

Level II TIX Team Training

with **Kate V. Davis** and **Beverly A. Meyer**

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Disclaimers

We can't help ourselves. We're lawyers.

- We are not giving you legal advice
- Consult with your legal counsel regarding how best to address a specific situation
- Feel free to ask questions

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Sex Discrimination and Harassment

Title VII and Title IX

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…"

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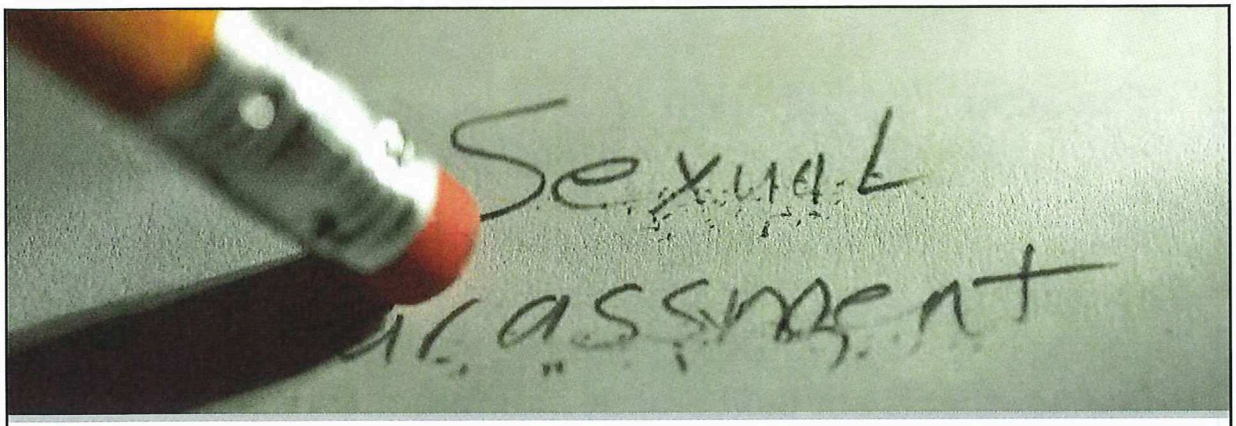
Sex Discrimination under Title IX

34 C.F.R. § 106.31(b)

- 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 such aid, benefit, or service
- Subject any person to separate or **different** rules of behavior, sanctions, or other treatment

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Sexual Harassment Definitions under the Title IX Regulations

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When does a school have notice of a complaint?

Actual knowledge = notice of sexual harassment or allegations of sexual harassment to a recipient's:

- Title IX Coordinator, or
- Any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or
- **To any employee of an elementary or secondary school**

34 C.F.R. § 106.30(a)

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Hostile Environment – What does this look like?

Be aware of things that are **not** elements:

- "Happened more than once"**
- "Parties weren't dating at the time"
- "Must involve two people of compatible sexual orientations"
- "Must occur on school property" ** (but remember state law restrictions)
- "Must have bad intent"

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TIX Regulations Apply to Employees

- Recipients that are subject to both Title VII (employment) and Title IX (education programs and activities, including employment) must comply with both
- "**Deliberate indifference**" standard applies
  - Because Title IX recipients are "in the business of education"
  - "Marketplace of ideas"

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Hypothetical #1 - continued

- Chuck asks Mary Sue out over the radio, and Mary Sue says no again
- The transportation supervisor warns them both informally not to discuss personal matters on the radio

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Hypothetical #1 - continued

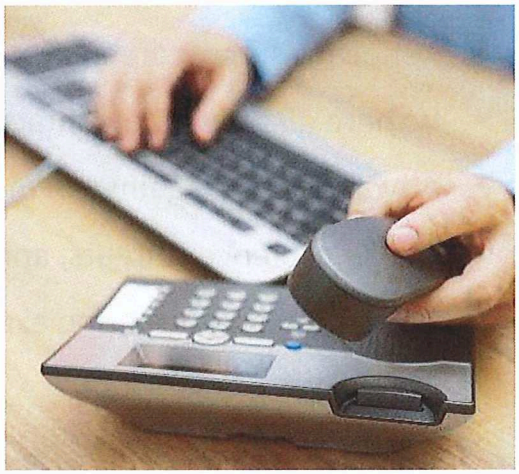
- Chuck corners Mary Sue in the break room before the morning route to ask her why she won't date him and won't let her leave until she says yes
- The transportation supervisor writes both of them up for starting their routes late

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Mandatory Reporting

- Child Abuse
- Felonies
- If a school employee engages in sexual conduct with a student, it must be reported
  - Even if the student is 18
- ODEW Conduct Reporting



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Prohibition Against Retaliation
§ 106.71

- Retaliation prohibited, including intimidation, threatening, coercion, or discrimination against any individual:
  - For purpose of interfering with any right or privilege secured by Title IX
  - Because an individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing
  - Includes charges for code of conduct violations that do not involve sex discrimination/harassment but arise out of the same facts or circumstances

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Employee Obligations

- Know who the District Title IX Coordinator is
- Recognize a potential Title IX violation
- Report any potential Title IX violation to the Title IX Coordinator **the same day** you receive notice of it
- Review your district's anti-discrimination and anti-harassment policies as soon as they are updated

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How does an employee make a report on their own behalf?

- Promptly report incidents of unlawful discrimination and/or retaliation to your District's Title IX Coordinator so that the District may address the conduct
- Remember – retaliation is prohibited



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Key Takeaways for Administrators

- Everything listed in the previous slide for staff
- Follow notice and posting requirements for anti-discrimination, Title IX policies, and training materials

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Training Requirements for the Title IX Team

- The definition of sexual harassment as defined in 34 C.F.R. § 106.30
- The scope of the district's education program or activities
- How to conduct an investigation
- How to consistently apply definitions used by the district with respect to consent (or the absence/negation of consent)
- The grievance process, including hearings, appeals, and informal resolution processes, as applicable
- How to serve impartially and avoid prejudgment of facts at issue, conflicts of interest, and bias

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What must notice include?
§106.8(a)

- Notice of the TIXC **must** include, for the employee or employees designated as the Title IX Coordinator:
  - The name or title
  - Office address
  - Electronic mail address
  - Telephone number

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Revise/Adopt TIX Grievance Procedures
§106.8(c)

- Implementation Date was August 14, 2020
- Identify the TIX Team (investigators, decision-makers, appeal entities, informal resolution facilitators)
- Ensure that the Code of Conduct and Handbooks are reconciled with the new procedure
  - How will the District address conflicts arising between the grievance procedure and established staff/student disciplinary frameworks?
  - Does the Code of Conduct require an update?

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"Actual Notice"

§ 106.30(a)

- TIX Coordinator responsible for receiving reports of conduct that **could** constitute sex discrimination or harassment
- Also responsible for receiving **formal** complaints that are signed by complainant
- Actual notice imputed not just when TIX Coordinator is notified, **but also** when someone with authority to correct the harassment is notified, **or** when **any** elementary/secondary school employee has knowledge

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District's Response to Sexual Harassment

§ 106.44(a) and (b)

- **District must respond promptly in a manner that is not deliberately indifferent**
- District must treat complainants and respondents equitably by offering supportive measures
- In response to formal complaint, District must follow a grievance process

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TIXC Makes Jurisdictional Determinations

§ 106.45(b)(3)

- **Mandatory Dismissals**
  - Would not constitute sexual harassment even if proved
    - Quid pro quo, hostile environment, Clery crimes
  - Did not occur in the recipient's education program or activity
  - Did not occur against a person in the United States

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TIXC Makes Jurisdictional Determinations

§ 106.45(b)(3)

- **Discretionary Dismissals**
  - Complainant notifies TIX Coordinator in writing they would like to withdraw the formal complaint
  - Respondent is no longer enrolled or employed by the recipient
  - Specific circumstances prevent the recipient from gathering sufficient evidence

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Provides Notice of Allegations to Parties

§ 106.45(b)(2)

- Needs to be supplemented if new allegations are to be included
- Must include statement that respondent is presumed not responsible for alleged conduct and that determination regarding responsibility is made at the conclusion of the grievance process
- Must inform the parties that they may have advisor of their choice who may be an attorney and who may inspect and review evidence

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Implement Supportive Measures

§ 106.30(a)

- 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."

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Supportive Measures – More Requirements and Some Best Practices

- Must consider the complainant's wishes
- The 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 because it preserves access and deters harassment
- If OCR doesn't discuss supportive measures in non-TIX guidance, should we provide them for non-TIX cases?

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Supportive Measures – Confidentiality & Recordkeeping

- Requirement to maintain as confidential any supportive measures provided §106.30
- Requirement to create and maintain records, for period of seven years, regarding any actions taken in response to report or formal complaint of sexual harassment **includes supportive measures** §106.45(b)(10)(ii)
- If recipient does not provide complainant with supportive measures, it must document the reasons why this was not clearly unreasonable in light of known circumstances

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Emergency Removal – Employees

§ 106.44(d)

- Administrative leave for employees remains available
- Nothing in the regulations dictates whether such leave is paid or unpaid

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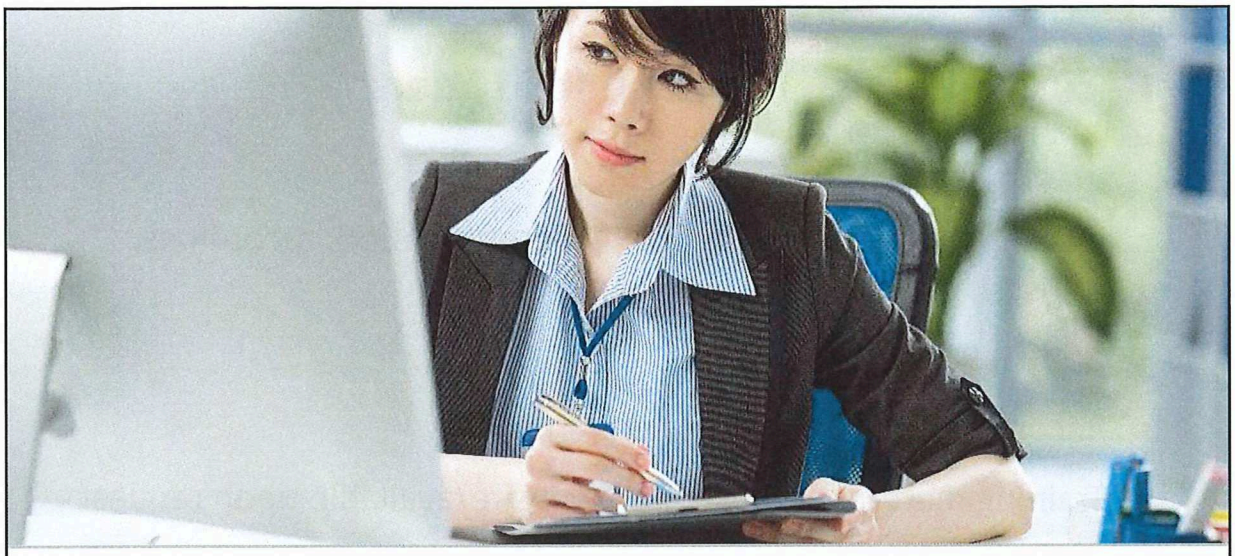
Provides Written Investigative Report

§ 106.45(b)(5)(vii)

- After **completion** of investigation, TIX Coordinator (or Investigator) **may** be responsible for providing the parties a copy of the written investigative report
- Parties are to be sent the report **at least 10 days** in advance of reaching a determination of responsibility
- Review process and exchange of written questions may also be coordinated by TIX Coordinator

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Other Title IX Coordinator Responsibilities

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TIXC May File Formal Complaint

§ 106.30(a)

- 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

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Intersection of Employee Issues with Title VII

- USDOE states that complaint and/or disciplinary measures in CBAs or employee handbooks may need to be revisited/renegotiated to comply with Title IX
- Board Policy may also need to be revisited

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Hypothetical – Employee-Student Allegations

- Teacher's suggestive statements make student so uncomfortable she wants to drop the class
- Her parent complains to the superintendent
- Student is insistent that she wants nothing more than to drop the class

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Impartiality and Avoiding Bias, Conflict of Interest and Prejudgment of Facts

- Section 106.45 **requires** that **Title IX Coordinators** (and investigators, decision-makers, appeals officers, and informal resolution officers) be:
  - free from **conflict of interest**, **bias**, and
  - trained **to serve impartially** and **without prejudging 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

(85 Fed. Reg. 30249-30257; 30496)

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Preamble Discussion: Bias and Conflict of Interest (1 of 2)

- 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) for:
  - Using employees or administrative staff (p. 826)
  - Conflict of interest or bias for professional experiences or affiliations of decision-makers and other roles in the grievance process (p. 827)

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How the Department Tried to Prevent Bias

No single-investigator model (34 C.F.R. 106.45(b)(7)(i)):

- Decision-maker must not have been the same person who served as the Title IX Coordinator or investigator (85 Fed. Reg. 30367)
- Separating the roles protects both parties because the decision-maker may not have improperly gleaned information from the investigation that isn't relevant that an investigator might (85 Fed. Reg. 30370)
- The institution may consider external or internal investigator or decision-maker (85 Fed. Reg. 30370)

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Examples in Discussion for Unreasonable Conclusion that Bias Exists (1 of 2)

"For example, assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents"

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Training, Bias, and Past Professional Experience

This required training (that you are sitting in right now) can help protect against disqualifying someone with prior professional experience

(85 Fed. Reg. 30252)

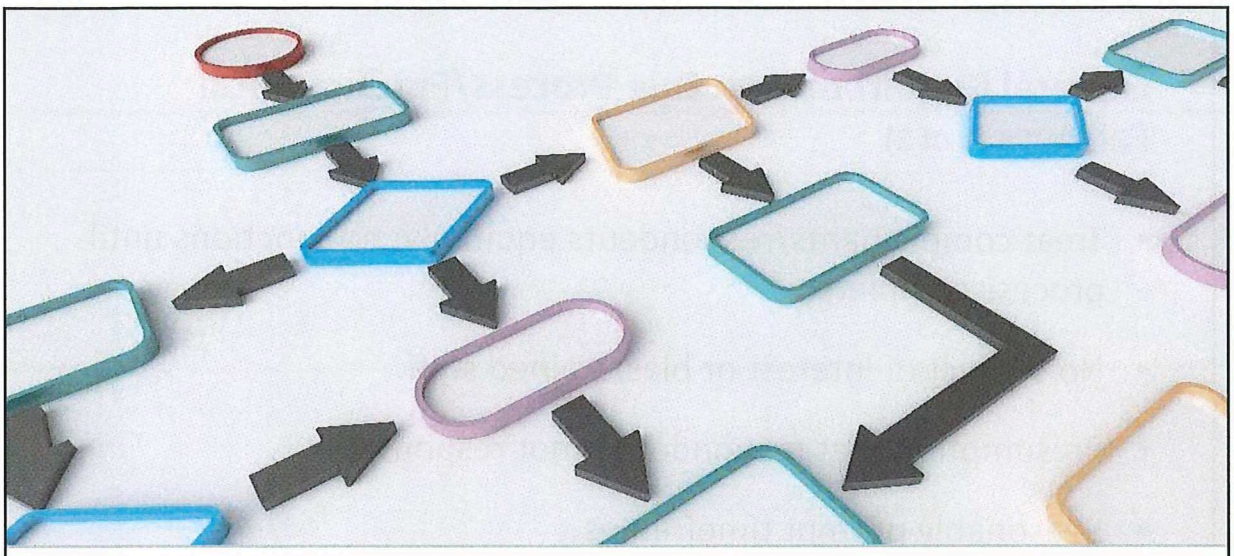
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Avoiding Pre-Judgment of Facts at Issue

- 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

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Title IX Grievance Procedure

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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"

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Notice of Allegations to Parties

- Several required elements must be included – see Notice of Allegations to Parties slide in Title IX Coordinator section
- Must be supplemented if additional allegations arise

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Dismissal and Consolidation

Dismissal of Formal Complaints

- 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

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Investigation Process (3 of 3)

Prepare Investigative Report

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

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Hearings and Cross Examination

Live Hearings

- Optional for K-12 (Career Center Adult Ed Programs must have hearings)
- Hearing does not have to provide the right to cross examination

With or Without Hearing

- 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)

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Bases for Appeal

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

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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

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Less Adversarial Resolution

"Informal resolution may present a way to resolve sexual harassment allegations **in a less adversarial manner** than the investigation and adjudication procedures that comprise the 106.45 grievance process."

(85 Fed. Reg. 30098 FN 463)

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When: Threshold

- **Only** available to the parties **if** a ***formal complaint*** is filed
- **Never** available to resolve allegations that an employee sexually harassed a student

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Caution in Approach (2 of 3)

A school district may **NOT** require:

- As a condition of enjoyment of *any other right*
- The waiver of the right to an investigation and adjudication of formal complaints of sexual harassment

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Caution in Approach (3 of 3)

A school district may **NOT** require:

- The parties to participate in an informal resolution process
- Pressure either or any party to participate
- **This is a voluntary process for both (or all) parties!**

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Mediation (1 of 2)

The regulations don't provide more detail on what this means

- "Mediation" may have legal meaning in your jurisdiction that invokes certain requirements
- Ohio does

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Mediation (2 of 2)

- In Ohio, the Supreme Court and state law have provisions governing mediation and a Uniform Mediation Act
- See ORC § 2710.01 through § 2710.10

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Facilitated Resolution (1 of 2)

Written agreement required?

- Regulations are silent about whether required.
- But – other provisions require ***documentation*** of the grievance process from formal complaint to resolution

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Facilitated Resolution (2 of 2)

What is a resolution of the dispute?

- Do parties need to reach an agreement about what occurred between them?
- Is it sufficient to find a way to move forward so both parties can have equal access to educational opportunities?

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Overview of the Process with the Parties

Whether beginning together or separately, the facilitator should begin by providing an overview with the parties of the expectations and process for the resolution

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Provide Opportunity for Each Party to Tell Their Story

- Whether beginning together or separately, the facilitator should provide space for each party to tell their "story" and present their perspective on the underlying dispute
- If haven't separated at this point, separate parties after this point

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Have Ready a List of Supportive Measures That Can Be Easily Offered

- Adjusting course schedules
- Online alternatives for courses
- Increased adult supervision
- Counseling
- Training
- Apology letters (not necessarily admitting wrongdoing, but acknowledging feelings)

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Review the WIFMs for Each Party and Look for Overlap

- Sometimes the parties want a lot of the same things
- Sometimes the parties do not have any overlap
- Identify with each party what they may be willing to share with the other party and that sharing may help resolve

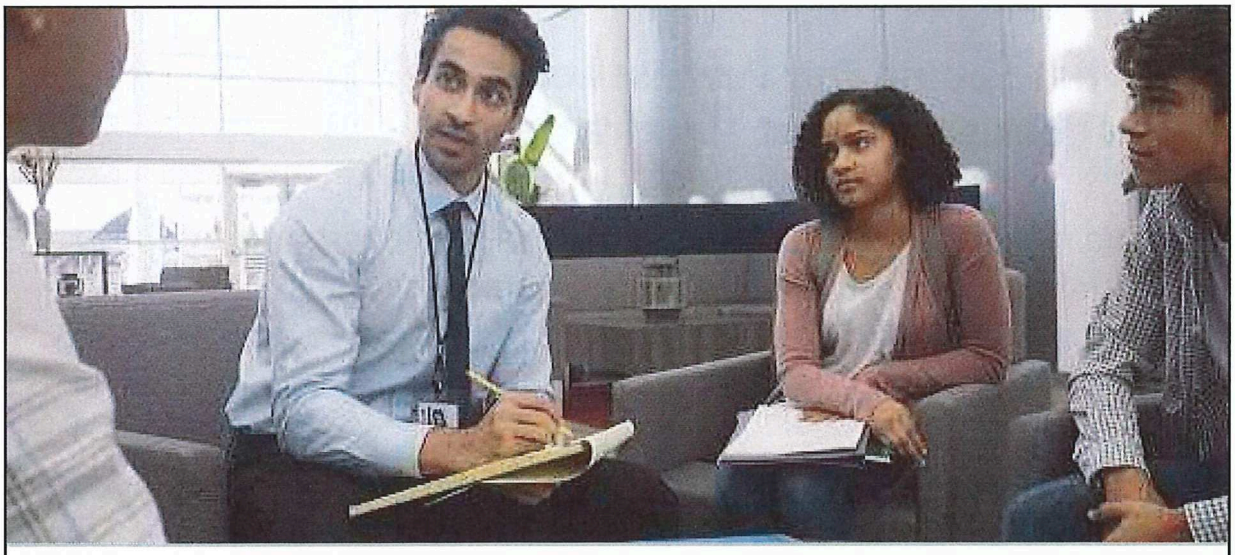
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If No Agreement Reached…

- Parties may want time to think about the resolution – this will be up to the school on how to proceed
- May provide a certain deadline by which to have signed
- May provide certain provision that it will go back to formal process by deadline
- May choose to offer further facilitated resolution on the dispute of it the parties think it would be helpful

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Informal Resolution: Best Practices

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Prompt Timeframe Considerations

- Stop the clock for exams or breaks so that students are not required to participate during exams or breaks or have that time count against resolving
- Have the ability to extend timeframe if close to resolving but need a few extra days

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Contact the Parties

- The informal resolution officer should contact each party individually to initiate and explain the process
- A written notice shall be provided disclosing:
  - The allegations
  - The informal resolution process requirements
  - Any consequences

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Assess Needs & Wants

- Meet with each party individually to find out:
  - What they **want**
  - What they **need**
- What are they willing to accept as a resolution?
- What are they not willing to accept?

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Finding Out What the Parties Want

Example:

- A complainant may tell you they want the respondent to admit wrongdoing
- However, the complainant may be willing to accept that respondent sees the underlying interaction differently but apologizes for the resulting harm to the complainant

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Reality Checking

A helpful tool – it may be helpful to remind one or both parties that:

- The limitation of informal resolution requires agreement to complete
- The alternative may be a return to the formal process
- They can control the outcome in the informal process, but not the formal process

... But be careful to remain neutral and not push a party to do something the party does not really want to do

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Reality Checking – Examples

Neutral Example:

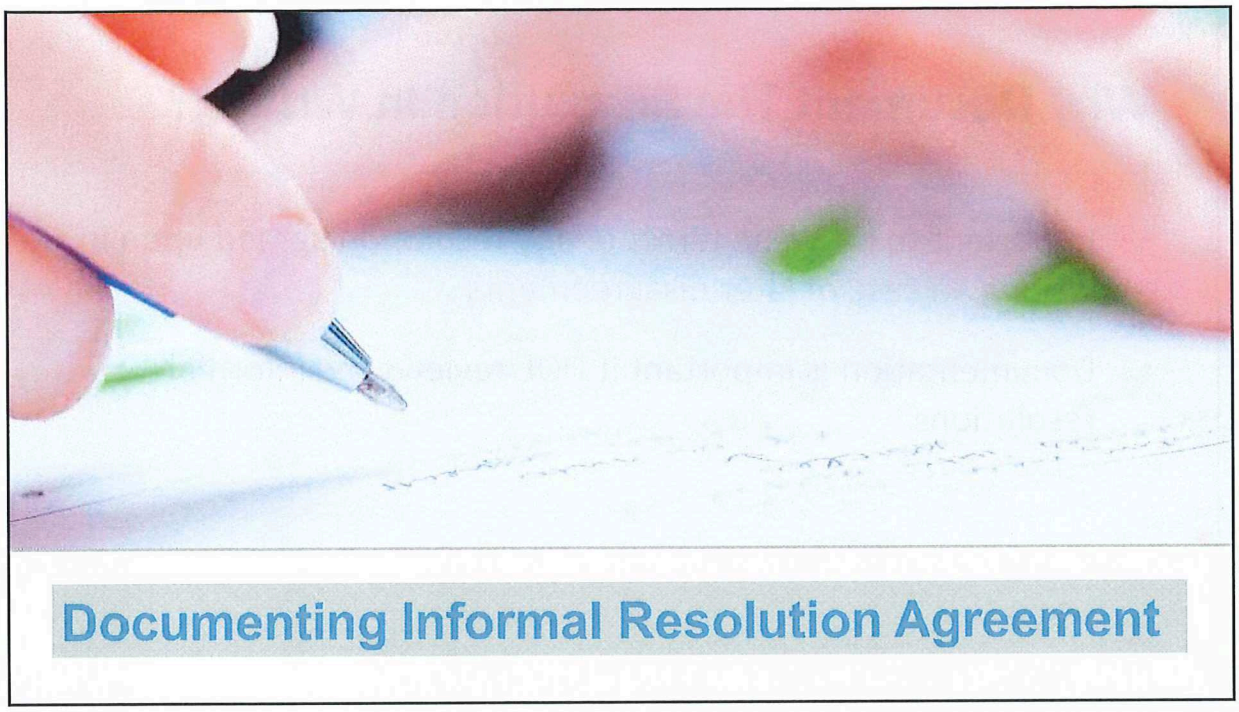
"If this goes back to the formal process, you will not have control over the outcome, and there is a possibility that a decision-maker could find you in violation of policy"

Biased/Pushy Example:

"I've seen cases like yours and it's not looking good for you. You should take the informal resolution option offered by the other party."

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Documenting Informal Resolution Agreement

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Why Document Agreement in Writing?

While some jurisdictions will not allow discussions or documents from mediation to be relied upon outside of mediation, many do allow a carve out for a written agreement (signed by the parties) as final memorialization of an agreement

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The Problem with "Gag" Orders or Non-Disparagement Agreements

- Could be contrary to the First Amendment
- Could be contrary to academic freedom if it involves teaching staff
- Could be contrary to public records laws
- **What happens if a party breaks the order?**
  - How will you enforce it?
  - What if it's years later?
  - What if it's a conversation with a family member vs. journalist?
  - What if it seems like the school is trying to bury information?

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What Resolution Documentation Should Include

- Names of any parties, representatives, and informal resolution officer
- The specific terms of agreement, with as much specificity as possible
- Acknowledgement of all the terms by signature of the parties (parents) and the consequences of signing

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Serving as Title IX Investigator

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Important Reminder

- As reviewed in the Title IX Coordinator section, the **Title IX regulations require** that all members of the Title IX team – including the **Investigator** – **serve impartially**, and **avoid bias, conflict of interest, and prejudgment of facts**

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Disclaimer (1 of 2)

- This section uses the terms "rape," "victim," and "perpetrator" – CRIMINAL, not POLICY
- 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

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Disclaimer (2 of 2)

- 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 not signs of trauma, therefore nothing bad happened

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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 a perpetrator's own behavior
- A wide variety of responses are normal for a victim of trauma (e.g., calm, hysterical, angry, in denial, detached, withdrawn, or in shock) – don't make assumptions about how they "should act"

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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

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Words Have Power

- Victim vs. survivor vs. complainant
- **Stick with policy language** to the extent possible

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Culture Affects Response (1 of 2)

- 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

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Issues of Relevancy (1 of 3)

- The Rules of Evidence do **NOT** apply and **CANNOT** apply (85 Fed. Reg. 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 Fed. Reg. 30336-37)
- "Any rules adopted by a recipient regarding issues of relevance should be reflected in the recipient's training materials." (85 Fed. Reg. 30294)

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Issues of Relevancy (2 of 3)

Not generally permissible unless expressly touched upon in Regulations (85 Fed. Reg. 30294):

- Information protected by a legally recognized **privilege**
- Evidence about complainant's **prior sexual history** unless such questions/evidence about complainant's prior sexual behavior are offered to prove that someone other than respondent committed the conduct or if the questions/evidence concern specific incidents of complainant'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
- 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)

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Relevancy: Legally Privileged Information (2 of 3)

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.

§ 106.45(b)(1)(x)

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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 (as in the 5th Amendment)
  - Confessions to a clergy member or other religious figures
  - Spousal testimony in criminal matters
  - Some confidentiality/trade secrets

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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

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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

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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?)

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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?

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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?

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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

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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

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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

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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?

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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

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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

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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

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Inspection and Review of Evidence

ALL Evidence must be provided 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

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Create Investigative Report

- Fairly summarizes the relevant evidence
  - Summarize **facts**
  - No determination
  - Provide to parties and advisors
  - Allow 10 days to review

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Role as a Decision-Maker

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What is your role as decision-maker?
(1 of 4)

- Conduct an objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence [34 C.F.R. § 106.45(b)(1)(ii)]
- Mandatorily dismiss Title IX complaint that do 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 C.F.R. § 106.45(b)(3)(i)]

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What is your role as decision-maker? (3 of 4)

- 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 to set reasonable limits [85 Fed. Reg. 30364]
  - The 10-day response period can overlap with the period for follow-up questions, so schools do not need to extend timelines [85 Fed. Reg. 30365]

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What is your role as decision-maker? (4 of 4)

- 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 C.F.R. § 106.45(b)(7)]
- Consider appeals (appellate decision maker)

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Consider All/Only Evidence

- You must make a decision based solely on the relevant evidence obtained in this matter
- You may consider nothing but this evidence

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Be Impartial

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

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Evaluate Witness Credibility (2 of 2)

- Is there any bias?
- The Regulations' commentary provides consideration of:
  - Consistency, accuracy, memory, credibility (85 Fed. Reg. 30315)
  - Implausibility, inconsistency, unreliability, ulterior motives, lack of credibility (85 Fed. Reg. 30330)
- 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

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Draw Reasonable Inferences

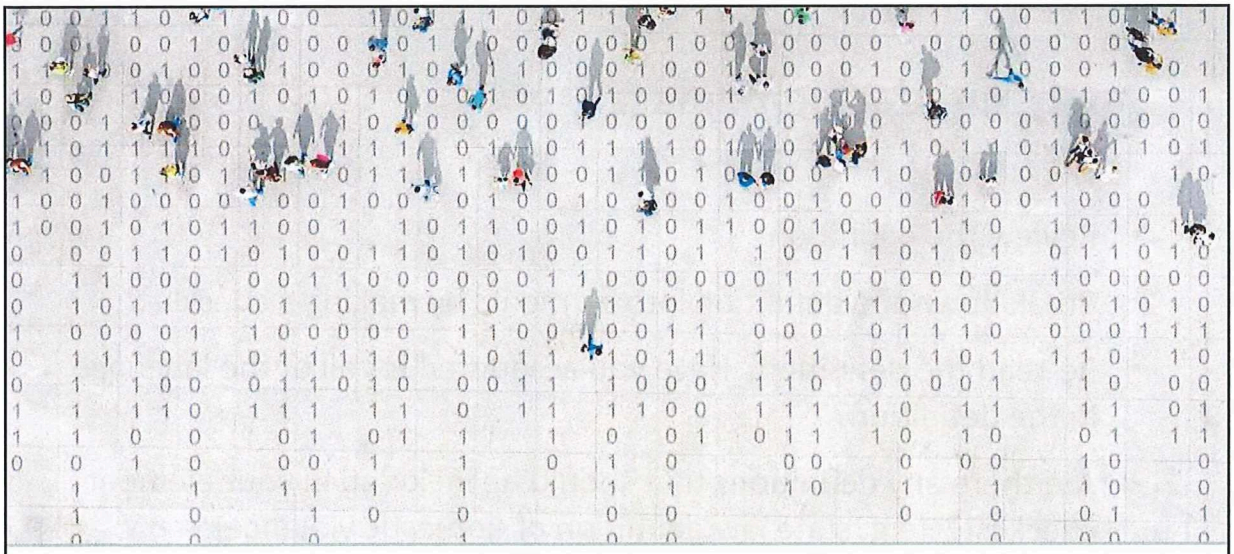
- Inferences are sometimes called "circumstantial evidence."
- It is the evidence that you infer from direct evidence that you considered.
- Inferences only as warranted and reasonable.

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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

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Analyzing the Elements of Prohibited Conduct

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Analyzing the Elements (3 of 3)

- 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

**If you use clear and convincing as your standard of evidence, substitute that here

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Example: Quid Pro Quo

- ❑ Conduct on the basis of sex
- ❑ By an employee of the recipient
- ❑ That conduct conditions the provision of an aid, benefit, or service of the recipient on an individual's participation in sexual conduct
- ❑ That sexual conduct is unwelcome

[34 C.F.R. § 106.30(a)]

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Example: Sexual Assault (2 of 2)

- ❑ In cases of rape or "criminal sexual contact" (formerly fondling), there was either:
  - ❑ No consent**, or
  - ❑ Victim was incapable of giving consent because of age or temporary/permanent mental or physical incapacity

**Note: Physical resistance by the victim is not required to establish lack of consent (2025 NIBRS)

[34 C.F.R. § 106.30(a); 20 U.S.C. § 1092(f)(6)(A)(v); FBI UCR National Incident-Based Reporting System User Manual]

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Example: Dating Violence

- ❑ 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
- ❑ 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

[34 C.F.R. § 106.30(a); 34 U.S.C. § 12291(a)(10)]

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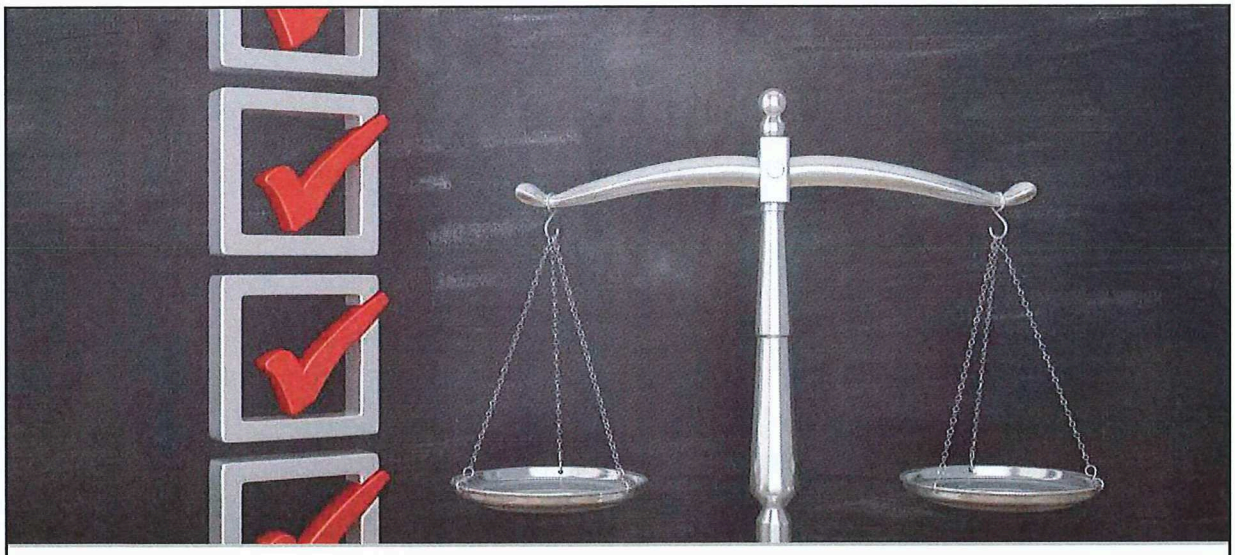
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Scope of Education Program/Activity

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 C.F.R. § 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 C.F.R. § 106.44(a)]

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Fact-Finding when Facts are Disputed

221

Objectively Evaluating Relevant Evidence (1 of 2)

- Preamble indicates that the decision-maker should be looking at:
  - Consistency, accuracy, memory, credibility (85 Fed. Reg. 30315)
  - Implausibility, inconsistency, unreliability, ulterior motives, lack of credibility (85 Fed. Reg. 30330)
- Again, not making relevancy determinations beyond those expressly included in regulations (as specified by policy)
  - See slides on Relevancy in Investigator section
- Use standard of proof in decision-making

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Objectively Evaluating Relevant Evidence (2 of 2)

- "[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 Fed. Reg. 30294)
- **BUT** "if 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 Fed. Reg. 30293)

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Recommended Considerations for Resolving Conflicts (3 of 4)

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

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Recommended Considerations for Resolving Conflicts (4 of 4)

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

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Regulatory Definitions

- 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"

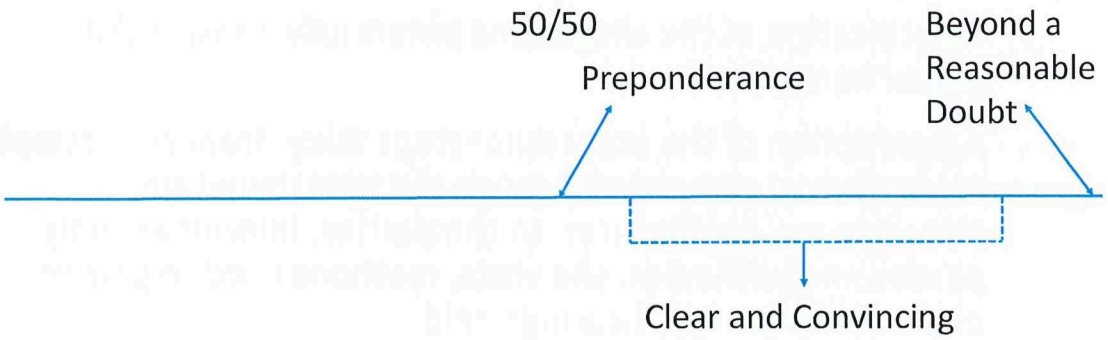
85 Fed. Reg. 30373 at FN 1409

- Recipients cannot use "beyond a reasonable doubt" standard, which is used in criminal cases, regardless of allegations as issue

85 Fed. Reg. 30373

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Standards of Evidence – What Are Our Choices?



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Written Determination (2 of 3)

§ 106.45(b)(7)(ii)

- 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

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Written Determination (3 of 3)

§ 106.45(b)(7)(ii)

- Institution's procedures and permissible bases for complainant and respondent to **appeal**
- Provided to both parties in writing contemporaneously (34 C.F.R. § 106.45(b)(7)(ii))

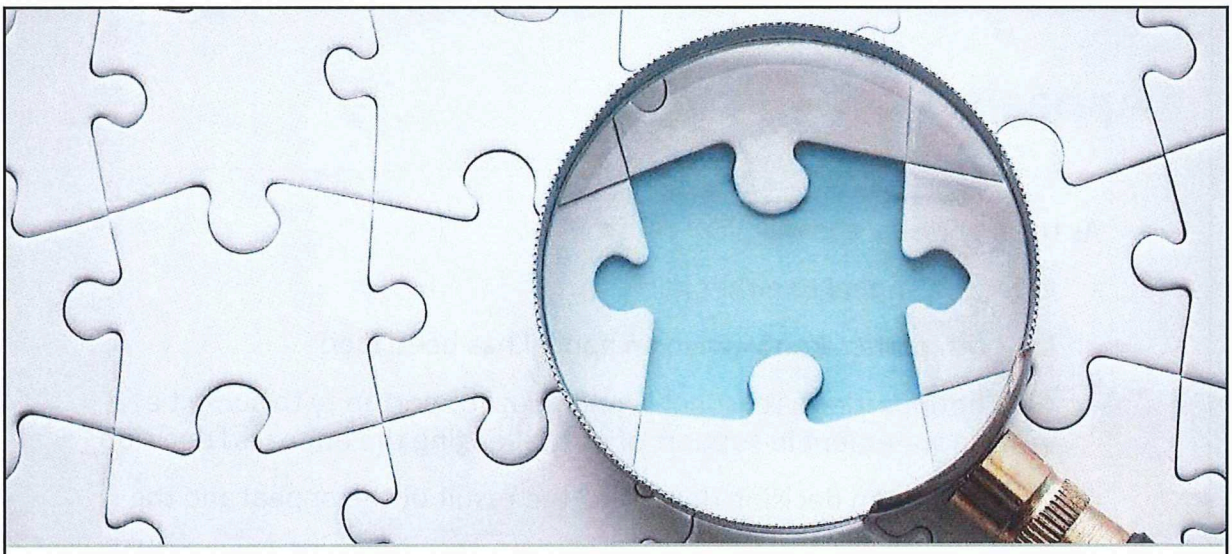
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Disciplinary Sanctions (2 of 2)

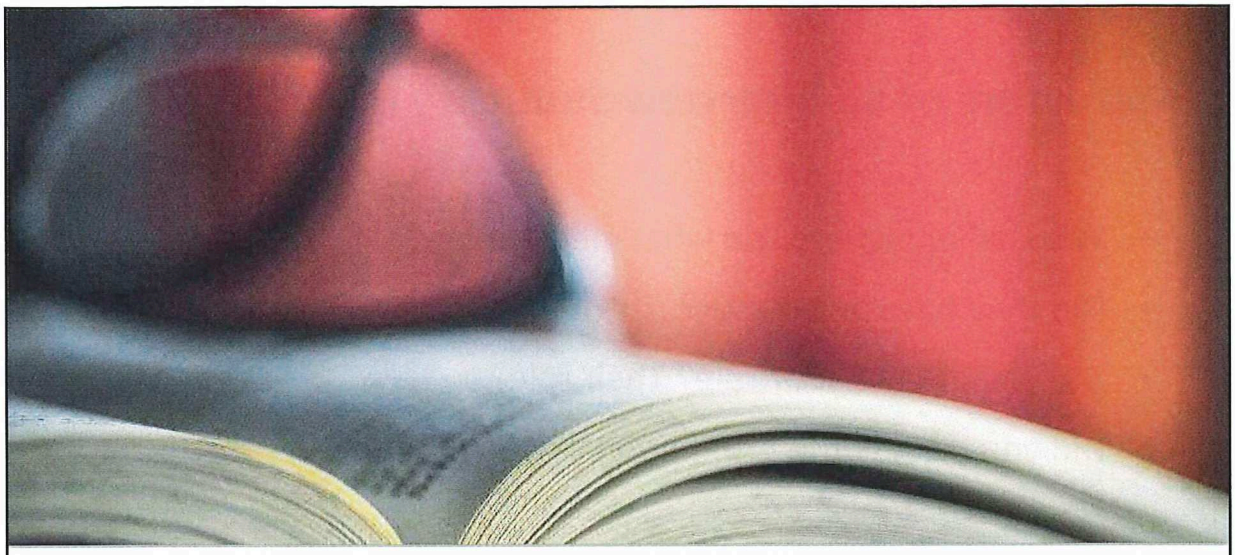
- Note that if schools permit appeals regarding sanctions, they must offer this right to the complainant and respondent [34 C.F.R. § 106.45(b)(8); 85 Fed. Reg. 30399]
- Before any sanction that would constitute a change of placement for a child with a disability, ensure compliance with IDEA and Section 504 (manifestation determination, continuation of services as applicable, etc.)

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Handling Appeals

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Report Writing for Investigators and Decision-Makers

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Goals

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

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Structure of an Interview Summary (3 of 4)

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

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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

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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?

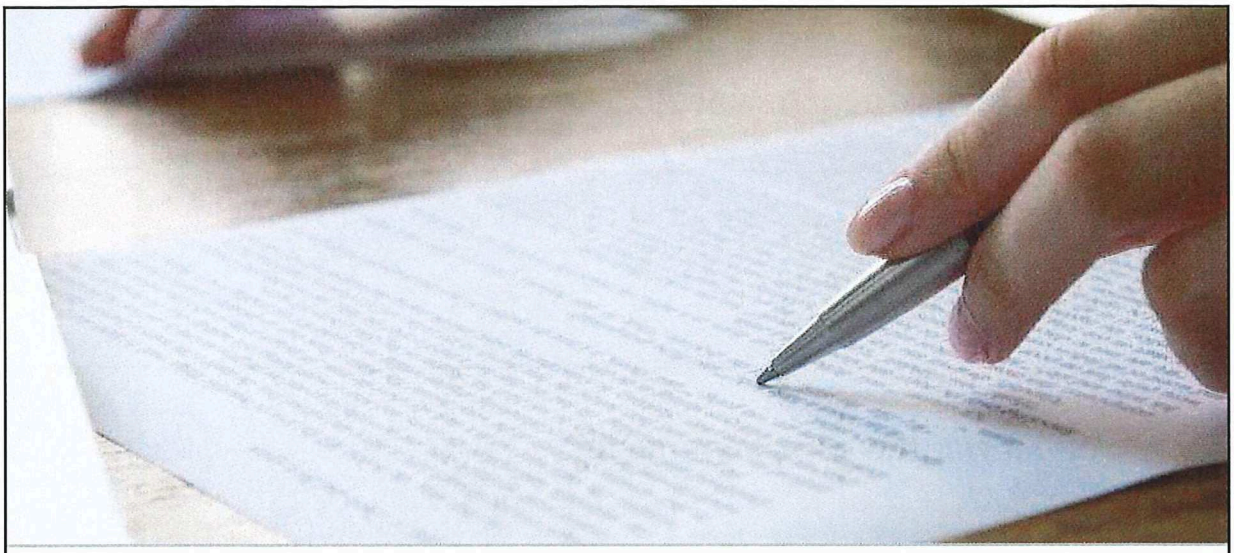
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Sensitive

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

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Synthesizing Evidence

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Begin with a Disclaimer

Example: "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 investigation file]* and the contents of the [exhibit packet]."*

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Does Your Policy Require Witness Sign-Off?

- "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?

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Basic Information

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

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Summary of Information (2 of 3)

- 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."

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Summary of Information (3 of 3)

- Tell the story chronologically
  - How did the relationship start?
- Citations to the record – always
  - Be helpful to the decision maker!
- Hearing packet or exhibits – helpful to number the pages sequentially for easy citation

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Summary of Information (3 of 5)

- 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

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Summary of Information (4 of 5)

- 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]."

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Written Determination (1 of 3)

§ 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

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Written Determination (2 of 3)

§ 106.45(b)(7)(ii)

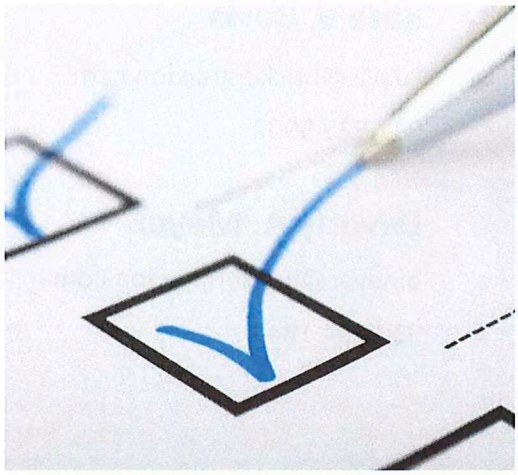
- A statement of, and rationale for, the results as to each allegation, including determination regarding responsibility, **any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity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

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Final Checklist (1 of 2)

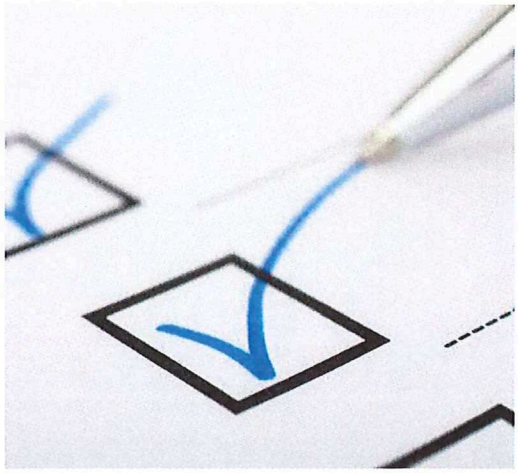
1. Are there any additional procedural anomalies to be explained?
2. Is every element of every charge accounted for?
3. Is every relevant disputed fact resolved in the analysis?



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Final Checklist (2 of 2)

4. Is there a clear connection between the **charges**, the **investigation**, the **evidence**, and the **conclusions**?
5. Would an unfamiliar reader be able to connect the dots?



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