEFINING AND NOTIFYING CAMPUS SECURITY AUTHORITIES (CSAS)

- **Public Safety** (two prongs)
Department members and others affiliated
- **Faculty/staff** with significant responsibility for students and campus activities (includes housing, discipline)
- **Individuals** specified as those to whom students and employees should report crimes



DEFINING AND NOTIFYING CAMPUS SECURITY AUTHORITIES (CSAS)

- **For those who are covered**
 - Must report to the appropriate personnel any allegations of Clery Act crimes
 - Report the **statistic** regardless of whether the reporting individual wants to speak to the police



DEFINING AND NOTIFYING CAMPUS SECURITY AUTHORITIES (CSAS)

Campus must:

- Annually notify campus security authorities of their status and what is expected of them
- Provide training on what to do when a crime is reported
 - Forward the reports to Public Safety
 - Keep documentation of reported crimes
- Provide definitions of Clery Act crimes and geographic locations
- Designate an individual or office to oversee CSAs and canvas these individuals to include reports in the ASR and to ED

DEFINING AND NOTIFYING CAMPUS SECURITY AUTHORITIES (CSAS)

Does not include:

- Exception: Staff or faculty with little or no student responsibility
 - Would include a faculty or staff member who advises a student club or sport
- Exemption: Pastoral counselors who provide confidential counseling
- Exemption: Professional counselors who provide mental health counseling within the scope of their license or certification
 - Both pastoral & professional counselors must be so acting when they hear the report of a crime (includes interns in these positions).

DEFINING AND NOTIFYING CAMPUS SECURITY AUTHORITIES (CSAS)

- We learn of Clery Act crimes/referrals through two sources:
 - **Campus Security Authorities**
- Storch Modified CSA Training for Busy Staff (**not** endorsed by Dept. of Ed., but meets the Handbook standards):
- **You have been defined or designated as a Campus Security Authority. This means that if you witness, learn of, or hear about a Clery Act crime, you must, as soon as possible, contact ____ and tell them what happened and where it happened;**
- Optional: you may identify the victim or keep the victim's identity confidential.

TITLE IX, CLERY AND FERPA

- What about FERPA (Family Educational Rights and Privacy Act)?
- Exception to FERPA: Share information with a school official with a legitimate educational interest.
- Public Safety/TIXC/Student Affairs qualifies.
- Identified v. de-identified data- remember what each law “needs”
- Counseling and other confidential data- some thoughts on strategy

TITLE IX, CLERY AND FERPA

What about
FERPA?

For all CSA's, in
sharing
information about
crimes, victims and
troubled students,
**FERPA says you
may; Clery says
you must.**

HIPAA generally
does not apply.

TITLE IX, CLERY AND FERPA

The Appendix- institution decision on CSA's is authoritative

CRIME STATISTICS- LOCAL LAW ENFORCEMENT

As long as we are getting information from other sources:

- Send requests for crime statistics to local law enforcement
- Specify what constitutes public and campus property (if applicable) for *Clery Act* reporting purposes
- State that the information is required by the *Clery Act* for disclosure in the ASR and to ED.
- Keep a copy of the request for required *Clery Act* statistics
- Document any response or non-response from local law enforcement
- Good faith means not waiting until the last minute (oral guidance).

UNFOUNDING

- Significant bureaucratic requirements
- *Not* for not guilty or withdrawn claims
- Truly did not happen after a complete and thorough investigation
- Do not need to put in table, can note Unfoundings in paragraph format.

TITLE IX AND CLERY: WORKING TOGETHER

LET'S PUT IT ALL TOGETHER
CSA's/Title IX/Other Offices

REAL TIME NOTIFICATIONS

Getting the Word Out

07

CRIME LOG

Record of all crimes and allegations of crimes

- Maintained by the institution
- May include reportable fires in residence halls and other related items
- Includes crimes that are not Clery reportable
- Enter within two days of when reported to Public Safety
- More specific information and location + disposition (where known)
- Clery geography and “patrol jurisdiction” (where applicable)
- Certain cases can be excluded for a time

TIMELY WARNINGS AND EMERGENCY NOTIFICATIONS

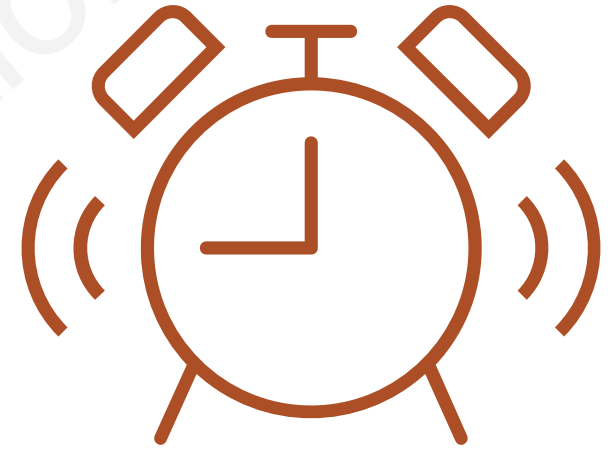
- Two methods of notifying college community about events that impact their safety.
- Significant technical and policy differences.



EMERGENCY NOTIFICATION

Institutions must:

- Have an emergency notification policy;
- Test it at least annually;
- Assess the results of the test; and
- Publicize the system and policy.



If issue emergency notification, need not issue timely warning (must provide adequate follow up information).

EMERGENCY NOTIFICATION

- An emergency notification is “required to immediately notify the campus community upon confirmation of a significant emergency or dangerous situation involving an immediate threat to the health or safety of students or employees occurring on campus.”
- Issue an emergency response notification upon confirmation of an immediate or impending threat to the welfare of the campus community (confirmation does not mean all pertinent details are yet known).
- No prescribed manner or language provided it is complete, accurate and easy to understand (active, not passive).

EMERGENCY NOTIFICATION

Policy/Procedures Include:

- Procedures the institution will use to immediately notify campus upon confirmation of a significant emergency or dangerous situation involving immediate threat to health or safety of students or employees occurring on the campus.
- Description of the process institution will use to
 1. Confirm the existence of a significant emergency or dangerous situation
 2. Determine the appropriate segment or segments of the campus community to receive a notification
 3. Determine the content of the notification
 4. Initiate the notification system

EMERGENCY NOTIFICATION

- Statement that institution will determine content of notification and initiate system:
 - Without delay
 - Taking into account safety of community
 - Unless issuing notification will compromise emergency response efforts **(mandatory statement per Handbook [sub-regulatory and withdrawn] page 102).**
- List titles of those responsible for emergency response notification process
- Institution's procedures for disseminating emergency response information to larger community
- Institutional procedures to test the emergency response and evacuation procedures on annual basis and publish test results.

HANDBOOK EXAMPLES

Incidents
Necessitating
Emergency
Notification:

Outbreak of
meningitis,
norovirus or
other serious
illness

Earthquake

Civil unrest or
rioting

Approaching
tornado,
hurricane or
other extreme
weather
conditions

Nearby
chemical or
hazardous
waste spill

Gas leak

Armed
intruder

Terrorist incident

Bomb threat

Explosion

COVID Guidance

TIMELY WARNING

One which “alert[s] the community to certain crimes in a manner that is timely and will aid in the prevention of similar crimes.”

Institutions must:

- Issue timely warnings; and
- Have a timely warning policy.



TIMELY WARNING

Issue a Timely Warning for:

- Any Clery Act crime (threat to person or property);
- That occurs in your Clery geography;
- That is reported to local police or campus security authority; and
- Is considered by the institution to represent a serious and continuing threat to students and employees.

Exception for reports to pastoral and professional counselors.



TIMELY WARNING

- **Case by case basis** considering all facts surrounding occurrence of a crime, including:
 - Nature of the crime;
 - Whether the crime presents a continuing danger to the campus community; and
 - Risk of compromising law enforcement efforts.
- **When you issue:**
 - No mandated format; distribute in a manner that gets the word out quickly (**active, not passive**).
 - Include in warning information to enable community members to protect themselves.

TIMELY WARNING

Department of Education suggests that your Timely Warning policy:

- Describe circumstances for which a warning will be issued;
- Identify the individual or office responsible for issuing the warning; and
- Describe the manner in which the warning will be issued.



TIMELY WARNING

From the Violence Against Women Act (2013):

- Withhold victims' names as confidential (practically we should have been doing this anyway).
- We may release the name of the accused.
 - Factors to consider.



TIMELY WARNINGS FOR KNOWN OFFENDER SEXUAL ASSAULTS

Timely Warning

- Narrow in scope – Clery Act crimes only (minimally).
- Crimes that occurred in past but constitute ongoing threat.
- Anywhere on your Clery geography.
- To be issued as soon as pertinent information available.



Emergency Notifications

- Wide focus – any emergency.
- Currently occurring emergencies or ones that pose imminent threat to campus community.
- On Campus property only.
- To be issued upon confirmation of a dangerous actual or threatened situation.

TIMELY WARNINGS FOR KNOWN OFFENDER SEXUAL ASSAULTS

A difficult balance

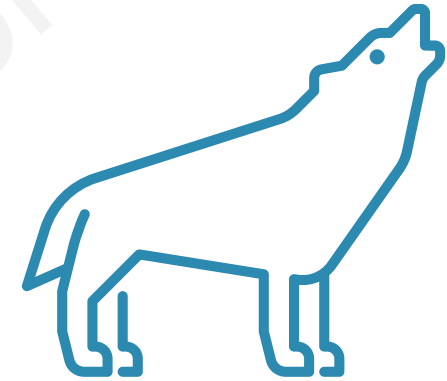
- Written guidance from ED is not very clear as to how much flexibility an institution has (oral guidance has been better)
- When an assailant is arrested, incarcerated, deceased or suspended and banned from campus, or otherwise in the system, do they present a continuing risk?
- Risk of sending too many Timely Warnings cannot be ignored.



TIMELY WARNINGS FOR KNOWN OFFENDER SEXUAL ASSAULTS

Why We Need a More Nuanced Approach

- Boy who cried “wolf”
- Unsubscribe?
- What information is useful
- Timely warnings are not meant to be education (we have VAWA/Clery education requirements)
- As reports increase, the nuance and care becomes more, not less important
- What ED has said...



TIMELY WARNINGS FOR KNOWN OFFENDER SEXUAL ASSAULTS

Findings of Non-Compliance in Clery Program Reviews

Violation where:

- No timely warning policy.
- No policy on who has authority to decide Factor 4.
- Unsolved and unaddressed pattern with no Timely Warnings
- Excessive timeframe where assailants remained on campus for classes or continued to live in a residence hall with no Timely Warnings.
- Cases where a Campus Security Authority did not bring forth a report (and therefore there was no analysis as to whether to issue a warning).
- Lack of documentation.

COMPLIANCE TIPS

For Timely Warnings and
Emergency Notifications

- Assign tasks, and reflect those assignments in Clery policy statements.
- Avoid arrangements that require command level law enforcement personnel to get executive approval to issue warnings.
- Train supervisory staff to issue warnings/notifications in the absence of command staff.
- Document steps you take.
- Test the systems at least annually.
- Thinking about Title IX and Clery Timely Warnings



MISSING PERSONS POLICIES

MISSING PERSONS POLICIES

- Initially passed in 2008 H.E.O.A.
- Part of expanded “Clery.”
- Technical steps required to comply.
- Policy required.
- Two “24 hour” periods in play.
- **Action required.**



MISSING PERSONS POLICIES

- Must provide on-campus residential students with the opportunity to register a confidential missing persons contact.
- Does not cover students living off campus or those who normally live on campus but are temporarily residing off-campus on study abroad.
- If institution has multiple campuses, only those with residence halls are covered.
- This is a floor, not a ceiling. You may cover *more* or even *all* students (practically that's not difficult)

MISSING PERSONS POLICIES

- Policy Statement: Institution will, within 24 hours of receiving a report of a missing residential student, take certain steps to locate students reported missing for 24 hours.
- 1. Include in ASR a list of campus professionals to whom a report of a missing person may be made
 - Advice: limit this list to those trained & available.
 - Note that requirements apply regardless of who receives initial report.

MISSING PERSONS POLICIES

2. Require that reports (from anyone, not just other students) of residential students missing for 24 hours be referred immediately to institution police or security or (if no police/security) to local law enforcement.

Make sure to train campus personnel to contact appropriate professionals when they receive a report, **immediately.**



MISSING PERSONS POLICIES

3. Provide on campus residential students with the option to designate a confidential contact person or persons whom the institution will notify within 24 hours of the student being reported missing.

Distinct from “emergency contact” (does not make sense).



MISSING PERSONS POLICIES

3. Provide on campus residential students with the option to designate a confidential contact person or persons whom the institution will notify within 24 hours of the student being reported missing.
 - Contact can be anyone (literally anyone), regardless of otherwise identified emergency contacts (we think this is unnecessarily confusing, but we don't run the Department of Education).
 - Must be offered annually to residential students.
 - Must be offered to students who move into residence halls mid-year.

MISSING PERSONS POLICIES

4. Confidential contact information is kept confidential. Only to be accessed by authorized campus officials and not disclosed except to law enforcement in cases of missing person reports.

Stronger FERPA protection for this information (no idea why).



MISSING PERSONS POLICIES

5. Advise students under 18 that the institution will contact their parent or guardian if they are reported missing.

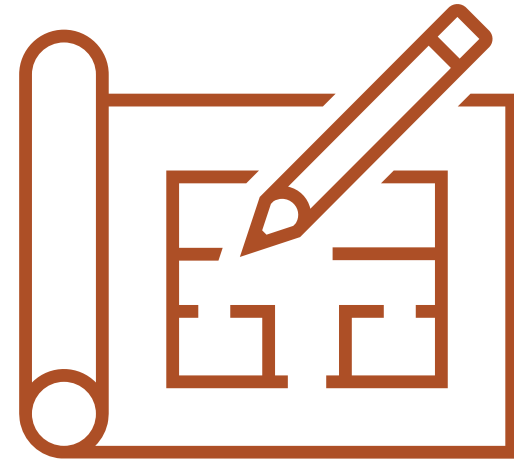
Will contact the parent/guardian and the confidential contact (if registered).



MISSING PERSONS POLICIES

6. Notify local law enforcement (if report did not originate from them initially) within 24 hours of receiving report.

Practically, it is a good idea to have regular communication and a plan or MOU on how to proceed in a case of a missing student.



MISSING PERSONS POLICIES

- Must provide on-campus residential students with the opportunity to register a confidential emergency contact.
- Within 24 hours of a report of a res. student missing for >24 hours:
- Refer reports to University Police/local police, etc.
- Contact the confidential contact if registered
- Contact the parents of a student under 18 years old.

MISSING PERSONS POLICIES

- Brief Investigation
- Pursuant to the 2009 Clery regulations, University Police/Campus Security/Student Affairs may conduct brief investigation.
- May include trying the student's phone number(s), Twitter, Facebook and Social Media, contacting friends/partners, etc.
- If you locate the student, you do **not** need to contact the confidential contact, local law enforcement or parent/guardian (if under 18).

MISSING PERSONS POLICIES- IN PRACTICE

- Paper or electronic? Ideal to have a popup during residence hall room choice, store the data accessible to police/security.
- Make sure your likely report recipients know to immediately contact campus police/security (and not run their own investigation).
- Make sure that campus police/security has procedures in place to implement the policy steps.
- Contact does not have to be in person; if multiple contact identified, may contact in any order.
- If unsuccessful in reaching a contact, document attempts.
- Per Department of Education: If the first person contacted says the student is not missing, you must still contact each additional contact unless you can speak to the student.

FIRE SAFETY AND REPORTING REQUIREMENTS



FIRE SAFETY AND REPORTING REQUIREMENTS

- Distinct from State fire reporting
- Only covers fires in on-campus housing facilities
- **Similar compliance schedule to Clery Annual Security Report:**
 - October 1 deadline
 - Report to community -and- statistics to ED
 - Can combine with Annual Security Report or standalone (extra requirements if standalone)

PER THE STATUTE AND THE REGULATIONS, THE ANNUAL FIRE REPORT MUST:

- Describe each on-campus student housing facility;
- Report the number of fire drills conducted during the reporting year;
- List the campus policies or rules on portable electronic appliances, smoking, and open flames in a student housing facility;
- List the campus procedures for evacuating student housing in the event of a fire;
- List the policies regarding fire safety education and training programs provided to the student and employees (including the procedures that students and employees should follow in the case of a fire);
- List the titles of each person or organization to which students and employees should report that a fire occurred; and
- List plans for future improvements in fire safety, if any.

PER THE STATUTE AND THE REGULATIONS, THE ANNUAL FIRE REPORT MUST:

- List the titles of each person or organization to which students and employees should report that a fire occurred.
- For your own sake, limit this list!
 - We recommend:
 - University Police/Public Safety
 - Environmental Health and Safety Officer
 - Hall Directors (if necessary)
 - Any more and you risk a reporting (and auditing) nightmare
 - There should not be any major issues with calling one of these people/offices

THE DEPARTMENT OF EDUCATION REGULATIONS DEFINED "FIRE"

“[a]ny instance of open flame or other burning in a place not intended to contain the burning or in an uncontrolled manner.”



THE DEPARTMENT OF EDUCATION REGULATIONS DEFINED "FIRE"

"[a]ny instance of open flame or other burning in a place not intended to contain the burning or in an uncontrolled manner."

Some examples:

Candles/incense (not a reportable fire, unless fire spreads)

Burned microwave popcorn (not a reportable fire, unless microwave melts or burns)

Burning food in a pan (reportable fire)

Hair dryer sets off fire alarm (not reportable, no open flame)



THE DEPARTMENT OF EDUCATION REGULATIONS DEFINED "FIRE"

“[a]ny instance of open flame or other burning in a place not intended to contain the burning or in an uncontrolled manner.”
Violation of campus policy is **NOT** sufficient (e.g., toasters, microwaves may not be allowed; this has no impact on fire reporting)



COLLEGES MUST REPORT ON:

- Number of fires (if any) and the cause of each that occur in residence halls
- Number of injuries (requiring treatment at a medical facility) and deaths from such fires (including someone who dies within a year from injuries sustained in a campus fire); and
- Value of fire-related property damage.

MUST MAINTAIN A WRITTEN, EASILY UNDERSTOOD FIRE LOG:

- Records fires, by date that the fire was reported (which may differ from the date in which the fire actually occurred).
- Log must include nature, date, time, and general location of each fire.
- Entry must be made within 2 business days after receipt of relevant information.
- Business hours (usually at University Police).

CAUTION: ASR NOT PROPERLY TITLED (FINE).

Hyper-technical but let's get this right:

Can separate ASR and Annual Fire Safety Report, or publish together.

- *If separate, each must reference the other.*
- *If published together, title must indicate that the document contains both reports.*
- *Can send notification together; describe both parts.*

AUDITS AND PROGRAM REVIEWS



CORRECTING THE ASR

- Corrections to ED
- Republishing and re-notifying about the ASR, even for past years.
- In Program Reviews



RECORD RETENTION

Retain all documentation for at least 6 years in case of audit.

PROGRAM REVIEWS AND FINES

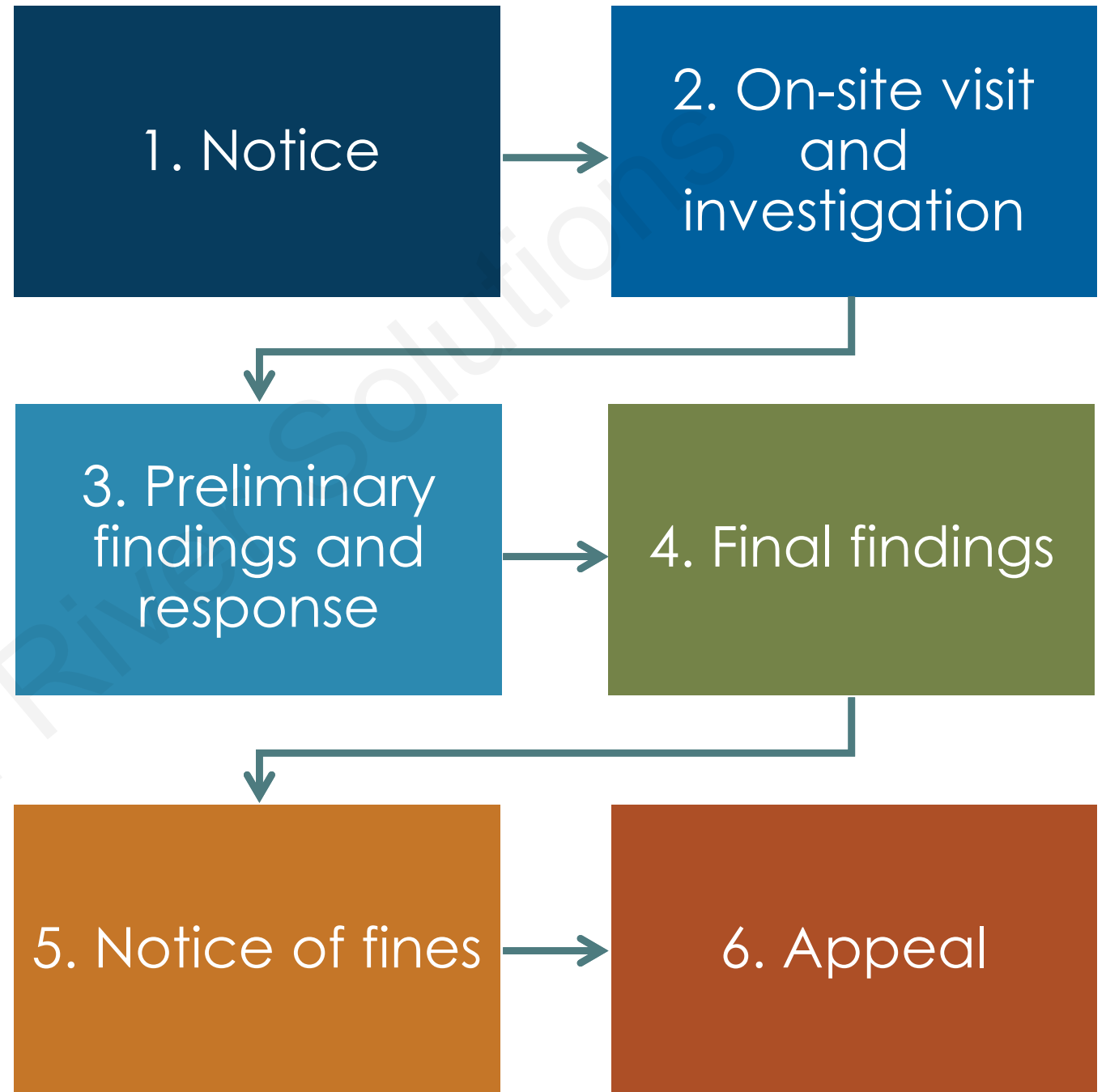
- Program Review Conducted by Department of Education
- Substantive violations can result in \$69,733 fine *per incident* (recently increased, annually adjusted for inflation).
- Program Review Occurs in Three Situations:
 - Incident occurs;
 - Complaint to Department of Education;
 - Random Review.
- Let's talk real talk here...



PROGRAM REVIEWS AND FINES

- The Clery Act is enforced through the ED's Federal Student Aid office ("FSA").
- FSA conducts audits; the Administrative Actions and Appeals Service Group ("AAASG") assesses fines.
 - FSA can initiate an audit even without a complaint.
- There is no private right of action for a violation of the Clery Act. See 20 U.S.C. § 1092(f)(14)(A).

PROCESS



NOTICE



- Immediately notify key stakeholders—leadership, witnesses, insurer
- Negotiate timing and scope with FSA to prepare for the on-site visit
- Prep witnesses and documents
- Consider conducting a “pre-audit” but make sure not to disturb or change any documents at that late hour.

ON-SITE VISIT AND INVESTIGATION



- Witness interviews
- Document production
- Debrief with your witnesses
- Respond to any follow-ups

PRELIMINARY FINDINGS AND RESPONSE

- Identifies areas of noncompliance with directions on how to get into compliance
- You can respond to these allegations and can negotiate with FSA about the scope and timing of your response.



PRELIMINARY FINDINGS AND RESPONSE

- Identifies areas of noncompliance with directions on how to get into compliance
- You can respond to these allegations and can negotiate with FSA about the scope and timing of your response.



FINAL FINDINGS



No opportunity to
respond to or appeal
the *final findings*

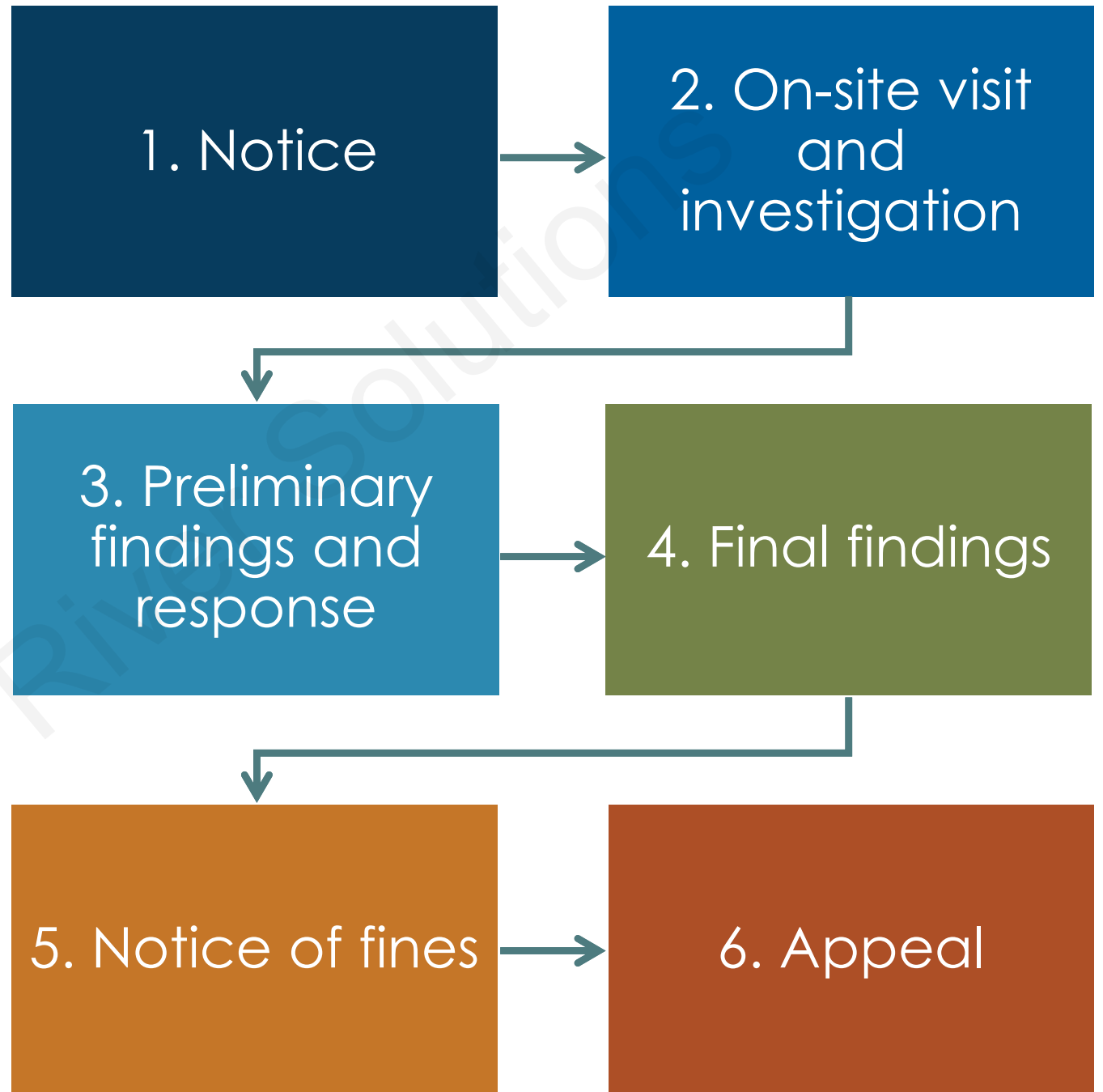
APPEAL

If you get a fine, you can request a hearing or submit written materials for your appeal.



PROCESS

A note about timelines...



PROCESS

A note about timelines...

Establish a compliance program

Standard Operating Procedures

- Crime classification
- Alerts/notifications/warnings

Document everything: training, decision making

Training, increasing awareness

Records retention and destruction

An aerial photograph of a winding stream flowing through a dense, vibrant green forest. The stream's path is irregular, creating several loops and bends. The surrounding trees are thick and cover the entire landscape except for the water. The overall scene is peaceful and natural.

PUTTING IT ALL TOGETHER

Each part of the stream is important

Community

Department of Public
Safety/University Police

Campus Security Authorities/
Title IX/Student Affairs

ASR & Notices

CONNECT WITH US



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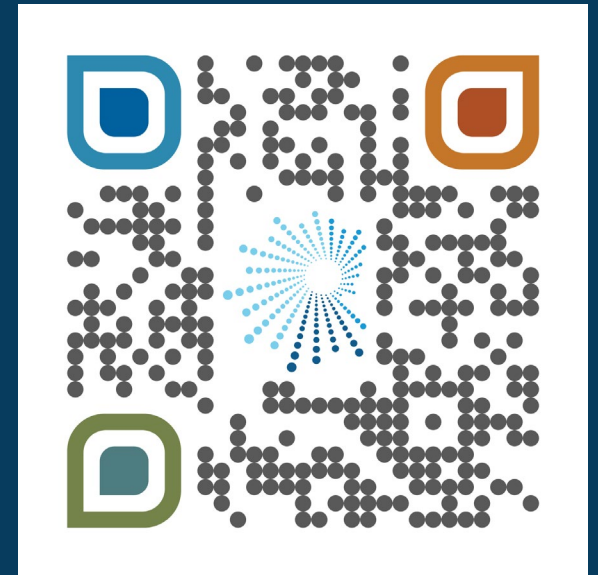


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WE LOVE FEEDBACK

Your Opinion Is Invaluable!



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NEW RULES



**2024
TITLE
IX**

2024 Final Title IX Regulations

July 12, 2024

Emma Hempel

Andrea Stagg

MEET YOUR FACILITATORS



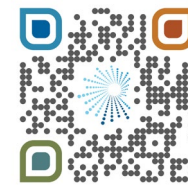
Andrea Stagg

Director of Consulting Services, Andrea Stagg has extensive experience consulting, writing and training on Title IX, Equity & safety. Andrea was Deputy General Counsel and Director of Government Relations & Compliance at Barnard College and was counsel to three colleges within the SUNY system. She has worked with federal and state legislators to develop state laws and follow best practices in campus safety and sexual harassment prevention.



Emma Hempel

Emma Hempel is a Title IX Coordinator and facilitates Title IX and Equity training for Grand River Solutions. Emma serves as a Title IX Coordinator for both large and small public and private institutions across the country. Emma also specializes in and leads seminars on the Intersection of Sexual Violence and the LGBTQ Community, and Sex, Gender, Identity and Practice.



GETTING TO KNOW YOU



1. Name
2. Pronouns
3. Where you live
4. How long have you been doing Title IX work?

Submit your responses in one message using the chat feature!

AGENDA

2024

Department of Education

Title IX Regulations

Big Picture + Overview

Scope and Geography

Coordinator Obligations

Procedural Changes

Employee Reporting Obligations

Training Requirements

Intersection with Other Applicable Laws

ACTION PLAN

Review your policy landscape

Update/adopt compliant policies

Retrain your implementation staff

Prepare to train all employees

Refresh community-facing materials

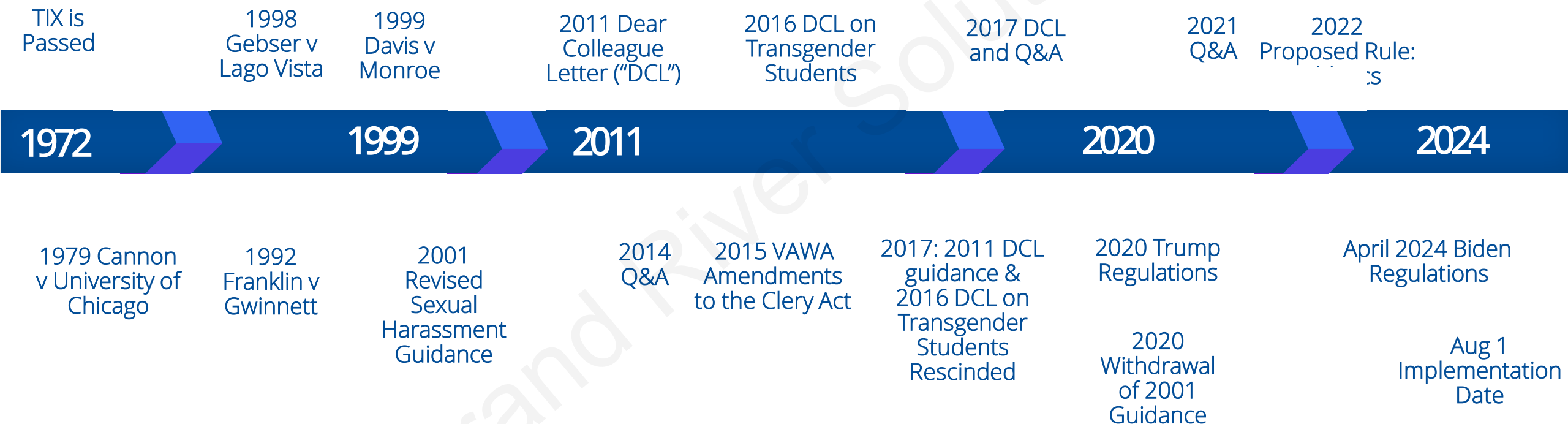
A high-angle, wide shot of a massive waterfall cascading down a steep, craggy cliff face. The water is white and frothy as it falls. A small figure of a person stands on a rocky outcrop in the foreground, looking up at the waterfall, emphasizing the scale of the scene. The overall tone is blue and misty.

BIG PICTURE & OVERVIEW

GRAND RIVER | SOLUTIONS

The History of Title IX

A Timeline



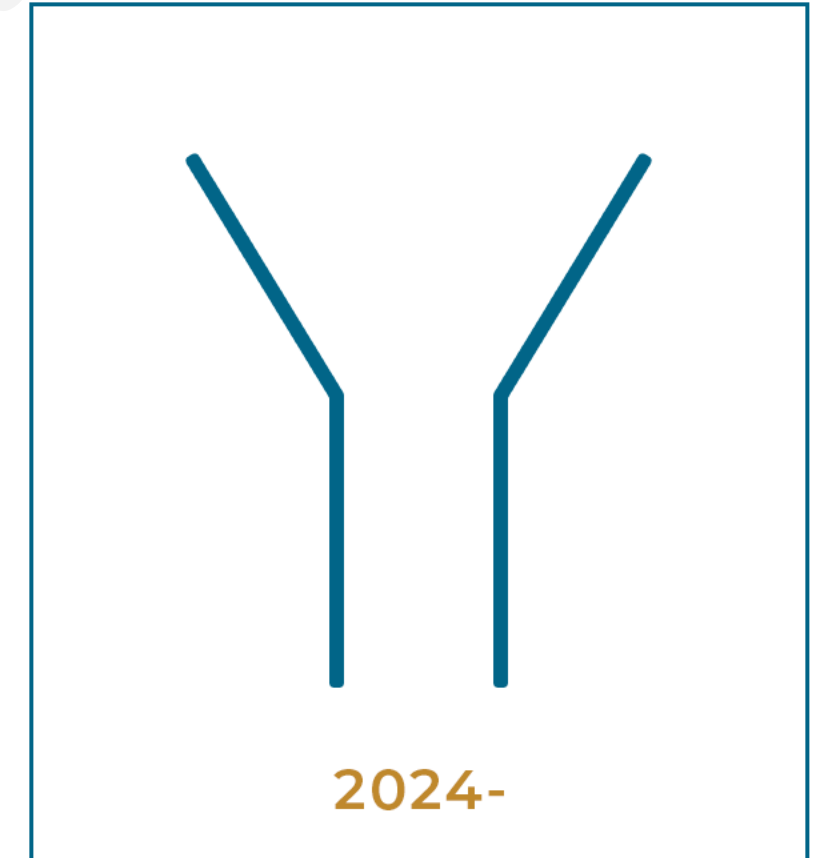
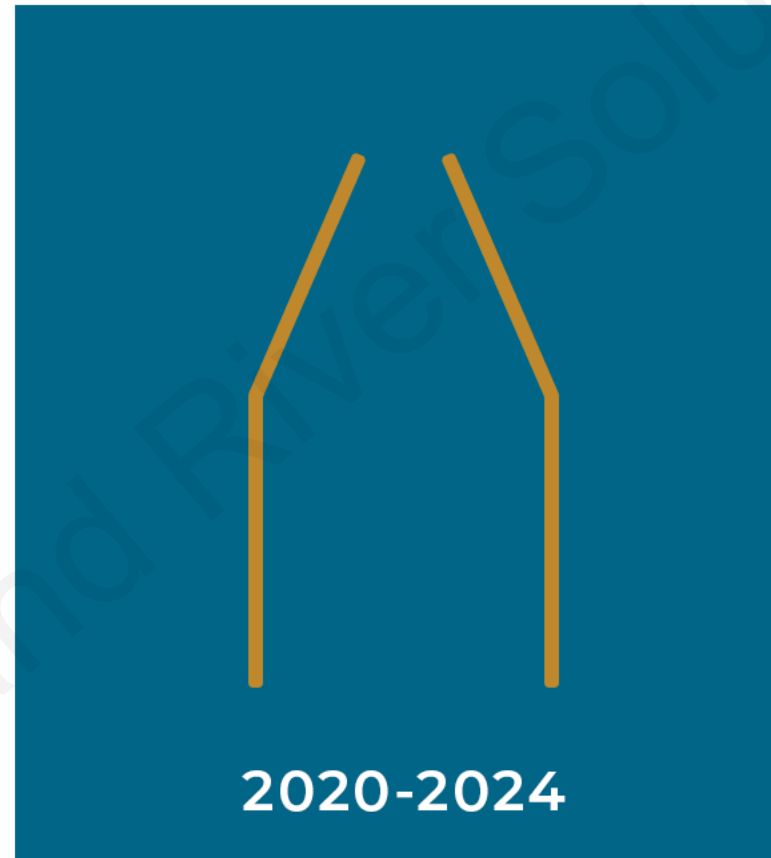
WHAT DOES THE FUTURE HOLD?

CHANGED FOR THE BETTER;
BUT WILL THEY BE
CHANGED...FOR GOOD?



BIG PICTURE: SHIFTING THE TIX FUNNEL SHAPE

Top of Funnel: Access to TIX Policy
Bottom of Funnel: Process Due



MAIN CHANGES FOR 2024

Creates framework to respond to sex discrimination other than sexual harassment

Updated training required for all employees

Not strictly limited by geography; impact matters

Expands employee reporting obligations

Requires prompt and effective action to end sex discrimination and prevent its recurrence

TIMING



- Implementation date is August 1, 2024.
- No retroactivity
- "The final regulations apply only to sex discrimination that allegedly occurred on or after August 1, 2024."
- "With respect to sex discrimination that allegedly occurred prior to August 1, 2024, regardless of when the alleged sex discrimination was reported, the Department will evaluate the recipient's compliance against the Title IX statute and the Title IX regulations in place at the time that the alleged sex discrimination occurred."

SINCE 1975...



Recipients have been required to . . .

- Notify students (defined to include persons who have gained admission) of their nondiscrimination policies and to resolve student complaints of sex discrimination.
- Maintain nondiscrimination notices and adopt and publish grievance procedures
- Prohibit discrimination based on pregnancy or related conditions
- Prohibit sex-based distinctions based on parental, family, or marital status
- Prohibit discrimination on the basis of sex in employment
- Balance equity with promptness

SCOPE AND APPLICABILITY

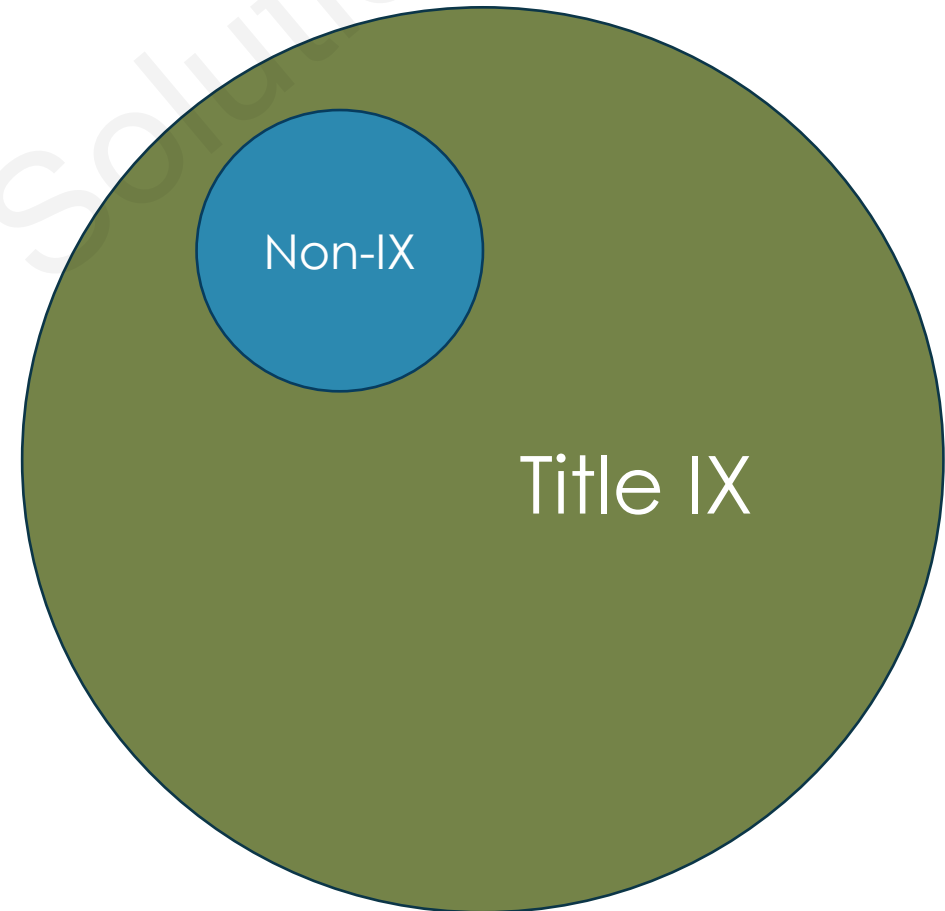


WHICH POLICY APPLIES?

2020



2024



WHAT IS COVERED BY 2024 TITLE IX?

- All sex discrimination – this is an umbrella term
- Not only sexual harassment (2020 amendments only addressed sexual harassment)



DEFINITIONS – WHAT IS SEX DISCRIMINATION?

- **Discrimination on the basis of sex** includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.
- Sex-based harassment is a form of sex discrimination and means sexual harassment, and other harassment *on the basis of sex, that is:*
 - Hostile environment sexual harassment
 - Quid Pro Quo
 - Domestic violence, dating violence, sexual assault, and stalking



LGBTQIA+

Preamble:

Price Waterhouse/Oncale/Bostock and Title VII → Title IX Regulations

Sex stereotypes → to treat differently on basis of sexual orientation/gender identity is to discriminate on the basis of sex

“Indeed, Bostock’s reasoning dictates that, even assuming that ‘sex’ refers to ‘biological distinctions between male and female,’ discrimination against a person because they are gay or transgender is, in part, discrimination on the basis of sex.”

§106.10: “Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.”



DEFINITIONS – WHAT ARE "SEX CHARACTERISTICS"?

The Preamble defines "sex characteristics" as "physiological sex-based characteristics."

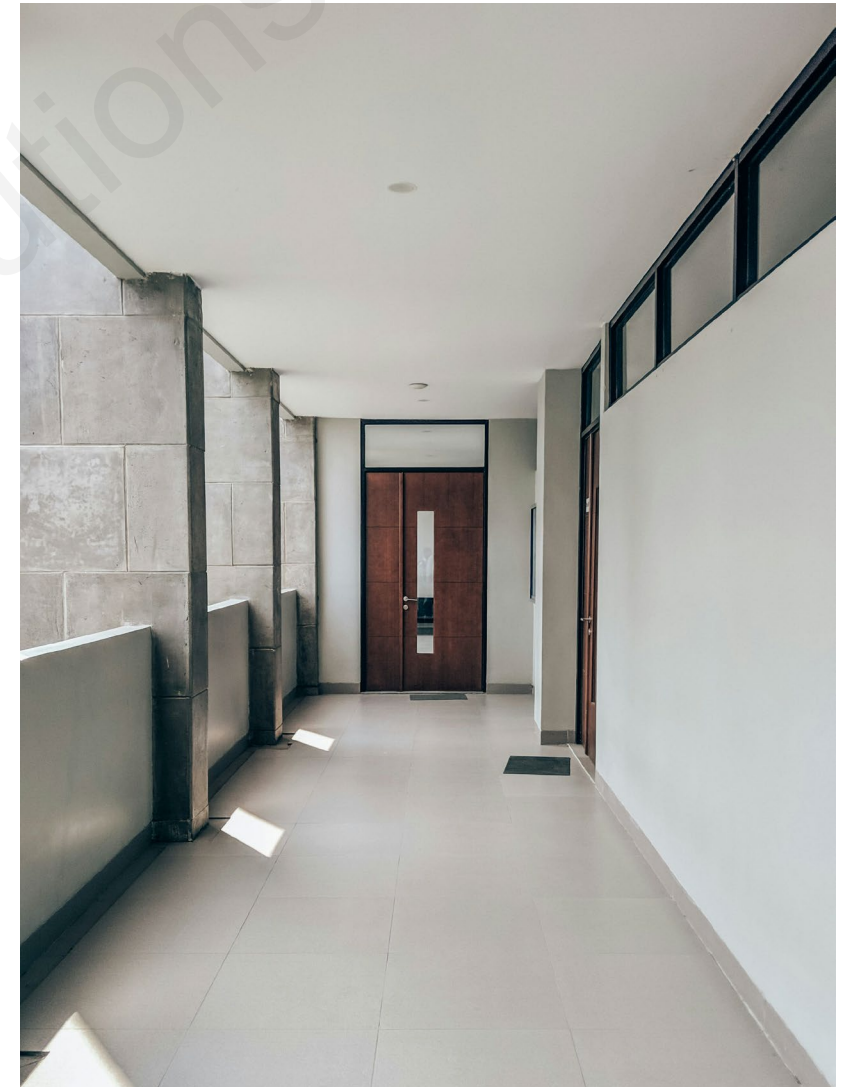
Sex discrimination based on a person's physiological sex characteristics may include discrimination based on a person's anatomy, hormones, and chromosomes associated with male or female bodies.

ED states Title IX also covers discrimination based on (undefined) "intersex" traits [It adopts this term instead of "differences of sex development"].

ED identifies that "inappropriate disclosure of medical information about a student's intersex traits could constitute prohibited discrimination based on sex characteristics."

EXAMPLES--WHAT ARE "SEX CHARACTERISTICS"?

- A faculty member requests a fan for their office because they are going through menopause and having hot flashes. Is this a Title IX issue?
- A faculty member responds to student emails and requests to meet within two days. They have an "open-door" policy. However, the faculty member refuses to respond to or meet with a transgender student in their class. Is this a Title IX issue?



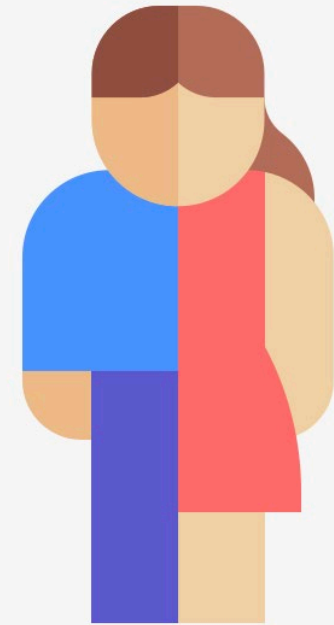


DEFINITIONS – "SEX STEREOTYPING"

Preamble: "fixed or generalized expectations regarding a person's aptitudes, behavior, self-presentation, or other attributes based on sex."

EXAMPLES-SEX STEREOTYPES

- A senior academic advisor discourages a student, who is a man, from applying to a new math fellowship available because the advisor thinks the opportunity should prioritize women in STEM. Is this a sex stereotype?
- After a student who is a woman gets a buzz cut, a peer begins referring to her as "man" as much as possible, saying, "Hey man" or "how are you, man," indicating that her haircut makes her appear as a man. Is this a sex stereotype?



Freepik

DE MINIMIS TEST



De Minimis test for sex-separated programs/activities:

- Otherwise permissible sex separation is consistent with Title IX as long as it is carried out in a manner that does not impose more than de minimis harm.
- Examples: locker and bathrooms; appearance codes
- Denying a transgender student "access to a sex-separate facility or activity consistent with that student's gender identity" would be more than a de minimis harm

HOSTILE ENVIRONMENT SEX-BASED HARASSMENT HAS 5 COMPONENTS

- The conduct is
- (1) unwelcome,
- (2) sex-based,
- (3) subjectively and objectively offensive, and
- (4) so severe or pervasive
- (5) that it results in a limitation of or denial of a person's ability to participate in or benefit from the education program or activity.



Must have all 5 above!

HOSTILE ENVIRONMENT SEX-BASED HARASSMENT FACTORS TO CONSIDER IN DECISION-MAKING

- (1) the degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;
- (2) the type, frequency and duration of the conduct;
- (3) the parties' ages, roles within the recipient's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct;
- (4) the location of the conduct and the context in which the conduct occurred; and
- (5) other sex-based harassment in the recipient's education program or activity.

IS THIS HOSTILE ENVIRONMENT SEX-BASED HARASSMENT?

You receive a 3rd party report from a Coach who heard some rumors about a student on their team, Dani.

Dani is constantly receiving sexually explicit photos via Snapchat from another teammate. Dani has asked them to stop numerous times. When they are at practice together, this individual often approaches Dani to make jokes of a sexual nature. This has happened about 3 times so far this week. Dani usually laughs it off and continues on with practice.

Why? Why not? What other information would you need to know?

DEFINITION OF A COMPLAINANT? STUDENT?

- A student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination
 - Student is broad - "Admitted"
- or
- A person other than a student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX **and** who was participating or attempting to participate in the recipient's education program or activity at the time of the alleged sex discrimination.



§ 106.2

DEFINITION OF A COMPLAINANT?

- A person does not need to continue to be participating or attempting to participate in the program or activity at the time they make a complaint.
- This is a change from the current regulations as amended in 2020.

§ 106.2



WOULD THIS FALL UNDER TITLE IX?

- A recently admitted individual emails the Title IX Office sharing they were sexually assaulted last week by one of your students. They want the campus to take action.
- A nonaffiliate attends a football game on your campus and is taunted based on their gender identity by a student. The nonaffiliate does not plan to attend any future campus programs or events.



FIRST AMENDMENT BALANCING

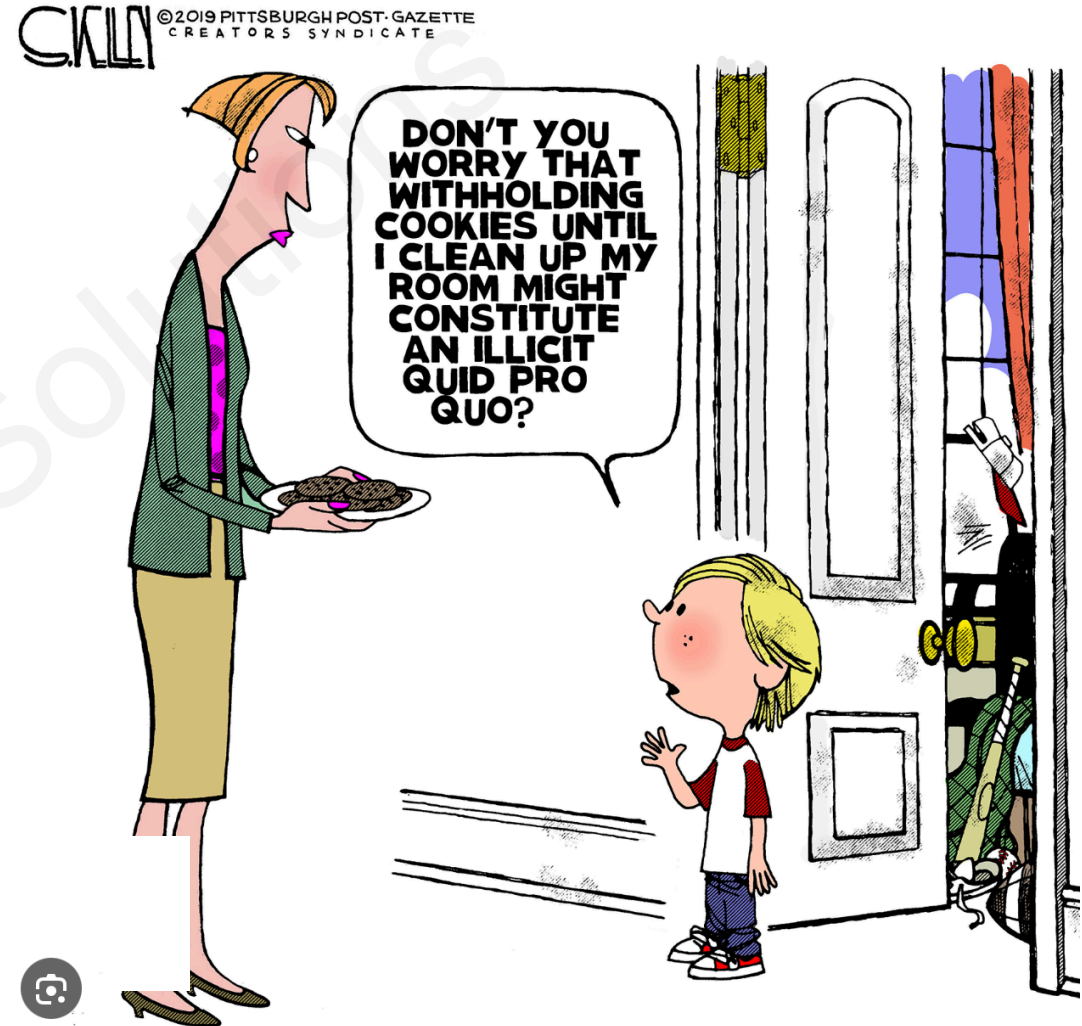
- "One stray remark" is not "pervasive"
- A statement "of one's point of view on an issue of debate and with which another person disagrees, even strongly so, is not the kind or degree of conduct that implicates the regulations."
- But "sex-based conduct that occurs on multiple occasions and is so persistent that, for example, it limits another student's ability to complete assigned coursework at the student's typical level of performance" might meet the standard.
- ED encourages consultation with "settled components of Title VII sexual harassment law" for guidance on the meaning of "severe or pervasive"

FIRST AMENDMENT BALANCING: LOOKING TO TITLE VII

- "whether conduct constitutes unlawful harassment depends on all the circumstances and is only unlawful under federal EEO law if it creates a hostile work environment."
- "conduct is not necessarily unlawful merely because it is based on a protected characteristic and that conduct also must alter a term, condition, or privilege of employment, typically by creating a hostile work environment."
- "conduct that occurs outside the workplace, including on social media accounts, and that does not target the employer or its employees and is not brought into the workplace generally will not have an impact on the workplace and therefore will not contribute to a hostile work environment."

QUID PRO QUO

- "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 EXAMPLE (OR NOT)

- Your institution hires a vendor to run your dining services. Charlie swipes the student's ID's to allow them in to use their meal plan. Charlie is employed by the vendor. Charlie strikes up a friendship with Jackie and offers that if Jackie engages in sexual activity with Charlie, Charlie will wave Jackie through the entrance without a swipe. This will allow Jackie to get through the semester without running out of meals.
- Jackie thinks this is a great deal, and has always thought Charlie was cute.



“SPECIFIC OFFENSES” (VAWA)

Now (actually) conformed to
VAWA Amendments to the Clery
Act...



DATING VIOLENCE

The term dating violence means “violence committed by a person—

- A. who is or has been in a social relationship of a romantic or intimate nature with the victim;
- B. the existence of such a relationship shall be determined based on the reporting party's statement and with consideration of:
 - I. The length of the relationship;
 - II. The type of relationship; and
 - III. The frequency of interaction between the persons involved in the relationship”

DOMESTIC VIOLENCE

The term domestic violence is a “felony or misdemeanor crimes of violence committed

- A. by a current or former spouse of the victim,
- B. by a person with whom the victim shares a child in common,
- C. by a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner,
- D. by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the violence occurred, or
- E. 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 in which the crime of violence occurred.

SEXUAL ASSAULT

“An offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation”



SEX OFFENSES

“An offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation”

SEX OFFENSES

A. Rape — The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.

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

C. Sexual Assault With an Object — The use of an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

SEX OFFENSES

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

E. Incest — Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

F. Statutory Rape — Nonforcible sexual intercourse with a person who is under the statutory age of consent.

STALKING

- The term stalking means “engaging in a course of conduct directed at a specific person that would cause a reasonable person to—
 - A. fear for the person’s safety or the safety of others; or
 - B. suffer substantial emotional distress.



PARENTAL, FAMILY, OR MARITAL STATUS

Regs address the treatment of applicants, students:

- Cannot adopt a policy, practice, or procedure, or take any employment action "concerning the current, potential, or past parental, family, or marital status of a student [or employee] or applicant that treats persons differently on the basis of sex" or "is based upon whether an employee or applicant is the head of household or principal wage earner" in their family unit



PARENTAL, FAMILY, OR MARITAL STATUS

- Can an institution offer married men financial aid, but as a practice decline to offer financial aid to women who are married?
- May a department exercise a preference to only hire women who do not have kids?



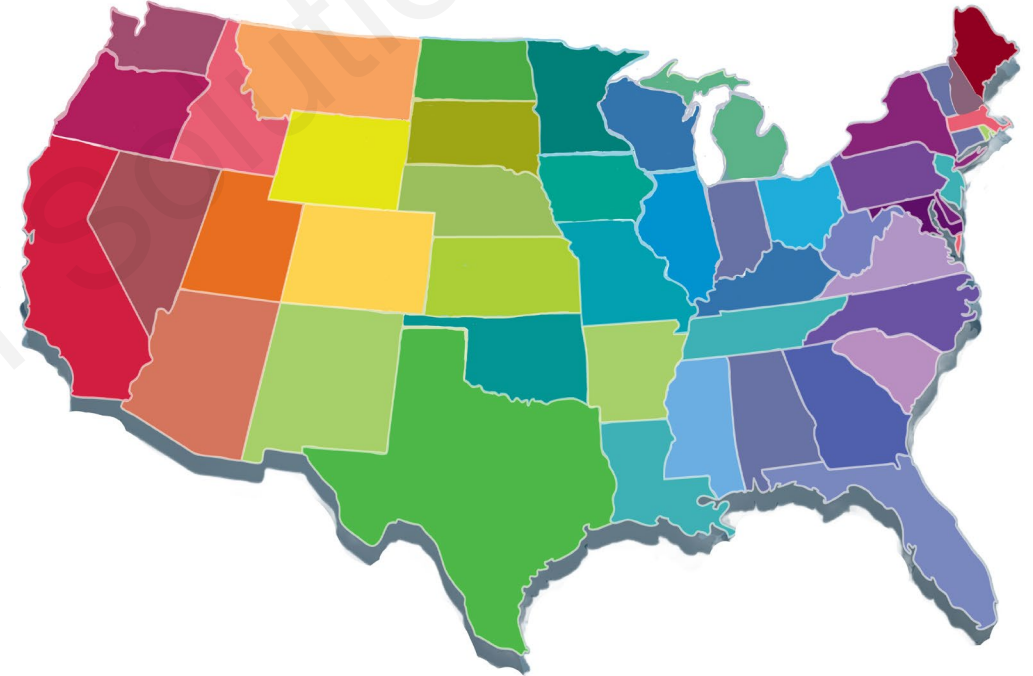
PREGNANCY



NOT NECESSARILY NEW, BUT CLARIFIED

§ 106.40

- Depending on state law, not necessarily new, but clarified
- More people will find new for students
- Reasonable Modifications
- Voluntary leaves or separate but comparable programs
- Lactation spaces
- Comparable treatment to other medical conditions



PREGNANCY AND RELATED CONDITIONS

- Since 1975, "pregnancy **and** related conditions" includes "pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom[.]"
- Section 106.2 (2024), "pregnancy **or** related conditions" includes:
 - (1) Pregnancy, childbirth, termination of pregnancy, or lactation;
 - (2) Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation; or
 - (3) Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions.

NOTICE AND REQUIRED RESPONSE

§ 106.40

When a student* informs any employee of the student's pregnancy or related conditions...the employee promptly:

- (1) provides the Title IX Coordinator's contact information and
- (2) informs that person that the Title IX Coordinator can coordinate specific actions to prevent sex discrimination and ensure the student's equal access....



PREGNANCY ACCOMMODATIONS

- if a recipient provides an applicant who is recovering from back surgery an extension of time for a medically necessary period to submit a required application essay, it must do the same for a student who is recovering from childbirth



TERMINATION OF PREGNANCY

- Consistent with the definition included in 1975 regulations: the end of pregnancy in any manner, including, miscarriage, stillbirth, or abortion

Examples of potential discrimination from Preamble:

- a high school may not exclude a student from participating in the student council solely because the student has had an abortion
- a college may not deny a professor a raise just because it learned she planned to have an abortion

NOW WHAT?

- A student in a science program asks a faculty member if they can be excluded from a series of lab sessions involving chemicals that may be harmful for pregnant people. The instructor is insistent that they must complete these labs in order to not fail the class:
 - As Title IX Coordinator, what are your next steps?
 - Who else are you bringing into the conversation?
 - How can we be creative to ensure equal access for this student?



PERCEIVED CHARACTERISTICS

- "Perceived" characteristics are also covered under Title IX
- Making discriminatory decisions based on assumptions about someone's sexual orientation or pregnancy status is prohibited

Example:

- If a professor refuses to allow a student to participate in a clinical course based on the mistaken belief that the student is pregnant, that professor may be discriminating against a student based on sex and denying the student access to the recipient's education program or activity based on the stereotype that a pregnant student is not physically capable of participating in the course or will not be as dedicated due to the demands of pregnancy.

GEOGRAPHY



DOES LOCATION MATTER?

- What is the geographic scope of your disciplinary authority?
 - o For students?
 - o For employees?
- Hostile Environment Sex-Based Harassment:
 - o Less about where (some of the) conduct occurred
 - o More about the impact in the program or activity
 - o OK if includes considering conduct that occurred elsewhere, outside P&A, online, even outside the US



GEOGRAPHY

2020

Inside U.S.

On-campus

Off-campus if part of P&A

May include online conduct

Building owned or controlled by institution

Building owned or controlled by recognized organization

Places where we have substantial control over respondent and context

2024

Inside U.S.

On-campus

Off-campus if part of P&A

May include online conduct

Buildings? Substantial control?
Flexibility to focus on disciplinary authority

Conduct outside of Title IX jurisdiction may contribute to hostile environment

EXPANDED SCOPE – OFF CAMPUS CONDUCT?

- Generally, not required to respond to alleged sex discrimination off-campus unless it is "within the program or activity"
- BUT "within the program and activity" includes "conduct that is subject to the recipient's disciplinary authority"
- How clear is your scope of disciplinary authority?



DISCIPLINARY AUTHORITY - EXAMPLES

- "The University may address off-campus behaviors when the Dean of Students determines that the off-campus conduct affects a University interest. University interests include but are not limited to health and safety, protection of rights or property of others and promoting the University's mission."



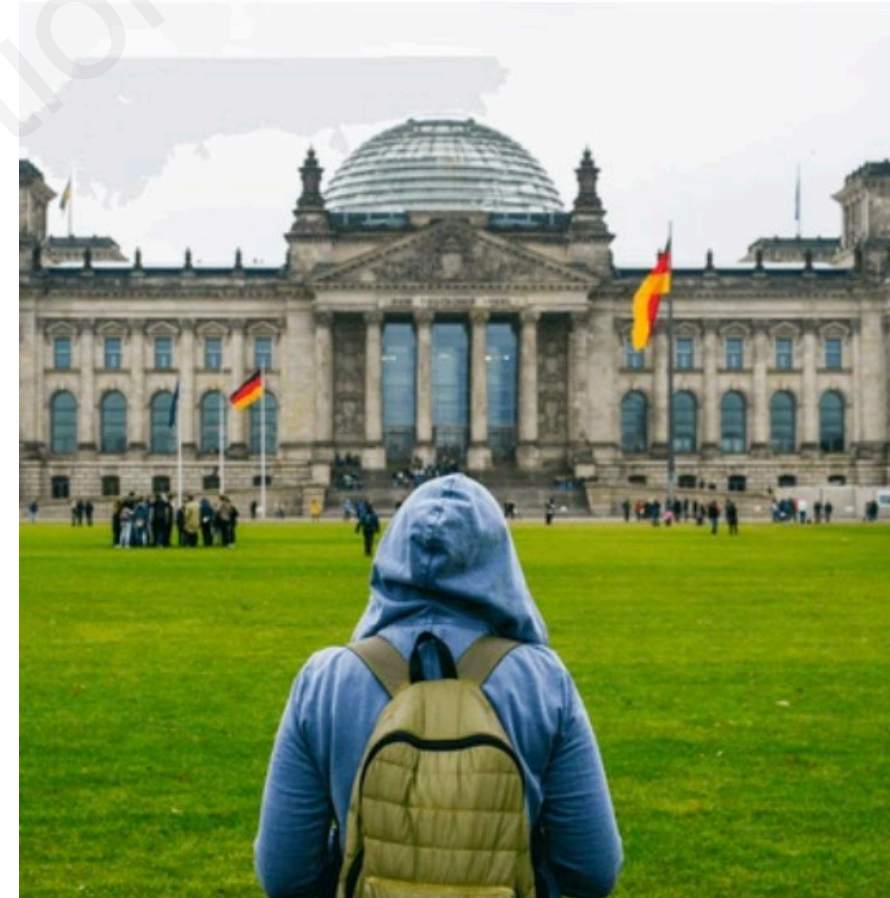
DISCIPLINARY AUTHORITY - EXAMPLES

- "Under limited circumstances, this policy may also apply in instances where the conduct occurred outside of the education program or activity."



EXPANDED SCOPE: STUDY ABROAD? NOT EXACTLY

- No obligation under Title IX to address sex discrimination occurring outside of the United States.
- Permitted to respond as appropriate under the code of conduct or other policies pertaining to study abroad programs.
- If conduct that occurred on study abroad program contributes to a hostile environment in the US, that conduct may be relevant and considered by the campus so that it can address the sex discrimination occurring within its program in the US.



CONSIDER ONLINE HARASSMENT

- ED does **not** expect institutions "to monitor the online activity of students or faculty"
- U.S. Supreme Court recently recognized a public K-12 institution's authority over off-campus online speech (*Mahanoy*)
- ED expects a response when an employee learns:
 - about conduct among students that took place on social media or other platforms and
 - that reasonably may have created a sex-based hostile environment in the recipient's education program or activity
- **Remember:** It's about impact and disciplinary authority, not where misconduct happens



**Will you address
under Title IX?**



EXAMPLE: CONDUCT ON STUDY ABROAD

- Student A reports that she was sexually assaulted by Student B while studying abroad, that Student B has been taunting her with sexually suggestive comments since their return to campus and that, as a result, Student A is unable to concentrate or participate fully in her classes and activities.
- Will you address under Title IX? Why or why not?



EXAMPLE: ONLINE CONDUCT

- Off-campus, a student shares intimate images online of another student, without consent, through private messaging apps.
- Off-campus, students post highly offensive messages on Instagram visible to many students.
- Will you address under Title IX? Why or why not?



EXAMPLE: PUBLIC AWARENESS EVENTS

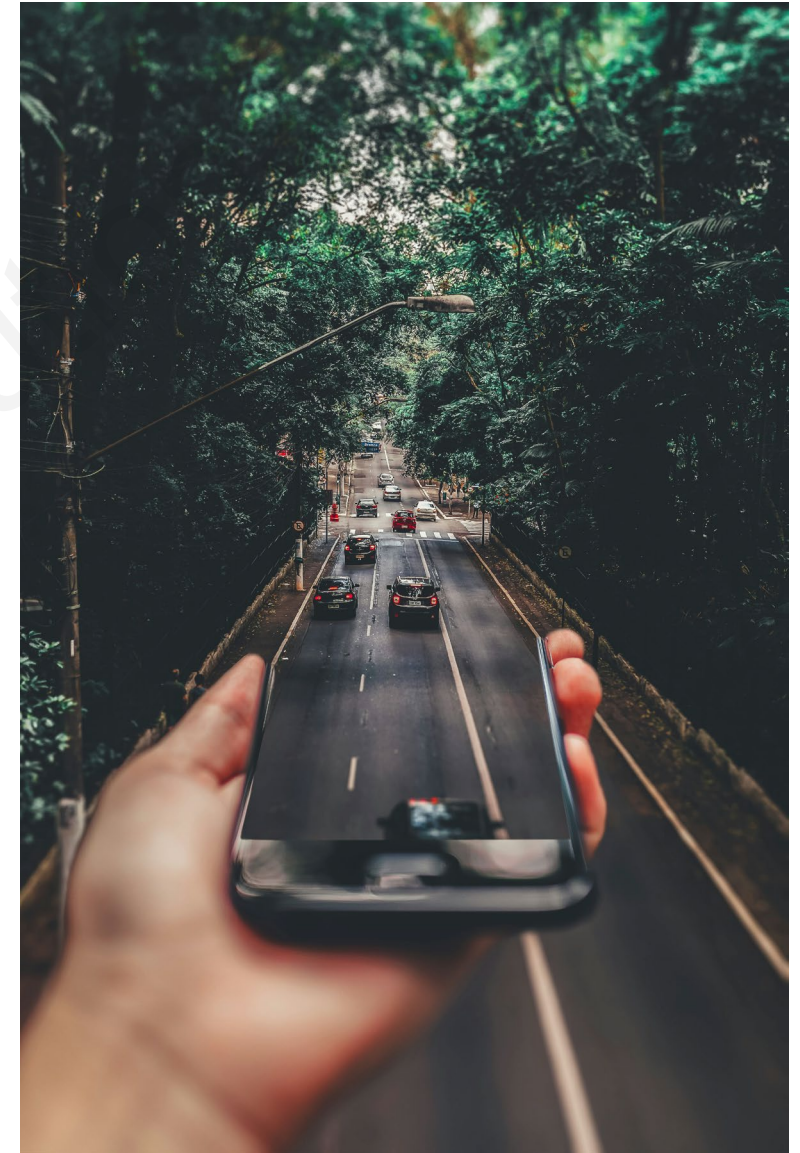
Town holds a *Take Back the Night* event, attended by institutional officials. Does information about sex-based harassment learned at this event need to be reported to the Title IX Coordinator?

What other information is needed?

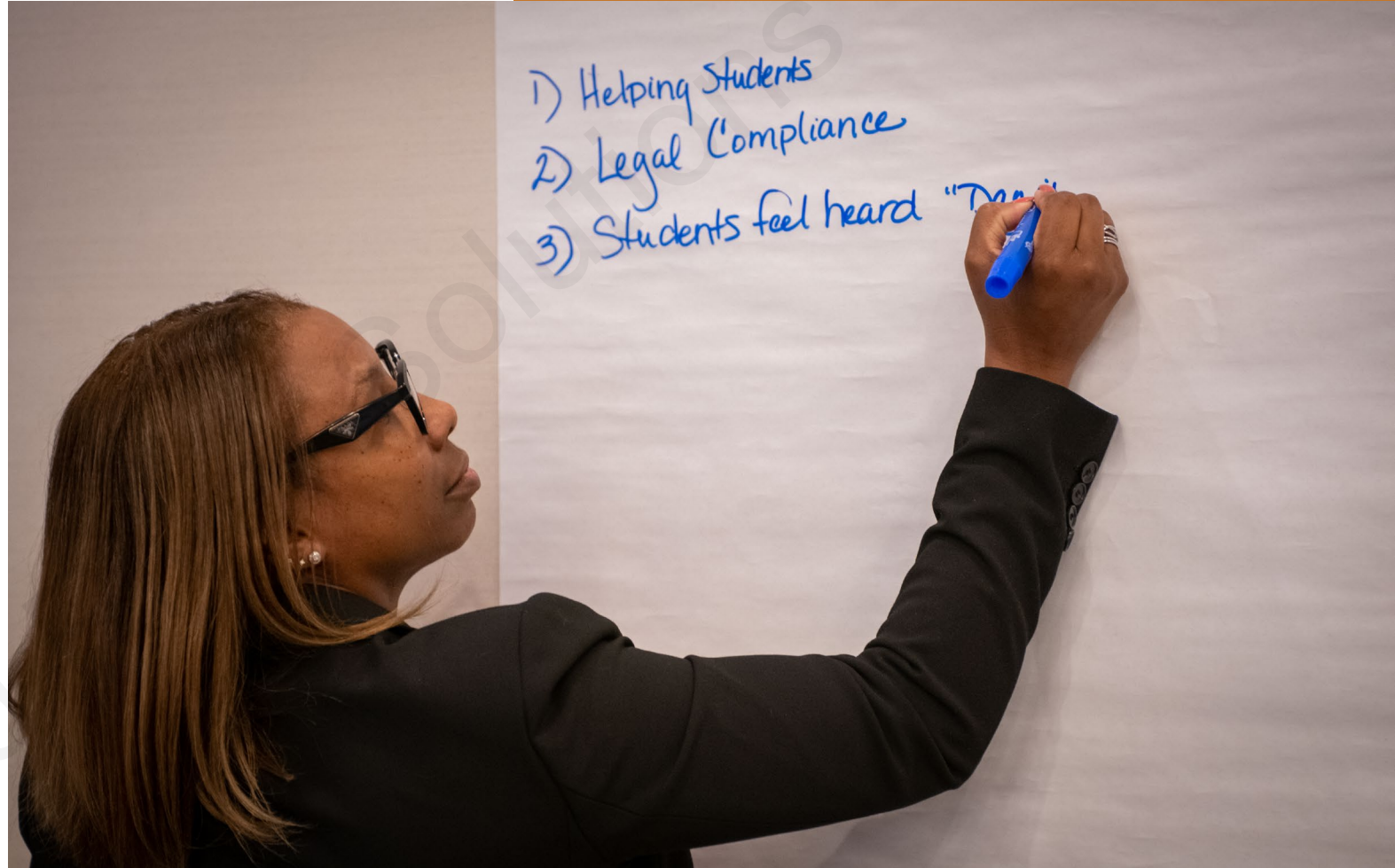


EXAMPLE: STALKING

- A student sends frequent disturbing text messages to another student and puts an AirTag on their car, which lets them monitor their travel.
- Will you address under Title IX? Why or why not?



ROLE OF THE COORDINATOR



ABOUT THE COORDINATOR

- One person must be designated as coordinator, with "ultimate oversight" over the Title IX responsibilities
- Can have deputies
- Can delegate to other designees



This is a basic compliance construct.

CONNECTING PREVENTION & RESPONSE

- To promptly and effectively end any sex discrimination in its education program or activity, prevent its recurrence, and remedy its effects.
- Non-discrimination notice must be posted widely.
- Addressing disclosures and reports.



TITLE IX COORDINATOR REQUIREMENTS

- Treat the parties equitably
- Offer and coordinate supportive measures
- Notify complainant about resolution options (alternative and grievance procedures)
- Decide whether to initiate an investigation if a Complainant doesn't want to



WHO'S WHO?

- DM can be TIXC or Investigator
- TIXC can be the Investigator and/or DM
- TIXC can be the Informal Resolution Facilitator, but then can no longer be DM or Investigator (if parties exit IR)
- TIXC can only serve in multiple roles if they can do so without conflict of interest or bias.



SUPPORTIVE MEASURES

Additionally, under § 106.44(g)(4), a school must provide the parties a timely opportunity to seek a modification or reversal of a decision to provide, deny, modify, or terminate supportive measures applicable to them.



INFORMAL RESOLUTION CHANGE

2020 regulations:

1. Do not offer to resolve allegations via IR without a formal complaint; and,
2. Never resolve an allegation that an employee sexually harassed a student via IR.

Final 2024 regulations:

1. No complaint required before starting IR; and,
2. Do not offer IR if the complaint includes allegations that an employee engaged in sex-based harassment of an elementary school or secondary school student or such a process would conflict with Federal, State or local law.

STUDENTS WITH DISABILITIES

- 106.8(e)
- K-12 versus higher education
- K-12: Mandatory: Must work with one or more members of the IEP team; likely involvement of parent or guardian
- Higher education: Permissive: Coordinator may consult, as appropriate, with office that serves students with disabilities to determine how to comply with Rehab Act Section 504
- Consider whether "equitable" treatment will require modifications of grievance procedure (and if those options will be "articulated" in policy as required)



RESOLUTION UPDATES –GRIEVANCE PROCEDURES

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GRIEVANCE PROCEDURES



DEFINITION OF A COMPLAINT

2020

Signed Formal Complaint Required



2024

- No "magic words"
- Oral or written
- "Objectively understood" by a reasonable person as a request to investigate
- But, informal process can begin before a complaint (after a disclosure)

§ 106.2

STANDARD PRACTICES

- Conduct an intake meeting
- Listen and take notes on what is shared.
- Review supportive measures and options for resolution.

If Complainant indicates verbally they want to move forward, then the Coordinator ***in writing***:

- Summarize allegations as it relates to your policy AND
- Confirm their request for an investigation.



COORDINATOR INITIATED COMPLAINT (RARE)

1. The complainant's request not to proceed with initiation of a complaint;
2. The complainant's reasonable safety concerns regarding initiation of a complaint;
3. The risk that additional acts of sex discrimination would occur if a complaint is not initiated;
4. The severity of the alleged sex discrimination, including whether the discrimination, if established, would require the removal of a respondent from campus or imposition of another disciplinary sanction to end the discrimination and prevent its recurrence;
5. The age and relationship of the parties, including whether the respondent is an employee of the recipient;
6. The scope of the alleged sex discrimination, including information suggesting a pattern, ongoing sex discrimination, or sex discrimination alleged to have impacted multiple individuals;
7. The availability of evidence to assist a decisionmaker in determining whether sex discrimination occurred; and
8. Whether the recipient could end the alleged sex discrimination and prevent its recurrence without initiating its grievance procedures under § 106.45, and if applicable § 106.46.

NOTICE, DISMISSAL, CONSOLIDATION

- Familiar notice requirements
- New "permissive" dismissal options, including when it's determined the conduct alleged, if proven, would not be sex discrimination or harassment
- Consolidation allowed for conduct arising from "same facts or circumstances," including cross-complaints



106.45 (CHILL)

VS.

106.46 (LESS CHILL)

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REQUIRED PROCEDURAL ELEMENTS

- 106.46 is the process for adjudicating any sex-based harassment complaint in which a **postsecondary** student is either a complainant or a respondent
- 106.45 is for everything else (under Title IX)
- Why do different procedures apply?
 - Type of violation
 - Status of party
 - Potential sanction

"ADEQUATE, RELIABLE, AND IMPARTIAL" INVESTIGATIONS

- Opportunity to present evidence
- Opportunity to suggest witnesses
- Evidence review
- Notice of meetings and proceedings



"equal opportunity" to "access" relevant and not impermissible evidence

RELEVANCE

- "Relevant" means "related to" the allegations of discrimination.
- **Questions** are relevant "when they seek evidence that may aid in showing" if the alleged discrimination occurred.
- **Evidence** is relevant "when it may aid a decisionmaker in determining" if the alleged discrimination occurred.
- "Not relevant" evidence from 2020 is now called "impermissible."
- "Sexual interests" of Complainant added to familiar 2020 exclusions.



CREDIBILITY ASSESSMENT

- DM must be able to question parties and witnesses to assess their credibility "to the extent" credibility is disputed and relevant to an allegation of sex discrimination.
- No definition, but example from ED: Credibility cases are those when the determination relies on testimonial evidence, and must choose to between competing narratives to resolve a case.
- DM may place less or no weight on statements based on refusal to answer relevant question.*

SEX-BASED HARASSMENT: POSTSECONDARY STUDENTS

Option 1:

- Investigator or DM holds "individual meetings" with parties and witnesses, and must ask relevant questions posed by parties.
- Parties must be provided with recording or transcription of that meeting and given enough time to prepare questions for follow-up interviews, if needed.

Option 2:

- Recorded live hearing, where DM can ask questions proposed by parties.

Option 3:

- Recorded live hearing, where Parties' advisors can question any party or witness.
- Parties cannot do the questioning, and advisor of institution's choice must be provided if needed.

OPTION 1

- Individual recorded meetings with parties and witnesses.
- Parties get transcripts or recordings of meetings and can suggest follow up questions to be asked in follow up meetings (which must also be recorded....).
- No limits described in the regulations about the number of follow ups permitted or required.

OPTION 2

- Live hearing with trauma-informed questioning; only through the hearing officer.
- Decisionmaker determines whether the question is relevant and not otherwise impermissible before asking the question.
- Maintain records of questions asked, modified, and not asked.

OPTION 3

- Live hearing; parties are present the whole time, witnesses only present during their testimony.
- The advisor of choice for each party (not the party), asks all direct, follow up, and or cross-examination questions of parties and witnesses.
- Decision maker determines relevance and not otherwise excluded in real time after each question. May require changes to question (but all parties have heard the question as asked).

***The process you
have been running
since August 2020!***

APPEALS

Must offer:

- Appeal of a dismissal
- Appeal for the outcome of sex-based harassment involving a student
- For other sex discrimination: offer an appeal if consistent with what is offered for "comparable proceedings."

EMPLOYEE REPORTING OBLIGATIONS



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WHERE WE WERE THEN, ARE NOW, AND ARE GOING

- 2011: responsible employees
 - Broad
 - Limited confidentiality
- 2020: officials with authority
 - Narrow
- 2024: NEW

NPRM, IT WAS THIS:

• IS THE EMPLOYEE CONFIDENTIAL?

YES, no reporting is required.

IF NO, does the employee have the authority to institute corrective measures?

IF YES, report to TIXC.

IF NO, does the employee have responsibility for administrative leadership, teaching, or advising?

IF YES, is the information about a student being subjected to conduct that may constitute sex discrimination under TIX?

IF YES, report to TIXC.

IF NO, TWO OPTIONS:
1. Report to TIX, or
2. Provide the TIXC's contact information and information about how to report sex discrimination to any person who provides the 'ee with the information about conduct that may constitute sex discrimination under TIX.

IF NO, is the information about an employee being subjected to conduct that may constitute sex discrimination under TIX?

IF YES, TWO OPTIONS:

- Report to TIX, or
- Provide TIXC contact information and information about how to report sex discrimination to any person who provides the employee with the information

NOW IT IS THIS: NOTIFICATION REQUIREMENTS UNDER 106.44(C)(2)

DOES AN EMPLOYEE HAVE TO TAKE ANY ACTION BECAUSE OF WHAT THEY LEARNED ABOUT CONDUCT THAT MAY CONSTITUTE SEX DISCRIMINATION UNDER TIX TO THE TIXC?
(FOR POSTSECONDARY)

IS THE EMPLOYEE CONFIDENTIAL? EITHER BECAUSE OF THEIR JOB DUTIES, OR...

YES, no reporting is required.

IF NO, does the employee have either (1) the authority to institute corrective measures, or (2) responsibility for administrative leadership, teaching, or advising? [Category 1]

IF YES, report to TIXC.

IF NO, TWO OPTIONS ARE PERMITTED:

1. Report to TIXC, or
2. Provide the TIXC's contact information and information about how to report sex discrimination to any person who provides the 'ee with the information about conduct that may constitute sex discrimination under TIX. [Category 2]

RESPONDING AND NOTIFICATION

There are three types of confidential employees:

1. Employees whose communications are privileged or confidential under Federal or State law and
2. Employees who are designated as "confidential" by the institution for the purpose of providing services to persons related to sex discrimination.

[and one more ...]

CONFIDENTIALITY FOR RESEARCHERS

3. New additional definition of confidential employees:

- Research covered by IRB on sex discrimination (institution's or another IRB)
- Confidential with respect to that study (perhaps not in other roles)
- They do not have to share the information that other confidential resources do



RESPONDING AND NOTIFICATION

- **Confidential employees** must share the following:
 - That they are confidential, including when they are not required to notify the Title IX Coordinator about conduct that reasonably may constitute sex discrimination;
 - How to contact the recipient's Title IX Coordinator and how to make a complaint of sex discrimination; and
 - That the Title IX Coordinator may be able to offer and coordinate supportive measures, as well as initiate an informal resolution process or an investigation under the grievance procedures.

CONFIDENTIAL EMPLOYEES

While not in the Regulations, beware the dangers of designating anyone who is not privileged as being a "confidential employee."

Don't do it.

Seriously.

RESPONDING AND NOTIFICATION

- **Category 1:** must notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination under Title IX or the regulations.
- **Category 2:** must either (1) notify the Title IX Coordinator, or (2) provide the contact information about the Title IX coordinator **and** state that the Title IX Coordinator will provide information about the grievance procedures, supportive measures, and how to make a complaint of sex discrimination.

RESPONDING AND NOTIFICATION

The institution can decide not to offer discretion, and instead to simplify by picking (1) or (2) as the rule for their institution.

- **Category 2:** must either
- (1) notify the Title IX Coordinator, or
- (2) provide the contact information about the Title IX coordinator **and** state that the Title IX Coordinator will provide information about the grievance procedures, supportive measures, and how to make a complaint of sex discrimination.

RESPONDING AND NOTIFICATION

You can say:

Every employee must report sex discrimination they observe or learn about to the Title IX coordinator.

If you are exempt from this requirement, we will tell you specifically, and you will be someone who is privileged/confidential by law, or someone who we designated as a private resource to provide services to people who experienced sex discrimination.

WHAT SHOULD HAPPEN NEXT?

A student tells their academic advisor, "My professor makes all of these jokes belittling people who are queer. I don't even think they know I am queer, but I don't want to go to class anymore."

- Should the academic advisor notify the Title IX Coordinator? Why or why not?
- Would this constitute hostile environment sex-based harassment? What else would you need to know before making this determination?



TRAINING REQUIREMENTS



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WHAT DOES YOUR CURRENT TRAINING LANDSCAPE LOOK LIKE?

- In person?
- Online?
- Hybrid?
- Through a third-party vendor?



TRAINING

2020

- One time
- Coordinators, investigators, decisionmaker, informal resolutions
- Core TIX Response
- Offer training?

2024

- Annual
- Coordinators, investigators, decisionmaker, informal resolutions, appeals, second look
- All employees (but different)
- Complete training!
- (more) consistent with VAWA

UPDATED TRAINING REQUIREMENTS

- When employees change roles
- Additional topics for those implementing grievance procedures, specific to their roles.
- No required training for students (who aren't also employees); but VAWA!



CORE RESPONSE TRAINING

1. Title IX Coordinators
2. Title IX Investigators
3. Title IX Decisionmakers
4. Title IX Appeals Officers
5. Title IX Informal Resolution Officers
6. Title IX Second Look Personnel

- Obligation to address sex discrimination in P&A (1, 2, 3, 4, 5, 6)
- Scope of Violative Conduct (1, 2, 3, 4, 5, 6)
- How to conduct Informal (1, 5)
- How to serve impartially (1, 2, 3, 4, 5, 6)
- Specific Position Responsibilities (1, 2, 3, 4, 6)
- Recordkeeping (1)
- Any other training necessary (1)
- Notification and information requirements (1, 2, 3, 4, 6)
- 106.45 and 106.46 procedures (1, 2, 3, 4, 6)
- Relevant meaning (1, 2, 3, 4, 6)

MAKE AVAILABLE V ACTUALLY TRAINED

- All employees – not merely offered.

“The Department appreciates the opportunity to clarify that § 106.8(d) requires a recipient to train all employees, as opposed to just making training available. While the Department recognizes that some commenters may find this burdensome, the requirement to train all employees serves the important purpose of ensuring that all employees understand their role in the recipient's compliance with its Title IX obligations and understand their responsibilities when they obtain information about conduct that may reasonably constitute sex discrimination under Title IX.” 33550



DON'T SLEEP ON VAWA TRAINING: RESPONSE



- Annual training for all officials who conduct any part of a prompt, fair, and impartial response from the initial investigation to the final result. At minimum, this includes investigators, hearing officers, and appeal officers (likely intake):
 - Issues related to dating violence, domestic violence, sexual assault, and stalking
 - How to conduct an investigation and hearing process that protects the safety of victims and promotes accountability

STUDENT FACING TRAINING?

- What do the new Title IX Regulations require that we train students on?



BUT...DON'T SLEEP ON VAWA TRAINING: PREVENTION

Education programs shall include “primary prevention and awareness programs for all incoming students and new employees,” which shall include:

- statement prohibiting domestic violence, dating violence, sexual assault, & stalking;
- definition of domestic violence, dating violence, sexual assault, & stalking in the applicable jurisdiction;
- definition of consent, in reference to sexual activity, in the applicable jurisdiction;
- safe and positive options for bystander intervention that may be carried out by an individual to prevent harm or intervene in cases of a risk of domestic violence, dating violence, sexual assault, or stalking;
- information on risk reduction to recognize warning signs of abusive behavior and how to avoid potential attacks; and
- ongoing prevention and awareness campaigns for students and faculty on all of the above (subject to regulations and ED guidance).

WHAT IS THE TRAINING CONTENT?

- Start with the practical, what makes logical sense.
- People implementing these grievance procedures need training on how to perform the role
- **Everyone else also need training to understand their response obligations**
 - Reporting to the coordinator
 - Giving information to disclosing parties if they are confidential or exempt from internal reporting
 - They need to know how to respond to a student who directly informs them of pregnancy or related conditions
 - They need to know what sex discrimination is in order to recognize it!

TRAINING FOR ALL EMPLOYEES MUST ANSWER THESE QUESTIONS

- What is the institution's obligation to address sex discrimination in its education programs and activities?
- What is sex discrimination? Including discrimination on the basis of sex, and sex-based harassment
- What do employees need to do?
 - When they know about sex discrimination
 - When a student informs them that they are pregnant

SO LONG, FAREWELL, AUF WIEDERSEHEN

- No more requirement to post training to your website
 - Still must make it publicly available for inspection upon request
 - Does not mean you have to provide a copy
 - Nothing prohibits posting



INTERSECTION WITH OTHER LAWS

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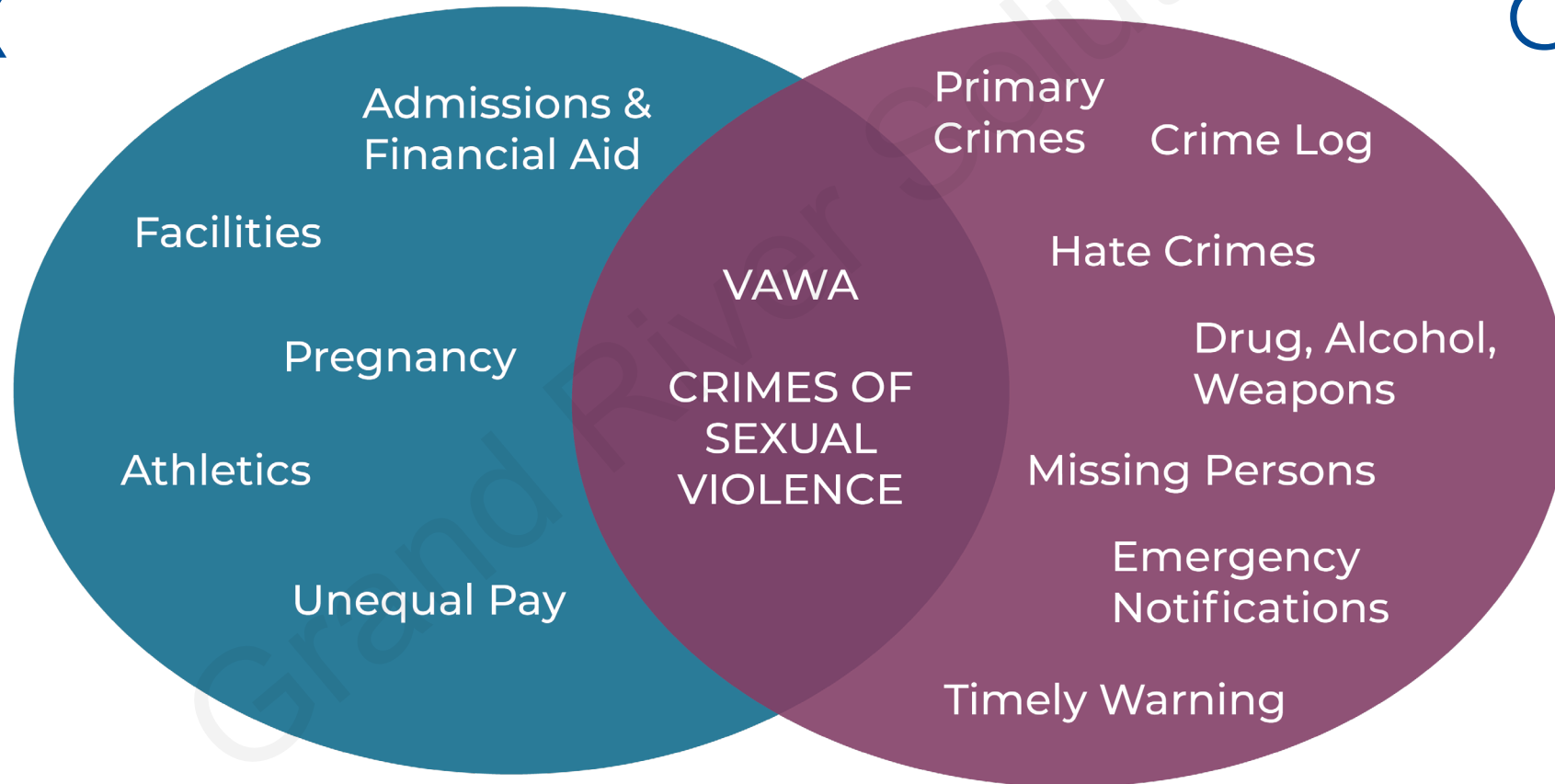


OVERLAPS

The Clery Act is not Title IX
2013 VAWA amended the Clery Act (they are not separate).

Title IX

Clery Act



VAWA AND CLERY RESPONSE

stalking, as required by paragraph (k) of this section; and

(vii) A statement that, when a student or employee reports to the institution that the student or employee has been a victim of dating violence, domestic violence, sexual assault, or stalking, whether the offense occurred on or off campus, the institution will provide the student or employee a written explanation of the student's or employee's rights and options, as described in paragraphs (b)(11)(ii) through (vi) of this section.

(12) A statement advising the campus community where law enforcement

- Title IX (historically) and VAWA response are not based on geography, they are based on identity (usually).
- Title IX (current) response and Clery counting are based on geography

VAWA AND INVESTIGATION/DETERMINATION PROCEDURES

- Fair disciplinary procedures (institutional response)
- Fair, prompt, impartial investigation and resolution
- Procedures must be conducted by “officials” who receive “annual training.”
- Advisors of choice
- Must publish the standard of evidence (whatever it may be)
- List all sanctions for VAWA crimes

REQUIRES PUBLICATION OF ALL AVAILABLE SANCTIONS

- *Not a range* (ignore prior OCR statements, since withdrawn, that institutions can use a range).
- Must specifically list all available sanctions for:
- Domestic violence; Dating violence; Sexual assault; Stalking
- **For suspension, list ALL possible suspension lengths.**
- **These standards apply to student discipline and faculty/staff discipline.**

PROVIDING WRITTEN NOTICE

Must notify victim in writing about:

Sanctions, protective measures;

Evidence preservation;

How to report the offense, on and off campus, and assistance with reporting;

Availability of orders of protection, no contact orders, etc.;

Interim remedies, including options for and assistance with changing academic, living, transportation, and working situations, if requested and reasonably available;

Procedures for institutional disciplinary proceedings.

PROVIDING WRITTEN NOTICE

- Written policy provided to all students and employees about awareness programs, confidentiality, support and resources, and disciplinary procedures
- Simultaneous written notice of outcome



VIOLENCE AGAINST WOMEN ACT

In short:

- Training, training, training...
- Awareness programs
- Bystander intervention training
- Ongoing prevention and awareness campaigns
- Primary prevention programs
- Risk reduction training (this is the one I often see not included)



VAWA CRIMES, TITLE IX VIOLATIONS, AND STATE LAW

- Thinking about overlaps: some state laws and Title IX adopt Clery definitions (sort of); some use very different definitions (especially for sexual harassment)
- Multiple obligations may stem from a specific report; whose role to address each element of the federal and state obligations?
- Note also overlap with Clery Act hate crime definitions
- Who does it apply to? Only between employees? Only involving employees?
- Importance of record-keeping, information-sharing, and getting on same page

FMLA, PUMP ACT, PWFA, SIMILAR STATE LAWS

- Intersection with Title IX and pregnancy or related conditions, including lactation, leaves of absence related.
- For student-employees, consider all applicable laws.



LITIGATION PENDING

- Ongoing injunction on ED "NOI" implementing Bostock
- Several new lawsuits challenging 2024 Title IX regulations brought by at least 15 states

Issues:

- Whether *Bostock* applies in Title IX context
- Whether ED had authority to issue these Title IX regulations
- Whether ED can preempt state laws concerning LGBTQIA+ rights

HELPFUL LINKS

The Federal Register notes that the Final Rule is scheduled to be officially published on 4/29/2024.

- <https://www.federalregister.gov/public-inspection/2024-07915/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>

Example Messages

- <https://www.k-state.edu/today/announcement/?id=96607>
- <https://www.uc.edu/about/equity-inclusion/Regulations-2024.html>
- <https://oie.jhu.edu/oie-announcements/release-of-final-title-ix-regulations-april-19-2024/>
- <https://msu.edu/issues-statements/2024-04-19-university-statement-on-federal-title-ix-regulations>

The Department has not provided a firm update on the date that the separate TIX Athletics Regulations will be released, but media have reported that this Regulation may not come out until after the next federal election (this may or may not be accurate).

- <https://www.washingtonpost.com/education/2024/03/28/title-ix-trans-athletes-biden/>

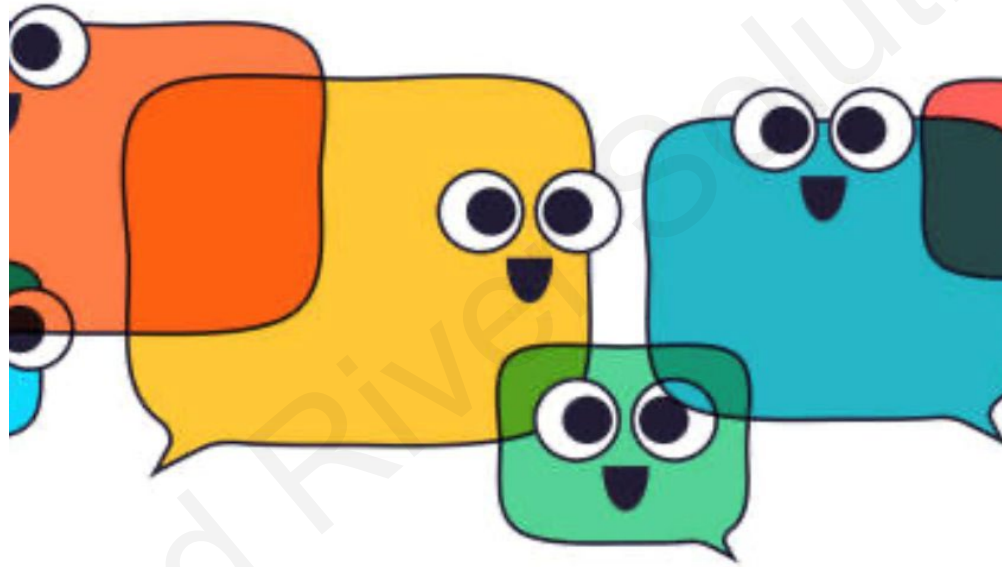
River Connect article on the Violence Prevention (mostly student facing) elements of VAWA

- <https://riverconnect.app/news/623643>

WHAT'S NEXT?



LET'S DISCUSS



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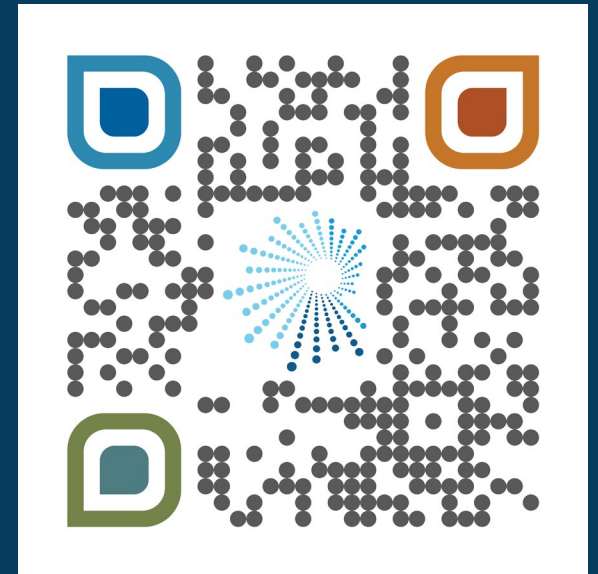


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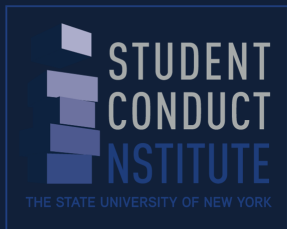


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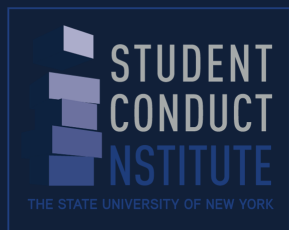
Module	Competencies	Mandated Training Topic	Level	Hours	Date Completed
2022-2023: Student Conduct Quiz Game: New York Edition	Conduct Theory,Foundations of Practice	Federal Legal Requirements*,State Legal Requirements*	Intermediate	0.25	2/22/2023
2022-2023: Employment Lawsuits: Title VII & Title IX	Law	Title IX: Sexual Harassment, Title IX: Jurisdiction,Federal Legal Requirements*	Intermediate	0.35	2/22/2023
2022-2023: Fundamental Issues in Higher Education Employment Investigations	Foundations of Practice,Law	Title IX: Investigation & Grievance Procedures,Investigation Process*,Understanding the Conduct Participant Experience*	Basic	0.6	2/22/2023
2022-2023: What Does Title IX Tell Us About Title VII?	Content Area Expertise,Law	Title IX: Sexual Harassment,Federal Legal Requirements*	Intermediate	0.3	2/22/2023
2022-2023: Labor Law Implications of the 2020 Title IX Regulations	Law	Title IX: Investigation & Grievance Procedures	Intermediate	0.25	2/22/2023
2022-2023: What Does Title VII Require?	Law	Federal Legal Requirements*	Basic	0.35	2/22/2023



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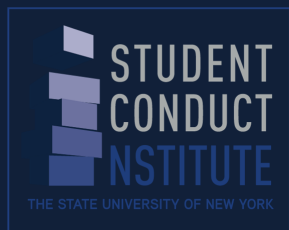
2022-2023: Determining Relevance in Title IX Hearings: Part One	Foundations of Practice, Law	Title IX: Investigation & Grievance Procedures, Title IX: Relevant Evidence, Adjudication Process*, Understanding the Conduct Participant Experience*, Federal Legal Requirements*	Basic	0.5	2/22/2023
2022-2023: Cultural Relevance and Inclusiveness, and Responding to Sexual and Interpersonal Violence on Campus	Content Area Expertise, Foundations of Practice	Cultural Awareness*	Basic	0.6	2/22/2023
2022-2023: Cross-Examination in a Title IX Hearing	Foundations of Practice, Law	Title IX: Investigation & Grievance Procedures, Adjudication Process*, Understanding the Conduct Participant Experience*, Federal Legal Requirements*, Working with Reporting Individuals (NY, MA, IL, NH, MN, OR)*, Working with Accused Individuals (NY, NH)*	Basic	0.5	2/21/2023
2022-2023: Relevance and Decorum in a Title IX Hearing	Foundations of Practice, Law	Title IX: Investigation & Grievance Procedures, Title IX: Relevant Evidence, Adjudication Process*, Understanding the Conduct Participant Experience*, Federal Legal Requirements*, Working with Reporting Individuals (NY, MA, IL, NH, MN, OR)*, Working with Accused Individuals (NY, NH)*	Basic	0.5	2/21/2023
2022-2023: Legal Framework for Understanding Conflicts of Interest and Bias	Foundations of Practice, Law	Title IX: Investigation & Grievance Procedures, Title IX: Conflicts of Interest and Bias, Conflict of Interest & Bias (NY, MA)*	Basic	0.65	2/21/2023

TRANSCRIPT



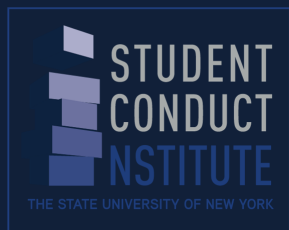
2022-2023: Collecting and Understanding Specialized Evidence	Foundations of Practice, Law	Title IX: Investigation & Grievance Procedures, Title IX: Relevant Evidence, Investigation Process*, Understanding the Conduct Participant Experience*, Federal Legal Requirements*	Intermediate	1	2/21/2023
2022-2023: Neurobiology of Sexual Assault Trauma - Part 1: Introduction	Foundations of Practice	Understanding the Conduct Participant Experience*, Trauma-Informed Practice (NY, IL, MA, NH, CT, MN)*	Basic	0.35	2/21/2023
2022-2023: Law & The Hearing Panel	Foundations of Practice, Law	Title IX: Investigation & Grievance Procedures, Title IX: Conflicts of Interest and Bias, Adjudication Process*, Understanding the Conduct Participant Experience*, Federal Legal Requirements*, Trauma-Informed Practice (NY, IL, MA, NH, CT, MN)*, Conflict of Interest & Bias (NY, MA)*	Basic	0.5	2/21/2023
2022-2023: Decision-Writing Basics for Conduct Hearings	Foundations of Practice	Adjudication Process*	Basic	0.5	2/21/2023
8 Hour Certification – 2022-2023				0	2/18/2023
2022-2023: Appeals in Student Conduct Proceedings	Content Area Expertise, Foundations of Practice	Title IX: Investigation & Grievance Procedures, Adjudication Process*, Federal Legal Requirements*	Basic	0.5	2/17/2023
2022-2023: Disability Law in Student Conduct Proceedings	Foundations of Practice, Law	Adjudication Process*, Understanding the Conduct Participant Experience*, Federal Legal Requirements*, Disability (MA, NH)*	Intermediate	0.4	2/17/2023

TRANSCRIPT



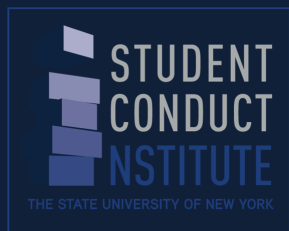
2022-2023: Pre-Hearing Preparations	Content Area Expertise, Foundations of Practice	Title IX: Investigation & Grievance Procedures, Investigation Process*, Understanding the Conduct Participant Experience*, Reporting & Confidentiality (NY, IL, MA)*, Working with Reporting Individuals (NY, MA, IL, NH, MN, OR)*, Working with Accused Individuals (NY, NH)*	Basic	0.5	2/17/2023
2022-2023: CAS Standards; Student Conduct Programs	Foundations of Practice, Law	Federal Legal Requirements*, Reporting & Confidentiality (NY, IL, MA)*	Basic	0.25	2/17/2023
2022-2023: No Contact Orders, Emergency Removals, and Interim Suspensions	Content Area Expertise, Foundations of Practice, Law	Title IX: Investigation & Grievance Procedures, Investigation Process*, Understanding the Conduct Participant Experience*, Federal Legal Requirements*, Working with Reporting Individuals (NY, MA, IL, NH, MN, OR)*, Working with Accused Individuals (NY, NH)*, Remedial Actions (NY, MA, OR)*	Basic	0.5	2/17/2023
2022-2023: Evidence in the Student Conduct Process	Content Area Expertise, Foundations of Practice	Title IX: Investigation & Grievance Procedures, Title IX: Relevant Evidence, Investigation Process*, Adjudication Process*, Federal Legal Requirements*	Basic	0.6	2/17/2023
2022-2023: Privacy, Confidentiality & Privilege in Disclosures of Sexual and Interpersonal Violence	Foundations of Practice, Law	Title IX: Investigation & Grievance Procedures, Understanding the Conduct Participant Experience*, Federal Legal Requirements*, Reporting & Confidentiality (NY, IL, MA)*, Working with Reporting Individuals (NY, MA, IL, NH, MN, OR)*, Working with Accused Individuals (NY, NH)*	Basic	0.5	2/17/2023

TRANSCRIPT



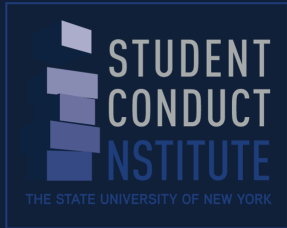
2022-2023: Understanding the Investigative Report Template for Investigations of Title IX Sexual Harassment	Foundations of Practice, Law	Title IX: Investigative Reports, Investigation Process*, Understanding the Conduct Participant Experience*, Federal Legal Requirements*, Working with Reporting Individuals (NY, MA, IL, NH, MN, OR)*, Working with Accused Individuals (NY, NH)*	Basic	0.35	2/15/2023
2022-2023: Title IX Final Rule Quiz Game	Conduct Theory, Foundations of Practice, Law	Federal Legal Requirements*	Intermediate	0.25	2/15/2023
2022-2023: CAS Standards; Sexual Violence Related Programs and Services	Foundations of Practice, Law	Understanding Sexual & Interpersonal Violence*, Consent*, Cultural Awareness*, Understanding the Conduct Participant Experience*, Working with Reporting Individuals (NY, MA, IL, NH, MN, OR)*, Working with Accused Individuals (NY, NH)*	Basic	0.25	2/15/2023
2022-2023: Supportive Measures in Response to Reports of Sexual and Interpersonal Violence	Content Area Expertise, Foundations of Practice, Law	Title IX: Investigation & Grievance Procedures, Understanding the Conduct Participant Experience*, Federal Legal Requirements*, Working with Reporting Individuals (NY, MA, IL, NH, MN, OR)*, Working with Accused Individuals (NY, NH)*	Basic	0.65	2/15/2023
2022-2023: Technology Basics - Information Security, Confidentiality, and Decorum	Law	Title IX: Technology	Basic	0.3	2/15/2023

TRANSCRIPT



2022-2023: Effective Interviewing of Parties and Witnesses	Content Area Expertise, Foundations of Practice, Law	Title IX: Investigation & Grievance Procedures, Title IX: Relevant Evidence, Title IX: Investigative Reports, Investigation Process*, Understanding the Conduct Participant Experience*, Working with Reporting Individuals (NY, MA, IL, NH, MN, OR)*, Working with Accused Individuals (NY, NH)*	Basic	0.85	2/15/2023
2022-2023: What is Severe, Persistent, and Objectively Offensive Title IX Sexual Harassment?	Law	State Legal Requirements*	Basic	0.3	2/15/2023
2022-2023: Title IX Final Rule Basics	Content Area Expertise, Foundations of Practice, Law	Title IX: Sexual Harassment, Title IX: Jurisdiction, Title IX: Investigation & Grievance Procedures, Title IX: Conflicts of Interest and Bias, Title IX: Relevant Evidence, Understanding Sexual & Interpersonal Violence*, Adjudication Process*, Federal Legal Requirements*, Reporting & Confidentiality (NY, IL, MA)*	Basic	0.6	2/15/2023
2022-2023: Making Your Practices More Inclusive: The Intersection of Title IX and LGBTQ+ Support	Foundations of Practice	Cultural Awareness*, Understanding the Conduct Participant Experience*	Basic	0.65	2/15/2023
2022-2023: Sexual Harassment: Legal Definitions	Law	Title IX: Sexual Harassment, Understanding Sexual & Interpersonal Violence*, Federal Legal Requirements*	Basic	0.4	2/14/2023

TRANSCRIPT



2022-2023: Trauma Informed Practice: Legal Compliance Basics	Foundations of Practice,Law	Title IX: Investigation & Grievance Procedures,Adjudication Process*,Understanding the Conduct Participant Experience*,Federal Legal Requirements*,Trauma-Informed Practice (NY, IL, MA, NH, CT, MN)*	Intermediate	0.2	2/14/2023
2022-2023: Title IX Liability for "Deliberate Indifference"	Content Area Expertise,Law	Title IX: Investigation & Grievance Procedures,Federal Legal Requirements*,Working with Reporting Individuals (NY, MA, IL, NH, MN, OR)*	Intermediate	0.85	2/14/2023
2022-2023: What Is Affirmative Consent?	Foundations of Practice,Law	Consent*,State Legal Requirements*	Basic	0.25	2/14/2023
2022-2023: Due Process Part Two: Practical Application	Conduct Theory,Foundations of Practice,Law	Adjudication Process*,Federal Legal Requirements*	Basic	0.25	2/14/2023
2022-2023: Due Process Part One: Theory and History	Conduct Theory,Foundations of Practice,Law	Federal Legal Requirements*	Basic	0.7	2/14/2023

Total: 17.3 Hours



CERTIFICATE OF COMPLETION

Elizabeth Towle

in recognition of successfully completing the
TITLE IX INVESTIGATOR TRAINING

Hours of Completion: 3

45th Annual National Conference on Law and Higher Education
March 8, 2024 | Clearwater, Florida

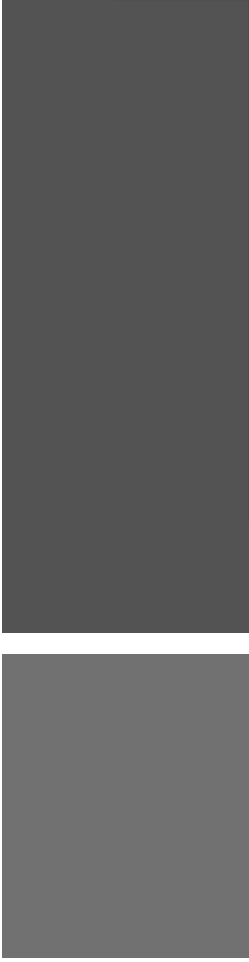
Jennifer Hammat, Ed.D.

Dean of Students | University of Southern Indiana

Kyle Griffis

Associate General Counsel | Florida State University

THE CENTER FOR EXCELLENCE IN
HIGHER EDUCATION LAW & POLICY
at Stetson University College of Law



TITLE IX AGREEMENT- BASED RESOLUTIONS

2024 Regulations
October 2024

MEET YOUR FACILITATOR

Kateeka Harris



Kateeka J. Harris has nearly two decades of experience in higher education at four year and two-year colleges and universities including Title IX compliance, student conduct, multicultural program administration, and undergraduate admissions. Kateeka is a nationally recognized expert in Student Conduct and Title IX Administration and has held leadership positions within the Association for Student Conduct Administration, including President. Kateeka received her Master of Arts in Higher Education from Slippery Rock University and anticipates receiving her Doctor of Educational Leadership from Texas Wesleyan University next year.

ABOUT US

Vision

We exist to create safe and equitable work and educational environments.

Mission

To bring systemic change to how school districts and institutions of higher education address their Clery Act & Title IX obligations.

Core Values

- Responsive Partnership
- Innovation
- Accountability
- Transformation
- Integrity

- Injunction status
- Pending litigation
- What's next?

AGENDA

- | Title IX
Regulations, Definitions, Scope
- | Conducting the ABR
Options & Considerations
- | Agreement-Based Resolution
Requirements and types
- | Reaching a Resolution
- | Impartiality
Avoiding bias, prejudgment
- | Documentation
Recordkeeping
- | Getting Started
Initial Steps & Considerations
- | Implementation
Strategies for Success

**WHAT ARE YOU
HOPING TO GET FROM
THIS TRAINING?**



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TITLE IX

Regulations, Definitions, Scope

01



Title IX of the Education Amendments Act 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."

20 U.S.C. § 1681 (1972).

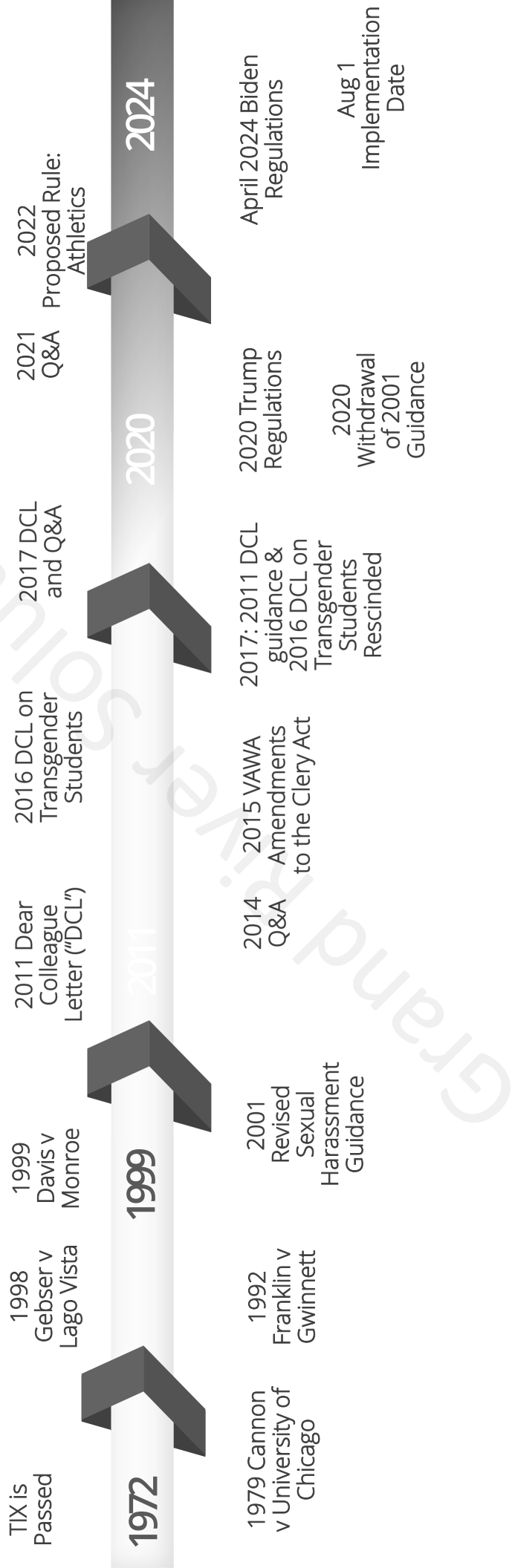


Schools have a duty to promptly and effectively end any sex discrimination in its education program or activity, prevent its recurrence, and remedy its effects.

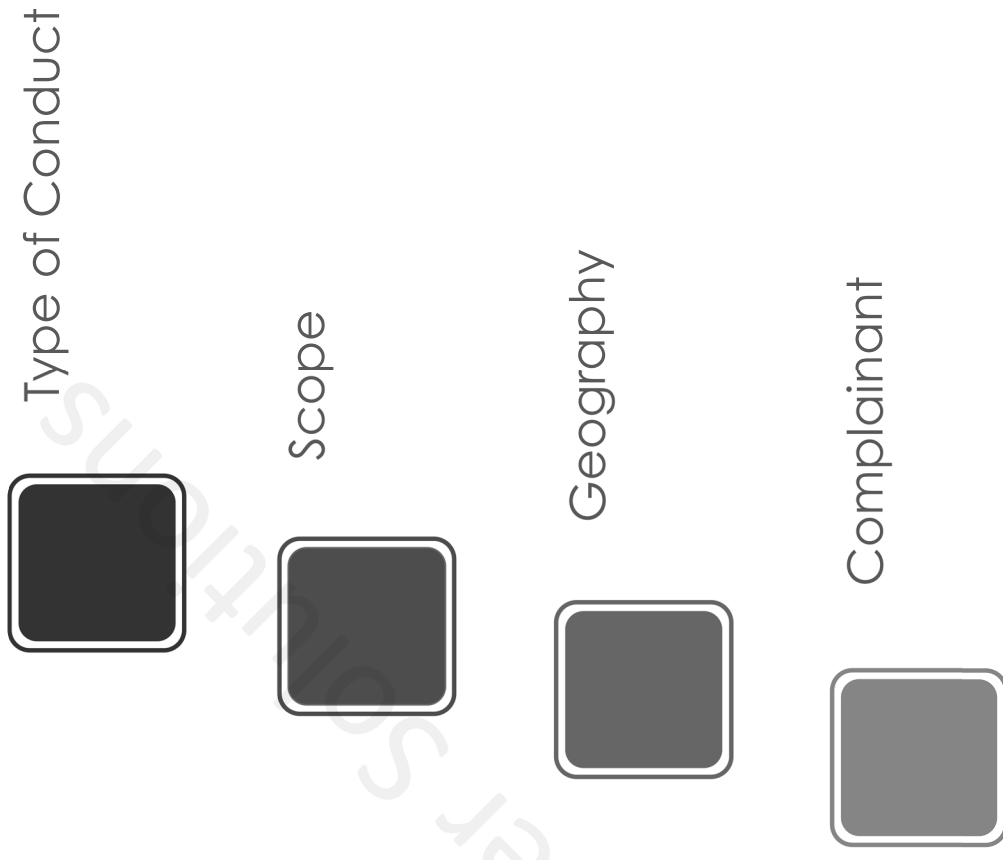


The History of Title IX

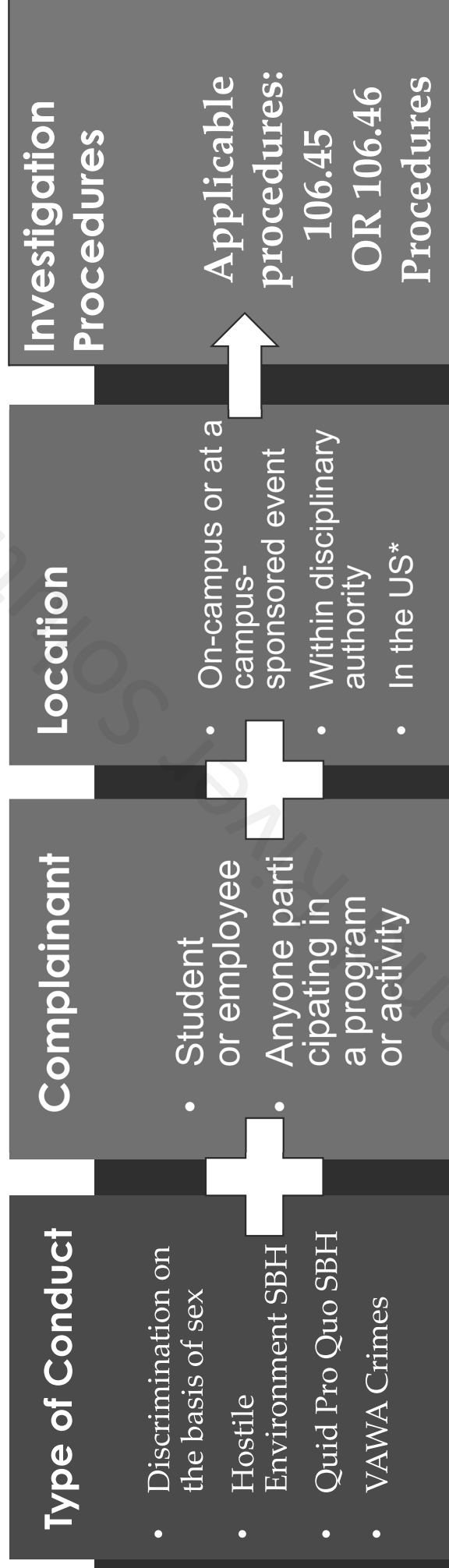
A Timeline



2024 Regs: Applicability Overview



FROM INTAKE TO INVESTIGATION (POST-AUGUST 2024)



RESOLUTION OPTIONS

Support- Based Only

No procedures



Informal or Agreement- Based Resolution

Voluntary



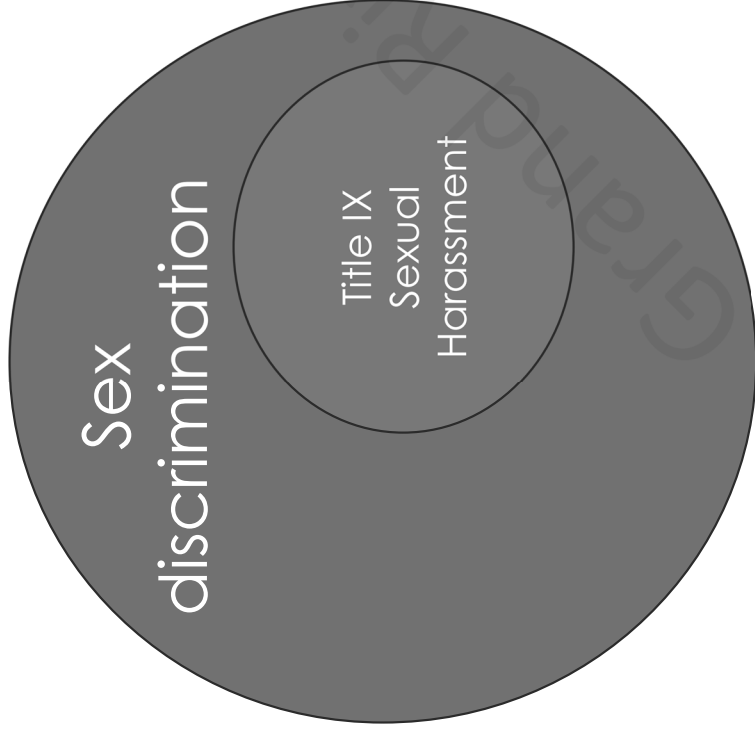
Grievance Procedures

All
requirements of
106.45 or 106.46



WHICH POLICY APPLIES?

2020



2024



PROHIBITED CONDUCT

WHAT IS COVERED BY 2024 TITLE IX?

- **All** sex discrimination – this is an umbrella term
- Not only sexual harassment (2020 amendments only addressed sexual harassment)



DEFINITIONS – WHAT IS SEX DISCRIMINATION?

- **Discrimination on the basis of sex** includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.



DEFINITIONS: SEX DISCRIMINATION – "SEX STEREOTYPING"

Preamble: "fixed or generalized expectations regarding a person's aptitudes, behavior, self-presentation, or other attributes based on sex."



DEFINITIONS: SEX DISCRIMINATION – "SEX CHARACTERISTICS"?

The Preamble defines "sex characteristics" as "physiological sex-based characteristics." Sex discrimination based on a person's physiological sex characteristics may include discrimination based on a person's anatomy, hormones, and chromosomes associated with male or female bodies.

ED states Title IX also covers discrimination based on (undefined) "intersex" traits [It adopts this term instead of "differences of sex development"].

ED identifies that "inappropriate disclosure of medical information about a student's intersex traits could constitute prohibited discrimination based on sex characteristics."



LGBTQIA+

Preamble:

Price Waterhouse/Oncale/Bostock and Title VII → Title IX Regulations
Sex stereotypes → to treat differently on basis of sexual orientation/gender identity is to discriminate on the basis of sex

“Indeed, Bostock’s reasoning dictates that, even assuming that ‘sex’ refers to ‘biological distinctions between male and female,’ discrimination against a person because they are gay or transgender is, in part, discrimination on the basis of sex.”

§106.10: “Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.”

DE MINIMIS TEST



StyleByRostik

De Minimis test for sex-separated programs/activities:

- Otherwise permissible sex separation is consistent with Title IX as long as it is carried out in a manner that does not impose more than de minimis harm.
- Examples: locker and bathrooms; appearance codes
- Denying a transgender student "access to a sex-separate facility or activity consistent with that student's gender identity" would be more than a de minimis harm

DEFINITIONS – WHAT IS SEX-BASED HARASSMENT?

- Sex-based harassment is a form of sex discrimination and means sexual harassment, and other harassment *on the basis of sex, that is:*
 - Hostile environment sexual harassment
 - Quid Pro Quo
 - Domestic violence, dating violence, sexual assault, and stalking

HOSTILE ENVIRONMENT SEX-BASED HARASSMENT HAS 5 COMPONENTS

- The conduct is
- (1) unwelcome,
- (2) sex-based,
- (3) subjectively and objectively offensive, and
- (4) so severe or pervasive
- (5) that it results in a limitation of or denial of a person's ability to participate in or benefit from the education program or activity.



Must have all 5 above!

HOSTILE ENVIRONMENT SEX-BASED HARASSMENT FACTORS TO CONSIDER IN DECISION-MAKING

- (1) the degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;
- (2) the type, frequency and duration of the conduct;
- (3) the parties' ages, roles within the recipient's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct;
- (4) the location of the conduct and the context in which the conduct occurred; and
- (5) other sex-based harassment in the recipient's education program or activity.

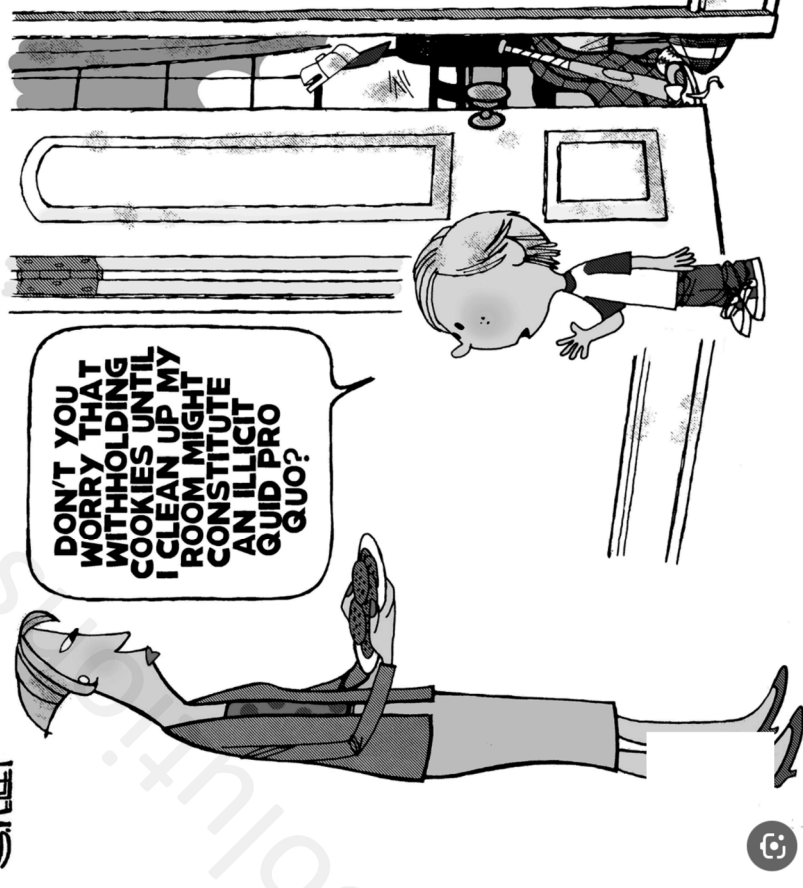
FIRST AMENDMENT BALANCING

- "One stray remark" is not "pervasive"
- A statement "of one's point of view on an issue of debate and with which another person disagrees, even strongly so, is not the kind or degree of conduct that implicates the regulations."
- But "sex-based conduct that occurs on multiple occasions and is so persistent that, for example, it limits another student's ability to complete assigned coursework at the student's typical level of performance" might meet the standard.
- ED encourages consultation with "settled components of Title VII sexual harassment law" for guidance on the meaning of "severe or pervasive"

QUID PRO QUO

- "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"

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CREATORS SYNDICATE



“SPECIFIC OFFENSES” (VAWA)

Specific offenses defined by the Violence Against Women Act's amendments to the Clery Act



DATING VIOLENCE

The term dating violence means “violence committed by a person—

- A. who is or has been in a social relationship of a romantic or intimate nature with the victim;
- B. the existence of such a relationship shall be determined based on the reporting party's statement and with consideration of:
 - I. The length of the relationship;
 - II. The type of relationship; and
 - III. The frequency of interaction between the persons involved in the relationship”

DOMESTIC VIOLENCE

The term domestic violence is a “felony or misdemeanor crimes of violence committed

- A. by a current or former spouse of the victim,
- B. by a person with whom the victim shares a child in common,
- C. by a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner,
- D. by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the violence occurred, or
- E. 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 in which the crime of violence occurred.”

SEXUAL ASSAULT

Sexual Assault includes Rape, Sodomy, Sexual Assault With an Object, Fondling, Incest, and Statutory Rape.

These definitions come from the FBI.

SEX OFFENSES

A. Rape — The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.

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

C. Sexual Assault With an Object — The use of an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

SEX OFFENSES

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

E. Incest — Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

F. Statutory Rape — Nonforcible sexual intercourse with a person who is under the statutory age of consent.

STALKING

- Title IX stalking is on the basis of sex, and “engaging in a course of conduct directed at a specific person that would cause a reasonable person to—
 - A. fear for the person’s safety or the safety of others; or
 - B. suffer substantial emotional distress.”



REPORTING & NOTICE OBLIGATIONS

- All employees (except confidential employees) must notify the Title IX Coordinator if they have information that may reasonably constitute sex discrimination.
- Confidential employees must let disclosing people know that they are confidential, and share the Coordinator's contact information and how they could support reporting parties with supportive measures and information about options.

NOTICE OBLIGATIONS

If a **student** directly informs any employee of their own pregnancy, the employee must:

- Provide the Title IX coordinator's contact information, and
- Tell the person that the coordinator can coordinate specific actions to prevent sex discrimination and ensure the student's equal access to the recipient's education program or activity.

No reporting to the Coordinator required. No recordkeeping required.

ALTERNATIVE RESOLUTION

Requirements and types



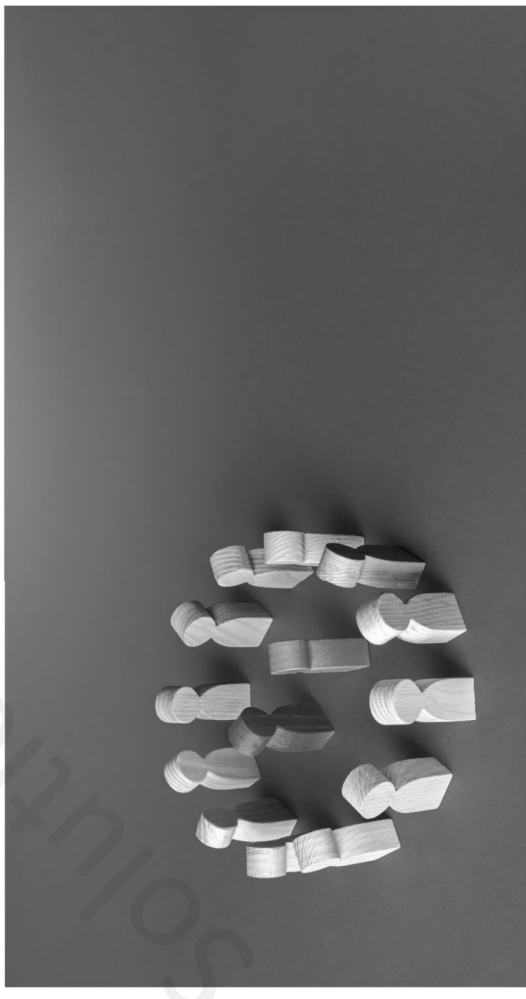
TRAINING REQUIREMENTS

All facilitators of an agreement-based resolution process must be trained upon their hiring or change in position resulting in them taking on this role, and every year thereafter, on:

- The institution's obligation to address sex discrimination in its program and activity
- The scope of conduct constituting sex discrimination, including the definition of sex-based harassment
- All applicable notification and information requirements
- How to serve impartially, including by avoiding conflicts of interest and bias
- The rules and practices associated with the recipient's informal resolution process
- This training cannot rely on sex stereotypes

AGREEMENT-BASED RESOLUTION

- Institutions have the option to offer an agreement-based resolution; it is not required
- Institutions may decide on a case-by-case basis which matters are eligible for agreement-based resolution
- They do not need to give a reason in writing for not allowing a case to go to IR
- In a change from the 2020 Title IX Final Rule, instances of alleged employee sex-based harassment against a **postsecondary** student **can** be eligible for agreement-based resolution.



TYPES OF AGREEMENT-BASED RESOLUTIONS

- In the preamble, the Department gives institutions discretion to choose the option best for their educational community
- The Department identifies the following as non-exclusive possibilities for postsecondary institutions:
 - Mediation
 - Restorative justice
 - Transformative justice

Agreement-based resolution requires its own notice to the parties and must include:

- The allegations
- The right to withdraw from ABR and begin or resume the formal process
- That IR precludes the formal process once it is completed
- The potential terms that can be offered in an ABR, and that those terms only bind the parties
- What information the recipient will maintain and whether and how the recipient could disclose such information for use in grievance procedures under § 106.45, and if applicable § 106.46, if grievance procedures are initiated or resumed.

Agreement-based Resolution: Required Notice

- The parties must give voluntary consent to the agreement-based resolution process
- May not require participation in the process as a condition of employment or enrollment
- May be entered into at any time in the process, prior to reaching a determination regarding responsibility
- May be stopped at any time prior to determination regarding responsibility

Agreement-Based Resolution

HIGHLIGHTS FROM THE 2024 FINAL RULE

- Must identify persons designated to facilitate agreement-based resolution processes.
- Facilitator cannot be same person as investigator or decision maker.
- ABR processes must be reasonably prompt.
- Options for ABR resolution processes should be included with notice of allegations.
- Potential "terms" are defined
- Must keep records regarding the facilitation of an ABR process.



POTENTIAL TERMS OF AGREEMENT-BASED RESOLUTION

Under the 2024 Final Rule, potential terms of an ABR agreement may include, but are not limited to:

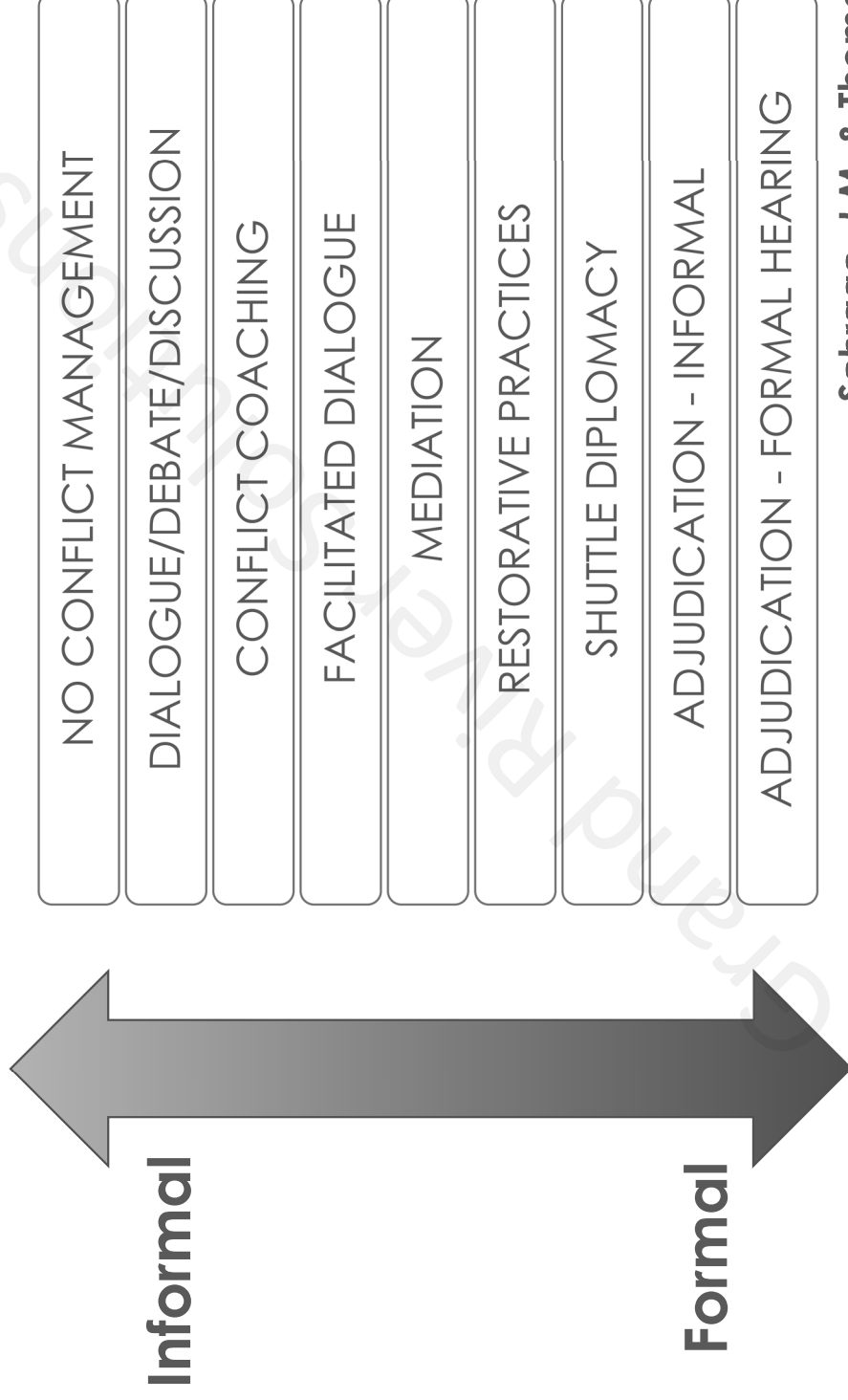
- Restrictions on contact; and
- Restrictions on the respondent's participation in one or more of the recipient's programs or activities or attendance at specific events
- "Nothing in § 106.44(k) prohibits a recipient from offering an ABR process in which a respondent may accept responsibility or accountability for sex discrimination or harm caused."
- Note: a party's admission of responsibility "is not a determination whether sex discrimination occurred" - that can **only** be found through the formal grievance process



WHAT CAN ABR LOOK LIKE?

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TYPES OF CONFLICT RESOLUTION



Schrage, J.M. & Thomas, M.C (2008)

WHAT WORKS BEST?

● | Mediation

● | Shuttle Diplomacy

● | Restorative Practices

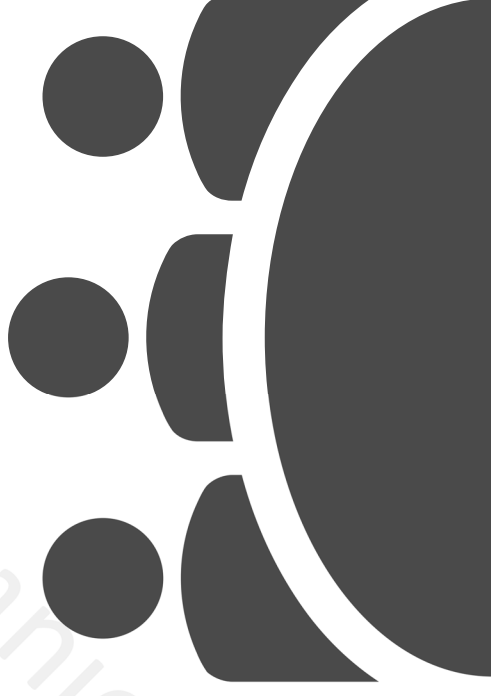
● | Informal Adjudication



MEDIATION

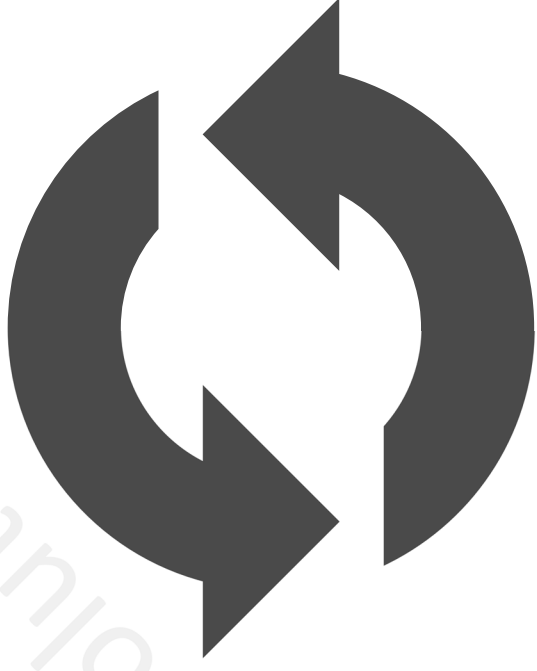
“Mediation is a process in which a neutral third party (mediator) helps the parties communicate with one another in an attempt to reach an agreement that is acceptable to everyone. Mediation is a forward-looking process in that it encourages the participants to focus on their current and future needs and interests rather than focusing on fault and blame for past actions. Mediation differs from a court proceeding in that the parties maintain control of their dispute. The decision-making power in mediation lies with the parties, not with the mediator.”

-Harris County TX Dispute Resolution Center



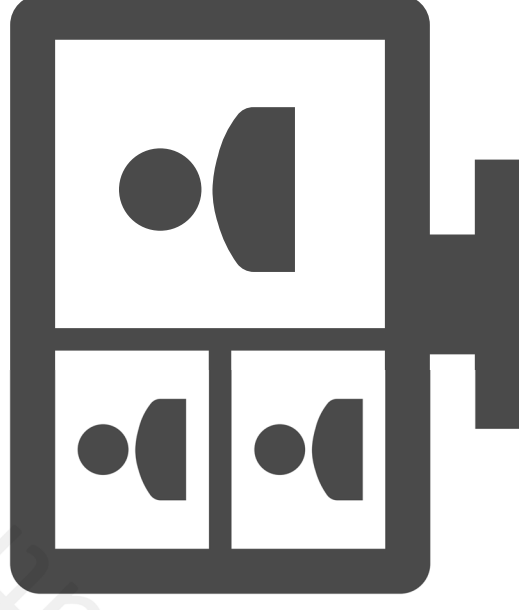
RESTORATIVE PRACTICES

Restorative practices focus on the respondent taking accountability and repairing harm they have caused. Restorative practices are community based and provides space for all of the parties involved to come together to restore trust and build or rebuild community.



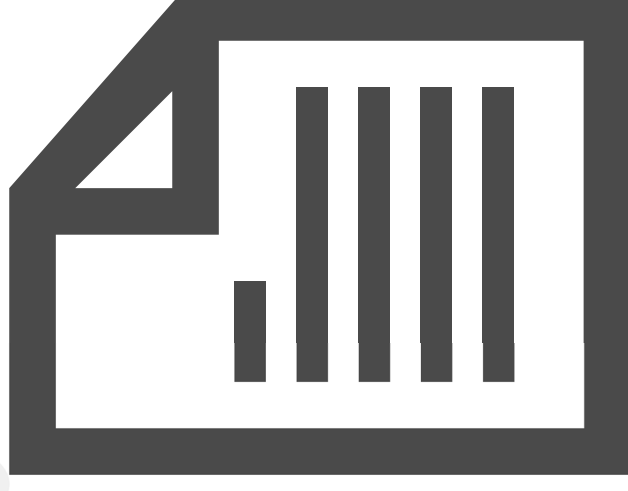
SHUTTLE DIPLOMACY

Shuttle diplomacy is a form of mediation that does not require the parties to interact directly with each other. An agreement is negotiated by a facilitator or mediator working with one party at a time to reach an agreed upon resolution.



INFORMAL ADJUDICATION

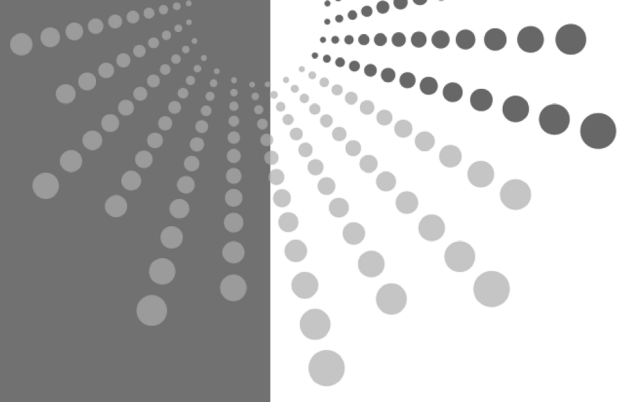
Informal adjudication is an administrative decision made in accordance with processes established by the institution. While the parties are largely responsible for suggesting outcomes and actions in other forms of informal resolution, in informal adjudication, the facilitator may lead by suggesting outcomes for the parties to consider.



IMPARTIALITY

Avoiding bias, prejudgment, and
conflicts of interest

03



WHAT CONSTITUTES BIAS?

Conduct a fact-specific, objective inquiry based in common sense to determine bias.

This Includes:

- Decision-making that is grounded in stereotypes
- Different treatment based on a person's sex or other protected characteristic
- A decision based on something other than the facts

IMPERMISSIBLE BIAS

Making a decision, determination, or finding that is based on something other than the evidence and specific facts of the case.

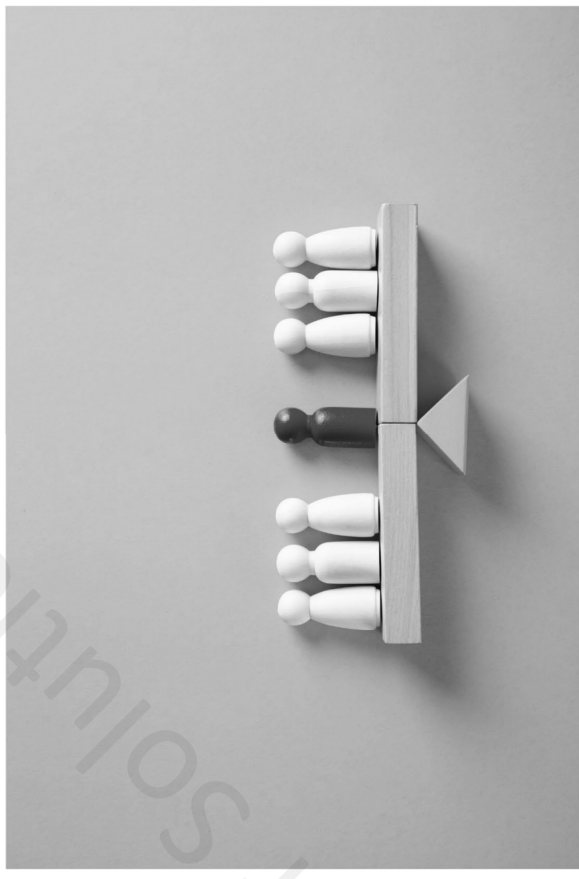
CONFLICT OF INTEREST



SECTION 106.44(K)(4)

Any person designated to facilitate an informal resolution process must not have a conflict of interest or bias:

- For or against complaints or respondents generally,
or
- An individual complainant or respondent



SECTION 106.45(b)(1)(iii)

“Title IX Coordinator, investigator, decision maker, or facilitator of informal resolution must receive training on...how to serve **impartially**, including **avoiding prejudgment** of the facts at issue, **conflict of interest**, and **bias**. This training material **may not rely on sex stereotypes** and **must promote impartial investigations and adjudications** of formal complaints of sexual harassment.”

GETTING STARTED

Initial Steps & Considerations

04





GOALS

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GOALS FOR INFORMATION RESOLUTION PROCESSES



- ✓ Neutral/Impartial Process
- ✓ Trauma Informed
- ✓ Meets the Needs of the Parties
- ✓ Clear and Transparent
- ✓ Empowerment of Parties
- ✓ Resolution Focused

REMINDERS ABOUT INFORMAL RESOLUTIONS

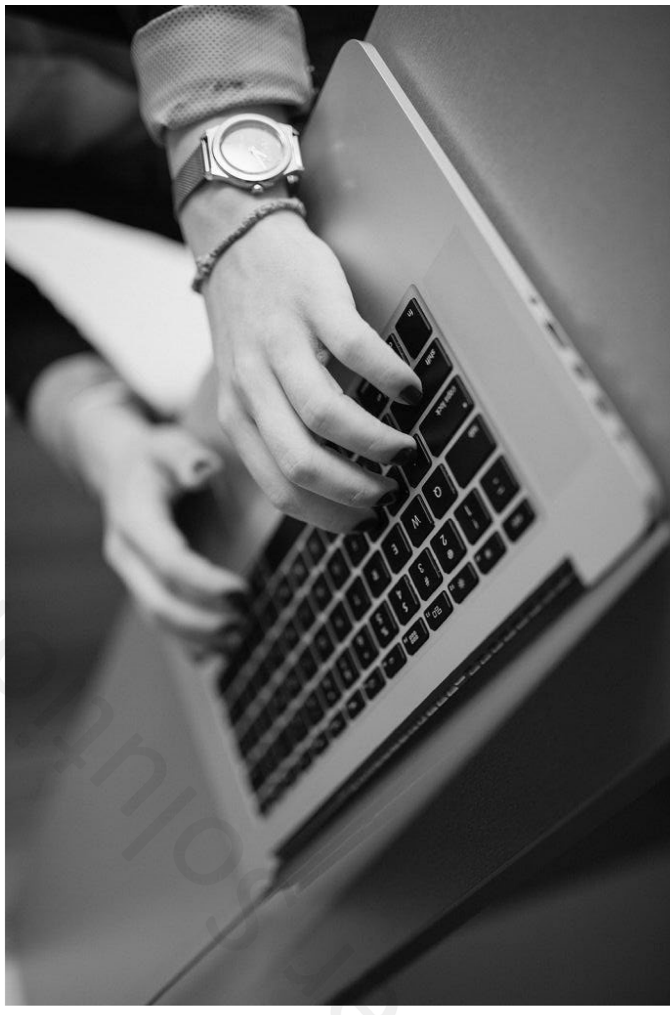
- As a best practice, any information shared or gained during the informal resolution process should not be used against either party should the matter return to the formal process.
- Informal resolutions typically do not result in a formal finding of violation.
- Any agreed upon outcomes are typically not considered sanctions.
- The Title IX Coordinator is responsible for determining when an informal resolution is appropriate.
- An agreement between the parties ends the matter.
- Informal resolution agreements are not able to be appealed.



REMINDER

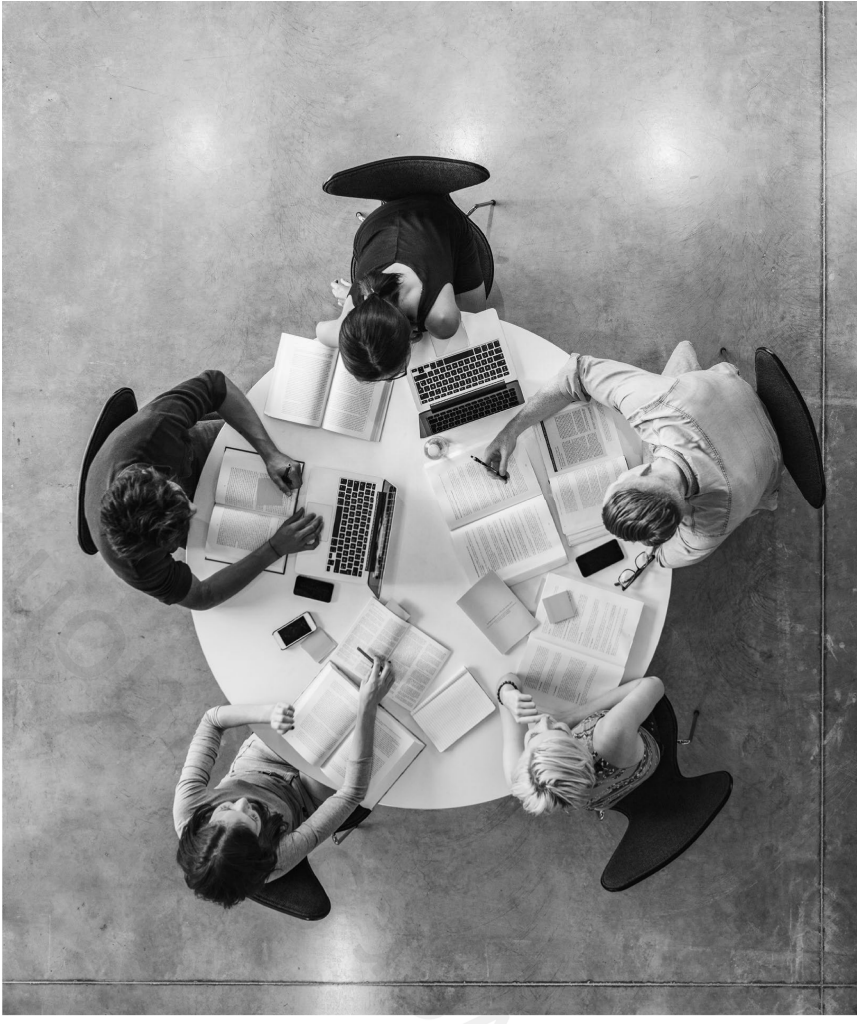
DRAFTING PROCESS

- Process should be clear and transparent
- Provides for appropriate due process under the regulations
- Provides flexibility to choose the method of resolution that best suits the parties and the situation at hand
- Complements existing investigation or grievance process
- Includes details about record keeping and confidentiality



STAFFING CONSIDERATIONS

- Informal Resolution facilitators need to be trained
 - In some states, mediators need to be trained but do not need to be certified.
 - In others, mediators need to be certified.
- Facilitators cannot be the investigator or decision maker
- Confidentiality is key
- Internal vs. External





CONSIDERING OUTCOMES

TEMPLATES



- Informal Resolution specific templates should include:
 - Notice of Informal Resolution
 - Informal Resolution Agreement
- Investigation or Grievance procedures templates should also be include information on Informal Resolution options, including:
 - Notice of Allegations
 - Notice of Investigation
 - Notice of Hearing (if applicable)

ASSESSMENT

Consider assessing:

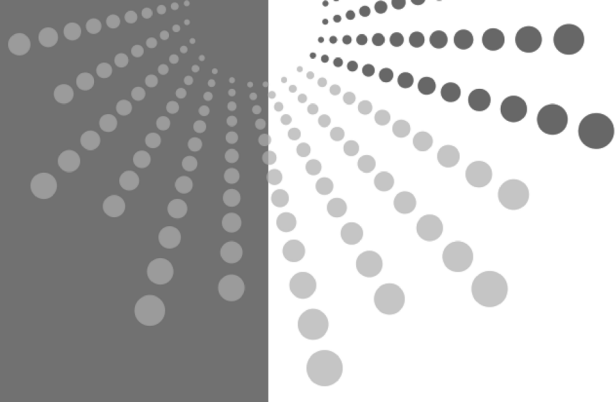
- Number of cases that enter ABR process
- Number of cases that exit ABR process
- Kinds of agreed upon outcomes
- Type of process used (mediation, shuttle negotiation, etc.)
- Overall party satisfaction with resolution process
- Compliance with resolution agreements



CONDUCTING THE ABR

Initial Steps & Requirements

05



HOW TO PROCEED?

Support-Based Only

No formal process



Informal or Agreement-Based

Signed agreement;
Voluntary;
What records?

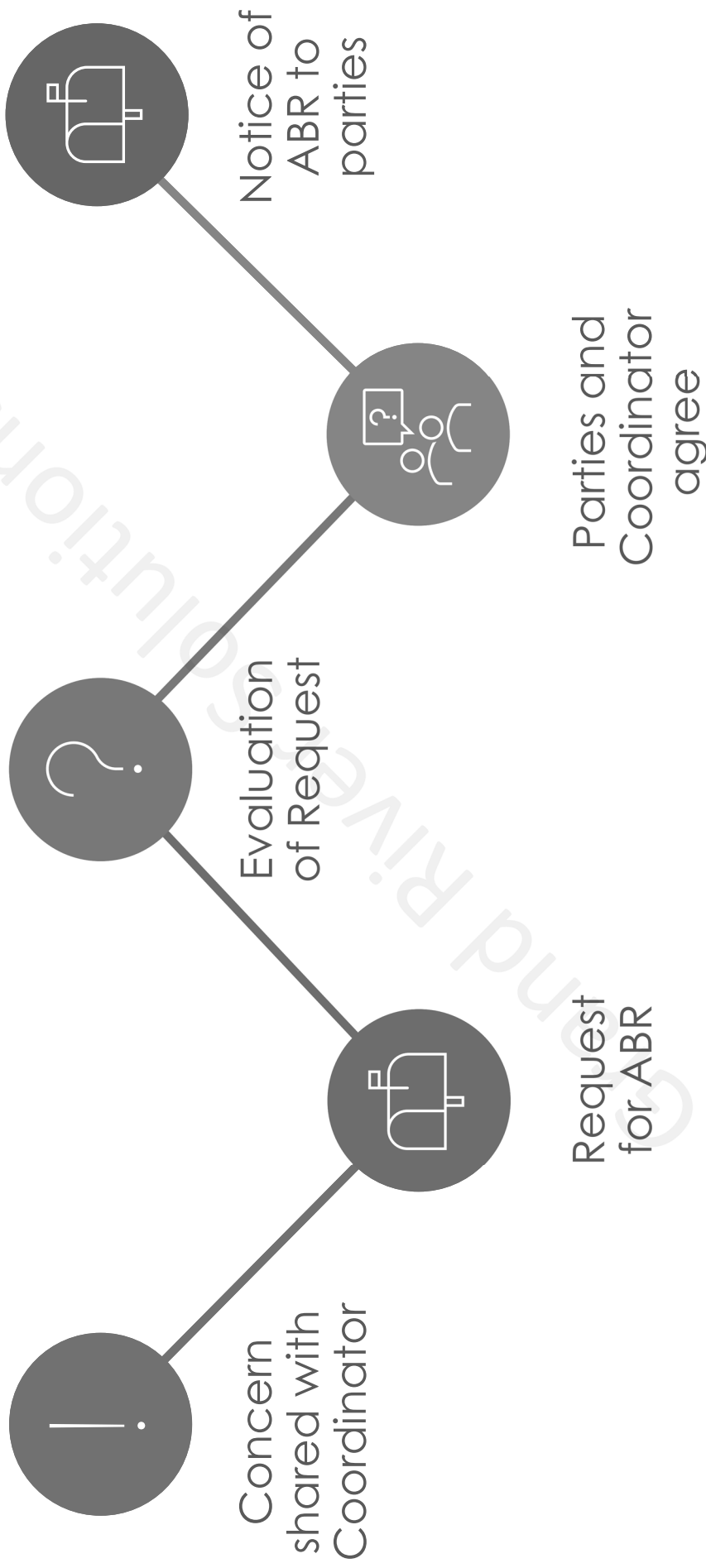


Grievance Procedures/ Investigation

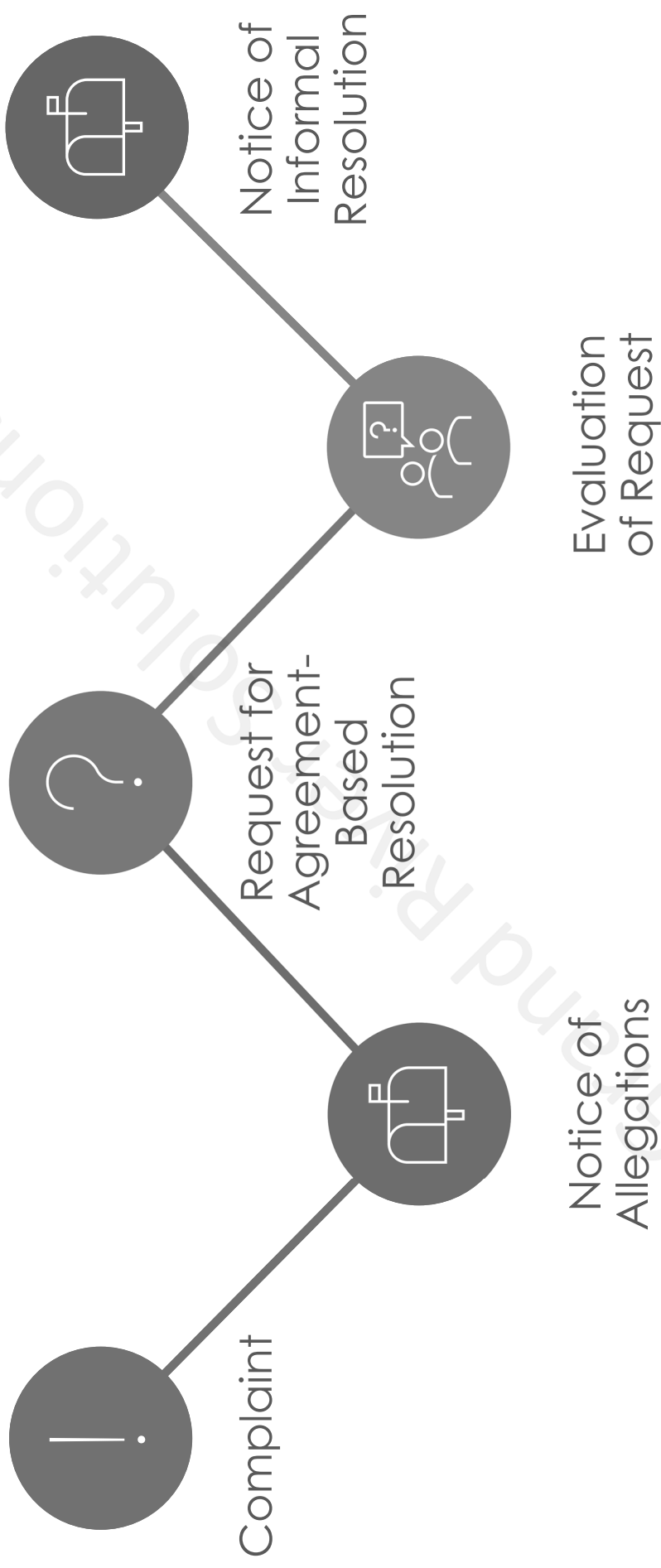
All requirements of
106.45 or 106.46



STARTING WITH AGREEMENT-BASED RESOLUTION



ANOTHER ROUTE TO AGREEMENT-BASED RESOLUTION



EVALUATING ABR REQUESTS

Is ABR appropriate?

- Considerations:
 - The emotional state of the parties
 - Do the parties hold equal power?
 - Are both parties willing to engage meaningfully in the process?



PROCESS PARTICIPANTS



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THE PARTICIPANTS: THE PARTIES

Complainant

An individual who is alleged to have experienced conduct that could constitute sex discrimination.

Respondent

An individual who has been reported to be the perpetrator of conduct that could constitute sex discrimination.

THE PARTICIPANTS: ADVISORS

- Can be anyone, including a lawyer, a parent, a friend, and a witness
- No particular training or experience required (institution appointed advisors should be trained)
- Can accompany their advisees at all meetings and interviews
- Advisors should help the Parties prepare for each meeting and are expected to advise ethically, with integrity, and in good faith
- May not speak on behalf of their advisee or otherwise participate, except that the advisor will conduct cross examination at a hearing
- Advisors are expected to advise their advisees without disrupting proceedings



THE PARTICIPANTS: ADVISORS

An Advisor who oversteps their role as defined by the policy should be warned once. If the Advisor continues to disrupt or otherwise fails to respect the limits of the Advisor role, the meeting may be ended, or other appropriate measures implemented. Subsequently, the Title IX Coordinator has the ability to determine how to address the Advisor's non-compliance and future role.



Prohibited
Behavior

THE PARTICIPANTS: THE FACILITATOR

- Manages logistics of process
- Communicates with parties
- Coordinates with and updates Title IX Coordinator
- Attempts to facilitate an agreed resolution
- Documents process and decisions





DOES THE FACILITATOR NEED ACCESS TO THE CASE FILE?

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REACHING A RESOLUTION

Options & Considerations

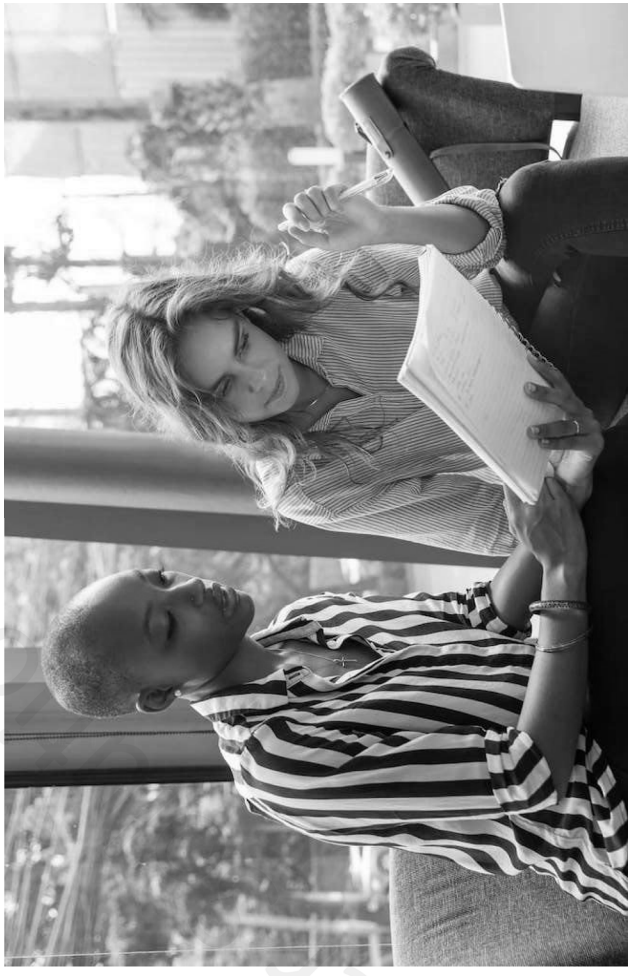
06



PREPARING FOR RESOLUTION

Individual meetings with each party and their advisor to discuss:

- Process
- Timeline
- Party's goals in the process
- Available types of resolution and comfort level with each
- Expectations of all participants
- Setting for resolution
 - *In person*
 - *Video conference*
 - *Asynchronous*



PARTY GOALS

- Why is understanding these goals important?
- What are some approaches to determining the goals each party has?



UNDERSTANDING PARTY GOALS

- Why did they decide to participate in ABR?
- In an ideal world, what is their desired outcome?
- What are their non-negotiables?
- Where are they willing to compromise?
- What level of interaction with the other party do they want?
- What do they need to feel comfortable with the resolution?

REMINDER:

Notice to the parties must state institutional policy on whether and how information from ABR may be used in grievance procedures, if grievance procedures are initiated (or resumed)



CONFLICT STYLES

The key difference between conflict styles is the priority each individual places on agenda vs. relationship.

Agenda: Each party has their own individual agenda or goals going into a conflict, which includes how much they are willing to push for what they want.

Relationship: Each party has their own personal perception of the current state of the relationship with the other party and their desired future relationship, if any.

CHOOSING A RESOLUTION FORMAT

- | Mediation
- | Shuttle Diplomacy
- | Restorative Practices
- | Adjudication Informal

POSSIBLE SETTINGS



In Person:

Process is conducted in person with all parties present, though not necessarily in the same room.



Teleconference:

Process is conducted remotely; parties may or may not meet with each other



Asynchronous:

Facilitator meets with each part individually, at different times.

SETTING CONSIDERATIONS

- Parties' desire for interaction
- Safety
- Physical location of the parties
- Physical environment if in person
- Timeline required by process
- Timeline desired by the parties



EXPECTATIONS

Setting expectations for behavior during the ABR process is crucial for a smooth, efficient process.

Your institution's hearing rules of decorum are a good place to start.

Treat everyone with respect.

Speak only at approved times in process.

Redisclosure of materials is prohibited.

Abusive conduct is prohibited.

Role of advisor is limited & must not disrupt the process.

KEY INGREDIENTS TO A RESOLUTION

Written

Clear

Specific

Stated Deadlines

Enforceable

State any process for
foreseeable revisions

WHEN TO CALL IT

- Either party decides to withdraw from the process.
- One or both parties is unresponsive.
- One or both parties is not participating in good faith.
- There is a non-negotiable sticking point for either party.
- The institution cannot support/approve the agreed resolution.

DOCUMENTATION

Recordkeeping

07



ELEMENTS OF A RESOLUTION AGREEMENT

- Identities of participants
- Procedural overview of matter
- Reference to appropriate policy
- Terms of the resolution
- Information on record retention
- Prohibition against retaliation
- Statement of agreement
- Signatures



RECORDKEEPING AND ABR

- **The institution must maintain for a period of seven years records of:**
 - For each complaint of sex discrimination, records documenting the informal resolution process under § 106.44(k) or the grievance procedures under § 106.45, and if applicable § 106.46, and the resulting outcome.
 - . . .
 - All materials used to provide training [as required by these rules]. A recipient must make these training materials available upon request for inspection by members of the public.

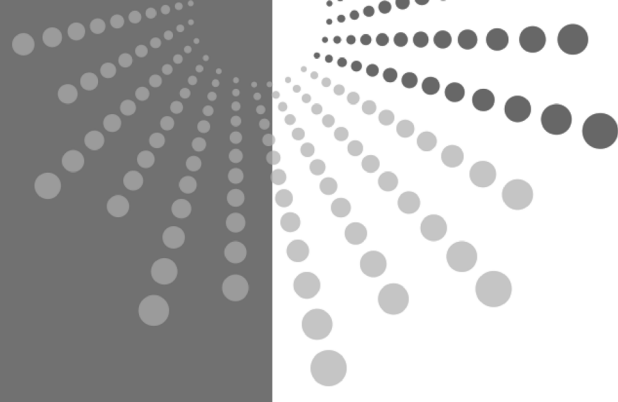
OTHER ABR PROCESS RECORDS

- Request for ABR
- Notice of denial of request (if appropriate)
- Written agreement of parties to participate
- Notice of ABR
- Agreement; or
- Notice of end of informal process and return to the investigation process.



IMPLEMENTATION

Strategies for Success



CONSIDERATIONS

- What information is confidential?
- Recordkeeping
- What ABR process(es) will you use?
- Who will conduct informal resolution? Remember the required training.
- What are the possible outcomes?
- Compliance with outcomes



POSSIBLE OUTCOMES OF ABR

No-contact
directives

Apology/Reflective
Writing

Coaching or Training

Agreements to stay
away from certain
classes or activities

Facilitated dialogue

Agreement to
withdraw/transfer/re
sign.

PRACTICAL APPLICATION - QUINN

“Casey and I have been friends for a few weeks. On Friday night, we were hanging out alone in my room, watching a movie. We started to make out, and I was ok with that. After making out for a while, Casey started touching me down there. Then Casey tried to have sex with me. Casey knew that I didn’t want to have sex but kept trying anyway. Casey was being really coercive, and so I just went along with it. Casey raped me and I want Casey to be held accountable.”

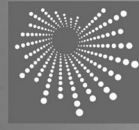
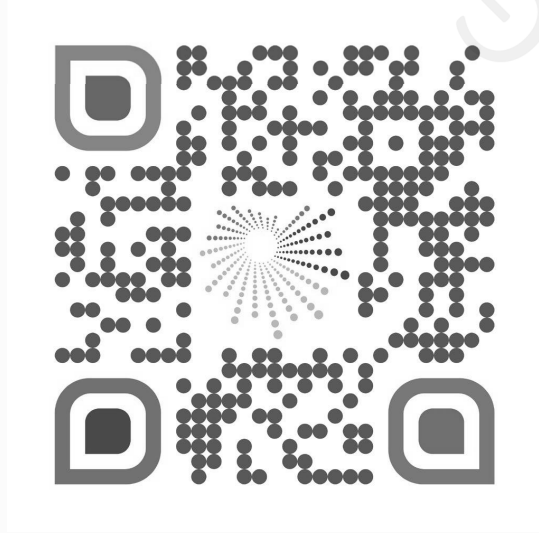
PRACTICAL APPLICATION - BARRI

"When I got to the party, I was already lit. I kept letting Marc get me drinks anyway. At some point, I just kinda don't remember anything. And then I woke up in Marc's bed and it was morning. I had all my clothes on, but I know someone had sex with me. I could feel it. I just wanted to go, so I did. Before I left Marc woke up and tried to talk to me but I wasn't hearing it. He looked guilty and I could tell he felt bad."

PRACTICAL APPLICATION - COLIN

“Pat and I have been together for about a month and have been intimate for the last two weeks. We went out with my friends on Friday night and Pat got really drunk. At some point we ran into my ex and Pat was really jealous, so we left. When we got back to my place, I thought things were fine. We started hooking up and all of a sudden Pat's mood changed. Pat got really aggressive and choked me. He was so angry and I was so scared.”

COMPLIMENTARY SUBSCRIPTION



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CONNECT

A place to

communicate
share
educate
learn

for HIGHER EDUCATION
PROFESSIONALS working in
Title IX, Equity & Clery



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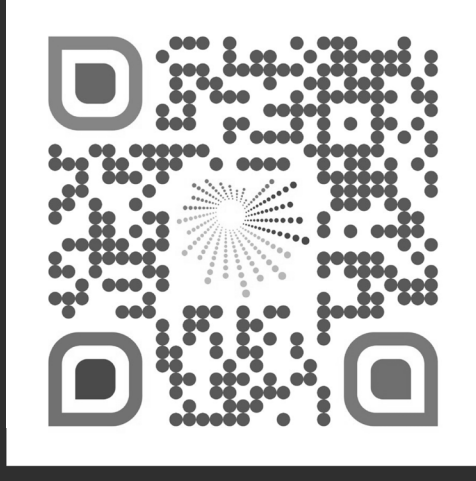
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