Level One Title IX Training: 2020 Title IX Regulations

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Disclaimers

- We can’t help ourselves. We’re lawyers.
- We are not giving you legal advice.
- Consult with legal counsel regarding specific situations.
- Please note that all references to 34 CFR §106 *et seq.* refer to the 2020 Title IX regulations (not the 2024 Title IX Regulations)

Can We Post These Training Materials?

YES – Post away!

The “recipient” (college or university) is required by the 2020 Title IX Regulations (§106.45(b)(10)(i)(D)) to post materials used to train Title IX personnel on its website.

2020 Title IX Training Requirements – Who?

34 CFR §106.45(b)(1)(iii)

- "A recipient must ensure that
  - Title IX Coordinators,
  - investigators,
  - decision-makers, and
  - any person who facilitates an informal resolution process…"

2020 Title IX Training Requirements – Content

34 CFR §106.45(b)(1)(iii)

- …receive training on…
  - the definition of **sexual harassment in §106.30,**
  - the scope of the recipient's **education program or activity,**
  - how to **conduct an investigation and grievance process including hearings, appeals, and informal resolution process, as applicable,** and
  - how to serve **impartially,** including
    - avoiding prejudgment of the facts at issue,
    - [avoiding] conflicts of interest, and
    - [avoiding] bias."

2020 Title IX Training Requirements - Investigators

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

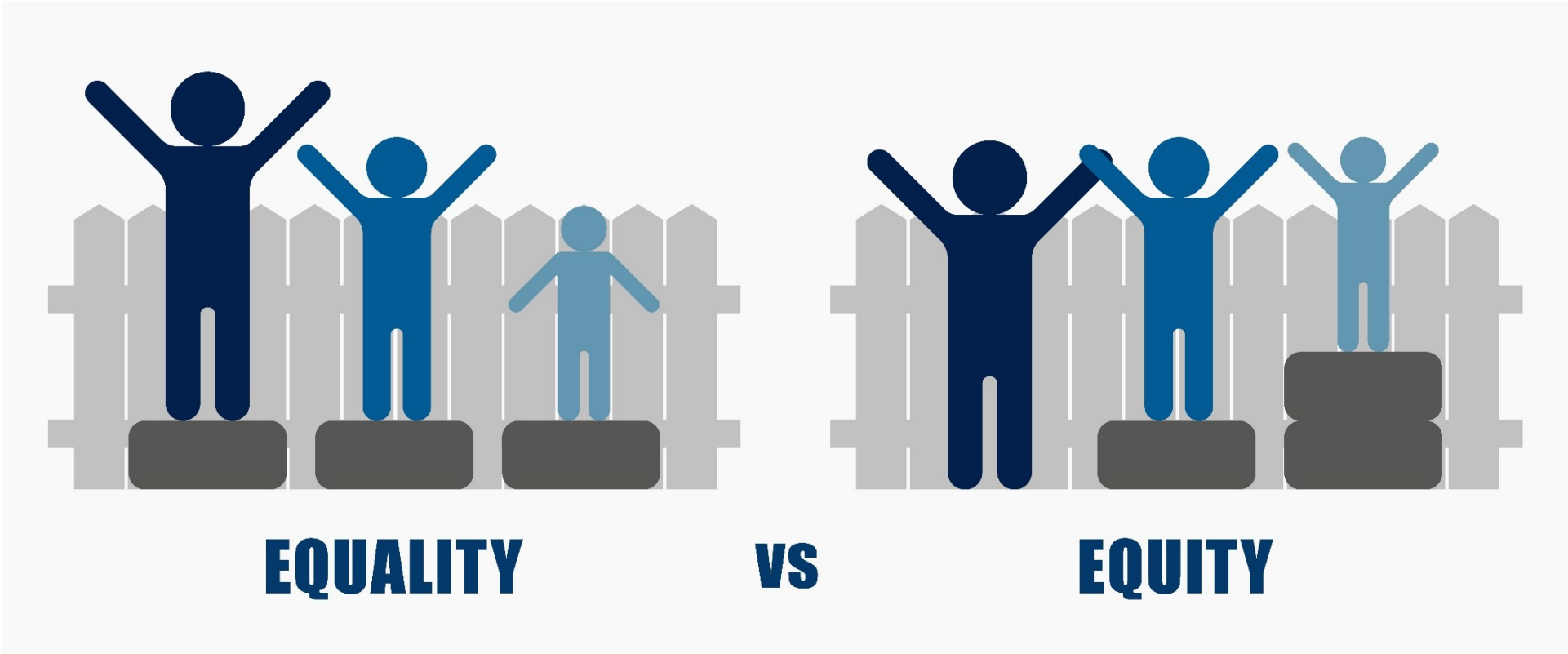
2020 Title IX Training Requirements – Decision-Makers

- Technology to be used at a live hearing
- Issues of relevance of questions and evidence
  - Including rape shield provisions in §106.45(b)(6)

Training Requirements – Clery Act

- Under the Clery Act, those involved in the disciplinary process must receive annual training on:
  - Issues related to sexual assault, domestic violence, dating violence, and stalking
  - How to conduct an investigation and hearing process that protects the safety of victims and promotes accountability

Title IX is an Equity Statute



TITLE IX TODAY:
Themes

Overview of Themes

Themes - Access

What we do for one, we do for the other

- It is meant to ensure ACCESS to your programs and activities, regardless of sex.
- “What we do for one, we do for the other” (or at least consider whether it is appropriate under the circumstances)
- Why are you treating someone differently?

Themes – Duty to Protect

All members of the community

- **“<u>They are all our students</u>.”**
- Supportive measures
- Any action by a recipient that results in changes or removal of access to education for respondents will require a process to respond
  - Appeal of interim emergency measure
  - Hearing with live cross-examination

Themes - Transparency

Help Others Trust the Process

- **TRANSPARENCY** is key to trusting the process.
  - Know your grievance process
  - Help them understand next steps.

  - If participants don't know what's happening, they will assume nothing is happening

Themes – Evidence Based Decisions

- We base decisions on **EVIDENCE**.
  - **“Don’t weigh your gut.”**
  - We can make reasonable inferences and credibility determinations, but be mindful of implicit bias, stereotypes, and using our own behavior as a yardstick.
  - Beware of confirmation bias based on what you *think* may have happened.

Themes –
Always Room for Improvement

Always be working to **IMPROVE**:

- Yourself as a neutral
- Your campus as a healthy and fair place to be
- Your policy to provide a better process informed by case law, regulations, guidance, and experience
- Your resources for all involved

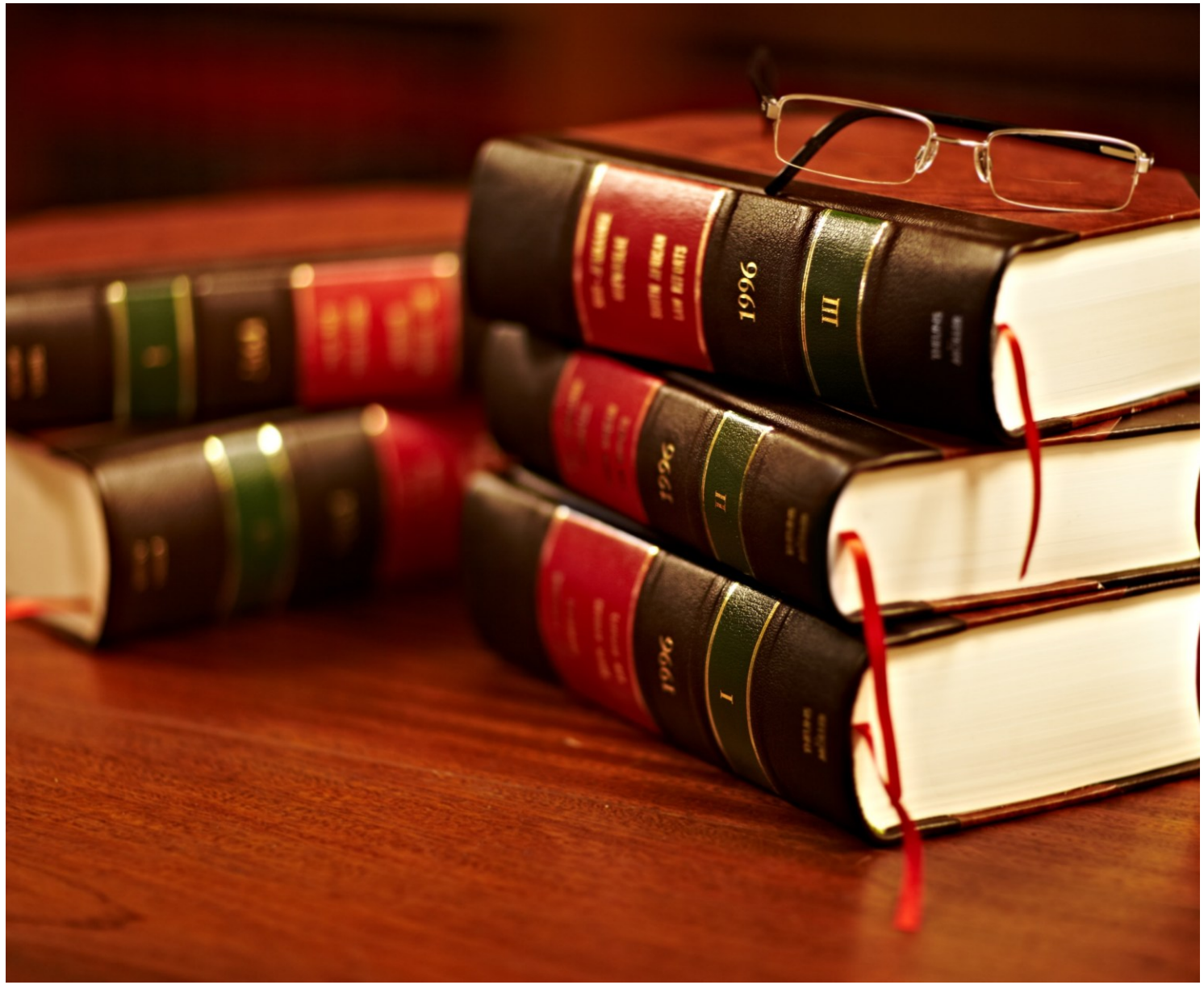
Themes –
Avoid Conflicts of Interest, Bias

- Always be working to avoid actual or perceived:
  - Conflict of interest:
  - Bias

Institutional Duties and Interests vs. Personal interests

Your work can impact the lives of others: take periodic self-inventories to be mindful of your activities, involvements, social media, and biases you may have and work to reset them to neutral.

How to Conduct a Grievance Process under the 2020 Title IX Regulations



Title IX Terminology - Parties

- **"Complainant"** – "an individual who is alleged to be the victim of conduct that could constitute sexual harassment." §106.30
- **"Respondent"** – "an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment." §106.30

Title IX Terminology - Institution

- "Recipient" – "means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, **any public or private** agency, **institution**, or organization, or other entity, or any person, **to whom Federal financial assistance is extended** directly or through another recipient and which operates an education program or activity which receives such assistance, including any subunit, successor, assignee, or transferee thereof." §106.2

What applies? (1 of 3)

- Law – 20 U.S.C. 1681 et seq.
- Regulations – 34 C.F.R. Part 106
  - Title IX Sexual Harassment
  - Athletics, employment, admissions, housing, etc.
- Clery – 20 U.S.C. 1092(f); 34 C.F.R. 668.46; Clery Appendix
  - The Clery Handbook has been withdrawn but can still be helpful

What applies? (2 of 3)

Guidance Documents from US ED:

- Title IX Q&A - July 2021 (Updated June 28, 2022)
- Notice of Interpretation – Gender Identity in Light of Bostock (Enjoined in certain states due to litigation)
- Limiting Use of Statements by Parties and Witnesses Not Subject to Cross-Examination at Live Hearing – 8/24/2021
- OPEN Title IX Q&A Parts 1 and 2 - January 15, 2021

All guidance in effect may be found on USED's Policy Guidance Portal located at:
https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/index.html

What applies? (3 of 3)

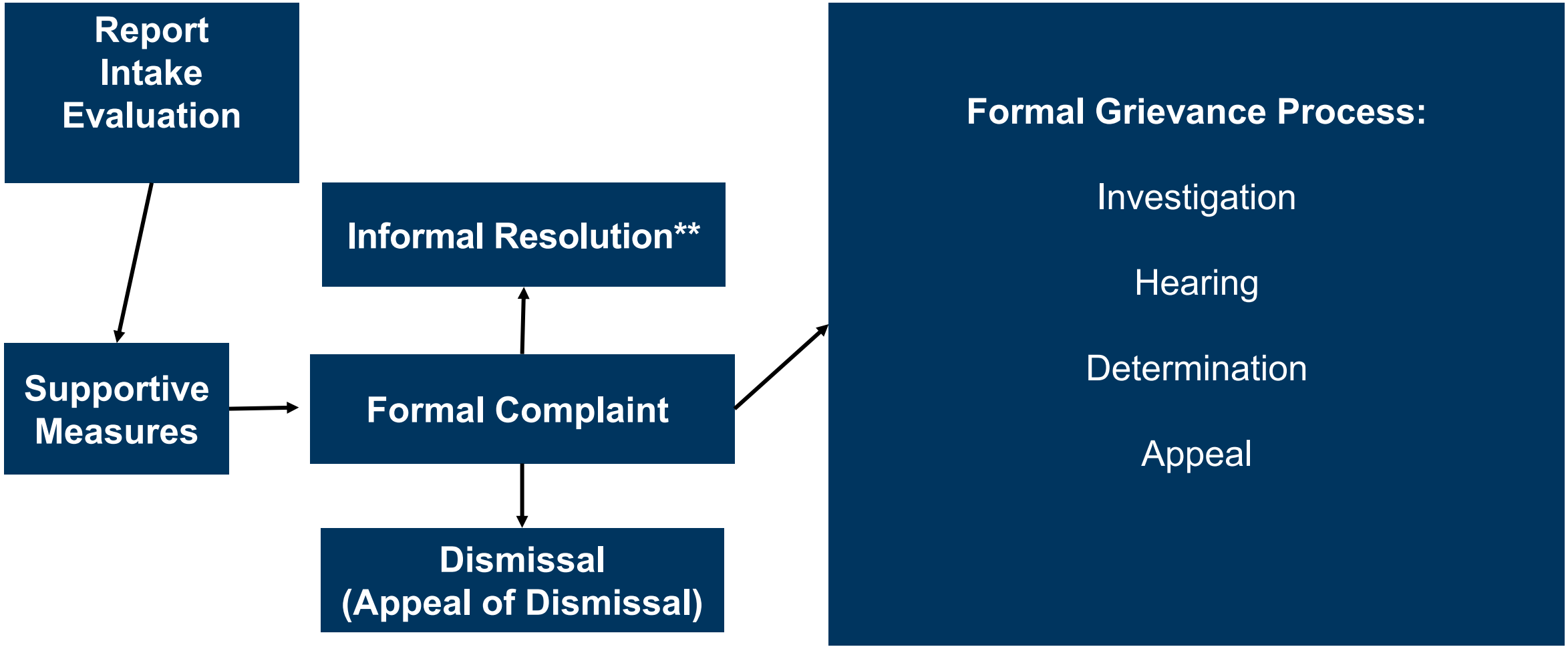
- Case Law
  - Supreme Court, federal courts
  - State courts
  - Look to other court decisions for persuasive authority

Non-Negotiable Principles

Preamble, p. 30059

- The right of every survivor to be taken seriously, and
- The right of every person accused to know that guilt is not predetermined

Overview of the 2020 Required Processes



Overview of the TIX Process: Actual Knowledge

Notice of sexual harassment or allegations of sexual harassment **to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient** (discretion of the postsecondary institution)

- Notice to employees is no longer enough to trigger actual knowledge (ability or obligation to report not enough)
- Purpose to allow complainants to speak with employees without automatically triggering process

Overview of the TIX Process: Formal Complaint

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

- In response to a formal complaint, a recipient must follow a grievance process (set by 106.45)
- Title IX Coordinator or designee must offer the complainant supportive measures (even if the complainant does not want to file a formal complaint)

Overview of the TIX Process: Formal Grievance Process (1 of 4)

Any provisions, rules, or practices, other than those in the regulations, must apply equally to both parties.

Basic requirements:

- Treat complainants and respondents equitably
- Follow grievance process
- Only impose any disciplinary sanctions against a respondent after grievance process followed (assuming there is a determination that the policy was violated)

Overview of the TIX Process: Formal Grievance Process (2 of 4)

- Requires an objective evaluation of all relevant evidence (inculpatory and exculpatory)
- Provide credibility determinations not based upon person's status as complainant, respondent, or witness
- Require an individual designated by recipient as Title IX Coordinator, investigator, decision-maker, informal resolution officer, and/or appeals officer be free from conflict of interest or bias

Overview of the TIX Process: Formal Grievance Process (3 of 4)

- Include presumption that respondent is not responsible for the alleged conduct until a determination regarding responsibility is made through the grievance process
- Include prompt time frames (some discretion)
- Describes range of possible disciplinary outcomes
- States standard of evidence (preponderance of the evidence or clear and convincing)

Overview of the TIX Process: Formal Grievance Process (4 of 4)

- Include procedures and bases for complainant and respondent to appeal
- Describe range of supportive measures available to complainants and respondents
- Not require legally privileged evidence absent a voluntary written waiver by the holder of the privilege

Overview of the Process: Written Notice (1 of 2)

- Recipient's grievance process and informal resolution process**
- Allegations with sufficient time for review with sufficient detail, such as date, location if known
- Respondent presumed not responsible for alleged conduct and determination made at conclusion of grievance process
- Parties may have an advisor of choice

Overview of the TIX Process: Written Notice (2 of 2)

- Any provision in recipient's code of conduct that prohibits knowingly making false statements or providing false information during the grievance process
- Additional notification to parties if new allegations arise as apart of the investigation

Overview of the TIX Process: Dismissal

- Recipient MUST investigate allegations in a formal complaint
- BUT recipient MUST dismiss
  - If conduct alleged would not constitute sexual harassment, even if proven, OR
  - Conduct did not occur within recipient's education program or activity or in the United States, OR
  - Complainant was not participating or attempting to participate in the recipient's program or activity

Overview of the TIX Process: Investigation (1 of 4)

- Only of a formal complaint
- Burden of proof and evidence gathering rests with recipient, not either party
- 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)

Overview of the TIX 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

Overview of the TIX 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 – recipient must send to party and party's advisor with at least 10 days to submit a written response before completion of investigation report

Overview of the TIX Process: Investigation (4 of 4)

- Recipient 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

Overview of the TIX Process: Hearings

- Must provide a live, cross-examination hearing
- Parties must have an advisor and the recipient 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
- Decision-maker makes live relevancy determinations after each question asked by advisors

Overview of the TIX Process: Determinations (1 of 3)

- Decision-maker (not Title IX Coordinator or investigator) must issue a written determination regarding responsibility
- Must include
  - Allegations
  - Procedural steps taken from receipt of formal complaint

Overview of the TIX 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 programs or activities will be provided to complainant

Overview of the TIX Process: Determinations (3 of 3)

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

Overview of the TIX Process: Appeals (1 of 2)

- Recipient must offer to both parties the following bases of appeal (can offer more by policy):
  - 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 TIX 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

Overview of the TIX Process: Informal Resolution

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

Overview of the TIX Process: Informal Resolution

- Recipient can offer informal resolution if:
  - Provides written notice to the parties
  - Obtains the parties' voluntary, written consent to the informal process
  - Does not offer IR for allegations of employee sexual harassment of a student

Overview of the TIX Process: Retaliation

- Neither recipient nor any other person may retaliate against an individual for purpose of interfering with any right or privilege secured by Title IX or because a person made a report or complaint, or participated or refused to participate in the process

Overview of the TIX Process: Confidentiality

Recipient **must keep confidential the identity of any individual** who has made a report or complaint of sex discrimination, including any individual who made a report, any complainant, any alleged perpetrator, any respondent, and any witness, **unless required by law**, permitted by FERPA, or **for the purposes of carrying out Regulations grievance process**.

Title IX Regs Apply to Employees

Preamble to the 2020 Title IX Regulations:

- "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)
- Recipients that are subject to both Title VII and Title IX must comply with both (30440)

Title VII Versus Title IX

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

Education Program or Activity Analysis

(Includes everything your institution does, plus a bit more)

Jurisdiction for TIX Sexual Harassment

“Education program or activity”

“includes **locations, events, or circumstances** over which the recipient exercised **substantial control** over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. “ §106.30(a)

Education Program or Activity

Locations, events, or circumstances with substantial control – the easy ones:

- Residence halls
- Classrooms
- Dining halls

Not an Education Program or Activity

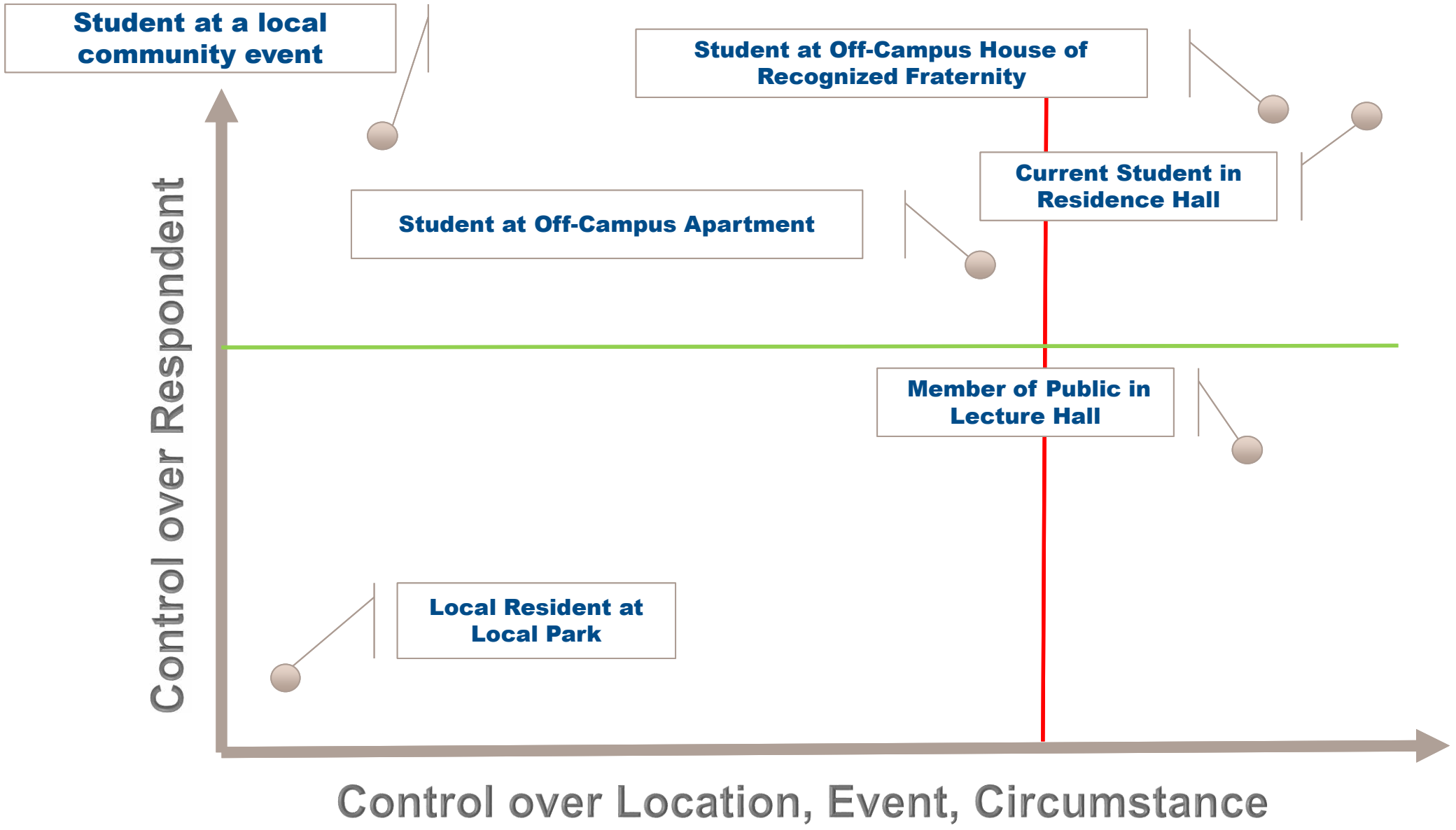
Locations, events, or circumstances without substantial control:

- **Anything** outside of the United States;
- Privately-owned off campus apartments and residences that do not otherwise fall under the control of the postsecondary institution (example: privately owned apartment complex not run by a student organization)

Substantial Control?

Depends on fact-analysis under “substantial control”:

- Conventions in the United States?
- Holiday party for an academic department?
- Professor has students over to house?


Student at a local community event
Student at Off-Campus House of Recognized Fraternity
Current Student in Residence Hall
Student at Off-Campus Apartment
Member of Public in Lecture Hall
Local Resident at Local Park
Control over Respondent
Control over Location, Event, Circumstance

Online Study

- “Operations” of the recipient may include computer and online programs and platforms “owned and operated by, or used in the operation of, the recipient.” (30202)
- Still has to occur in your educational program or activity
- And in the United States…

Study Abroad Programs

- Title IX draws a bright line: plain text of Title IX states “no person in the United States” is protected, which means you must dismiss anything that occurred against a person outside the USA. (30205-06)
- Programs of college based in other countries? No jurisdiction and must dismiss.
- Foreign nationals in the United States are covered.

Jurisdiction and Dismissal

Dismissal of a formal complaint— §106.45(b)(3)(i)

The recipient **must** investigate the allegations in a formal complaint.

(BUT) If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in §106.30 even if proved, did not occur in the recipient's **education program or activity**, or **did not occur against a person in the United States**, ….

Jurisdiction and *Mandatory* Dismissal

"… then the recipient **must** dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; **such a dismissal does not preclude action under another provision of the recipient's code of conduct."**

Mandatory Dismissal & Exit Ramps

- Although you may be required to dismiss a Formal Complaint
- Doesn’t preclude the institution from taking action under other policies
- Know your exit ramps
  - Examples:
    - Human Resources
    - Student Conduct
    - Provost’s Office

Discretionary Dismissal

Dismissal of a formal complaint per §106.45(b)(3)(ii)

- "The recipient **may** dismiss the formal complaint or any allegations therein, if at the time during the investigation or hearing:
  - A complainant notifies the TIXC in writing that **the complainant would like to withdraw the formal complaint** or any allegations therein;
  - The **respondent is no longer enrolled or employed** by the recipient; or
  - **Specific circumstances** prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

Dismissal Considerations (1 of 2)

- Procedural posture
  - Has a formal complaint been filed?
  - If not, how will you document the dismissal and/or referral?
- Reaction of the parties
  - Has the issue of dismissal been previewed?
  - Do you need to meet to explain the decision?

Dismissal Considerations (2 of 2)

- Documentation of the dismissal
  - Internal or shared with the parties?
    - Depends on Formal Complaint and your process
  - Meeting with the parties to explain the dismissal
- Consistency with prior dismissals
  - Substantively and Procedurally
  - Watch for this with discretionary dismissal

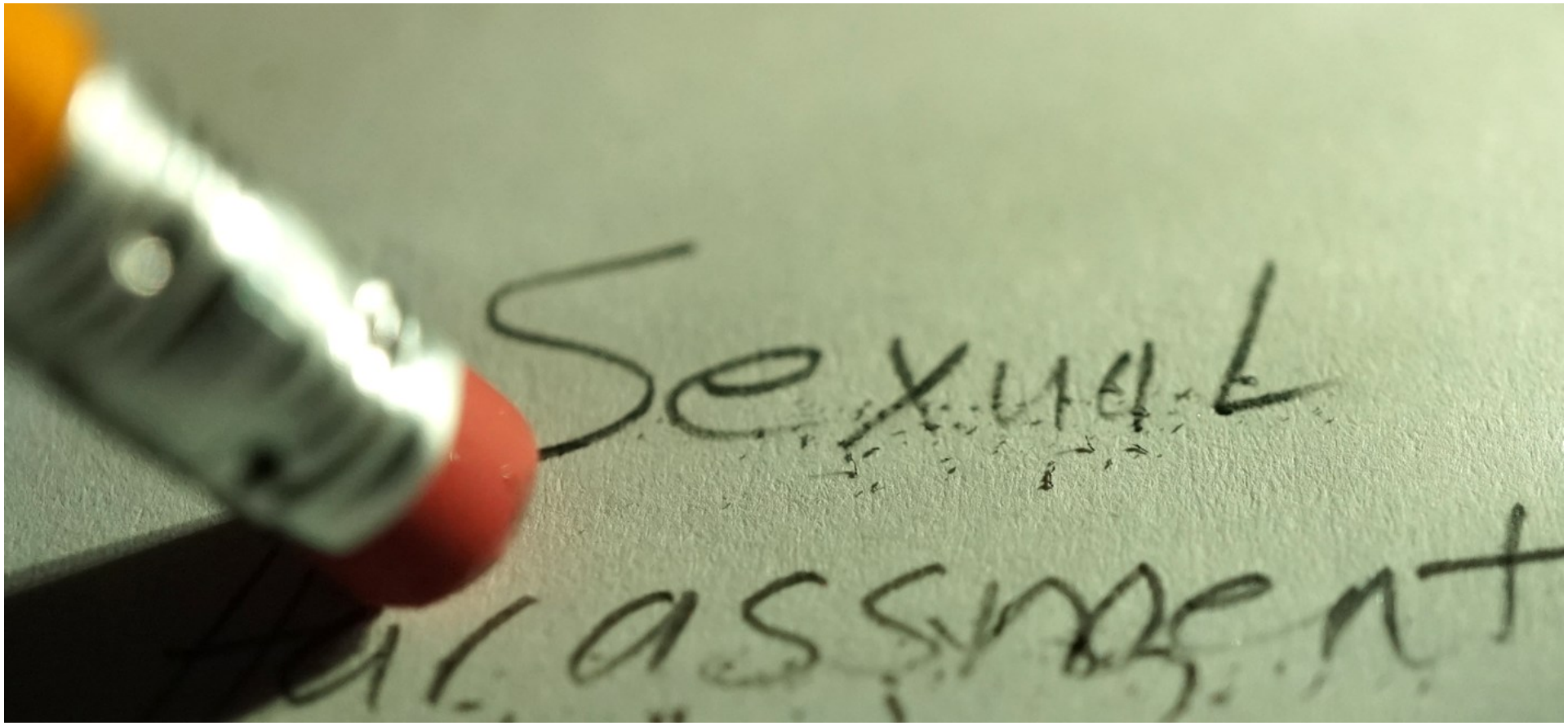
Dismissal Notice & Timing

34 CFR § 106.45(b)(3)(iii)

- Must promptly send written **notice** of dismissal/**reasons** simultaneously to the parties
- Jurisdictional issues can arise **at any time**, even during the investigation

Retaliation & Jurisdiction

(a) *Retaliation prohibited.* **No recipient** or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation proceeding, or hearing under this part. Intimidation, threats, coercion, or discrimination, **including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or formal complaint of sexual harassment,** for the purpose of interfering with any right or privilege secured by Title IX or this part, **constitutes retaliation.**



Title IX Sexual Harassment

34 CFR § 106.30

Title IX Sexual Harassment - 3 Classifications

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 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

Title IX Sexual Harassment: *Quid Pro Quo*

- Only applies to employee respondents (can be any complainant)
- ED 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: "Title IX Hostile Environment"

- The second prong: severe, persistent, and objectively offensive and deny equal access (vs. Title VII: severe or pervasive)
- Does not require 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/protected classes
- 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

Sexual Harassment Considerations

The preamble notes that the Regulations do not prohibit postsecondary institutions from:

- Publishing a list of situations that would violate Title IX as "sexual harassment"
- Advising when similar conduct has been found to violate Title IX
- Publishing a list of situations that would violate other policies (30158)

Definitions Disclaimer

This next section of the presentation uses the terms such as “rape,” “victim,” and “perpetrator”, and “sodomy.”

These are the CRIMINAL terms, not POLICY terms, but they are the definitions that apply according to the 2020 Title IX regulations.

Clery Crimes referenced in Title IX Regs: Sexual Assault, Dating Domestic Violence, & Stalking

Third prong refers to certain statutory definitions for sexual assault, dating violence, domestic violence and stalking

- Sexual assault is defined as forcible and non-forcible sex offenses as defined in the FBI's Uniform Crime Reporting (UCR) database, which you can find in the National Incident-Based Reporting System (NIBRS) manual
- Dating violence, domestic violence, and stalking definitions are from Clery statute (not regulations) as amended by VAWA

Sexual Assault Definition - FBI UCR & NIBRS

- The FBI UCR provided definitions for Sexual Assault under two different databases, the SRS and the NIBRS.
- The FBI retired the SRS in January of 2021, so the NIBRS database is the best source of Sexual Assault definition available.

Campus Considerations:

- The specific offenses covered in the NIBRS definitions of Sexual Assault must be prohibited by your policy.
- You do not have to track word for word, as long as the behavior is covered.
  - Ex – Sodomy may be viewed as a derogatory term in the LGBTQ Community.

Sexual Harassment:
Sexual Assault as Defined in NIBRS

"Sexual Assault" includes:

- Rape (includes substance of def's below)
- Sodomy
- Sexual Assault with an Object
- Fondling
- Incest
- Statutory Rape

Sexual Assault: Rape - NIBRS Manual 2021

"Rape" means the **carnal knowledge** of a person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity. **Carnal knowledge** is defined as the slightest penetration of the sexual organ of the female (vagina) by the sexual organ of the male (penis).

Title IX Sexual Assault: Sodomy

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

Title IX Sexual Assault: With an Object

"Sexual Assault with an Object" means use an object or instrument to unlawfully **penetrate**, however slightly, the **genital or anal opening** of the body of another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity. An object or instrument is anything used by the offender **other than the offender's genitalia**, e.g., a finger, bottle, handgun, stick.

Title IX Sexual Assault: Fondling

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

Title IX Sexual Assault: Incest

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

- Look to your state law

Title IX Sexual Assault: Statutory Rape

"Statutory Rape" means non-forcible sexual intercourse with a person who is under the statutory age of consent.

Title IX Sexual Harassment: Dating Violence (34 USC 12291(a)(10))*

"Dating Violence" means violence committed by a person

(A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and

(B) where the existence of such a relationship shall be determined based on a consideration of the following factors:

(i) The length of the relationship.

(ii) The type of relationship.

(iii) The frequency of interaction between the persons involved in the relationship.

*Title IX cites to this provision for its definition of "Dating Violence," but the Act has since been amended. Subsection 11 now includes the definition of "Dating Violence."

Title IX Sexual Harassment: Stalking

"Stalking" is engaging in a course of conduct directed at a specific person 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)

- Stalking that is ***not*** based on sex must be prohibited by the institution in order to comply with Clery.

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.

Stalking: Reasonable Person

"Reasonable person"

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

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.

Discretionary Definitions: Consent, Coercion, Incapacitation, Exploitation

- Discretion is left to the institution to define the following:
  - Consent
  - Coercion
  - Incapacitation
  - Exploitation/revenge porn: may be pervasive unwelcome conduct depending on widespread dissemination (30166)

Consent: Left to the Institutions to Define

US ED left “consent” and terms that often negate consent to the discretion of the recipients to “reflect the unique values of a recipient’s educational community.” (Preamble, p. 30159, see also 30174)

- Does your state law require a particular definition?

Who May *NEVER* Give Consent?

- Minors
- Incarcerated persons
- Cognitively disabled individuals
- Incapacitated individuals

Consent, generally

- Always look to your Policy language
- Common requirements
  - Clear, knowing, mutually understood
  - Voluntary, and not the result of force, threats, and/or coercion
- Common provisions
  - May be withdrawn with clear communication
  - Consent for one activity is not consent for other activities
  - Silence or failure to resist ≠ consent
  - Consent on a prior occasion ≠ consent

Evidence of Consent (1 of 2)

What words or actions did Complainant use to convey consent?

- Must examine the sexual acts in detail
- Must understand the words and acts of both parties
- Examples:
  - Who took off what clothes?
  - Who provided the condom?
  - Who initiated physical contact?
  - Who touched who where?
  - “They gave consent” – What does that mean?
    - What did you say to them? What did they say to you?

Evidence of Consent (2 of 2)

- Was Complainant capable of giving consent?
  - Asleep?
  - Passed out?
  - Aware of the who, what, where, when, why of the encounter?
- Always consider whether an incapacitation analysis is helpful

Incapacitation

- Look to your Policy definition
- Beyond mere intoxication
- Generally – state of being unconscious, asleep, or under the influence of drugs and/or alcohol to such an extent that the person cannot appreciate the nature or consequences of their actions
- Remember:
  - **Intoxicated people CAN consent.**
  - **Incapacitated people CANNOT consent.**

Incapacitation – Finding of Responsibility

- Policies typically require that the Respondent **knew or reasonably should have known** about the incapacitation
  - Look for outward signs of incapacitation
  - Slurred speech
  - Vomiting
  - Trouble walking
  - Unaware of who, what, where, when, why, how
- Note: Incapacitation of Respondent is NOT a defense
  - But Respondent not having any reasonable way of knowing of the incapacitation *is* a defense

Productive Questioning on Gauging Intoxication/Incapacitation (1 of 2)

Difficult to gauge:

- How trashed were you?
- On a scale of 1-10, how drunk were you?

Preferable approach:

- Can you talk about how this felt in relation to other times you've consumed alcohol/drugs?
- In that moment, were you aware of where you were? Who you were with? What was happening?
- Do you know if anyone helped you up the stairs?

Productive Questioning on Gauging Intoxication/Incapacitation (2 of 2)

Not Productive:

- Why did you get that drunk?

Preferable approach:

- Explain why you need the information
- Don’t place blame

Any Drugs?

- Did they take any medications that might have interacted with alcohol or otherwise affected their level of intoxication?
- Did they take any drugs that may have altered their ability to stay awake, understand what was happening, etc.?
- What, how much, and when?
- Remember: can have amnesty in your policy for personal drug and alcohol use (also a good way to avoid institutional retaliation!) at 30536

Blackout ≠ Incapacitation

- Alcohol can interfere with the ability to form memories
- May be a complete lack of memory or fragmentary blackouts
- What did witnesses observe?

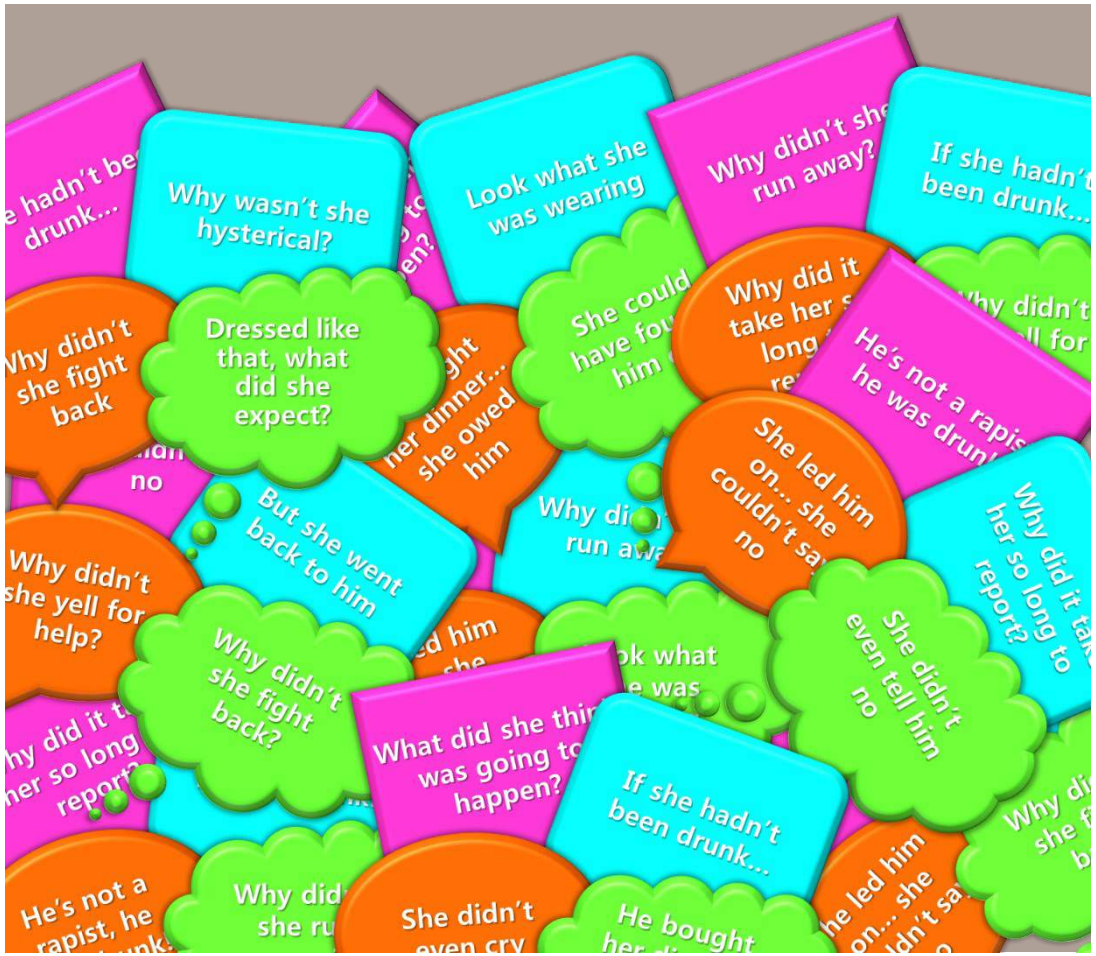
Coercion

- Is this defined in your Policy?
- Does your Title IX team, prevention and education team, and party advocate team agree on a definition of coercion?
- Often descried as unreasonable pressure for sexual activity
- Compare: “I will break up with you” versus “I will kill myself”

Amnesty

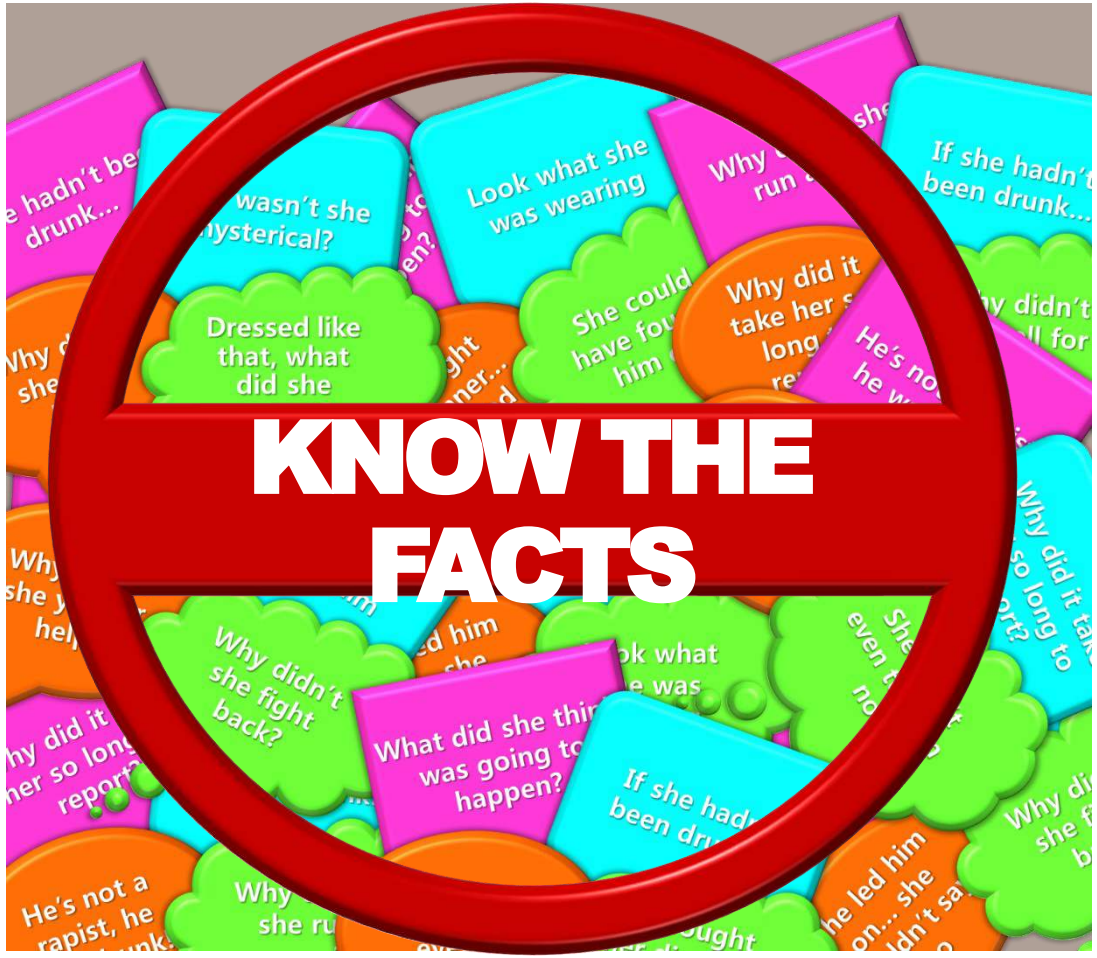
Nothing in the 2020 Title IX Regulations precludes the postsecondary institution from providing amnesty to students for personal alcohol and/or drug use when participating in a Title IX investigation

Myths and Stereotypes



These statements are common, but not helpful.

- "Why wasn't she hysterical?"
- "It can't have been rape. She went back to him the next day!"
- "Of course he did it. You know how men are."
- "If she hadn't been drunk..."



Know Better

Let's talk about why these statements don't help get the information we need to make a good decision in our process.

Most rapes are committed by perpetrators that know their victims

Rape can happen in a committed relationship

Sexual Assault can happen between individuals of any gender identity

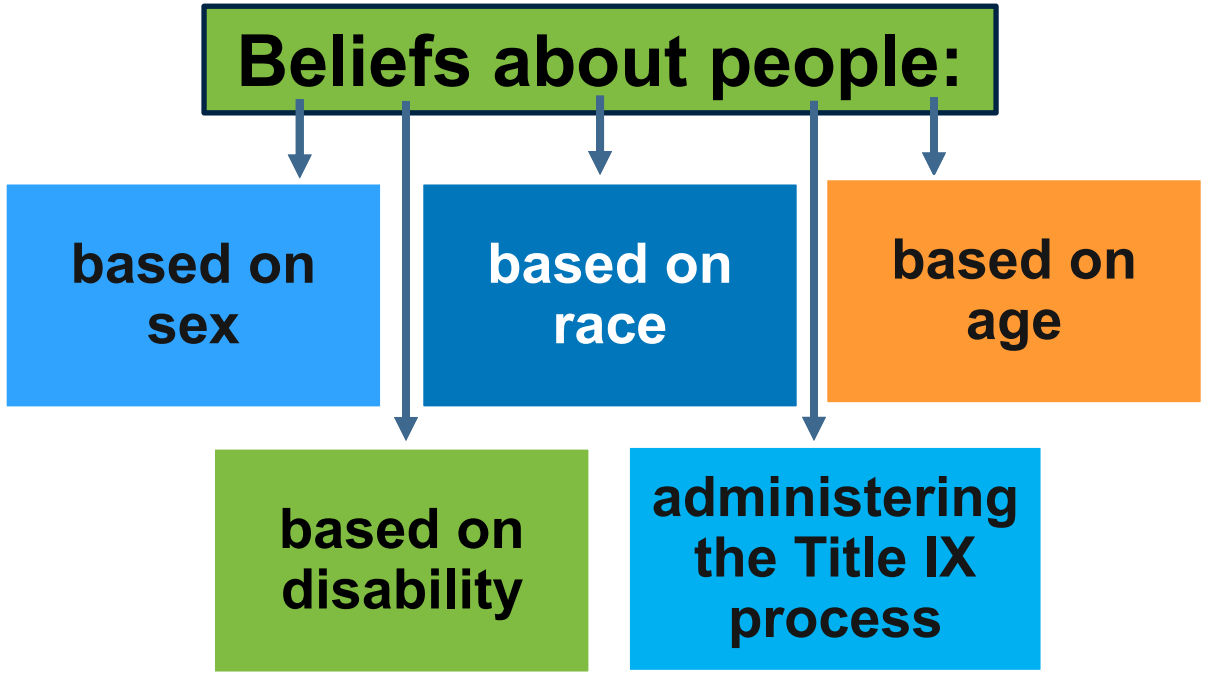
Victims of intimate partner violence may return to their perpetrator for reasons that may not seem rational to others

Drug-facilitated sexual assault is common, and the most common drug used is alcohol

Being drunk doesn’t excuse a perpetrator’s own behavior

A wide variety of responses are normal for victims: people are different and react differently– don’t make assumptions about how they “should act”

Stereotypes Affect Response



Avoiding Sex Stereotypes

- "Must" not rely on sex stereotypes: Also helpful to avoiding pre-judgment of facts, remaining unbiased and impartial
- Examples of sex stereotypes in comments (Preamble, p. 30253):
  - Women have regret sex and lie about sexual assaults
  - Men are sexually aggressive or likely to perpetrate sexual assault

Analyzing Sex Stereotypes

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

Culture Affects Response

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

Process *YOUR* Response (1 of 2)

- Is your assessment based on your culture, or theirs, or both? (It shouldn't be.)
- Is your assessment based on stereotypes you hold based on sex? Race? Culture? Yours or theirs? (It shouldn't be.)
- Is your assessment based on their role (Complainant or Respondent)? (It shouldn't be.)

Process *YOUR* Response (2 of 2)

- Is your assessment based on a person you like or someone you identify with? (It shouldn't be.)
- Is your assessment based on a person "acting guiltily" by not making eye contact or fidgeting? (It shouldn't be.)
- Would you have done things differently?
- If so, SO WHAT?

Counterintuitive Response

- If they didn’t act the way you might have, that doesn’t mean it isn’t true.
- Stop and consider carefully before you decide someone is lying because they responded in a way different from how you would have responded.
- Counterintuitive response has to be measured to another’s perspective to be counterintuitive to something. Be careful to use a valid measurement.

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