



Title IX in K-12

Centerville City Schools August 23, 2024

**A Title IX Refresher on Acting as Investigator,
Acting as Decision-Maker, and Implications
for Student Discipline**

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Agenda

- Introduction and Definitions
 - Grievance Process
 - Conflicts of Interest, Bias, and Considering Trauma
 - Role of the Investigator
 - Investigative Techniques
 - Interview Summaries
 - Relevancy Determinations
- Summary of Information
 - Evaluating Evidence and Credibility
 - Written Determination
 - Decision-Maker Checklist
 - Implications for Student Discipline

Introduction

Sex Discrimination and Harassment

- 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)

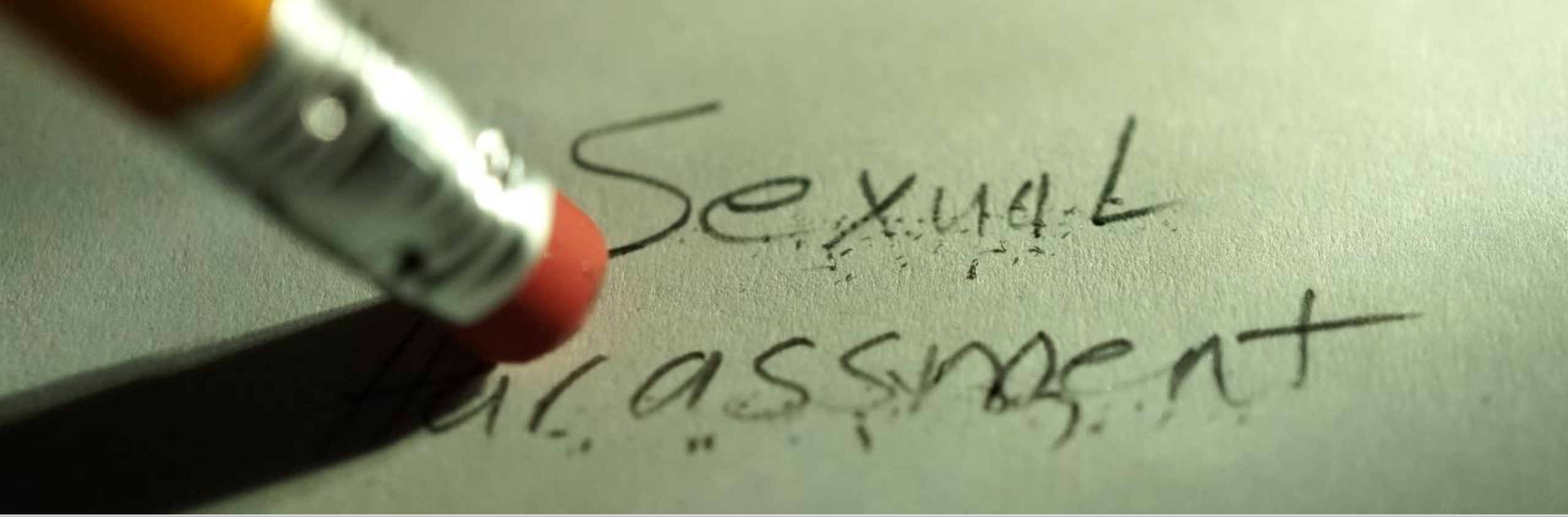
- Treat one person **differently** from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;
- Provide **different** aid, benefits, or services or provide aid, benefits, or services in a different manner;
- Deny any person 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; or
- Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity. 34 CFR § 106.31(b).

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; or
 - **Clery crimes** – Sexual assault, dating violence, domestic violence, or stalking [Clery regulatory definition cites omitted]

Jurisdiction

- Under the regulations, 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

Definition of “Educational 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...

The Regs on Retaliation

- Title IX regs at 34 CFR § 106.71:

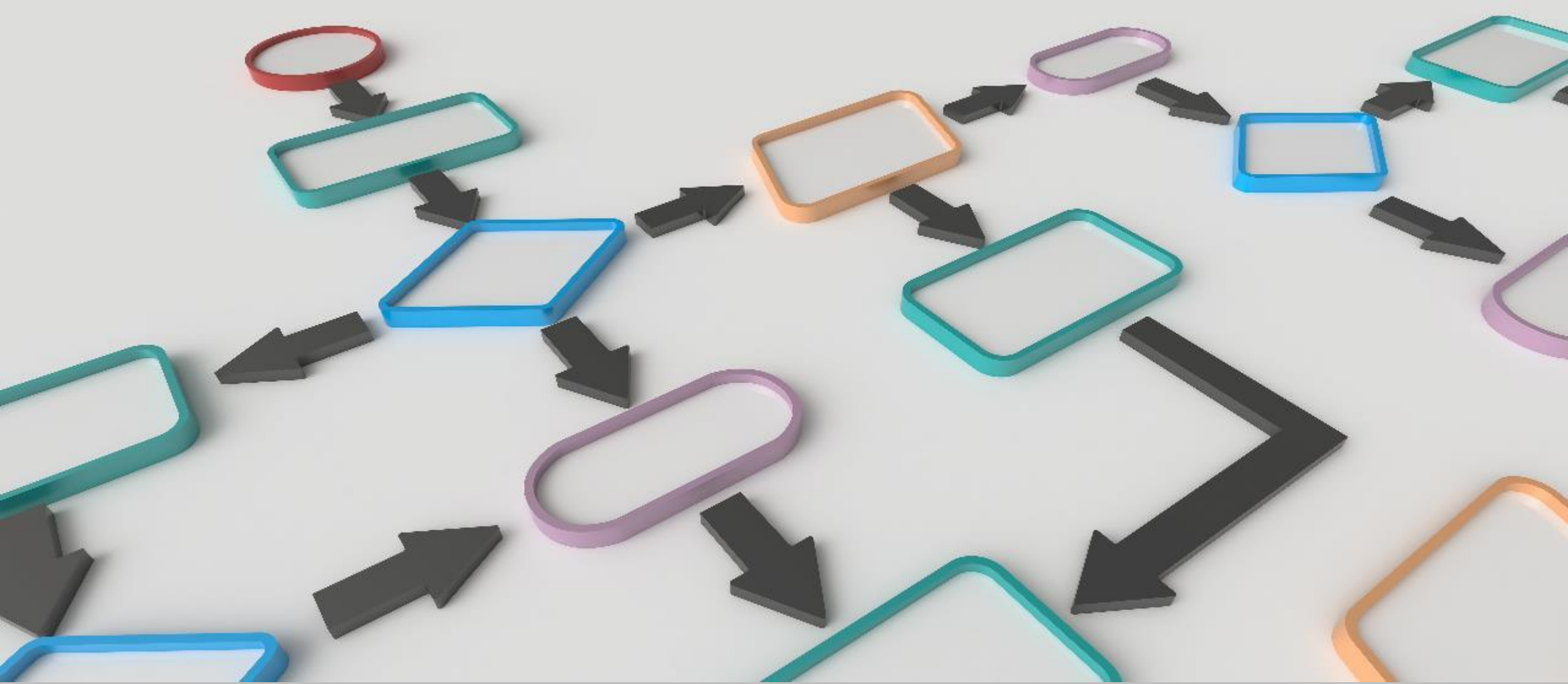
Retaliation defined in part: “No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part”...

Retaliation

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

District Obligations

- Address complainant and provide supportive measures
- Mandatory reporting
- Informal Resolution
- Investigation
- Formal grievance process: notice, report, decision, appeal



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”

General Requirements: Due Process/ Fundamental Fairness (1 of 2)

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

General Requirements: 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

Notice to Parties

- 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
- Statement that respondent is presumed not responsible and that determination will be made at conclusion of grievance process
 - May have advisor of choice
 - May inspect/review evidence
 - Inform of standards prohibiting false statements
 - Notice of any additional allegations that may arise

Dismissal and Consolidation

Dismissal of Formal Complaints by the Title IX Coordinator

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

Consolidation of Formal Complaints

- Permissive – where allegations arise out of same facts/circumstances

Investigation Process (1 of 2)

- Burden of proof and burden of 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 (2 of 2)

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

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

Written Decision

- Note: Decision maker cannot be investigator or Title IX Coordinator
- Identification of the allegations
- Description of procedural steps
- Findings of fact

- Conclusions
- Statement of result as to each allegation, including determination, sanctions, and remedies
- Procedures and bases for appeal
- Provided to parties simultaneously

Appeals

Required bases:

- Procedural irregularity that affected the outcome
- New evidence not reasonably available at time determination was made that could affect the outcome
- Conflict of interest/bias

Additional bases permitted –

Offered to both parties equally

Appeals process:

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

Informal Resolution

Procedures may include informal resolution process

- May not be mandatory
- May not be offered unless formal complaint is filed
- May not be offered in allegation by student against employee

Requirements

- Written notice of: allegations; requirements of process; right to withdraw from process and resume formal grievance process; consequences of participation including the records that will be maintained or could be shared
- Obtain voluntary, written consent from both parties

Recordkeeping – Maintain for 7 Years

- 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



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

Being Impartial, Unbiased, without Conflict of Interest, and Avoiding Pre-Judgment 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 pre-judging facts.
- Discussed in preamble on pp. 821-843; 1720-1726

Being Impartial

- The preamble discussion (pp. 828-829) appears to indicate that being impartial means being free from bias
- “The Department believes that keeping this provision focused on ‘bias’ paired with an expectation of impartiality helps appropriately focus on bias that impedes impartiality.” (p. 829)

Bias: Concerns Raised in Comments in Preamble

- Preamble concerns about 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” v. actual bias

Conflict of Interest: 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 Discussion: Bias and Conflict of Interest

- Final regulations “leave recipients flexibility to use their own employees, or to outsource Title IX investigation and adjudication functions, and the Department encourages recipients to pursue alternatives to the inherent difficulties that arise when a recipient’s own employees are expected to perform functions free from conflicts of interest and bias.”
- No *per se* prohibited conflicts of interest under 106.45(b)(1)(iii) in using employees or administrative staff. (p. 826)
- No *per se* violations of 106.45(b)(1)(iii) for conflict of interest or bias for professional experiences or affiliations of decision-makers and other roles in the grievance process. (p. 827)

Avoiding Pre-Judgment of Facts at Issue

- A good way to avoid bias and ensure impartiality: avoiding prejudgment of facts
- Keep an open mind as a decision-maker and actively listen to all the facts presented as subjected to cross-examination*
- Each case is unique and different

Avoiding Sex Stereotypes

- “Must” not rely on sex stereotypes: Preamble pages 831-837
- Comments include examples of sex stereotypes (e.g., women have regret about sex and lie about sexual assaults, men are sexually aggressive or likely to perpetrate sexual assault)
- Stereotype considerations:
 - Different from evidence-based information or peer-reviewed scientific research, including impact of trauma
 - Cautions against an approach of “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, “LGBTQ” individuals (pp. 1723-25; 1732-1737)

Considerations: Potential Responses to Trauma

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

A Disclaimer

- 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
- Do **not** assume that because there are signs of trauma, the trauma was caused by the respondent and therefore the respondent violated the policy
- Do **not** assume that because there are no signs of trauma, nothing happened

Stories We Tell Ourselves

Know the Facts (1 of 2)

- 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)

- 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 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 Being Trauma Informed Important?

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

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

Culture Affects Response (1 of 2)

- | | |
|--|--|
| <ul style="list-style-type: none">• Age of consent• Dating vs. arranged marriages• Attitudes towards homosexuality• Attitudes towards intimate partner violence | <ul style="list-style-type: none">• Cooperating with investigations• Sharing personal information• Reactions toward authority figures• Reactions toward male vs. female |
|--|--|

Culture Affects Response (2 of 2)

- 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

- No required definition in law, regs, or guidance
- Policy language is going to be critical to your analysis
- We will use standard language for discussion purposes

Who Can *Never* Give Consent?

- Under age 13 (varies by state)
- Between the ages of 13 and 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...

- **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...

- 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?

- Use of physical force, threats of physical force, physically intimidating behavior, or coercion
- Individual from whom consent is required is incapacitated

Evidence of Consent? (1 of 3)

- 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)

- 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)

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

What is your role as investigator?

As you write a report keep in mind that you are **NOT** the decision-maker

Report Process and Timelines – Opportunity to Inspect Evidence

- 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 the evidence you don't intend to rely on**
 - **Include inculpatory or exculpatory evidence whether obtained from a party or other source**
 - Purpose: allow each party to meaningfully respond to the evidence prior to conclusion of the investigation.

Report Process and Timelines – Opportunity to Submit Written Response to Evidence

- **Prior to completion of the investigative report**, you must send the evidence subject to inspection and review **to each party and the party's advisor**
- You must give the parties at least **10 days to submit a written response**
- **You must consider the responses prior to completion of the investigative report**

Report Process and Timelines – Availability of Evidence at Hearing

- You must make all of the evidence subject to the parties' inspection and review available at any hearing

Report Process and Timelines – Opportunity to Submit Written Response to Report

- Create an investigative report that fairly summarizes relevant evidence
- Send it 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**

Report Process and Timelines – Opportunity for Parties to Submit Questions

- Before reaching a determination regarding responsibility, the decision-maker(s) **must afford each party**:
 - The opportunity to submit written, relevant questions that a party wants asked of any party or witness
 - The answers to those questions
 - Additional, limited follow-up questions



Introduction to Investigative Techniques

Initial Review

- 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

- 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

- 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

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

Organizing for the Interview

What should you have with you?

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

Note-taking Tips

- 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

- 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

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

Begin Broadly

- 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

- 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

- 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

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

When Consent is at Issue

- 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

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

After the Witness Leaves

- 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

- 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

Provide ALL Evidence to both parties and advisors

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

Key Takeaways (1 of 2)

- 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)

- 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



Writing Interview Summaries

Goals

- Write your interview summaries in narrative form so you can drop them into your report
- Be consistent in terminology
- Be clear as to the source of information – compare:
 - “Bob stated that this happened”
 - “This happened”

Structure of an Interview Summary (1 of 4)

- Who, when, where, via what medium?
- Did they have an advisor?
- Did you discuss your role? Their role?
- Did you discuss the prohibition on retaliation?

Structure of an Interview Summary (2 of 4)

- Background
 - How does this person connect with the parties and witnesses?
 - Age, year in school
 - Length of employment, position

Structure of an Interview Summary (3 of 4)

- Background
 - Monologue
 - Follow-up questions you ask, including responses
 - Evidence requested, evidence provided
 - Witnesses suggested

Structure of an Interview Summary (4 of 4)

- Know your policy and procedures
 - Interview summary is often more complete than what is included in report
 - May include information irrelevant to investigative decision, such as discussions about supportive measures

Complete

- Include screenshots and other reference material directly in summary when possible
- Don't paraphrase a document when you can use direct quotes

Unambiguous

- Could my mother pick up the report and understand what happened?
- Make no assumptions that the reader will understand certain aspects of the community
- Write for a judge and jury to understand with no prior background

Relevant

- Is there extraneous information that is unnecessary to resolve the charges or credibility disputes?
- Is the extraneous information nevertheless appropriate to include?
- Does your report contain any information you are prohibited from including?
- Will the parties read this, and if so, will they focus on the wrong things?

Sensitive

- Will the parties feel heard?
- Will the parties feel blamed?
- Will the parties feel vilified?
- Will the tone otherwise inflame the parties unnecessarily?

Empathetic

- Maintain a non-judgmental tone
- Stay away from charged words of advocacy:
 - Clearly/obviously
 - Innocent/guilty
 - Victim/perpetrator
- Watch your adjectives and adverbs – unless they are in a quote
- Recognize the impact of your words

Specific

- Set the scene visually (will help identify inconsistencies in stories)
- Use quotation marks carefully
- Include details to the level that you can thoroughly understand what it looked like

Issues of Relevancy – What's *Not* Relevant?

- Information protected by a legally recognized privilege
- Evidence about complainant's prior sexual history
 - Unless questions/evidence are offered to prove that someone other than the respondent committed the conduct or
 - Concern specific incidents of the complaint's prior sexual behavior with respect to the respondent and are offered to prove consent.
- Party's medical, psychological, and similar records unless voluntary written consent

Relevancy: Legally Privileged Information

(1 of 3)

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

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

Relevancy: Legally Privileged Information

(2 of 3)

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

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

Relevancy: Legally Privileged Information

(3 of 3)

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



Just the Facts: Synthesizing Evidence Into an Investigative Report

Disclaimer

“This document is intended to be a summary of evidence and a description of what was learned through an investigation. Please refer to the full record, including [information shared in the hearing, and]* the contents of the [hearing packet] [exhibit packet].”*

Basic Information

- Complainant
- Respondent
- Investigator
- When was the complaint made?

Basic Information (1 of 2)

- Basic description of charges
- How did the complaint make its way to an investigation?
- Witnesses interviewed
- Witnesses not interviewed (and why)
- Any procedural anomalies that need explained?
- Jurisdiction issues

Basic Information (2 of 2)

- “All relevant information gathered during the course of the investigation has been included in this report/hearing packet.”

Summaries Reviewed by Witnesses?

- “Each person interviewed was provided with a written copy of a summary of their interview, and was given an opportunity to provide feedback and approve the accuracy of the summary.”
 - Did everyone do so?

Applicable Policy Provisions

- Definition of prohibited conduct alleged
- Related definitions as appropriate (e.g. consent, substantial incapacitation)
- Include verbatim, in entirety

Summary of Information

- **Give an overview** of evidence collected
- **Attach as appendices** any statements and important evidence
- **Ways to Arrange**
 - Chronologically
 - By witness summary
 - By allegation/topic

Summary of Information - Tips on Structure

- Tell the story **chronologically**
 - E.g.: How did the relationship start?
- If you can, **synthesize** the information from multiple parties and witnesses
- Where the stories **diverge**:
 - “Information from [Complainant]”
 - “Information from [Respondent]”

Summary of Information – Undisputed and Disputed Facts

- Undisputed Facts
 - Series of numbered sentences
- Disputed Facts
 - Series of numbered sentences
- Make sure you have facts for each element of each charge

Summary of Information – Explain Your Structure

- Example: “The information in this report is a summary of the facts. Where there is a difference in the accounts, it is noted in the report. For the sake of clarity, the report is organized chronologically and by subject matter when appropriate.”

Summary of Information – Organizing and Referencing Evidence

- Insert into the report screenshots of text messages and pictures where relevant
- If information is attached but not referred to in a summary, may want to drop a footnote explaining why not
- Always cite to the record – Helpful for your decision-makers!
- Hearing packet or exhibits – helpful to number the pages sequentially for easy citation

Summary of Information – Impact on Complainant

- Don't forget to summarize impact on **complainant** if the charges require consideration as an element
 - “The investigator notes that this incident and the process may have had an impact on [Respondent]. However, to determine whether sexual harassment occurred, the decision-maker will be required to review the impact of the reported behavior on [Complainant]. This is the reason that the information here focuses solely on [Complainant].”



Objectively Evaluating Evidence and Resolving Credibility Disputes

Objectively Evaluating Relevant Evidence

Decision-maker should consider:

- consistency
- accuracy
- memory
- credibility, or lack thereof
- implausibility
- inconsistency
- unreliability

Recommended Considerations for Resolving Conflicts (1 of 2)

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

Recommended Considerations for Resolving Conflicts (2 of 2)

- The complainant's response to the reported conduct
 - Did witnesses see that the complainant was upset?
 - Were there changes in behavior? Work/school performance? Concerns from friends and family? Changes in routine?
 - Did the complainant write about the conduct or 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 or their reaction soon after it occurred?

Recommended Considerations for Resolving Conflicts

- Did the complainant submit a complaint or take other action to protest the conduct
- NOTE: failure to immediately complain may reflect a fear of retaliation, a fear that the complainant may not be believed, etc. rather than that the reported conduct did not occur



The Written Decision

Written Determination in 106.45(b)(7)(ii)

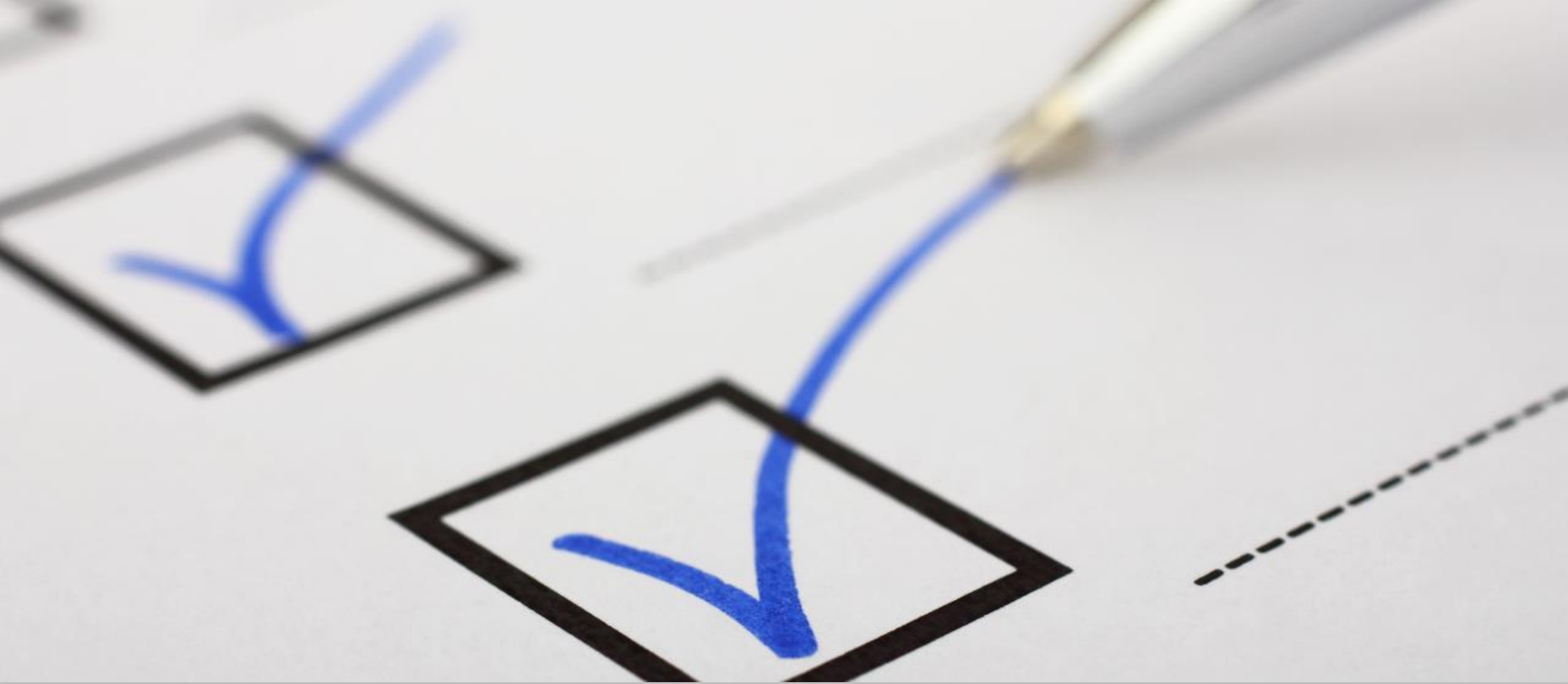
- Written determination **must** include:
 - Identification of the allegations potentially constituting sexual harassment
 - A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties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

Written Determination in 106.45(b)(7)(ii) (1 of 2)

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

Written Determination in 106.45(b)(7)(ii) (2 of 2)

- Institution's procedures and permissible bases for complainant and respondent to appeal
- Provided to both parties in writing contemporaneously (106.45(b)(7)(ii))



Final Checklist for the Decision Maker

Final Checklist (1 of 5)

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



Final Checklist (2 of 5)

2. Is every element of every charge accounted for?



Final Checklist (3 of 5)

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



Final Checklist (4 of 5)

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



Final Checklist (5 of 5)

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



Bases for Appeal

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

Responding to Appeals

- As to all appeals, the recipient must:
 - Issue a written decision describing the result of the appeal and the rationale for the result
 - Provide the written decision simultaneously to both parties.



Title IX Discipline – Not What You're Used To

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 – §106.30(a)

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)

Discipline Lesson 1 (1 of 2)



Question: Can the district go ahead and discipline a student or employee for other misconduct instead of following the TIX process?

Discipline Lesson 1 (2 of 2)

Answer: No, not if the conduct is related to TIX misconduct

If the alleged misconduct could constitute TIX sexual harassment, the formal grievance process must be followed

This makes the jurisdictional determination at the beginning of the process all the more important

Discipline Lesson 2 (1 of 2)

Question: What if the principal has already investigated the matter and issued discipline to the student before it ever gets to the TIXC? Should the district redo the investigation and follow the TIX process?



Discipline Lesson 2 (2 of 2)

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

If discipline hasn't occurred yet, could be held in abeyance

Consider

- Is an investigation necessary to identify underlying issues
- Provision of supportive measures
- Consult Title IX Coordinator

Emergency Removal Under Title IX (different than state law)

District can issue emergency removal under Title IX, provided that it:

- Undertakes **individualized** safety and risk analysis
- Determines that an **immediate threat** to **physical** health or safety of **any student/individual** arising from the allegations justifies removal
- Provides respondent with **notice and opportunity to challenge** decision immediately

Does not modify IDEA, Section 504, or ADA rights

When Is Emergency Removal Available Under Title IX?

During an investigation or when no grievance is pending

Not limited to violent offenses

Safety and risk analysis

- More than a generalized or speculative belief of threat
- Based on facts, not assumptions
- Threat must be immediate and one that justifies removal
- Conducted by someone impartial – may need training

Challenging a Title IX Emergency Removal

Notice and opportunity to challenge determination after removal

- No requirement of written notice, but recommended
- Notice must describe reasons for finding a threat
- District has discretion to establish hearing procedures and determine who conducts the hearing

Timeline – immediately after removal (without delay / as soon as possible given the circumstances)

When *Can* the District Impose Discipline in Title IX Matters?

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



Questions?

Thank you for attending!

Remember – additional
information available at:

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

Find us on **Twitter** at
@BrickerEdLaw

