

# Title IX: Training for Administrative Teams\*

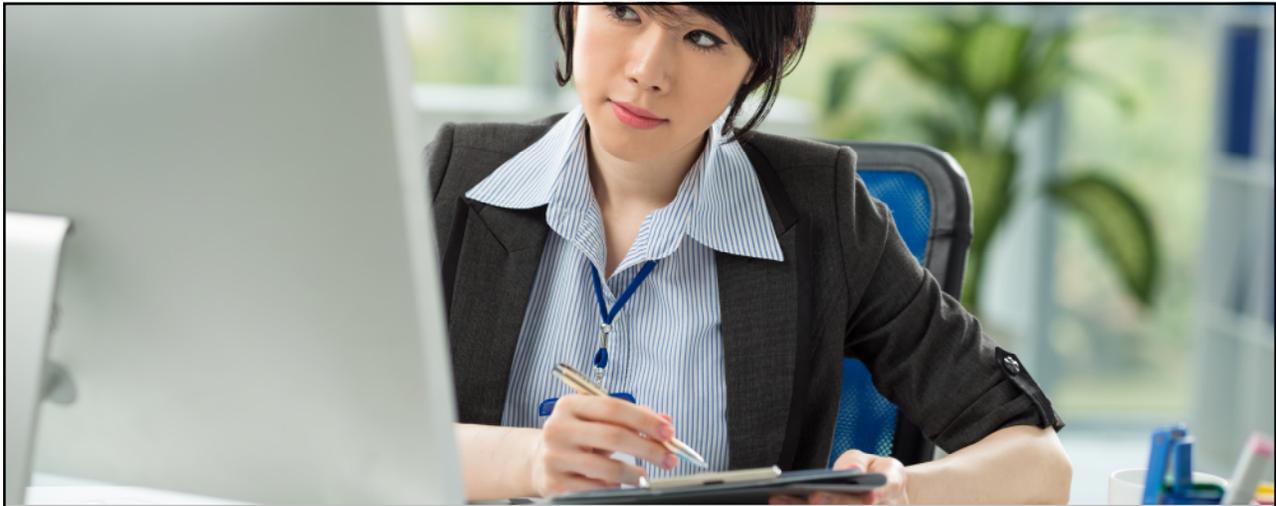
April 12, 2023 | 9:00 a.m. - 2:15 p.m.

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## AGENDA

- 9:00 a.m. - 10:00 a.m. **Title IX Overview and the Formal Grievance Process**  
*Experienced Title IX attorneys will provide an overview of Title IX and the procedural aspects of the grievance process that are a must for school administrators.*  
  
*Warren Grody*
- 10:00 a.m. - 10:45 a.m. **Title IX Investigations**  
*Learn practical tips for navigating Title IX investigations—including how to prepare for an interview, tips for managing evidence, and best practices for communicating with an attorney-advisor.*  
  
*Katy Osborn*
- 10:45 a.m. - 11:00 a.m. BREAK
- 11:00 p.m. - 11:45 p.m. **Title IX Implications for Discipline**  
*Attorneys will review how the Title IX regulations affect both staff and student discipline issues including administrative leave issues, and impacts on student suspensions and expulsions.*  
  
*Kate Davis*
- 11:45 a.m. - 12:15 p.m. LUNCH
- 12:15 p.m. - 1:00 p.m. **Title IX Decision Making**  
*Attorneys who also serve as K12 decision makers will walk through the requirements of Title IX decisions and best practices for writing an appeal-proof decision.*  
  
*Kate Davis*
- 1:00 p.m. - 2:15 p.m. **Title IX Informal Resolution and Looking Ahead to the NPRM**  
*Learn about the informal resolution of Title IX complaints, and then wrap up with a look into expected changes to the Title IX regulations, coming potentially as early as May 2023.*  
  
*Laura Anthony*

\* This seminar is intended for Superintendents and other school administrators who are part of a district's Title IX team (coordinators, investigators, decision-makers, informal resolution officers).



## Title IX Overview and Grievance Process

with Warren Grody



## 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
- You will be provided with a copy of the slides for all of today's sessions
- Feel free to ask questions – we will answer them as time permits

## Posting These Training Materials?

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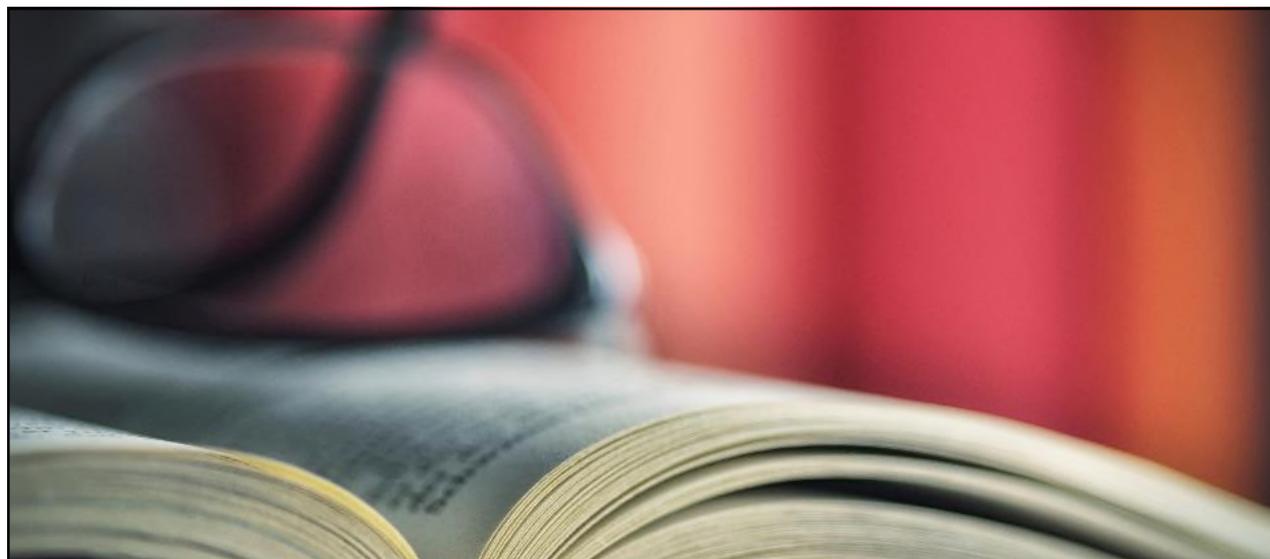
- Yes!
- Your Title IX Coordinator is required by 106.45(b)(10)(i)(D) to post materials to train Title IX personnel on its website
- We know this and will make these materials available electronically for your district electronically

Additional information  
available at:

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

Find us on **Twitter** at  
**@BrickerEdLaw**





## Introduction

### **Discrimination = Treating people differently**

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- 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
- Disparate treatment in the workplace/school
- Disparate impact claims (neutral policies that have discriminatory impacts)

## Common Types of Protected Traits

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

## Sex Discrimination and Harassment

### Title IX

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

## **Sex Discrimination under Title IX**

34 C.F.R. § 106.31(b)

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- 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 (cont'd)**

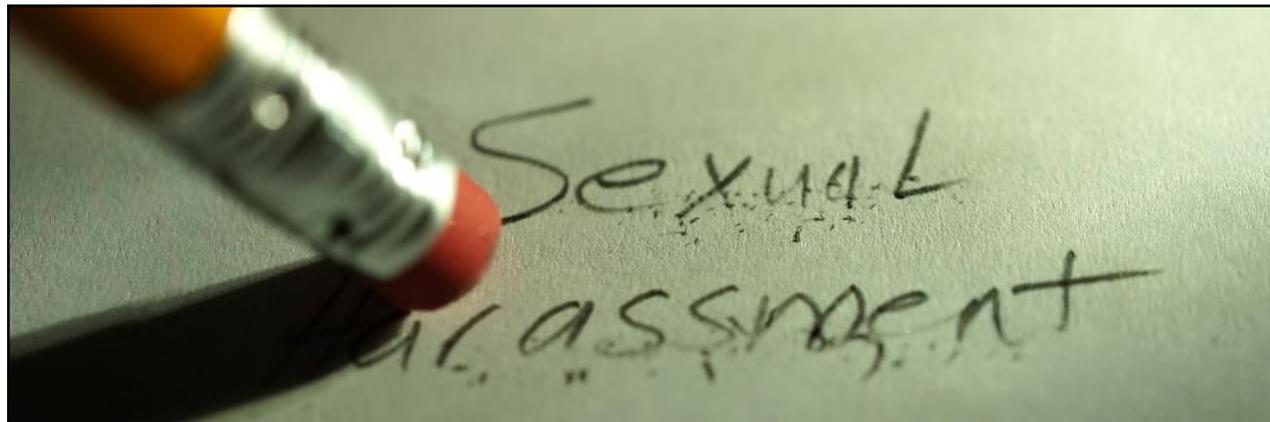
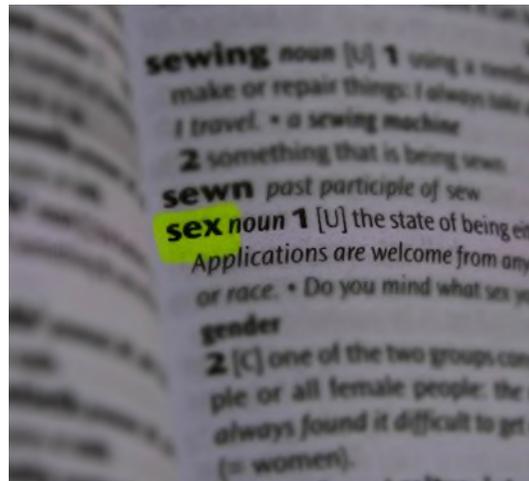
34 C.F.R. § 106.31(b)

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- 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 Current Title IX Regulations

## When does a school have notice of a complaint?

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- **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

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

## Definitions of Sexual Harassment under Title IX

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- **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

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- 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 – Examples

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- 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

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- 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?

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- 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

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- 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** (1 of 4)

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

## **Hypothetical #1** (2 of 4)

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

## **Hypothetical #1 (3 of 4)**

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- 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 (4 of 4)**

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- 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

## Hypothetical #2

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- Mr. Smith 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. Smith has been sending to Josie (not sexual in nature)

## Hypothetical #3

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- 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 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 #4

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- 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

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- 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 – Definition

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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 CFR § § 106.71

## Retaliation

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- 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

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

## Employee Obligations

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- 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? (1 of 3)

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- 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? (2 of 3)

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- 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? (3 of 3)**

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- 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**

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- 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**

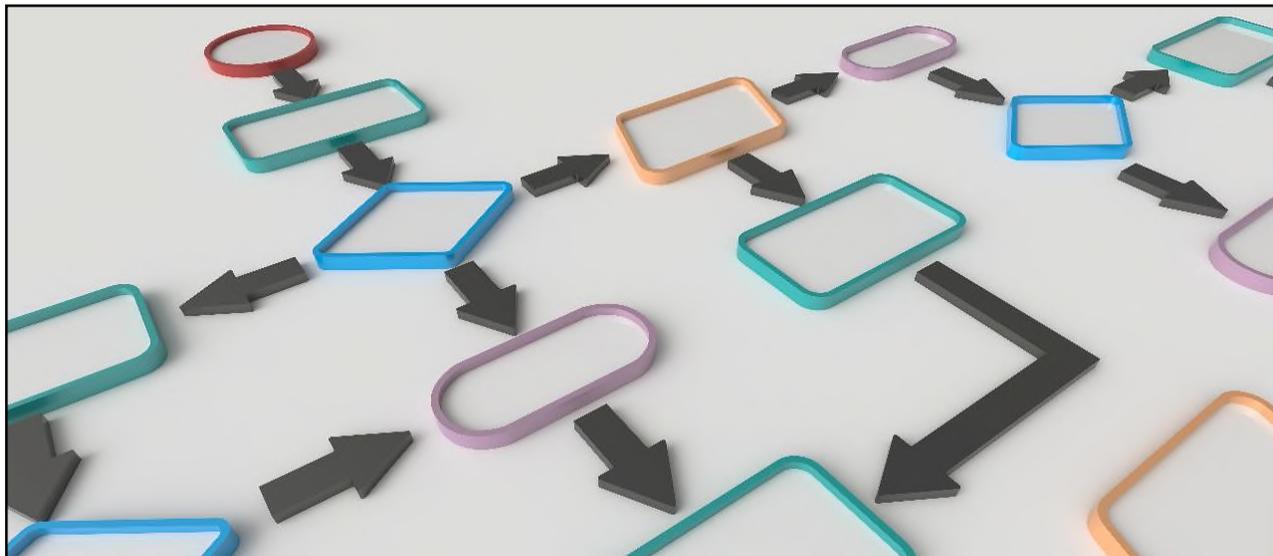
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- Everything listed in the previous slide for staff
- Current regs required recipients' policies to be updated by August 14, 2020
- Follow notice and posting requirements for anti-discrimination, Title IX policies, and training materials

## **TIX Team Training Requirements**

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- 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



## Grievance Procedures

### Formal Complaint

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- **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 (cont'd)**

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

## **General Requirements: Due Process/ Fundamental Fairness**

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- 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

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- Grievance Process
- Allegations
  - Sufficient details known at the time, including 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

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### 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

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- 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 (cont'd)

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### 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

- Fairly summarizes relevant evidence
- Provide to parties 10 days prior to determination of responsibility
- Allow parties to submit written response

## Hearings and Cross Examination

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### 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

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- |  |  |
|--|--|
| <ul style="list-style-type: none"><li>• Note: Decision maker cannot be investigator or Title IX Coordinator</li><li>• Identification of the allegations</li><li>• Description of procedural steps</li><li>• Findings of fact</li></ul> | <ul style="list-style-type: none"><li>• Conclusions</li><li>• Statement of result as to each allegation, including determination, sanctions, and remedies</li><li>• Procedures and bases for appeal</li><li>• Provided to parties simultaneously</li></ul> |
|--|--|

## Appeals

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### 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 both parties opportunity to submit written statement
- Written decision with result and rationale
- Provided to both parties simultaneously

## Informal Resolution

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### 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

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- 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

**Thank you for attending!**

Remember – additional  
information available at:

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# Title IX K-12 Training

Title IX Investigator Training

with Katy Osborn



Introduction to Investigative Techniques

## Initial Review

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- 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

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- |   |  |
|---|--|
| <ul style="list-style-type: none"><li>• If there is a criminal investigation, work with law enforcement to collect and preserve evidence</li><li>• <b>Types of evidence</b><ul style="list-style-type: none"><li>– Electronic communications</li><li>– Security information</li></ul></li></ul> | <ul style="list-style-type: none"><li>– Pictures, videos, audio</li><li>– Police reports</li><li>– Personnel files</li><li>– Prior complaints against respondent</li></ul> |
|---|--|

## **Begin Witness List**

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- 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**

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- 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

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- 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

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- 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**

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- 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**

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

## **Begin Broadly**

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- 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**

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- 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

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- 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

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- 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**

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- 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
- Apply definition of consent consistently and impartially

## **Evidence of Consent? (1 of 3)**

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

## **Evidence of Consent? (2 of 3)**

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

## **Evidence of Consent? (3 of 3)**

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- [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?

## **Closing the Interview**

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- 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**

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- 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

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- 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

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- **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

### Fairly Summarizes the Relevant Evidence

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

*(Need help? Report-writing training available!)*



**Relevancy**

## Relevancy: Legally Privileged Information (1 of 3)

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

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

## Relevancy: Legally Privileged Information (2 of 3)

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

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

## Relevancy: Legally Privileged Information (3 of 3)

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- 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

## Relevancy: Complainant's Sexual Predisposition or Prior Sexual Behavior

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- Questions and evidence regarding a complainant's sexual predisposition or prior sexual behavior are **not relevant** (34 CFR § 106.45(B)(6)(i))
- **Except:**
  - If offered to prove someone other than the respondent committed the conduct alleged; or
  - If evidence/questions concern specific incidents of the complainant's prior sexual behavior **with the respondent and** offered to prove consent



## Advisors: Considerations for Investigators

### Quick Reminders About Advisors

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- Parties are entitled to an advisor of their choice, who may be an attorney
  - Encourage parties to consult with their advisor, and to use them to draft statements, etc., if they find it helpful
- Advisors have the opportunity to review documents in the same manner that the parties do
- Advisors do not have rights beyond those granted in your policy

## FERPA Releases

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- A **signed FERPA release** will be required for any advisor (including attorneys) that isn't either:
  - An employee or,
  - If the party is a minor student, the student's parent

## Acquaint Advisors with the Process

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- Offer advisors the **opportunity to meet with the Title IX Coordinator** at the beginning of the process to help them understand the procedure, and give them the opportunity to ask questions
- Continually **cite to the policy** so the advisors can follow along with the process and know what to expect next

## **Advisors and the Prohibition on Retaliation**

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- Remind advisors that they are prohibited from retaliation
  - If they do so in their capacity as an advisor, it may be imputed to the party
  - Could result in the advisor being prohibited from further participation in the process

## **Include Advisor on Communications with Party**

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- Once a FERPA form is received, copy the advisor on every communication with the party
- If a party communicates directly with you without copying the advisor, copy the advisor on your response
- If an advisor communicates directly with you without copying the party, copy the party on your response
- If an advisor asks a procedural question by email, address the response to both the advisor and the party



**Questions?**

**Thank you for attending!**

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**Bricker**  
**Graydon**

The logo graphic for Bricker Graydon, featuring a stylized speech bubble or arrow shape composed of green and blue squares.



# Title IX K-12 Training

Title IX Implications for Discipline

with Kate Davis



## 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
- You will be provided with a copy of the slides for all of today's sessions
- Feel free to ask questions – we will answer them as time permits

## Posting These Training Materials?

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- 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 these materials available electronically for your district electronically

## Supportive Measures

### § 106.30(a)

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- **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**

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- 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

## **Hypothetical – Supportive Measures**

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- 12yo student allegedly commits multiple off-campus sexual assaults against classmates over the summer
- Criminal investigation ongoing; court issued protective order requiring student to stay at least 15 feet away from complaining students at all times
- Complainants scared to be around respondent
- Respondent maintains innocence; fears harassment or retaliation

## Thoughts on Hypothetical

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- Raises the issue of off-campus conduct and on-campus climate
- Under R.C. §3313.66, you must have a connection to campus to discipline under your student code of conduct
  - Extracurricular codes of conduct can generally be broader than this
- Need to evaluate whether the off-campus misconduct has created hostile environment on campus is affecting access to your program

## 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

## **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 (cont'd)**

### **§ 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

## **Notice and Opportunity to Challenge Determination After Emergency 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 vs. Supportive Measure**

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- Consider if it 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**

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- 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)**

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



## Title IX Discipline Is *Very* Different

### Discipline Under Title IX

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The Title IX regulations provide that a school district's response to sexual harassment must follow the Title IX grievance procedure "**before** the imposition of any disciplinary sanctions or other actions that are not supportive measures"



## Discipline of Students

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- Principals may be comfortable with proceeding to gather facts on misconduct claims against students and then meting out discipline
- **But**, when they are a school employee who has actual knowledge of alleged sexual harassment under Title IX, the regulations **require them to behave in a very different way than they're used to**, including **holding off** on any further investigation or on imposing any discipline

## Discipline of Staff

---

- As with students, a district cannot initiate discipline against a staff member for Title IX misconduct without following the formal grievance process
- If the district were to proceed with discipline without following the formal process, the employee could challenge the ultimate discipline issued for **failure to afford them the due process** to which they are entitled

## Discipline Question 1

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**Question:** Assume the culpable party admits misconduct – can the District go ahead and discipline a student or employee for other misconduct instead of following the Title IX process?

## Answer to Discipline Question 1

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**Answer:** No, not if the conduct is related to Title IX misconduct

- If the alleged misconduct could constitute Title IX sexual harassment, the formal grievance process must be followed
- This makes the jurisdictional determination at the beginning of the process all the more important

## Discipline Question 2

---



**Question:** What if the principal has already investigated the matter and issued discipline to the student before it ever gets to the Title IX Coordinator? Should the District redo the investigation and follow the Title IX process?

## Answer to Discipline Question 2

---

**Answer:** The District **cannot** issue new or different discipline if it has already been served

- If discipline hasn't occurred yet, it could be held in abeyance
- But, depending on the facts, there could be a case where it's appropriate to still investigate to see if there are underlying issues and/or supportive measures that need to be addressed
- State law on student discipline may require removing discipline resulting from a noncompliant process from a student's transcript



**Questions?**

**Thank you for attending!**

Remember – additional  
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Find us on **Twitter** at  
**@BrickerEdLaw**

**Bricker**  
**Graydon**





## Decision-Making

with Kate Davis



## 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
- You will be provided with a copy of the slides for all of today's sessions
- Feel free to ask questions – we will answer them 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 these materials available electronically for your district electronically

## 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
- Recipient may offer an appeal equally to both parties on additional bases



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

### **Preamble Discussion: Bias and Conflict of Interest**

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

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“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

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

## Avoiding Sex Stereotypes

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- “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 – Marginalized Groups

---

- 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



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

### Issues of Relevancy (1 of 4)

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- 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 (2 of 4)

---

- Relevant unless expressly touched upon in Regulations (p. 980):
  - Information protected by a legally recognized privilege
  - Evidence about complainant's prior sexual history (with two exceptions)
  - Party's medical, psychological, and similar records unless voluntary written consent

## Issues of Relevancy (3 of 4)

---

- 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)**

## Issues of Relevancy (4 of 4)

---

- “[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)



## Objectively Evaluating Evidence and Resolving Credibility Disputes

## Objectively Evaluating Relevant Evidence

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- 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

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- Standard of Evidence: Preponderance of the Evidence or Clear and 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

## **Recommended Considerations for Resolving Conflicts (1 of 4)**

---

- 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?

## **Recommended Considerations for Resolving Conflicts (2 of 4)**

---

- 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

## **Recommended Considerations for Resolving Conflicts (3 of 4)**

---

- 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

## **Recommended Considerations for Resolving Conflicts (4 of 4)**

---

- 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?



## The Written Decision

### Written Determination (1 of 3) 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 (1 of 3)**

### **106.45(b)(7)(ii)**

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

## **Written Determination (3 of 3)**

### **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 of 5)

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



## Final Checklist (2 of 5)

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2. Is every element of every charge accounted for?



## Final Checklist (3 of 5)

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



## Final Checklist (4 of 5)

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



## Final Checklist (5 of 5)

---

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



## **Reminder: 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
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- 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?**

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## Informal Resolution and Looking Ahead to the NPRM

with Laura Anthony



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---

- Yes!
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## **Agenda**

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- Impartiality and avoiding bias
- Informal resolution theory
- Working with parties to identify their wants, needs, and areas of compromise
- Helping parties reach a mutually beneficial way forward
- Documenting and maintaining agreements
- Observe a mock informal resolution
- Preview the top 10 potential changes to Title IX



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

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

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- Section 106.45 **requires** that **informal resolution** officers (and Title IX Coordinators, investigators, decision-makers, and appeals officer)
- be free from **conflict of interest, bias**, and
- be trained **to serve impartially** and **without prejudging facts**

## **Impartiality**

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

## **Avoiding Prejudgment of Facts at Issue**

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- A good way to ensure impartiality and avoid bias:
- Keep an open mind and actively listen
- Each case is unique and different

## **Concerns raised in comments in preamble**

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- Neutrality of paid staff in Title IX positions
- Tweets and public comments
- Identifying as a feminist
- Past advocacy for a survivor's group
- Past advocacy for a respondent's group

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

---

- No per se prohibited conflicts of interest in using employees or administrative staff
- No per se violations for conflict of interest or bias for professional experiences or affiliations of decision-makers and other roles in the grievance process

## How the Department Tried to Prevent Bias

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- No single-investigator model
- Decision-maker must not have been the same person who served as the Title IX Coordinator or investigator
- Separating the roles protects both parties because the decision-maker may not have improperly gleaned information from the investigation that isn't relevant that an investigator might
- The institution may consider external or internal investigator or decision-maker

## Bias: Objective Rules and Discretion

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“[R]ecipients *should* have **objective rules** for determining when an adjudicator (or Title IX Coordinator, investigator, or person who facilitates an informal resolution) is biased, and the **Department leaves recipients discretion to decide how best to implement the prohibition on conflicts of interest and bias...**” (85 Fed. Reg. 30250)

## **Bias: Objective Rules and Discretion** (cont'd)

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

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

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

## Examples of Bias

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- An informal resolution officer has a relationship with one party but not the other (for example, the resolution officer also serves as a Coach for one party and they have a close relationship)
- Information “gleaned” by the investigator is shared with the informal resolution officer outside the investigation report (in a meeting to discuss student discipline data, or in passing while at work, etc.)



**Informal Resolution: The Theory and Practice**

## Reasons Parties May Prefer Informal Resolution to Formal Process

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

## Less Adversarial Resolution

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

(85 Fed. Reg. 30098 FN 463)

## When Informal Resolution Is Available (And When It's Not)

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- **Threshold**
  - **Only** available to the parties **if a formal complaint is filed**
  - Never available to resolve allegations that an employee sexual harassed a student
- **Termination:** Available at any time prior to reaching a determination

## Caution in Approach

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- A school district may **NOT** require:
  - As a condition of enrollment or continuing enrollment
  - As a condition of employment or continuing employment
  - As a condition of enjoyment of any other right
  - The waiver of the right to an investigation and adjudication of formal complaints of sexual harassment

## Caution in Approach (cont'd)

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- A school district may **NOT** require:
  - The parties to participate in an informal resolution process
  - Pressure either or any party to participate
- **This is a *voluntary* process for both (or all) parties!**

## What Can Be Offered?

---

- An “informal resolution process, such as mediation, that does not involve a full investigation and adjudication”
- **What does this mean?** The regulations don’t provide more detail on what this means, but the preamble gives examples of the processes, such as:
  - Mediation
  - Restorative justice

## Mediation or, Perhaps Better – Facilitated Resolution

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- There are many definitions of mediation out there, but the TIX Regulations anticipate a **third party** (the informal resolution officer) **facilitated resolution** of a dispute between parties
- Facilitated resolution is what you will be doing

## Facilitated Resolution

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- Written agreement required?
- Regulations are silent about whether required.
- But – other provisions require **documentation** of the grievance process from formal complaint to resolution

## Facilitated Resolution (cont'd)

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

## Restorative Justice

---

- The Regulations do not define “restorative justice.”
- Usually aims to repair harm done to victims or relationships through facilitation, but will vary from program to program.
- **Example:** A system of school-based, non-punitive interventions, in which students are brought together with staff to discuss differences and conflicts, often in a group setting

## **Restorative Justice** (cont'd)

---

- **Remember:**
  - What we do for one we do for the other
  - Recipient cannot make a finding of responsibility without completing the formal grievance procedure
  - The goal must be to ensure that the process preserves (equal) access for both parties to educational opportunities



**Informal Resolution: Basic Principles and Best Practices**

## Informal Resolution Officer Goals

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

## What Should Our Process Look Like? Requires a Prompt Timeframe

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- The recipient (the school) should decide what “prompt” timeframe to set to resolve the informal resolution
- **Considerations**
  - Stop the clock for exams or breaks so that students are not required to participate during exams or breaks or have that time count against resolving
  - Have the ability to extend timeframe if close to resolving but need a few extra days

## Contact the Parties

---

- The informal resolution officer should contact each party individually to initiate and explain the process.
- A written notice shall be provided disclosing:
  - The allegations
  - The informal resolution process requirements
  - Any consequences

## Initial Consideration: Separation of the Parties

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- In person in same room?
- In person but in separate rooms with informal resolution officer going between (“shuttle diplomacy”)?
- Virtual?

## **Overview of the Process with the Parties**

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

## **Provide Opportunity for Each Party to Tell Their Story**

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

## Assess Needs & Wants

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- Meet with each party individually to find out:
  - What they **want**
    - “WIFM” – what’s in it for me?
  - What they **need**
- What are they willing to accept as a resolution?
- What are they not willing to accept?

## Finding Out What the Parties Want

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

## Questions Facilitator May Ask of a Party

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

## Identify Overlap

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- Identify any overlap between what the parties:
  - Want
  - Need
  - Are willing to accept

## **Have Ready a List of Supportive Measures That Can Be Easily Offered**

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- Adjusting course schedules
- Online alternatives for courses
- Increased adult supervision
- Counseling
- Training
- Apology letters (not necessarily admitting wrongdoing, but acknowledging feelings)

## **Go Back and Forth Until a Resolution Agreement Can Be Reached**

---

- This may not happen. Not everyone can reach a resolution agreement in every case
- May require reality checking: the alternative to resolution will be the formal process
- Make sure you can get both parties to agree to the same terms and then make sure you have their agreement

## Reality Checking

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- **A helpful tool...**
  - May be helpful to remind one/both parties the limitation of informal resolution requires agreement to complete
  - May be helpful to remind one/both parties that the alternative may be a return to the formal process
  - May be helpful to remind one/both parties that they can control the outcome in the informal process, but not the formal process
- **... But be cautious:** Be careful to remain neutral and not push a party to do something the party does not really want to do

## Reality Checking Examples

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- **Example of a neutral reality check:** “If this goes back to the formal process, you will not have control over the outcome, and there is a possibility that a decision-maker could find you in violation of policy”
- **Example of a biased/pushy reality check:** “I’ve seen cases like yours and it’s not looking good for you. You should take the informal resolution option offered by the other party.”



## Documenting Agreement

### If Agreement Reached...

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- Document it in some fashion
- Have the parties sign that the documentation accurately reflects their understanding
- If parties are minors, have parents sign
- Try to finish it before the parties leave so it doesn't fall apart

## **If No Agreement Reached...**

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

## **Why Document Agreement In Writing?**

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- Important to have the terms of any resolution agreed upon in writing, in case of later disagreements
- Documentation is important if DOE reviews the informal resolutions

## **What Resolution Documentation Should Include**

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- Names of any parties, representatives, and informal resolution officer
- The specific terms of agreement, with as much specificity as possible
- Acknowledgement of all the terms by signature of the parties (parents) and the consequences of signing

## **What Any Resolution Documentation Should Include**

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- How to resolve any future disputes arising out of the underlying facts or the resolution itself
- Who to contact with questions or concerns about the terms
- Provide each party a copy of the agreement

## **Recordkeeping**

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- Maintain a copy of documentation in the Title IX office for seven years
- If the resolution is not successful, maintain any records of the process and its result for seven years

## **What About Confidentiality?**

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

## **What About Confidentiality?** (cont'd)

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- For employees, these may have different considerations and more than likely are a public record
- May be contained in a separate file from the employee's personnel file

## **The Problem with “Gag” Orders or Non-Disparagement Agreements**

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- Could be contrary to the First Amendment
- Could be contrary to academic freedom if it involves teaching staff
- Could be contrary to public records laws

## The Problem with “Gag” Orders or Non-Disparagement Agreements (cont’d)

---

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

## Final Thoughts

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- Share with parties that the TIX Coordinator will check in on how the resolution is going
  - **Pros:** Helps the school monitor the effectiveness of the solution
  - **Cons:** Might poke a sleeping bear



## Looking Ahead to the NPRM

### **All Forms of Sex Discrimination Prohibited; Definition of Sexual Harassment Expanded**

---

- The Department of Education's proposed regulations would expand the definitions of "**discrimination**" and "**on the basis of sex**"
- "Discrimination on the basis of sex **includes** discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity."

## Department of Education's Perspective

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“Title IX’s broad prohibition on discrimination “on the basis of sex” encompasses, at a minimum, discrimination against an individual because, for example, **they are or are perceived to be** male, female, or nonbinary, transgender or cisgender, intersex, currently or previously pregnant, lesbian, gay, bisexual, queer, heterosexual or asexual, gender conforming or gender nonconforming. All such classifications depend, at least in part, on consideration of a person’s sex”

## Newly Proposed Definition of Sex-Based Harassment

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- **Current** – “Sexual harassment means conduct on the basis of sex that satisfies one or more of the following . . .”
- **Proposed** – “Sex-based harassment prohibited by this part means sexual harassment, sex harassment on the bases described in § 106.10, and other conduct on the basis of sex that is:”

## **Newly Proposed Definition of *Quid Pro Quo* Harassment**

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

## **Newly Proposed Definition of Hostile Environment Harassment**

---

- **Current** – “Unwelcome conduct (on the basis of sex) 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”
- **Proposed** – “Unwelcome sex-based conduct that is **sufficiently severe or pervasive**, that, **based on the totality of the circumstances** and **evaluated subjectively and objectively**, denies or limits a person’s ability to participate in or benefit from the recipient’s education program or activity”

## Duty to Respond to Sexual Harassment

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Proposed regulations would eliminate the “actual knowledge” requirement, and expand the recipient’s response requirements

## Current Provisions Regarding Actual Knowledge

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- “Actual knowledge” means notice of 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.”
- “A recipient who has **actual knowledge of sexual harassment** . . . must respond promptly in a manner that is not deliberately indifferent.”

## Newly Proposed Provisions on Actual Knowledge

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- Eliminates the entire section which contained “actual knowledge” requirement
- A recipient would instead be required to take prompt and effective action to end any **sex discrimination** that **has occurred** in its education program or activity, prevent its recurrence, and remedy its effects.

## Expanded Jurisdiction to Certain Off-Campus Conduct

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- Compared to current rules, there is some expansion of jurisdiction for Title IX policies
- If off-campus conduct creates hostile environment on campus, then the TIX policy will apply



## The Newly Proposed Definition of “Education Program or Activity”

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- **Current** – includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution
- **NPRM** – includes but is not limited to conduct that occurs in a building owned or controlled by a student organization that is officially recognized by a postsecondary institution, and **conduct that is subject to the recipient’s disciplinary authority ...**

## But Wait, There’s More...

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- **NPRM (cont.)** – “A recipient has an obligation to address a sex-based hostile environment under its education program or activity, **even if sex-based harassment contributing to the hostile environment occurred outside the recipient’s education program or activity or outside the United States**”

## Two Types of Off-Campus Conduct

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**First, off-campus consistency** – if you typically consider off-campus conduct within the scope of your disciplinary authority, then Title IX would also reach off-campus to the same extent

## Two Types of Off-Campus Conduct (cont'd)

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- **Second, on-campus hostile environment** – If off-campus conduct creates a hostile environment on campus, you are required to **address** the hostile environment.
  - Supportive measures
  - Does this mean you must discipline for the on campus hostile environment even if no actual conduct was committed within your disciplinary authority?

## Duties of Title IX Coordinator

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- Expanded requirements specific to the Title IX Coordinator in section 106.44
- Express permission to delegate

## Coordinator Duties

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- Equitable treatment of complainant and respondent
- Notification of parties re: grievance and informal resolution procedures when complaint made
- Offer and coordinate supportive measures
- Initiate grievance procedures/informal resolution
- Determine whether to initiate a complaint process to address conduct that may constitute sex discrimination
- “Take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur...”

## **Inclusion of Definition of Student with a Disability**

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- Proposed regulations include definition of an individual with a disability as defined by Section 504 or IDEA
- **New Duties for TIXC**
  - Must consult with teams throughout grievance process
  - Must consult with teams about supportive measures

## **Supportive Measures**

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- Retains most of current definition
- Adds that supportive measures include “temporary **measures that burden a respondent**”
- Some limitations:
  - May only be imposed during grievance process
  - Respondent must be provided due process to challenge or modify by someone other than person who originally imposed the measure

## Emergency Removal

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- May remove respondent after conducting an individualized analysis and determining that respondent poses an immediate threat to **physical** health or safety
- “The Department proposes deleting the term ‘physical’ as a restrictive qualifier on threats to health and safety and adding the term ‘serious’ ....”

## Informal Resolution – Current Rules

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- An option for parties to address complaints (except complaints of sexual harassment by student against employee)
- Required notices to parties in writing
- Required training for IR facilitators
- Must provide supportive measures to the parties during IR
- Available any time before a determination of responsibility and process can be terminated at any time, but must have formal complaint

## **Informal Resolution – Current Rules**

### (cont'd)

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- Need voluntary, written consent to proceed
- IR doesn't result in a finding of responsibility, so no resulting sanction/discipline. But respondent can agree to terms that may otherwise constitute discipline had there been a determination of responsibility through the grievance procedures.
- Records requirement

## **Informal Resolution – Proposed Rules**

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- Special training requirements
- Can offer the option of IR before a complaint is filed
- Institution has discretion whether to offer IR, but must exercise discretion in an equitable manner and must not require or pressure the parties to participate
- More detailed notice requirement, including explanation of the process, confidentiality expectations, and the types of terms the parties might agree to as a part of an IR process

## Informal Resolution – Proposed Rules (cont'd)

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- Supportive measures that only burden the respondent are not an option during IR
- Even if parties come to an agreement through IR, the institution must take steps to ensure that discrimination does not continue or recur
- Cannot be used in cases involving sexual **discrimination** of a student by an employee

## Grievance Process

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- Broader – applies to **all** complaints of sex discrimination, not just sexual harassment

## **Formal Complaints**

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- No more “formal complaints” – can be oral or written
- Complaint can be initiated by:
  - For sex-based harassment – Complainant, parent/guardian/guardian ad litem, or Title IX Coordinator
  - For sex discrimination that is not sex-based harassment – any student or employee, or any third party participating or attempting to participate in your education program/activity when the discrimination occurred

## **Notice of Allegations**

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- No longer required to be in writing
- Must include:
  - Grievance procedures
  - Sufficient information known at the time to allow the parties to respond
  - Statement that retaliation is prohibited

## Single Investigator Model Is Back!

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- Decision-Maker may now be the Title IX Coordinator or the Investigator

## Mandatory Dismissal

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- No more mandatory dismissal, but discretionary dismissal available when:
  - Unable to identify the respondent
  - Respondent is not participating in the education program/activity and is not employed by the institution
  - Complainant voluntarily withdraws
  - Doesn't constitute sex discrimination
- Must have appeal for dismissal

## Investigative Process

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- No written notice prior to interview
- No right to have advisor present
- No more 10 day review periods
- Can provide evidence **or** summary for review
- Both parties get opportunity to provide **fact** witnesses
- Must have a process to evaluate credibility (flexibility!)

## Written Determination

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- Reach a determination using “preponderance of the evidence” standard (**unless** your district uses “clear and convincing” standard in **all other comparable proceedings**)
- Notify parties of outcome, including determination and appeal rights
  - Detailed components of written determination are eliminated
  - Does not have to be in writing
- Upon reaching determination, notify parties, provide and implement remedies, stop discrimination, prevent its recurrence

## Thank you for attending!

Remember – additional  
information available at:

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

Find us on **Twitter** at  
**@BrickerEdLaw**

