



## **Required Training for Title IX Team**

ESC of Central Ohio

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### **Presented By:**


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## **AGENDA**

- 9:00 – 10:00 **Level I: Introduction, Reporting and Response Requirements, and Supportive Measures**
- 10:00 – 11:00 **Investigator Training: Grievance Process**
- 11:00 – 11:15 *Break*
- 11:15 – 12:00 **Investigator Training: Conflict of Interest, Bias, Impartiality, and Being Trauma-Informed**
- 12:00 – 12:45 *Lunch*  
**Investigator Training (cont.): Consent**
- 12:45 – 1:45 **Serving as Decision-Maker/Appeal Officer**
- 1:45 – 2:45 **Analyzing the Elements/Report Writing**
- 2:45 – 3:00 **A Final Word About Discipline**



**Title IX Team Training**

**Investigators, Decision-Makers, and Report Writing**

with Melissa Martinez Bondy and Kate V. Davis

**Bricker Graydon**

## Agenda

- Intro and Definitions
- Reporting and Response Requirements
- Grievance Process
- Impartiality, Bias, Conflict of Interest, and Avoiding Prejudgment
- Consent
- Serving as Investigator
- Serving as Decision-Maker
- Appeals
- After the Decision
- Discipline and Emergency Removal under Title IX



## **Why Are You Here? Required TIX Team Training** (1 of 2)

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



## **Why Are You Here? Required TIX Team Training** (2 of 2)

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



## Additional Training Requirements

### Investigator

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

### Decision-Maker

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



## Introduction

## Sex Discrimination and Harassment

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



## Sex Discrimination under Title IX *(1 of 2)*

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



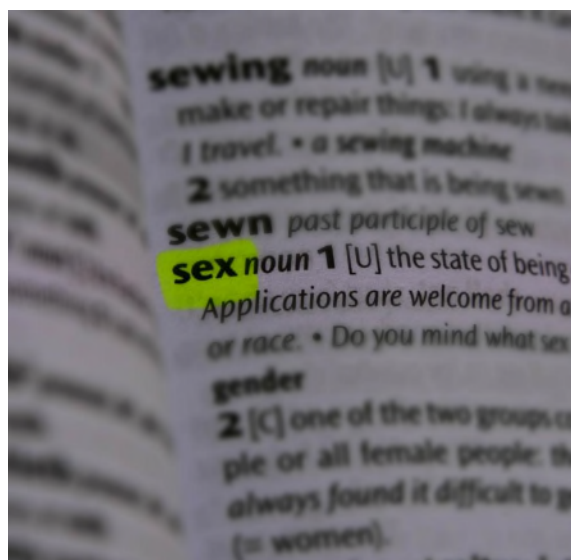
## Sex Discrimination under Title IX (2 of 2)

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

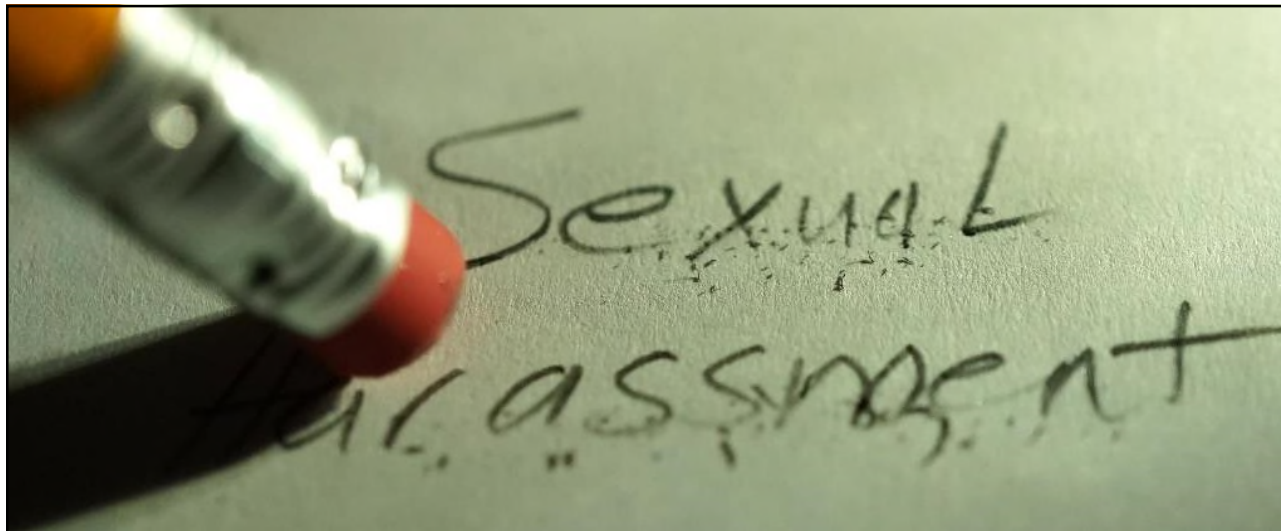


## What Does “Sex” Mean?

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







## Sexual Harassment Definitions under the Title IX Regulations

### Definition of Sexual Harassment under Title IX

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

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



## Jurisdiction

- If the District does not have jurisdiction to process the complaint under Title IX, the Title IX Coordinator must dismiss the complaint
- This does not preclude supportive measures or addressing other Code of Conduct violations

### No jurisdiction if:

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



## “Educational Program or Activity”



Includes **locations**, **events**, or **circumstances** over which the recipient exercised **substantial control** over **both the respondent and the context** in which the sexual harassment occurs





## Retaliation (34 CFR § 106.71) (1 of 2)

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No recipient or other person may **intimidate**, **threaten**, **coerce**, or **discriminate** against any individual:

- For the purpose of **interfering with any right or privilege secured by Title IX** or this part, or
- Because the individual has **made a report or complaint**, **testified**, **assisted**, or **participated** or **refused to participate** in any manner in an investigation, proceeding, or hearing under this part



## Retaliation (34 CFR § 106.71) (2 of 2)

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





## Reporting and Response Obligations

### What is the *District's* obligation?

- 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**
- A recipient is only deliberately indifferent if its response to sexual harassment is **unreasonable in light of known circumstances**



## How does the District fulfill its obligation?

- Updated policies
- Address complainant and provide supportive measures
- Mandatory reporting
- Informal resolution, if allowed under District policy
- Prompt investigation
- Compliance with formal grievance process:
  - Notice
  - Report
  - Decision
  - Appeal



## What is actual knowledge?

- **Actual knowledge** – notice or allegations of sexual harassment to a recipient's:
  - Title IX Coordinator, or
  - Any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or
  - **To any employee of an elementary or secondary school**
- Title IX Coordinator is responsible for receiving:
  - Reports of conduct that may constitute sex discrimination/harassment
  - Formal complaints signed by a complainant



## Obligations of *ALL* Employees under Title IX

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- Know who the District's Title IX Coordinator is
- Know how to recognize a potential Title IX violation
- Review the District's anti-discrimination and anti-harassment policies as soon as they are updated



## What if I'm not *sure* something is Title IX?

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- You **don't** need to be sure before reporting – if you think or suspect something **might** be a Title IX violation, **report it right away** to the Title IX Coordinator!
- If the Title IX Coordinator determines it's not TIX, it may then be handled under other District policies/conduct codes
- And of course, don't forget your **other mandatory reporting obligations** – they're separate, and you must fulfil both



## TIXC Specific Required Responses (34 CFR § 106.44(a))

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



### Supportive Measures

## Implement Supportive Measures 34 CFR § 106.30(a)

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



## Supportive Measures 34 CFR § 106.30(a)

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





## Examples in Regs of Supportive Measures

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



## More Requirements and Some Best Practices

- Must consider the complainant's wishes
- School should follow up with both parties regarding the efficacy of the supportive measures
- Supportive measures may be appropriate to offer regardless of whether the allegation has been substantiated or fully investigated – preserves access and deters harassment



## 2266 - NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS OR ACTIVITIES

### Introduction

The Board of Education of the Oak Hill Union Local School District (hereinafter referred to as "the Board" or "the District") does not discriminate on the basis of sex (including sexual orientation or gender identity), in its education programs or activities, and is required by Title IX of the Education Amendments Act of 1972, and its implementing regulations, not to discriminate in such a manner. The requirement not to discriminate in its education program or activity extends to admission and employment. The Board is committed to maintaining an education and work environment that is free from discrimination based on sex, including sexual harassment.

The Board prohibits Sexual Harassment that occurs within its education programs and activities. When the District has actual knowledge of Sexual Harassment in its education program or activity against a person in the United States, it shall promptly respond in a manner that is not deliberately indifferent.

Pursuant to its Title IX obligations, the Board is committed to eliminating Sexual Harassment and will take appropriate action when an individual is determined responsible for violating this policy. Board employees, students, third-party vendors and contractors, guests, and other members of the School District community who commit Sexual Harassment are subject to the full range of disciplinary sanctions set forth in this policy. The Board will provide persons who have experienced Sexual Harassment ongoing remedies as reasonably necessary to restore or preserve access to the District's education programs and activities.

### Coverage

This policy applies to Sexual Harassment that occurs within the District's education programs and activities and that is committed by a member of the School District community or a Third Party.

## Grievance Procedures

## Formal Complaint

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



## Due Process/Fundamental Fairness (1 of 2)

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



## Due Process/Fundamental Fairness (2 of 2)

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



## **TIXC May File Formal Complaint** *(34 CFR § 106.30(a))*

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



## **Jurisdiction – Dismissal and Consolidation**

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### **Dismissal of Formal Complaints by the Title IX Coordinator**

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

**Consolidation of Formal Complaints** – Permissive where allegations arise out of same facts/circumstances



## Jurisdictional Determinations (34 CFR § 106.45(b)(3))

- Preamble discussion notes that permitting districts to dismiss because they deem an allegation meritless or frivolous without following the grievance procedure would defeat the purpose of the regulations
- Must promptly send written notice of dismissal (including the reasons) simultaneously to both parties
- Jurisdictional issues can arise at any time – even during the investigation



## Notice to Parties – Required Contents

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



## Investigation Process – General Requirements

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



## Investigation Process

### Provide All Evidence to Parties

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

### Prepare Investigative Report

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





## Questioning Phase

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



## Written Decision

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

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



## Informal Resolution

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- May not be mandatory – must obtain **voluntary, written consent** from both parties
- May not be offered unless formal complaint is filed
- May not be offered in allegation by student against employee



## Informal Resolution Notice Requirements

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- **Written notice** of:
  - Allegations
  - Requirements of process
  - Right to withdraw from process and resume formal grievance process
  - Consequences of participation, including the records that will be maintained or could be shared



## Recordkeeping (34 CFR § 106.45(b)(10)(i)) (1 of 2)

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All of the following must be **maintained for 7 years**:

- Investigation Records (including determination, recordings, transcripts, sanctions, remedies)
- Appeal Records
- Record of any Informal Resolution
- Training materials – posted on website/available upon request
- Documentation of recipient's response to all reports and formal complaints



## Recordkeeping (34 CFR § 106.45(b)(10)(i)) (2 of 2)

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



**Make No Assumptions: Impartiality, Avoiding Bias and Conflict of Interest, and Being Trauma-Informed**

## Make No Assumptions

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Being **impartial**, **unbiased**, and **without conflict of interest**, and **avoiding prejudgment** of facts

- We will discuss each of these individually and provide examples, but some of the factors for each overlap
- For example, being impartial is greatly aided by not prejudging facts



## Being Impartial

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- The preamble discussion appears to indicate that being impartial means being free from bias (*p. 828-829*)
- “The Department believes that keeping this provision focused on ‘bias’ paired with an expectation of impartiality helps appropriately focus on bias that impedes impartiality”
- **Be neutral** – don’t be partial to a complainant or a respondent, or complainants or respondents generally
- **Do not judge** – memory is fallible, and judging is contrary to your neutral role (*85 FR 30323*)



## Bias

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### Concerns Raised in Comments in Preamble:

- All paid staff members being biased in favor of institution
- Institutional bias – cover-ups
- Past tweets that appear to support complainants or respondents
- Being a feminist
- “Appearance of bias” vs. actual bias



## Conflict of Interest

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### Concerns Raised in Comments in Preamble:

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





## Preamble on Bias, Conflict of Interest (1 of 2)

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



## Preamble on Bias, Conflict of Interest (2 of 2)

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- No *per se* prohibited conflicts of interest in using employees or administrative staff (*Preamble p. 826*)
- No *per se* violations for conflict of interest or bias for professional experiences or affiliations of decision-makers and other roles in the grievance process (*Preamble p. 827*)
  - Receiving this training can help protect against disqualifying someone with prior professional experience (*85 FR 30252*)



## Avoiding Prejudgment of Facts

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- Avoiding prejudgment of facts → a good way to avoid bias and ensure impartiality
- If a hearing occurs, the decision-maker should keep an open mind and actively listen to all the facts presented as subjected to cross-examination
- Each case is unique



## Sex Stereotypes *(Preamble p. 831-837)*

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- **Must not** rely on sex stereotypes *(Preamble p. 831-837)*
- Comments include **examples of sex stereotypes**, such as:
  - Women have regret about sex and lie about sexual assaults
  - Men are sexually aggressive or likely to perpetrate sexual assault



## Sex Stereotypes *(Preamble p. 1723-25, 1732-37)*

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- Different from evidence-based information or peer-reviewed scientific research, including impact of trauma
- Cautions against “believing” one party over the other, and notes 106.45(b)(1)(ii) precludes credibility determinations based on a party’s status as a complainant or respondent
- Consideration of marginalized groups – people with disabilities, people of color, people who identify in the “LGBTQ” community



## Potential Responses to Trauma

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



## Disclaimer

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- This section is about rape myths and trauma as **context for what may or may not be someone's internal dialogue**, to help you ask sensitive questions
- **Both parties may be traumatized** – and the trauma may be **completely unrelated** to the incident you're investigating
- **Don't assume** that signs of trauma mean it was caused by the respondent and therefore the respondent violated the policy
- Likewise, **don't assume** that because there are no signs of trauma, nothing happened



## Know the Facts *(1 of 2)*

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- Most rapes are committed by those who know each other
- Rapes can happen in a committed relationship
- Rapes can happen between individuals of any gender
- Victims of intimate partner violence may return to the violent partner for a variety of reasons that may not seem rational to outsiders looking in



## Know the Facts *(2 of 2)*

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- Drug-facilitated sexual assault is common, and the most common drug used is alcohol
- Being drunk doesn't excuse behavior
- A wide variety of responses are normal for those who experience trauma
  - E.g., calm, hysterical, angry, in denial, detached, withdrawn, or in shock
  - Don't make assumptions about how they "should" act



## Trauma Responses

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### Trauma and the Brain

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

### Why don't people tell right away?

- Fear of retaliation
- Fear of not being believed



## Why Is It Important To Be Trauma Informed?

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

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



## Words Have Power

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- Victim **vs.** Survivor **vs.** Complainant
- Perpetrator **vs.** Accused **vs.** Respondent
- Alleged Behavior **vs.** Reported Conduct
- **Stick with policy language** to the extent possible





## Culture Affects Response *(1 of 2)*

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



## Culture Affects Response *(2 of 2)*

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



## Consent: Left to Schools to Define

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- No required definition in law, regs, or guidance
- Policy language is going to be critical to your analysis



## Who Can Never Give Consent?

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- Under age 13 (varies by state)
- Between ages 13-16, if the other person is over 18 (varies by state)
- A student, if the offender is a teacher, administrator, coach, or other person in authority employed by or serving in their school
- Severely cognitively disabled persons
- Those who are incapacitated
- Those who are by law unable to give consent



## Consent: Some Policies Require...

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



## Consent: Some Policies Include...

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



## When Does Consent Not Exist?

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- Use of:
  - Physical force
  - Threats of physical force
  - Physically intimidating behavior
  - Coercion
- Individual from whom consent is required is incapacitated



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

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



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

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

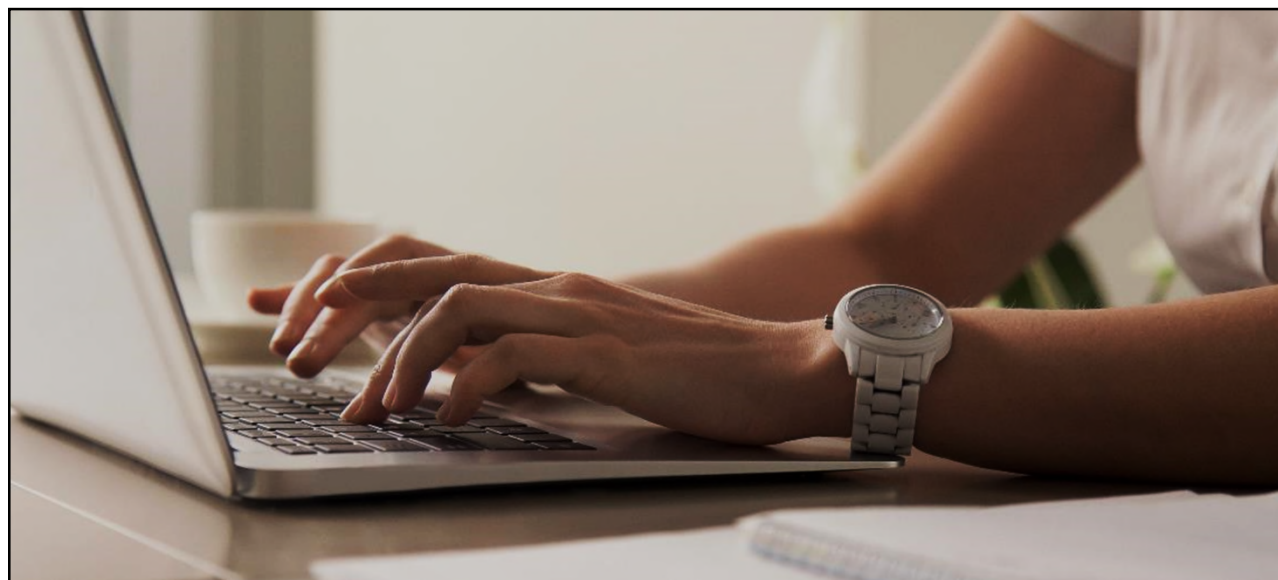


## Evidence of Consent? *(3 of 3)*

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





## Serving as a Title IX Investigator

### Serving as Investigator

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- As you investigate and write the report, keep in mind that **you are NOT the decision-maker**
- Parties must receive written notice to parties/witnesses before any investigative interview



## Evidence Review Period (34 CFR § 106.45(b)(5)(vi))

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- Provide both parties an **equal opportunity to inspect and review any evidence** obtained as part of the investigation that is directly related to the allegations raised in a formal complaint
  - **Include evidence you don't intend to rely on**
  - **Include inculpatory or exculpatory evidence**, whether obtained from a party or other source
- Must be sent to each party *and* their advisors **prior to completion of the investigative report**



## Investigative Report (34 CFR § 106.45(b)(5)(vii))

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





## Introduction to Investigative Techniques

### Initial Review

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





## Begin Evidence List

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- If there is a criminal investigation, work with law enforcement to collect and preserve evidence
- **Types of Evidence**
  - Electronic communications
  - Security information
  - Pictures, videos, audio
  - Police reports
  - Personnel files
  - Prior complaints against respondent



## Begin Witness List

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



## Craft Questions for Each Witness

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



## What to Have with You at the Interview

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



## Note-Taking Tips

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



## Setting Up the Interview

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



## Set the Stage

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



## Begin Broadly

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



## Freeze Frames

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



## Ask Follow-Up Questions

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



## Credibility

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



## When Consent is at Issue

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



## Closing the Interview

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



## After the Witness Leaves

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



## Physical Evidence

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



## Inspection and Review of Evidence

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### Provide ALL Evidence to both parties and advisors

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





## Key Takeaways *(1 of 2)*

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



## Key Takeaways *(2 of 2)*

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





## Serving as a Title IX Decision-Maker

### What is your role as decision-maker?

- Facilitate the **questioning phase** (34 CFR § 106.45(b)(6)(ii))
- Conduct an **objective evaluation** of all relevant evidence – including both inculpatory and exculpatory evidence (34 CFR § 106.45(b)(1)(ii))
- **Mandatorily dismiss** Title IX complaint that does not rise to the level of “sexual harassment,” did not occur in the recipient’s education program or activity, or did not occur against a person in the USA (34 CFR § 106.45(b)(3)(i))



## Questioning Phase (1 of 2)

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- After the school sends the investigative report to the parties, they have **10 days to provide a written response** (34 CFR § 106.45(b)(5)(vii))
- **Before** reaching a determination regarding responsibility, the **decision-maker must:**
  - Afford each party the opportunity to **submit written, relevant questions** that a party wants asked of any party or witness
  - The decision-maker must **explain any decision to exclude a question** as not relevant to the party proposing the question (34 CFR § 106.45(b)(6)(ii))



## A Note About Hearings

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- K-12 is not required to hold live hearings
- The regulations provide little structure for live hearings at the K-12 level



## Questioning Phase *(2 of 2)*

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



## Decision-Maker's Determinations

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



## Keep an Open Mind

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



## Make Sound, Reasoned Decisions

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- You must render a **sound, reasoned decision** on every charge
- You must **determine the facts** in this case based on the information presented
- You must **determine what evidence to believe**, the **importance** of the evidence, and the **conclusions** to draw from that evidence
- You may consider **nothing but this evidence** – make decisions solely based on the relevant evidence obtained in the matter



## Be Impartial

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



## Weight of Evidence

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



## Evaluate Witness Credibility

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



## Evaluate Witness Credibility (1 of 2)

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- Consider the reasonableness or unreasonableness, or probability or improbability, of the testimony
- Does the witness have any motive?
- Is there any bias?
- The commentary to the regulations provides consideration of:
  - Consistency, accuracy, memory, credibility (*85 FR 30315*)
  - Implausibility, inconsistency, unreliability, ulterior motives, lack of credibility (*85 FR 30330*)



## Evaluate Witness Credibility *(2 of 2)*

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



## Draw Reasonable Inferences

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





## Standard of Evidence *(1 of 2)*

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



## Standard of Evidence *(2 of 2)*

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



## Don't Consider Impact

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



## Analyzing the Elements of Prohibited Conduct

## Analyzing the Elements (1 of 3)

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



## Analyzing the Elements (2 of 3)

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



## Analyzing the Elements (3 of 3)

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

*(\*Districts using clear and convincing as their standard of evidence would substitute that here)*



## Example\*\* Policy Elements: *Quid Pro Quo*

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- Conduct on the basis of sex
- By an employee of the recipient (i.e., Board employee)
- The provision of an aid, benefit, or service of the recipient was conditioned on an individual's participation in sexual conduct

*\*\*The elements in your district's policy may vary*



## Example<sup>\*\*</sup>: Hostile Environment

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

<sup>\*\*</sup>The elements in your district's policy may vary



## Example<sup>\*\*</sup>: Sexual Assault (1 of 2)

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- Rape (penetration of genital/anal opening)
- Sodomy (oral/anal intercourse)
- Sexual Assault with an Object (penetration of another's genital/anal opening with something other than one's genitalia)
- Fondling (touching another's private parts for sexual gratification)
- Incest (nonforcible intercourse between persons related to each other within degrees wherein Ohio law prohibits marriage)
- Statutory Rape (nonforcible intercourse with person under Ohio's statutory age of consent)

<sup>\*\*</sup>The elements in your district's policy may vary



## Example<sup>\*\*</sup>: Sexual Assault (2 of 2)

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

<sup>\*\*</sup>*The elements in your district's policy may vary*



## Example<sup>\*\*</sup>: Dating Violence (1 of 2)

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- Conduct on the basis of sex
- Violence
- Committed by a person who has been in a social relationship of a romantic or intimate nature with the victim

<sup>\*\*</sup>*The elements in your district's policy may vary*



## Example<sup>\*\*</sup>: Dating Violence *(2 of 2)*

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- Where the existence of such a relationship shall be determined based on a consideration of the following factors:
  - Length of the relationship
  - Type of relationship
  - Frequency of interaction between the persons involved in the relationship

<sup>\*\*</sup>*The elements in your district's policy may vary*



## Example<sup>\*\*</sup>: Domestic Violence *(1 of 2)*

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

<sup>\*\*</sup>*The elements in your district's policy may vary*



## Example<sup>\*\*</sup>: Domestic Violence (2 of 2)

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- Felony or misdemeanor crime of violence committed (cont'd):
  - By a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction
  - By any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction

<sup>\*\*</sup>*The elements in your district's policy may vary*



## Example<sup>\*\*</sup>: Stalking

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

<sup>\*\*</sup>*The elements in your district's policy may vary*





## Scope of Education Program/Activity

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



## Relevancy: What Can You Consider?

## Issues of Relevancy

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



## Issues of Relevancy *(1 of 3)*

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



## Issues of Relevancy *(2 of 3)*

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- The process allows both parties to submit all relevant evidence:
  - Similarly, decision-makers are directed to allow parties to ask witnesses all relevant questions and follow-up questions (*34 CFR § 106.45(b)(6)(i)-(ii)*)
  - A recipient may not adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice (*85 FR 30294*)



## Issues of Relevancy *(3 of 3)*

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- “[D]oes not prescribe rules governing how admissible, relevant evidence must be **evaluated for weight or credibility** by recipient’s decision-maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with 106.45 and apply equally to both parties” (*85 FR 30294*)
- **BUT**, “[I]f a recipient trains Title IX personnel to evaluate, credit, or assign weight to types of relevant, admissible evidence, that topic will be reflected in the recipient’s training materials” (*85 FR 30293*)



## Legally Privileged Information *(1 of 3)*

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- When investigating a formal complaint, recipient “cannot access, consider, disclose, or otherwise use a party’s records that are ...
- “Made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, ...
- “Unless the recipient obtains that party’s voluntary, written consent to do so for a grievance process under this section”

*(34 CFR § 106.45(b)(5)(i))*



## Legally Privileged Information *(2 of 3)*

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

*(34 CFR § 106.45(b)(1)(x))*



## Legally Privileged Information *(3 of 3)*

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



## Rules of Relevancy

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





## The Fact Finding Process

1

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

2

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

3

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



## Objectively Evaluating Relevant Evidence

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



## Standard of Proof

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



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

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



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

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





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

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



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

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





## Regulatory Definitions

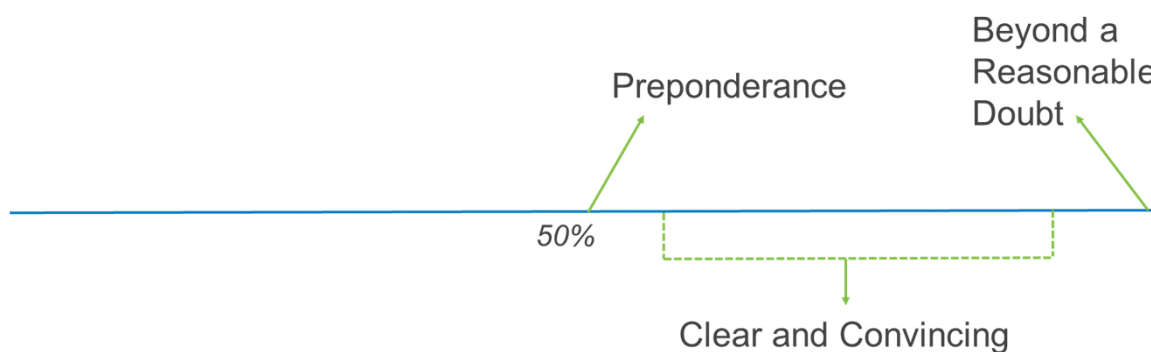
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Standards of Evidence (*85 FR 30373 at fn 1409*)

- **Preponderance of the Evidence** – “Concluding that a fact is more likely than not to be true”
- **Clear and convincing** – “Concluding that a fact is highly probable to be true”
- Recipients cannot use “beyond a reasonable doubt” standard, which is used in criminal cases (*85 FR 30373*)



## Choices for Standard of Evidence



## Applies to *Every Fact and Every Decision*

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

## Written Determination (34 CFR § 106.45(b)(7)(ii)) (1 of 3)

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



## Written Determination (34 CFR § 106.45(b)(7)(ii)) (2 of 3)

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



## Written Determination (34 CFR § 106.45(b)(7)(ii)) (3 of 3)

- Institution's procedures and permissible bases for complainant and respondent to appeal
- Provided to both parties in writing simultaneously



## Identity of the Appeals Officer

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- **You cannot hear an appeal of your own decisions**
- The Appeals Officer cannot be the same as the:
  - Investigator on the same case
  - Title IX Coordinator on the same case
  - Decision-Maker on the same case
- The Appeals Officer must be trained in the same manner as the Decision-Maker



## Bases for Appeal

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- Procedural irregularity that affected the outcome of the matter
- New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter
- TIX Coordinator/investigator/decision-maker had conflict of interest or bias for/against complainants or respondents generally, or the individual complainant or respondent, that affected the outcome
- A recipient may offer an appeal equally to both parties on additional bases



## Requirements on Recipients for Appeals

- Offer equal opportunity to appeal to either party
- Let both parties know when an appeal has been filed
- Give both parties a reasonable and equal opportunity to submit a **written statement** in support of/challenging the appealed decision
- Issue a **written decision** describing the **result** of the appeal and the **rationale** for the result
- Provide the written decision **simultaneously** to both parties

*(34 CFR § 106.45(8)(C)(iii))*



What's Next?

**After the Decision**

## Remedies and Sanctions

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- Ensure policy/code of conduct contains relevant language
- Title IX Coordinator is responsible for effective implementation of any remedies
- If there has been a finding of responsibility (incl. retaliation), follow due process procedures in state law and Board Policy
  - Written notice of possible discipline (suspension/expulsion)
  - Opportunity to respond to the allegations/proposed discipline
  - Appeal rights



## Disciplinary Sanctions

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







## Title IX Implications for Student Discipline

- Title IX Regs impose an intensive and lengthy process for intake, investigation, and determination of conduct involving sexual harassment or assault
- **This entire process must be completed BEFORE any discipline is imposed**
- If the conduct does (or seems like it might) implicate Title IX, **STOP** and call the Title IX Coordinator **BEFORE** investigating and **BEFORE** imposing any discipline



## Discipline of Students

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- Building leaders may be comfortable investigating claims of student misconduct and issuing discipline
- **But**, when that misconduct involves sexual harassment under TIX, the regulations **require leaders to respond in a very different way than they are used to**,
  - Including **holding off on imposing any discipline** until a determination is made through the Title IX process.

*(please read that again)*



## When Can the District Impose Discipline?

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- **After the entire Title IX grievance process is completed** and **respondent is found responsible** for violating District policy
- If that occurs, the District may issue discipline by following
  - General education discipline procedures
  - Special education discipline procedures, if applicable



## Bricker Graydon's Title IX Toolkit

Available for download: [k12tixtoolkit.bricker.com](https://k12tixtoolkit.bricker.com)

**VEED.IO**



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