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Overview of the New Title IX Regulations (Summary and Comments)

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On May 6, 2020 the United States Department of Education (“DOE”) issued final regulations regarding the obligations of U.S. colleges and universities to address incidents of sexual harassment under Title IX.

These regulations supersede previous guidance issued by DOE regarding sexual harassment and sexual assaults on colleges campuses.

Proposed regulations were open for public comments since initially proposed on November 16, 2018, and the preamble to the final regulations discusses many of the comments submitted regarding the proposed regulations and DOE’s response to those comments.

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Summary of Regulations

I) Introduction

- A) The final Title IX Regulations (34 CFR Part 106) (the “regulations”) cover postsecondary institutions of higher education, including graduate, undergraduate, vocational and professional schools as well as elementary and secondary schools, including preschools as well as private elementary and secondary schools. §106.30(b)

Some portions of the regulations apply equally to both postsecondary schools as well as elementary and secondary schools, while other provisions differentiate the requirements imposed upon each type of institution.

- B) “Recipient” is defined as a recipient of Federal financial assistance covered by Title IX of the Education Amendments of 1972 (“Title IX”). *Preamble p. 1*
- C) The effective date for all schools to come into compliance with the new regulations is August 14, 2020. *Preamble p. 13*
- D) Schools must comply with the requirements of Title IX as outlined under the regulations. §106.8(c); §106.44(b)(1); §106.45(b)

Subject to compliance with the regulations, schools may provide guidelines, policies or protocols through their codes of conduct beyond the scope of the regulations, and/or provide details regarding policies or procedures which are not addressed in the regulations. §106.45 (b) (3). *Preamble p. 481-482*

For example, the regulations only apply to sexual discrimination against a person “in the United States” based upon DOE’s analysis of the statutory language of Title IX. However, a school may, within its code of conduct and sexual misconduct policy, address issues related to students while studying abroad. *Preamble p. 660*

Similarly, the regulations may only apply to sexual harassment related to activities on campus or sponsored by a school or in a facility occupied by an organization which is endorsed by the school. The institution’s code of conduct may expand this scope of coverage.

Further, the regulations do not specify timelines or procedures for parties to submit exculpatory or inculpatory evidence following issuance of an investigative report. Consequently, the school may establish timelines and protocols for such submissions.

- E) Recipients must have “prompt and equitable” grievance procedures for complaints of sex discrimination, and must have in place a grievance process that complies with § 106.45 for formal complaints of sexual harassment. *Preamble p. 1629*

While a recipient is free to apply the § 106.45 grievance process to resolve complaints of non-sexual harassment sex discrimination, the final regulations only require a recipient to use the § 106.45 grievance process with respect to formal complaints of sexual harassment. *Preamble p. 1634*

- F) The final regulations describe sexual harassment as actionable when it “denies a person equal access to education” rather than the former definition of sexual harassment as creating a “hostile environment.” *Preamble p. 529*
- G) The Title IX Regulations apply equally to all persons regardless of sexual orientation or gender identity. *Preamble p. 430*
- H) A guiding principle throughout the regulations is that a school must treat both parties equitably and equally throughout the process including supportive measures, investigations, and the grievance process. *§106.44(a) and §106.45(b)(1)(i)*
- I) § 106.45 (b)(1)(iii) requires:
 - i) “...that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.”
- J) Recipients should have objective rules for determining when an adjudicator (or Title IX Coordinator, investigator, or person who facilitates an informal resolution process) is biased, and the Department leaves recipients discretion to decide how best to implement the prohibition on conflicts of interest and bias, including whether a recipient wishes to provide a process for parties to assert claims of conflict of interest of bias during the investigation. *Preamble p. 820*
- K) The final regulations leave recipients flexibility to use their own employees, or to outsource Title IX investigation and adjudication functions, and the Department encourages recipients to pursue alternatives to the inherent difficulties that arise when a recipient’s own employees are expected to perform these functions free from conflicts of interest and bias. *Preamble p. 825*
- L) The Department understands that despite 34 CFR 106.9 having required, for decades, recipients to adopt and publish prompt and equitable grievance procedures (and designate an employee to coordinate the recipient’s efforts to comply with Title IX), some recipients have not “adopted and published” grievance procedures for handling sex discrimination complaints, and have not designated a Title IX Coordinator. The Department intends to enforce these final regulations vigorously for the benefit of all students and employees in recipients’ education programs or activities, and any person may file a complaint with the Department alleging that a recipient is non-compliant with these final regulations. *Preamble p. 1637*

II) Definitions of “Sexual Harassment”—34 CFR §106.30(a)

- A) “Sexual Harassment” is defined as conduct on the basis of sex that satisfies one or more of three types of behavior:
- i) A recipient’s employee conditioning provision of an aid, benefit or service of the recipient on an individual’s participation in unwelcome sexual conduct (“quid pro quo” harassment);
 - ii) 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
 - iii) “Sexual assault,” “dating violence,” “domestic violence” or “stalking” as defined in referenced statutes.
- B) “Quid pro quo” harassment may be express or implied and need not be “severe” or “pervasive” as a single incident is inherently “offensive” and jeopardizes equal educational access. *Preamble p. 446-447*
- C) “Sexual Assault” is defined as:

Forcible or nonforcible sex offenses under the FBI’s Uniform Crime Reporting (U.C.R) program. *U.S.C. 1092 (f)(6)(A)(v)*

The U.C.R. contains the following definitions:

- i) Sex Offenses, Forcible: Any sexual act directed against another person, without the consent of the victim including instances where the victim is incapable of giving consent.
 - (a) Forcible Rape: (Except Statutory Rape) The carnal knowledge of a person, forcibly and/or against that person’s will or not forcibly or against the person’s will in instances where the victim is incapable of giving consent because of his/her temporary or permanent mental or physical incapacity.
 - (b) Forcible Sodomy: Oral or anal sexual intercourse with another person, forcibly and/or against that person’s will or not forcibly or against the person’s will in instances where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity.
 - (c) Sexual Assault with an Object: To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, forcibly and/or against that person’s will or not forcibly or against the person’s will in instances where the victim is incapable of giving consent because

of his/her youth or because of his/her temporary or permanent mental or physical incapacity.

- (d) Forcible Fondling: The touching of the private body parts of another person for the purpose of sexual gratification, forcibly and/or against that person's will or not forcibly or against the person's will in instances where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity.
- ii) Sex Offenses, Nonforcible: (Except Prostitution Offenses) Unlawful, nonforcible sexual intercourse.
 - (a) Incest: Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
 - (b) Statutory Rape: Nonforcible sexual intercourse with a person who is under the statutory age of consent.

D) "Dating Violence" is defined as:

- i) 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:
 - (1) The length of the relationship.
 - (2) The type of relationship.
 - (3) The frequency of interaction between the persons involved in the relationship.
- 34 U.S.C. 12291 (a)(10)*

E) "Domestic Violence" is defined as:

- i) Felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's

acts under the domestic or family violence laws of the jurisdiction. 34 U.S.C. 12291 (a)(8)

F) “Stalking” is defined as:

i) Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

(a) Fear for his or her safety or the safety of others; or

(b) Suffer substantial emotional distress. 34 U.S.C. 12291 (a)(30)

G) The regulations do not include a definition of consent and do not require recipients to adopt a particular definition of consent, including “affirmative consent,” with respect to sexual assault. 34 CFR §106.30(a)

H) Recipients must clearly define consent and must apply that definition consistently between men and women, generally, and complainant and respondents in particular cases. *Preamble p. 364*

I) Some states have statutes directed to sexual assault which contain definitions of “consent” that a school will necessarily include within its sexual misconduct policy. *Preamble p. 363*

J) **Comment:** Note the “consent” requirement under the definitions of sexual assault. (See II. B. above). This “consent” criteria will continue to focus, as under prior DOE guidelines, on the victim’s ability to give consent, and inability to give such consent if impaired by alcohol, drugs or mental incapacity.

K) **Comment:** Note the subjective and conjunctive standards referenced under Paragraph II.A.2. above, which is based upon the Supreme Court decision *Davis vs. Monroe County Board of Education 526 U.S. 629 (1999)*:

Unwelcome conduct determined by a reasonable person that is so severe, pervasive and objectively offensive that it effectively denies a person equal access to the school’s education program or activity.

Each factor in this paragraph must be met in order for an alleged incident or behavior to constitute “sexual harassment” subject to the requirements under the regulation. The question of what conduct is “severe”, “pervasive” and “objectively offensive” as determined under the “reasonable person” standard will be unique to virtually every situation and educational institution and the source of potential litigation in every case.

For instance, a single unwelcome act by a student against another student may not equate to “pervasive” conduct on a college campus. Consequently, that act may not give rise to any obligation on the college to investigate or respond to the victim’s complaint under the regulation guidelines.

On the other hand, if similar acts of sexual harassment involving different students is routine on a college campus the behavior may rise to the level of being “pervasive.”

Similar questions regarding the definitions of “severe” and “objectively offensive” may arise in many cases, ultimately posing the potential for litigation in these incidents.

- L) Online sexual harassment, if part of a recipient’s educational program or activity, may be subject to the regulations. The preamble notes this is fact specific. A recipient may also cover such harassment under its code of conduct, even if not subject to the regulations.
Preamble p. 643-645

III) Recipient’s General Response—Threshold Criteria –34 CFR §106.44(a)

- A) Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person’s verbal or written report. Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator. *§106.8(a)*
- B) §106.44(a) provides:
 - i) A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.
- C) The regulations set forth specific and limiting threshold criteria in which a school is required to respond to an alleged incident of sexual harassment:
 - i) The incident constitutes “sexual harassment” within the definitions outlined in Paragraph II. above.
 - ii) The school must have “actual knowledge” of an allegation of the incident of sexual harassment.
 - iii) The conduct must have occurred within the school’s own “education program or activity.”
 - iv) The alleged harassment must occur “in the United States.”
- D) Note that all four criteria must be met to constitute an incident of sexual harassment which is subject to the requirements of the regulations. A dismissal of a formal complaint due to

failure to meet the requirements of Title IX does not preclude an action under other provisions of the school's code of conduct. §106.45(b)(3)

E) "Actual knowledge" is defined as:

i) Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient or to any employee of an elementary and secondary school. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is the respondent. The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient. "Notice" as used in this paragraph includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator as described in §106.8(a). §106.30(a)

F) The manner by which a recipient receives actual knowledge need not be a written statement, much less a formal complaint; actual knowledge may be conveyed on a recipient via "notice" from any person – not only from the complainant (i.e., person alleged to be the victim) – regardless of whether the person who reports does so anonymously. *Preamble p. 378*

G) At a postsecondary institution reporting sexual harassment to a Title IX coordinator always constitutes "actual knowledge." Reporting to a person "with authority to take corrective action" also constitutes "actual knowledge." §106.30(a)

H) At an elementary or secondary institution reporting to "any employee" constitutes "actual knowledge." §106.30(a)

I) Under the regulations the reporting of an incident to a resident assistant, professor, or campus counselor or advisor, does not rise to the definition of "actual knowledge." §106.30(a)

J) "Education program or activity" includes:

i) 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. §106.44(a)

K) This third criteria limits a school's responsibility to school related services, locations and activities. Outside locations, even involving students of a college, are outside of actionable events under the regulations though they may be subject to the school's code of conduct.

L) Incidents involving students in programs outside of the United States, i.e. exchange or study-abroad programs, are not subject to the regulation requirements, though the school may address sexual harassment involving students studying abroad, including supportive measures, in its code of conduct. *Preamble p. 660*

M) **Comment:** These threshold criteria are significantly more limited than under previous DOE guidelines and will presumably result in many incidents falling outside of the requirements of a school taking any responsive action. For instance, an incident of sexual assault (which would constitute sexual harassment under Paragraph II.A.3. above) by one student against a fellow student during a party at a privately rented home off campus would apparently not meet the second requirement under Paragraph III.A.3. above and the college would have no obligation to investigate or take any responsive action, even if the incident was reported to the Title IX Coordinator.

IV) Recipient’s Response—Deliberately Indifferent—34 CFR §106.44(a)-(b)

A) Under the proposed regulations a school will be held liable for violating its obligations under Title IX if it is found that the school’s response was “deliberately indifferent” which is defined as “clearly unreasonable in light of the known circumstances.” §106.44(a)

B) Regulation §106.44(b)(2) provides:

i) The Assistant Secretary will not deem a recipient’s determination regarding responsibility to be evidence of deliberate indifference by the recipient, or otherwise evidence of discrimination under Title IX by the recipient, solely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence.

C) As noted above, only alleged incidents meeting the threshold criteria noted under Paragraph III above require a response by the institution.

V) Recipient’s Response to Qualifying Incidents of Sexual Harassment—34 CFR §106.44

A) If an incident meets the criteria of: (1) constituting sexual harassment (as defined in Paragraph II.A. above); (2) the school has actual knowledge (as defined in Paragraph III.D above); and (3) the incident falls within the required jurisdictional criteria (as defined in paragraphs III.A.3. and 4. above) the school has a duty to respond as provided under the regulations. §106.44(a)

B) Regulation §106.44(a) provides:

i) A recipient’s response must treat complainants and respondents equitably by offering supportive measures as defined in §106.30 to a complainant, and by following a

grievance process that complies with §106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in §106.30, against a respondent.

- C) If a formal complaint is filed, the recipient must follow its grievance process. *§106.44(b)(1)*
- D) Even if no formal complaint is filed (and consequently the school is not required to investigate) the school must offer the complainant supportive measures. *§106.44(b)(1)*
- E) Regulation §106.44(a) provides:
 - i) The Title IX Coordinator must 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, and explain to the complainant the process for filing a formal complaint.
- F) Regulation §106.30(a) describes supportive measures as:
 - i) *Supportive measures* means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment. *§106.30(a)*
- G) Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. *§106.30(a)*
- H) The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the institution to provide the supportive measures. *§106.30(a)*
- I) The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures. *§106.30(a)*

VI) Recipient's Response—Emergency Removal—34 CFR §106.44(c)

- A) The regulations do not preclude a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient

undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.

VII) Recipient’s Response—Administrative Leave—34 CFR §106.44(d)

- A) The regulations do not preclude a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45. This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.

VIII) Grievance Process—Formal Complaint—34 CFR §106.30(a) and §106.45(b)

- A) A “formal complaint” is defined as:
 - i) A document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment.
 - ii) At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.
 - iii) A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under §106.8(a), and by any additional method designated by the recipient.
 - iv) As used in this paragraph, the phrase “document filed by a complainant” means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.
 - v) Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party under this part or under §106.45, and must comply with the requirements of this part, including §106.45(b)(1)(iii). *§106.30(a)*

- B) There is no time limit on a complainant's filing of a formal complaint. *Preamble p. 385*
- C) In response to a formal complaint, a recipient must follow a grievance process that complies with §106.45. With or without a formal complaint, a recipient must comply with §106.44(a). *§106.44(b)(1)*
- D) The recipient must investigate the allegations in a formal complaint. *§106.45(b)(3)(i)*
- E) Dismissal of a formal complaint:
 - i) The recipient must dismiss a formal complaint if the conduct alleged in the formal complaint:
 - (a) Would not constitute sexual harassment as defined in §106.30 even if proved;
 - (b) Did not occur in the recipient's education program or activity; or
 - (c) Did not occur against a person in the United States. *§106.45(b)(3)(i)*
 - (d) Such a dismissal does not preclude action under another provision of the recipient's code of conduct. *§106.45(b)(3)(i)*
 - ii) The recipient may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing:
 - (a) A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein;
 - (b) The respondent is no longer enrolled or employed by the recipient; or
 - (c) Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein. *§106.45(b)(3)(ii)*
 - iii) Upon a dismissal required or permitted pursuant to §106.45(b)(3)(i) or (b)(3)(ii) of this section, the recipient must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties. *§106.45(b)(3)(iii)*
- F) Consolidation of formal complaints:
 - i) A recipient may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances. Where a grievance

process involves more than one complainant or more than one respondent, references in the regulations to the singular “party,” “complainant,” or “respondent” include the plural, as applicable. *§106.45(b)(4)*

IX) Grievance Process—Process for Formal Complaints—34 CFR §106.45(b)

- A) In addressing formal complaints of sexual harassment, a recipient’s grievance process must comply with the requirements of the regulations. *§106.45(b)*
- B) Any provisions, rules, or practices other than those required by the regulations that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in §106.30, must apply equally to both parties. *§106.45(b)*
- C) A recipient’s grievance process must:
 - i) Treat complainants and respondents equitably by:
 - (a) Providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent; and
 - (b) By following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in §106.30, against a respondent.

Remedies must be designed to restore or preserve equal access to the recipient’s education program or activity. Remedies may include the same individualized services described in §106.30 as “supportive measures”; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent

- ii) Require an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence – and provide that credibility determinations may not be based on a person’s status as a complainant, respondent, or witness;
- iii) Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.
- iv) A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training. See Paragraph XIX below.

- v) Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process;
 - vi) Include reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes;
 - vii) Include a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities;
 - viii) Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility;
 - ix) State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment;
 - x) Include the procedures and permissible bases for the complainant and respondent to appeal;
 - xi) Describe the range of supportive measures available to complainants and respondents; and
 - xii) Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege. *§106.45(b)(1)(i)-(x)*
- D) A recipient's treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under Title IX. *§106.45(a)*
- E) **Comment:** Note that the "same standards" requirements noted under Paragraph IX. C.ix. above may necessitate a school's applying the higher standard of "clear and convincing evidence" due to the school's general code of conduct or employee/faculty contract criteria.
- F) A recipient must establish a "set" time frame for the grievance process. *Preamble p. 894*

X) Grievance Process—Notice—34 CFR §106.45(b)(2)

A) In response to a formal complaint a school must give written notice of the allegations to the parties. This notice is to include:

- i) Notice of the school’s grievance process.
- ii) Sufficient details of the allegations known at the time, including:
 - (a) Identities of the parties involved.
 - (b) The conduct allegedly constituting sexual harassment as defined in the regulation.
 - (c) The date and location of the alleged incident.
- iii) A sufficient time period for the parties to prepare a response before an initial interview.
- iv) That the respondent is presumed to not be responsible until a final determination is made.
- v) That a determination of responsibility will be made at the conclusion of the grievance process.
- vi) That each party may have an advisor of their choice who may, but need not be, an attorney.
 - (a) The school may elect to pay for the advisor throughout the grievance process but is only required to ensure that a party has an advisor at the hearing. See Preamble p. 992. See Paragraph XII below
- vii) The right of each of the parties to inspect and review all evidence gathered during the investigation.
- viii) Reference to any policy in the school’s code of conduct which prohibits knowingly making false statements or submitting false information during the grievance process.
§106.45(b)(2)(i)

B) If the investigation is expanded, then notice must be given. *§106.45(b)(2)(ii)*

C) See Paragraph VIII above regarding handling, dismissal, and consolidation of complaints.

XI) Grievance Process—Investigation of Formal Complaints—34 CFR §106.45(b)(5)

- A) A recipient must investigate a formal complaint. §106.45(b)(3)
- B) The Title IX Coordinator also may serve as the investigator. *Preamble p. 1257 & 1957*
- C) The burden of proof and gathering of evidence is on the recipient. §106.45(b)(5)(i)
- D) Medical and similar privileged records are not available unless the party (or parent) gives written consent. §106.45(b)(5)(i)
- E) Both parties must be given the equal opportunity to present fact and expert witnesses and evidence during the grievance process. §106.45(b)(5)(ii)
- F) Neither party may be restricted in their ability to discuss the allegations or gather and present relevant evidence. §106.45(b)(5)(iii)
- G) Both parties have the right to an advisor (including an attorney) throughout the grievance process though the recipient may establish restrictions on the advisor's participation in proceedings provided the restrictions are equally applied. §106.45(b)(5)(iv)
- H) The school must give written notice of any interview, meeting or hearing at which a party is to participate, including date, time, location and purpose, with sufficient time for the party to prepare. §106.45(b)(5)(v)
- I) All parties and their advisors must be given equal access to inspect and review all evidence gathered during the investigation that is directly related to the allegations raised in the formal complaint, including evidence upon which the recipient does not intend to rely in reaching a determination and inculpatory as well as exculpatory evidence, regardless of source. The evidence must be provided in electronic format or hard copy. §106.45(b)(5)(vi)
- J) The parties must be given at least 10 days to file a written response regarding the investigation evidence and the investigator must consider those responses prior to completion of the investigative report. The recipient may elect to use calendar or business days (*Preamble p. 1963*). §106.45(b)(5)(vi)
- K) A school may require the parties to submit any additional evidence prior to the investigator finalizing the investigator report or after the report and prior to the hearing. A school may provide a copy and allow the other party to respond. *Preamble p. 1042-1043*

- L) The evidence provided to the parties must also be available at the hearing with each party having equal access to refer to the evidence or use it in cross examination. *§106.45(b)(5)(vi)*
- M) The investigator must complete an investigative report that fairly summarizes relevant information at least 10 days prior to a scheduled hearing and provide copies to each party and their advisors, in electronic or hard format, for their review and written response. *§106.45(b)(5)(vii)*
- N) The investigator may include recommended findings or conclusion in the investigative report, but the decision-maker is under an independent obligation to objectively evaluate relevant evidence in making a determination. *Preamble p. 1031*
- O) **Comment:** The rights of the parties to access investigative reports and evidence, and the obligation of a decision-maker in issuing a written determination (see Paragraph XIII.C. below), illustrates the need to have well-planned and implemented investigations, with organized and detailed evidentiary files, recordings, virtual interviews, etc.
- P) **Comment:** Note the importance of the school's code of conduct expressly setting forth: the type of conduct which constitutes sexual harassment; the definition of consent; the standards of evidence; the prohibition upon making false statements or submitting false information; and timelines for responses (which may be longer than 10 days).
- Q) **Comment:** The school's code of conduct should also clearly set forth the investigation and grievance process.

XII) Grievance Process—Hearings—34 CFR §106.45(b)(6)

- A) The decision-maker(s) in a hearing cannot be the same person(s) as the Title IX Coordinator or the investigator(s). *§106.45(b)(7)(i)*
- B) A postsecondary school must provide for a live hearing. *§106.45(b)(6)(i)*
- C) A live hearing is optional for elementary and secondary schools, though the parties must be given the opportunity to review the investigative report, submit written relevant questions of any party or witness to the decision-maker, receive answers to those questions, and submit limited follow-up questions prior to a determination by the decision-maker. The decision-maker must explain the exclusion of any question as not being relevant. *§106.45(b)(6)(ii)*
- D) The recipient may consolidate cases when allegations arise out of the same facts or circumstances. *Preamble p. 1038; §106.45(b)(4)*
- E) Live hearings may be conducted either with all parties physically present at the same location or, at the recipient's election, any or all parties, witnesses and other participants

may appear at the live hearing virtually, provided all participants can simultaneously see and hear each other. §106.45 (b)(6)(i)

- F) The recipient must create an audio or audiovisual recording or transcript and make it available to both parties for inspection and review. §106.45(b)(6)(i)
- G) Either party may request that a hearing be held with the parties in separate rooms with technology enabling the parties and the decision-maker(s) to see and hear witnesses. §106.45(b)(6)(i)
 - i) Webcams, laptops or cell phones, utilizing available software will meet this requirement. *Preamble p. 1968*
- H) If a party does not have an advisor at the live hearing, the recipient must provide an advisor of the recipient's choice, without charge to the party, who may be an attorney, to conduct cross examination. §106.45(b)(6)(i)
- I) At the hearing each party must be given the opportunity for relevant questions and cross-examination to be conducted by the party's advisor of the other party and any witnesses, including challenging credibility. The cross examination must be conducted directly, orally and in real time and only by the party's advisor, never by the party. §106.45(b)(6)(i)
- J) Only relevant questions may be asked of a party or witness in cross examination or other questions and before a question is answered the decision-maker must first determine whether the question is relevant and explain any decision to exclude a question as not relevant. §106.45(b)(6)(i)
- K) The regulations focus on the investigator and decision-maker considering relevant evidence. A recipient may not adopt evidentiary rules of admissibility that might serve to exclude relevant information (i.e. lie detector results or rape kits), or because it may be unduly prejudicial, relate to prior bad acts, or constitute character evidence. *Preamble p. 811 and 981*
- L) Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless offered to prove someone other than the respondent committed the conduct alleged by the complainant, or 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. §106.45(b)(6)(i)
- M) If a party or witness does not submit to cross-examination at the live hearing the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination of responsibility. However, the decision-maker(s) cannot draw an inference regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions. §106.45(b)(6)(i)

XIII) Grievance Process—Determinations—34 CFR §106.45(b)(7)

- A) The determination must be made by a decision-maker(s) who is/are not the Title IX Coordinator or investigator, and who does not have a conflict of interest or bias. *§106.45(b)(7)(i)*
- B) In reaching a determination the recipient must apply the standard of evidence adopted by the school. *§106.45(b)(7)(i)* and *§106.45(b)(1)(vii)*. See Paragraph XIV below.
- C) Following the hearing the decision-maker must issue a written determination which must include:
 - i) Identification of the allegations potentially constituting sexual harassment as defined in §106.30;
 - ii) 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;
 - iii) Findings of fact supporting the determination;
 - iv) Conclusions regarding the application of the recipient’s code of conduct to the facts;
 - v) A statement of, and rationale for, the result as to each allegation, including a 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
 - vi) The recipient’s procedures and permissible bases for the complainant and respondent to appeal. *§106.45 (b)(7)(ii)*
- D) The recipient must provide the written determination to the parties simultaneously. *§106.45(b)(7)(iii)*
- E) The determination is final either: 1) on the date the recipient provides the parties with written determination of an appeal if an appeal was filed; or 2) the date for filing an appeal expires without an appeal having been filed. *§106.45(b)(7)(iii)*
- F) The Title IX Coordinator is responsible for implementation of any remedies. *§106.45(b)(7)(iv)*
- G) **Comment:** In light of the requirement that the decision-maker must not have a conflict of interest or bias, schools should consider using an independent outside party as the decision-

maker rather than a school employee or administrator who may be conflicted or biased, or perceived as being so.

- H) **Comment:** Note that the decision-maker is charged with determining relevance of questions during the hearing.

XIV) Grievance Process—Standard of Evidence—34 CFR §106.45(b)(1)(vii)

- A) A school may elect to apply either:
- i) The preponderance of evidence; or
 - ii) The clear and convincing evidence standard of evidence.
- B) The same standard of evidence must be used for formal complaints against students as is used for formal complaints against employees, including faculty, and the same standard must be applied to all formal complaints of sexual harassment. *§106.45(b)(1)(vii)*
- C) **Comment:** Note that the “same standards” requirements noted under Paragraphs XIV. B. above may necessitate a school’s applying the higher standard of “clear and convincing evidence” due to the school’s general code of conduct or employee/faculty contract criteria.
- D) Neither standard requires corroborating evidence. The decision-maker can make a determination of responsibility based on objective evaluation of party statements with or without corroborating evidence. *Preamble p. 1295*

XV) Grievance Process—Appeals—34 CFR §106.45(b)(8)

- A) Recipients must offer an appeal process to both parties from a) a determination regarding responsibility, and b) from a recipient’s dismissal of a formal complaint or any allegations therein on several bases:
- i) Procedural irregularity that affected the outcome. *§106.45(b)(8)(i)(A)*
 - ii) New evidence that was not reasonably available at the time of the determination or the dismissal, that could affect the outcome of the matter. *§106.45(b)(8)(i)(B)*
 - iii) The Title IX Coordinator, investigator or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or in the case that affected the outcome. *§106.45(b)(8)(i)(C)*
- B) The recipient may offer additional bases to appeal provided they are equally available to both parties. *§106.45(b)(8)(ii)*

- C) The appeal decision-maker(s) must also be free of bias or a conflict of interest; cannot be the Title IX Coordinator, investigator or decision-maker; and have required training. *§106.45(b)(8)(iii)(B)* and *§106.45(b)(8)(iii)(C)*
- D) The recipient must notify the other party in writing of a party’s appeal and implement equal rights to both parties on the appeal. *§106.45(b)(8)(iii)(A)*
- E) Both parties must be offered a reasonable, equal opportunity to submit written arguments. *§106.45(b)(8)(iii)(D)*
- F) The decision-maker(s) must issue a written decision simultaneously to both parties describing the result and the rationale of the decision. *§106.45(b)(8)(iii)(E)* and *(F)*
- G) **Comment:** Schools should consider independent third parties to consider the appeal.

XVI) Grievance Process—Informal Resolutions—34 CFR §106.45(b)(9)

- A) If a formal complaint is filed a school may offer informal resolutions of alleged incidents such as mediation or other forms of alternative dispute resolution, without a full investigation or adjudication. *§106.45(b)(9)*
- B) Informal resolution must be voluntary, with the parties being fully informed of the process and options and the parties must consent in writing to the process. *§106.45(b)(9)(i)* and *(ii)*
- C) Informal resolutions cannot be offered or facilitated by a recipient in a case involving an employee’s sexual harassment of a student. *§106.45(b)(9)(iii)*
- D) **Comment:** Schools should consider the use of trained and experienced mediators for informal resolution of cases.
- E) **Comment:** In mediation three parties will be involved – the complainant, the respondent, and the school. Such situations may entail careful and comprehensive consideration of each party’s role, concerns and responsibilities.
- F) **Comment:** Consider whether such informal proceedings might extend to encompass claims between the complainant and respondent in lieu of civil litigation.

XVII) Title IX Coordinator, Investigators and Decision-Makers—Training—34 CFR §106.45(b)(1)(iii) and (b)(10)

- A) Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the “Title IX Coordinator.” *§106.8*

- B) The Title IX Coordinator may also be the investigator. The decision-maker(s) in a hearing cannot be the Title IX Coordinator or investigator. The decision-maker(s) in an appeal cannot be the Title IX Coordinator, investigator or decision-maker(s). *Preamble p. 1257 & 1957; §106.45(b)(7)(i); §106.45(b)(8)(iii)(B)*
- C) The regulation requires that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. *§106.45(b)(1)(iii)*
- D) A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on:
- i) The definition of sexual harassment in § 106.30;
 - ii) The scope of the recipient's education program or activity;
 - iii) How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable; and
 - iv) How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. *§106.45(b)(1)(iii)*
- E) Decision-makers must receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, as set forth in Regulation 106.45(b)(6). *§106.45(b)(1)(iii)*
- F) Investigators must receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth Regulation 106.45(b)(5)(vii). *§106.45(b)(1)(iii)*
- G) Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment. *§106.45(b)(1)(iii)*
- H) All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process must be maintained for 7 years by the recipient. *§106.45(b)(10)(i)(D)*
- I) A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public. *§106.45(b)(10)(i)(D)*

- J) Training is to be 8 hours with additional training annually. *Preamble p. 1958*
- K) Training need not be live and may be online or virtual. *Preamble p. 1961*
- L) **Comment:** As noted in Paragraph XI above, the investigative report, as well as all evidence gathered during an investigation must be made available to both parties for review prior to any determination. This requirement emphasizes the importance of designing and conducting comprehensive investigations which are well-documented and organized.

XVIII) Recordkeeping—34 CFR §106.45(b)(10)

- A) Schools must maintain records of every Title IX sexual harassment investigation and determinations of responsibility, including informal resolutions. *§106.45(b)(10)(i)(A)-(C)*
- B) Schools must keep records of responses to every allegation of sexual harassment under 106.44 even if no formal complaint was filed, and any response, including supportive measures offered and implemented. *§106.45(b)(10)(ii)*
- C) Schools must document the facts upon which it was determined that they were “not deliberately indifferent” to the allegations of sexual harassment. *§106.45(b)(10)(ii)*
- D) Schools must maintain all materials used to train Title IX Coordinators, investigators, decision-makers and any person who facilitates an informal resolution process, and post such materials on the school’s website. *§106.45(b)(10)(i)(D)*
- E) Records must be maintained for 7 years. *§106.45(b)(10)*

XIX) Remedial Action—34 CFR §106.3

- A) DOE may require a recipient to take remedial action for discriminating in violation of Title IX or the regulations. *§106.3*
- B) DOE will not assess monetary damages against a school as a result of violations of the regulations. *Preamble p. 1412 et seq.*
- C) DOE reserves the right to terminate Federal financial assistance as a “severe” remedy. *Preamble p. 1418-1419*
- D) **Comment:** Under the new guidelines the threat of monetary damages from a school in violation is not an available sanction.

XX) Dissemination of Policy and Grievance Procedures—34 CFR §106.8

- A) Each school must notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the school (collectively referred to in this Paragraph XX as “Notice Parties”) that it does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by Title IX and the regulations not to discriminate in such a manner. Such notification must state that the requirement not to discriminate in the education program or activity extends to employment and admissions (unless Subpart C does not apply to the institution) and that inquiries about the application of Title IX and the regulations to the school may be referred to the Title IX Coordinator or to the Assistant Secretary of DOE, or both. *§106.8(b)(1)*
- B) A recipient must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited under the regulations and a grievance process that complies with § 106.45 for formal complaints as defined in § 106.30. A recipient must provide to Notice Parties notice of the recipient’s grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond. *§106.8(c)*
- C) A recipient must notify the Notice Parties of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator. *§106.8(a)*
- D) A recipient must prominently display the contact information required to be listed for the Title IX Coordinator under Paragraph XX.C) above and the policy described in Paragraph XX.A) above on its website, if any, and in each handbook or catalog that it makes available to Notice Parties. *§106.8(b)(2)*
- E) Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person’s verbal or written report. Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator. *§106.8(a)*
- F) All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process must be publicly available on the recipient’s website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public. *§106.45(b)(10)(D)*

XXI) Retaliation—34 CFR §106.71

- A) 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 the regulations, 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 the regulations. Any such act constitutes retaliation. *§106.71(a)*
- B) Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination. *§106.71(a)*
- C) Exercise of First Amendment rights does not constitute retaliation. *§106.71(b)(1)*
- D) Charging a party with a Code of Conduct violation for making a materially false statement in bad faith in connection with the grievance process does not constitute retaliation. A determination regarding responsibility, alone, is not sufficient to conclude that an individual made a materially false statement in bad faith *§106.71(b)(2); Preamble p. 854*

XXII) Confidentiality—34 CFR §106.71

- A) The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. *§106.71(a)*

XXIII) Exemption for Educational Institutions Controlled by Religious Organizations—34 CFR §106.12

- A) An educational institution controlled by a religious organization may apply for exemption from application of part or all of the regulations that conflict with the tenet of the organization. *§106.12(b)*

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Training Overview

Training Program: Title IX Solutions, LLC's *Title IX & Beyond*

Training Session: Continuum of Sexual Misconduct, Implicit Biases, and Equitable Responses

Date: August 6, 2020

ABOUT RAINN

RAINN, the nation's largest anti-sexual violence organization, founded and operates the National Sexual Assault Hotline and Online Hotline to provide 24/7 support that's free, anonymous, confidential, and in English and Spanish to anyone affected by sexual violence. Leveraging our expertise and insights in the field, our consulting team has created a customized training for Title IX personnel attending Title IX Solutions, LLC's *Title IX & Beyond* virtual training program. Please direct any questions regarding this training or RAINN's Consulting Services to consulting@rainn.org.

TRAINING GOAL

To provide participants with education on providing a fair, unbiased, and equitable response to sexual misconduct

TRAINING OUTLINE

I. CONTINUUM OF SEXUAL MISCONDUCT

The training begins with an overview of the continuum of sexual misconduct, from attitudes to overt sexual violence, and a discussion of other boundary violations that have the potential to contribute to discrimination. In order to deepen competency in reviewing the facts of a case, participants will consider six areas along the continuum: oppressive societal attitudes, nonsexual boundary violations, grooming tactics, microaggressions, subtle sexual misconduct, and overt sexual misconduct. This section will conclude with a closer look at the three-pronged definition of sexual harassment as outlined in the new regulations.

II. IMPLICIT BIASES

A deep dive into biases, this section will define implicit biases and highlight why understanding them is fundamental to responding to sexual misconduct in an impartial way. Through a thought exercise and scenario-based activity, participants will reflect on their own biases and how those may be activated when responding to a report of sexual misconduct. The goal of this reflection is to identify individual biases so that Title IX personnel are able to better set them aside and provide a fair and equitable response.

III. EQUITABLE RESPONSES

Participants will build upon the knowledge from section II as they learn equitable response strategies premised on fairness and impartiality. The strategies will include tangible skills to be used prior to and during Title IX proceedings, in conversations with complainants and respondents, and when communicating about the case.

IV. RESOURCES

Resources that participants can access will be provided within the following categories: Resources for Students, Resources for Title IX Personnel, RAINN's Resources, and Other National Support Hotlines.

August 6, 2020

12:40 PM – 1:40 PM

TITLE IX INVESTIGATION PROCEDURES & BEST PRACTICES

Isaac (Ron) A. Bratcher & Thomas A. Denton, Jr.

I. Introductions

II. Investigation is a serious matter – First, DO NO HARM

III. Meet with Title IX Coordinator and any first responders for case background

- A. Role of First Responders
- B. Locate and secure any physical items of potential evidence
- C. Locate potential witnesses and contact information

IV. Review School’s student conduct/employee policies, formal complaint, case specifics, witness list, contact information and notices to parties

V. Designing Investigative plan of action – case preparation

- A. Prioritize order of activities
- B. Select investigator team
- C. Prioritize order of witness interviews
- D. Conduct interviews – complainant, respondent & witnesses
- E. Write report for each interview with transcripts & recordings

VI. Collected Items

- A. It is highly recommended that a collected item kit put together. The kit should include, but not limited to, pens, pencils, paper/tablet, sharpie/marker, latex gloves, several sizes of paper bags, zip lock type plastic bags, manilla envelopes, white envelopes, tamperproof tape, small containers for liquids, digital camera with removal Secure Digital Card (SD), and a video camera with a removal SD card.
- B. Try not to use personal cellular telephones to photograph, text, email, or record any potential Title IX issue. Advise the Complainant and/or the Respondent not to text message you regarding the Title IX issue.

VII. Documentation of Collected Items:

A. Create a photograph log.

- i. Give the log a name (Photo Log of Search of Alpha Beta Fraternity House).
The log should have the photograph number. This is normally assigned to the photograph by the camera. If not start with Photo 1. The log should describe the what the image depicts. (Item 1, Red Solo cup with unknown liquid, north view)
- ii. Photograph the item before the item is disturbed.
- iii. If possible, consider using the four corners approach. Take a photograph depicting each corner of the item, north south east west
- iv. Take photographs from a distance to give a general idea of where the item was located. Then take photographs closer to clearly identify the item. After the item is collected additional photographs can be taken if necessary.

B. Create a collected items log.

- i. Give the log a name (Collected Items Log of Search of Alpha Beta Fraternity House). The log should list the item number (Item 1); a description of the item (Red Solo cup with unknown liquid); location (Bedroom 1, desk in northeast corner); who found/collected the item (Title IX investigator Smith); and the date and time the item was collected.

C. Collection/Storage

- i. Wear latex gloves before touching any item collected. (Laten Fingerprints/DNA)
- ii. Place the item in a bag.
- iii. Write detailed description of what was collected on the bag (Red solo cup. Unknown liquid was placed in sealed plastic vile, Item 1A.
 - a. From whom was the item collected? Name and contact information. (bedroom 1 Alpha Beta)
 - b. Where was the item collected? (Bedroom 1, desk in northeast corner).
 - c. When was the item collected? Date and time the item was collected. (Chain of custody)
- iv. Seal the bags with tamperproof tape. If no tamperproof tape is available, seal the package the best way possible. Date and initial the seal with marker.
- v. Store the collected item in a locked compartment with very limited access.
- vi. If the item is opened for inspection or analyzes, do not open at the original seal.

- vii. Document why, for whom the item was opened, when the inspection was complete, and the item resealed.
 - a. **Example:** (On 01/01/2020 at 1:00 pm, Item 1 was removed from the storage cabinet at the request of Respondent and Respondent’s Representative. Item 1 was opened and viewed by the aforementioned. Latex gloves were worn during inspection. On 01/01/2020 at 1:15 pm, Item 1 was resealed and placed back into the storage cabinet.)
- viii. When inspection or analyzes is complete, reseal and store following the aforementioned procedure.
- ix. The reason you don’t open at the original seal is so you can so seal was intact. This is a chain of custody issue.

VIII. Cellular Telephone Data Collection

- A. The best method is to use a Forensic Extraction Device (FED) to extract all the data stored on the cellular telephone. If no FED is available: (assuming the provider wants the cellular telephone returned)
- B. Create an email address specifically for the event (TitleXcase1@yahoo.com).
- C. Forward all email to the newly created email address.
- D. If the cellular telephone has a removable storage card (SD card). Transfer as much data as possible to the SD card. Remove the SD card and make two copies of the SD card. Provide a copy to the provider, keep the second copy to work from, and package and store the original as a collected item.
- E. If the cellular telephone does not have a removable SD card email all pertinent photographs to the newly created email address.
- F. Text messaging and Snapchat will be the most difficult data to retain. There are apps available that will convert the text message to a pdf file. The pdf file can be emailed the newly created email address.
- G. You can also take digital photographs of the text messages, store the digital camera’s SD card the same way as collected items. Make copies for analysis before bagging and sealing the SD card. Follow the same procedures for Photo Log as before. Write a report indicating you photographed the text messages to preserve the text message.

IX. Organization of Case File

- A. Document all contact regarding the Title IX event, when, where, why, who.
- B. Take notes.
- C. Keep all handwritten notes regarding the contacts.
- D. Generate reports from the notes. Store the notes and the reports (digital or manually).

- E. Organize the case file so that all data can be recovered quickly.
- F. Event (do not mix events)
- G. Title your case file. (Investigative File Complainant vs. Respondent)
- H. Summary: Write a brief summary Complainant's allegation and Respondent's retort. Refer to the tabbed memorandum of reports, tabbed collected items, and the tabbed Forensic data.
- I. Index of Investigative File:
 - a. (tab the Indexed reports alphabetically, numerically or a mixture of both)
 - b. Complaint's initial complaint
 - c. Memorandum of Interviews
 - d. Collected items and photographs of collected items
 - e. Photographs of dorms, bars, street signs, security cameras, etc.
 - f. Forensic data (lab results, cellular telephone records, emails, text message, etc.
 - g. Misc. reports

Investigator Checklist

- Present Complainant and/or Respondent with Consent to Remove and Search Form, if applicable
- Collect evidence
- Create Inventory List for all Collected Items of Potential Evidence
- Sign and date Evidence Inventory and Receipt Form as first recipient
- Interview Complainant
- Write Complainant Memorandum of Interview
- Transcribe Complainant Interview (if recorded)
- Interview Respondent
- Write Respondent Memorandum of Interview
- Transcribe Respondent Interview (if recorded)
- Interview Witnesses
- Write Witness Memorandum of Interview (may be multiple memoranda)
- Transcribe Witness Interview(s) (if recorded)
- Write Executive Summary of Investigation
- Write Factual Report of Investigation
- Combine Executive Summary, Factual Report of Investigation, Memoranda of Interviews, interview recordings and transcripts, evidence inventory and receipt form, and collected evidence to create Investigation Report
- Submit Investigation Report to Title IX Coordinator

Informal Resolution of Title IX Complaints: Mediation & Arbitration

August 6, 2020

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Common forms of Informal Resolution (ADR)

THE ALTERNATIVE DISPUTE RESOLUTION CONTINUUM



A THIRD PARTY NEUTRAL IS INVOLVED
PROCESS IS (IN THEORY) DECIDED BY PARTIES
OUTCOME IS DECIDED BY ARBITRATOR

Most common Alternative Dispute Resolution processes



Title IX Informal Resolution Requirements

- ▶ Voluntary
- ▶ Consent in writing
- ▶ Not available: Employee sexual harassment of student
- ▶ Timing:
 - ▶ May be conducted before full investigation
 - ▶ Must be conducted:
 - ▶ After complaint filed
 - ▶ Before adjudication completed
- ▶ Party may withdraw from mediation and pursue grievance process

Mediator/Facilitator Requirements

- ▶ Mediators required to have 8 hours of training(Section 106.45(b)(1)(iii)
 - ▶ Same as Title IX Coordinators, Investigators, Decision Makers
- ▶ Mediator Disclosure - free from Conflicts of Interest and Bias

What is Mediation

- ▶ Process of assisted negotiation in which a neutral person helps people reach agreement.
- ▶ Mediator:
 - ▶ Impartial third party
 - ▶ No decision making authority
- ▶ Consensual
- ▶ Informal
- ▶ Confidential process
- ▶ Parties are the decision makers

What is Arbitration

- ▶ Neutral person acts like a judge
- ▶ Reviews evidence (testimony & documents)
- ▶ Applies the facts to the law
- ▶ Decides outcome
- ▶ Confidential process guided by arbitration agreement of the parties and applicable rules

Restorative Justice

Focus on Repairing the Harm



Benefits of Mediation

- ▶ Parties determine outcome
- ▶ Resolution can be creative
- ▶ Faster
- ▶ Cheaper
- ▶ Result can be confidential

Mediation: 3 Legged Stool

- ▶ Cost
- ▶ Time and Timing
- ▶ Risk



Overview of Mediation Process

- ▶ Initial Caucus with each party
- ▶ Joint sessions (Optional)
 - ▶ Meet and Greet; or
 - ▶ Description of claims/defenses
 - ▶ Not an Opening Statement to a jury
 - ▶ Opportunity for Apology/Acknowledgment
- ▶ Shuttle diplomacy
- ▶ If resolved: Mediated Settlement Agreement

Mediation preparation

It takes time

- ▶ Attorney: Mediator Brief/Position Paper
- ▶ Client: prepare for what to expect, process, timeframe
- ▶ Explain strengths and weaknesses to client
- ▶ Plan starting and ending point
- ▶ Prepare Litigation Budget and Risk Assessment
- ▶ Be open to the PROCESS

Before Mediation

- ▶ **Who should attend from your side?**
Decision makers?
 - ▶ If decision maker is not available in person, communicate via video conference or telephone
- ▶ **Who should not attend?**

Before Mediation

- ▶ Come to mediation with authority
- ▶ Think about the alternatives if no settlement [BATNA]
- ▶ Provide Mediator with position paper

During Mediation

- ▶ How to deal with the problem client and/or attorney?
- ▶ Dealing with the Complainant and/or attorney who do not understand the case issues?
- ▶ Dealing with the Respondent and/or attorney who do not appreciate the case issues?
- ▶ Give the mediator a “heads up” about the issue & solicit her/his assistance/suggestions

During Mediation

- ▶ When to have an opening joint session, when only a “meet and greet” or none?
- ▶ Mediators can use a “controlled agenda” (more than “meet & greet” but less than full-blown opening)
- ▶ Mediation is fluid. Be flexible & creative.
- ▶ Beware of Backward Steps

During Mediation

- ▶ Recognizing the drama taking place in the Complainant's caucus
- ▶ Recognizing the drama taking place in the Respondent's caucus
- ▶ Recognizing the school's concerns regarding the Complainant, Respondent, School Code of Conduct, reputation, publicity
- ▶ When to move fast and when to move slowly. When is it closing time.

During Mediation

- ▶ The power of apology.
- ▶ The difference between an acknowledgement and apology and when to use each.

During Mediation

- ▶ What does your offer/demand mean (give rationale)
- ▶ Mediator Proposals
- ▶ Use mediation to strengthen relationship between school and students

Using the Mediator

- ▶ Using (but not abusing) the mediator
 - ▶ Truth telling
 - ▶ Holding back
 - ▶ Ask Mediator for his/her opinion or suggestions. Use as sounding board

If No Settlement: Soft Landing



Questions



TITLE IX GRIEVANCE PROCESS

DO'S AND DON'TS

MELVIN KENNEDY, Attorney

HON. PATRICIA RIEHL, Attorney and former Trial Judge

KIM L. KIRN, Attorney

Designation of Title IX Coordinator:

- **Do:** Designate and authorize at least one employee to coordinate schools' efforts to comply with Title IX.
- **Do:** Notify applicants for admission and employment, students, parents, legal guardians, employees, unions and professional organizations of the name, office and e-mail address and telephone number of the Title IX coordinator. Include the Coordinator's contact information in catalogs, employee or student handbooks and on school's website. A complaint may be received by these means, **or by any other means that result in the Title IX coordinator receiving the person's verbal or written report.**
- **Do:** Widely disseminate policy of nondiscrimination in accordance with Title IX.

Designation of Title IX Coordinator:

- **Don't:** Select a Coordinator who is biased toward or against either Complainants (people alleging discrimination or harassment) or Respondents (those alleged to have committed acts of discrimination or harassment).
- **Don't:** Allow the Coordinator to take part in rendering decision.

Grievance Process:

- **Do:** Adopt and publish grievance procedures that provide for resolution of complaints. Procedures must include notification to applicants for admission and employment, students, parents, legal guardians, employees, unions and professional organizations of grievance procedures and process, along with how to file a complaint of sex discrimination, or sexual harassment and how the school will respond.
- **Do:** Recognize that actual knowledge will be imputed to a school where notice is provided to its Title IX Coordinator, or any employee of school who has authority to institute corrective measures on behalf on school.
- **Do:** Provide a formal complaint process for allegations of sexual harassment by persons participating or attempting to participate in the educational program or activity of the school.
- **Do:** Allow the formal complaint to be filed with the Title IX Coordinator in person, by mail, e-mail, or any additional method designated by the school.
- **Do** Provide supportive measures to both complainant and respondent, such as counseling, extensions of deadlines or other course related adjustments, modification of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security of monitoring of certain areas of campus and other similar measures. Such supportive measure must be offered free of charge and can be offered before or after filing of a formal complaint, or where no formal complaint is filed.

Grievance Process:

- **Do:** Maintain as confidential any supportive measures offered to the complainant or respondent.
- **Do:** Conduct a thorough, unbiased investigation. **The burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the school and not the parties.**
- **Do:** Allow each party to review any evidence obtained as part of the investigation (inculpatory and exculpatory) that is related to the allegations raised in the complaint, including the evidence upon which the school does not intend to use at hearing. The parties must be allowed 10 days to respond and the investigator must consider the responses.
- **Do:** Create an investigative report that summarizes the evidence and send to each side for review and written response at least 10 days prior to hearing.

Grievance Process:

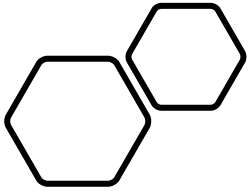
- **Don't:** Administer any disciplinary measures against respondent before completion of the grievance process.
- **Don't:** Hesitate to remove a respondent who poses a threat to the safety of another student, after school undertakes an individualized risk assessment.
- **Don't: Require** parties to participate in an informal resolution process.
- **Don't:** Offer informal resolution as a condition of enrollment, continuing enrollment, or employment, continuing employment, or enjoyment of any other right.
- **Don't:** Allow the investigator to also act as decision maker.

Standard of Evidence

- **Do:** Check the policy to know what is applicable STANDARD OF EVIDENCE
 - **Do:** Let Advisors know at beginning of Hearing
 - **Do:** Recite STANDARD OF EVIDENCE in the written determination
-
- This will be a guiding principle to Hearing Officer
 - Sometimes referred to as STANDARD OF PROOF
 - Criminal or civil courts may be using different standard

WRITTEN DETERMINATION

- MUST INCLUDE:
 - Allegations
 - Description of all procedural steps taken
 - Findings of fact
 - Conclusions applying the code of conduct to the facts
 - Rationale for each determination; corresponding disciplinary sanctions imposed; and whether remedies designed to restore or preserve equal access to the School will be provided to the parties
 - Basis for either party to appeal.



Title IX Coordinator implements remedies

Written determination given to parties at same time

Becomes final when time for an appeal has expired; OR if appeal has been filed, the date the determination was given to parties

FINALITY



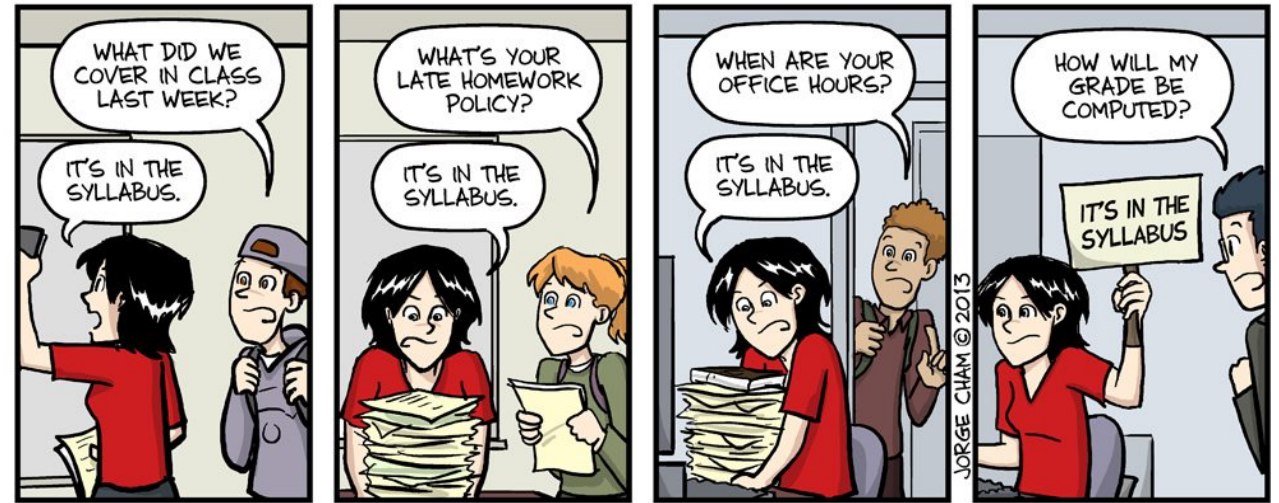
CONDUCTING THE HEARING:

- **Do:** Provide complainants and respondents live hearings
- **Do:** Provide for live real-time cross examination.
- **Do:** Provide separate rooms required if requested by either party.
- **Do:** Provide advisor of party's choice at no cost to the party.
- **Do:** Allow only advisor questioning and only relevant questions. The decision maker must determine relevancy and explain reasons for excluding inquires before witnesses may answer.

RECORDING THE HEARING:

- **Do:** Record the hearing and make the transcript available to the parties.
- **Do:** Keep all records regarding reports or complaints of sexual harassment, including investigation, informal resolution, recordings, sanctions imposed, appeals, supportive measures and **training materials used to train Title IX Coordinators, investigators, decision makers and anyone who facilitates an informal resolution process.**

Relevant Questions and Cross-Examination



IT'S IN THE SYLLABUS

This message brought to you by every instructor that ever lived.

WWW.PHDCOMICS.COM

AND NOW IT'S IN THE
REGULATIONS!

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ADVISORS

If a party does not have an advisor at the live hearing:

The school **MUST** provide an advisor of the school's choice without charge, who may be an attorney to conduct Cross-Examination.

- Applies to both Complainant and Respondent.
- Guiding principle is equal and equitable.
- Attorney vs. Non- Attorney.
- Is paid for or provided by the school.
 - Law School clinic.
 - Local Bar Association for pro bono or reduced rate.
 - Grant writing.
- Critical because only Advisors may cross-examine a witness.

CROSS- EXAMINATION

- At the hearing each party must be given the opportunity for relevant questions and cross- examination to be performed by the advisor and never by the party that includes challenging the credibility of a witness.
- Cross- examination must be conducted directly, orally, and in real time.

Note: the Regulations do not address the swearing in of a witness. Best practice would be to swear in the witness prior to hearing testimony.



RELEVANCY AND CROSS-EXAMINATION

- At the hearing each party must be given the opportunity for relevant questions and cross-examination to be conducted by the advisor of the other party and any witnesses, including challenging credibility.
- The cross-examination must be conducted directly, orally, in real time, and only by the advisors; never by the party.
- Only relevant questions may be asked of a witness in cross-examination or other questions and before a question is answered the hearing officer must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.
- If a party or witness does not submit to cross-examination at the live hearing, the hearing officer must not rely on any statements of that party or witness in reaching a determination of responsibility.
- The hearing officer cannot draw an inference regarding responsibility based solely on the refusal to appear or failing to submit to cross-examination.

IT IS ALL ABOUT RELEVANCY

"Relevant evidence" is not defined by the Regulations.

- "Relevant evidence" is defined by Black's Law Dictionary to be "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."
- Regulations focus on the investigator and hearing officer consider relevant evidence. A school may not adopt evidentiary rules of admissibility that might serve to exclude relevant information.

Polygraph/ Voice Stress Analysis/ Sexual Assault Kits

- Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless offered to prove someone other than the respondent committed the alleged conduct or to prove consent.



QUESTIONS TO CONSIDER?

- Must a hearing officer rule on each and every question asked of each and every witness as to relevancy? Must they do so without an objection from an advisor?
- Is it relevant evidence to take testimony about the following:
 - The complainant's attire.
 - The use of alcohol or drugs by any party or witness.
 - Emotional state of either party or witness.
 - Mental health diagnosis/treatment of either party or witness.
 - An arrest record of either a party or a witness.
 - A criminal history of either a party or a witness.
 - The occupation or job of either a party or a witness.
 - Prior complaints that were filed by a complainant/ the disposition of the complaint
 - Prior complaints that were filed against the Respondent/the disposition of the complaint
 - Previous sanctions imposed by the school or another school on a party or witness
 - Sexual history or dating history of the parties

STANDARD OF EVIDENCE



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Standard of evidence is determined by the school and can either be:

- A preponderance of the evidence OR;
 - A clear and convincing standard of evidence
 - School must choose one standard of evidence and include it in the School's general code of conduct.
- Caveat: The same standard of evidence must be used for formal complaints against students as is used for formal complaints against employees, including faculty, and the same standard must be applied to all formal complaints of sexual harassment. "Same standard" may require a school to apply the higher standard of evidence due to the school's general code of conduct or employee/faculty contract.

Risk Management and Litigation Analysis

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Agenda

- Let's explore Title IX risk areas.
 - Incomplete Investigation
 - Unreasonable Delays
 - Imbalanced Investigation – Due Process
 - Failure to Communicate
 - Retaliation
- Best Practices to reduce those risks.
 - Policy
 - Procedure
 - Understanding Rights and Responsibilities – training and more!
 - Above all – communicate!
- Case Studies and Litigation Trends

“If you don’t deal with sexual violence, you are going to get sued. If you deal with sexual violence, you are going to be sued.”

Peter Lake, Director of Stetson University’s Center for Excellence in Higher Education Law and Policy

Title IX Risks

- Failing to understand, follow, and enforce your Title IX Policy.
- Failing to understand the roles each individual plays in a Title IX matter.
 - Coordinator, Investigator, Decision Maker
- The goal of any investigation procedure should be **promptness, thoroughness, and impartiality**.
 - Anything less is a risk!
- Conduct a thorough investigation before reaching any conclusions.
- **DO NOT promise confidentiality but be mindful of restrictions!**

Title IX Risks

- Failure to honor due process or fairness in the process.
- RETALIATION, real or perceived.
- Not investigating when you had the chance.
- Failing to thoroughly and properly document the process.
- Going too far... crossing the line into invasion of privacy, intimidation, false imprisonment, etc.

Best Practices to Minimize Risk

- Familiarity with the Title IX Policy is key! Everyone in the process must commit to this. Enforcement and compliance with your policies and procedures is part of your obligation and best practice to avoid liability.
- Familiarity with any FERPA policy and confidentiality considerations that may prohibit you from sharing student's information.
- Be thorough and patient, while being as prompt as possible. Don't leave leads unchecked or make assumptions before seeing evidence or meeting witnesses.
- Communicate with parties about how long you expect the investigation to take and when you will get back to him or her so as to set reasonable expectations. And DO it!
- Make sure you ask all witnesses for any physical evidence that might exist, including texts, photos, documents, emails, or voicemail messages.

Best Practices to Minimize Risk

- Ask the parties regarding desired interim measures or remedies.
- Document any unsuccessful attempts to interview potential witnesses.
- Inform all parties and witnesses that retaliation directed at anyone who participates in the investigation should be reported immediately and appropriate action will be taken if retaliation is demonstrated.
- Don't prevent an interviewee from leaving the meeting if he or she chooses to leave.
- Avoid leading questions that suggest an answer to the witness or suggest impartiality.
- Avoid ask questions that call for a legal conclusion.
- Understand and honor due process or fairness rights of both parties.

Title IX Statistics and Trends

- OCR Cases: 2011 – present - 502 investigations, 197 cases resolved, 305 open.
- Litigation Trends: students are increasingly claiming flawed hearings or unfair disciplinary sanctions as a result of procedural failings at their universities.
- United Educators reported that sexual assault was the top liability for colleges and universities in 2018.
- “A lot of criminal defense lawyers are specifically advertising that they represent the accused in Title IX cases,” he said. “Pick any university in the country and go five miles from there, and you will find lawyers who advertise defending the accused. That wasn’t the case 10 years ago.”

Title IX Statistics and Trends

- Settling complaints from alleged victims in court cost colleges and universities an average of \$350,000 in the years following the Obama guidance, and some settlements reached \$1 million, United Educators reported in an analysis of Title IX claims from 2011 to 2015 at 1,600 institutions (not including defense costs).
- Litigation challenging new regulations – already several cases filed and a motion by attorneys general to block the regulations.
 - Asking for more time to restructure policies and procedures.
 - Argue they are discriminatory because they create a separate standard for sex discrimination than that for discrimination on the basis of race and national origin.
 - Take aim at what are seen as increased protections for those accused of sexual misconduct (live hearing, cross examination, and clear and convincing standard).

Case Study: Due Process

In cases under the prior guidance we have seen the following:

- Claims of violation of due process rights. Due process requires fair notice and an opportunity to be heard.
- Due process arguments come up in many Title IX cases.
 - Cross-examination – new regulations
 - Notice of charges and grounds
 - Adequate, in-person hearing
 - Public v. Private actors – what are students entitled to with respect to due process

Case Study: Due Process / Unfair Treatment

- *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018), the Sixth Circuit held that the University of Michigan's process for adjudicating sexual misconduct allegations did not meet minimum standards of due process because, as an arm of the State of Michigan, the school must provide constitutional due process to students accused of sexual misconduct.
 - With its holding, the Sixth Circuit made a blanket finding that a student at a state institution accused of sexual misconduct is entitled to cross-examine his or her accuser, either directly or through an agent or representative.
- *Haidak v. University of Massachusetts-Amherst*, No. 18-1248 (1st Cir. Aug. 6, 2019), The First Circuit made it clear it was NOT holding Haidak's due process rights were violated and stated the Sixth Circuit went too far with its blanket rule.

Case Study: Reverse Title IX - Gender Discrimination

- Citing Obama-era guidance or pressures from #MeToo movement, male students argue the Title IX process is biased against men.
- *Doe v. Purdue Univ.*, 928 F.3d 652 (7th Cir. 2019).
 - Title IX issue: whether Purdue discriminated against Doe on the basis of sex.
- *Doe v. Virginia Polytechnic Institute and State University*, 400 F.Supp.3d 479 (W.D.Va. 2019).
 - Title IX issue: whether the disciplinary process was an “erroneous outcome” motivated by gender bias in violation of Title IX.

Case Study: Reverse Title IX - Gender Discrimination

- *Doe v. Harvard University*, 2020 WL 2769945 (D. Mass. May 28, 2020).
 - An “erroneous outcome: claim under Title IX must allege 1) “particular facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding,” and 2) “particularized allegations relating to the causal connection between the flawed outcome and gender bias.” *Yusaf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994).
 - Gender bias must be a motivating factor.

Other Claims In Title IX Cases

Breach of Contract

- Some states follow that the relationship between a university and student is contractual in nature and the entity is therefore bound to provide students with procedural safeguards promised in policies, etc.
- Does your policy say you will conduct follow-up interviews with parties? *Doe v. Harvard University*, 2020 WL 2769945 (D. Mass. May 28, 2020).

Negligence

Practical Takeaways

- Review policy – make sure updates are incorporated and in line with the regulations, decide whether you want to go beyond the regulations in light of potential liabilities discussed.
- TRAIN on your policy – Title IX process participants – Coordinators, hearing board members, advisors, mandatory reporters, etc.
- Share the policy – complainants, respondents, witnesses, hearing board members, etc.
- FOLLOW the policy – in each case. Do not deviate from the policy and procedure!
- COMMUNICATE! Manage expectations, be clear, keep parties informed, but be mindful of restrictions.

THANK YOU!!



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Trauma-Informed Victim / Complainant Interview



Chief Tom Tremblay (Ret)
Thomas Tremblay Consulting & Training
www.tomtremblayconsulting.com



Training and Guidance for Consideration

This presentation was designed based on experience and input from multi-disciplinary partners to reflect examples of promising practices, alternative approaches, and lessons learned. It is not intended to constitute legal advice, or to create a legal standard of care. Participants should follow their own policies, procedures, and guidance from their respective institution's legal counsel.

Chief Tom Tremblay (Ret), Tom Tremblay Consulting & Training

Learning Objectives:

1. Recognize trauma in the context of sexual assault / misconduct to assist in preparing for the victim / complainant interview;
2. Identify helpful communication strategies to promote victim / complainant empowerment and encourage continuation in the administrative and/or criminal justice process;
3. Develop trauma-informed victim / complainant interview skills to help capture and consider potentially compelling evidence of the victim's experience.

Trauma-Informed Approach: Presumption of Innocence & Due Process

- We can be trauma-informed and still ensure the critical rights of those who have been reported to have committed an offense;
- Trauma-informed approach means understanding victim trauma and developing strategic approaches in an effort to minimize trauma throughout the reporting / investigative process;
- The trauma-informed approach is about being more objective in our response to sexual assault / misconduct – including adherence to the presumption of innocence and due process rights of respondents who are reported to have committed an offense.
- “Treat both parties equitably and equally”

Terminology During This Session:

Complainant / Reporting Party: Title IX language;

- Victim: referencing the trauma that a victim of sexual assault or sexual misconduct may experience during an assault;
- Survivor: referencing the trauma and recovery of a victim following a sexual assault or sexual misconduct

Respondent / Responding Party: Title IX language

- Suspect: referencing a person suspected of a criminal offense
- Offender: referencing a person who has been adjudicated or convicted of sexual misconduct or criminal sexual offense

Understanding Trauma / Resources

- 1970s Ann Burgess (Psychiatric Nurse) and Lynda Holmstrom (Sociology Professor) *“Rape Trauma Syndrome”*
- 1980: American Psychiatric Assoc: *“PTSD.” “Rape Related PTSD”* followed
- 2000: Dr. David Lisak coined the phrase *“Neurobiology of Trauma”*
- 2012: Dr. Rebecca Campbell, popularized *“Neurobiology of Trauma”*
- 2017: Dr. Jim Hopper, *“Brain Based Reasons”* for victim reactions

Is your response Trauma Informed?

Trauma Informed Care: Strengths-based service delivery grounded in responsiveness to the **impact of trauma**, emphasizing **physical, psychological, and emotional safety for survivors and providers**, and promoting **survivor empowerment**.

From Hopper, E.K., Bassuk, E.L., Ollivet, J. (2010). Shelter from the Storm: Trauma-Informed Care in Homelessness Services Settings. The Open Health Services and Policy Journal, 3, 80-100.

Defining Trauma

A traumatic event either witnessed or experienced, representing a fundamental threat to one's physical integrity or survival

- Responses involve intense fear, helplessness or horror
- The meaning of the event may be as important as the actual physical act/experience

(Lisa Ferentz, 2008)

Credit Dave Thomas M.S., Johns Hopkins University

Understanding Trauma

Trauma physically changes our brain...

- Trauma can trigger chemicals...
- Chemicals can influence perception, reaction, and memory...
- Rational thought can be impaired (counter intuitive behaviors)
- Memory can be fragmented...
- Traumatic memory may be stored in the brain differently...
- We **do not control** how the **brain** and **body** responds to trauma...

Impacts of Victim Trauma

Post Traumatic Stress Disorder: 4 major symptoms:

1. Re-experiencing the trauma
2. Social withdrawal
3. Avoidance behavior and actions
4. Increased physiological arousal characteristics

National Center for Victims of Crime

Overview: Trauma-Informed Victim / Complainant Interview

The interview is a way to allow the victim to express what their **experience was** rather than just what they remember or don't remember. Capturing the **trauma** and exploring **sensory details** of the event can lead to **compelling evidence for consideration.**

Victim / Complainant Interview

Trauma-Informed Interview Recognizes:

- **Disclosure is a process, not an event!**
- Delayed reporting, inability to recall details and sequence of events can be common as a result of **victim trauma**
- Complainant may remember additional details over time, keep options open for continued disclosures
- Traumatic memory may be stored in the brain differently

Building Trust: Providing Physical, Psychological, and Emotional Safety

- **Before we ask a single question about the incident:**
Providing physical, psychological, and emotional safety
- The need for a consistent and supportive institutional message (What is your institutional message?)
- Use victim empowerment: **Ask – don't tell**
- Where would you like to sit? Is it okay if I sit here?
- May I introduce myself and my role (professional, compassionate tone and demeanor)

Building Trust: Providing Physical, Psychological, and Emotional Safety

Ask – don't tell...

- Would it be helpful if I briefly explain the statement process? (in accordance with your policy)
- Can I answer any other questions about the process?
- Communicate empathy / demonstrate active listening
- Address complainant's concerns

Preparing the Complainant for the Interview

- Acknowledge difficulty disclosure, establish common language
- Permission to recall additional details later
- Importance of being accurate / truthful: don't hold back, its okay if you don't remember...
- Amnesty – *“our focus is on what you are reporting”*
- Note taking / recording (Institutional Policy)
- Introduce clarifying questions (*“Ice Breaker”*)

Starting the Interview

- What are you able to tell me about your experience?
Where would you like to begin?
- Allow victim to give uninterrupted statement (*Patience*)
- Demonstrate empathy and active listening

Capturing the Experience

Following the complainant's uninterrupted narrative:

- Commend and reassure (thank you...)
- Seek clarifying information (avoid leading questions)
 - What are you able to tell me more about... ?
 - Can you tell me more about...?
 - It would be helpful to hear more about...

Exploring / Seeking Details from the 5 Senses

- What are you able to tell me about...
 - What did you see?
 - What did you hear?
 - What did you taste?
 - What did you smell?
 - What did you feel?

Avoid “Victim Blaming”

Questions to avoid:

Why did you...?

Why didn't you...?

We can find a better way to ask these questions through ***“thinking and feeling”*** questions.

Capturing the Victim's Experience: Thinking and Feeling Questions

“Thinking and feeling questions” take the place of:

“why did you...” “why didn't you...”

- Can you help me understand what your thought process was when...?
- Can you help me understand how that made you feel when...?

Capturing the Victim's Experience: Thinking and Feeling Questions

“Thinking and feeling questions” take the place of:

“why did you...” “why didn't you...”

- What are you able to tell me about what you were experiencing when...?
- Are there other things about that moment that stand out in your mind?

Capturing the Experience

Document traumatic impact: _____

What are you able to tell me about...

- ...your reactions to this experience physically? (During / After)
- ...your reactions to this experience emotionally? (During / After)
- ...anything that may have changed for you since this experience?
- ...what has been the most difficult part of the experience for you?
- ...is there anything that you can't forget?

Capturing the Experience

Document traumatic Impact:

What are you able to tell me about...

- ... any images, smells, or sounds that keep coming back?
- ... any re-occurring thoughts?
- ... your sleep now compared to before? Eating? Drinking?
- ... anything you avoid now that you didn't before?
- ... if your friends / family expressed concern about you, observations, changes, etc...

Complainant Interview

After collecting the complainant's experience:

- Seek clarification, facts and information pertaining to elements of misconduct and other potential evidence (Who, What, Where, When)

Are we communicating accurately?



Explain All Your Questions – Reframing Questions

WHAT YOU SAY...

Are those the clothes you were wearing when this happened?

Were you drinking or doing any drugs?

Why did you go to the respondent's room?

Why didn't you report this immediately after it happened?

WHAT THE COMPLAINANT HEARS...

The investigator thinks it is my fault because of what I was wearing!

This is my fault for drinking, the investigator thinks so too!

The investigator thinks I deserved this because I went to the room!

There is nothing they can do, I knew I shouldn't bother reporting

Interview for Clarification

Some victims may provide information that is incomplete, inaccurate, or untrue: (avoiding trauma /“face-saving” / recantation)

- **Interview for clarification, don't interrogate**
- What are you able to tell me about that?
- Can you help me understand...?
- Can you tell me what your thought process was when...?

Interview for Clarification

Interview for clarification, don't interrogate:

- Can you tell me what you were feeling at that point?
- Can you tell me more about that?
- Are there other things about that moment that stand out in your mind?
- **Acknowledge difficulty of disclosure... importance of not holding back / accuracy**

Complainant Interview

What are you **able** to tell me about...

- ...what did respondent say; threats, language, tone?
- ...how did respondent appear; facial expressions, posture, demeanor?
- ...communication after; calls, texts, social media?

Explore Potential Serial Nature of Some Offenders

What are you able to tell me about...

- ...any previous conduct?
 - controlling, threatening, frightening behavior
 - abuse, harassment, stalking
 - physical assault, injury, strangulation
- ...Respondent's conduct with other potential victims?

Prior to concluding interview...

Is there any additional information you think would be helpful for me to know?

Is there anything you thought that we would discuss that we didn't discuss?

Is there anything else you want to add before we end the interview?

Managing Expectations and Outcomes

Come to **Agreement** with the Complainant

- Interview is a process, write down new details as they come
- Next steps, follow-up questions, time line
- Contact details and information?
- How would you to be kept informed?
- Is it okay to leave messages?
- Safety planning / interim actions / supportive measures
- Work with advocate: resources and referrals

What About Follow-up or Clarifying Questions Following the Complainant Interview?

- Maybe you are unclear about something from the original statement
- New witness information or new evidence comes to light
- Responding Party provides additional information or potentially exculpatory evidence (e.g. alibi, photos, videos, messages...)

Trauma-Informed Approach

- Consider use of experts to help understand trauma and impact;
- Evidence of victim trauma by itself does not prove sexual assault / misconduct;
- The absence of victim trauma does not disprove sexual assault / misconduct;
- Victim trauma should be carefully considered along with all other evidence, taking into account the totality of circumstances for each investigation (Policy/Legal Counsel)

Trauma-Informed Approach

Being Trauma-Informed and Balancing Equitable, Reliable and Impartial Investigations:

- understanding victim trauma and impact;
- developing approaches designed to minimize trauma for victims / complainants in the process;
- support services and compassionate response are necessary for the Respondent;
- ensuring equitable, reliable, and impartial investigations for all involved (“treat both parties equitably and equally”)

Trauma-Informed Victim / Complainant Interview

Q & A Discussion:

Impacts of trauma and the trauma-informed interview.

Participants are encouraged to come with questions.

1:10pm – 2:10pm



Chief Tom Tremblay (Ret)
Tom Tremblay Consulting & Training
www.tomtremblayconsulting.com



11:10 am – 12:30 pm

TITLE IX INVESTIGATIONS

Strategies for Establishing Rapport & Optimizing Interviews

Tom Denton: (55 mins.)

- Introductions
- Be familiar with school policy and procedures – equally applied, fair, impartial
- Investigation is a serious matter which demands full attention – First, DO NO HARM
- You are in charge. It is up to you to discover the facts.
- Conflicts of Interest – What to do?
- Implicit and explicit biases
 - Interview vs. Interrogations – What’s the difference? (planned conversation vs. overcoming resistance to answers)
- In Person & Virtual Interviewing techniques
 - Controlling the environment, setting the stage, searching for truth
 - Those critical first minutes – understand your role. Mindful of appearance & mannerisms
 - Role of Advisors –
 - may not participate
 - solely to advise client
 - Establishing rapport – developing empathy, building trust
 - Empowering the witness - “Whether you talk to me today is not up to me, not up to your advisor, it is up to you and you alone.”
 - Nothing you say today will shock or offend me. There will be no trick questions. This is your opportunity to share your recollection of events
 - Be genuinely curious, compassionate and completely objective
 - Find common ground or interests
 - Working as an investigator team i.e. lead interviewer vs note taker
 - Video/audio recording –
 - Preamble date, time, location, persons present
 - Verbal consent for recording and voice identification for transcriptionists
- Rapport is the “TRUTH SERUM” of Interviewers
 - “Good cop/bad cop” routine does not work. Can lead to false admissions particularly among young people, non-native speakers and vulnerable persons (traumatized).
 - Search for truth, NOT a confession
 - Maintain control over yourself. Keep calm, remain objective, professional, unbiased and non-judgmental

- When proper techniques are applied, justice can be appropriately served. You are a neutral, unbiased fact finder.

Ron Bratcher: (10-15 mins.)

- Gathering, securing, packaging and storage of digital evidence
 - Cellphone, laptop, notebooks, etc.
 - Equipment needed
 - Packaging
 - Chain of custody
 - Storage
- Documentation
- Organization of Case File
- Report Writing

Q & A – (5-10 mins.)

*(possible questions from Moderator)

SEXUAL MISCONDUCT INVESTIGATION MANUAL

This Sexual Misconduct Investigation Manual is designed to aid sexual misconduct investigators in understanding their role and responsibilities throughout the investigation process. This manual provides general guidelines and tips for conducting interviews with complainants, respondents, and witnesses. Additionally, the manual explains how investigators should take notes during interviews and outlines the expected work product that should be included in the Investigative Report, which will be submitted to the Title IX Coordinator, complainant, respondent and decision makers. In addition to interviewing involved parties, investigators must also collect and inventory evidence, which is highlighted in the manual as well.

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SEXUAL MISCONDUCT INVESTIGATION MANUAL

Once a complainant decides to file a formal complaint regarding an alleged incident of sexual misconduct, the complainant and respondent will be notified of the allegations, and a prompt, thorough, and impartial investigation of the incident will begin. Investigative and resolution procedures are intended to protect the rights of both the complainant and respondent, protect privacy, and prevent retaliation.

ROLE OF INVESTIGATORS

Investigators are responsible for interviewing and recording facts from the complainant, respondent, and witnesses regarding the alleged incident of sexual misconduct. Investigators also collect any relevant evidence including but not limited to emails, text messages, clothing, and photographs.

Sexual misconduct investigators must comply with the following criteria:

- Investigators must be trained and experienced.
- Investigators must remain **impartial, unbiased, fair, and able to objectively evaluate the credibility of the complainant, respondent, witnesses, evidence and relevance.**
- Investigators must remain unbiased as they generate and submit an impartial investigative report to the Title IX Coordinator who will present the investigative report to the complainant, respondent, and appropriate decision-maker. The decision-maker reviews the investigation report, conducts the hearing, makes a determination regarding the allegations raised in the formal complaint and, if the respondent is found to be responsible, imposes sanctions.
- The investigator cannot be the same person who acted as an advisor for the complainant or witness and cannot participate in the decision-maker role.

If at any point during the investigation the investigator becomes unable to remain impartial or unbiased, or has a conflict of interest, he or she must notify Title IX Coordinator and a new investigator will be assigned to the case.

RESPONSIBILITIES

While conducting interviews with the complainant, respondent, and witnesses, investigators are responsible for the following:

- Investigate the WHO, WHAT, WHERE, WHEN, WHY, and HOW of the alleged incident

- Investigators are to maintain an objective perspective and remain unbiased throughout the investigation. It is natural for investigators to develop certain opinions over the course of the investigation, but they must continue to test for the truth.
- While interviewing complainants, respondents, and witnesses, the role of the investigator is to record the facts, test for truth, and determine relevance. Credibility of statements should be based on the level of detail provided by the interviewed party. Investigators can test the facts of parties' statements through identifying the party's basis of knowledge, which consists of asking the party specific questions to understand how they know what they know (were they at the incident, did they hear about it from the complainant, etc.), why they are making the statement, and their relationship with the complainant or respondent. Ultimately, investigators are to question if an interview subject's account of events seems logical or plausible.
- Investigators must consider motivations for parties to lie to the investigator.
- Investigators are to collect all available facts and evidence. The decision-makers determine the outcome of the investigation and impose any sanctions and supportive measures for the involved parties.

Given the circumstances of an investigation, it may not be possible for investigators to definitively confirm that the alleged incident occurred or draw a conclusion. The most important task of investigators is to perform a prompt, impartial, and thorough investigation and provide documentation of every step of the investigation.

If investigators initiate the investigation promptly and conclude it within the allotted time, maintain an unbiased and objective perspective throughout the investigation, interview all related parties, examine all leads, collect all available evidence, and provide comprehensive documentation of the investigative process, the university has performed its obligation to investigate the alleged incident of sexual misconduct and compile information to allow the university's decision-maker to make a fully-informed determination.

GENERAL GUIDELINES

While conducting interviews with the complainant, respondent, or witnesses, investigators are encouraged to take into account the following guidelines:

Number of Investigators: Investigations may be carried out by a team of investigators (no more than two to three people), but one central investigator will be required to delegate tasks within the investigative team and report to the Title IX Coordinator.

Outside Investigators: For more complex cases in which trained, in-house sexual misconduct investigators are not adequately prepared to investigate, outside investigators may be called upon to either consult with or provide guidance to in-house investigators or conduct the investigation. Outside investigators should also be called when a majority of the in-house investigators have a bias or conflict of interest. Outside investigators should be properly licensed by appropriate authorities.

Number of Interviews: Typically, the investigator will interview each party once, but investigators are encouraged to meet with a party as many times as necessary if the party requests additional conversations with the investigator. Interview subjects may remember more information or specific details about the alleged incident over time, and the investigator should take advantage of the interview subject's willingness to participate in the investigation while still assessing the credibility of the information and interview subject.

Gender Balance: It is useful to have one man and one woman present while interviewing complainants, respondents, and witnesses. A gender-balanced team of investigators (or investigator and note-taker) permits the interviewed party to converse with the gender with which they feel most comfortable. This is especially important for interviewing complainants.

Note-taking: Ideally, the investigator will be accompanied by a note-taker (which may or may not be another investigator) during interviews so the lead investigator is able to focus on asking questions and reading body language while the note-taker documents statements and observations. All notes should be preserved, as part of the official record and made available to the complainant and respondent as part of the investigation file

Recording: It is always preferable to record an interview with a complainant, respondent, or witness so the investigator is able to freely converse with the other party. Recording the interview may also permit the investigator to focus more on the body language and expressions of the interviewed party, which should also be documented and included in the final report. Prior to recording, the investigator must obtain consent from the interviewed party. The investigator should authenticate the recording by including a preamble describing the date, time, purpose of recording, location, persons present and verbal consent of all persons participating. It is helpful to ask each person present to state their name for later voice identification during transcription. The time and date should be read onto the recording at the end of the recorded interview.

Using an HD recording app on a phone is the least intimidating option for the interviewed party while still ensuring a high-quality recording of the conversation. After the interview, the investigator should transcribe the interview.

Cell Phones: A phone should be purchased and used exclusively for each investigation, as it will be part of the investigation file. An investigator's personal cell phone should never be used in an investigation.

Scheduled breaks: If the investigator has multiple interviews scheduled with witnesses, a minimum one-hour break should be scheduled between each interview to better provide the investigator with time to note key findings and observations prior to initiating another interview.

Right to an advisor: Complainants and respondent have the right to an advisor, who may be an attorney, friend, family member, or social worker who may accompany them to the interview for emotional support. The advisor is not permitted to intervene or otherwise participate in the interview.

Tips for Interviewing Complainants and Respondents

Often complainants have experienced a traumatic event and therefore will require a trauma-informed approach to the interview. It is recommended that investigators take a class and watch the YouTube videos listed below, or similar to those, prior to interviewing complainants to recall trauma-informed interview techniques and better understand the neurobiology of trauma.

Sexual Assault: A Trauma Informed Approach to Law Enforcement First Response

[“Neurobiology of Trauma”, Dr. David Lisak Part 1 and 2](#)

Investigators are encouraged to consider the following tips while interviewing complainants:

1. *Make the Complainant Feel Comfortable:* First, **DO NO HARM**. The first 10-30 seconds of an interview with a complainant are crucial. In this short period of time, complainants develop perceptions of the investigator, which will ultimately impact how the complainant tells their story. Therefore, it is critical that the investigator develop rapport with the complainant as soon as possible to make them feel comfortable. In doing this, investigators may also avoid causing further harm to a traumatized victim.

Example statements include: “I’m so sorry that this has happened” “Can I get you anything?” “How can I help you” “Are you up for this interview?” “Has everything you need been provided?” These non-threatening questions help to put the complainant at ease and can help the investigator assess how to proceed with the interview as to not traumatize the victim further.

2. *Making the Respondent Feel Comfortable:* A similar approach should be taken when interviewing a respondent. Developing rapport with a respondent is often critical to a productive interview.

Respondents are not “guilty” or “responsible” until a final determination may reach that finding. Respondents should be treated with respect and investigators should approach a respondent’s interview as a matter of determining the facts related to the alleged incident, not building a case to prosecute and convict a criminal”.

3. *Understanding the Complainant’s/Respondent’s Rights:* The complainant is not required to participate in the investigation, but he or she will be given the option to participate in an interview with the investigator. The complainant’s and respondent’s statements may be considered credible sources of information regarding the alleged incident, but should be tested for truthfulness. This may be accomplished by considering the consistency of an interviewee’s statement, or confirming statements through third party interviews or other evidence.

If the complainant wishes to participate in the investigation process, the investigators should always interview the complainant before the respondent and witnesses.

If the complainant declines to participate in the investigation, the complainant's account of the alleged incident should still be assessed. If the account seems credible, the investigator must continue the investigation without the cooperation of the complainant and submit an investigation report to the Title IX Coordinator.

4. *Explain the Investigative Process:* Complainants and respondents in sexual assault cases often know little about the investigative process and may find the interview intimidating, confusing, or even frightening. Explain the investigative process to the complainant/respondent to create transparency and trust. This may also help to establish a sense of control for the interviewee.
5. *Develop Empathy for the Complainant/Respondent:* Empathy will impact the types of questions investigators ask the complainant/respondent and may aid the investigator in further developing a level of trust. The more trust a complainant/respondent has in the investigator, the more likely they are to share a greater level of detail of the alleged incident during the interview.
6. *While Conducting the Interview:* Trauma impacts victims of sexual assault in various ways, therefore complainants can have a wide range of demeanors and affects during the interview. Complainants may also experience memory fragmentation. Therefore, investigators should approach complainants with care.

Go slowly and use a reassuring voice. It is critical to listen carefully and watch for signs or indicators of post-traumatic stress. Questions should be open-ended and non-threatening. The complainant should be asked to describe his or her feelings, and the investigator should allow ample space and time for the complaint to talk. Questions designed to capture senses (sight, touch, smell, taste, and hearing) should also be asked. Investigators should have tissues readily available throughout the interview.

Investigators should listen to complainants and respondents without judgment. They must also refrain from assuming anything during the interview or judging the complainant or respondent based on dress, actions, inactions, omissions, etc. Investigators are to keep an open mind and remain objective. Investigators should always take the matter seriously. Title IX investigations can have life changing impacts on peoples lives.

7. *Timing:* The investigator should allow the complainant at least two sleep cycles after the alleged incident and should generally interview the complainant before the respondent or any witnesses. Investigators should allow ample time to interview the complainant and respondent (at least one hour) and have patience should the complainant or respondent need time to compose themselves or recall events.
8. *Setting:* The investigator should carefully structure the setting and environment for interviews. While interviewing the complainant/respondent, comfort is key. It is suggested to conduct the interview in a room with soft-colored or muted-toned walls, carpeting, and furniture. Ideally this room will have a couch or comfortable chair and multiple seating

options for the complainant/respondent. If used, the recording device should be out of view or discrete. The investigator should be able to maneuver freely in response to the complainant/respondent.

Techniques for Interviewing Parties

Investigators may use any or all of the following interview techniques during the investigation:

Funnel interviewing: Start asking the interviewed party broad questions and then narrow questions as the interview unfolds.

Circular interviewing: Ask numerous questions surrounding the topic of interest. Circle back a second time to the same topic of interest for clarity and consistency to test for truth. Repeat the question, and then ask it again later. Continue to “circle back” to the same question. For key issues, a different form of the same question may be asked three times.

Zigzag interviewing: Ask two to three linear, nondescript, and innocent questions. Then ask one stressful question that is about the key topic of interest.

INVESTIGATION NOTES

Investigators should take notes throughout the investigation process and are encouraged to use the **contemporaneous notes template**. Contemporaneous notes are notes taken at the time or shortly after an interview and represent the best recollection of the interview. Given the sensitive nature of investigative interviews, investigators and note-takers should take handwritten notes in ink during the interview, which may be typed up afterwards. Only the facts of the interview along with observations of the interview subject will be included in the final investigation report, but investigators should document as much as possible in their contemporaneous notes throughout the investigation process.

While still important for recorded interviews, if the interview is not recorded, taking contemporaneous notes is critical. Ideally notes are taken during the interview, which is why a note-taker is useful.

Important information to note through an interview and an investigation include:

- Investigator’s observations, opinions, impressions, inconsistencies, red flags
 - This information will be used to aid the investigator in writing up the Executive Summary. Not all observations, impressions, etc. may be included in the Executive Summary, but any written notes will be part of the investigation file.
- Ongoing list of pointers and leads
 - These highlight available opportunities for next steps in the investigation. For example, if an interview subject mentions a location, the investigator may note that investigators should go to this location to check for video cameras
- Key things learned
 - This may include information about the alleged incident or improved personal investigation techniques that may be implemented during the next interview or

investigation. Investigators should think critically about the best investigation tactics for the case and evaluate their effectiveness

- Statements investigators have made to the complainant or respondent
 - It is critical to note the statements made to the complainant or respondent (promises, etc.) so expectations are clear among all parties.

****If interviews are recorded, after contemporaneous notes are used to craft the Executive Summary and Memoranda of Interviews and the investigator extracts effective techniques for personal use, all contemporaneous notes and the recording must be preserved.**

The investigator may also solicit a written or typed (and signed) statement of the account from the complainant/respondent or witnesses.

These documents must be preserved and must be included in the investigation file as evidence.

FINAL PRODUCT: INVESTIGATIVE REPORT

- Under Title IX regulations the complainant, respondent and their advisors will be given the opportunity to inspect and review all evidence gathered in the investigation directly related to the allegations raised in the complaint and respond to that information before the investigative report is written.
- To maintain transparency throughout the investigation process and comply with Title IX regulations, the complainant and respondent will be permitted to read the investigative report before it is submitted to the decision-maker. The complainant and respondent will have the opportunity to respond to the report during any formal hearing.

The Investigative Report is the final product of the investigation. Upon completion, the investigator should submit the Investigative Report (which includes collected evidence) to the Title IX Coordinator. The complainant and respondent will be given the opportunity to respond to the report during the hearing in front of the decision-makers.

INVESTIGATION REPORT:

The Investigative Report consists of:

- 1) Executive summary of investigation
- 2) Factual report of investigation
- 3) Memoranda of interviews
- 4) Interview recordings and transcripts
- 5) Evidence Inventory & Receipt
- 6) Collected Evidence (including consent forms)

Executive Summary: This document acts as a cover letter for the Investigative Report. It contains the investigator's overall assessment and narrative of the investigation. Although it is not the role of the investigator to determine if the alleged incident occurred, in the executive summary the

investigator may state if they find the complainant, respondent, or witnesses truthful and credible. The executive summary may also theories or motivations of the parties, including possible motives for lying to investigators, if applicable.

Factual Report of Investigation: This report states the facts and tested truth of the investigation. It is free of personal opinion and judgment. In addition to facts obtained from evidence and interviews, it should include observations from the interviews (i.e. the number of restroom breaks an interview subject took, if the interview subject was offered soda or coffee, if he or she accepted soda or coffee, the duration of the interview, etc.).

Memoranda of Interviews: Following each interview, the investigator should produce a Memorandum of Interview to state the basic facts of the interview (date, time, duration, parties involved, etc.), the interview subject's background, a summary of the interview subject's statements, and observations. This document is based on the facts of the interview and the investigator's observations and perceptions of the interview subject's credibility.

Interview Recordings and Transcripts: If the interview subject consents to being recorded, the recording and transcript should be included in the investigation file.

Collected Items Inventory & Receipt: This document contains an itemized list of collected items, the date the evidence was found, and a list of recipients. Evidence Inventory & Receipt organizes and acts as a table of contents for collected evidence. The list of recipients acts as a chain of custody form to track and document each person (investigator, Title IX Coordinator, etc.) who has had custody and control of the evidence throughout the investigation and decision-making process. Investigators should use the Evidence Inventory & Receipt form.

Collected Items: All collected items should be included in the investigation file. This may include screenshots of text messages, photographs, videos, clothing, etc. In addition to the physical or electronic evidence, signed consent to remove and search forms should be included with evidence collected. It is recommended that such consent forms be utilized if and when investigators seize and search electronic devices belonging to parties involved in the investigation (complainant, respondent, witnesses).

Mock Mediation Scenario

Training Program Session Date & Time: Friday, August 7th from 2:20 – 3:20 pm

Casting:

Mediator: Michael S. Geigerman

Complainant (Jamie): Sarah Freymiller

Complainant's Advisor: Kenneth M. Chackes

Respondent: Virginia Parkinson

Respondent's Advisor: James W. Reeves

Title IX Coordinator: Kim Kirn

University General Counsel: Whitney Dowdy

Jamie (complainant) is a junior, and Kate (respondent) is a senior. They have known one another for over a year and even went on three dates at the end of the previous school year. After summer break last year, Kate asked Jamie out again. They went on six or eight casual dates during the Fall semester. By October, Jamie felt that the relationship had run its course and declined to go out with Kate again.

Jamie and Kate live in the same campus housing building and eat at the same dining hall.

In the Spring semester, Kate and Jamie have a few classes together. Several times, Kate has waited for Jamie after class and asked them out. Jamie declines persistently. About once a week, Kate tries to sit with Jamie at dinner. Rather than confront Kate about this, Jamie has packed up their meal and left the dining hall immediately.

Jamie plays on the basketball team, and Kate is always in the bleachers watching during the practices and games.

Kate continues to tell her friends how much she likes Jamie.

Kate has never verbally threatened Jamie.

The Spring semester ends, and Jamie and Kate part ways. Both are taking courses online. Jamie no longer sees Kate at basketball practice, in the dining hall, or in their classroom. Kate emails Jamie daily asking what they're doing over break and how are their online classes.

After three weeks of daily emails, Kate posts intimate photos of her with Jamie—which were taken while they were dating in the Fall—on Instagram and Snapchat.

Jamie files a formal complaint alleging sexual harassment with the Title IX coordinator via email.

Issues: Stalking; online sexual harassment; severe, pervasive, and objectively offensive

THE STAGES OF MEDIATION

Mike Geigerman

August 7, 2020

United States Arbitration & Mediation

Mediation is a process and not an event. Many writers describe Mediation as having 5 to 10 stages.

1. Preliminary Considerations
 - a. Pre-mediation communication
 - i. In the age of Covid19
 - ii. Pre and Post Covid19
 - b. Attendees and timing
 - c. Information available
 - d. Agreement to Mediate
 - e. Ex parte communication
2. Starting the Mediation Session
 - a. Caucus First Mediation
 - b. Caucusing
 - c. "Joint Session" vs "Meet and Greet"
3. Identification of Issues
 - a. Goals
 - b. Interests

4. Negotiation

- a. Positions
- b. Interests

5. Closure

- a. Agreement-Enforcement-Follow up
- b. No agreement
 - i. Reset
 - ii. Go to next step



Investigation Scenario

Title IX & Beyond Training Program

Role-Playing with Professional Investigators

August 7, 2020 from 3:30 – 4:30 pm

Cast:

Title IX Investigator: Thomas A. Denton, Jr.

Title IX Investigator: Isaac (Ron) A. Bratcher

Complainant (Alaina): Korenna Anderson

Complainant Advisor: Natalie Lorenz

Alaina Jones is a freshman at Bischoff College. It is currently the fourth week of the Fall semester. She filed a complaint with the Title IX coordinator last week alleging a junior on the soccer team, Jake Daniels, sexually assaulted her at a frat party two weeks prior. This is the first investigative interview with Alaina.

Background:

Alaina met Jake at “Senior Visit Weekend” at Bischoff College, a weekend in which prospective students (high school seniors) are invited to campus to meet other prospective students, get a feel for the campus, and spend time with current students. After meeting at a Senior Visit Weekend ice cream social event, Jake and Alaina stayed in loose contact throughout the summer.

On the first Friday night on campus, Alaina and her friends decide to go to the school’s first frat party of the year. She went with her friends to a bar with her friends before the party and had two to three drinks. Alaina did not drink much in high school, so this was a new experience for her.

Alaina then arrived at the frat party, where she was served two to three more drinks. She ran into Jake at the party, and he led her to a room in frat house. Alaina recalls sitting on the bed and kissing Jake. She does not recall verbally objecting or resisting to the kissing and intimate touching.

Alaina then states that she passed out. She woke up in the morning to find herself alone with some of her clothing removed. She goes back to her dorm.

At first Alaina did not mention the incident to her friends, but she decided to talk to them about it after a few days. Jake has not texted or messaged Alaina since the incident. However, Alaina says that her friends on the soccer team told her that Jake mentioned going upstairs with Alaina at the party.

Two weeks after the party, Alaina files a formal complaint with the Title IX coordinator alleging that Jake sexually assaulted her.

Issues: Sexual Assault, Consent

Mock Hearing Scenario

Training Program Session Date & Time: Friday, August 7th from 3:30 – 4:30pm

Casting:

Decision-Maker: Judge Michael T. Jamison

Complainant (Grace): Leslie Symonds

Complainant's Advisor: Kenneth M. Chackes

Respondent (Ted): Michael Dorwart

Respondent's Advisor: James W. Reeves

Grace and Ted are juniors and have been dating for six months. Ted is Grace's first serious boyfriend, and Grace's friends and roommate, Macy, have started to distance themselves from Grace because Grace only spends time with Ted. Either Grace and Ted go to her room immediately to spend time alone, or Grace brings Ted to girls nights and even group projects for class. In the rare event that Grace is not with Ted, she is texting Ted. When her friends make fun of her for taking her phone to the bathroom at sorority house meetings or to the gym, Grace casually says that Ted gets upset, paranoid, and even jealous if she does not respond to him right away.

When they're together, Ted likes to "play" on Grace's phone. This often leads to him reading her texts, checking up on her Instagram DMs, and even declining invitations to hang out with friends on Grace's behalf-without her permission. While Ted's jealousy frustrates Grace at times, she tells herself that what may be seen as "possessive" to her friends is really Ted's way of showing affection.

Last month, Grace and Ted went to a party together. While Ted went to grab a drink, Grace ran into one of her friends from high school who was visiting campus for the weekend, Mark. Grace and Mark were talking and laughing when Ted returned. Although Grace did her best to introduce Ted to Mark, Ted appeared to be in bad mood and wanted to leave the party. Both Grace and Ted had been drinking since 7:00 pm and left the party at 10:30 pm.

Grace and Ted went back to Grace's apartment. Ted admits that he was upset that Grace was standing so close to Mark. Grace tries to comfort Ted by showing him affection—holding his head, running her fingers through his hair, and kissing him. Ted responds to Grace and wants to have sex, but Grace says was too tired. Ted forces Grace onto the couch, takes off her clothes, and has sex with her. Grace states that Ted told her that she owed him this because she was talking with Mark at the party without his permission.

Grace tells Macy and her other friends about Ted's behavior, asking if this is normal when you have a serious boyfriend. Grace's friends recommend she reach out to the school's counseling services to talk about Ted's behavior. Macy is alarmed and reports the incident to the Title IX Coordinator.

The Title IX Coordinator contacts Grace a week after the incident and informs her of the report, offers supportive measures, and explains the formal complaint process. At first, Grace does not want to file a formal complaint against Ted, who is still her boyfriend.

Ted becomes increasingly possessive. Two weeks after the party, Ted becomes angry with Grace for going to a young male professor's office hours alone to talk about an upcoming paper. Ted takes Grace's phone and throws it at the wall, grabs Grace by the neck, and then locks her in her room as he leaves her apartment. Macy hears Grace crying in her bedroom and opens the door. Ted and Grace break up.

Macy accompanies Grace to the Title IX Coordinator's office to file a formal complaint alleging sexual harassment under Title IX. No prior reports or complaints alleging similar incidents involving Ted have been filed with the Title IX Coordinator.

Ted is notified of the Title IX complaint and threatens to harm Grace if she continues with the Title IX investigation. She has seen him standing outside of her apartment building at night twice since filing the formal complaint. Ted lives on a different side of campus.

Grace proceeds with the Title IX process. As the Title IX investigators interview Grace's friends, they find that Ted has been known to be possessive of his past girlfriends. The Title IX investigators include the references to other alleged instances of dating violence in the investigation report.

Fifty days after filing the formal complaint, Ted and Grace are attending the live hearing.

Issues: Dating violence, "severe, pervasive, and objectively offensive," retaliation, Title IX Coordinator's role

Title IX Hearings

Procedures, Definitions and the Law

By Judge Michael T. Jamison (Ret.)

On May 6, 2020 the United States Department of Education (“DOE”) issued its final regulations outlining the obligations and responsibilities of colleges and universities regarding incidents of sexual harassment, sexual assaults, dating and domestic violence, and stalking. These regulations are effective August 14, 2020.

The challenges of handling a Title IX complaint can be an emotionally charged situation even for the most experienced experts. Those challenges to institutions of higher learning present unique issues as well as opportunities for the decision-maker officer to conduct a fair and impartial hearing, free of bias and without any conflict of interest. Accordingly, it is critical that the decision-maker (sometimes called adjudicator or hearing officer) have the proper training as required by those regulations, as well as appropriate experience in order to succeed.

This outline is not meant to answers all questions relative to Title IX hearing situations, but is meant to present a quick reference on the procedures, issues and questions for the decision-maker.

DEFINITIONS AND PROCEDURES

To better understand the process of a Title IX hearing, we first provide a summary of key definitions and procedures.

Sexual Harassment: conduct based on sex that satisfies any of the following: a school’s employee conditioning aid, benefit or service to an individual in return for unwelcomed sexual conduct (“quid pro quo” harassment); or unwelcomed conduct determined by a reasonable person to be severe, pervasive and objectively offensive and denies a person equal access to the school’s educational programs/activities; or a sexual assault including dating violence, domestic violence or stalking.

Formal Complaint: A document filed by a **complainant** or signed by a **Title IX Coordinator** alleging sexual harassment by a **respondent** requesting that the school investigate the alleged sexual harassment. The **complainant** must be participating or engaging in the education program or program of the school or attempting to do the same while filing the complaint.

Investigation of Formal Complaint: The school **must** investigate formal complaints. The Title IX Coordinator **may** serve as the investigator and the burden of proof and gathering of the evidence is on the school. Medical and similar privileged records are not available unless the party has given written consent and both parties must be given an equal opportunity to present facts and expert witnesses and evidence without any restrictions. Both parties have the right to an **advisor**, who may be a member of the faculty, counselor or an attorney however, the advisor is not required to be an attorney. The school **may** elect to pay for the advisor throughout the investigation, but the school is only required to ensure an advisor at the hearing. If a party does not have an advisor at the hearing the school **must** provide an advisor of the school's choice, without charge to the party and this advisor may conduct cross examination of the other party and witnesses. The investigator must complete an investigative report at least ten (10) days prior to the hearing and provide copies to the parties and their advisors.

Decision-Maker: The decision-maker(s) can not be the same person(s) as the Title IX Coordinator, the investigator, or mediator during informal resolution process. The decision-maker must not have or demonstrate any conflict of interest, bias or prejudice towards either of the parties and must show proper decorum with respect for the parties, provide timely breaks and manage and control the hearing. The decision-maker will conduct a **live** hearing. A live hearing may be conducted either with all parties physically present, or at the school's or either of the party's election, separately with parties appearing virtually, with requisite technology enabling the parties to see and hear each other. Web cameras, laptops and cell phones meet the requirements of the regulations. The decision-maker will open and close the hearing, allow examination of witnesses, including cross examination of respective parties, determine relevance of questions and

evidence and evaluate credibility. The decision-maker will provide a **written determination** to the parties which must include: (i) identification of the allegations that represent potential sexual harassment; (ii) a description of the procedural steps in the formal complaint (any notification to the parties , interviews, site visits, evidence gathering methods and description of the hearing held); (iii) Finding of Fact supporting the determination; (iv) Conclusions regarding the application of the school's code of conduct to the facts; (v) a statement of the rationale for the results reached on each allegation and any discipline imposed on the respondent and remedies offered to complainant, and (vi) the school's procedure for appeal by the complainant or respondent.

The Hearing: The live hearing, although adversarial, is to be conducted in a civil manner with respect for all parties. The school **must** create an audio or audiovisual recording or transcript of the hearing to be made available to both parties for inspection and review. The decision-maker may open the hearing by announcing the particulars of why the hearing is called, introduce the parties and their advisors, allow opening statements by the advisors and may swear in witnesses. The respondent is presumed innocent unless and until the allegation(s) of harassment have been proved. The school will elect and the decision-maker will follow the **standard of evidence** selected for the hearing using either a **preponderance of evidence** standard (proof that a particular fact or event was more likely than not to have occurred) or the **clear and convincing** standard (proof that a particular fact or event was highly and substantially likely to be true than not true). This standard of evidence **must** be the same standard used in complaints involving employees and faculty.

The new regulations do not require application of the rules of evidence and most decision-makers will be liberal in the admission of evidence to have as full and complete a record as possible. Accordingly, circumstantial and even hearsay evidence may be admitted as well as character evidence and evidence of prior bad act. There are nevertheless some rules that are specifically required in the new regulations. The decision-maker must be trained on the **issue of relevance** inasmuch as only relevant cross-examination and other questions may be asked

of a party or witness. In fact the decision-maker must determine whether a question is relevant before the witness provides an answer and explain the decision to exclude a question as not being relevant. Relevance determinations in the middle of cross-examination may be difficult but are a requirement of the new regulations.

The accepted definition of “relevant” evidence is:

Relevant Evidence “means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Accordingly, for the decision-maker, evidence is not relevant and may be excluded if it does not go to the proof of a fact that is of consequence to the determination of an action at issue.

Moreover, in many of these cases the decision-maker should be keenly aware and sensitive to the rules of evidence regarding the non-admissibility of evidence of complainant’s sexual predisposition or prior sexual behavior. The revised regulations act much like the Federal Rules of a “rape shield” which would normally prohibit the admission of evidence offered to prove that a victim engaged in other sexual behavior or to prove a victim’s sexual disposition as not relevant. The decision-maker may allow such evidence as relevant where it is offered to show that someone other than respondent committed the alleged act, or the prior incidents go to show the complainant’s consent.

Also, the decision-maker should be familiar with state laws excluding evidence protected by a legal privilege unless the holder of the privilege has waived the privilege. Attorney-client, physician-patient and the Fifth Amendment privilege against self-incrimination apply and evidence protected by those privileges should be excluded and the exercise of the privilege cannot be held against the respondent by the decision-maker when reaching a decision.

Finally, the decision-maker should remember that she or he serves as a fact finder and as such may ask questions, which the decision maker deems relevant. In the event a party fails to appear at the hearing or refuses to be cross-examined by their opponent's advisor, the decision-maker may not rely on any statements given by that party in reaching a decision. The decision-maker may consider the statements of a witness refusing to answer the decision-makers questions. The advisor of a non-appearing party may still represent the absent party at the hearing by calling witnesses and cross-examining the opponent and other witnesses.