



Civil Rights and Title IX Training: Level 1

with Beverly A. Meyer



Bricker & Eckler
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Our Presenter: Beverly A. Meyer

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Beverly is a partner in the Education Group at Bricker & Eckler and has been practicing law for 25 years. During this time, she has helped K-12 and Higher Ed institutions comply with their civil rights responsibilities, including those arising under Title IX. Beverly conducts impartial investigations of discrimination and harassment complaints and also advises and represents school districts and colleges responding to such complaints. She regularly assists K-12 schools with their policy development, investigations processes, and staff trainings.



Beverly's Recent Trainings Include:

- **New Title IX Regulations: Hot Takes for K12 Webinar (May 2020)**
- **Title IX Compliance Update (conference presentations) (September 2019)**
- **Title IX/Civil Rights Investigator Trainings – District and ESC in-services (November 2019, October 2019, September 2019, August 2019, March 2019)**

Disclaimers

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

- We are not giving you legal advice
- Consult with your legal counsel regarding how best to address a specific situation
- Yes, we will send a copy of the slides after this presentation to all who registered their email address when signing in
- I will take questions at the end as time permits

Posting These Training Materials?

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

Agenda

- Civil Rights Laws
 - Notice of a Complaint
 - Discrimination on the basis of sex
 - Sexual Harassment
 - Hypothetical examples of potential harassment/discrimination
- Mandatory reporting obligations
 - Retaliation
 - District obligations
 - Employee obligations

Additional information
available at:

Title IX Resource Center
at www.bricker.com/titleix

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Civil Rights Laws: Key Laws, Regulations, and Guidance

Discrimination = Treating people differently

Discrimination is the act of treating people **differently** based on a protected characteristic (or stereotypes based on that characteristic)

- Focus on access to education opportunities, resources, programs, and activities
- Disparate treatment in the workplace/school
- Disparate impact claims (neutral policies that have discriminatory impacts)

Common Types of Protected Traits

- Race
 - Color
 - Religion
 - Sex (gender)
 - Military status
 - National origin
- Disability
 - Age
 - Ancestry
 - Marital status
 - Pregnancy
 - Genetic information

Disability Harassment

- Denying participation in or benefits of school's programs and services on the basis of a disability
- Intimidation or abusive behavior based on disability can create a hostile environment
- Look to Policy/Handbook

Title VI and Title VII

- Title VI – “Any program, activity receiving Federal financial assistance”
- Race, color, or national origin
- Contracts, grants, educational activities



Title VI and Title VII

- Title VII – “An unlawful employment practice for any employer...”
- Fail or refuse to hire, or discriminate, on the basis of race, color, religion, sex**, or national origin
- Limit, segregate, or classify employees that would deprive or limit employment opportunities based on...

What does “race” mean?

- Ancestry
 - Physical characteristics
 - Race-linked illness
 - Culture
 - Association
- Perception that someone belongs to a certain race
 - “Race-Plus”
 - Reverse race discrimination

Sex Discrimination and Harassment

Title VII and Title IX

“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...”

Sex Discrimination under Title IX

34 C.F.R. § 106.31(b)

- Treat one person **differently** from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service
- Provide **different** aid, benefits, or services, or provide aid, benefits, or services in a different manner
- Deny any person such aid, benefit, or service
- Subject any person to separate or **different** rules of behavior, sanctions, or other treatment

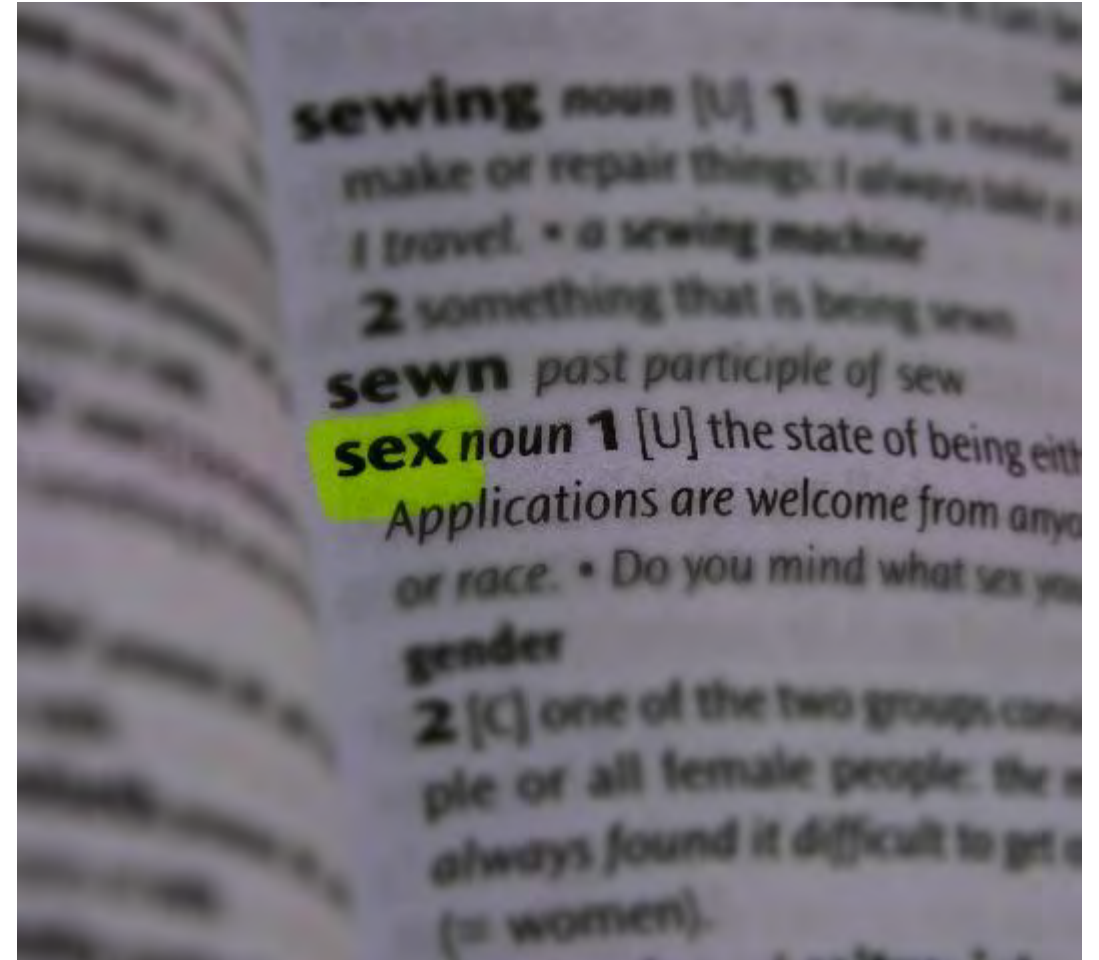
Sex Discrimination under Title IX

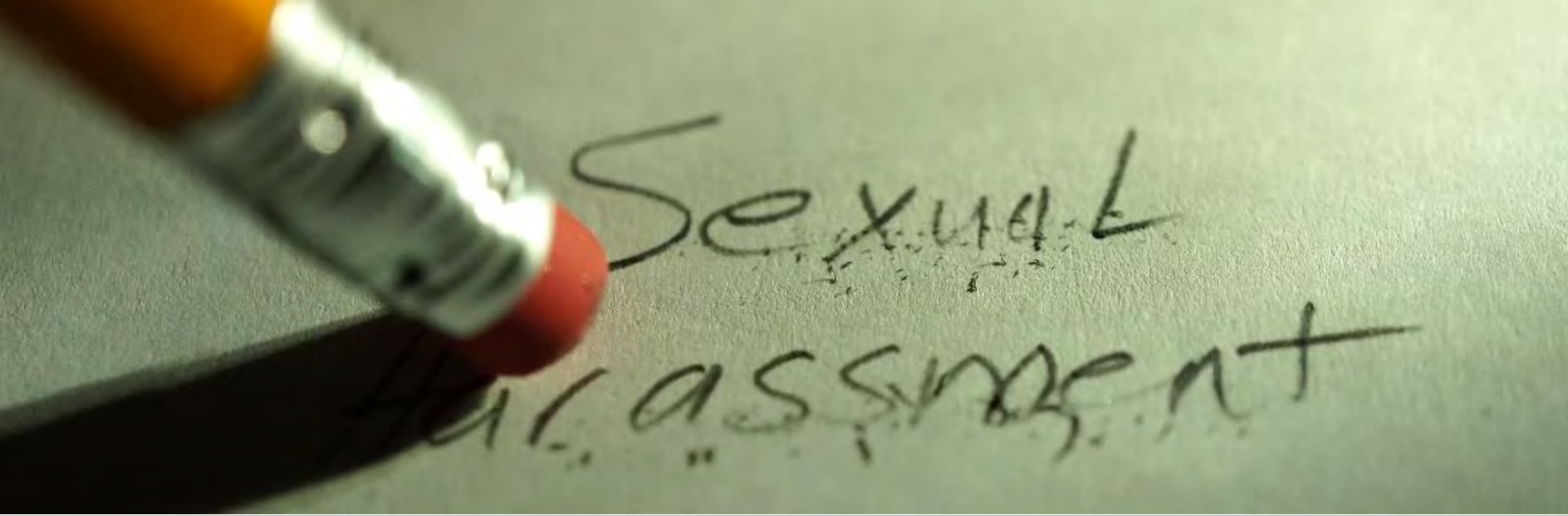
34 C.F.R. § 106.31(b)

- Apply any rule concerning the domicile or residence of a student or applicant
- Aid or perpetuate discrimination against any person by **providing significant assistance to any agency, organization, or person which discriminates on the basis of sex** in providing any benefit or service to students or employees
- Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity

What does “sex” mean?

- Biological sex
- Gender
- Sex stereotyping
- Sexual orientation**
- “Sex” as a verb





Sexual Harassment Definitions under the New Title IX Regulations

When does a school have notice of a complaint?

Actual knowledge = notice of sexual harassment or allegations of sexual harassment to a recipient's:

- Title IX Coordinator, or
- Any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or
- **To any employee of an elementary or secondary school**

34 C.F.R. § 106.30(a)

The School's Obligation

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

New Definitions of Sexual Harassment under Title IX

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

- **Quid pro quo** – An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct
- **Hostile environment** – Unwelcome conduct determined by a reasonable person to be so severe, pervasive, **and** objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity; or
- **Clery crimes** – Sexual assault, dating violence, domestic violence, or stalking [Clery regulatory definition cites omitted]

Final Regulations Apply to Employees

- Recipients that are subject to both Title VII and Title IX must comply with both
- “Deliberate indifference” standard applies
 - Because Title IX recipients are “in the business of education”
 - “Marketplace of ideas”

Quid Pro Quo

- They do/won't do this, so...
- They will/won't put up with this, so...
- If you do/don't... I will/won't...



Quid Pro Quo

- May involve a power differential
- “Everyone knows that so-and-so...”
- Voluntary conduct between some may put observers in the position of believing that something sexual is necessary to get something favorable

Hostile Environment – What does this look like?

Be aware of things that are **not** elements:

- “Happened more than once”**
- “Parties weren’t dating at the time”
- “Must involve two people of compatible sexual orientations”
- “Must occur on school property” ** (but remember state law restrictions)
- “Must have bad intent”

Jurisdictionally Important

From 34 C.F.R. § 106.44:

“If the conduct alleged in the formal complaint would not constitute sexual harassment... even if proved, did not occur in the recipient’s education program or activity, or did not occur against a person in the United States, then the recipient **must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under Title IX or this part**; such a dismissal does not preclude action under another provision of the recipient’s code of conduct.”

Hypothetical #1

- Chuck and Mary Sue are bus drivers
- Chuck asks Mary Sue out on a date
- Mary Sue says no

Hypothetical #1

- Chuck brings flowers and asks again
- Mary Sue says no again

Hypothetical #1

- Chuck asks Mary Sue out over the radio, and Mary Sue says no again
- The transportation supervisor warns them both informally not to discuss personal matters on the radio

Hypothetical #1

- Chuck corners Mary Sue in the break room before the morning route to ask her why she won't date him and won't let her leave until she says yes
- The transportation supervisor writes both of them up for starting their routes late even though Mary Sue tells the supervisor what happened

Hypothetical #2

- Mr. Joe is a well-loved teacher
- He is always commenting on how pretty his female students look
- Josie, a student, is his helper and comes to his room during fourth period class to grade papers
- Josie's mother brings you text messages that Mr. Joe has been sending to Josie (not sexual in nature)

Hypothetical #3

- One of your newer teachers is a person of color
- She has struggled with communicating with parents, disciplining students appropriately, classroom management, and curriculum
- She is claiming that her non-renewal is due to race discrimination

Hypothetical #4

- A student approaches a trusted teacher after class and mentions that she was at a party last Friday night
- The student tells the teacher she was kissing another student at the party who happens in to be in this class and then he reached down her pants and touched her in a way that made her uncomfortable after she told him to stop
- The student asks the teacher not to tell anyone, saying she “doesn’t want to make a big deal out of it”

Hypothetical #5

- You're a custodian in the school district
- While working in the boys' locker room one evening, you overhear a student complaining to his friend about the annual "hazing ritual" that happens in the locker room
- The student tells his friends that he's "dreading the towel on his privates..."

Mandatory Reporting

- Child Abuse
- Felonies
- If a school employee engages in sexual conduct with a student, it must be reported
 - Even if the student is 18
- ODE Conduct Reporting



Retaliation

Section added to new Title IX regs

Retaliation defined in part: “No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part...”

34 C.F.R. § 106.71

Retaliation

- Report this **immediately** to the Title IX Coordinator
- Is there already a no-contact order and, if not, do you want one?
- Adverse action against an individual
- Abuse, violence, threats, and intimidation
- More than just someone expressing their opinion

District Obligations

- Update district policies
 - Address complainant and provide supportive measures
 - Mandatory reporting
 - Informal resolution
- Investigation
 - Formal grievance process:
 - Notice
 - Report
 - Decision
 - Appeal

Employee Obligations

- Know who the District Title IX Coordinator is (their information will be posted on the school's website)
- Recognize a potential Title IX violation
- Report any potential Title IX violation to the Title IX Coordinator **the same day** you receive notice of it
- Review your district's anti-discrimination and anti-harassment policies as soon as they are updated

How do you make a report on your own behalf?

- Promptly report incidents of unlawful discrimination and/or retaliation to your District's Title IX Coordinator so that the Board may address the conduct
- Remember – retaliation is prohibited



How do you make a report on your own behalf?

- The Title IX Coordinator can describe for you the difference between formal and informal complaints, discuss the criminal reporting process, determine appropriate supportive measures, and identify other available resources
- You can then choose how you wish to proceed (i.e., a formal or informal resolution process)

How do you make a report on your own behalf?

- If you make a report, the Title IX Coordinator should discuss **supportive measures** with you
- May include counseling, extensions of deadlines, modifications of work or class schedules, escort services, mutual no-contact orders, changes in work locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures

Key Takeaways for Staff

- Understand the definition of sexual harassment
- Know to whom you should report any complaints of sexual harassment (whether witnessed yourself, or reported to you by someone else)
- Recognize or know responsibility to report any acts of retaliation
- Understand supportive measures you may need to help implement

Key Takeaways for Administrators

- Everything listed in the previous slide for staff
- Update the Title IX policy by **August 14, 2020**
- Follow notice and posting requirements for anti-discrimination, Title IX policies, and training materials

Training Requirements for Your Title IX Team

- The definition of sexual harassment as defined in 34 C.F.R. § 106.30
- The scope of the district's education program or activities
- How to conduct an investigation
- How to consistently apply definitions used by the district with respect to consent (or the absence/negation of consent)
- The grievance process, including hearings, appeals, and informal resolution processes, as applicable
- How to serve impartially and avoid prejudgment of facts at issue, conflicts of interest, and bias

Upcoming Trainings

Register at: www.bricker.com/events

Level 1

- General Title IX Training: Aug 4, Aug 7, Aug 11

Level 2 (All 9:00-11:30am)

- K-12 TIX Coordinator/administrator training: Jun 5, Aug 14
- K-12 TIX Investigator training: Jun 9, Aug 18
- K-12 TIX Decision-maker training: Jun 16, Aug 25
- K-12 TIX Report writing for investigators and decision-makers: Jun 23, Aug 28

Thank you for attending!

Remember – additional information is available at:

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A photograph of two women in a professional setting. The woman on the left is a Black woman with long dark hair, wearing a brown cardigan over a blue top, with a stethoscope around her neck. She is looking towards the woman on the right. The woman on the right is a white woman with her hair pulled back, wearing a light blue sweater, and is holding a pair of glasses. They appear to be in a meeting or discussion.

Title IX K-12 Training Level 2

Title IX Coordinator Training & Responsibilities

with Laura Anthony and Melissa Bondy



Bricker & Eckler
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Our Presenter: Laura G. Anthony

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Laura has been an education attorney for over 22 years, and helps K-12 and higher education institutions comply with their civil rights responsibilities, including those under Title IX. She has experience conducting impartial investigations and assists clients with related policy development and training.



Laura's Recent Trainings Include:

- **New Title IX Regulations: Hot Takes for K12 Webinar** (May 2020)
- **Civil Rights Compliance Update** (Feb 2020, Oct 2019, Aug 2019)
- **Title IX/Civil Rights Investigator Training – District and ESC in-services** (Jan 2020, Nov 2019, Oct 2019, Sept 2019, Aug 2019, March 2019, Dec 2018, Oct 2018, Sept 2018, Aug 2018, June 2018, May 2018, Jan 2018)
- **Proposed Title IX Regulations: Hot Takes for K12 Webinar** (Dec 2018)

Our Presenter: Melissa M. Bondy

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Melissa has over 20 years of experience in the education arena, assisting K-12 and higher education institutions, in developing compliance frameworks for their anti-harassment and civil rights responsibilities, including Title IX. She has conducted numerous impartial Title IX and Section 504/Disability investigations, and assists clients with related policy development and training.



Melissa's Recent Trainings Include:

- **Title IX/Civil Rights Harassment Training** (Aug 2015, Mar 2015, Aug 2016, Nov 2016, Aug 2017, Sept 2017, Oct 2017, Nov 2017)
- **ADA/504 Issues and the Intersection with Title IX** (Oct 2019)
- **Title IX/Civil Rights Investigator Training – Higher Education and K12** (Jan 2020, Oct 2019, Oct 2018)
- **Title IX Athletics, Transgender Students, and Harassment** (Oct 2016)
- **Introduction to Title IX Investigations/BASA Workshop** (Feb 2016)

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Agenda

- Expectations of the Title IX Coordinator
 - Between now and school resuming
 - Once students and employees are back
 - When there has been a report or complaint
- Checklist and resources for additional information

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available at:

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at www.bricker.com/titleix

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What do Title IX Coordinators need to do before students return?

Designate Title IX Coordinator

§106.8(a)

- Designate at least one employee – Title IX Coordinator – to coordinate compliance
- Inform the following persons of the identity of the Title IX Coordinator:
 - Applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding CBAs or professional agreements with the recipient (i.e., the District)

What must notice include?

§106.8(a)

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

Revise/Adopt TIX Grievance Procedures

§106.8(c)

- Implementation Date – August 14, 2020
- Engage relevant parties
 - HR, unions, key administrators (e.g., principals, SPED director)
- Identify the TIX Team
 - Investigators, decision-makers, appeal entities, informal resolution facilitators

Revise/Adopt TIX Grievance Procedures

§106.8(c)

- Make grievance procedure “elections”:
 - All protected classes anti-discrimination policy vs. separate sex discrimination policy?
 - Standard of evidence election – preponderance of the evidence or clear and convincing?
 - Standard must be consistent across CBAs and/or Employee Handbooks that address sexual harassment
 - Incorporating a live hearing?

Revise/Adopt TIX Grievance Procedures

§106.8(c)

- Begin reconciling Code of Conduct and Handbooks with the new procedure
 - How will the District address conflicts arising between the grievance procedure and established staff/student disciplinary frameworks?
 - Does the Code of Conduct require an update?

Additional Steps

- Disseminate the policy, grievance procedure, and contact information for the TIX Coordinator (§106.8(b))
- May want to facilitate and/or schedule training for **all** District employees
- Will need to facilitate and/or schedule specific and targeted training for the TIX Team Members (§ 106.45(b)(1)(iii))

Training Requirements – All TIX Team Members

- Definition of sexual harassment
- Scope of District's education program or activity
- How to conduct investigation and grievance process, including hearings, appeals, and informal resolution processes

Training Requirements – All TIX Team Members

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

Training Requirements – Decision-Makers

- Technology to be used at a live hearing
- If live hearings provided for as part of the grievance procedure:
 - Issues of relevance of questions and evidence
 - Including applicability of rape shield laws

Training Requirements – Investigators

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



Process and Implementation Considerations

“Actual Notice”

§ 106.30(a)

- TIX Coordinator responsible for receiving reports of conduct that **could** constitute sex discrimination or harassment
- Also responsible for receiving **formal** complaints that are signed by complainant
- Actual notice imputed not just when TIX Coordinator is notified, **but also** when someone with authority to correct the harassment is notified, **or** when **any** elementary/secondary school employee has knowledge

District's Response to Sexual Harassment

§ 106.44(a) and (b)

- **District must respond promptly in a manner that is not deliberately indifferent**
- District must treat complainants and respondents equitably by offering supportive measures
- In response to formal complaint, District must follow a grievance process

Specific Required Responses

§ 106.44(a)

- The TIX Coordinator has certain **specific required responses** to sexual harassment
 - Promptly contact complainant to discuss availability of supportive measures
 - Consider complainant's wishes with respect to supportive measures
 - Inform complainant of availability of supportive measures with or without the filing of a formal complaint
 - Explain to complainant the process for filing formal complaint

Voluntary Informal Resolution

§ 106.45(b)(9)

- TIX Coordinator may need to facilitate scheduling and participation, if elected by complainant
- Informal resolution may occur, provided the district gives written notice to the parties of the allegations, and that they can withdraw at any time and resume formal grievance process
- **May not** be used to resolve employee-student harassment allegations
- Could include mediation, restorative justice practices

Jurisdictional Determinations

§ 106.45(b)(3)

- **Mandatory Dismissals**

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

Jurisdictional Determinations

§ 106.45(b)(3)

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

Jurisdictional Determinations

§ 106.45(b)(3)

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

Notice of Allegations to Respondent

§ 106.45(b)(2)

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

Notice of Allegations to Respondent

§ 106.45(b)(2)

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



Let's take a break!

Implement Supportive Measures

§ 106.30(a)

- TIX Coordinator “is responsible for coordinating effective implementation of supportive measures” to the parties
- **Preamble:** TIXC “must serve as the point of contact for the affected student to ensure that the supportive measures are effectively implemented so that the burden of navigating paperwork or other administrative requirements” does not fall on the student receiving the supportive measures.”

Supportive Measures

§ 106.30(a)

- **Elements:** Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonable available, without fee or charge to the parties
- **Availability?** Before or after filing formal complaint, or where no formal complaint is filed
- **Purpose:**
 - Designed to restore or preserve equal access to recipient's program/activity
 - Protect safety of all parties or recipient's educational environment, or deter sexual harassment

Supportive Measures Defined within Regulation

- Counseling
 - Extensions of deadlines or other course-related adjustments
 - Modifications of work or class schedules
 - Campus escort services
- Mutual restrictions on contact between the parties
 - Changes in work/housing locations
 - Leaves of absence
 - Increased security/monitoring of certain areas on campus

Supportive Measures – More Requirements and Some Best Practices

- Must consider the complainant's wishes
- The school should follow up with both parties regarding the efficacy of the supportive measures
- Supportive measures may be appropriate to offer regardless of whether the allegation has been substantiated or fully investigated because it preserves access and deters harassment
- If OCR doesn't discuss supportive measures in non-TIX guidance, should we provide them for non-TIX cases?

Supportive Measures – Confidentiality & Recordkeeping

- Requirement to maintain as confidential any supportive measures provided §106.30
- Requirement to create and maintain records, for period of seven years, regarding any actions taken in response to report or formal complaint of sexual harassment **includes supportive measures** §106.45(b)(10)(ii)
- If recipient does not provide complainant with supportive measures, it must document the reasons why this was not clearly unreasonable in light of known circumstances

Emergency Removal

§ 106.44(c)

- District can issue emergency removals, provided that it:
 - Undertakes **individualized** safety and risk analysis
 - Determines that an **immediate threat** to **physical** health or safety of **any student/individual** arising from the allegations justifies removal
 - Provides respondent with **notice and opportunity to challenge decision immediately**
- Does not modify IDEA, Section 504, or ADA rights

Emergency Removal

§ 106.44(c)

- When available?
 - During an investigation or when no grievance is pending
 - Not limited to violent offenses
- Safety and risk analysis
 - More than a generalized or speculative belief of threat
 - Based on facts, not assumptions
 - Threat must be immediate and one that justifies removal
 - Conducted by someone impartial – may need training

Emergency Removal

§ 106.44(c)

- Notice and opportunity to challenge determination after removal
 - No requirement of written notice, but recommended
 - Notice must describe reasons for finding a threat
 - District has discretion to
 - Determine who conducts hearing
 - Establish hearing procedures
- Timeline for challenge
 - Immediately after removal (without delay / as soon as possible given the circumstances)

Emergency Removal

§ 106.44(c)

- Removal v. Supportive Measure
 - Consider if the action is disciplinary or punitive
 - Would it cause an unreasonable burden on the respondent?
 - Fact specific analysis
- Consider scope of removal (all or part of program)

Considerations – Emergency Removal

- Risk can be to anyone
- Alignment with general emergency removal/discipline procedures
- Implications for reassignment to alternative programs
- Considerations for students with disabilities

Emergency Removal – Employees

§ 106.44(d)

- Administrative leave for employees remains available
- Nothing in the regulations dictate whether such leave is paid or unpaid

Basic Requirements for Formal Grievance Process

§ 106.45(b)(1)

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

Basic Requirements for Formal Grievance Process

§ 106.45(b)(1)

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

Facilitate Inspection/Review of Evidence

§ 106.45(b)(5)(vi)

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

Providing Written Investigative Report

§ 106.45(b)(5)(vii)

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

Submission of Written Questions

§ 106.45(b)(6)(ii)

However, **the decision-maker must** afford each party “the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party” and also to **explain any decision to “exclude a question as not relevant.”**

Live Hearing

§ 106.45(b)(6)(ii)

- **If provided**, TIX Coordinator will need to facilitate scheduling and completion of a live hearing

Determination and Remedies

§ 106.45(b)(7)(iii), (b)(7)(iv)

- TIX Coordinator (or possibly the decision-maker) will need to disseminate the written determination to the parties simultaneously
- TIX Coordinator is responsible for effective implementation of any remedies
- TIX Coordinator will want to offer both parties an equal opportunity to appeal determination regarding responsibility, or dismissal of formal complaint or any allegations therein

Offer Opportunity to Appeal

§ 106.45(b)(8)

- TIX Coordinator will want to offer both parties an equal opportunity to appeal determination regarding responsibility, or dismissal of formal complaint or any allegations therein
 - Procedural irregularity that would affect the outcome
 - New evidence that was not available at the time of the determination that would affect the determination
 - Member of TIX Team had conflict of interest or bias that affected the outcome



Other Title IX Coordinator Responsibilities

TIXC May File Formal Complaint

§ 106.30(a)

- After receiving multiple reports about same respondent
- Must remain free from conflicts of interest and bias, and must serve impartially
- Is not acting as complainant
 - Not participating in the investigation
 - Not submitting questions or cross examining on behalf of the complainant

Recordkeeping

§ 106.45(b)(10)(i)(A), (B), (D)

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

Intersection of Employee Issues with Title VII

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

Intersection of Employee Issues with Title VII

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

Hypothetical – Employee-Student Allegations

- Teacher's suggestive statements make student so uncomfortable she wants to drop the class
- Her parent complains to the superintendent
- Student is insistent that she wants nothing more than to drop the class

Time for another poll question!

Hypothetical – Employee-Student Allegations

- If TIX issue, informal resolutions not available
- **Make sure the student is safe** – remedy any effects – remove teacher, possibly run TIX investigation **and** parallel conduct investigation (unprofessional behavior, boundary violations)
- Professional misconduct report?

Prohibition Against Retaliation

§ 106.71

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



Questions?

Checklist for the Title IX Coordinator

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

Upcoming Trainings

Register at: www.bricker.com/events

Level 1

- General Title IX Training: Aug 4, Aug 7, Aug 11

Level 2 (All 9:00-11:30am)

- K-12 TIX Coordinator/administrator training: Jun 5, Aug 14
- K-12 TIX Investigator training: Jun 9, Aug 18
- K-12 TIX Decision-maker training: Jun 16, Aug 25
- K-12 TIX Report writing for investigators and decision-makers: Jun 23, Aug 28

Thank you for attending!

Remember – additional information available at:

Title IX Resource Center
at www.bricker.com/titleix

Find us on **Twitter** at
@BrickerEdLaw





Title IX K-12 Level 2

Title IX Investigator Training

with Kate Davis and Katy Osborn



Bricker & Eckler
ATTORNEYS AT LAW

Our Presenter: Kate V. Davis

kdavis@bricker.com | 937.535.3902

Kate Davis is an attorney with over 16 years of experience representing educational and other public institutions. Kate frequently partners with K-12 and higher education institutions on a variety of issues, including civil rights and Title IX issues. She has conducted independent investigations for public entities and assists clients with policy revision and training.



Kate's Recent Trainings Include:

- **New Title IX Regulations: Hot Takes for K-12** (May 2020)
- **K-12 Title IX/Civil Rights Investigator and Coordinator Training** (Jan 2020)
- **Changing Standards: Is Preponderance Right for Your Campus?** (Feb 2019)
- **K-12 Title IX and Sexual Harassment Investigations** (Oct 2018, Feb 2019)
- **Title IX for K-12 Staff and Administrators** (Aug 2018)

Our Presenter: Katy Osborn

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Katy Osborn is an attorney with over 14 years of experience representing public school districts and higher education institutions. She regularly counsels school boards on a variety of education law issues, including board policies, employment matters and student discipline. She has conducted independent investigations and has served as a resolution hearing officer in a variety of civil rights and Title IX matters.



Katy's Recent Trainings Include:

- **New Title IX Regulations: Hot Takes for K-12 (May 2020)**
- **Title IX Hearing Officer Training (Dec 2019)**
- **Half-Day Title IX/Clery Training Update (Sep 2019)**
- **Resolution Officer Training (Jul 2019)**
- **Five Colleges of Ohio – Two-Day Title IX Investigator Training (Au2018)**

Disclaimers

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

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

Posting These Training Materials?

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

Additional information
available at:

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Agenda

- General overview/definition of sexual harassment
- Grievance process
- Bias and conflicts of interest
- Relevancy

- Investigative Techniques
- Mock Interview
- Takeaways



Introduction

Sex Discrimination and Harassment

- Title VII and Title IX
- “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...”

Sex Discrimination under Title IX

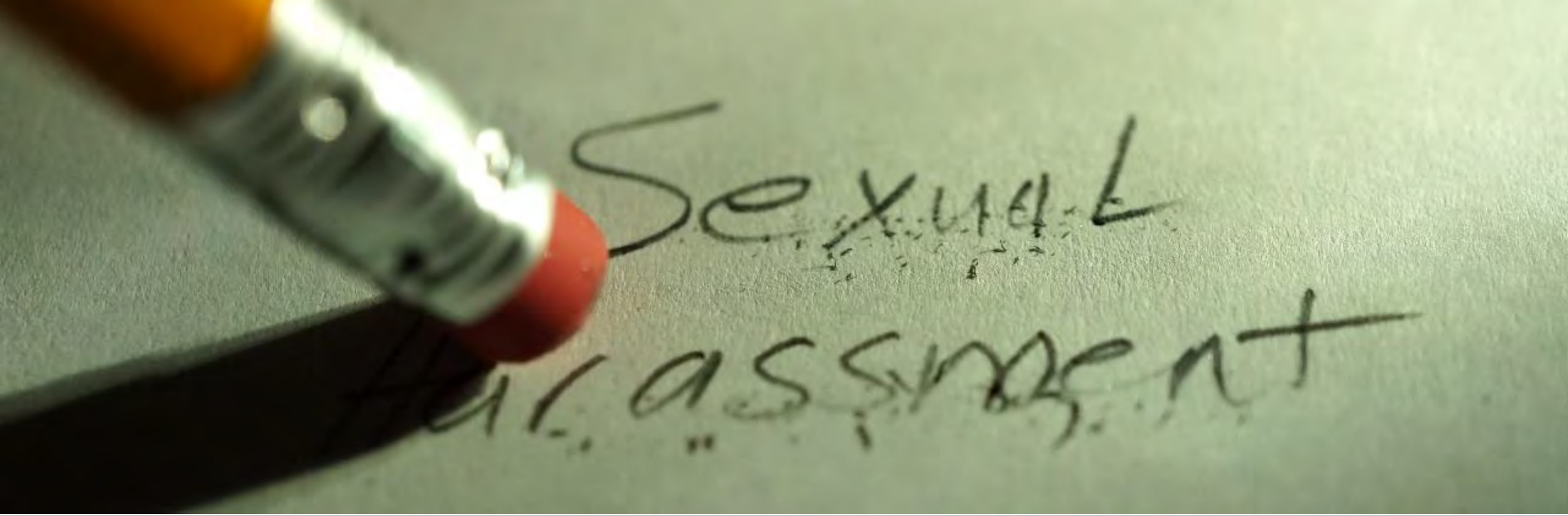
- Treat one person **differently** from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;
- Provide **different** aid, benefits, or services or provide aid, benefits, or services in a different manner;
- Deny any person any such aid, benefit, or service;
- Subject any person to separate or **different** rules of behavior, sanctions, or other treatment

Sex Discrimination under Title IX

- Apply any rule concerning the domicile or residence of a student or applicant;
- Aid or perpetuate discrimination against any person by **providing significant assistance to any agency, organization, or person which discriminates on the basis of sex** in providing any benefit or service to students or employees; or
- Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity. 34 C.F.R. § 106.31(b).

What Does “Sex” Mean?

- Biological Sex
- Gender
- Sex Stereotyping
- Sexual Orientation**
- “Sex” as a verb



Sexual Harassment Definitions under the New Title IX Regulations

New Definition of Sexual Harassment under Title IX

- **Sexual harassment** means conduct on the basis of sex that satisfies one or more of the following:
 - **Quid pro quo** – An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct
 - **Hostile environment** – Unwelcome conduct determined by a reasonable person to be so severe, pervasive, **and** objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
 - **Clery crimes** – Sexual assault, dating violence, domestic violence, or stalking [Clery regulatory definition cites omitted]

Jurisdiction

- Under the new regulations, if you do not have jurisdiction you must dismiss the Title IX complaint
- This does not preclude supportive measures or other Code of Conduct violations

No Jurisdiction If:

- Alleged conduct would not be sexual harassment if proved
- Occurred outside of the US or
- Occurred outside of the District's education program or activity

Definition of “Educational Program or Activity”

“Educational program or activity” includes **locations, events, or circumstances over which** the recipient exercised **substantial control** over **both the respondent and the context** in which the sexual harassment occurs...

Retaliation

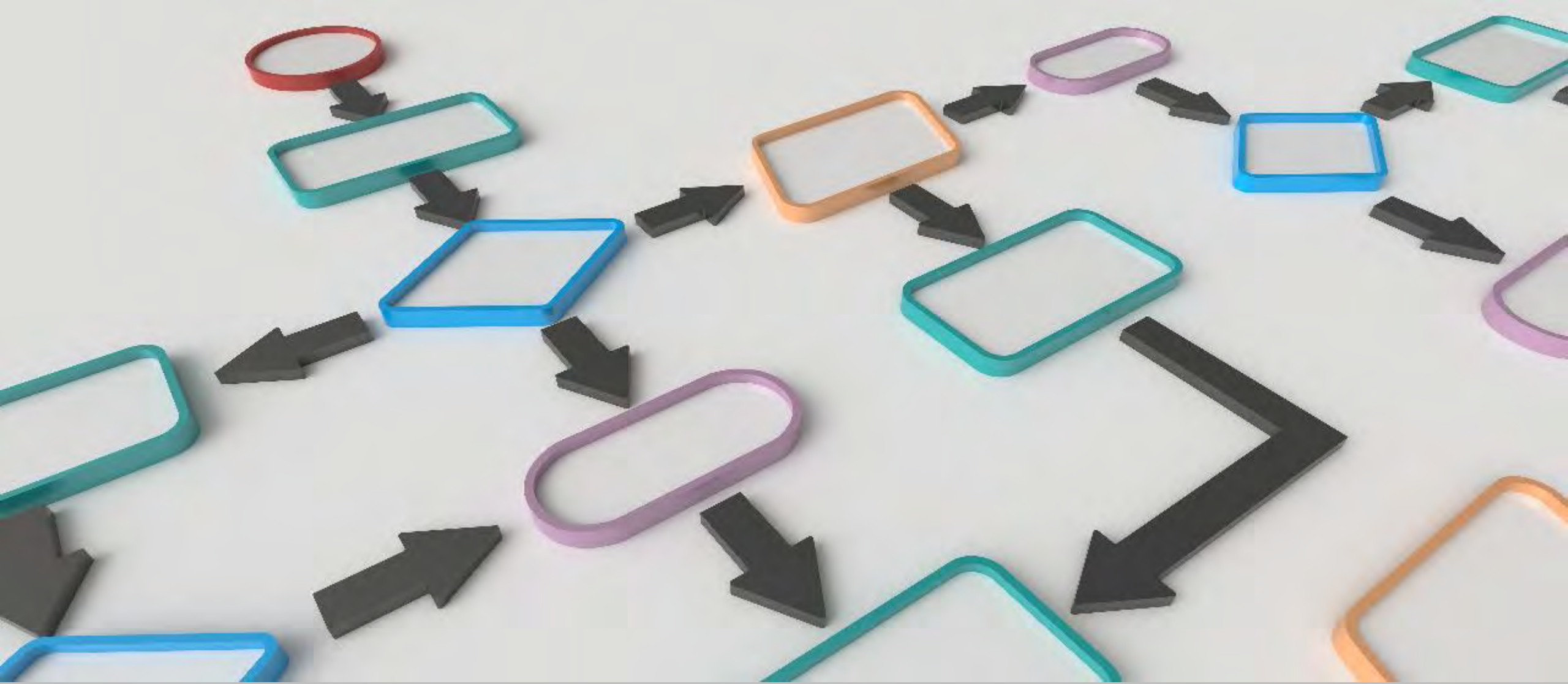
- Retaliation section added to new Title IX regs at 34 C.F.R § 106.71:
- Retaliation defined in part: “No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part”...

Retaliation

- Report this **immediately** to the Title IX Coordinator
- Is there already a no-contact order and if not, do you want one?
- Adverse action against an individual
- Abuse, violence, threats, and intimidation
- More than just someone expressing their opinion

District Obligations

- Update district policies
- Address complainant and provide supportive measures
- Mandatory reporting
- Informal Resolution
- Investigation
- Formal grievance process: notice, report, decision, appeal



Grievance Procedures

Formal Complaint

- **Formal Complaint** – “a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment”
- **Complainant** – “an individual who is alleged to be the victim of conduct that could constitute sexual harassment”

General Requirements: Due Process/ Fundamental Fairness

- Treat complainants/respondents equitably; no sanctions until process complete
- No conflict of interest or bias; trained staff
- Presumption that respondent is not responsible
- Reasonably prompt timeframes
- Range of possible sanctions/remedies

General Requirements: Due Process/ Fundamental Fairness

- Evidentiary Standard – Preponderance or Clear and Convincing
 - Same standard applicable to complaints against students and employees
 - Same standard applicable to all complaints of sexual harassment
- Describe supportive measures
- Exclude privileged information

Notice to Parties

- Grievance Process
- Allegations
 - Sufficient details known at the time
 - Identity of parties; date and location of alleged incident; alleged conduct
 - Sufficient time to prepare response
- Statement that respondent is presumed not responsible and that determination will be made at conclusion of grievance process
- May have advisor of choice
- May inspect/review evidence
- Inform of Code of Conduct prohibiting false statements
- Notice of any additional allegations that may arise

Dismissal and Consolidation

Dismissal of Formal Complaints

- Mandatory
 - Alleged conduct, even if proved, would not fall within the scope of Title IX
 - Does not preclude action under other Code of Conduct provision
- Permissive
 - Complainant withdraws formal complaint
 - Respondent is no longer enrolled/employed
 - Specific circumstances prohibit gathering sufficient evidence
- Must provide notice of dismissal to parties

Consolidation of Formal Complaints

- Permissive – where allegations arise out of same facts/circumstances

Investigation Process

- Burden of proof and burden of gathering evidence is on recipient
- Equal opportunity to present witnesses
- May not prohibit parties from discussing allegations or gathering/presenting evidence
- Provide same opportunity to have others present including advisor of choice
- Written notice of any hearings/interviews/meetings

Investigation Process

Provide All Evidence to Parties

- Allow 10 days to review
- Allow parties to submit a written response before completion of Investigative Report

Prepare Investigative Report

- Provide to parties 10 days prior to determination of responsibility
- Allow parties to submit written response

Hearings and Cross Examination

Live Hearings

- Optional for K-12
- Hearing does not have to provide the right to cross examination

With or Without Hearing

- Allow parties to submit written questions of other parties/witnesses
- After distribution of Investigative Report; before determination regarding responsibility
- Provide answers and allow limited follow up
- Questions and evidence regarding complainant's sexual predisposition or prior sexual behavior prohibited (very limited exceptions)

Written Determination of Responsibility

- Note: Decision maker cannot be investigator or Title IX Coordinator
- Identification of the allegations
- Description of procedural steps
- Findings of fact

- Conclusions
- Statement of result as to each allegation, including determination, sanctions, and remedies
- Procedures and bases for appeal
- Provided to parties simultaneously

Appeals

Required bases:

- Procedural irregularity that affected the outcome
- New evidence not reasonably available at time determination was made that could affect the outcome
- Conflict of interest/bias

Additional bases permitted -

Offered to both parties equally

Appeals process:

- Notify other party in writing when appeal is filed
- New decision maker
- Allow opportunity for both parties to submit written statement
- Written decision with result and rationale
- Provided to both parties simultaneously

Informal Resolution

Procedures may include informal resolution process

- May not be mandatory
- May not be offered unless formal complaint is filed
- May not be offered in allegation by student against employee

Requirements

- Written notice of: allegations; requirements of process; right to withdraw from process and resume formal grievance process; consequences of participation including the records that will be maintained or could be shared
- Obtain voluntary, written consent from both parties

Recordkeeping – Maintain for 7 Years

Investigation Records (including determination, recordings, transcripts, sanctions, remedies)

Appeal Records

Record of any Informal Resolution

Training materials – posted on website/available upon request

Documentation of recipient's response to all reports and formal complaints



**Make No Assumptions: Being Impartial,
Avoiding Conflicts of Interest, and Bias**

Being Impartial, Unbiased, without Conflict of Interest, and Avoiding Pre-Judgment of Facts

- We will discuss each of these individually and provide examples, but some of the factors for each overlap.
- For example, being impartial is greatly aided by not pre-judging facts.
- Discussed in preamble on pp. 821-843; 1720-1726

Being Impartial

- The preamble discussion (pp. 828-829) appears to indicate that being impartial means being free from bias
- “The Department believes that keeping this provision focused on ‘bias’ paired with an expectation of impartiality helps appropriately focus on bias that impedes impartiality.” (p. 829)

Bias: Concerns Raised in Comments in Preamble

- Preamble concerns about all paid staff members being biased in favor of institution
- Institutional bias: cover-ups
- Past tweets that appear to support complainants or respondents
- Being a feminist
- “Appearance of bias” v. actual bias

Conflict of Interest: Concerns Raised in Comments in Preamble

- Decision-maker and financial and reputational interest aligned with institution (or to protect institution)
- Co-mingling of administrative and adjudicative roles
- Title IX Coordinator supervisor of decision-maker
- Past advocacy for victim's or respondents' rights (example also for bias)
- “Perceived conflict of interest” v. actual conflict of interest

Preamble Discussion: Bias and Conflict of Interest

- Final regulations “leave recipients flexibility to use their own employees, or to outsource Title IX investigation and adjudication functions, and the Department encourages recipients to pursue alternatives to the inherent difficulties that arise when a recipient’s own employees are expected to perform functions free from conflicts of interest and bias.”
- No *per se* prohibited conflicts of interest under 106.45(b)(1)(iii) in using employees or administrative staff. (p. 826)
- No *per se* violations of 106.45(b)(1)(iii) for conflict of interest or bias for professional experiences or affiliations of decision-makers and other roles in the grievance process. (p. 827)

Preamble Discussion: Bias and Conflict of Interest

- Discretion to institutions on how to comply with providing decision-maker role (and other roles in the grievance process) without bias or conflict of interest
- Notes that excluding certain professionals out of fear of bias would improperly exclude experienced, knowledgeable individuals who are capable of serving impartially (citing history of working in the field of sexual violence). (p. 827)

Discussion Recommendation for Assessing Bias

“Whether bias exists requires examination of the particular facts of a situation and the Department encourages recipients 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, exercising caution not to apply generalizations that might unreasonably conclude that bias exists...bearing in mind that the very training required by 106.45(b)(1)(iii) is intended to provide Title IX personnel with the tools needed to serve **impartially** and without bias such that the prior professional experience of a person whom a recipient would like to have in a Title IX role need not disqualify the person from obtaining the requisite training to serve impartially in a Title IX role.”

Examples in Discussion for Unreasonable Conclusion 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”

Examples in Discussion for Unreasonable Conclusion that Bias Exists

- Department also cautioned parties and recipients from concluding bias or possible bias “based solely on the outcomes of grievance processes decided under the final regulations”
- Explained that this means, the “mere fact that a certain number of outcomes result in determinations of responsibility, or non-responsibility, does not necessarily indicate bias”

Avoiding Pre-Judgment of Facts at Issue

- A good way to avoid bias and ensure impartiality: avoiding prejudgment of facts
- Keep an open mind as a decision-maker and actively listen to all the facts presented as subjected to cross-examination*
- Each case is unique and different

Avoiding Sex Stereotypes

- “Must” not rely on sex stereotypes: Also helpful to avoiding pre-judgment of facts, remaining unbiased and impartial
- Pp. 831-837 in the preamble
- Comments include examples of sex stereotypes in comments (e.g., Women have regret about sex and lie about sexual assaults, men are sexually aggressive or likely to perpetrate sexual assault)
- Discussion – prohibition against sex stereotypes, but not feasible to list them (p. 835)
 - Different from evidence-based information or peer-reviewed scientific research, including impact of trauma
 - Cautions against an approach of “believing” one party over the other and notes 106.45(b)(1)(ii) precludes credibility determinations based on a party’s status as a complainant or respondent

Avoiding Sex Stereotypes

Consideration of marginalized groups: people with disabilities, people of color, people who identify in the “LGBTQ” community (pp. 1723-25; 1732-1737)

- Preamble discusses concerns by commentators about stereotypes and accommodations for individuals with disabilities under the ADA, and individuals with developmental and cognitive disabilities
- Preamble discusses concerns from people of color for cultural and racial stereotypes
- Preamble discusses concerns regarding stereotypes of the “LGBTQ” community

Considerations: Potential Responses to Trauma

- Delayed reporting
- Difficulty remembering specifics (could also be due to drugs/alcohol)
- Reluctant reporting
- Remaining in a relationship or living arrangement with the respondent
- Being calm and composed after an assault
- Failing to identify the accused

Disclaimer

- This section uses the terms “rape,” “victim,” and “perpetrator” – CRIMINAL, not POLICY
- This section is about rape myths and trauma as **context for what may or may not be someone’s internal dialogue**, to help you ask sensitive questions
- Both parties may be traumatized – and the trauma may be **completely unrelated** to the incident you’re investigating

Disclaimer

- Do **not** assume that because there are signs of trauma, the trauma was caused by the respondent and therefore the respondent violated the policy
- Do **not** assume that because there are not signs of trauma, therefore nothing bad happened

Know the Facts

- Most rapes are committed by perpetrators that know their victims
- Rapes can happen in a committed relationship
- Rapes can happen between individuals of any gender
- Victims of intimate partner violence may return to their perpetrator for a variety of reasons that may not seem rational to outsiders looking in

Know the Facts

- Drug-facilitated sexual assault is common, and the most common drug used is alcohol
- Being drunk doesn't excuse a perpetrator's own behavior
- A wide variety of responses are normal for a victim of trauma (e.g., calm, hysterical, angry, in denial, detached, withdrawn, or in shock) – don't make assumptions about how they "should act"

Trauma and the Brain

- Trauma affects the way the brain **encodes and decodes memories** of what occurred
- Fight, flight, or freeze

Why Don't People Tell Right Away?

2001 Guidance tells us:

- Fear of retaliation
- Fear of not being believed

Why Is Being Trauma Informed Important?

How you handle a person in your first meeting can make the difference between:

- Cooperation in the investigation **vs.** refusal to cooperate
- Retraumatization **vs.** supportive environment
- Putting off other potential complainants or witnesses from coming forward **vs.** encouraging future reports
- Lawsuit or OCR complaint (or both) **vs.** supportive and cooperative relationship

Words Have Power

- Victim vs. survivor vs. complainant
- **Stick with policy language** to the extent possible

Culture Affects Response

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

Culture Affects Response

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

The Bottom Line

Be Human & Be a Blank Slate

Issues of Relevancy (NOT Rules of Evidence)

- The Rules of Evidence do **NOT** apply and **CANNOT** apply (p. 1135)
- “The Department appreciates the opportunity to clarify here that the final regulations do not allow a recipient to impose rules of evidence that result in the exclusion of relevant evidence; the decision-maker must consider relevant evidence and must not consider irrelevant evidence.”

Issues of Relevancy

Relevant unless expressly touched upon in Regulations (p. 980):

- Information protected by a legally recognized privilege
- Evidence about complainant's prior sexual history – unless such questions/evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct or if the questions/evidence concern specific incidents of the complaint's prior sexual behavior with respect to the respondent and are offered to prove consent.
- Party's medical, psychological, and similar records unless voluntary written consent
- Party or witness statements that have not been subjected to cross-examination at a live hearing*

Issues of Relevancy

The process allows both parties to submit all relevant evidence:

- Similarly 106.45(b)(6)(i)-(ii) directs the decision-maker to allow parties to ask witnesses all relevant questions and follow-up questions (p. 980)
- A recipient may not adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice (p. 981)

Issues of Relevancy

- “[D]oes not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by recipient’s decision-maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with 106.45 and apply equally to both parties.” (p. 981)

BUT

- “[I]f a recipient trains Title IX personnel to evaluate, credit, or assign weight to types of relevant, admissible evidence, that topic will be reflected in the recipient’s training materials.” (p. 978)

Relevancy: Legally Privileged Information

Section 106.45(b)(5)(i): when *investigating* a formal complaint, recipient:

- “[C]annot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party’s voluntary, written consent to do so **for a grievance process under this section.**”

Relevancy: Legally Privileged Information

Section 106.45(b)(1)(x):

- A recipient's grievance process **must...not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of,** information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

Relevancy: Legally Privileged Information

- Preamble identifies medical and treatment records.
- Other typical privileges recognized across jurisdictions but with variations (will want to involve your legal counsel for definitions in your jurisdiction):
 - Attorney-client communications
 - Implicating oneself in a crime
 - Confessions to a clergy member or other religious figures
 - Spousal testimony in criminal matters
 - Some confidentiality/trade secrets

Consent: Left to Schools to Define

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

Who Can *Never* Give Consent?

- Under age 13 (varies by state)
- Between the ages of 13 and 16, if the other person is over 18 (varies by state)
- Regardless of age, if the other person is a coach, teacher, administrator, or other person of authority
- Severely cognitively disabled persons
- Those who are incapacitated
- Those who are by law unable to give consent

Consent: Some Policies Require...

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

Consent: Some Policies Include...

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

When Does Consent *Not* Exist?

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

Evidence of Consent?

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

Evidence of Consent?

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

Evidence of Consent?

- [Ask the respondent] What did complainant say to you and/or what actions did they take to show consent?
 - “How did you know they wanted to have sex?”
- If applicable, what role, if any, did respondent play in complainant’s intoxication/incapacitation?



Introduction to Investigative Techniques

Initial Review

- Review notes and information collected by the Title IX Coordinator
- Review Notices to Complainant and Respondent
- Review Policy/Code of Conduct
- Define Scope of Investigation
 - What elements do you think will be disputed?
 - Agreed upon?

Begin Evidence List

- If there is a criminal investigation, work with law enforcement to collect and preserve evidence

Types of evidence

- Electronic communications
- Security information

- Pictures, videos, audio
- Police reports
- Personnel files
- Prior complaints against respondent

Begin Witness List

- If there is a criminal investigation, work with law enforcement to ensure permission to question witnesses
- Who should be included?
- Who should NOT be included?
- In what order should the witnesses be interviewed?
- Be flexible

Craft Questions for Each Witness

- Refer to the policy
- Consider what information they are likely to have related to each element
- Consider what information they are likely to have that may assist the decision-maker in determining credibility
- Be flexible

Organizing for the Interview

- What should you have with you?
 - Allegations
 - Investigation log
 - Investigation notes cover sheet
 - Pre-prepared questions
 - Evidence you may need to reference or show witness
 - Policy or Handbook

Note-taking Tips

- Use predictable symbols in the margin to easily skim during the interview:
 - ? ← Follow-up questions
 - * ← Potential evidence
 - **W** ← Potential witness
- Try to record exact quotes when possible

Setting Up the Interview

- Identify yourself, your role, and a general outline of what you're investigating
- Consider requesting the TIX Coordinator check in with those who fail to respond or refuse to participate
- Don't give up on the interview till you've tried at least 3 times, in at least 2 different methods

Set the Stage

- Make introductions
- Be hospitable
- Give overview of why they are being interviewed
- Explain retaliation policy
- Invite questions

Begin Broadly

- Elicit a monologue about the incident
 - What happened earlier that day before the incident?
 - What happened with regard to the incident?
 - What happened next?

Freeze Frames

- Ask the witness to “freeze” on the moment and describe details
 - What could they see? Feel? Smell? Taste? Hear?
 - Where was the other person? How were they positioned?
 - Where were you? How positioned?
 - What did you say to the other person? Them to you?
 - Describe other person’s tone, demeanor, body language

Ask Follow-Up Questions

- Re-review your notes
- Re-review the elements of each charge
 - Have you elicited all of the information this witness might have about each element?
 - Do you have an understanding of how the witness obtained the information they shared?

Credibility

- Gather facts to assist **decision-maker**
- Ask questions to test memory
- Identify where the witness may corroborate or contradict their testimony, or other witnesses, and physical evidence
- Be sensitive to potential trauma experienced by witnesses

When Consent is at Issue

- Consider the wording and tone of your questions
- Utilize “freeze frame” strategy
- Ask questions about what happened to determine whether there was unspoken consent
- Ask questions to identify whether alcohol/drugs may have played a role regarding consent

Closing the Interview

- Closing questions
- Request copies of all evidence potentially available to the witness
- Discuss confidentiality - but do not prohibit a party from discussing allegations
- Inform the witness of next steps and how to reach you

After the Witness Leaves

- Update investigation log
- Review notes, make corrections/clarifications
- Update witness list
- Update list of evidence to be obtained
- Write down questions to ask other witnesses
- Consider whether appropriate to send email

Physical Evidence

- Follow up on anything identified during interviews
- Is law enforcement involved? Could they be?
- Ensure physical evidence is in a secure location and documented in the investigation log

Inspection and Review of Evidence

Provide ALL Evidence to both parties and advisors

- Include everything directly related to allegations, even if you don't expect decision-maker to rely on it
- Allow 10 days to review
- Allow written response
- Follow up where necessary
- Consider responses when preparing report

Create Investigative Report

- Summarize **facts**
- No determination
- Provide to parties and advisors
- Allow 10 days to review

(Need help? Report-writing training available!)



Mock Interviews

Key Takeaways

- Study your updated grievance procedures
- Know the definition of sexual harassment and keep the policy language in mind as you interview parties and witnesses
- Identify when/if another policy such as anti-bullying is in play

Key Takeaways

- Make sure you understand potential biases (actual or perceived)
- Trauma may affect how someone responds to an incident
- Prepare for your interview with questions and statements
- Start with open-ended questions
- Obtain any documentary evidence that you can



Questions?

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Title IX K-12 Training Level 2

Report Writing for Investigators & Decision-Makers

with Kate V. Davis and Warren Grody



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Our Presenter: Warren Grody

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Warren Grody has been an attorney with Bricker & Eckler for the last 25 years, where he assists K-12 and higher education institutions with a variety of issues, including Title IX compliance. Warren has been involved in investigations in one role or another for 32 years, including as a Title IX investigator, advisor, and Resolution Hearing Officer.



Warren's Recent Trainings Include:

- **New Title IX Hot Takes for K-12 (May 2020)**

Disclaimers

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

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

Posting These Training Materials?

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

Additional information
available at:

Title IX Resource Center
at www.bricker.com/titleix

Find us on **Twitter** at
@BrickerEdLaw



Agenda

- Report process/timelines
 - Writing the facts
 - Jurisdiction
 - Bias and conflicts of interest
- Relevancy
 - Resolving credibility disputes
 - The written decision
 - Appeals

What is your role as investigator?

As you write a report keep in mind that you are **NOT** the decision-maker

Report Process and Timelines

- Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint
 - **Include the evidence you don't intend to rely on**
 - **Include inculpatory or exculpatory evidence whether obtained from a party or other source**
 - Purpose: allow each party to meaningfully respond to the evidence prior to conclusion of the investigation.

Report Process and Timelines

- **Prior to completion of the investigative report**, you must send the evidence subject to inspection and review **to each party and the party's advisor**
- You must give the parties at least **10 days to submit a written response**
- **You must consider the responses prior to completion of the investigative report**

Report Process and Timelines

- You must make all of the evidence subject to the parties' inspection and review available at any hearing

Report Process and Timelines

- Create an investigative report that fairly summarizes relevant evidence
- Send it to each party and the party's advisor for review and a written response **at least 10 days prior to a hearing** (if there is one) **or other time of determination regarding responsibility**

Report Process and Timelines

- Before reaching a determination regarding responsibility, the decision-maker(s) **must afford each party**:
 - The opportunity to submit written, relevant questions that a party wants asked of any party or witness
 - The answers to those questions
 - Additional, limited follow-up questions



Writing the Facts

Goals

- Write your interview summaries in narrative form so you can drop them into your report
- Be consistent in terminology
- Be clear as to the source of information – compare:
 - “Bob stated that this happened”
 - “This happened”

Structure of an Interview Summary

- Who, when, where, via what medium?
- Did they have an advisor?
- Did you discuss your role? Their role?
- Did you discuss the prohibition on retaliation?

Structure of an Interview Summary

- Background
 - How does this person connect with the parties and witnesses?
 - Age, year in school
 - Length of employment, position

Structure of an Interview Summary

- Background
 - Monologue
 - Follow-up questions you ask, including responses
 - Evidence requested, evidence provided
 - Witnesses suggested

Structure of an Interview Summary

- Know your policy and procedures
 - Interview summary is often more complete than what is included in report
 - May include information irrelevant to investigative decision, such as discussions about supportive measures

Complete

- Include screenshots and other reference material directly in summary when possible
- Don't paraphrase a document when you can use direct quotes

Unambiguous

- Could my mother pick up the report and understand what happened?
- Make no assumptions that the reader will understand certain aspects of the community
- Write for a judge and jury to understand with no prior background

Relevant

- Is there extraneous information that is unnecessary to resolve the charges or credibility disputes?
- Is the extraneous information nevertheless appropriate to include?
- Does your report contain any information you are prohibited from including?
- Will the parties read this, and if so, will they focus on the wrong things?

Sensitive

- Will the parties feel heard?
- Will the parties feel blamed?
- Will the parties feel vilified?
- Will the tone otherwise inflame the parties unnecessarily?

Empathetic

- Maintain a non-judgmental tone
- Stay away from charged words of advocacy:
 - Clearly/obviously
 - Innocent/guilty
 - Victim/perpetrator
- Watch your adjectives and adverbs – unless they are in a quote
- Recognize the impact of your words

Specific

- Set the scene visually (will help identify inconsistencies in stories)
- Use quotation marks carefully
- Include details to the level that you can thoroughly understand what it looked like

Editing Exercises

1. Respondent engaged in sexual intercourse with Complainant from behind.
2. Complainant couldn't explain why she was sitting on the couch by herself.
3. Respondent visibly winced when Complainant said "no."
4. John stated that Alice told him to "knock it off."
5. On a scale of 1 to 10, the witness described the Respondent as being a "level 4 kind of drunk."

Editing Exercises

6. There was no evidence to support Complainant's assertion that the activity was without consent.
7. During the mediation, Respondent admitted to the misconduct and promised not to do it again.
8. Professor Clark indicated that he had never known Respondent to commit sexual misconduct at 2:00 in the morning in the back of a bar before.

Editing Exercises

9. Respondent stated that Complainant was diagnosed with bipolar disorder and that the complaint was “all in his head.”
10. When Respondent asked if Complainant wanted oral sex and Complainant said, “That’s OK,” that was indication of the Complainant’s consent.
11. Jane insinuated that Respondent changed her grade based on her report.



Just the Facts: Synthesizing Evidence Into an Investigative Report

Disclaimer

“This document is intended to be a summary of evidence and a description of what was learned through an investigation. Please refer to the full record, including [information shared in the hearing, and]* the contents of the [hearing packet] [exhibit packet].”*

Basic Information

- Complainant
- Respondent
- Investigator
- When was the complaint made?

Basic Information

- Basic description of charges
- How did the complaint make its way to an investigation?
- Witnesses Interviewed
- Witnesses Not Interviewed (and why)
- Any procedural anomalies that need explained?

Jurisdiction

- Under the new regulations, if you do not have jurisdiction you must dismiss the Title IX complaint
- This does not preclude supportive measures or other Code of Conduct violations

No Jurisdiction If:

- Alleged conduct would not be sexual harassment if proved
- Occurred outside of the US or
- Occurred outside of the District's education program or activity

Definition of “Educational Program or Activity”

“Educational program or activity” includes **locations, events, or circumstances over which** the recipient exercised **substantial control** over **both the respondent and the context** in which the sexual harassment occurs...

Does Your Policy Require Witness Sign-Off?

- “Each person interviewed was provided with a written copy of a summary of their interview, and was given an opportunity to provide feedback and approve the accuracy of the summary.”
 - Did everyone do so?

Basic Information

- “All relevant information gathered during the course of the investigation has been included in this report/hearing packet.”

Applicable Policy Provisions

- Definition of prohibited conduct alleged
- Related definitions as appropriate (e.g. consent, substantial incapacitation)
- Include verbatim, in entirety

Summary of Information

- Ways to arrange:
 - Chronologically
 - By witness summary
 - By allegation/topic

Summary of Information

- Explain your structure
 - Example: “The information in this report is a summary of the facts. Where there is a difference in the accounts, it is noted in the report. For the sake of clarity, the report is organized chronologically and by subject matter when appropriate.”

Summary of Information

- Tell the story chronologically
 - How did the relationship start?
- Citations to the record – always
 - Be helpful for your fact-finders!
- Hearing packet or exhibits – helpful to number the pages sequentially for easy citation



**Make No Assumptions: Being Impartial,
Avoiding Conflicts of Interest, and Bias**

Being Impartial

- The preamble discussion (pp. 828-829) appears to indicate that being impartial means being free from bias
- “The Department believes that keeping this provision focused on ‘bias’ paired with an expectation of impartiality helps appropriately focus on bias that impedes impartiality.” (p. 829)

Conflicts of Interest: Concerns Raised in Comments in Preamble

- Decision-maker and financial and reputational interest aligned with institution (or to protect institution)
- Co-mingling of administrative and adjudicative roles
- Title IX Coordinator supervisor of decision-maker
- Past advocacy for victim's or respondents' rights (example also for bias)
- “Perceived conflict of interest” vs. actual conflict of interest

Preamble Discussion: Bias and Conflict of Interest

- Final regulations “leave recipients flexibility to use their own employees, or to outsource Title IX investigation and adjudication functions, and the Department encourages recipients to pursue alternatives to the inherent difficulties that arise when a recipient’s own employees are expected to perform functions free from conflicts of interest and bias.”
- No per se prohibited conflicts of interest under 106.45(b)(1)(iii) in using employees or administrative staff. (p. 826)
- No per se violations of 106.45(b)(1)(iii) for conflict of interest or bias for professional experiences or affiliations of decision-makers and other roles in the grievance process. (p. 827)

Discussion Recommendation for Assessing Bias

“Whether bias exists requires examination of the particular facts of a situation and the Department encourages recipients 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, exercising caution not to apply generalizations that might unreasonably conclude that bias exists...bearing in mind that the very training required by 106.45(b)(1)(iii) is intended to provide Title IX personnel with the tools needed to serve **impartially** and without bias such that the prior professional experience of a person whom a recipient would like to have in a Title IX role need not disqualify the person from obtaining the requisite training to serve impartially in a Title IX role.”

Avoiding Pre-Judgment of Facts at Issue

- A good way to avoid bias and ensure impartiality: avoiding prejudgment of facts
- Each case is unique and different

Avoiding Sex Stereotypes

- “Must” not rely on sex stereotypes: Also helpful to avoiding pre-judgment of facts, remaining unbiased and impartial
- Pp. 831-837 in the preamble
- Examples of sex stereotypes in comments:
 - Women have regret and lie about sexual assaults
 - Men are sexually aggressive or likely to perpetrate sexual assault

Avoiding Sex Stereotypes

- Discussion – prohibition against sex stereotypes, but not feasible to list them (p. 835)
 - Different from evidence-based information or peer-reviewed scientific research, including impact of trauma
 - Cautions against an approach of “believing” one party over the other and notes 106.45(b)(1)(ii) precludes credibility determinations based on a party’s status as a complainant or respondent

Avoiding Sex Stereotypes

- Consideration of marginalized groups: people with disabilities, people of color, people who identify in the “LGBTQ” community (pp. 1723-25; 1732-1737) - preamble discusses concerns:
 - From commentators about stereotypes and accommodations for individuals with disabilities under the ADA, and individuals with developmental and cognitive disabilities
 - From people of color for cultural and racial stereotypes
 - Regarding stereotypes of the “LGBTQ” community

Considerations: Potential Responses to Trauma

- Delayed reporting
- Difficulty remembering specifics (could also be due to drugs/alcohol)
- Reluctant reporting
- Remaining in a relationship or living arrangement with the respondent
- Being calm and composed after an assault
- Failing to identify the accused

Disclaimer

- Do **not** assume that because there are signs of trauma that the respondent caused the trauma and violated the policy
- Do **not** assume that because there are **no** signs of trauma nothing bad happened



More on Issues of Relevancy: *Not* Rules of Evidence

Issues of Relevancy

- The Rules of Evidence do **NOT** apply and **CANNOT** apply (p. 1135)
- “The Department appreciates the opportunity to clarify here that the final regulations do not allow a recipient to impose rules of evidence that result in the exclusion of relevant evidence; the decision-maker must consider relevant evidence and must not consider irrelevant evidence.”

Issues of Relevancy

- Relevant unless expressly touched upon in Regulations (p. 980):
 - Information protected by a legally recognized privilege
 - Evidence about complainant's prior sexual history
 - Party's medical, psychological, and similar records unless voluntary written consent
 - Party or witness statements that have not been subjected to cross-examination at a live hearing*

Issues of Relevancy

- The process allows both parties to submit all relevant evidence:
 - Similarly 106.45(b)(6)(i)-(ii) directs the decision-maker to allow parties to ask witnesses all relevant questions and follow-up questions (p. 980)
 - A recipient may not adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice (p. 981)

Issues of Relevancy

- “[D]oes not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by recipient’s decision-maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with 106.45 and apply equally to both parties.” (p. 981)

BUT

- “[I]f a recipient trains Title IX personnel to evaluate, credit, or assign weight to types of relevant, admissible evidence, that topic will be reflected in the recipient’s training materials.” (p. 978)

Relevancy: Legally Privileged Information

- Section 106.45(b)(5)(i): when **investigating** a formal complaint, recipient:
 - “[C]annot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party’s voluntary, written consent to do so **for a grievance process under this section.**”

Relevancy: Legally Privileged Information

- Section 106.45(b)(1)(x):
 - A recipient's grievance process **must...not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of,** information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

Relevancy: Legally Privileged Information

- Preamble identifies medical and treatment records.
- Other typical privileges recognized across jurisdictions but with variations (will want to involve your legal counsel for definitions in your jurisdiction):
 - Attorney-client communications
 - Implicating oneself in a crime
 - Confessions to a clergy member or other religious figures
 - Spousal testimony in criminal matters
 - Some confidentiality/trade secrets

Summary of Information

- **Give an overview** of evidence collected
- **Attach as appendices** any statements and important evidence

Summary of Information

- If you can, synthesize the information from multiple parties and witnesses
- Where the stories diverge:
 - “Information from [Complainant]”
 - “Information from [Respondent]”

Summary of Information

- Insert into the report screenshots of text messages and pictures where relevant
- If information is attached but not referred to in a summary, may want to drop a footnote explaining why not

Summary of Information

- Don't forget to summarize impact on **complainant** if the charges require consideration as an element
 - “The investigator notes that this incident and the process may have had an impact on [Respondent]. However, to determine whether sexual harassment occurred, the decision-maker will be required to review the impact of the reported behavior on [Complainant]. This is the reason that the information here focuses solely on [Complainant].”

Summary of Information

- Undisputed Facts
 - Series of numbered sentences
- Disputed Facts
 - Series of numbered sentences
- Make sure you have facts for each element of each charge



Objectively Evaluating Evidence and Resolving Credibility Disputes

Objectively Evaluating Relevant Evidence

- Preamble indicates that the decision-maker should be looking at consistency, accuracy, memory, credibility (p. 1060), implausibility, inconsistency, unreliability, ulterior motives, lack of credibility (p. 1111)
- Again, not making relevancy determinations beyond those expressly included in regulations
- Standard of proof and using it to guide decision

Standard of Proof

- Standard of Evidence: Preponderance of the Evidence or Clear & Convincing
- Must use same standard for formal Title IX complaints against both students and employees (including teachers) for all policies and procedures with adjudication for sexual harassment complaints (e.g., union grievances procedures, teacher conduct)
- Must begin with a presumption of no violation by Respondent

OCR 2001 Guidance: Recommended Considerations for Resolving Conflicts

- Statements by any witnesses to the alleged incident
- Evidence about the relative credibility of the complainant/respondent
 - The level of detail and consistency of each person's account should be compared in an attempt to determine who is telling the truth
 - Is corroborative evidence lacking where it should logically exist?

OCR 2001 Guidance: Recommended Considerations for Resolving Conflicts

- Evidence of the complainant's reaction or behavior after the alleged harassment
 - Were there witnesses who saw that the complainant was upset?
 - Changes in behaviors? Work-related? School? Concerns from friends and family? Avoiding certain places?
 - May not manifest until later

OCR 2001 Guidance: Recommended Considerations for Resolving Conflicts

- Evidence about whether the complainant filed the complaint or took other action to protest the conduct soon after the alleged incident occurred
 - But: failure to immediately complain may merely reflect a fear of retaliation, a fear that the complainant may not be believed, etc. rather than that the alleged harassment did not occur

OCR 2001 Guidance: Recommended Considerations for Resolving Conflicts

- Other contemporaneous evidence:
 - Did the complainant write about the conduct and reaction to it soon after it occurred (e.g. in a diary, email, blog, social media post)?
 - Did the student tell others (friends, parents) about the conduct and their reaction soon after it occurred?

1) Keep an Open Mind

- Keep an open mind until all evidence has been heard (and tested at the live hearing if applicable)
- Don't come to any judgment, opinion, conclusion or belief about any aspect of this matter until you've reviewed or heard all of the evidence AND consider only the evidence that can remain

2) Sound, Reasoned Decision

- You must render a sound, reasoned decision on every charge
- You must determine the facts in this case based on the information presented
- You must determine what evidence to believe, the importance of the evidence, and the conclusions to draw from that evidence

3) Consider All/Only Evidence

- You must make a decision based solely on the relevant evidence obtained in this matter
- You may consider nothing but this evidence

4) Be Reasoned and Impartial

- You must be impartial when considering evidence and weighing the credibility of parties and witnesses
- You should not be swayed by prejudice, sympathy, or a personal view that you may have of the claim or any party
- Identify any action or perceived conflict of interest

5) Weight of Evidence

- The quality of evidence is not determined by the volume of evidence or the number of witnesses or exhibits.
- It is the **weight** of the evidence, or its **strength** in tending to prove the issue at stake that is important.
- You must evaluate the evidence as a whole based on your own judgment.

6) Evaluate Witness Credibility

- You must give the testimony and information of each party or witness the degree of importance you reasonably believe it is entitled to receive.
- Identify all conflicts and attempt to resolve those conflicts and determine where the truth (**standard or review/proof**) lies.

6) Evaluate Witness Credibility

- Consider the reasonableness or unreasonableness, or probability or improbability, of the testimony.
- Does the witness have any motive?
- Is there any bias?
- As indicated above, the Regulations provide consideration of consistency, accuracy, memory, credibility (p. 1060), implausibility, inconsistency, unreliability, ulterior motives, lack of credibility (p. 1111)

6) Evaluate Witness Credibility

- Credibility is determined fact by fact, not witness by witness
 - The most earnest and honest witness may share information that turns out not to be true

7) Draw Reasonable Inferences

- Inferences are sometimes called “circumstantial evidence.”
- It is the evidence that you infer from direct evidence that you reviewed during the course of reviewing the evidence.
- Inferences only as warranted and reasonable.

8) Standard of Evidence

- Use the standard of evidence as defined by your policy when evaluating whether someone is responsible for each policy violation and **ALWAYS** start with presumption of no violation.
- Preponderance of the evidence (most common standard of evidence): you must determine whether it is more likely than not true that the respondent engaged in the alleged misconduct.
- But may be clearly convincing standard

8) Standard of Evidence

- Look to all the evidence in total, make judgments about weight and credibility, and then determine whether or not the burden has been met.
- Any time you make a decision, use your standard of evidence

9) Don't Consider Impact

- Don't consider the potential impact of your decision on either party when determining if the charges have been proven
- Focus only on the charge or charges brought in the case and whether the evidence presented to you is sufficient to persuade you that the respondent is responsible for the charges
- **Do not consider the impact of your decision**



The Written Decision

Written Determination in 106.45(b)(7)(ii)

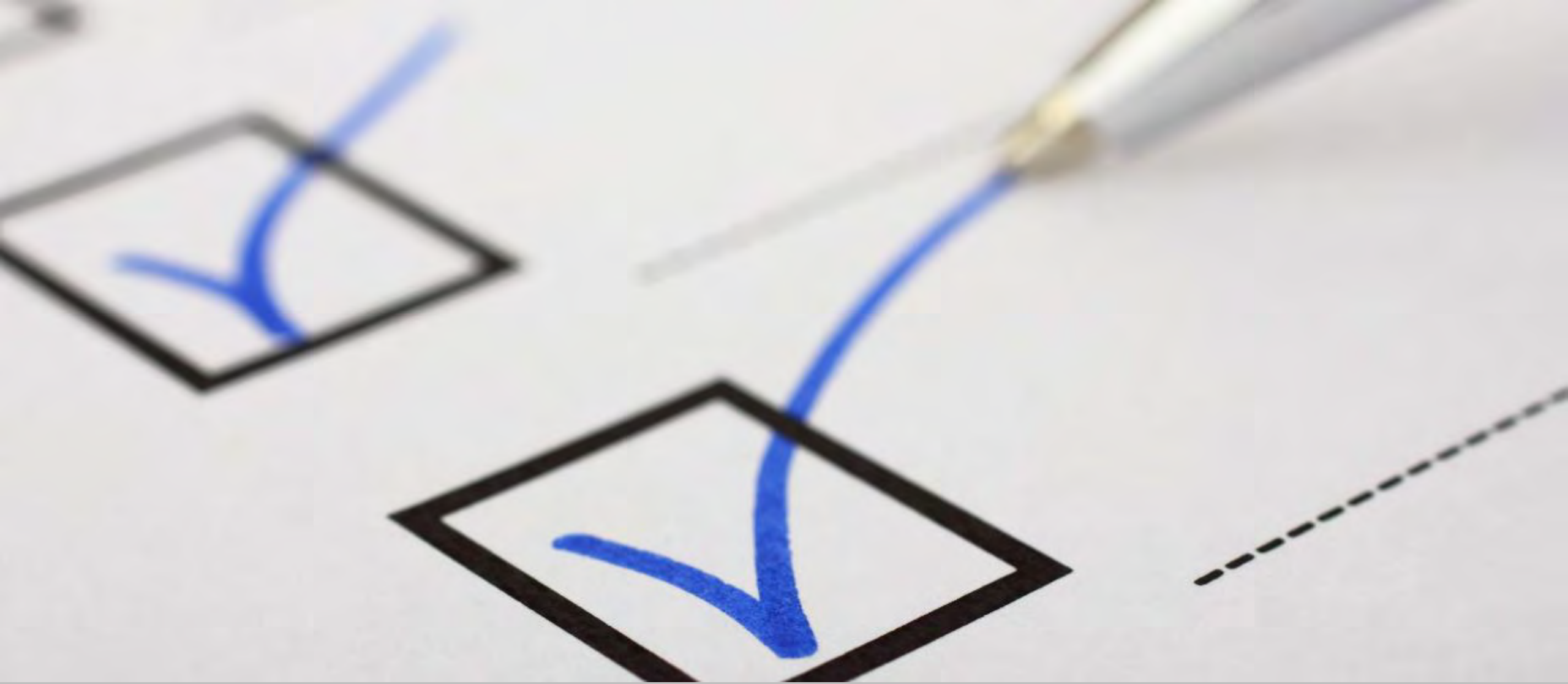
- Written determination **must** include:
 - Identification of the allegations potentially constituting sexual harassment
 - A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence; and hearings held

Written Determination in 106.45(b)(7)(ii)

- A statement of, and rationale for, the results as to each allegation, including determination regarding responsibility, **any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant**

Written Determination in 106.45(b)(7)(ii)

- Institution's procedures and permissible bases for complainant and respondent to appeal
- Provided to both parties in writing contemporaneously (106.45(b)(7)(ii))



Final Checklist for the Decision Maker

Final Checklist

1. Are there any additional procedural anomalies to be explained?



Final Checklist

2. Is every element of every charge accounted for?



Final Checklist

3. Is every relevant disputed fact resolved in the analysis?



Final Checklist

4. Is there a clear connection between the **charges**, the **investigation**, the **evidence**, and the **conclusions**?



Final Checklist

5. Would an unfamiliar reader be able to connect the dots?



Bases for Appeal

- Procedural irregularity that affected the outcome of the matter
- 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
- 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
- A recipient may offer an appeal equally to both parties on additional bases

Appeals

- As to all appeals, the recipient must:
 - Issue a written decision describing the result of the appeal and the rationale for the result
 - Provide the written decision simultaneously to both parties.



Questions?

Upcoming Trainings

Register at: www.bricker.com/events

Level 1

- General Title IX Training: Jul 27, Aug 4, Aug 7, Aug 11

Level 2 (All 9:00-11:30am)

- K-12 TIX Coordinator/administrator training: Jun 30, Jul 27, Aug 4, Aug 14
- K-12 TIX Investigator training: Jun 29, Jul 28, Aug 5, Aug 18
- K-12 TIX Decision-maker training: Jun 30, Jul 30, Aug 6, Aug 25
- K-12 TIX Report writing for investigators and decision-makers: Jul 29, Aug 7, Aug 28

Thank you for attending!

Remember – additional information available at:

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Find us on **Twitter** at
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Title IX K-12 Training Level 2

Decision-Maker and Appeals Training

with Laura G. Anthony and Melissa M. Carleton



Bricker & Eckler
ATTORNEYS AT LAW

Our Presenter: Laura G. Anthony

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Laura has been an education attorney for over 22 years, and helps K-12 and higher education institutions comply with their civil rights responsibilities, including those under Title IX. She has experience conducting impartial investigations and assists clients with related policy development and training.



Laura's Recent Trainings Include:

- **New Title IX Regulations: Hot Takes for K12 Webinar** (May 2020)
- **Civil Rights Compliance Update** (Feb 2020, Oct 2019, Aug 2019)
- **Title IX/Civil Rights Investigator Training – District and ESC in-services** (Jan 2020, Nov 2019, Oct 2019, Sept 2019, Aug 2019, March 2019, Dec 2018, Oct 2018, Sept 2018, Aug 2018, June 2018, May 2018, Jan 2018)
- **Proposed Title IX Regulations: Hot Takes for K12 Webinar** (Dec 2018)

Our Presenter: Melissa M. Carleton

mcarleton@bricker.com | 614.227.4846

Melissa is a regular speaker, trainer, and author on Title IX matters for both K-12 and higher education. She regularly advises school districts on Title IX compliance, trains administrators, writes policies, and acts as an investigator and a decision-maker in sexual misconduct cases.



Melissa's Recent Trainings Include:

- **One-Day Title IX Investigator Training** (April 2020; March 2020, Oct. 2019, Sept. 2019, Aug. 2019, Jan. 2019, Dec. 2018, Nov. 2018, Sept. 2018, Aug. 2018, June 2018, March 2018, Jan. 2018, Dec. 2017, Oct. 2017, Sept. 2017, Aug. 2017, June 2017, April 2017)
- **Advanced Title IX Investigator Training** (Nov. 2019)
- **Title IX Investigator/Adjudicator Two-Day Workshop** (January 2020; Sept. 2019, June 2019, Oct. 2018, Sept. 2018, Aug. 2018, May 2018, June 2017, Jan. 2017)
- **Title IX Adjudicator/Appeals Officer Training** (Nov. 2018, Nov. 2017)
- **Title IX for Law Enforcement** (Aug. 2017)

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

Posting These Training Materials?

- Yes!
- Your Title IX Coordinator is **required** by 34 CFR 106.45(b)(10)(i)(D) to post materials used to train Title IX personnel on its website
- We know this and will make this packet available to your district electronically to post

Agenda

- Required training
 - Overview of Role as a Decision-Maker
 - Bias and Impartiality
 - Questioning Phase
 - Analyzing the Elements of Prohibited Conduct
 - What Is Relevant?
- Fact finding
 - Credibility Analysis
 - Approaches To Counterintuitive Response
 - Weighing the Evidence
 - After the Decision
 - Handling Appeals

A Note About Hearings

- K-12 is not required to hold live hearings
- The regulations provide little structure for live hearings at the K-12 level
- This training presumes that you do not elect to offer live hearings prior to making a determination as to whether a policy violation occurred
- This does not excuse you from holding subsequent suspension/expulsion hearings as may be applicable

Why No Live Hearing?

Cross examination in a live hearing is “not necessarily effective in elementary and secondary schools where most students tend to be under the age of majority and where.... parents or guardians would likely exercise a party’s rights.” 85 FR 30334

- This applies to cases involving student and staff respondents.
- Consider career center with adult education program



Required Training for Decision-Makers

Required Training for Decision-Makers

- Issues of relevance (questions and evidence)
- When questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant
- If holding live hearings, must be trained on that process, as well as any technology to be used at a live hearing

Required Training for Decision-Makers

- Definition of “sexual harassment”
- Scope of the recipient’s education program or activity
- How to conduct an investigation and grievance process
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, bias and reliance on sex stereotypes
- See 34 CFR 106.45(b)(1)(iii) for training requirements



Role as a Decision-Maker

What is your role as decision-maker?

- Conduct an objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence [34 CFR 106.45(b)(1)(ii)]
- Mandatorily dismiss Title IX complaint that do not rise to the level of “sexual harassment,” did not occur in the recipient’s education program or activity, or did not occur against a person in the USA [34 CFR 106.45(b)(3)(i)]

What is your role as decision-maker?

- Afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions for each party. [34 C.F.R. 106.45(b)(6)(ii)]
- Explain to the party proposing the questions any decision to exclude a question as not relevant [34 C.F.R. 106.45(b)(6)(ii)]

What is your role as decision-maker?

- Issue a written determination regarding responsibility by applying the standard of evidence chosen by the recipient (either “preponderance of the evidence” or “clear and convincing”) [34 CFR 106.45(b)(7)]
- Consider appeals

1) Keep an Open Mind

- Keep an open mind until all evidence has been heard (and tested at the live hearing, if applicable)
- Don't come to any judgment, opinion, conclusion or belief about any aspect of this matter until you've reviewed or heard all of the evidence AND consider only the evidence that is permissible and relevant

2) Make Sound, Reasoned Decisions

- You must render a sound, reasoned decision on every charge
- You must determine the facts in this case based on the information presented
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- You must give the testimony and information of each party or witness the degree of importance you reasonably believe it is entitled to receive.
- Identify all conflicts and attempt to resolve those conflicts and determine where the truth (**standard of review/proof**) lies.

6) Evaluate Witness Credibility

- Consider the reasonableness or unreasonableness, or probability or improbability, of the testimony.
- Does the witness have any motive?
- Is there any bias?
- The Regulations provide consideration of consistency, accuracy, memory, credibility (85 FR 30315), implausibility, inconsistency, unreliability, ulterior motives, lack of credibility (85 FR 30330)

6) Evaluate Witness Credibility

- Credibility is determined fact by fact, not witness by witness
 - The most earnest and honest witness may share information that turns out not to be true

7) Draw Reasonable Inferences

- Inferences are sometimes called “circumstantial evidence.”
- It is the evidence that you infer from direct evidence that you considered.
- Inferences only as warranted and reasonable.

8) Standard of Evidence

- Use the standard of evidence as defined by your policy when evaluating whether someone is responsible for a policy violation
 - *ALWAYS* start with presumption of no violation.
- Preponderance of the evidence (most common standard of evidence): Is it more likely than not true that the respondent engaged in the alleged misconduct?
- But may choose clear and convincing standard

9) Don't Consider Impact

- Don't consider the potential impact of your decision on either party when determining if the charges have been proven
- Focus only on the allegations and whether the evidence presented is sufficient to persuade you that the respondent is responsible for a policy violation

8) Standard of Evidence

- Look to all the evidence in total, make judgments about weight and credibility, and then determine whether or not the burden has been met.
- Whenever you make a decision, apply your standard of evidence



Addressing Bias and Impartiality

Decision-Makers Must Be Impartial

- Decision-Makers “may not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent” [34 CFR 106.45(b)(1)(iii)]
- Decision-makers must avoid prejudgment of the facts at issue [34 CFR 106.45(b)(1)(iii)]

Being Impartial

- The preamble discussion indicates that being impartial means being free from bias (85 FR 30252)
- “The Department believes that keeping this provision focused on ‘bias’ paired with an expectation of impartiality helps appropriately focus on bias that impedes impartiality.” (85 FR 30252)

Conflicts of Interest: Concerns Raised in Comments in Preamble

- Decision-maker and financial and reputational interest aligned with institution (or to protect institution)
- Co-mingling of administrative and adjudicative roles
- Title IX Coordinator supervises decision-maker
- Past advocacy for victim's or respondents' rights (also given as an example of potential bias)
- “Perceived conflict of interest” vs. actual conflict of interest

Preamble Discussion: Bias and Conflict of Interest

- The regulations “leave recipients flexibility to use their own employees, or to outsource Title IX investigation and adjudication functions, and the Department encourages recipients to pursue alternatives to the inherent difficulties that arise when a recipient’s own employees are expected to perform functions free from conflicts of interest and bias.” 85 FR 30251
- “The Department declines to define certain employment relationships or administrative hierarchy arrangements as per se conflicts ... or to state whether particular professional experiences or affiliations do or do not constitute per se violations.” 85 FR 30252

Discussion Recommendation for Assessing Bias

“Whether bias exists requires examination of the particular facts of a situation and the Department encourages recipients 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, exercising caution not to apply generalizations that might unreasonably conclude that bias exists...bearing in mind that the very training required by 106.45(b)(1)(iii) is intended to provide Title IX personnel with the tools needed to serve **impartially** and without bias such that the **prior professional experience of a person whom a recipient would like to have in a Title IX role need not disqualify the person** from obtaining the requisite training to serve impartially in a Title IX role.”

Avoiding Pre-Judgment of Facts at Issue

- A good way to avoid bias and ensure impartiality: avoiding prejudgment of facts
- Each case is unique and different

Avoiding Sex Stereotypes

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

Avoiding Sex Stereotypes

- Discussion – prohibition against sex stereotypes, but not feasible to list them (85 FR 30254)
 - Different from evidence-based information or peer-reviewed scientific research, including impact of trauma
 - Cautions against an approach of “believing” one party over the other and notes 106.45(b)(1)(ii) precludes credibility determinations based on a party’s status as a complainant or respondent

Avoiding Sex Stereotypes

- Preamble discusses concerns regarding marginalized groups:
 - From commentators about stereotypes and accommodations for individuals with disabilities under the ADA, and individuals with developmental and cognitive disabilities
 - From people of color for cultural and racial stereotypes
 - Regarding stereotypes of people within the “LGBTQ community”



The Questioning Phase

After the Report

- After the school sends the investigative report to the parties, they have 10 days to provide a written response.
[34 CFR 106.45(b)(5)(vii)]

After the Report

- Before reaching a determination regarding responsibility, the decision maker must:
 - Afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness
 - The decision-maker must explain to the party proposing the question any decision to exclude a question as not relevant. [34 CFR 106.45(b)(6)(ii)]

After the Report

- Questions go to the decision-maker for review prior to being given to parties/witnesses.
- Allow for additional, limited follow-up questions from each party
 - School can to set reasonable limits [85 FR 30364]
 - The 10-day response period can overlap with the period for follow-up questions, so schools do not need to extend timelines [85 FR 30365]



Analyzing the Elements of Prohibited Conduct

Analyzing the Elements

- To find a policy violation, there must be evidence to show, using the standard of evidence in your policy (preponderance of the evidence or clear and convincing), that each and every element of a policy violation has been met
- How do you do this?

Analyzing the Elements

- Review the definition
- Break down the definition into elements by making a checklist
- Re-read the definition. Have you accounted for all of the language in the definition?
- Are there any definitions that should be included in your element checklist? (e.g. state law definition of domestic violence)
- Sort evidence according to element

Analyzing the Elements

- If you have a preponderance of the evidence* that each element is present, you have a policy violation
- If you do not have a preponderance of the evidence that each element is present, you do not have a policy violation
- If you have a preponderance of the evidence that one or more elements is not present, you do not have a policy violation

*If you use clear and convincing as your standard of evidence, substitute that here

Example: Quid Pro Quo

- Conduct on the basis of sex
- By an employee of the recipient
- That conduct conditions the provision of an aid, benefit, or service of the recipient on an individual's participation in sexual conduct
- That sexual conduct is unwelcome

[34 C.F.R. 106.30(a)]

Example: Hostile Environment

- Conduct on the basis of sex
- That is unwelcome
- That a reasonable person has determined is so severe, pervasive, and objectively offensive...
- That it effectively denies a person equal access to the recipient's education program or activity

[34 C.F.R. 106.30(a)]

Example: Sexual Assault

- Conduct on the basis of sex
- Qualifies as one of the following:
 - Rape (male on female penetration only)
 - Sodomy (oral/anal penetration)
 - Sexual Assault With An Object (other than genitalia)
 - Fondling
 - Incest
 - Statutory Rape

Example: Sexual Assault (cont.)

- ❑ In cases of rape, sodomy, sexual assault with an object, or fondling, there was either:
 - ❑ No consent, or
 - ❑ Victim was incapable of giving consent because of age or temporary/permanent mental or physical incapacity

[34 C.F.R. 106.30(a); 20 U.S.C. 1092(f)(6)(A)(v); FBI UCR National Incident-Based Reporting System User Manual]

Example: Dating Violence

- Conduct on the basis of sex
- Violence committed by a person
- Who has been in a social relationship of a romantic or intimate nature with the victim
- Where the existence of such a relationship shall be determined based on a consideration of the following factors:
 - Length of the relationship
 - Type of relationship
 - Frequency of interaction between the persons involved in the relationship

[34 C.F.R. 106.30(a); 34 U.S.C. 12291(a)(10)]

Example: Domestic Violence

- Conduct **on the basis of sex**
- Felony or misdemeanor crime of violence committed:
 - By current/former spouse or intimate partner of the victim
 - By a person with whom the victim shares a child in common
 - By a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner
 - By a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction
 - 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

[34 C.F.R. 106.30(a); 34 U.S.C. 12291(a)(8)]

Example: Stalking

- Conduct **on the basis of sex**
- Course of conduct
- Directed at a specific person
- Would cause a reasonable person to either:
 - Fear for his or her safety or the safety of others; or
 - Suffer substantial emotional distress.

[34 C.F.R. 106.30(a); 34 U.S.C. 12291(a)(30)]

Scope of Education Program/Activity

Remember that the behavior addressed must occur in the recipient's "education program or activity"

- "Education program or activity" means all of the operations of the recipient [34 CFR 106.2(h)(2)(i)]
- In the Title IX grievance context, "education program or activity" includes "locations, events, or circumstances over which the recipient exercised **substantial control** over both the **respondent** and the **context** in which the sexual harassment occurs." [34 CFR 106.44(a)]



Relevancy: What Can You Consider?

Issues of Relevancy

- The Rules of Evidence do **NOT** apply and **CANNOT** apply 85 FR 30337
- “The Department appreciates the opportunity to clarify here that the final regulations **do not allow** a recipient to impose rules of evidence that **result in the exclusion of relevant evidence**; the decision-maker must consider relevant evidence and must not consider irrelevant evidence.” 85 FR 30336-37

Issues of Relevancy

- Not generally permissible unless expressly touched upon in Regulations (85 FR 30294):
 - Information protected by a legally recognized **privilege**
 - Evidence about complainant's **prior sexual history**
 - Party's **medical, psychological, and similar records** unless voluntary written consent
 - Party or witness statements that have not been subjected to **cross-examination at a live hearing** (if your policy allows hearings – otherwise this restriction does not apply)

Issues of Relevancy

- The process allows both parties to submit all relevant evidence:
 - Similarly 106.45(b)(6)(i)-(ii) directs the decision-maker to allow parties to ask witnesses all relevant questions and follow-up questions
 - A recipient may not adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice (85 FR 30294)

Issues of Relevancy

- “[D]oes not prescribe rules governing how admissible, relevant evidence must be **evaluated for weight or credibility** by recipient’s decision-maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with 106.45 and apply equally to both parties.” (85 FR 30294)

BUT

- “[I]f a recipient trains Title IX personnel to evaluate, credit, or assign weight to types of relevant, admissible evidence, that topic will be reflected in the recipient’s training materials.” (85 FR 30293)

Relevancy: Legally Privileged Information

- Section 106.45(b)(5)(i): when **investigating** a formal complaint, recipient:
 - “[C]annot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party’s voluntary, written consent to do so for a grievance process under this section.”

Relevancy: Legally Privileged Information

- Section 106.45(b)(1)(x):
 - A recipient's grievance process must...not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

Relevancy: Legally Privileged Information

- Preamble identifies medical and treatment records.
- Other typical privileges recognized across jurisdictions but with variations (will want to involve your legal counsel for definitions in your jurisdiction):
 - Attorney-client communications
 - Implicating oneself in a crime (as in the 5th Amendment)
 - Confessions to a clergy member or other religious figures
 - Spousal testimony in criminal matters
 - Some confidentiality/trade secrets

Rules of Relevancy

“Any rules adopted by a recipient regarding issues of relevance should be reflected in the recipient’s training materials.” 85 FR 30294



Fact-Finding when Facts are Disputed

The Fact Finding Process

1

- List undisputed facts – what do parties agree on? = **findings of fact**
- List disputed facts – what do parties disagree on?

2

- What undisputed facts address each element?
- What disputed facts must be resolved for each element?

3

- Weigh the evidence for each **relevant** disputed fact
- Resolve disputed facts = **findings of fact**



Credibility Analysis

Objectively Evaluating Relevant Evidence

- Preamble indicates that the decision-maker should be looking at consistency, accuracy, memory, credibility (p. 85 FR 30315), implausibility, inconsistency, unreliability, ulterior motives, lack of credibility (85 FR 30330)
- Again, not making relevancy determinations beyond those expressly included in regulations (as specified by policy)
- Use your standard of proof to guide decision-making

Standard of Proof

- Standard of Evidence: Preponderance of the Evidence or Clear & Convincing
- Must use same standard for formal Title IX complaints against both students and employees (including teachers) for all policies and procedures with adjudication for sexual harassment complaints (e.g., union grievances procedures, teacher conduct)
- Must begin with a **presumption of no violation** by Respondent

OCR 2001 Guidance: Recommended Considerations for Resolving Conflicts

- Statements by any witnesses to the alleged incident
- Evidence about the relative credibility of the complainant/respondent
 - The level of detail and consistency of each person's account should be compared in an attempt to determine who is telling the truth
 - Is corroborative evidence lacking where it should logically exist?

OCR 2001 Guidance: Recommended Considerations for Resolving Conflicts

- Evidence of the complainant's reaction or behavior after the alleged harassment
 - Were there witnesses who saw that the complainant was upset?
 - Changes in behaviors? Work-related? School? Concerns from friends and family? Avoiding certain places?
 - May not manifest until later

OCR 2001 Guidance: Recommended Considerations for Resolving Conflicts

- Evidence about whether the complainant filed the complaint or took other action to protest the conduct soon after the alleged incident occurred
 - But: failure to immediately complain may merely reflect a fear of retaliation, a fear that the complainant may not be believed, etc. rather than that the alleged harassment did not occur

OCR 2001 Guidance: Recommended Considerations for Resolving Conflicts

- Other contemporaneous evidence:
 - Did the complainant write about the conduct and reaction to it soon after it occurred (e.g. in a diary, email, blog, social media post)?
 - Did the student tell others (friends, parents) about the conduct and their reaction soon after it occurred?



Approaches to Counterintuitive Response

Not Everyone Thinks Like You

- Differences in:
 - Cultural backgrounds
 - Learned responses
 - Age, gender, race, religion, height/weight, strength
 - Adverse childhood experiences
 - Trauma in the moment or prior to the encounter

Considerations: Potential Responses to Trauma

- Delayed reporting
- Difficulty remembering specifics (could also be due to drugs/alcohol)
- Reluctant reporting
- Remaining in a relationship or living arrangement with the respondent
- Being calm and composed after an assault
- Failing to identify the accused

Considerations: Potential Responses to Trauma

Trauma isn't just something to consider from the complainant's perspective. The respondent may be dealing with trauma, as may be the witnesses.

Trauma may cause counterintuitive responses – from your perspective. Stop and consider carefully before you decided someone is lying because they responded in a way different from how *you* would have responded.

Disclaimer

- Do **not** assume that because there are signs of trauma that the respondent *therefore* caused the trauma and violated the policy
- Do **not** assume that because there are no signs of trauma, nothing bad happened

Credibility Factors

- Revisit the credibility factors we just discussed from the 2001 guidance and the 2020 regulatory comments
- Focus on your evidence
- Draw reasonable inferences from that evidence
- Focus on your parties and witnesses, and take them as they are
- Check yourself: am I reaching my decision because of any bias that I may hold?



Weighing the Evidence

Regulatory Definitions

- Preponderance of the Evidence – “Concluding that a fact is more likely than not to be true”
- Clear and convincing – “concluding that a fact is highly probable to be true”

85 FR 30373 at fn 1409

Recipients cannot use “beyond a reasonable doubt” standard, which is used in criminal cases. 85 FR 30373.

Standards of Evidence



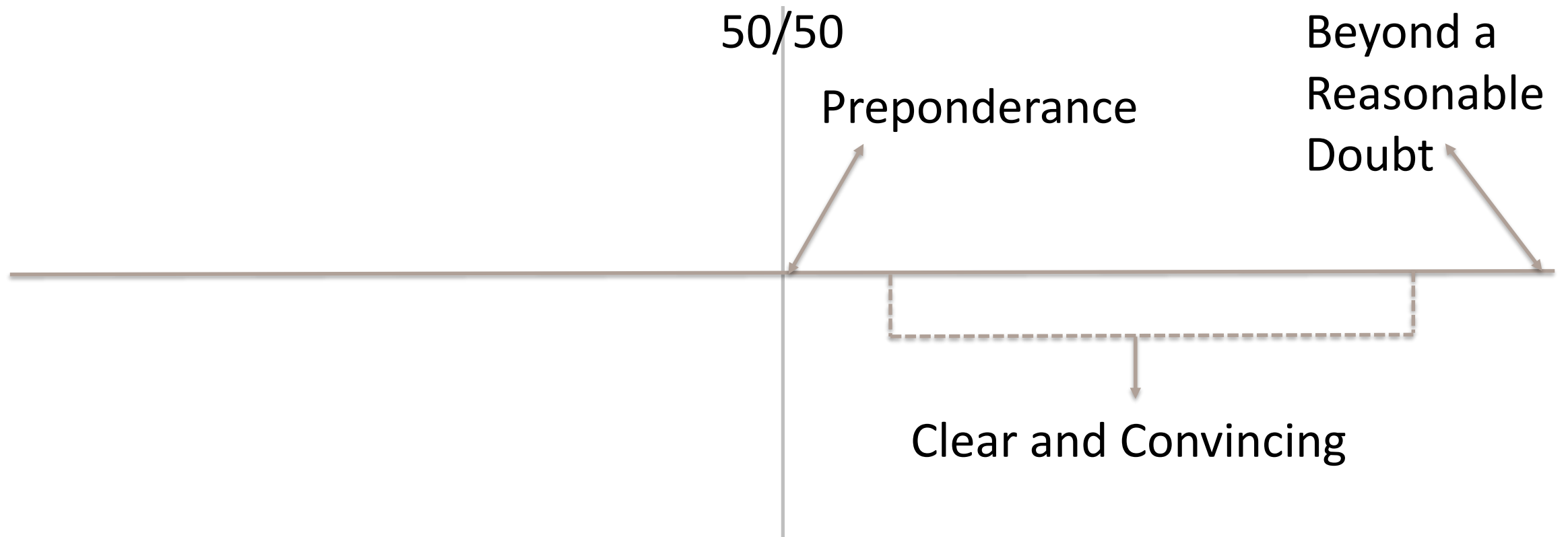
What are our choices?

50/50

Preponderance

Beyond a Reasonable Doubt

Clear and Convincing



Applies to *Every Fact* and *Every Decision*

- When you make a determination as to a disputed fact, use your standard of evidence
- When you make a determination as to whether an element exists, use your standard of evidence
- If you are using “preponderance of the evidence” and the evidence is exactly 50/50, you do not have a preponderance, so you have *insufficient evidence* to support the existence of the fact/element

Written Determination in 106.45(b)(7)(ii)

- Written determination **must** include:
 - Identification of the allegations potentially constituting sexual harassment
 - A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence; and hearings held

Written Determination in 106.45(b)(7)(ii)

- A statement of, and rationale for, the results as to each allegation, including **determination** regarding responsibility, any disciplinary **sanctions** the recipient imposes on the respondent, and whether **remedies** designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant

Written Determination in 106.45(b)(7)(ii)

- Institution's procedures and permissible bases for complainant and respondent to **appeal**
- Provided to both parties in writing contemporaneously (106.45(b)(7)(ii))

What's
NEXT?

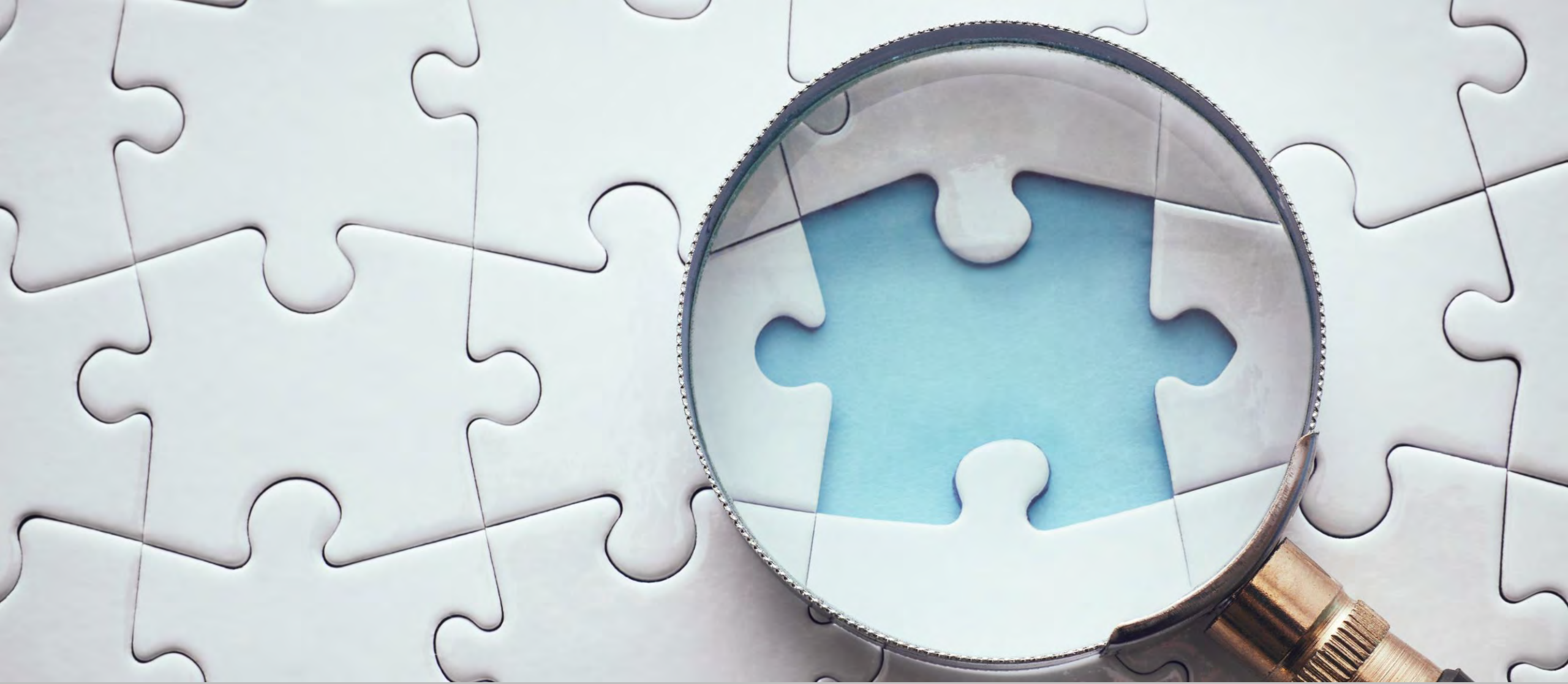
After the Decision

Disciplinary Sanctions

- Ensure policy/code of conduct contains relevant language
- If there has been a finding of responsibility (inc. retaliation), follow due process procedures in state law and Board Policy
 - Written notice of possible discipline (suspension/expulsion)
 - Opportunity to respond to the allegations/proposed discipline
 - Appeal rights

Disciplinary Sanctions

- Note that under 34 CFR 106.45(b)(8), if schools permit appeals regarding sanctions, they must offer this right to the complainant and respondent. 85 FR 30399
- Before any sanction that would constitute a change of placement for a child with a disability, ensure compliance with IDEA and Section 504 (manifestation determination, continuation of services as applicable, etc.)



Handling Appeals

Identity of the Appeals Officer

- You cannot hear an appeal of your own decisions
 - The Appeals Officer cannot be the same investigator, Title IX Coordinator, or decision-maker that worked on the case
- The Appeals Officer must be trained in the same manner as the Decision-Maker

Bases for Appeal

- Procedural irregularity that affected the outcome of the matter
- 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
- The Title IX Coordinator/investigator/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
- A recipient may offer an appeal equally to both parties on additional bases

Appeals

- As to all appeals, the recipient must:
 - Offer the appeal to either party
 - Issue a written decision describing the result of the appeal and the rationale for the result
 - Provide the written decision simultaneously to both parties.



Questions?

Upcoming Trainings

Register at: www.bricker.com/events

Level 1

- General Title IX Training: Jun 22, Aug 4, Aug 7, Aug 11

Level 2 (All 9:00-11:30am)

- K-12 TIX Coordinator/administrator training: Jun 30, Aug 14
- K-12 TIX Investigator training: Jun 29, Aug 18
- K-12 TIX Decision-maker training: Jun 30, Aug 25
- K-12 TIX Report writing for investigators and decision-makers: Jun 23, Aug 28

Thank you for attending!

Remember – additional information available at:

Title IX Resource Center
at www.bricker.com/titleix

Find us on **Twitter** at
@BrickerEdLaw





K-12 Title IX Level 2

**Decision-Maker Training with Live Hearing
and Cross-Examination**



Bricker & Eckler
ATTORNEYS AT LAW



Disclaimer



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

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

Presentation Rules



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

Aspirational Agenda



- 9:00-9:45 Intro & Being Impartial, Avoiding Bias, and Conflict of Interest
- 9:45-10:45 Live Cross-Examination Theory & Practice; Issues of Relevancy
- 10:45-11:00 Break
- 11:00-12:00 Issues of Relevancy, Hypotheticals
- 12:00-12:30 Lunch
- 12:30-1:30 Observe a Live Cross-Examination Hearing
- 1:30-1:45 Debrief/Hearing
- 1:45-2:00 Break
- 2:00-3:00 Objectively Evaluating Evidence/Written Decision

Posting these Training Materials



- Yes!
- The “recipient” is required by §106.45(b)(10)(i)(D) to post materials used to train Title IX personnel on its website
- We know this and will make this packet available to you electronically to post. Look for the “Thank You For Attending” email in the next day or so.

Training Requirements



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

Post-Secondary Institutions



A post-secondary institution is defined as “an institution of graduate higher education as defined in section 106.2(l), and institutions of undergraduate higher education as defined in 106.2(m), an institution of professional education as defined in section 106.2(n) or **an institution of vocational education as defined in section 106.2(o).**”

34 C.F.R. § 106.30(b).

Vocational Education Programs



Vocational education defined in 34 CFR Section 106.2(o) “means a school or institution (except an institution of professional or graduate or undergraduate higher education) which has as its **primary purpose** preparation of students to pursue a **technical, skilled or semi-skilled occupation or trade, or to pursue study in a technical field, whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers fulltime study.**”

Training Requirements for Decision Makers



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

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

Training Requirements (1 of 5)



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

Training Requirements (2 of 5)



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

Training Requirements (3 of 5)



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

Training Requirements (4 of 5)



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

Training Requirements (5 of 5)



Note that if your institution is subject to the Clery Act, your decision-maker must receive annual training on:

- Issues related to sexual assault, domestic violence, dating violence, stalking – *not* covered here; and
- How to conduct an investigation and hearing process that protects the safety of victims and promotes accountability (today!)

MAKE NO ASSUMPTIONS

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

Being Impartial



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

(30323)

Bias: Concerns raised in comments in preamble



- Are all **paid staff members biased** in favor of the institution that employs them?
- Was an institutional **history of covering up issues** enough for bias?
- Were **past tweets or public comments** that appear to support complainants or respondents sufficient to show bias?
- Is identifying as a **feminist** enough to show bias?
- Should bias extend to “perceived bias” or did it require actual bias?

Bias: Response of Department to Perceived v. Actual Bias



- Department declined to determine whether bias has to be actual or if perceived is sufficient to create an issue
- Each specific bias issue requires a fact-specific analysis

(30252)

Bias: How the Department tried to minimize bias



No single-investigator model for Title IX

- Decision-maker (or makers if a panel) cannot have been the same person who served as the Title IX Coordinator or investigator (30367)
- Prevents the decision-maker from **improperly gleaning information from the investigation** that isn't relevant that an investigator might be aware of from gathering evidence (30370)
- **The institution may consider external or internal investigator or decision-maker (30370)**

Bias: Objective Rules and Discretion



- “[R]ecipients **should have objective rules** for determining when an adjudicator (or Title IX Coordinator, investigator, or person who facilitates an informal resolution) is **biased**, and the Department **leaves recipients discretion to decide how best to implement the prohibition on conflicts of interest and bias...**” (30250)
- Recipients have the discretion to have a process to raise bias during the investigation
- Bias is a basis for appeal of decision-maker’s determination (34 C.F.R. 106.45(b)(8)(i)(C))

Conflict of Interest: Concerns raised in comments in preamble



Similar to those raised regarding bias:

- Does a decision-maker **with financial and reputational interests aligned with institution** create a conflict?
- Would the **Title IX Coordinator directly supervising the decision-maker** create a conflict?
- Does **past advocacy** for a survivor's or respondent's rights group create conflict (also comes up in bias)?
- Are perceived conflicts of interest sufficient or do the conflicts have to be actual conflicts?

Preamble Discussion: Bias and Conflict of Interest



- No *per se* prohibited conflicts of interest from using employees and administrative staff, including supervisory hierarchies (30352)
 - but see portion about decision-makers and Title IX Coordinator as supervisor
- No *per se* conflict of interest or bias for professional experiences or affiliations of decision-makers and other roles in the grievance process (30353)

Preamble Discussion: Bias and Conflict of Interest (1 of 2)



The preamble discussion:

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

Preamble Discussion: Bias and Conflict of Interest (2 of 2)



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

Discussion Regarding Training's Role



“[T]he **very training required by 106.45(b)(1)(iii)** [that you are sitting in right now] is intended to

- provide Title IX personnel with the tools needed to serve impartially and without bias
- such that the prior professional experience of a person whom a recipient would like to have in a Title IX role
- need not disqualify the person from obtaining the requisite training to serve impartially in a Title IX role.”

(30252)

Examples in Discussion for Unreasonable Conclusion that Bias Exist: Review of Outcomes



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

Examples of Bias



- Situations where a decision-maker has already heard from a witness or party in a prior case and has made a credibility determination re: that person;
- Situations where information “gleaned” by the investigator is shared with the decision-maker outside the investigation report (in meetings to discuss pending cases, in passing while at work, etc.)

Avoiding Pre-Judgment of Facts at Issue



A good way to avoid bias and ensure impartiality:
avoiding prejudgment of facts

Remember:

- **Keep an open mind** as a decision-maker and actively listen to all the facts presented as subjected to cross-examination
- If a party or witness does not submit to cross-examination, may not be able to consider statements in the record
- Each case is unique and different

Being impartial: Avoiding Sex Stereotypes



Decision-makers are trained to avoid bias and sex stereotypes—

- “such that even if a cross-examination question impermissibly relies on **bias or sex stereotypes** while attempting to challenge a party’s plausibility, credibility, reliability, or consistency,
- **it is the trained decision-maker**, and not the party advisor asking a question,
- **who determines whether the question is relevant if it is relevant**, then evaluates the question and any resulting testimony in order to reach a determination on responsibility” (30325)

Avoiding Sex Stereotypes: Quick Recap



- “Must” **not** rely on sex stereotypes: Also helpful to avoiding pre-judgment of facts, remaining unbiased and impartial
- Examples of sex stereotypes in comments (30253):
 - Women have regret sex and lie about sexual assaults
 - Men are sexually aggressive or likely to perpetrate sexual assault
 - Consideration of marginalized groups: people with disabilities, people of color, people who identify in the “LGBTQ” community (30259-30260)

Sex Stereotypes: Rape Myths



The preamble discussed a particular study referred to by commenters about a “common tactic” in defense of sexual assault remains the “leveraging rape myths” when cross-examining rape victims (30325)

- However, the preamble discussion determines that this is a broader societal issue, a not an issue with cross-examination as a tool for truth-seeking

LIVE CROSS-EXAMINATION: Theory and Practice

Cross Examination



Traditionally, cross examination questions are those that try to elicit “yes” or “no” answers, not explanations.

Examples:

- You were at the party that night, weren't you?
- You'd agree with me that you had three beers, wouldn't you?
- You didn't call an Uber, did you?

They aren't required to be asked this way in our hearings, however.

Live Cross-Examination: Theory (1 of 3)



- Essential for truth seeking (30313)
- Provides opportunity of both parties to test “consistency, accuracy, memory, and credibility so that the decision-maker can better assess whether a [party’s] narrative should be believed” (30315)

Live Cross-Examination: Theory (2 of 3)



- Provides parties with the opportunity to “direct the decision-maker’s attention to **implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility**” in the other party’s statements. (30330)
- Promotes transparency and equal access (30389)

Live Cross-Examination: Theory (3 of 3)



According to the Department, the process in 106.45 best achieves the purposes of:

- (1) effectuating Title IX's non-discrimination mandate by ensuring **fair, reliable outcomes** viewed as **legitimate** in resolution of formal complaints of sexual harassment so that victims receive remedies
- (2) **reducing and preventing sex bias** from affecting outcomes; and
- (3) ensuring that Title IX regulations are consistent with **constitutional due process and fundamental fairness**
(30327)

Live Cross-Examination: How it should look



“[C]onducting cross-examination consists simply of posing questions intended to advance the asking party’s perspective with respect to the specific allegation at issue.” (30319)

Live Cross-Examination: Regulations (1 of 2)



In this process:

- Decision-maker must permit each party's advisor to ask the other party and any witnesses **all relevant** questions and follow-up questions, including those challenging **credibility**
- Must be conducted directly, orally, and in real time by the party's advisor, but never party personally
- Only relevant cross-examination and other questions may be asked of a party or witness

Live Cross-Examination: Regulations (2 of 2)



- Before a party or witness may answer a question, the decision-maker must first determine whether the question is relevant and explain the reason if not relevant
- Must audio record, audio-video record or provide a transcript of the hearing

Suggest using Zoom

Role of Decision-Maker/questioning by (1 of 2)



The preamble discussion provides some additional information on protecting neutrality of the **decision-maker**:

“To the extent that **a party wants the other party questioned in an adversarial manner** in order to further the asking party’s views and interests, that questioning is conducted by the party’s own advisor, **and not by the recipient**. Thus, no complainant (or respondent) need feel as though the recipient is “taking sides” or otherwise engaging in cross-examination to make a complainant feel as though the recipient is blaming or disbelieving the complainant.” (30316)

Role of Decision-Maker/questioning by (2 of 2)



So take that into consideration if eliciting questions:

- “[O]n the decision-maker’s initiative [can] ask questions and elicit testimony from parties and witnesses,
- as part of the recipient’s **burden** to reach a determination regarding responsibility based on objective evaluation of all relevant evidence including inculpatory and exculpatory evidence.
- Thus, the skill of a party’s advisor is not the only factor in bringing evidence to light for a decision-maker’s consideration.” (30332)

District MUST gather all relevant evidence - burden is on district not complainant or respondent

Confidentiality



- 106.71 requires recipients to keep party and witness identities confidential except as permitted by law or FERPA, and as needed to conduct an investigation or hearing (30316)
- Prevents anyone in addition to the advisor to attend the hearing with the party, unless otherwise required by law (30339)

Reminders (1 of 3)



- Individual cases are not about statistics
- Decision in every case must be based on preponderance of evidence or clear and convincing evidence presented
- Cannot fill in evidentiary gaps with statistics, personal beliefs or information about trauma
- Process must be fair and impartial to each party
- Institution may proceed without active involvement of one or both parties; base conclusions on impartial view of evidence presented

Reminders (2 of 3)



- **Withhold pre-judgment:** The parties may not act as you expect them to
- Be aware of your own biases as well as those of the complainant, respondent, and witnesses
- Let the available facts and standard of proof guide your role in overseeing the live cross-examination hearing, not unfair victim-blaming or societal/personal biases

Reminders (3 of 3)



- Burden of gathering the evidence on the recipient, not the parties (30333)
- should be an issue with investigation, but might be something you see as the decision-maker

ISSUES OF RELEVANCY: Not Rules of Evidence

Relevancy (1 of 2)



- Per 34 C.F.R. 106. 45(b)(6)(i):
 - “Only **relevant** cross-examination and other questions may be asked of a party or witness.”

“[C]ross examination **must focus only on questions that are relevant to the allegations in dispute.**” (30319)

Relevancy (2 of 2)



Party or witness **cannot** answer a question until the decision-maker determines whether it is relevant.

- Requires decision-makers to make “on the spot” determinations and explain the “why” if a question or evidence is not relevant (30343)

What is Relevant? (1 of 4)



Decisions regarding relevancy do not have to be lengthy or complicated:

“... it is sufficient... to explain that a question is irrelevant because it calls for prior sexual behavior information without meeting one of the two exceptions, or because the question asks about a detail that is not probative of any material fact concerning the allegations.” (30343)

What is Relevant? (2 of 4)



Questions to consider:

- Does this question, topic, evidence help move the dial under the standard of evidence?
 - **Preponderance of the evidence**: a fact is more likely than not to be true (30373 fn. 1409)
 - **Clear and convincing**: a fact is highly probable to be true (30373 fn. 1409)

What is Relevant? (3 of 4)



Under the **preponderance of the evidence** standard:

- Does this help me in deciding if there was more likely than not a violation?
- Does it make it more or less likely?
- Why or why not?

If it doesn't move this dial: likely not relevant.

What is Relevant? (4 of 4)



Under the **clear and convincing** standard of evidence:

- Does this help me in deciding if a fact is highly probable to be true?
- Does it make it more or less probable?
- Why or why not?

If it doesn't move this dial: likely not relevant.

Not Governed by Rules of Evidence (1 of 2)



The Rules of Evidence do NOT apply and CANNOT apply

“[T]he decision-maker’s only evidentiary threshold for admissibility or exclusion of questions and evidence is not whether it would then still be excluded under the myriad of other evidentiary rules and exceptions that apply under, for example, the Federal Rules of Evidence.” (30343)

Not Governed by Rules of Evidence (2 of 2)



Examples:

- No reliance of statement against a party interest (30345)
- No reliance on statement of deceased party (30348)
- A recipient may not adopt a rule excluding relevant evidence whose **probative value is substantially outweighed by the danger of unfair prejudice** (30294)

Relevancy



Recipient must ensure that “all *relevant* questions and evidence are admitted and considered (though varying weight or credibility may of course be given to particular evidence by the decision-maker).” (30331)

- A recipient may not adopt rules excluding certain types of relevant evidence (**lie detector** or rape kits) where that type of evidence is not labeled irrelevant in the regulations (e.g., sexual history) or otherwise barred for use under 106.56 (privileged) and must allow fact and **expert witnesses**. (30294)

Relevancy: Not Relevant



The Department has determined that recipients must consider relevant evidence with the following exceptions:

- (1) Complainant's sexual behavior (except for two narrow exceptions)
- (2) information protected by a legal privilege
- (3) party's treatment records (absent voluntary written waiver by the party) (30337)

Relevancy: Regulations' Rape Shield Law-Complainants



- According to 34 C.F.R. 106. 45(b)(6)(i), Cross-examination **must exclude** evidence of the Complainant's "sexual behavior or predisposition"
UNLESS
 - its use is to prove that someone other than the Respondent committed the conduct, OR
 - it concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent

Relevancy: Regulations' Rape Shield Law - Respondents



- Rape shield protections **do not apply to Respondents**
- “The Department reiterates that the rape shield language . . . does not pertain to the sexual predisposition or sexual behavior of respondents, so **evidence of a pattern** of inappropriate behavior by an alleged harasser must be judged for relevance as any other evidence must be.”

Relevancy: Treatment Records



“[C]annot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and **which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party’s voluntary, written consent** to do so for a grievance process under this section.”

Section 106.45(b)(5)(i) (see also 30317).

Relevancy: Legally Privileged Information (1 of 2)



Section 106.45(b)(1)(x):

A recipient's grievance process **must...not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of**, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

Relevancy: Legally Privileged Information (2 of 2)



Other typical privileges recognized across jurisdictions but with variations (will want to **involve your legal counsel for definitions in your jurisdiction**):

- Attorney-client communications
- Implicating oneself in a crime
- Confessions to a clergy member or other religious figures
- Spousal testimony in criminal matters
- Some confidentiality/trade secrets

Relevancy: Improper Inference



When parties do not participate:

- “If a party or witness does not submit to cross-examination at the live hearing...the decision-maker(s) cannot draw an inference about the determination regarding responsibility **based solely** on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions.” 34 C.F.R. 106.45(b)(6)(i).

Relevancy: No Reliance on Prior Statements



When parties elect not to participate, a recipient cannot retaliate against them (30322)

What if a party or witness gave a statement during the investigation but is not participating in cross-examination?

- “Must not rely on any statement of that party or witness in reaching a determination”

Relevancy: No Reliance on Prior Statements - Theory



If parties do not testify about their own statement and submit to cross-examination, **the decision-maker will not have the appropriate context for the statement**, which is why the decision-maker cannot consider that party's statement.

(30349)

Relevancy: When Parties or Witnesses Do Not Participate



The preamble recognizes that there are many reasons a party or witness may not elect not to participate in the live cross-examination hearing or answer a question or set of questions

- The decision-maker cannot make inferences from non-participation or compel participation (retaliation) (30322)
- Relevant questioning by advisor along these lines?

Relevancy: No Reliance on Prior Statements (1 of 5)



“[A] party’s advisor may appear and conduct cross-examination **even when the party whom they are advising does not appear.**” (30346)

“Similarly, where one party does not appear and that party’s advisor does not appear, **a recipient-provided advisor must still cross-examine the other, appearing party,** resulting in consideration of the appearing party’s statements (without any inference being drawn based on the non-appearance).” (30346)

Relevancy: No Reliance on Prior Statements (2 of 5)



Third party cross-examination of what a non-appearing party stated **does not count** as statements tested on cross-examination. (30347)
(provides examples of family and friends showing up on behalf of the non-appearing party)

“[A] rule of non-reliance on untested statements is more likely to lead to reliable outcomes than a rule of reliance on untested statements.” (30347)

Relevancy: No Reliance on Prior Statements (3 of 5)



When statement IS the sexual harassment...

“One question that a postsecondary institution may have is whether not relying on a party’s statement—because that party has not submitted to cross-examination —means not relying on a description of the words allegedly used by a respondent if those words constitute part of the alleged sexual harassment at issue.

The answer to that question is ‘no’...”

May 22, 2020 OCR blog

Relevancy: No Reliance on Prior Statements (4 of 5)



“[E]ven though the refusing party’s statement cannot be considered, the decision-maker may reach a determination based on the remaining evidence so long as no inference is drawn based on the party or witness’s absence from the hearing or refusal to answer cross-examination (or other) questions.” (30322)

Example: “[W]here a complainant refuses to answer cross-examination questions but video evidence exists showing the underlying incident, a decision-maker may still consider the available evidence and make a determination” (30328)

Relevancy: No Reliance on Prior Statements (5 of 5)



“Thus, a respondent’s alleged verbal conduct, that itself constitutes the sexual harassment at issue, is not the respondent’s “statement” as that word is used in § 106.45(b)(6)(i), because the verbal conduct does not constitute the making of a factual assertion to prove or disprove the allegations of sexual harassment; instead, the verbal conduct constitutes part or all of the underlying allegation of sexual harassment itself.”

- If you don’t already follow the blog, add it to your favorites bar: <https://www2.ed.gov/about/offices/list/ocr/blog/index.html>

Relevancy: No Reliance on Prior Statements- Examples



- But, if a party or witness does not submit to cross examination and makes a statement in a video, cannot consider that statement in the video to reach a decision on responsibility (30346)
- Remember: No rules of evidence can be imported

Relevancy: No Reliance on Prior Statements – SANE and Police Reports



- This expressly means no statements in police reports, no SANE reports, medical reports, or other documents to the extent they contain statements of parties or witnesses who do not submit to cross examination (30349)
- If non-cross-examined statements are intertwined with statements tested by cross-examination, can only consider those that have been cross-examined (30349)

Issues of Relevancy



“[D]oes not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by recipient’s decision-maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with 106.45 and apply equally to both parties.” (30294)

BUT

“[I]f a recipient trains Title IX personnel to evaluate, credit, or assign weight to types of relevant, admissible evidence, that topic will be reflected in the recipient’s training materials.” (30293)

Other Considerations



- What about sex stereotyping questions?
- What about questions by advisor about why a party isn't participating?
- What about decorum?

Decorum (1 of 5)



The preamble to the Title IX Regulations contains many discussions of an institution's discretion to set rules to maintain decorum throughout hearings and to remove non-complying advisors, parties, or witnesses.

Decorum (2 of 5)



“Recipients may adopt rules that govern the **conduct and decorum of participants at live hearings** so long as such rules comply with these final regulations and **apply equally to both parties**... These final regulations aim to ensure that the truth-seeking value and function of cross-examination applies for the benefit of both parties while minimizing the discomfort or traumatic impact of answering questions about sexual harassment.”
(30315)

Decorum (3 of 5)



“[W]here the **substance of a question is relevant**, but the manner in which an advisor attempts to ask the question is **harassing, intimidating, or abusive** (for example, the advisor yells, screams, or physically ‘leans in’ to the **witness’s personal space**), the recipient may appropriately, evenhandedly enforce rules of decorum that require relevant questions to be asked in a respectful, non-abusive manner.”
(30331)

Decorum (4 of 5)



“The Department acknowledges that predictions of **harsh, aggressive, victim-blaming** cross-examination may dissuade complainants from pursuing a formal complaint out of fear of undergoing questioning that could be perceived as interrogation. However, recipients retain discretion under the final regulations to educate a recipient’s community about what cross-examination during a Title IX grievance process will look like, including developing rules and practices (**that apply equally to both parties**) to oversee cross-examination to **ensure that questioning is relevant, respectful, and non-abusive.**” (30316 see also 30315; 30340)

Decorum (5 of 5)



- “[T]he essential function of cross-examination is **not to embarrass, blame, humiliate, or emotionally berate a party**, but rather to ask questions that probe a party’s narrative in order to give the decision-maker the fullest view possible of the evidence relevant to the allegations at issue.” (30319)
- Nothing in this rule prevents recipient from enforcing decorum rules in the hearing and “the recipient may require the party to use a different advisor” if the advisor does not comply and may provide a different advisor to conduct cross examination on behalf of that party (30320)

Practice Making Relevancy Determinations

Relevancy Determination Hypotheticals (1 of 2)



Okay, decision-maker, is this question relevant?

For practice, we will pose these in cross-examination format. As discussed before, the traditional cross-examination style is aimed at eliciting a short response, or a “yes” or “no,” as opposed to open-ended question which could seek a narrative (longer) response.

For example, instead of, “How old are you?” the question would be, “You’re 21 years old, aren’t you?”

Relevancy Determination Hypotheticals (2 of 2)



For each practice hypothetical, ask yourself:

Is this question relevant or seeking relevant information?

- Why or why not?
- Does the answer to this depend on additional information?
- If it so, what types of additional information would you need to make a relevancy determination?

Relevancy Determination Hypotheticals Disclaimer



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

Our complainant is Jennifer. Our respondent is Bob.

Practice Hypothetical #1



“Bob, isn’t it true you were accused of violating appropriate instructor/student boundaries with a student last year too?”

Practice Hypothetical #2



“Jennifer, isn’t it true you texted Bob last week and signed off 😊 Jenn”

Practice Hypothetical #3



“Jennifer, didn’t you get into trouble last year for sexual misconduct on school grounds?”

Practice Hypothetical #4



“Jennifer, isn’t it true you received a bad grade on the test, and that made you angry?”

Practice Hypothetical #5



“Bob, did your counselor tell you that you have anger issues?”

Practice Hypothetical #6



“Bob, are you choosing not to answer my questions because you lied to investigators?”

Practice Hypothetical #7



“Jennifer you were afraid your boyfriend would be jealous about your relationship with Bob, weren’t you?”

Practice Hypothetical #8



“Jennifer, you could be wrong about that timeline, right?”

Practice Hypothetical #9



“Bob, this isn’t the only Title IX complaint against you right now, is it?”

Practice Hypothetical #10



“Jennifer, your witness, Carrie, didn’t even show up today, right?”

Practice Hypothetical #11



“Bob, in the police report it says you told the Officer that you ‘didn’t recall when Jennifer was in your car,’ right?”

Practice Hypothetical #12



“Bob, you’re even paying for a private defense attorney instead of a free advisor, right?”

The Hearing

The Setup



- Can have in one room if a party doesn't request separate rooms and recipient chooses to do so.
- Separate rooms with technology allowing live cross examination at the request of either party
- “At recipient’s discretion, can allow any or all participants to participate in the live hearing virtually” (30332, see also 30333, 30346) explaining 106.45(b)(6)(i)

Process (1 of 2)



- Discretion to provide opportunity for opening or closing statements
- Discretion to provide direct questioning (open-ended, non-cross questions)
- Cross-examination must to be done by the party's "advisor of choice and never by a party personally."

Process (2 of 2)



- An advisor of choice may be an attorney or a parent (or witness) (30319)
- Discretion to require advisors to be “potted plants” outside of their roles cross-examining parties and witnesses. (30312)

Advisors (1 of 3)



If a party does not have an advisor present at the live hearing, **the recipient must provide without fee or charge to that party, an advisor of the recipient's choice**, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.
(106.45(b)(6)(i) and preamble 30339)

Advisors (2 of 3)



- Advisors do not require Title IX Training, however a recipient may train its own employees whom the recipient chooses to appoint as party advisors (30342)
- A party cannot “fire” an appointed advisor (30342)
- “But, if the party correctly asserts that the assigned advisor is refusing to ‘conduct cross-examination on the party’s behalf’ then the recipient is obligated to provide the party an advisor to perform that function, whether counseling the advisor to perform the role or stopping the hearing to assign a different advisor” (30342)

Advisors (3 of 3)



- Regulations permit a recipient to adopt rules that (applied equally) do or do not give parties or advisors the right to discuss relevance determinations with the decision-maker during the hearing. (30343)
- “If a recipient believes that arguments about a relevance determination during a hearing would unnecessarily protract the hearing or become uncomfortable for parties, the recipient may adopt a rule that prevents parties and advisors from challenging the relevance determination (after receiving the decision-maker’s explanation) during the hearing.” (30343)

Advisors: But Other Support People?



- Not in the hearing, unless required by law (30339)
- “These confidentiality obligations may affect a recipient’s ability to offer parties a recipient-provided advisor to conduct cross-examination in addition to allowing the parties’ advisors of choice to appear at the hearing.”
- ADA accommodations-required by law
- CBA require advisor and attorney?

Recording the Hearing



- Now required to be audio, audio visual, or in transcript form Suggest using Zoom
- Decision-makers have to know how to use any technology you have

The Hearing.



- Order of questioning parties and witnesses – not in regulations
 - Consider time restraints on witnesses
 - Questioning of Complainant
 - Questioning of Respondent

Questioning by the Decision-Maker (1 of 2)



- The neutrality of the decision-maker role and the role of the advisor to ask adversarial questions, protects the decision-maker from having to be neutral while also taking on an adversarial role (30330)
- “[P]recisely because the recipient must provide a neutral, impartial decision-maker, the function of adversarial questioning must be undertaken by persons who owe no duty of impartiality to the parties” (30330)

Questioning by the Decision-Maker (2 of 2)



- BUT “the decision-maker has the right and responsibility to ask questions and elicit information from parties and witnesses on the decision-maker’s own initiative to aid the decision-maker in obtaining relevant evidence both inculpatory and exculpatory, and the parties also have equal rights to present evidence in front of the decision-maker so the decision-maker has the benefit of perceiving each party’s unique perspective about the evidence.” (30331)

The Hearing (1 of 3)



- Ruling on relevancy between every question and answer by a witness or party
 - Assumption that all questions are relevant unless decision-maker otherwise states irrelevant? Risky.
 - Set expectation that party or witness cannot answer question before decision-maker decides if relevant.
 - Pros: helps diffuse any overly aggressive or abusive questions/resets tone
 - Cons: may lengthen hearing

The Hearing (2 of 3)



- “[N]othing in the final regulations precludes a recipient from adopting a rule that the decision-maker will, for example, send to the parties after the hearing any revisions to the decision-maker’s explanation that was provided during the hearing.” (30343)

The Hearing (3 of 3)



- Confidentiality appears to preclude support persons other than the advisor from participating in the live-cross examination hearing
 - Perhaps allow support person to meet in waiting rooms or before and after hearing
 - Consistent with providing supportive services to both parties – hearings can be very stressful for both parties

Hearing Toolbox

Hearing Toolbox: Prehearing Conference



- Pre-hearing conference – helps inform parties and set expectations – have one separate with each party and the party’s advisor
- Provides opportunity to address issues common to both parties:
 - Parties and their representatives will often not understand the process: help educate and answer questions (again, know your institution’s grievance process)
 - Jurisdictional challenges: perhaps less of an issue with new jurisdictional terms—many issues were related to off-campus extension of jurisdiction (may tell advisor that you will provide the opportunity for advisor to state on the record at the hearing)

Hearing Toolbox: the Pre-Hearing Conference



- Parties may want to add evidence and witnesses that were not in the investigation for the first time at the hearing (perhaps outside of the process).

Hearing Toolbox: Use of a Script



- Responsible for running an orderly and fair hearing.
- A script can serve as a checklist of everything the decision-maker wants to cover and a cheat sheet for reminders of allegations, alleged policy violations, and elements of the alleged policy violations
- Helps ensure rights, responsibilities, and expectations are set
- Helps provide consistency between one hearing and the another
- Helps provide transparency
- Can even have a separate one for prehearings

Hearing Toolbox: Decorum



- Evaluating each question for relevancy before a party or witness can answer can help set the tone
- Remind parties about expectations of decorum

Hearing Toolbox: Breaks



- Preamble discusses the use of breaks to allow parties to recover from panic attacks or emotional questioning
- Also helpful to reset tone and reduce emotion and tension
- Can use to review policy and procedures to address relevancy issues that arise

Hearing Toolbox: Questions



- Do you have the information you need on each element to be able to evaluate the claims?
- Consider neutral phrasing of questions:
 - “In the report you said... Help me understand...”
 - “You stated... Tell me more about that.”
 - “Could you give more information about what happened before/after...”

Hearing Toolbox: Considerations for Panels



Hearing panel:

- Identify one person on the panel to make relevancy rulings
- Identify one person to draft the decision (for review of other panel members)
- Determine how panel members will ask questions (e.g., will only one person ask the questions or will panelists take turns?)

Objectively Evaluating Evidence and Resolving Credibility Disputes

Objectively Evaluating Relevant Evidence



- As addressed in the preamble and discussed earlier, the decision-maker should evaluate:
- “consistency, accuracy, memory, and credibility” (30315)
- “implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility” (030330)
- Standard of proof and using it to guide decision

Standard of Proof



- Standard of Evidence: Preponderance of the Evidence or Clear & Convincing
- Must use same standard for formal Title IX complaints against both students and employees for all policies and procedures with adjudication for sexual harassment complaints (e.g., union grievance procedures)
- Must begin with a presumption of no violation by Respondent.

Making credibility decisions



The preamble discussion includes the following additional information on credibility:

- “Studies demonstrate that inconsistency is correlated with deception” (30321)
- Credibility decisions consider “plausibility and consistency” (30322)

Resolving Disputes (1 of 4)



Consider the following when resolving the conflict:

- Statements by any witnesses to the alleged incident (Regs: only when subjected to cross-examination)
- Evidence about the relative credibility of the complainant/respondent
 - The level of detail and consistency of each person's account should be compared in an attempt to determine who is telling the truth
 - Is corroborative evidence lacking where it should logically exist?

Resolving Disputes (2 of 4)



Also, consider the following when resolving the conflict and consistent with Regulations:

- Evidence of the complainant's reaction or behavior after the alleged harassment
 - Were there witnesses who saw that the complainant was upset?
 - Changes in behaviors? Work-related? School? Concerns from friends and family? Avoiding certain places?
 - May not manifest until later

Resolving Disputes (3 of 4)



Also consider the following when resolving the conflict and consistent with Regulations:

- Evidence about whether the complainant filed the complaint or took other action to protest the conduct soon after the alleged incident occurred
 - But: failure to immediately complain may merely reflect a fear of retaliation, a fear that the complainant may not be believed, etc. rather than that the alleged harassment did not occur

Resolving Disputes (4 of 4)



Also consider the following when resolving the conflict:

- Other contemporaneous evidence:
 - Did the complainant write about the conduct and reaction to it soon after it occurred (e.g. in a diary, email, blog, social media post)?
 - Did the student tell others (friends, parents) about the conduct and their reaction soon after it occurred?
- **Again, only if subjected to cross-examination**

#1 Keep an Open Mind



- Keep an open mind until all statements have been tested at the live hearing
- Don't come to any judgment, opinion, conclusion or belief about any aspect of this matter until you've reviewed or heard all of the evidence AND consider only the evidence that can remain (statements in the record might have to be removed from consideration if not tested in live-hearing)

#2 Sound, Reasoned Decision



- You must render a sound, reasoned decision on every charge
- You must determine the facts in this case based on the information presented
- You must determine what evidence to believe, the importance of the evidence, and the conclusions to draw from that evidence

#3 Consider All/Only Evidence



- You must make a decision based solely on the relevant evidence obtained in this matter and only statements in the record that have been tested in cross-examination
- You may consider nothing but this evidence

#4 Be Reasonable and Impartial



- You must be impartial when considering evidence and weighing the credibility of parties and witnesses
- You should not be swayed by prejudice, sympathy, or a personal view that you may have of the claim or any party
- Identify any actual or perceived conflict of interest

#5 Weight of Evidence (1 of 2)



- The quality of evidence is not determined by the volume of evidence or the number of witnesses or exhibits.
- It is the weight of the evidence, or its strength in tending to prove the issue at stake that is important.
- You must evaluate the evidence as a whole based on your own judgment.

#5 Weight of Evidence (2 of 2)



- Decision-makers who are trained to perform that role means that the same well-trained decision-maker will determine the weight or credibility to be given to each piece of evidence, and how to assign weight (30331)

Weight of Evidence Example



The preamble provides in the discussion:

“[W]here a cross-examination question or piece of evidence is relevant, but concerns a party’s character or prior bad acts, under the final regulations **the decision-maker cannot exclude or refuse to consider the relevant evidence, but may proceed to objectively evaluate that relevant evidence by analyzing whether that evidence warrants a high or low level weight or credibility,** so long as the decision-maker’s evaluation treats both parties equally **by not, for instance, automatically assigning higher weight to exculpatory character evidence than to inculpatory character evidence.**” (30337)

#6 Evaluate Witness Credibility (1 of 3)



- You must give the testimony and information of each party or witness the degree of importance you reasonably believe it is entitled to receive.
- Identify all conflicts and attempt to resolve those conflicts and determine where the truth (standard or review/proof) lies.

#6 Evaluate Witness Credibility (2 of 3)



- Consider the reasonableness or unreasonableness, or probability or improbability, of the testimony.
- Does the witness have any motive?
- Is there any bias?

#6 Evaluate Witness Credibility (3 of 3)



- Credibility is determined fact by fact, not witness by witness
 - The most earnest and honest witness may share information that turns out not to be true

#7 Draw Reasonable Inferences



- Inferences are sometimes called “circumstantial evidence.”
- It is the evidence that you infer from direct evidence that you reviewed during the course of reviewing the evidence.
- Inferences only as warranted and reasonable and not due to decision to opt out of cross-examination or questioning.

#8 Standard of Evidence (1 of 2)



Use the standard of evidence as defined by your policy when evaluating whether someone is responsible for each policy violation and ALWAYS start with presumption of no violation.

- Preponderance of the evidence: a fact is more likely than not to be true (30373 fn. 1409)
- Clear and convincing: a fact is highly probable to be true (30373 fn. 1409)

#8 Standard of Evidence (2 of 2)



- Look to all the evidence in total, and make judgments about the weight and credibility, and then determine whether or not the burden has been met.
- Any time you make a decision, use your standard of evidence

#9 Don't Consider Impact



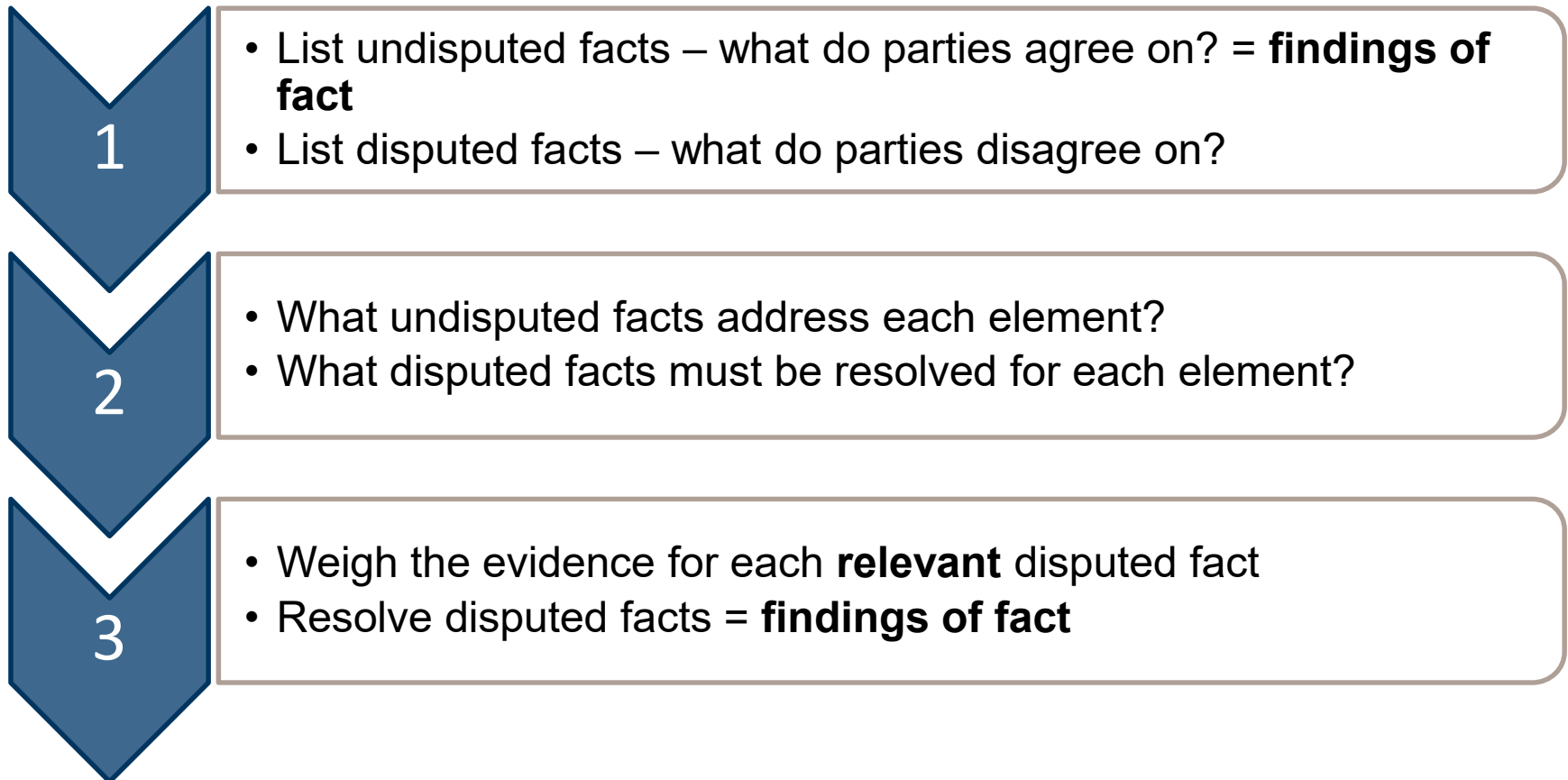
- Don't consider the potential impact of your decision on either party when determining if the charges have been proven.
- Focus only on the charge or charges brought in the case and whether the evidence presented to you is sufficient to persuade you that the respondent is responsible for the charges.
- **Do not consider the impact of your decision.**

The Written Decision

Resolving Disputes



Fact Finding Process:



Written Determination in 106.45(b)(7)(ii) - (1 of 9)



Written determination must include:

- Identification of the allegations potentially constituting sexual harassment;
- A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence; and hearings held;

Written Determination in 106.45(b)(7)(ii) - (2 of 9)



Include key elements of any potential policy violation so parties have a complete understanding of the process and information considered by the recipient to reach its decision (30391) – should “match up” with decision (30391)

Written Determination in 106.45(b)(7)(ii) - (3 of 9)



Purpose of key elements of procedural steps
“so the parties have a thorough
understanding of the investigative process
and information considered by the recipient
in reaching conclusions.” (30389)

Written Determination in 106.45(b)(7)(ii) - (4 of 9)



- A statement of, and rationale for, the results as to each allegation, including determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and

Written Determination in 106.45(b)(7)(ii) - (5 of 9)



- Statement of rationale: requiring recipients to describe, in writing, conclusions (and reasons for those conclusions) will help prevent confusion about how and why a recipient reaches determinations regarding responsibility (30389)
- The requirement of “Transparent descriptions of the steps taken in an investigation and explanations of the reasons why objective evaluation of the evidence supports findings of facts and conclusions of facts” helps prevent injection of bias (30389)

Written Determination in 106.45(b)(7)(ii) - (6 of 9)



- Institution's procedures and permissible bases for complainant and respondent to appeal
- Provided to both parties in writing contemporaneously (106.45(b)(7)(ii))

Written Determination in 106.45(b)(7)(ii) - (7 of 9)



- Receiving decision simultaneously will ensure both parties have relevant information about the resolution of the allegations

Written Determination in 106.45(b)(7)(ii) - (8 of 9)



Reference to code of conduct not prohibited:

“Recipients **retain discretion to also refer to in the written determination to any provision of the recipient’s own code of conduct** that prohibits conduct meeting the [Title IX definition] of sexual harassment; however” the final regulations apply to recipient’s response to Title IX portion only.
(30389)

Written Determination in 106.45(b)(7)(ii) - (9 of 9)



The preamble discussion notes that it does not “expressly require the written determination to address evaluation of contradictory facts, exculpatory evidence, all evidence presented at a hearing, or how credibility assessments were reached, because the decision-maker is obligated to objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence (and to avoid credibility inferences based on a person’s status as a complainant, respondent, or witness.”

Note: Consider including these anyway for a more thorough determination.

Goals



- Be consistent in terminology
- Be clear as to the source of information.
Compare:
 - “Bob stated that this happened.”
 - “This happened.”

Unambiguous



- Could someone unfamiliar with the incident pick up the decision and understand what happened?
- Make no assumptions that the reader will understand certain aspects of the community
- Write for a judge and jury to understand with no prior background

Relevancy.



- Include any decisions made that exclude information as not relevant and the explanation given in hearing
- Check to ensure that your report does not contain any information you are prohibited from including?

Sensitive



- Will the parties feel heard?
- Will the parties feel blamed?
- Will the parties feel vilified?
- Will the tone otherwise inflame the parties unnecessarily?
- Maintain neutral, evidence-driven tone.

Empathetic



- Maintain a non-judgmental tone
- Stay away from charged words of advocacy:
 - Clearly/obviously
 - Innocent/guilty
 - Victim/perpetrator
- Watch your adjectives and adverbs – unless they are in a quote
- Recognize the impact of your words

Specific



- Set the scene visually (will help identify inconsistencies in stories)
- Use quotation marks carefully
- Include details to the level that you can thoroughly understand what it looked like
- Be careful of pronoun usage so that we always know who is saying or doing what



Handling Appeals

Identity of the Appeals Officer

- You cannot hear an appeal of your own decisions
 - The Appeals Officer cannot be the same investigator, Title IX Coordinator, or decision-maker that worked on the case
- The Appeals Officer must be trained in the same manner as the Decision-Maker

Bases for Appeal

- Procedural irregularity that affected the outcome of the matter
- 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
- The Title IX Coordinator/investigator/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
- A recipient may offer an appeal equally to both parties on additional bases

Appeals

- As to all appeals, the recipient must:
 - Offer the appeal to either party
 - Let both parties know when an appeal has been filed
 - Give both parties a reasonable and equal opportunity to submit a written statement in support of or challenging the appealed decision
 - Issue a written decision describing the result of the appeal and the rationale for the result
 - Provide the written decision simultaneously to both parties.

Questions?