Bricker & Eckler LLP

Clery Training & Title IX Drive-In Conference
Track 1 – Title IX Administrators

Wednesday, August 3, 2022

9:30 AM – 12:00 PM | **Annual Clery Training**

12:00 PM – 1:15 PM | **Lunch & Networking**

1:15 PM – 1:45 PM | **The Challenges and Successes of Informal Resolution**

1:45 PM – 2:00 PM | **Break**

2:00 PM – 3:15 PM | **Review of the Department of Education's Notice of Proposed Rule Making Regarding Title IX and its Implications for Campuses**

3:15 PM – 3:30 PM | **Break**

3:30 PM – 4:00 PM | **Title IX Q&A**

5:00 PM | **Reception**

Please join Bricker & Eckler LLP for a reception at the Kenyon Inn. Complimentary hors d'oeuvres will be served and a cash bar will be available. We hope to see you there!

Kenyon Inn
100 West Wiggin Street
Gambier, OH 43022

TITLE IX INVESTIGATOR, DECISION-MAKER, AND ADVISOR TRAINING

The Five Colleges of Ohio, Inc.
Kenyon College

AUGUST 3-4, 2022

Bricker & Eckler
ATTORNEYS AT LAW

Agenda

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Clery Training (9:30 – 12:00)

- Themes
- Issues related to Dating Violence, Domestic Violence, Sexual Assault, and Stalking
- Overview of your Policy/Process
- Intake
- Conducting an Investigation
- Conducting a Hearing
- Appeals
- Informal Resolution

Lunch (12:00 – 12:45)

Investigator/Advisor Training (12:45 – 4:00)

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Agenda

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Investigator/DM/Advisor Training (12:45 – 4:00)

- Ethic of Care (free from bias)
- Scope/Jurisdiction
- Investigative Techniques
- Hypotheticals on Consent, Coercion, Incapacitation
- Preparing for and conducting interview of Complaint and Respondent

Investigator/DM/Advisor Training Day 2 (9:30 – 4:00)

- Continue investigation process and practice
- Report writing exercises
- Title IX definition of Relevant and its practical implications
- Cross examination techniques
- Mock hearing
- Decisions

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Posting these Training Materials

- Yes, you may post these slides.
- The University is required by §106.45(b)(10)(i)(D) to post materials used to train Title IX personnel on its website

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Training Requirements 1 of 2

	Def. Sexual Harassment	Scope of Ed. Prog/Activity	Conducting grievance process	Serving impartially	Tech training	Drafting investigative report
Coordinator	X	X	X	x		
Investigator	**X**	**X**	**X**	**X**		**X**
Decision-Maker	**X**	**X**	**X**	**X**	*	
Appeals	X	X	X	X	*	
Informal Res. Facilitator	x	X	x	X		
Advisor						

Training Requirements 2 of 2

Under Clery Act, must receive annual training on:

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

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.
- Ask general questions and hypotheticals.
- This training is not being recorded, but we will provide you with a packet of the training to post on your websites for Title IX compliance.

Presentation Rules

- 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

Themes

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Themes (1 of 2)

- Title IX meant to ensure equitable access, regardless of sex
- We have an obligation to protect our community – including both parties
- Transparency in the process encourages participation, reduces stress, and increases trust in the outcome

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Themes (2 of 2)

- Use language of the policy (complainant, respondent, report), not language of criminal law (victim/survivor, perpetrator, allegation)
- Be incredibly mindful not to prejudge the outcome of the case
- Base decisions on evidence, not your "gut"

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Sexual Harassment - 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 University conditioning the provision of an aid, benefit, or service of the University on an individual's participation in unwelcome sexual conduct;
  - [**Unweclome conduct**] 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 University's education program or activity; or
  - [**Clery crimes**] Sexual assault, dating violence, domestic violence, or stalking

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SH – IX (continued)

- **Sexual Assault**

  Rape (non-consensual penile/vaginal penetration)

  Sodomy (non-consensual oral/anal penetration)

  Sexual Assault with an Object (penetration with object or body part other than genitalia)

  Fondling – Must be done "for the purpose of sexual gratification"

  Incest – Look to state law

  Statutory rape – Look to state law

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Data and Statistics

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

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Sexual Assault Data

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

Statistics from the National Intimate Partner and Sexual Violence Survey (NISVS), Centers for Disease Control and Prevention, 2015 Data Brief, available online at https://www.cdc.gov/violenceprevention/datasources/nisvs/2015NISVSdatabrief.html (last visited June 2020).

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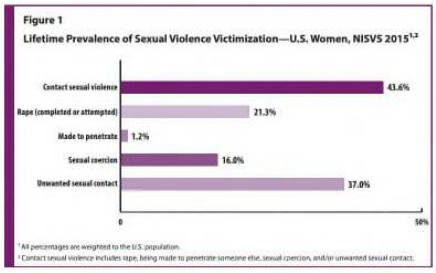
Sexual Assault Data - 1



Statistics from the National Intimate Partner and Sexual Violence Survey (NISVS), Centers for Disease Control and Prevention, 2015 Data Brief, available online at https://www.cdc.gov/violenceprevention/datasources/nisvs/2015NISVSdatabrief.html

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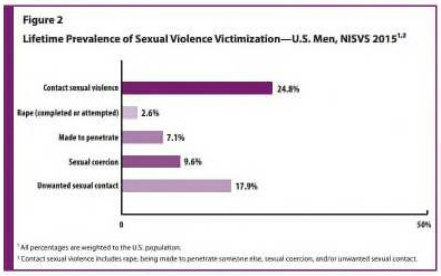
Sexual Assault Data - 2



Statistics from the National Intimate Partner and Sexual Violence Survey (NISVS), Centers for Disease Control and Prevention, 2015 Data Brief, available online at https://www.cdc.gov/violenceprevention/datasources/nisvs/2015NISVSdatabrief.html

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Sexual Assault Data:
Prevalence Data for Postsecondary Institutions

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

Preamble, p. 30076 (Official) notes that "Commenters cited: Rape, Abuse & Incest National Network (RAINN), *Campus Sexual Violence: Statistics*, https://www.rainn.org/statistics/campus-sexual-violence."

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Sexual Harassment: Dating Violence

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

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Sexual Harassment: Domestic Violence

"Domestic violence" is an act of violence committed on the basis of sex by:

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

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Data: Intimate Partner Violence

"Nearly 1 in 5 women and about 1 in 7 men report having experienced severe physical violence from an intimate partner in their lifetime."

"41% of female IPV survivors and 14% of male IPV survivors experience some form of physical injury related to IPV."

"1 in 6 homicide victims are killed by a current or former intimate partner."

Source: CDC.gov, "Preventing Intimate Partner Violence" fact sheet, accessed Sept. 20, 2020.

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Sexual Harassment: Stalking

"Stalking" is engaging in a course of conduct directed at a specific person on the basis of sex that would cause a reasonable person with similar characteristics under similar circumstances to:

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

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

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Stalking: Course of Conduct

"Course of Conduct"

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

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Stalking: Reasonable Person

"Reasonable person"

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

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Stalking: Substantial Emotional Distress

"Substantial emotional distress"

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

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Stalking Data - 1

- 4.5 million women and 2.1 million men are stalked in one year in the United States.
- Over 85% of stalking victims are stalked **by someone they know**.
- **61%** of female victims and **44%** of male victims of stalking are stalked by a **current or former intimate partner**.

- First statistic: National Intimate Partner and Sexual Violence Survey: 2015 Data Brief (CDC)
- Second and third statistics: National Intimate Partner and Sexual Violence Survey: 2010-2012 State Report (CDC)

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Stalking Data - 2

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

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

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

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

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Impact of Stalking on Victims

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

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

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

[Baum et al.]

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More Impact of Stalking

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

[Baum et al.]

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

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

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Overview of Your Policy/Process

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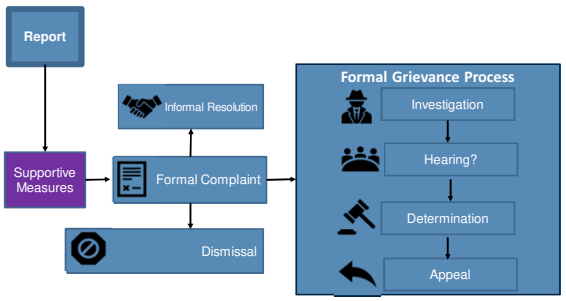
Overview of the Process



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Intake

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Overview of the Process: Supportive Measures (1 of 5)

- Non-disciplinary and non-punitive
- Individualized
- "As reasonably available"
- Without fee or charge to either party
- Available at any time (regardless of whether a formal complaint is filed)

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Overview of the Process: Supportive Measures (2 of 5)

Designed to:

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

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Overview of the Process: Supportive Measures (3 of 5)

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

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Overview of the Process: Supportive Measures (4 of 5)

Role of the TIXC upon receiving a report:

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

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Overview of the Process: Supportive Measures (5 of 5)

- Must maintain confidentiality to the greatest extent possible
- Note: Title IX Coordinator may ask you to help with accommodations and may not be able to tell you all the details as to *why*.

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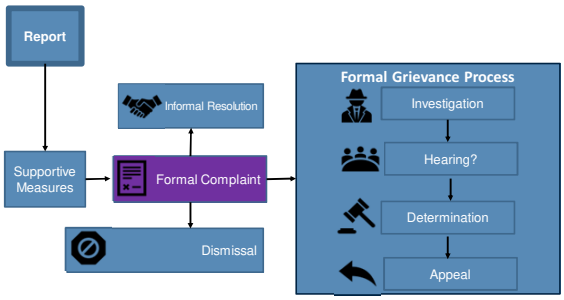
Formal Complaints



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Overview of the Process: Formal Complaint (1 of 2)

A document filed by a complainant or signed by the Tile IX Coordinator alleging Prohibited Conduct against a respondent and requesting the University investigate the allegations

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

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Overview of the Process: Formal Complaint (2 of 2)

Once a Formal Complaint is filed, there are four possibilities:

- Informal Resolution
- Formal Grievance Process (Hearing)
- Mandatory Dismissal from Hearing Process and Resolution through Investigative Process
- Formal Complaint is withdrawn

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Conducting an Investigation

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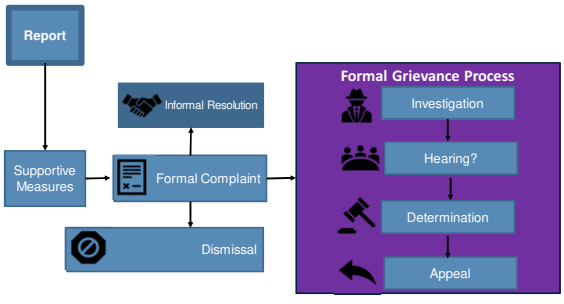
Formal Process



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Overview of the Process: Formal Grievance Process

Basic requirements:

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

Includes the presumption that respondent is not responsible for the alleged conduct until a determination regarding responsibility is made through the grievance process

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Overview of the Process: Written Notice

- University's grievance process and informal resolution process
- Allegations with sufficient time for review with sufficient detail, such as date, location if known
- Parties may have an advisor of choice

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Overview of the Process: Investigation (1 of 4)

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

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Overview of the Process: Investigation (2 of 4)

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

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Overview of the Process: Investigation (3 of 4)

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

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Overview of the Process: Investigation (4 of 4)

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

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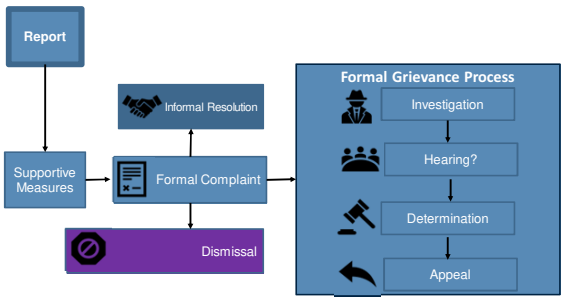
Dismissal



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Dismissal (1 of 3)

- University MUST investigate allegations in a formal complaint
- BUT University MUST dismiss from the hearing process is
  - if conduct alleged would not constitute Sexual Harassment – Title IX, even if proven, OR
  - Conduct did not occur within University's education program or activity or in the United States

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Dismissal (2 of 3)

- University MUST investigate allegations in a formal complaint
- BUT University MUST dismiss from the hearing process is
  - if conduct alleged would not constitute Sexual Harassment – Title IX, even if proven, OR
  - Conduct did not occur within University's education program or activity or in the United States

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Dismissal (3 of 3)

- Cases not eligible for a Title IX hearing go instead to:
  - Investigation
  - Decision (potentially by investigator, without Title IX hearing)
  - Appeal

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Conducting a Hearing

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Overview of the Title IX Process: Hearings

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

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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)

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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."

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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)

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Slide 57

MMC15 What is the reference to the official regs here?
Carleton, Melissa, 6/14/2020

Advisors

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)

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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?

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Recording the Hearing

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

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The Hearing

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

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Questioning by the Decision-Maker (1 of 2)

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

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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-makers own initiative to aid the decision-maker in obtaining relevant evidence both inculpatory and exculpatory, and the parties also have equal rights to present evidence in front of the decision-maker so the decision-maker has the benefit of perceiving each party's unique perspective about the evidence." (30331)

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The Hearing (1 of 2)

- Ruling on relevancy between every question and answer by a witness or party
  - Set expectation that party or witness cannot answer question before decision-maker decides if relevant.

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The Hearing (2 of 2)

- 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

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Live Cross-Examination: Theory

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)

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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)

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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

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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

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More Reminders

- 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

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Reminders

- 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

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Overview of the Process: Determinations (2 of 3)

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

Overview of the Process: Determinations (3 of 3)

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

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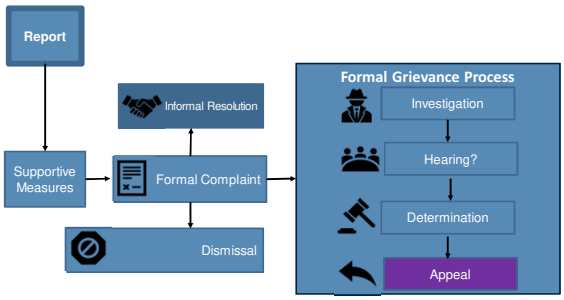
Appeal Decisions



Overview of the Process: Appeals (1 of 2)

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

Overview of the Process: Appeals (2 of 2)

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

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Informal Resolution

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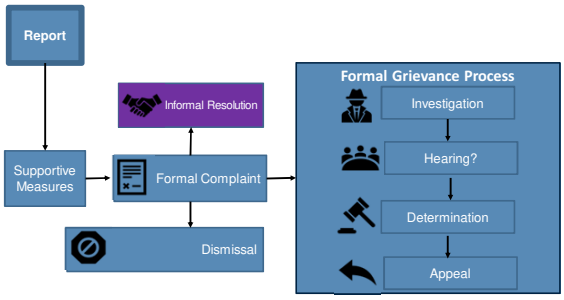
Informal Resolutions



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Overview of the Process: Informal Resolution (1 of 2)

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

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Overview of the Process: Informal Resolution (2 of 2)

- University can offer informal resolution if:
  - Provides written notice to the parties
  - Obtains the parties' voluntary, written consent to the informal process

University cannot offer this option in certain cases of employee sexual harassment of a student

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Questions?

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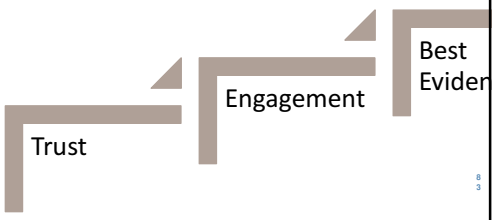
Fundamental Values in the Title IX Process

Remember your Institutional Ethic of Care

What is our goal?

Compliance, yes, but also…



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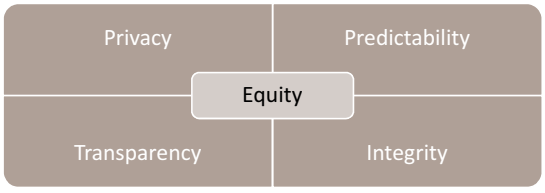
How Do You Build Trust?

Through infusing your process with values



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Value: Equity

"What we do for one, we do for the other" (as appropriate)

- Until we have reached the end of the process, we don't know whether anyone did anything wrong.
- Treat both parties equitably with regard to access to supportive measures, evidence, opportunities to provide information, and in every other respect that is appropriate.

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Value: Privacy

No one will tell you anything if they don't trust you

- Explain privacy versus confidentiality
- Explain how information is shared
  - Within the investigation
  - With other school officials
  - With advisors
- Connect individuals with confidential resources as necessary
- Remember to collect FERPA forms for advisors when necessary

86

Value: Predictability

Knowing what happens next builds trust in the process.

- Give a copy of the policy at the outset.
- Constantly refer back to policy language to explain:
  - Where we are in the process;
  - What happens next;
  - What the expectations will be for the person.
- Follow your policy and follow your process.
- When you must deviate, fill in the gaps with your institutional ethic of care.

87

Value: Transparency

If they hear nothing, they'll assume you're doing nothing or actively working against them.

- Give regular updates to the parties and their advisors.
- Answer questions truthfully, to the extent permitted considering privacy.
- Be cautious before deciding to withhold anything that may be relevant. What is the concern? Does it serve the parties and the process?

88

Value: Integrity

Personal integrity – and integrity within the process

- Watch for conflicts of interest and bias so as to be fair and maintain confidence in the process.
- Don't use or share information outside the process. All evidence should be "on the table" for all parties and advisors to see.

89

HIGHWAY TO THE HEARING ZONE

Highway to a Hearing?

- You **must** provide a hearing under 34 CFR 106.45 **only if** the circumstances require it
- Not all sexual misconduct triggers the hearing requirement
- So, think of your highway to a hearing as having checkpoints to get on and off

Checkpoint one: All of these

- Complainant: Complainant was participating or attempting to participate in your education program or activity when formal complaint was filed
- Definition: Reported conduct in formal complaint could constitute "sexual harassment" under Title IX definition if proved
- Setting: Reported conduct occurred in your education program or activity
- U.S.A.: Reported conduct occurred against a person in the United States

What if you lack a factor?

- Use your policy as a roadmap to the off-ramps.
  - Some will tell you it's OK to keep going through the same process.
  - Some will tell you that you should send the case to HR or student conduct or through some other process

Off-Roading

- If you aren't using the Title IX process:
  - Evidentiary rules may be different
  - Use of advisors may be different
  - Identity of decision-maker(s) may be different
  - Whether there is a hearing at all may be different
- Remember that certain procedural rights are guaranteed in sexual assault, dating violence, domestic violence, and stalking cases – even if they don't go to a Title IX hearing

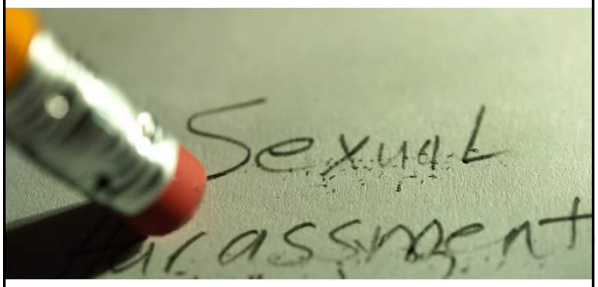
SCOPE OF YOUR EDUCATION PROGRAM AND ACTIVITY

Education Program/Activity

- 106.2(h) – All the operations of a college or university
- 106.44(a) – 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 an officially recognized student org

Within the Scope?

- Co-curricular trip to Cuba – ?
- Fraternity party in recognized house – ?
- Holiday party for students at prof's house – ?
- Athletes traveling to game, but not with team – ?
- Holiday party at employee's house, invites co-workers and others – ?
- Off-campus apartment – ?



A quick discussion on "Sexual Harassment"

Sexual Harassment

- **Sexual harassment** means conduct **on the basis of sex** that satisfies one or more of the following:
  - [***Quid pro quo***] An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
  - [**Unwelcome conduct**] 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; or
  - [**Clery crimes**] Sexual assault, dating violence, domestic violence, or stalking

Sexual Harassment: *Quid Pro Quo*

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

Sexual Harassment: Unwelcome Conduct

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

Severe?

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

Pervasive?

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

Objectively Offensive?

Reasonable person is very fact-specific (30167)

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

Applies to Employees 1 of 5

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

Applies to Employees 2 of 5

Near the beginning of the preamble, the Department noted:

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

Applies to Employees 3 of 5

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

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

Applies to Employees 4 of 5

The preamble clarified:

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

Applies to Employees 5 of 5

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

Hypotheticals – Sexual Harassment

Let's put these definitions to the test…see your hypo packet

- Chuck and Mary Sue
- Baldwin Hall

110

Reviewing our Hypothetical:

Meet Tessa and Michael

Formal Complaint

Filed by Tessa on May 1, 2021 – the incident was April 3, 2021

"On April 3, 2021, my then-boyfriend, Michael, sexually assaulted me in my apartment. We were in my bedroom and I was trying to sleep after a long night of going out with Michael and some friends. Michael knows I'm against premarital sex, but that night I was very intoxicated and he had sex with me, even though I was too incapacitated to consent and can't remember everything."

112

Notice of Allegations

Charge #1

✓ Sexual Assault (Title IX):

Sexual Assault is engaging or attempting to engage in one of the following activities with another individual without consent or where the individual cannot consent because of age or temporary or permanent mental or physical incapacity:

(1) Sexual intercourse (anal, oral, or vaginal), including penetration with a body part (e.g., penis, finger, hand, or tongue) or an object, however slight;

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Email to Tessa (1 of 4)

Contact the Complainant

Dear Tessa,

My name is Rob Kent and the Title IX Coordinator has assigned me to investigate your case. I would like to meet with you to discuss what you remember about your encounter. Do you have time to meet with me on May 14th at 12:30 in the conference room? You may bring an advisor of choice with you, so if that date and time is not convenient for both of you, please let me know a few times that would work better.

114

Email to Tessa (2 of 4)

Preparations for Interview?

There is nothing you need to do to prepare for our interview, but if you wish, you may want to begin gathering any evidence you may have, such as text messages or videos from the night in question. You may also want to think about potential witnesses that may be helpful for me to talk to. However, this isn't required to complete before we meet.

115

Email to Tessa (3 of 4)

Accommodations/Interpreters

If you are disabled and need reasonable accommodations to participate, or if you speak another language and would like an interpreter to be present, please let the Title IX Coordinator know and we can make those arrangements.

116

Email to Tessa (4 of 4)

Questions?

When we meet, we can talk through any questions you may have for me about the process, and we will discuss the prohibition against retaliation against anyone that participates in the process. I am also happy to address any questions beforehand if you'd like. In the meantime, if you need any supportive measures, please contact the Title IX Coordinator.

117

What About Michael?

"What we do for one, we do for the other"

- Don't leave Michael hanging. Make contact with him when you make contact with Tessa!

118

Email to Michael

Echoing what we have told Tessa

Dear Michael,
My name is Rob Kent and the Title IX Coordinator has assigned me to investigate your case. My first step will be to meet with the other person to get more information about the formal complaint. I am in the process of setting that meeting up.
Once I have conducted that interview, I will reach back out to you to set up a time to interview you. You will be permitted to bring an advisor of choice to that interview.

119

Email to Michael (2 of 4)

Preparations for Interview?

There is nothing you need to do to prepare for our interview, but if you wish, you may want to begin gathering any evidence you may have, such as text messages or videos from the night in question. You may also want to think about potential witnesses that may be helpful for me to talk to. However, this isn't required to complete before we meet.

120

Email to Michael (3 of 4)

Accommodations/Interpreters

If you are disabled and need reasonable accommodations to participate, or if you speak another language and would like an interpreter to be present, please let the Title IX Coordinator know and we can make those arrangements.

121

Email to Michael (4 of 4)

Questions?

When we meet, we can talk through any questions you may have for me about the process, and we will discuss the prohibition against retaliation against anyone that participates in the process. I am also happy to address any questions beforehand if you'd like. In the meantime, if you need any supportive measures, please contact the Title IX Coordinator.

122

Interviewing Skills

Preparation, Attention to Detail, and Being Human

Start with your Scope

What are you investigating?

- This should be documented in the Notice of Investigation
- The NOA should also include information about which policies are at issue
  - Double-check – is the correct policy cited?
- Break down the provisions to elements.

124

Elementary, My Dear Watson

What are you investigating?

- For example:
  - ✓ Unwelcome conduct
  - ✓ On the basis of sex
  - ✓ That a reasonable person would determine to be:
    - ✓ So severe, pervasive, and objectively offensive that
    - ✓ It effectively denies a person equal access to the recipient's education program or activity.

125

Elements as Questions: Brainstorm

What types of questions do you ask for each of these?

- For example:
  - ✓ Unwelcome conduct
  - ✓ On the basis of sex
  - ✓ That a reasonable person would determine to be:
    - ✓ So severe, pervasive, and objectively offensive that
    - ✓ It effectively denies a person equal access to the recipient's education program or activity.

126

Outline your thoughts

Get your plan on paper

- Prepare a bullet point list of things you want to explain at the outset
- Have your policy language at the ready
- Bring any evidence that you may want them to review and comment on
- Prepare an outline of questions
  - Don't forget to ask the complainant about impact if it's an element of your policy language!

127

Setting the Stage

Where are you interviewing?

- Private location – be cautious of windows, traffic in the area
- Distraction-free – Ringer off, noise outside
- Comfortable seating that provides equal positioning for interviewee, interviewer, and advisor (if any)
- Zoom → sometimes preferred by parties and witnesses. Concerns?

128

The Investigator Spiel

What do you say at the outset?

- Explain your role
- Explain how information will be shared in the process
- Explain the prohibition against retaliation
- Explain amnesty provision

129

Explain Your Role (1 of 2)

How do you explain it?

"As the investigator, my job is to gather evidence, interview witnesses, and prepare summaries of those interviews."

"Today, I'll be taking notes so that I can prepare a good summary of our conversation, but I want to make sure it's accurate, so I'll send you a copy for your review. You'll get the opportunity to suggest changes to make sure that it's complete and truthful, and that I've properly captured your side of the story."

130

Explain Your Role (2 of 2)

How do you explain it?

"I'll also draft a report that summarizes what I've done to investigate, and the information I've collected. I do not make decisions about what happened or whether the policy was violated. A hearing officer has that job."

"The goal is for me to collect information to help the hearing officer understand what happened so that they can make a good decision in this case, which is why I'm very thankful that we're speaking today."

131

Retaliation Prohibition

How do you explain it?

"Our policy prohibits retaliation, and there's a technical definition for that. But listen – if anyone makes you uncomfortable because you've spoken with me or participated in this process, please tell me right away. It may not rise to the level of retaliation under the policy, but there are still things we can do to address it. And if you're feeling uncomfortable, chances are good that other folks are, too, so you'll be doing them a favor by reporting it."

132

Retaliation – More Oomph

How do you explain it?

"Please don't do one of these two things:

1) Re-read the policy and decide you don't need to tell me because you don't think it rises to the level of a policy violation; or
2) Decide that you are strong enough to handle it and don't tell me.

You might be strong, but maybe other witnesses are experiencing the same thing and they might not be strong enough. I'd rather help address things before they get too complicated, so please let me know."

133

Amnesty

How do you explain it? Check your policy, but here is a sample.

"Our policy gives you amnesty for personal drug and alcohol use, and it gives amnesty for other witnesses and the parties also. So, if any part of your story involves people using drugs or alcohol, please know that we're not going to bring student conduct charges in this situation. We want you to feel comfortable telling us the whole truth about the evening, and this is more important than underage drinking or drug use."

134

To Record Or Not?

Should you record interviews?

- Ohio is a "one party" state, which means as long as one party to the conversation is aware of the recording, you can record.
  - But failure to disclose this recording is likely not consistent with your institutional ethic of care.
- If you ask for consent and some witnesses refuse, what then?
- Your hearing officer will need either transcripts of the recordings, or they will need to review all of the videos. If you have a panel, they all will need to review this information.
- Recordings can be incredibly useful when a party or witness changes their story, and they can be helpful in lawsuits/OCR complaints.

135

Advisors

An Advisor can be anyone – including an attorney, a parent, a witness…

- Must have FERPA release if students are involved and the advisor is not an employee
- Title IX Coordinator can help set expectations for advisors up front
- Communicate with the party and copy the advisor: "Your advisor asked ____, so I wanted to share my response directly with you."
- If the advisor submits the party's written statement, make sure the party adopts that statement as their own.

136

Start with Relationships

This helps to get context

- Student: What year are you? Where are you from originally? What is your major? Where do you live on campus?
- Employee: What is your title/position here? How long have you worked here?
- Who did you meet first, C or R? How? When?
- Relationships with other key people in the case (to help assess potential bias)

137

Get a Timeline

This helps to get context

- "What do you remember regarding this situation?"
  - Give them a starting point or let them choose
  - "And then what happened? And what happened next?"
  - Let them deliver a monologue
- Think in terms of a timeline for your report
  - What section headings will help you tell the story chronologically?
  - Are you clear as to which parts of their monologue fit under which section?

138

Ask Follow-Up Questions

Acknowledge that the individual may not remember every detail.

- Go back to each incident on your timeline and flesh out the details.
- If the witness was alleged to have done or said something in particular, check to see if that's accurate
- Cover every element that the individual could have information about
  - Remember: is impact an element in my case?

139

Consent – Explicit?

These may be worded slightly differently depending on the party.

- "They gave consent" → "What did you say to them, and what did they say to you?"
- Did you have any conversation about sexual activity?
- Did the other person say anything to you that suggested they were consenting?
- Did the other person do anything that suggested they were consenting?
- Who initiated the sexual activity?

140

Consent – Implicit?

These may be worded slightly differently depending on the party.

- Who took off your clothes? Who took off the other person's clothes?
- Was there a condom? Who provided it? Was there any conversation about using protection?
- Did you touch the other person? If so, where?
- Did they touch you? If so, where?

141

Questions for Respondent

If they say there was consent, these can help get more details.

- What did the other person say to you to show consent?
- What actions did the other person do to show consent?
- Were they making any noises during the encounter?
- Did they help position their body during the encounter?
- Did they move your hands during the encounter?

142

Hypotheticals - Consent

Check your policy for your own definition, but here's what we'll use.

Words or actions that show ***a knowing and voluntary*** agreement to engage in ***mutually agreed-upon sexual activity***.

Effective consent **cannot** be gained by taking advantage of the incapacitation of another, where the respondent knows or reasonably should have known of such incapacitation.

143

Incapacitation

First, explain why you need information on alcohol/drug use.

- Remember: Does your Policy permit amnesty?
- "I want to understand the role that drugs or alcohol may have played in this situation."
- "I want to understand whether you were capable of giving consent, or whether you were incapacitated due to drugs or alcohol."
- "I want to understand whether the other person was sober enough to understand and consent."
- "I am trying to get a sense of how intoxicated the person may have been when you saw them."

144

Incapacitation Questions (1 of 2)

You need a good physical description of relevant symptoms

- How much alcohol? Any drugs?
- Any medications that may have affected your ability to stay awake, or that might have interacted with alcohol?
- "They were drunk" → What did "drunk" look like?
  - Slurring? Clumsy? Uncoordinated?
  - Able to walk on their own? Need assistance to navigate or complete tasks?
  - Vomiting?
  - Able to carry on a conversation?
  - Oriented to who/what/where/when/why?

145

Incapacitation Questions (2 of 2)

You need a good physical description of relevant symptoms

- Was it a cup or a CUP?
- How many "fingers" of alcohol on the solo cup?
- What type of alcohol was consumed?
- What did they eat? When?

146

Respondent's Awareness

Did Respondent know or should have known of incapacitation?

- Was Respondent there?
- Did Respondent see when Complainant was [fill in symptom]?
- Did Respondent bring Complainant any alcohol/drugs?
- Did Respondent say anything about Complainant's level of intoxication?
- Was any planning done to take care of Complainant? Was Respondent part of that conversation or plan?

147

Incapacitation: Timeline

This will be critical

- Drinks
- Drugs
- Food
- Complainant's own recall
- Behavioral observations from other
- Electronic information – texts, videos, audio files
- Security footage
- Cards swipes

148

Hypotheticals - Incapacitation

Check your policy for your own definition – The definition is provided

- Occurs when the complainant **lacks the ability to make informed, rational judgments regarding the participation in sexual activity**.
- Defined is the inability to give consent because the complainant is **mentally and/or physically helpless, asleep, unconscious, or unaware that sexual activity is occurring.**
- A person may be considered incapacitated if the person cannot appreciate the who, what, where, when, why, or how of a sexual interaction.
- To be responsible where a complainant is incapacitated, policies typically require that the **respondent knew or reasonably should have known about the incapacitation**

149

Coercion: Left to Institution to Define

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

Hypotheticals - Coercion

Bricker & Eckler ATTORNEYS AT LAW

Check your policy for your own definition – The definitions are provided

- In small groups of 3-4, please review the hypotheticals on pages 15-16.
- Focus on the elements of coercion. What is needed in each definition?

151

Sensory Questions

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These may help with memories that are hard to access.

- What do you remember hearing, smelling, tasting, feeling?
- Where was the other person's hand, leg, body weight, etc.?

Focusing on sensations can help to recall memories that may not have been mentioned when asked to give an overview of what happened.

152

Paraphrase Questions

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Make sure you understand

- "So, what I heard you saying is…"
- "Let me make sure I understand…"
- "It sounds like… do I have that right?"

153

Strategic Questions

Be thoughtful about when these are appropriate.

- "Would it surprise you to learn…"
- "Witness X said…. Do you agree?"
- "Here you said X, but today, you said Not X. Can you help me reconcile those things?"
- "Witness X said this and Witness Y said that. Can you help me understand why they might have different information?"
- "Let's look at this [evidence] together so I can get a better understanding…"

154

Final Questions

Catch-alls at the end

- Is there anything you thought I would ask you about that we haven't discussed?
- Is there anything else you'd like to tell me?
- Is there anything else you think I should know?

155

Drafting Interview Summaries

This isn't literature, folks. The key is clarity, not eloquence.

- Virtually every sentence should start with, "Witness stated…" or "Witness recalled…"
- Use direct quotes whenever possible and appropriate.
- Don't use adjectives or adverbs unless they are direct quotes from the witness.
- Avoid pronouns, as they can make a sentence ambiguous.

156

Thoughts About Summaries

There is no perfect way to write a summary.

- Include procedural review at the outset (your "spiel")?
- Complete sentences vs. bullet points?
- Anonymize witness names?
- Use "Complainant" or "Respondent," or use the names as they are used by the witness?

157

Create Investigative Report

- "Fairly summarize relevant evidence" – usually include appendix with evidence copies to create a packet for hearing
- No determination of responsibility, no credibility findings, no findings of fact!
- Many ways to organize
- Be transparent – what did you try that didn't work? (Security footage gone, witness refused to participate, etc.)
- Provide to parties and advisors
- Allow 10 days to review prior to hearing

Hypotheticals - IPV

Check your policy for your own definition

- In small groups of 3-4, please review the IPV hypotheticals on pages 18-20.
- For Investigators: What questions would I ask to include more information in the report?
- For Advisors: What types of questions/comments do you have if you're working with the Complainant? Respondent?

159

Back to our Hypothetical

Your task: plan interview questions for Tessa

Formal Complaint

Filed by Danielle on May 1, 2021 – the incident was April 3, 2021

"On April 3, 2021, my then-boyfriend, Michael, sexually assaulted me in my apartment. We were in my bedroom and I was trying to sleep after a long night of going out with Michael and some friends. Michael knows I'm against premarital sex, but that night I was very intoxicated and he had sex with me, even though I was too incapacitated to consent and can't remember everything."

Michael's Turn

Time to ask questions of Michael!

Preparing the Case File

Parties review and respond

Redactions

Is it relevant?

- Sexual predisposition or prior sexual behavior of complainant
- Privileged information where privilege has not been waived
- Medical records where no consent has been granted

164

What do you include?

Pretty much everything

- Interview summaries
- Evidence gathered
- Do you prepare a draft report to go with the evidence for review?

165

How do you share it?

Technology or not?

- Privacy is important.
- Technology – can limit ability to print, share, download, screenshot?
- Use watermarks for Complainant/Respondent file?
- In-person review?
- Non-disclosure agreements for technological access?
- How can advisors access it?

166

Draft Report

Can't finalize it until you give the opportunity to review and respond (10 days)

- "Fairly summarizes relevant evidence"
  - What you summarize is likely narrower than what you include in the file for review

167

Report Includes?

Can't finalize it until you give the opportunity to review and respond (10 days)

- Procedural History
- Summary of Allegations
- Relevant Policy Language
- Investigation Overview
  - Witnesses – Who you spoke with, who declined to participate, who never responded, who was requested wasn't relevant (and why)
  - Evidence – What you gathered, what you tried to gather but couldn't, what you were asked to gather but didn't (and why)

168

Synthesis of Information

How can you make heads or tails of what is in the full file?

- Do you want to detail what each witness said?
- Do you want to synthesize and summarize undisputed facts?
- Do you want to do a combination, depending on whether a particular issue is disputed or undisputed?
- Do you want to intersperse evidence, or make it a separate section?

169

Report Attachment

All relevant evidence should be attached – and relevant is a broad term.

- Put it in a single PDF.
- Make a table of contents.
- Bonus: Make the table of contents clickable.
- Refer to relevant documents when you write your summary.
  - My ideal world: Every sentence has a citation to the attachments.

170

Party Responses

What do you do with them?

- Do you need to conduct follow up interviews or request additional evidence?
- (Do you need to then circle back and do another round of evidence review/response?)
- Integrate relevant portions of the responses into your summaries.
- Attach the responses.

171

Report Editing Exercises

See the packet of fun.

- Individually, please take 5-10 minutes and review the editing samples on pages 20-23. Identify issues and suggest corrections in writing.
- When you're done, please get together in small groups at your table and review the exercise.

172

What is Relevant?

Review of Relevance (1 of 9)

- Regulations do not define "relevant," but tells us what is not relevant
- Per *Regulations* 34 C.F.R. 106. 45(b)(6)(i):
  - "Only relevant cross-examination and other questions may be asked of a party or witness."
  - "**Before a complainant, respondent, or witness answers** a cross-examination or other question, **the decision-maker must first determine whether the question is relevant** and explain any decision to exclude a question as not relevant."

Review of Relevance (2 of 9)

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

- Does this help me in deciding if there was more likely than not a violation/highly probable to be a violation?
- Does it make it more or less likely/does it make it highly probable?
- Why or why not?

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

Review of Relevance (3 of 9)

- **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)." (Preamble, p. 30331)
- A recipient may not adopt rules excluding certain types of relevant evidence (Preamble, p. 30294)
- May not adopt Rules of Evidence.

Review of Relevance (4 of 9)

What is NOT relevant:

Questions and evidence about the **complainant's sexual predisposition or prior sexual behavior are not relevant, UNLESS**

1) Such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
2) If the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

[34 C.F.R. 106.45(b)(6)(i)]

Review of Relevance (5 of 9)

What is NOT relevant:

Information **protected by a legal privilege**

[34 C.F.R. 106.45(b)(1)(x)]

This will vary state-by-state, so check with your legal counsel. Most common in this context are:

a) Attorney-client privilege
b) Doctor-patient/counselor-patient
c) Fifth Amendment/right not to incriminate self (not really applicable in this venue, but sometimes raised and cannot force to answer questions)

Review of Relevance (6 of 9)

What is NOT relevant:

A party's **treatment records** (absent voluntary written wavier by the party)

[34 C.F.R. 106.45(b)(5)(i)]

- PRACTICE TIP – LOOK for that written waiver in the materials provided to you

Review of Relevance (7 of 9)

What is NOT relevant:

No improper inference from a party or witness **declining to participate** in cross-examination.

[34 C.F.R. 106.45(b)(6)(i)]

Review of Relevance (8 of 9)

- Consideration of past statements of a party or witness that does not answer questions on cross-examination.
  - Preamble
  - Open Source and September 4, 2020 Q&A
  - *VRLC* and August 24, 2021 OCR guidance letter

Discuss with your legal counsel and Title IX Coordinator.

Review of Relevance (9 of 9)

If you maintain the prohibition AND the statement IS the sexual harassment…

When it constitutes the sexual harassment, it is not the Respondent's "statement" as used in 34 C.F.R. 106.45(b)(6)(i), because the verbal conduct constitutes part or all of the allegations of sexual harassment itself.

https://www2.ed.gov/about/offices/list/ocr/blog/index.html (May 22, 2020 blog post)

VRLC v. Cardona (1 of 3)

Submission to Cross-Examination

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

VRLC v. Cardona (2 of 3)

"Arbitrary & Capricious"

- Mass. Federal decision vacated regulation requiring submission to cross-examination for consideration of statements (*VRLC v. Cardona,* June 28, 2021)
- August 24, 2021 letter providing guidance that, pursuant to *VRLC* decision, OCR will "immediately cease enforcement" of this specific provision in 34 CFR 106.45(b)(b)(i)

VRLC v. Cardona (3 of 3)

*****Work with legal counsel to assess risk*****

- Pending cases
- Breach of contract concerns

- On appeal
  - Texas has been permitted to appeal this decision, along with several individuals who have an interest in the outcome

Decorum During Hearings

- Relevant questions must not be abusive
- Enforcement of decorum must be applied evenhandedly
- "…where 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." (Preamble, 30331)
- The decision maker may remove any advisor, party, or witness who does not comply with expectations of decorum. (Preamble 30320)

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Practice Making Relevance Determination

Bricker & Eckler ATTORNEYS AT LAW

Relevance Determination Hypotheticals (1 of 2)

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Okay, decision-maker, is this question relevant?

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

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

Relevance Determination Hypotheticals (2 of 2)

Bricker & Eckler ATTORNEYS AT LAW

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 is so, what types of additional information would you need to make a relevance determination?

Relevance 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.

Practice Hypothetical #1

Question from Respondent's Advisor to Complainant:

Since you can't remember your conversations with Michael that night, it is possible that you asked him to make love to you, right?

Practice Hypothetical #2

Question from Complainant's Advisor to Respondent:

Since you acknowledged that you "pushed too hard before," it makes sense that you pushed too hard on April 3rd, doesn't it?*

*Referring to March 4, 2021 text message

Practice Hypothetical #3

Question from Respondent's Advisor to Complainant:

You never went to the hospital for a SANE exam, did you?

Practice Hypothetical #4

Question from Complainant's Advisor to Respondent:

Prior girlfriends have told you that you pushed too hard sexually, haven't they?

Practice Hypothetical #5

Question from Respondent's Advisor to Complainant:

Tessa, I understand that now you want to wait until you are married to have sex, but you're aren't a virgin, are you?

Practice Hypothetical #6

Question from Complainant's Advisor to Respondent:

Michael, you're not a virgin, are you?

Practice Hypothetical #7

Question from Complainant's Advisor to Complainant:*

Tessa, you brought your counseling records today, correct?

*Questioning of a party by their own advisor is not required by the regulations, and may not be part of your process.

Practice Hypothetical #8

Question from Respondent's Advisor to Complainant:

Tessa, did you tell your advisor (who is not an attorney) during break that you thought today was not going well for you?

Practice Hypothetical #9

Question from Complainant's Advisor to Respondent:

Michael, did you tell your attorney during break that you thought today was not going well for you?

Review of Tasker/Murphy Investigation Report

Things to Note

- Reported that Respondent engaged in Title IX Sexual Assault on April 3, 2021
- Incapacitation
  - What information does the decision-maker need?
  - What questions are the advisors likely to ask?

Opportunities to Practice

Questioning of Tessa

- DM questioning of Tessa
- Relevance determinations for cross-exam of Tessa by Michael's advisor

Questioning of Michael

- DM questioning of Michael
- Relevance determination for cross-exam of Michael by Tessa's advisor

LIVE CROSS-EXAMINATION: Theory and Practice

Cross Tools: What are the goals of cross-examination?

- Obtain **factual admissions** helpful to your party's case.
- **Corroborate the testimony** of your party's witnesses.
- Minimize the other party's case by ***impeachment*** *of witness* being questioned.
- Minimize the other party's case by ***impeachment*** *of other witnesses* through the witnesses being questioned.
- Reduce **confusion and seek truth**.

Cross Tools: Impeachment 1 of 5

- What bias might a witness have?
- Do you understand the relationship between the witness and the parties?
- Experts: getting paid for testimony
  - You charge fees based on an hourly rate?
  - You were paid to produce a written report?
  - Based on this report, you're testifying today?
  - You're charging money for each hour you're here?

Cross Tools: Impeachment 2 of 5

- Perception and Recall
  - What is the witness's perception of the facts?
    - Has time impacted recall or ability to remember clearly?
    - How many times has the witness talked to a party about this case?
    - Was there anything that impacts the person's physical or mental ability to perceive or recall facts accurately?
  - Does the witness form a conclusion without knowing certain information?

Cross Tools: Impeachment 3 of 5

- Example: Intoxication level information from witness.
  - You did not see the consumption, or keep track of how long the party was consuming alcohol?
  - You did not measure the alcohol poured by ____ at the party?
  - Your statements are based on information provided by others? the other party?
  - Party's statements were made after they had been drinking alcohol (consuming other drugs, etc)?

Remember: Determine whether the person is not speaking from personal knowledge.

Cross Tools: Impeachment 4 of 5

- Inconsistency in statements
  - If a fact was very important, why is the hearing the first time it has come up?
  - What possible reasons might the witness have for changing their testimony?
  - Did a witness receive coaching from the party or others between making one statement and another?
  - Has the witness's perspective or motive changed between statements?
  - Does changing this fact help the other party's case?

Cross Tools: Impeachment 5 of 5

- Lack of Corroborating Evidence
  - Example: Card swipes
    - You said that you entered the building by yourself at 1:00 a.m.
    - Security footage doesn't show you entering.
    - Your card swipe record doesn't show you entering.
    - Can you help me understand why there is a discrepancy?

Advisors: Thought Process

Advocating for your party in the Hearing 1 of 7

Preparation

- Review the entire investigation hearing report
- Review all evidence (some may have non-relevant evidence also—know if you disagree with any relevancy determinations made by the investigator)
- Meet with your party to review what your party thinks and wants
- Discuss strategy

Advocating for your party in the Hearing 2 of 7

Preparation

- Realize that your party may want to take a more aggressive approach – If you are not comfortable with the approach, discuss it with the party and check to see if you can advise your party
- Discuss the expectations of decorum vs. the expectations of questioning the other party and witness

Advocating for your party in the Hearing 3 of 7

Preparation

- Determine who your witnesses are and whether your party thinks they will show up to the hearing
- Be careful of the line between asking a party to participate and explain the importance of their statements vs. coercing a party to participate who has the right not to participate

Advocating for your party in the Hearing 4 of 7

Preparation

- Consider a script
  - List each allegation and policy definition/elements for the policy violation (e.g., sexual assault—know which definition and what must be met to show sexual assault under the policy)
  - Standard of review: this can be helpful to have written out so that you can support relevancy determinations for your questions to show why relevant

Advocating for your party in the Hearing 5 of 7

The Hearing

- Ask one question at a time and wait for the Decision-Maker to determine if it is relevant
- If the Decision-Maker has a question about why the question is relevant, be prepared to answer that question (see preparation)
- Be respectful of the process so that you can effectively ask your party's questions – if you think you or someone else is becoming too heated, ask for a break to regroup

Advocating for your party in the Hearing 6 of 7

The Hearing

- Be aware that the other advisor may not be as prepared as you are and the decision-maker has a duty to ask questions the advisor does not—this doesn't mean the decision-maker is biased or trying to help the other side – you may not like it, but it's a requirement for the decision-maker

Advocating for your party in the Hearing 7 of 7

Post-hearing

- The decision-maker will issue a decision to both parties at the same time.
- Under the regulations, the advisor is not required to have any further role in the process (this may be especially true if the advisor is appointed by the institution)
- Other advisors (attorney or parent), may choose to work with the party to appeal on the bases listed in the decision

How Do You Choose Questions?

What Don't You Know?

Decision-makers: If you need to know it to make a determination, you have the obligation to ask the question.

Advisors: If you don't know the answer to the question before you ask it, it may harm your party. Weigh the benefits of asking carefully before proceeding.

What Do You Know?

Decision-makers: It can be helpful to ask questions when you think you already know the answer, to ensure that you are able to sequence events correctly and that you understand nuances in the testimony.

Advisors: If the testimony is going to help tell your party's story, it can be helpful to bring it to the forefront of the decision-maker's mind.

Disputed Facts?

Decision-makers: Question on disputed facts so that you can weigh credibility, make a determination, and explain your rationale.

Advisors: Highlight areas for the decision-maker where the other party's story doesn't make sense, by asking questions to discredit the witness, or to provide corroborating evidence for your party's story.

Make Your Plans

- Decision-makers:
  - What themes do you wish to draw out?
  - What disputed points do you need information on?
  - Who will cover which topics?
  - Which questions will be asked?
- Advisors:
  - Use this discussion to help frame your questions. What key points do you think need to be addressed with each witness to highlight your party's story?
  - What information is most critical of your party's story, and what can help highlight the weaknesses in that information as compared to the strengths in your information?

Pick a Goal

- Consider choosing a goal for yourself to try to reach through questioning:
  - Advisor: "By questioning Sarah, I will try to show that Respondent was more aware of Complainant's intoxication level than the report suggests."
  - Decision-maker: "In questioning Complainant, I will try to better understand what effects she felt from her head injury versus intoxication."
  - Etc.

Break & Preparation for Practice Session

Decision-Maker Hearing Practice and Debrief

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 (including faculty) for all policies and procedures with adjudication for sexual harassment complaints (e.g., union grievances procedures, faculty conduct)
- 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)

Considerations:

- 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?

Resolving Disputes (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

Resolving Disputes (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

Resolving Disputes (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?

#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)

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

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

#8 Standard of Evidence (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

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.

Questions?

Additional information available at:

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

Free upcoming webinars at www.bricker.com/events

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

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2022 Ohio Five Two-Day Title IX Workshop
Discussion Hypotheticals

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Sexual Harassment Hypotheticals: Chuck and Mary Sue

Chuck and Mary Sue are both custodians. They are assigned to work the same night shift in the same academic building, five nights per week. They are both supervised by the same person, Jason, who works in the administrative building. All of the custodians across campus communicate with each other, and with Jason, by using university-issued walkie-talkies that they carry with them at all times during their shifts. Each custodian must clock in and out at the administrative building before reporting to their assigned building.

Mary Sue believes that Chuck may be sexually harassing her. She relays the following facts. At what point, if any, do you believe that sexual harassment has occurred, and why?

1. Chuck asks Mary Sue out on a date after a shift. Mary Sue says no.
2. Chuck brings flowers to work and asks Mary Sue out on a date again. Mary Sue says no again.
3. Chuck asks Mary Sue out on a date over the radio. Mary Sue says no again.
4. Jason informally warns both Chuck and Mary Sue not to discuss personal matters on the radio.
5. Chuck corners Mary Sue in the break room at the beginning of shift to ask her why she won't date him, and he won't let her leave until she says yes. (She gets away.) Jason writes them both up for starting their shifts late that day.

Changing it Up

Chuck and Mary Sue are both students. Mary Sue believes that Chuck may be sexually harassing her. She relays the following facts. At what point, if any, do you believe that sexual harassment has occurred, and why?

1. Chuck asks Mary Sue out on a date. Mary Sue says no.
2. Chuck brings flowers to class and asks Mary Sue out on a date again. Mary Sue says no again.
3. Chuck asks Mary Sue out on a date on social media. Mary Sue says no again.
4. Chuck and Mary Sue's professor sees that they are on social media during class time and asks them both to stop and pay attention.
5. Chuck corners Mary Sue in an academic building lounge to ask her why she won't date him, and he won't let her leave until she says yes. (She gets away.) Their professor is not happy that they are both late to class.

Sexual Harassment Hypotheticals: Baldwin Hall

Hypothetical #1

Fran Yeager is a First-year student and a resident of Baldwin Hall, a co-ed, all First-year residence hall. Baldwin Hall is co-ed by room, meaning that residents are paired by the same gender identity as roommates on a hall with two single-gender bathrooms. Fran has an extremely positive body image and is comfortable walking to and from the bathroom wearing nothing but a very small towel.

Some of the male-identified residents are uncomfortable with Fran's conduct and come to Sarah Overton, the Second-year (but not sophomoric) resident advisor, to request that Sarah intervene. The residents state that Fran's conduct has created a hostile environment under the Title IX Policy and they want Fran to be removed from the hall.

Questions:

- Does Fran's conduct meet the definition of sexual harassment? Why or why not?
- What questions would you ask to determine if Fran's conduct meets the definition of sexual harassment under your policy?

Fran is walking to the bathroom and Bryan, one of the residents, yells out, "Fran! You sexy beast! Work it!" Fran proceeds to turn toward the resident and slowly and seductively removes the towel. Fran smiles and walks to the bathroom wearing only the fuzzy slippers. Some of the other residents see Fran and, again, go to Sarah insisting that Fran be removed. They share with her that some of the residents are now using the bathrooms on other floors of the building to avoid Fran.

Questions:

- Does Fran's conduct meet the definition of sexual harassment now? Why or why not?
- Does Bryan's conduct meet the definition? If not, what other facts would you need?

Bryan and Fran go to a party. Both have been drinking heavily and are visibly intoxicated, but are coherent and laughing loudly in the hallway. The laughter wakes up Sarah and she opens her door to see Bryan and Fran in the hallway. She sees Bryan's hand on Fran's buttocks and overhears him saying, "Just kiss me you sexy beast!" Sarah observes Fran push Bryan away. Fran walks unsteadily past Sarah to exit the hall. Sarah observes that Fran appears to be "upset" and the next day confirms that Fran was angry with Bryan for "making a move."

Questions:

- Does Bryan's conduct constitute sexual harassment? Why or why not?
- How should Sarah and the college respond to this situation?

Hypothetical #2

Second year resident advisor, Sarah Overton, has even more difficulties on her floor. One of her residents, Max, is a transgender male. He is currently taking hormone replacement therapy and has started to grow a beard. Max has been using the male restroom on the floor since the beginning of the school year. Shortly before fall break (middle of October) a resident comes to Sarah and expresses his concerns that a woman should not be using the bathroom. In talking to Sarah, the resident expresses that his religious beliefs do not permit him to accept Max's "lifestyle choices." He adds quickly that "Max is a nice person and if she wishes to act like a man, that's okay," but he's uncomfortable being in the bathroom with Max.

Questions:

- Is your policy implicated by the fact pattern that is currently written? For example, does your policy protect gender identity or gender expression? What should Sarah do?

Sarah tells the resident that she is going to check in with her area coordinator (professional staff member responsible for her building) and wishes her resident a good fall break. Sarah returns early from fall break and notices that someone has written the words "fucking freak" in dry erase marker on Max's door. Sarah quickly erases the comment. She is not sure if anyone has seen the graffiti. She makes an incident report.

Questions:

- You are now in the role of the area coordinator. Does this constitute a policy violation under your policies? If it does, which policies are implicated?

[You are still in the role of the area coordinator] Max comes down to your office and is visibly upset. He tells you that as he was walking out of the bathroom this morning, a group of residents stopped him in the hallway and told him that he needed to "shave off that ridiculous beard and act like the woman that you are." Max explained that he pushed his way past the three residents and when he did so, one of them, he's not sure which one, shoved him from behind calling him a "freak."

Max has come to you seeking a room change to another residence hall. He says "I don't want to make any trouble, I just don't feel safe living in this building anymore." Fighting back tears, Max tells you that he doesn't want anything to be reported. You tell Max that you are deeply concerned about the behaviors and want to respect his requests.

Questions:

- What potential policy violations are implicated now?

- If Max does not want to move forward with a formal investigation, do your policies permit that to happen under these circumstances? What are your tests or considerations in determining whether or not the case would move forward with a formal investigation?

- Assuming that your policy covers harassment on the basis of gender identity, are these facts sufficient to create a hostile environment? If not, why not? If so, why?

Sexual Harassment: Professor Player

Statement of the Reporting Person, Becca Newcomer

I am a first-year student enrolled in Professor Player's Long and Boring Equations class this semester. I am writing to complain about Professor Player's treatment of women in the class.

Everyone knows that Professor Player treats women badly, but I needed the class for my major and so I thought that it wouldn't be so bad, but it is. He is awful. One day in class, he declared that in an effort to promote diversity, he was going to have a "Famous Female Mathematician Day" and give us a slide show of all the Famous Female Mathematicians. He joked it would be a short slide show. Then he put up a picture of Hedy Lamarr and said that she was a female mathematician, but couldn't you tell she was famous for something more than her equations? Then he kind of leered at the class. Some people laughed, but I didn't.

I think he grades women unfairly, too. I am a good student, but I have a B- in his class. He doesn't offer any feedback on my papers, but I sit between two guys and they both get A's and lots of feedback. Some of the other women in the class say they have heard for a long time that he grades women lower than men.

Last week, I finally got the guts to go ask him about it, so I took my last three papers and I went to his office hours. There were lots of people there, so I waited in the little waiting area outside his office with some other people from my class. When it was my turn, I went in and showed him the three papers and asked him for feedback. He didn't have any, and it was like he hadn't even read them. I asked him point blank if he was grading me lower because I was a woman, and he said that if anything, he was grading me higher than I deserved. Then he put his hand on my shoulder and told me that maybe if I bothered coming in for his office hours more often, I would understand more about the class. He said he needed to meet with another group of students, but that I could accompany him to dinner later if I wanted so we could discuss it more. I didn't like the way he looked at me. I grabbed my papers and ran out of the room.

I was so upset, I didn't do the homework that night. The next day in class, he called on me at the beginning of the lecture and kept calling on me for the entire class period. He completely humiliated me. It was obvious I hadn't done the work yet, and I told him that, but he kept asking me questions and didn't even give anyone else a chance to raise their hands.

I am still shaking with anger about how I have been treated. I don't want to go to his class anymore, and I don't want anyone else to have to put up with him either.

Statement of the Responding Person, Professor Player

These allegations are completely ridiculous. I have never treated any of my students with anything other than my utmost respect, regardless of whether they are male or female. Ms. Newcomer's allegations are patently false. Simply put, she is not used to receiving anything less than an A, but in my class, her substandard work does not deserve to be rewarded with such high marks.

We have had three papers and a multiple choice exam thus far in the semester. Ms. Newcomer earned a D+, B, and C+ on the papers, and a B- on the exam. The first paper often earns students low scores because it is early in the semester and they have little experience in scientific writing at a college level. I offered extra office hours to give feedback on early drafts, and those students that took advantage of this help received much higher grades.

Ms. Newcomer did not attend those or any other office hours, until last week when she showed up waving term papers at me and screaming that I hated women. I told her that I did not hate women, that she was welcome to come to my office hours at any time for assistance, and that I would be happy to schedule time with her outside those office hours if she needed more help or had scheduling conflicts. She started crying. Professor Bystander, who has the other office in my suite, was standing in my doorway to see what all the noise was about, and Ms. Newcomer pushed past him to leave.

I did once put a picture of Hedy Lamarr in a PowerPoint. I did not say that it was "Famous Female Mathematician Day." We talked about Ms. Lamarr's underappreciated contributions to mathematics with regard to her contributions to war-time technology, some of which is the foundation to other technologies that we have been studying. There is no denying Ms. Lamarr is beautiful, and I believe I expressed the opinion that her beauty detracted from the proper appreciation of her mathematical genius.

Upon Further Investigation…

Neither Professor Bystander nor the students outside the office door were able to provide any information on the content of the conversation. The students stated that Ms. Newcomer entered the office in a calm state. The students and Professor Bystander agreed that when she left, she was crying and highly agitated.

Professor Bystander stated that after Ms. Newcomer pushed past him, he asked Professor Player what had happened. Professor Player responded, "She doesn't like her grades and I don't like her attitude, so everyone is unhappy at the moment." Professor Player does not recall having any conversation with Professor Bystander about the incident.

Is the Playwright Discriminating?

Professor Gene O'Neill is a well-regarded scholar and playwright at your institution. He is a respected teacher and for the last 25 years has received nothing but exceptional feedback from his students. He is well connected to the Broadway community and runs an intensive two-week summer class in New York City. Students vie to get into this intensive program because of the opportunities it provides to interact with playwrights and performers.

Professor O'Neill is scrupulous about gender balance in his class. He works with the Registrar to ensure that all genders are well represented in his classes.

In recent years, Professor O'Neill has decided to not meet alone with female students without his office door being open. His colleagues have noted that he is uncomfortable in social settings with female students. They have commented that he appears to make sure that he is never alone with female students in social settings (*e.g.* departmental functions, dinners during the New York trip, etc.).

An assistant professor and informal mentee of Professor O'Neill asked him if there was a pedagogical or other reason for his behavior. Professor O'Neill responded that he was trying to avoid any situation that could be deemed "improper." He recognized that this meant that female students had fewer one-on-one interactions with him, but he shrugged off any negative implications of it stating, "My student evaluations are excellent and I'm just trying to avoid any Title IX issues."

Is there Sexual/Gender Harassment? Why or Why Not?

- If students raised concerns about Prof. O'Neill's conduct to the Dean of the College and reported that they noticed these behaviors and also reported having fewer opportunities to interact with Prof. O'Neill outside of the classroom, would this change your analysis?

Understanding Consent: Mini-Hypotheticals

Hypo #1: Charlie and Andy are dating. Charlie tells Andy, "I've always thought it would be nice to wake up to oral sex." A few days later, Andy wakes Charlie up with oral sex.

Did Charlie consent to the oral sex?

Hypo #2: Remy and Sage are kissing. Remy asks Sage if it is OK to have sex. Sage says it is OK, "but only if you use a condom." Remy puts on a condom and penetrates Sage. Halfway through the sexual encounter, Remy removes the condom without telling Sage and continues to penetrate Sage.

Did Sage consent to the sexual intercourse?

Hypo #3: Alex and Chris are kissing. Alex asks Chris if it is OK to have sex. Chris agrees. They have sex. Chris doesn't realize that Alex has hidden a friend in the closet to watch.

Did Sage consent to the sexual intercourse?

Hypo #4: Quinn is giving oral sex to Riley after Riley gives verbal consent. After a minute, Riley lays hands on Quinn's shoulders, pushing Quinn back somewhat but not totally away. This keeps Quinn from being able to push as hard, but still allows Quinn to continue. Quinn continues for a few more moments, then stops and the two go on to do something else.

Did Riley consent to the oral sex for the entirety of the act?

Hypo #5: Angel threatens to post pornographic pictures of Jordan on Facebook if Jordan does not have sex with Angel. Jordan has sex with Angel.

Did Jordan consent to sex?

Hypo #6: Kai and Dylan have been in a relationship for the past semester. Dylan tells Kai that if Kai loves Dylan, Kai would have sex with Dylan. Kai reports feeling pressure to have sex or lose the relationship. Kai has sex with Dylan, although Kai is reluctant to do so.

Did Kai consent to sex?

Hypo #7: Hunter and Jayden have been in a relationship for nearly two years. Jayden has been experiencing serious mental health issues and has recently attempted suicide after Hunter stated that their relationship was over. After Jayden attempted suicide, they reconciled. Hunter reported that Jayden threatened to commit suicide if Hunter did not engage in sexual contact with Jayden, so Hunter did so.

Did Hunter consent to sex?

Hypo #8: Cameron and Nova met at a party. They have both been drinking and they return to Nova's apartment. When they arrived, they went to Nova's small bedroom in the apartment. They hook up briefly and Cameron decides to leave the room. Nova blocks the door to the room and tells Cameron that Cameron needs to kiss Nova before Cameron can leave. Cameron kisses Nova, then heads to the bathroom.

Did Cameron consent to the kiss?

Keys to Consent Analysis

When a case relates to consent, look for behaviors that demonstrate a willingness to participate in sexual activity, such as:

- Words or phrases that suggest consent
- Taking off own clothes
- Providing protection from STIs
- Assisting with penetration
- Guiding the other person's touch

Lack of such behaviors may constitute a lack of consent. The presence of behaviors that demonstrate an unwillingness to participate in sexual activity may likewise constitute a lack of consent, for example:

- Saying "no"
- Pushing the person away
- Physically moving oneself away
- Putting clothes back on
- Lying about having protection in the hopes of deterring sexual activity

Keys to Incapacity Analysis

When a case relates to incapacity, an investigator's goal is to create a timeline of:

- Drug and alcohol use by the reporting party
- Use of medications by the reporting party that could interact with drug and alcohol use or affect consciousness
- Physical and cognitive behaviors demonstrated by the reporting party to suggest intoxication level – observed by whom?
- Text messages, photographs, and videos of the reporting party that could help to demonstrate intoxication levels
- Card swipes and security footage of the reporting party
- Any other information with a timestamp

Consent and Incapacitation Mini-Hypotheticals

Work together in small groups to determine whether the conduct was non-consensual in each of these situations.

#1: Casey and Jessie go to Casey's apartment. Both are sober. Casey asks Jessie if they can have sex. Jessie says yes. They proceed to have sex. Both Casey and Jessie actively participate in the sex.

Was the conduct consensual? □ Yes □ No

Why or why not? _____

#2: Dakota and Harper don't know each other. Harper is sleeping in the student lounge when Dakota arrives. Dakota rubs Harper's genitals, which awakens Harper.

Was the conduct consensual? □ Yes □ No

Why or why not? _____

#3: Jamie and Rory are roommates. Jamie spends the evening drinking alone to the point of incapacitation. Rory returns to their apartment to find Jamie in Rory's bed. Rory gets into bed with Jamie. Jamie wakes up, kisses Rory, and asks Rory for sex. Rory says yes. Rory and Jamie have sex.

Was the conduct consensual on Jamie's part? □ Yes □ No

Why or why not? _____

#4: Angel and Avery meet at a party. While they are sitting together, Avery has two "Long Island Iced Teas," each of which contain five shots of alcohol. Avery asks Angel to assist with the walk home, and Angel ends up carrying Avery partway. When they get to Avery's room, Avery kisses Angel passionately, then proceeds to give Angel oral sex.

Was the conduct consensual on Avery's part? □ Yes □ No

Was the conduct consensual on Angel's part? □ Yes □ No

Why or why not? _____

#5: Quinn takes sleeping medication and drinks a wine glass full of vodka, intending to sleep for twelve hours or more. Parker, Quinn's friend, stops by to see Quinn before bedtime and convinces Quinn to go to a party. Quinn and Parker walk down two flights of stairs, out the door, down a hill, and across campus to the party. While at the party, they dance and talk. Parker kisses Quinn. Quinn then kisses Parker. They walk back together. The next morning, Quinn remembers nothing about being with Parker.

Was the conduct consensual on Quinn's part? □ Yes □ No

Why or why not? _____

#6: Charlie and Kendall are at a party dancing. Charlie comes up behind Kendall and begins grinding against Kendall's back, with Charlie's genitals rubbing against Kendall's hip. Kendall is sober and steps away from Charlie.

Was the conduct consensual? □ Yes □ No

Why or why not? _____

#7: Ryan drinks three beers, three shots of vodka, and a whiskey and coke. Ryan is able to text a friend, Taylor, in a coherent manner for about twenty minutes. Taylor asks Ryan to stop in before bed, and Ryan obliges. Taylor's door is open when Ryan arrives, and Ryan leans against Taylor's doorframe as they talk. Taylor asks Ryan for sex, and Ryan initially says no. After talking for a few more minutes, Taylor asks again and Ryan comes into the room and closes the door. Taylor kisses Ryan, but Ryan pulls away. Then Ryan kisses Taylor, and the two have sex.

Was the conduct consensual on Ryan's part? □ Yes □ No

Was the conduct consensual on Taylor's part? □ Yes □ No

Why or why not? _____

Incapacitation Scenario

Our scenario facts have been established as indicated below. For purposes of this scenario, you may assume that each drink constitutes one standard serving of alcohol.

Kevin and Caden are roommates. Kevin is gay. Caden is questioning. One night, they go to a party together.

10:00 p.m. - They arrive at the party and split up at the door. Kevin goes to the basement. Caden goes to the third floor. Kevin has two beers with a group of friends. Caden has a glass of wine and a cup of vodka and punch with a separate group of friends.

11:00 p.m. – Kevin climbs the stairs to the third floor. Kevin asks Caden if he's ready to leave. Caden takes a shot of vodka and announces that he is "good to go." Kevin leads the way down the stairs. Caden stumbles on the last step but catches himself on the handrail. He is laughing. On the way back to their room, Caden texts with a friend:

> James: You going out tonight?
> Caden: with kevin coming home
> James: Stop over to my place to say hi.

Caden tells Kevin that he wants to stop on the floor below where they live to see James. They take the elevator to the fourth floor where James lives.

11:15 p.m. -- James is in his room with his girlfriend, Amanda, and his friend Pat. They have purchased three different types of whiskey and are making their own flights (one shot of each type). James doesn't drink. Kevin tries one sip of whiskey but doesn't like it. Caden finishes a flight while they talk.

12:30 a.m. – Amanda, Pat, and Caden finish off Kevin's flight by each taking one shot.

1:15 a.m. – Caden starts an argument with Pat about whether the "new Browns" are the real deal or whether next year will be the same old Browns. Caden can't choose a position, then begins to get depressed.

1:30 a.m. – Kevin announces that it's time to take Caden back to their room. Caden leads the way. In the hallway, he puts his right palm against the wall as he walks. James texts Caden: "Drink water and take aspirin, dude." James explains that he sent this because he feared Caden would be very sick the next morning. Caden responds, "no rsswyf"

1:45 a.m. – Kevin undresses Caden so that he can go to bed. The two begin kissing. Kevin says that Caden initiated the kiss; Caden does not believe he did so. The two have sex. Caden has limited memory of the encounter.

What facts suggest Caden was incapacitated? What facts suggest Caden was capable of consenting? What additional context would you like to know?

Coercion Hypotheticals

Hypothetical No. 1: Complainant has reported that the Respondent has naked pictures of the Complainant and threatened to post them publicly if Complainant refuses to engage in sexual intercourse with Complainant.

Is this coercion? __ Yes __ No __ Need more information?

Hypothetical No. 2: Complainant and the Respondent have been in a relationship for the past semester. Respondent tells Complainant that if Complainant loves Respondent, Complaint would have sex with Respondent. Complainant reports feeling pressure to have sex or lose the relationship. Complainant decided to have sex although Complaint is reluctant to do so.

Is this coercion? __ Yes __ No __ Need more information?

Hypothetical No. 3: Complaint and the Respondent have been in a relationship for nearly two years. Respondent has been experiencing serious mental health issues and has recently attempted suicide after Complainant stated that their relationship was over. After Respondent attempted suicide, they reconciled. Complaint reported that Respondent threatened to commit suicide if Complainant did not engage in sexual contact with Respondent.

Is this coercion? __ Yes __ No __ Need more information?

Hypothetical No. 4: Complaint and the Respondent met at a party. They have both been drinking and they return to Respondent's apartment. When they arrived they went to Respondent's small bedroom in the apartment. They hook up briefly and Complainant decides to leave the room. Respondent blocks the door to the room and tells Complainant that Complainant needs to kiss Respondent before Complainant can leave.

Is this coercion? __ Yes __ No __ Need more information?

Definition #1:

Coercion is compelling another individual to participate in sexual activity in a manner that makes the participation involuntary. Consent for sexual activity must be clear, knowing, and voluntary. The reasonable person standard is used to establish whether participation was voluntary. Coercion contains a wide range of behaviors which override the voluntary nature of participation. Such acts include, but are not limited to, threatening to disclose personal sexual information, or threatening to harm oneself if the other party does not engage in the sexual activity. Coercing an individual into engaging in sexual activity violates this policy in the same way as physically forcing someone into engaging in sexual activity. Consent cannot be obtained by coercion.

Definition #2:

An individual cannot consent who has been coerced, including being compelled by force, threat of force, or deception; who is unaware that the act is being committed; or who is coerced by a supervisory or disciplinary authority.

Force: violence, compulsion, or constraint; physically exerted by any means upon or against a person.

Coercion: the application of pressure by the respondent that unreasonably interferes with the complainant's ability to exercise free will. Factors to be considered include, but are not limited to, the intensity and duration of the conduct.

Stalking Hypotheticals

When does the behavior cross into stalking under your policy (if it does at all)? Each scenario is cumulative. You may assume that substantial emotional distress occurs where you believe a reasonable person would feel substantial emotional distress.

Scenario #1 – Student on Student

1. On the first day of class, Jamie sits next to Alex. Jamie smiles at Alex, but says nothing.
2. On the second day of class, Jamie sits next to Alex.
3. After that day's class, Alex sees Jamie in the student union grabbing lunch. Jamie sits at the table immediately behind Alex and eats lunch alone.
4. Every day at lunch from then on, Jamie sits at the table behind Alex in the Union, grabbing lunch. They never speak.
5. Jamie "friends" Alex on Facebook. Alex accepts.
6. Jamie "likes" a few old pictures that Alex has on Facebook.
7. Jamie begins "liking" every picture that Alex posts on Facebook.
8. Jamie begins commenting on every picture that Alex posts on Facebook.
9. Jamie tags Alex on Facebook and says, "See you in class."

Scenario #2 – Student on Faculty

1. Professor hands back an assignment. Student got a D.
2. Student emails Professor to argue about their grade.
3. Student comes to office hours to argue about their grade.
4. Student stays after class to argue about their grade.
5. Professor tells student that the grade stands, that the conversation is over, and that the Professor needs to leave.
6. Student follows Professor out of the classroom, still arguing about their grade.
7. Another professor steps into the hallway and stands between Student and Professor.
8. The other professor takes Student into an office, listens for a few moments, and tells the Student to stop harassing the Professor and let it go. (Professor makes a quick getaway.)
9. Students shows up at office hours the next day to argue about their grade.

Scenario #3 – Student on Student

1. Jen breaks up with Ben after two years. Jen would describe the relationship as "abusive."
2. The next day, Ben shows up outside Jen's class to talk. Jen declines.
3. As Jen walks across campus, Ben follows her.
4. Ben begins crying hysterically and pleading with her as she walks away.
5. Ben gets on his knees and follows her, begging her to come back to him.
6. When Jen gets to her next class, Ben sits outside the door and waits for her.
7. After class is over, Jen tells Ben to go away, and Ben leaves.
8. In Jen's third class, Ben keeps walking back and forth past the classroom windows wearing a thick wool sweater that Jen hand-knitted for him. It's eighty degrees outside.
9. Jen texts Ben to go away. Ben texts her back that he intends to "follow [Jen] to the ends of the earth" until she takes him back.

Intimate Partner Violence Scenarios

Would the following behaviors constitute IPV under your policy? Why or why not?
A is the reporting party and B is the responding party. They are dating.

- B slaps A.
- B threatens to hurt A's dog if A breaks up with B.
- B threatens to tell A's parents that A is gay.
- B threatens suicide if A moves out.
- B constantly puts A down, calls A names, and tells A that A is "horrible."
- B berates A for texting friends and staying late at the library, saying that A "must be cheating."
- B tells A that A is "immoral" and "ungodly."

Remember to challenge your assumptions when working IPV cases:

- A person may stay in abusive situations for much longer than an objective outsider might assume is appropriate.
- A person may return to their abuser many times before they leave for good.
- The motives a person may have for staying with their abuser may not "make sense" to someone outside the relationship.
- One person who experiences abuse may respond differently than another person who experiences similar abuse.
- On the other hand, counterintuitive response could also be a sign that the person is not accurately relating the facts. Don't assume that a counterintuitive response automatically indicates that the person is or is not a victim of IPV. Either way, as an investigator, you have more digging to do – but don't stop digging because you have made an up-front assumption one way or the other.

IPV Scenario – Credibility Assessment Exercise

Credibility is determined based on the "totality of the circumstances." Factors to consider in determining credibility include:

- Statements by witnesses to the incident.
- The detail and consistency of each person's account.
- Corroborating evidence, such as medical records, key card records, surveillance video.
- The lack of corroborating evidence, if such evidence should logically exist.
- Information about how the reporting person acted following the incident – immediately and over time.
- Information about whether the reporting person reported the incident or told others soon after the incident occurred.
- Other contemporaneous evidence –social media posts, text messages, etc. – that tend to support a person's version of the incident.
- Credible reports of similar incidents by the responding person (Be cautious here!).
- Whether the reporting person has been shown to make false reports (Again, exercise caution here).

Charlie and Jesse

Charlie and Jesse dated during fall semester of this year. The alleged incident reportedly occurred on December 13th. Both parties agree that they later broke up on Christmas Day.

Charlie's story

It was late at night, and it was very cold. Jesse and I had gone on a long walk through town to talk about our relationship, but I had an exam the next morning so we got back in the car to drive back to campus. I was in the passenger seat of Jesse's car, and Jesse was driving. When we got to my residence hall, Jesse parked and we continued talking for a while. I told Jesse that I wasn't happy and thought it might be time to break up. Jesse got mad and started yelling that I was "self-absorbed," and that when Jesse expressed concerns about the relationship, I would ignore or blame Jesse for everything. I told Jesse that I wasn't going to be yelled at and that I thought it was time to go inside. Jesse grabbed my left arm forcefully and told me that I "can't get away that easily." I tried to wrench my arm free. Then Jesse slapped me across the face. I screamed, and Jesse let go. I ran out of the door up to my room, locked the door, and stayed in for the rest of the night. I didn't talk to anyone that night and ate my way through a box of chocolates I had in my room. The next morning before my exam, Jesse snapped me, "I love you. I am so sorry. Let's talk." I had a deep bruise on my left forearm that didn't go away for two weeks. I wish I had taken pictures.

Jesse's story

Yeah, I remember that night, but that's not how it happened. Charlie and I drove into town for dinner. Charlie had a glass of wine; I didn't drink because I was driving. After dinner, we walked down to a little park and talked. It was freezing. Charlie spent a lot of time telling me

how I never listened and was always late. When I tried to respond, Charlie started playing with a phone. I got mad because Charlie was accusing me of not listening, but now Charlie wasn't listening. I told Charlie it was time to head back to the car, and we didn't talk most of the way back. Once we got to the residence hall, I wasn't in the mood to talk anymore so I pulled up outside the door and said "Good night." Charlie said, "Figures you don't want to talk. You don't want to hear anything bad about yourself. Why do I keep dating you? I think it's time for me to leave." Then I felt guilty for brushing Charlie off, so I said, "Oh, don't be like that. Let's talk after your exam," and leaned over to kiss Charlie good night. Charlie leaned away from me so I missed the kiss, then got out of the car. Later I snapped Charlie, "I love you. I'm sorry. Let's talk tomorrow." The next day, I was waiting for Charlie outside the exam room and we talked it through. There's no way I bruised Charlie's arm. If I touched Charlie's arm, it was just to get my balance when I leaned over for the kiss.

Whitney's story

Charlie lives next door to me, and we have bio together. Charlie came home around midnight the night before our exam in a huff. Charlie had borrowed my winter coat for a date and stopped by to drop it off. I asked Charlie what was wrong. Charlie told me about an argument with Jesse and said that the relationship was getting to be too much. I told Charlie to get some sleep for the exam tomorrow, and Charlie left, talking about wanting to gorge on chocolate and go to bed. The next day, Jesse was waiting for Charlie outside the exam room. I never saw any bruises on Charlie's arm. I left for home a few days later.

Other information

- Security footage shows the car pulling up to the residence hall at 11:44 p.m. and Charlie exiting approximately one minute later. The camera can't see the inside of the car.
- Card swipes show Charlie entered the residence hall at 11:45 p.m., then again at 12:08 a.m. through a different door; security footage could not be obtained for the later swipe.

Questions for discussion:

- Do you believe that Jesse grabbed Charlie's arm? Why or why not?
- Do you believe that Jesse bruised Charlie's arm? Why or why not?
- Did Jesse violate the policy regarding IPV? Why or why not?

Editing Samples

Brief Samples for Editing:

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. Complainant stated that Respondent jacked himself off, then gave him a blow job.

4. Respondent visibly winced when Complainant said "no."

5. John stated that Alice told him to "knock it off."

6. On a scale of 1 to 10, the witness described the Respondent as being a "level 4 kind of drunk."

7. There was no evidence to support Complainant's assertion that the activity was without consent.

8. During the mediation, Respondent admitted to the misconduct and promised not to do it again.

9. 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.

10. Respondent stated that Complainant was diagnosed with bipolar disorder and that the complaint was "all in his head."

11. When Respondent asked if Complainant wanted oral sex and Complainant said, "That's OK," that was indication of the Complainant's consent.

Sample 1:

The investigators interviewed the following witnesses:

- Rod Stewart;
- Paul McCartney;
- John Lennon;
- Ringo Starr;
- John Denver;
- Kermit the Frog; and
- Fozzie Bear.

The respondents' witnesses (Gonzo, Ms. Piggy, Ralph, and the Chicken) were not interviewed.

Comments

Sample 2:

When reviewing Alice's credibilities when compared to John's, we find that Alice is more credible than John. Therefore, we must adopt Alice's factual allegations as true and discount John's for the sake of analyzing whether or not a policy violation was committed.

Comments

Sample 3:

Complainant went to a party that night. When he arrived, he had a cup of beer, quickly followed by a glass of wine. Later in the evening, he had another glass of beer and a shot of whiskey. Before he left the party, Complainant had another shot of whiskey. By the time that Complainant arrived back at his residence hall, he was incapacitated and could not hold a conversation.

Comments

Sample 4:

Walt described the complainant as being "wasted." When asked to describe what "wasted" means, Walt stated that the complainant was drunk, and that he had seen her consume three or four drinks.

Comments

Sample 5:

Respondent explained that he is significantly taller than Complainant. When they laid down together and were kissing, his penis was above her belly button. There was no way that he could have penetrated her while kissing her, as she alleged.

Comments

Sample 6:

Findings of Fact: Complainant states that Respondent was engaging in non-consensual sexual activity, including intercourse, in the early morning hours of September 1st.

Comments

Sample 7:

The panel concludes that there was insufficient evidence to demonstrate that Complainant had not consented to the sexual activity. Therefore, no policy violation occurred with respect to the non-consensual sexual intercourse charge against Respondent. However, Respondent admits that he voluntarily had sex with Complainant in the back office of the library while they were on duty, which is prohibited. Therefore, Respondent is terminated from his employment effective immediately.

Comments

Decision Matrix

Question 1: Did the complainant and respondent engage in sexual activity? ____ Yes ____ No
(If no, respondent is not responsible for violation. Proceed no further.)

What facts support that sexual activity occurred?

What facts support that sexual activity did not occur?

What facts (if any) are disputed that are relevant, and how do you resolve each?

Question 2: Was the complainant capable of giving consent to the activity? ____ Yes ____ No
(If no, respondent is responsible for violation.)

Consider: age of complainant, cognitive capability of complainant, sleep, incapacitation, medical condition, force, coercion

What facts support the complainant's capability to consent?

What facts support the complainant's incapability to consent?

What facts (if any) are disputed that are relevant, and how do you resolve each?

If you found that the complainant was incapacitated, did the respondent know or should the respondent have known that the complainant was incapacitated such that the respondent is responsible for a policy violation?

Question 3: Did the complainant give consent to each sexual activity? ___ Yes ___ No
(If no, respondent is responsible.)

What facts support this determination?

What facts (if any) do not support this determination?

What facts (if any) are disputed that are relevant, and how do you resolve each?

Was consent, if given, withdrawn at any time? If so, when?

Is the Respondent responsible for Non-Consensual Sexual Intercourse?

___ Yes ___ No

For the sake of argument, how would you argue that the opposite is true?

Informal Resolution Review
August 3, 2022
Ohio Five Conference

Bricker&Eckler ATTORNEYS AT LAW

Disclaimer and Presentations Rules

- We are not giving you legal advice.
- Consult with competent legal counsel regarding how best to address a specific situation.
- Use chat function to ask general questions and hypotheticals.
- Questions are encouraged!
- "For the sake of argument…"

2

Quick Polls

1. Has your institution successfully conducted an informal resolution since the new regulations went into effect?
2. Have you personally assisted with conducting an informal resolution since the new regulations went into effect?
3. Does your institution already have informal resolution procedures?

3

Trends

- Reports are steady…formal complaints are fewer.
- Informal resolution (IR) is desired, but formal complaint process is daunting.
- Resources dictate the players and the format of IR.

4

Agenda

- Informal Resolution - What the Regulations and Preamble Say (not much)
- Informal Resolution and Title VII
- Structuring Your Program
- Ohio Five collaboration

5

Yes, you may post these slides

- Your Title IX Coordinator is required by 34 C.F.R. 106.45(b)(10)(i)(D) to post on your website the materials used to train Title IX personnel.
- All of the guidance documents and regulations referred to in this presentation can be found at www.bricker.com/titleix.

6

Informal Resolution and Title IX (and some Title VII)

Why Offer It?

- Parties may be more satisfied with an outcome they can control themselves
- Parties can tailor solutions to their needs
- May reach a resolution more quickly
- Less adversarial than the investigation/adjudication process in the regulations (per Preamble at 30098 FN 463)

8

Informal Resolution – 2001 Guidance

- Discussed an avenue for "informal action" with both parties' agreement
- "Not appropriate for a student who is complaining of harassment to be required to work out the problem directly with the individual alleged to be harassing him or her, and certainly not without appropriate involvement by the school (e.g., participation by a counselor, trained mediator, or, if appropriate, a teacher or administrator)."

9

2001 Guidance (continued)

- Complainant [but not Respondent?] must be notified of the right to end the process at any time.
- "In some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary bases."
- Footnote 109: Not required to have a procedure for resolving informal complaints, but you must address them, especially where there is evidence of more potential complainants.

10

Informal Resolution – 2017 Q&A

- Parties may agree to participate "after receiving a full disclosure of the allegations and their options for formal resolution"
- School can determine whether the particular complaint is appropriate for such a process

11

Key Regulation: 106.45(b)(9)

- Can/will you offer informal resolution?
- What boundaries apply to who can participate?
- What notice must be provided to the parties?
- What is required in terms of consent?

Will You Offer Informal Resolution?

- Can **not** offer it in cases involving allegations of an employee sexually harassing a student
- Otherwise, you "may" offer it at any time prior to reaching a determination
- How do you decide when to offer it and when not to offer?
  - Consider memorializing some factors to consider in your policy or procedures.

Can't Require Informal Resolution

- Can **not** require parties to participate in informal resolution
- Can **not** require students or employees to **waive their right** to investigation and adjudication of a formal complaint as a condition of becoming or continuing as a student or employee.
- Can **not offer** informal resolution until there is a formal complaint

Written Notice to the Parties

- Must include:
  - Allegations
  - Requirements of the informal resolution process (precludes formal complaint from same allegations)
  - Party may withdraw from process at any time prior to resolution
  - Consequences of participation, including what records will be maintained/shared

Consent

- Must obtain the parties' **voluntary written consent** to initiate informal complaint process
- Regulations do not require use of a particular form for this consent
- Consent can be provided electronically if your institution chooses to accept electronic consent

Training Requirements

- Must train facilitators of informal resolution in:
  - Definition of sexual harassment in the regulations
  - Scope of your education program or activity
  - How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable
  - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias

See 34 C.F.R. 106.45(b)(1)(iii).

Title VII Generally

- 29 C.F.R. 1604.11 defines sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" where:
  - "Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;
  - "Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
  - "Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."

Required Response?

- Once your institution is "on notice" of sexual harassment, it must investigate and correct the sexual harassment (see EEOC Guidance N-915-050, March 19, 1990)
- But what about informal resolution? Does that count as addressing the harassment?

Structuring Your Program

Consider your options

- Title IX team members not otherwise assigned to the case
- Ombudsperson
- Human Resources staff with conflict resolution training
- Residence Life professionals
- Student Affairs professionals
- Legal clinic/law professors
- Local alumni lawyers (pro bono project?)

Types of Informal Resolution

- Shuttle diplomacy*
- Mediation (!!!)
- Restorative justice (!)
- Other conflict resolution procedures available on your campus

Mediation

- Specifically listed in the Preamble, but not defined.
- "Mediation" may have a specific legal meaning in your jurisdiction that invokes certain requirements
  - May require specific training for mediators in your jurisdiction (e.g. lawyer, certification)
- Typically involves a third-party facilitating the resolution of a dispute between the parties

State Laws

- Uniform Mediation Act (Ohio – R.C. 2710.01-2710.10)
  - Defines "Mediation" as "any process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute."
  - Defines "Mediator" as an "individual who conducts a mediation."
  - QUALIFICATIONS? (No conflicts of interest; disclosure of same; disclose qualifications upon request)
  - You may be mediating if:
    - you agree that mediation communications are privileged; or
    - the parties use someone who calls themselves a "mediator"

State Laws (continued)

- What statutory protections are there for mediation?
- Mediation Communications are protected as Privileged (with Exceptions: child abuse, felony reporting, etc.)
- Parties can be accompanied by an attorney (even if waived by the parties in an agreement)
- Consider Advisor of Choice VAWA requirements…
- NOTE: THE PARTIES CAN AGREE IN WRITING TO WAIVE SOME OF THESE PROTECTIONS

Your Current Program?

- Does it require one or both parties to admit responsibility?
- Does it allow the full range of options that informal resolution under Title IX contemplates (sanctions, supportive measures, restrictions on access)?

Where Does The Process Live?

- No requirement as to "who" does it
- Title IX Coordinator must maintain records for 7 years
- Need to have good connectivity with Title IX Office

Other Considerations

- Can the Ohio Five members join together to pool resources (shared IR facilitators, harmonize policies and forms)?
  - What are the concerns here?
- Pressures on “slash” job positions and the blending of roles

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Bricker&Eckler
ATTORNEYS AT LAW

Proposed Title IX Regulations and Implications for Higher Education

Bricker&Eckler ATTORNEYS AT LAW

Disclaimer

- We are not giving you legal advice. Consult with your legal counsel regarding how best to address a specific situation.
- Use chat function to ask general questions and hypotheticals.
- We cannot possibly cover every detail, but we're trying to focus on what we believe are the biggest changes.

2

Agenda

- Big Picture
- Details:
  - *Bostock* protections
  - Athletics?
  - Sex Discrimination vs. Sex-Based Harassment
  - Pregnancy/Parenting
  - Off-Campus Conduct
- Title IX Coordinator Duties/Training Requirements
- Supportive Measures
- Emergency Removal
- Informal resolution
- Two new grievance procedures
- Retaliation

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Big Picture Thoughts

As in: remember these rules aren't effective yet.

Basics

- 701 page PDF – unofficial version
- Official version will likely be much shorter because of the formatting used in the Federal Register
- Start reading on page 650 where the proposed regulations start
- Go back and read the commentary for additional details on the thought process

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What We Look For

- Clarity
- Consistency
- Fair Treatment
- Flexibility (to an extent?)
- Does the commentary offer any guidance on how to implement the current regulations right now?

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Things to Know

- Likely to be published in the register in another week
- Once published, likely a 60 day comment period is triggered
  - All comments are PUBLIC, so do not include confidential information
- Will likely take at least 18 months before we see final regulations
- All references would be to 34 C.F.R. 106.xx of the regulations

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Definitional Shifts

Expansions of coverage

***Bostock* Protections**

- Title IX prohibits discrimination "on the basis of sex"
- "Discrimination on the basis of sex" would include "discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity."
  - See newly proposed 106.10, page 666.
- Policy that prevent a person from participating in an education program/activity consistent with the person's gender identity "subjects a person to more than de minimis harm on the basis of sex" – see 106.31(a)(2).
- Religious exemptions still apply.

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Athletics Implications §106.41

- Relevant to definition of sex discrimination, which now includes sexual orientation, gender identity, and sex characteristics
  - NPRM: Prohibits schools from separating or treating any person differently based on sex in a manner that subjects that person to more than minimal harm (unless otherwise permitted by Title IX).
  - The Department recognizes that exclusion from a particular male or female athletics team may cause some students more than de minimis harm, and yet that possibility is allowed under current § 106.41(b).
- Where we currently stand in athletics
- Where we are going in athletics →
- Why separate rule-making

"The Department will engage in **separate rule-making** to address Title IX's application to the context of athletics and, in particular, what criteria recipients may be permitted to use to **establish students' eligibility to participate on a particular male or female athletic team**." (p. 542-54)

Sex Discrimination and Sex-Based Harassment (1 of 2)

- prohibit **all forms of sex discrimination**, including discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity. (Proposed § 106.10)
- Quid pro quo sex-based harassment
- Sexual misconduct, domestic violence, dating violence, stalking
- Hostile environment

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Sex Discrimination and Sex-Based Harassment (2 of 2)

Compare Proposed and Current Definitions of Hostile Environment

Current: "so severe, pervasive, **and** objectively offensive that it effectively **denies** a person **equal access** to the recipient's education program or activity." (Current § 106.30)

Proposed: "unwelcome sex-based conduct that is **sufficiently severe or pervasive** that, based on the totality of the circumstances and evaluated subjectively and objectively, it **denies or limits** a person's **ability to participate in or benefit from** the recipient's education program or activity." (Proposed § 106.2)

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VAWA Amendments

- Domestic Violence definition still includes "crimes of violence"
  - Commentary says that you do not need to use the portion of the definition that applies to victim services

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Non-Discrimination on the Basis of Parental, Family, or Pregnancy/Related Conditions (1/2)

1. Expanded Non-Discrimination prohibition (34 C.F.R §§ 106.40 (a) and (b));
2. Added definitions of Family Status and Pregnancy or Related Conditions (34 C.F.R § 106.2);
3. Imposed an obligation to provide information (34 C.F.R § 106.40(b)(2)); and
4. Imposed obligations to take action to prevent sex-discrimination on the basis of Parental, Family or Pregnancy and Related Conditions once Title IX Coordinator is aware of Pregnancy or Related Condition (34 C.F.R § 106.40(b)(3)).

Note: 34 C.F.R § 106.57 addresses a recipient's obligations regarding the parental, family, or marital status and pregnancy or related conditions of employees.

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Non-Discrimination on the Basis of Parental, Family, or Pregnancy/Related Conditions (2/2)

Current Rule – 106.40

(a) *Status generally.* A recipient shall not **apply any rule** concerning a student's **actual or potential parental, family, or marital status** which treats students differently on the basis of sex.

(b) *Pregnancy and related conditions.*

- (1) A recipient **shall not discriminate** against any student, or exclude any student from its education **program or activity**, including any class or extracurricular activity, on the basis of such student's **pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom**

Proposed Rule – 106.40

(a) Status generally. A recipient must not adopt or apply any policy, practice, or procedure concerning a student's current, potential, or past parental, family, or marital status that treats students differently on the basis of sex.

(b) Pregnancy or related conditions.
(1) Nondiscrimination. A recipient must not discriminate in its education program or activity against any student based on the student's current, potential, or past pregnancy or related conditions . . .

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Definitions: 106.2

Parental Status

1. A biological parent;
2. An adoptive parent;
3. A foster parent;
4. A stepparent;
5. A legal custodian or guardian;
6. In loco parentis with respect to such a person; or
7. Actively seeking legal custody, guardianship, visitation, or adoption of such a person

Pregnancy or Related Conditions

1) Pregnancy, childbirth, termination of pregnancy, or lactation;
2) Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation; or
3) Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or their related medical conditions.

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Provide Information: 106.40(b)(2)

"A recipient must ensure that when any **employee** is informed of a student's pregnancy or related conditions by the student or a person who has a legal right to act on behalf of the student**, the employee promptly informs that person of how the person may notify the Title IX Coordinator of the student's pregnancy or related conditions for assistance** and **provides contact information for the Title IX Coordinator**, unless the employee reasonably believes the Title IX Coordinator has already been notified."

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Take Action: 106.40(b)(3)

Once the Title IX Coordinator is informed of a student's pregnancy or related condition, the Title IX Coordinator must provide the student with and inform the student of the recipient's obligations to:

- Provide the student with reasonable modifications;
- Allow voluntary access to a separate but comparable portion of the recipient's educational program or activity;
- Allow a voluntary leave of absence;
- Ensure lactation space is available; and
- Maintain grievance procedures for the resolution of sex discrimination.

Record Keeping: A recipient must keep "all records documenting the actions the recipient took to meet its obligations under §§ 106.40 and 106.57" for a period of seven years. 34 C.F.R § 106.8(f)(4).

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Dobbs v. Jackson Women's Health Organization

- How will your campus respond to potential increasing numbers of pregnant or parenting students?
- Start reviewing your policies and practices to ensure your College or University is compliant with the current regulations; and
- Review the 2013 Pamphlet on Supporting the Academic Success of Pregnant and Parenting Students for additional guidance on your obligations.

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Off Campus Conduct

Yep, they go there.

Two Types of Off-Campus Conduct

- **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.
- **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?

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Title IX Coordinators

More responsibility. More team training.

Coordinator Duties

Expanded requirements specific to the Title IX Coordinator in section 106.44 (Note: Express permission to delegate at 106.8(a)(2))

- Equitable treatment of complainant and respondent - (f)(1)
- Notification of parties re grievance and informal resolution procedures when complaint made - (f)(2)
- Offer and coordinate supportive measures - (f)(3)
- Initiate grievance procedures/informal resolution - (f)(4)
- Determine whether to initiate a complaint process to address conduct that may constitute sex discrimination - (f)(5)
- "Take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur…" - (f)(6)

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Training Requirements (1 of 2)

Expanded to encompass all employees, even those outside of grievance process 106.8

All employees – (g)(1)

- When to notify Title IX Coordinator of potential sex discrimination
- How students can report sex discrimination for (1) confidential assistance, and (2) to initiate grievance procedures

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Training Requirements (2 of 2)

Investigators, decisionmakers, others responsible for grievance procedures or who have authority to modify or terminate supportive measures – (g)(2)

- Response obligations, grievance procedures, impartial service, meaning of term "relevant"

Facilitators of informal resolution – (g)(3)

- Rules associated with informal resolution process, impartial service

Title IX Coordinator and designees – (g)(4)

- All training for others in process, recordkeeping system and recordkeeping requirements, any other necessary training

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Mandatory Reporting "Lite" – 106.44(c)

Who	Duty if Student Complainant	Duty if Employee Complainant
Confidential Employees	Not discussed (state law)	Not discussed (state law)
Administrator, Teaching, Advising	Report to Coordinator	Report to Coordinator or Provide Notice of How to Report
All Other Employees	Report to Coordinator or Provide Notice of How to Report	Report to Coordinator or Provide Notice of How to Report
Student Employees	Fact-Specific Inquiry	Fact-Specific Inquiry
Employee is Complainant	No Requirement	No Requirement

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Supportive Measures

Not as equitable?

Supportive Measures (1 of 2)

- Retaining current definion:non-disciplinary, non-punitive, individualized measures, offered as appropriate, as reasonably available, without unreasonably burdening a party, and without fee or charge to the complainant or respondent, with some clarifying amendments.
- Make available ways access to supportive measures without complaint to restore of preserve access to education program.
- Offered to both Complainant and Respondent.
- Range of supportive measures and Title IX Coordinator's obligation to offer and coordinate supportive measures. (Proposed § 106.44(g)(6))
- Supportive measures may include, for example, counseling, extension of deadlines, restrictions on contact between the parties, and voluntary or involuntary changes in class, work, or housing. (Proposed § 106.44(g))

Supportive Measures (2 of 2)

- Supportive measures should be outlined for grievance process and informal resolution process. (Proposed § 106.45(k))
- Confidentiality and sharing of supportive measures. (Proposed 106.44(g)(5))
- Supportive measures can now burden respondent during pendency of a grievance procedures.

* Measures should be non-punitive and for non-disciplinary reasons. (restrictions on contact)

* Respondent provided the opportunity (prior to or asap) to seek modification or reversal of issued measures. (Proposed 106.44(g)(4))

Emergency Removals - Current

Current:

Institution may remove a respondent from its program or activity on an emergency basis after conducting an individualized health and risk analysis and determining that respondent poses an immediate threat to physical health or safety

Respondent is entitled to notice and immediate opportunity to challenge removal

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Emergency Removals - Proposed

Proposed:

Expanded authority for emergency removal when the threats are to physical and non-physical health.

Threat must be serious

Emergency removal is available to address threats arising from all forms of alleged sex discrimination, not just sex-based harassment

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Informal Resolutions

More opportunities to get together?

Informal Resolutions (IRs)

- Current:
  - An option for parties to address complaints, except those involving a student complainant and employee respondent
  - Required notices to parties
  - 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
  - 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

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IR – Proposed Rule

- 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
- 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

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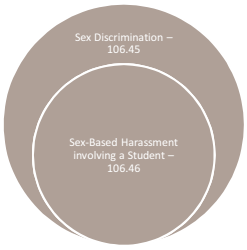
New Grievance Procedures

106.45 – Sex Discrimination

106.46 – Sex-Based Harassment involving a Student

Which applies?



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~~"Formal Complaints"~~

- No more "formal complaints" – can be oral or written
- Complaint can be initiated by:
  - Complainant
  - Parent/guardian/guardian ad litem
  - 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

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Single Investigator Model is Back

- Decision-maker may now be the Coordinator or the Investigator
- Remember: this may not apply to you, depending on court decisions in your jurisdiction
- Question: How might your campus community respond to a shift away from a hearing?

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~~Mandatory Dismissal~~

- No more mandatory dismissal text
- Discretionary dismissal available:
  - Unable to identify the respondent
  - Respondent is not participating in educational program/activity and is not employed by institution
  - Complainant voluntarily withdraws
  - Doesn't constitute sex discrimination

Must have appeal for dismissal

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Other Changes

- No more 10/10 day reviews
- Can provide evidence OR summary for review
- Both parties get opportunity to provide FACT witnesses
- Must have a process to evaluate credibility (flexibility!)
- Preponderance standard unless you use clear and convincing standard in **all other comparable proceedings**

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Sex-Based Harassment Grievance Procedure (§106.46)

2020 Final Rule	2022 NPRM
Applies to Title IX Sexual Harassment that occurs against any person in the U.S.	Applies to Sex-Based Harassment complaints* involving student complainants or student respondents at postsecondary schools
No Single Investigator Model	Permits Single Investigator Model
Hearing Required for Title IX Sexual Harassment	Hearing OPTIONAL for Title IX Sexual Harassment • BUT requires mandatory process for assessing credibility
Advisor-conducted questions at live hearing	Advisor-conducted questions at live hearing
Relevance determinations by decision-maker	Relevance determinations by decision-maker
Emphasis of relevance, but no definition	Relevance definition
Exclusion of certain evidence (rape shield, treatment records, privileged communications)	Exclusion of certain evidence (rape shield, treatment records, privileged communications)
Simultaneous written determination to the parties	Simultaneous written determination to the parties (required components reorganized)
Opportunity to Appeal on a minimum of 3 grounds	Opportunity to Appeal on a minimum of 3 grounds

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New Prohibition on Party Statements (1 of 3)

- Acknowledges *VRLC v. Cardona,* but…
- Proposed 106.46(f)(4) states:

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

Unofficial, p. 695

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New Prohibition on Party Statements (2 of 3)

- Rationale: "The Department is concerned, however, that placing no limitations on the decisionmaker's ability to consider statements made by a party who does not submit to a credibility assessment could lead to manipulation by the parties." (Unofficial, p. 436)
  - Examples: email or voicemail to a friend that supports a party's factual account
  - Concerns about considering email or voicemail "for their truth"

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New Prohibition on Party Statements (3 of 3)

- So… what is a question "related to [a party's] credibility"?
  - Questions about other purported victims, if the complainant has alleged there are others?
  - Questions about cheating on a test freshman year?
  - Questions about drug use at the time of the incident?
- And… what is a "statement of that party that supports that party's position"?
  - Emails, voicemails, text messages?
  - Statements against interest?

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Note: Revised Guidance

- June 28, 2022 – ED revised its July 2021 Q&A to remove exclusionary rule – EFFECTIVE NOW
- "To the extent that statements made by a party or witness who does not submit to cross-examination at a live hearing satisfy the regulation's relevance rules, they must be considered in any postsecondary school's Title IX grievance process that is initiated after July 28, 2021."
- You can find the guidance at www.bricker.com/titleix

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Retaliation

New: Peer Retaliation, Defined.

Retaliation – 106.2

- "**Intimidation, threats, coercion, or discrimination** against any person by a student, employee, person authorized by the recipient to provide aid, benefit, or service under the recipient's education program or activity, or recipient for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the person has reported information, made a complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part…"

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Peer Retaliation – 106.2

- "Retaliation by a student against another student."

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Melissa M. Carleton

Partner & Higher Education Chair

Melissa Carleton advises higher education entities in a variety of areas, including student affairs, student conduct, disability accommodations, student confidentiality, policies, contracts, governance, accreditation, and employment matters. Melissa takes a practical and proactive approach to legal issues. She particularly enjoys working on collaborative matters between educational entities.

Melissa has a great deal of experience in guiding the institutional response to allegations of sexual abuse. She regularly works with colleges, universities, career-technical schools, K-12 school districts, and private elementary and secondary schools to comply with Title IX and, where applicable, the Clery Act, as well as implementing guidance and regulations. Melissa is available to conduct impartial investigations, as well as to provide reviews of policies, procedures, and case files from a neutral perspective. Melissa trains administrators, staff members, and other investigators using real-world examples to help learn how to navigate the trickiest situations with regard to sexual misconduct. More information on Title IX training can be found in our Title IX Resource Center.

Melissa also works with religious entities to address allegations of sexual abuse in a manner that is respectful of the parties and their privacy, is transparent and fair, and is attentive to religious beliefs and the safety needs of the community.

Bar Admissions & Activities

- Admitted, State of Ohio, 2009
- Admitted, State of Florida, 2021
- Participant, Columbus Bar Association Barrister Leadership Program, 2012
- Member, Columbus Bar Association

Education

- University of Pennsylvania (J.D., 2009), James Wilson Scholar; Associate Editor, *Journal of Constitutional Law*
- The Ohio State University (Bachelor of Music Education, *magna cum laude*, 2002), School of Music Undergraduate Outstanding Achievement Award

Awards & Recognition

- Rising Star, *Ohio Super Lawyers* (Schools & Education), 2018–2021

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Education (Pre-K to 12)

Melissa Carleton is a top-notch attorney. Her knowledge of the law is vast and deep. Melissa responds to all of my questions swiftly and thoroughly, which is not an easy task. I value her opinion and trust her implicitly.

Samantha Hughes, Kenyon College, as quoted in Best Law Firms, 2018

Melissa M. Carleton

Partner & Higher Education Chair

Presentations & Published Works

- Adjunct Professor, "Title IX and Issues Unique to K-12 Institutions", Tulane Law School Title IX Certificate Program, September 2020 to present.
- Co-Presenter, "Title IX Takes Up Residency: Addressing Sexual Misconduct Under the New Regulations," Ohio Hospital Association Annual Meeting, June 2021
- Op-Ed, "The Education Department's New Clery Act Guide Raises New Questions", Higher Ed Dive, November 2020
- Panelist, "IX on IX", SUNY SPECTRUM Conference, August 2020
- Podcast Guest, "Episode 27: Implications of Title IX Regulations for K-12 and Higher Education with Melissa Carleton", The Law and Higher Ed Podcast, June 2020
- Author, "Confidentiality Throughout the Investigation, Hearing, and Disciplinary Process for Campus Adjudication of Sexual Misconduct." In C. Renzetti, & D. Follingstad (Eds.), Adjudicating Campus Sexual Misconduct and Assault: Controversies and Challenges. San Diego: Cognella., 2019
- Co-Presenter, COVID-19 and Higher Education Webinars, March-April 2020
- Co-Presenter, "Title IX Update: Planning for the Regulations Online Workshop," AICUO, April 2020
- Panelist, "Title IX: A View from the Trenches," Washington D.C. Bar Association, February 2020
- Co-Presenter, "Two-Day Title IX Investigator/Adjudicator Training," Bricker & Eckler LLP, January 2020
- Co-Presenter, "Advanced Title IX Investigator Training," Ohio Department of Higher Education, November 2019
- Co-Presenter, "Webinar: Title IX Litigation Update," September 2019
- Co-Presenter, "Two-Day Title IX Investigator, Adjudicator, and Hearing Panel Training," Indiana University, September 2019
- Co-Presenter, "Civil Rights Investigator/Adjudicator Training," Bricker & Eckler LLP, September 2019
- Co-Presenter, "Title IX Investigator/Adjudicator Training," Ohio Department of Higher Education, September 2019
- Co-Presenter, "Two-Day Title IX Conference: Investigator Training," Five Colleges of Ohio, June 2019
- Presenter, "Down the Rabbit Hole: Entering the World of Student Mental Health and Threat Assessment," National Association of College and University Attorneys, June 2019
- Presenter, "The Business Implications of Title IX," Ohio Association of College and University Business Officials Annual Meeting, April 2019
- Presenter, "Policies and Procedures regarding Sexual Abuse of Minors," Leadership Conference of Women Religious Region 6, March 2019
- Presenter, "Title IX Litigation Update," Legal Issues and Student Affairs Drive-In, Oberlin College, February 2019

- Presenter, "Webinar: Overview of Submitted Comments to the Proposed Title IX Regulations: Perspectives for Higher Education," February 2019
- Presenter, "Webinar: Changing Standards – Is Preponderance Right for Your Campus?" Ohio Department of Higher Education, February 2019
- Presenter, Civil Rights Coordination and Investigation Training for K-12 School Administrators, December 2018
- Presenter, "Webinar: Title IX Proposed Regulations – Hot Takes for K-12 Administrators," December 2018
- Presenter, "Webinar: Title IX Proposed Regulations – Hot Takes for Higher Ed," November 2018
- Presenter, "Webinar: Title IX & Due Process: Case Law Updates," Ohio Department of Higher Education, November 2018
- Presenter, Two-Day Title IX Investigator Training Workshop, Michigan State University, October 2018
- Presenter, Two-Day Title IX Investigator Training Workshop, The Ohio State University, October 2018
- Presenter, Civil Rights Coordination and Investigation Training for K-12 School Administrators, September 2018
- Presenter, Civil Rights Coordination and Investigation Training for K-12 School Administrators, Bowling Green City School District, August 2018
- Presenter, "The State of Civil Rights," Ohio Associate for Career and Technical Education, July 2018
- Presenter, Two-Day Title IX Investigator Training and Advanced Discussion Workshop, Five Colleges of Ohio, August 2018
- Presenter, Association for Student Conduct Administration Ohio Drive-In, Oberlin College, June 2018
- Presenter, Civil Rights Coordination and Investigation Training for K-12 School Administrators, June 2018
- Presenter, Two-Day Title IX Investigator Training Workshop, University of Findlay, May 2018
- Presenter, Student Handbook Bootcamp – Higher Ed, March 2018

Professional & Community Activities

- Member, National Association of College and University Attorneys
- Member, Ohio Association of College and University Business Officers

Experience

Secured a $42 million court award for three Ohio school districts

Secured $42 million judgment, plus interest, for Cleveland, Dayton and Toledo city school districts after the Ohio Department of Education unlawfully deprived the districts of the funding they were entitled to receive. For more details, please view Bricker's full recap of the case.

Title VII and Title IX settlement

Advised higher learning institution's leadership and a board chairperson regarding the investigation and ultimate resolution of Title VII and IX harassment and retaliation claims made against multiple board members. Negotiated a favorable settlement and withdrawal of the claims through mediation prior to litigation.

Title IX investigator training

Served as the sole presenter at training workshops for Title IX investigators at the college and K-12 levels, helping administrators to become trauma-informed and approach cases involving sexual assault and intimate partner violence in an appropriate and equitable manner.

College defense of Title IX case

Won motion for summary judgment on a claim brought by a student disciplinary respondent against a college in a case involving allegations of sexual assault.

Title IX policies and procedures

Prepared and revised Title IX policies and procedures to comply with changing guidance.

School district policies and handbooks

Revised student handbooks, athletic handbooks, extracurricular policies and drug testing policies for numerous school districts.

College Credit Plus agreements

Drafted College Credit Plus agreements on behalf of both school districts and colleges to establish advanced standing programs.

School district/hospital collaboration

Drafted a unique school district-hospital agreement to provide educational opportunities to high school students.

Special education due process hearing and suspension appeal

Negotiated a successful resolution in a special education due process request and suspension appeal relating to drug possession on school grounds.

School district defense related to sexual abuse

Successfully defended a school district on charges by a former student relating to sexual abuse by a former teacher.

Federal bullying litigation

Successfully represented a school district in federal court against claims of bullying, disability discrimination under ADA and Section 504, and sexual harassment under Title IX.

Misapplied school foundation funding

Obtained a favorable decision in a $40 million lawsuit filed on behalf of three large metropolitan school districts against the Ohio Department of Education claiming that ODE misapplied the statutory school foundation funding formula to the detriment of the school districts.

Jessica L. Galanos

Of Counsel

Jessica Galanos is a former university administrator and litigator with experience in the areas of student affairs, student conduct, regulatory compliance and employment law. She regularly advises higher education clients on a variety of legal issues, drawing from her own experience working at a large public university and defending universities as a litigator in both the private and public sectors.

Jessica works with colleges and universities to comply with Title VII, Title IX, the Clery Act, and various other federal and state regulations. She routinely conducts impartial investigations, reviews policies and procedures, and advises higher education clients on how to avoid and navigate complex litigation matters. Jessica also has experience training administrators, staff and attorneys on how to address sexual misconduct matters.

Prior to joining Bricker & Eckler, Jessica served as an Assistant Director and Deputy Title IX Coordinator for Illinois State University, as an Assistant Attorney General in the Office of Attorney General for the State of Illinois, and as the Legislative Assistant Inspector General for the Office of Executive Inspector General for the Agencies of the Illinois Governor. Jessica has also represented clients in a variety of litigation matters while working at a private law firm in Springfield, Illinois.

Bar Admissions & Activities

- Admitted, State of Ohio, 2020
- Admitted, United States District Court, Northern District of Illinois, 2018
- Admitted, United States Court of Appeals for the Seventh Circuit, 2016
- Admitted, United States District Court, Southern District of Illinois, 2011
- Admitted, State of Illinois, 2008
- Admitted, United States District Court, Central District of Illinois, 2008

Education

- Southern Illinois University School of Law, (J.D., *summa cum laude*), 2008
- Southern Illinois University – Carbondale, (B.S. in Paralegal Studies, *summa cum laude*), 2003

Awards & Recognition

- Emerging Lawyer, *Leading Lawyers*, 2017
- "Forty Under 40" honoree, *Springfield Business Journal*, 2016

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INDUSTRIES & PRACTICES

Colleges & Universities
Employment & Labor
Education Law

Jessica L. Galanos

Of Counsel

Presentations & Published Works

- Presenter and co-creator of Bricker & Eckler's "Level Two: Higher Education Title IX Decision-Maker Training," Summer 2020
- Presenter and co-creator of Bricker & Eckler's "Level Two: Higher Education Title IX Coordinator Training," Summer 2020
- Presenter and co-creator of Bricker & Eckler's "Level One: Higher Education Annual Clery Training and Introduction to Title IX Basics," Summer 2020
- Presenter, Bricker & Eckler's "Level Two: Title IX Informal Resolution Officer Training," Summer 2020
- Presenter, Bricker & Eckler's "Level Two: Title IX Appeals Officer Training," Summer 2020
- Presenter, Bricker & Eckler's "Level Two: Title IX Investigator Training," Summer 2020
- Presenter, "Higher Ed Webinar: Title IX Litigation Update," May 2020
- Presenter, Concussion Litigation Update, Legal Issues and Student Affairs Drive-In Conference, February 2020
- Presenter, Title IX Investigator Training Workshop for College and University Administrators, January 2020
- Presenter, Title IX Hearing Officer Training Workshop, December 2019
- Presenter, Title IX Bootcamp presented by the Ohio Alliance to End Sexual Violence, September 2019
- Presenter, "Legal Issues and Concerns," Association of Independent Colleges and Universities of Ohio (AICUO) Executive Assistant Seminar, September 2019
- Presenter, "What You Missed This Summer" webinar, August 2019
- Presenter, "Technology in the Courtroom," Medical Evidence for Lawyers Seminar, Illinois Institute for Continuing Legal Education, 2017
- Presenter, "Developments in Employment Law," Central Illinois Chapter, Society of Human Resource Managers, 2017
- Presenter, "Employment Practices Liability Coverage: Addressing Employment-Based Claims," Chicago, Chicago-Northwest and West Suburban Chartered Property Casualty Underwriter Chapters, 2017
- Presenter, "New Rules for Overtime," Illinois Municipal League; Chatham Area Chamber of Commerce, 2016
- Presenter, "What to Do When You or Your Business Has Been Sued," Chatham Area Chamber of Commerce, 2015

Professional & Community Activities

- Member, National Association of College and University Attorneys, 2019
- Member, Board of Directors, Chatham Area Chamber of Commerce, 2016–2018
- Member, Governance Committee, Girls on the Run of Central Illinois, 2016–2018

- Volunteer, Take Your Child to Work Day Mock Trial, Central Illinois Women's Bar Association, 2014–2018

Robert T. Kent

Of Counsel

Rob Kent is a higher education attorney with experience navigating civil rights, Title IX and other compliance issues on behalf of colleges and universities. He is skilled in managing student and staff complaints, overseeing and conducting investigations fairly and efficiently, and working with both internal and external parties to be sure investigators and administrators are both accountable and transparent.

Rob collaborates with university leaders to administer awareness regarding services and resources; build channels of communication within the university for better collaboration with support services, human resources and police; and manage local, state and national media inquiries. Additionally, he assists with training and education among students and staff and provides guidance on overall strategy regarding campus-related compliance.

Rob is a former in-house attorney with Michigan State University, where he effectively managed a variety of legal matters. Most recently, he served in the university's Office for Civil Rights and Title IX Education and Compliance, leading a new major administrative unit, instituting new programs and services, growing the employee team, interpreting and implementing changing regulations, and managing an unprecedented complaint volume under constant scrutiny.

Bar Admissions & Activities

- Admitted, State of Michigan, 2008
- Admitted, State of Ohio, 2020
- Admitted, United States District Court for the Eastern District of Michigan, 2009
- Admitted, United States District Court for the Western District of Michigan, 2014
- Admitted, United States Court of Appeals for the Sixth Circuit, 2012
- Admitted, United States Bankruptcy Court for the Eastern District of Michigan, 2011
- Member, Michigan Bar Association

Education

- Wayne State University Law School (J.D.), 2008; Executive Board Member, Student Bar Association Board of Governors; Small Business Enterprises and Nonprofit Corporations Clinic
- Michigan State University, (B.A. in General Business Administration/Pre-Law), 2004; Order of Omega Honors Scholar; Executive Board Member, Sigma Pi Fraternity, Honors Business Study Abroad Program, Mérida, Mexico

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INDUSTRIES & PRACTICES

Colleges & Universities

Education Law

Employment & Labor

Robert T. Kent

Of Counsel

Awards & Recognition

- Rising Star, *Michigan Super Lawyers*, 2012–2013

Presentations & Published Works

- Author, "Understanding the Drug-Free Schools and Communities Act, Then and Now," *Journal of College and University Law*, Vol. 44:2.1, 2019

Professional & Community Activities

- Wayne State University Law School Alumni Association (Board of Directors, 2008–2014; President, 2012–2014)
- Member, National Association of College and University Attorneys, 2014–present
- Member, Big 10 Title IX Coordinators and Michigan Association of State Universities Title IX Coordinators, 2018–2020

Joshua D. Nolan

Partner & Higher Education Chair

Joshua Nolan is a higher education attorney with a litigation background. Throughout his career, he has helped numerous universities, public institutions and private colleges handle many facets of education law, including Title IX, and he manages sensitive litigation and administrative actions for individuals, institutions, and universities.

Josh understands that higher education law involves complicated and personal issues, so he takes an unbiased, professional and knowledgeable approach to identify, resolve and prevent such issues. Because he has more than 10 years of experience as a college administrator, he knows the intricacies of academic cultures and is able to anticipate risks and alleviate threats for his clients before they become problematic. He strives to empower his clients to handle difficult situations, leading them to a reasonable and compliant resolution.

Specifically, Josh's experience includes risk management, privacy law compliance, campus conduct, First Amendment issues and student mental health intervention. He has performed investigations regarding sexual harassment and misconduct for both corporations and educational institutions. He manages Title IX, FERPA and Clery Act compliance and has drafted and reviewed student conduct, speech codes and crisis management policies and procedures. Likewise, he advocates for clients in both state and federal court and administrative hearings for regulatory, criminal and commercial litigation issues.

Bar Admissions & Activities

- Admitted, State of Ohio, 2009
- Admitted, Northern District Court of Ohio
- Admitted, Sixth Circuit Court of Appeals
- Member, Ohio Bar Association
- Member, Akron Bar Association

Education

- University of Akron School of Law (J.D. *cum laude*), 2009
- Indiana University (M.S. in Higher Education and Student Affairs), 1999
- Boston College (B.A. in English), 1997

Awards & Recognition

- Rising Star, *Ohio Super Lawyers* (Schools & Education; General Litigation), 2013–2019

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INDUSTRIES & PRACTICES

Colleges & Universities
Education Law
Public Sector
Regulatory Law
Education (Pre-K to 12)

Joshua D. Nolan

Partner & Higher Education Chair

Presentations & Published Works

- Co-Presenter, "Title IX Takes Up Residency: Addressing Sexual Misconduct Under the New Regulations," Ohio Hospital Association Annual Meeting, June 2021
- Presenter, "Title IX Update: Preparing for the Regulations", Webinar, April 2020
- Presenter, "Ohio College Student Personnel Student Affairs Drive-In Conference", February 2020
- Presenter, "Two-Day Title IX Investigator/Adjudicator Training", January 2020
- Presenter, "Title IX Hearing Officer Training", December 2019
- Presenter, "Discussion of Impacts of Title IX Proposed Regulations", CUPA-HR Ohio Chapter, November 2019
- Presenter, "Advanced Title IX Investigator Training", Ohio Department of Higher Education, November 2019
- Presenter, "Title IX Investigator Training", various colleges, November 2019
- Presenter, "Title IX Investigator Training", various colleges, October 2019
- Presenter, "Title IX Coordinator Training", Private College, October 2019
- Presenter, "Title IX Litigation Update", Webinar, September 2019
- Presenter, "Title IX Investigator, Adjudicator and Hearing Panel Training", Indiana University, September 2019
- Presenter, "Title IX Investigator/Adjudicator Training", Ohio Department of Higher Education, September 2019
- Speaker, “What You Missed This Summer – Higher Ed Edition,” Webinar, August 2019
- Panelist, “Nine on IX,” SUNY, Spectrum Conference, Albany, NY, July 2019
- Presenter, “Title IX Investigator Two-Day Workshop,” various colleges, June 2019
- Presenter, "The Business Impacts of Title IX," Ohio Association of College and University Business Officers Annual Meeting, April 2019
- Presenter, “Free Speech Issue on Public and Private College and University Campuses,” Ohio College Personnel Association Drive-In Conference, Oberlin College, February 2019
- Speaker, "Should I Worry About GDPR," Webinar, July 2018
- Presenter, "University Counsel’s Perspective on #MeToo, Title IX, and Campus Culture," National Association of Criminal Defense Lawyers Annual Meeting and Seminar, July 2018
- Presenter, "Legal Issues Update," Association of Student Conduct Administrators, Ohio Drive-In Conference, Oberlin College, June 2018
- Presenter, "Higher Education Student Handbook Bootcamp," Bricker & Eckler Columbus office, March 2018
- Keynote speaker, "#MeToo and Title IX," Annual Meeting of the Association of Independent Colleges and Universities of Ohio (AICUO), March 2018
- Presenter, NCAA training for athletics department on Title IX and the Clery Act, April 2018

- Presenter, “Ethics in Public Relations and Marketing,” AICUO Communicators Summit, January 2018
- Speaker, "Best Practices for Managing Hazing and Risky Behaviors," Association of Independent Colleges & Universities of Ohio (AICUO), December 2017
- Speaker, "Public Records & Private Police," Webinar, October 2017
- Speaker, "Dealing with Campus Sexual Misconduct in a Post-2011 Dear Colleague Letter World," Webinar, September 2017
- Speaker, "Sending Students Home - Interim Suspensions & Safety Concerns," Webinar, September 2017
- Speaker, "Title IX Enforcement Changes - Initial Read," Webinar, September 2017
- Speaker, Civil Rights Coordination and Investigation Training for K-12 School Administrators, August 2017
- Speaker, "What You Missed This Summer - College & University Edition," Webinar, August 2017
- Speaker, "Athletic Culture in the Age of Title IX," Webinar, July 2017
- Speaker, "Title IX Litigation Update," Webinar, July 2017
- Speaker, "Title IX 2.0," AICUO Affiliate Member Conference, June 2017
- Speaker, "Emotional Support Animals on Campus," Webinar, June 2017
- Speaker, "Title IX Policy Tune-Up for Colleges and Universities," Webinar, June 2017
- Speaker, "Trauma-Informed Title IX Training," Various Colleges, June 2017
- Speaker, "Minors on Campus - Issue Spotting," Webinar, April 2017
- Speaker, “Concealed Carry on College Campuses & Government Buildings – Important Changes in Ohio SB 199,” Webinar, March 2017
- Speaker, “Transgender Guidance Withdrawal: Where Are We Now?” Webinar, February 2017
- Speaker, "Student Conduct Board/Investigator Two-Day Workshop," Various Colleges, January 2017
- Speaker, "Title IX Investigator Two-Day Workshop," Various Colleges, January 2017
- Speaker, “Title IX Investigator Training,” Various Colleges, October 2016
- Speaker, Title IX Investigative Training Workshop, August 2016
- Speaker, Title IX Investigator/Adjudicator Training, August 2016
- Speaker, “Title IX Investigator Training Two-Day Workshop,” Various Colleges, July 2016
- Speaker, “Introduction to Title IX Investigations,” Buckeye Association of School Administrators, February 2016

Professional & Community Activities

- Member, National Association of College and University Attorneys
- Member, Association of Student Conduct Administrators
- Member, Advisory Board, *The Journal of College and University Law*