



Title IX K-12 Training

Investigations, Decisions, and Report Writing



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
- We will send a copy of the slides after this presentation to all who registered their email address when signing in
- Feel free to submit questions - we will answer them at the end as time permits

Posting These Training Materials?

- Yes!
- Your Title IX Coordinator is required by 106.45(b)(10)(i)(D) to post materials to train Title IX personnel on its website
- We know this and will make this packet available to your district electronically to post

Additional Information

Additional information available
at:

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

Find us on **X** at
[@BrickerEdLaw](https://twitter.com/BrickerEdLaw)



Agenda

- Title IX Definitions
- Bias & Conflict of Interest
- Trauma-informed Responses
- Grievance Procedures
- Investigations from Start to Finish (including writing your report)
- Decisions from Start to Finish (questioning phase, weighing the evidence, writing your determination)
- Appeals



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 C.F.R. § 106.31(b).

What Does “Sex” Mean?

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

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]

Definition of “Educational Program or Activity”

(1 of 2)

“Educational program or activity” includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs...

Retaliation (1 of 2)

- Retaliation section added to new Title IX regs at 34 C.F.R § 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 (2 of 2)

- Adverse action against an individual
- Abuse, violence, threats, and intimidation
- More than just someone expressing their opinion



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

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)

Concerns Raised in Comments in Preamble

- Preamble concerns about all paid staff members being biased in favor of institution
- Institutional bias: cover-ups
- Past advocacy
- Being a feminist
- “Appearance of bias” v. actual bias

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) 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)

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

- Discretion to institutions on how to comply with providing decision-maker role (and other roles in the grievance process) without bias or conflict of interest
- Notes that excluding certain professionals out of fear of bias would improperly exclude experienced, knowledgeable individuals who are capable of serving impartially (citing history of working in the field of sexual violence). (p. 827)

Discussion Recommendation for Assessing Bias

“Whether bias exists requires examination of the particular facts of a situation and the Department encourages recipients to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased, exercising caution not to apply generalizations that might unreasonably conclude that bias exists...bearing in mind that the very training required by 106.45(b)(1)(iii) is intended to provide Title IX personnel with the tools needed to serve **impartially** and without bias such that the prior professional experience of a person whom a recipient would like to have in a Title IX role need not disqualify the person from obtaining the requisite training to serve impartially in a Title IX role.”

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”

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

- Department also cautioned parties and recipients from concluding bias or possible bias “based solely on the outcomes of grievance processes decided under the final regulations”
- Explained that this means, the “mere fact that a certain number of outcomes result in determinations of responsibility, or non-responsibility, does not necessarily indicate bias”

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 (1 of 2)

- “Must” not rely on sex stereotypes: Also helpful to avoiding pre-judgment of facts, remaining unbiased and impartial
- Pp. 831-837 in the preamble
- Comments include examples of sex stereotypes in comments (e.g., Women have regret about sex and lie about sexual assaults, men are sexually aggressive or likely to perpetrate sexual assault)
- Discussion – prohibition against sex stereotypes, but not feasible to list them (p. 835)
 - 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

Avoiding Sex Stereotypes (2 of 2)

- Consideration of marginalized groups: people with disabilities, people of color, people who identify in the “LGBTQ” community (pp. 1723-25; 1732-1737)
- Preamble discusses concerns by commentators about stereotypes and accommodations for individuals with disabilities under the ADA, and individuals with developmental and cognitive disabilities
- Preamble discusses concerns from people of color for cultural and racial stereotypes
- Preamble discusses concerns regarding stereotypes of the “LGBTQ” community

Be Human & Be a Blank Slate



Approaches to Counterintuitive Response

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



Considerations: Potential Responses to Trauma (1 of 2)

- 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

Considerations: Potential Responses to Trauma (2 of 2)

- Trauma isn't just something to consider from the complainant's perspective. The respondent may be dealing with trauma, as may be the witnesses.
- Trauma may cause counterintuitive responses – from your perspective. Stop and consider carefully before you decided someone is lying because they responded in a way different from how you would have responded.

Why Don't People Tell Right Away?

- Fear of retaliation
- Fear of not being believed

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

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

Trauma and the Brain

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

Not Everyone Thinks Like You

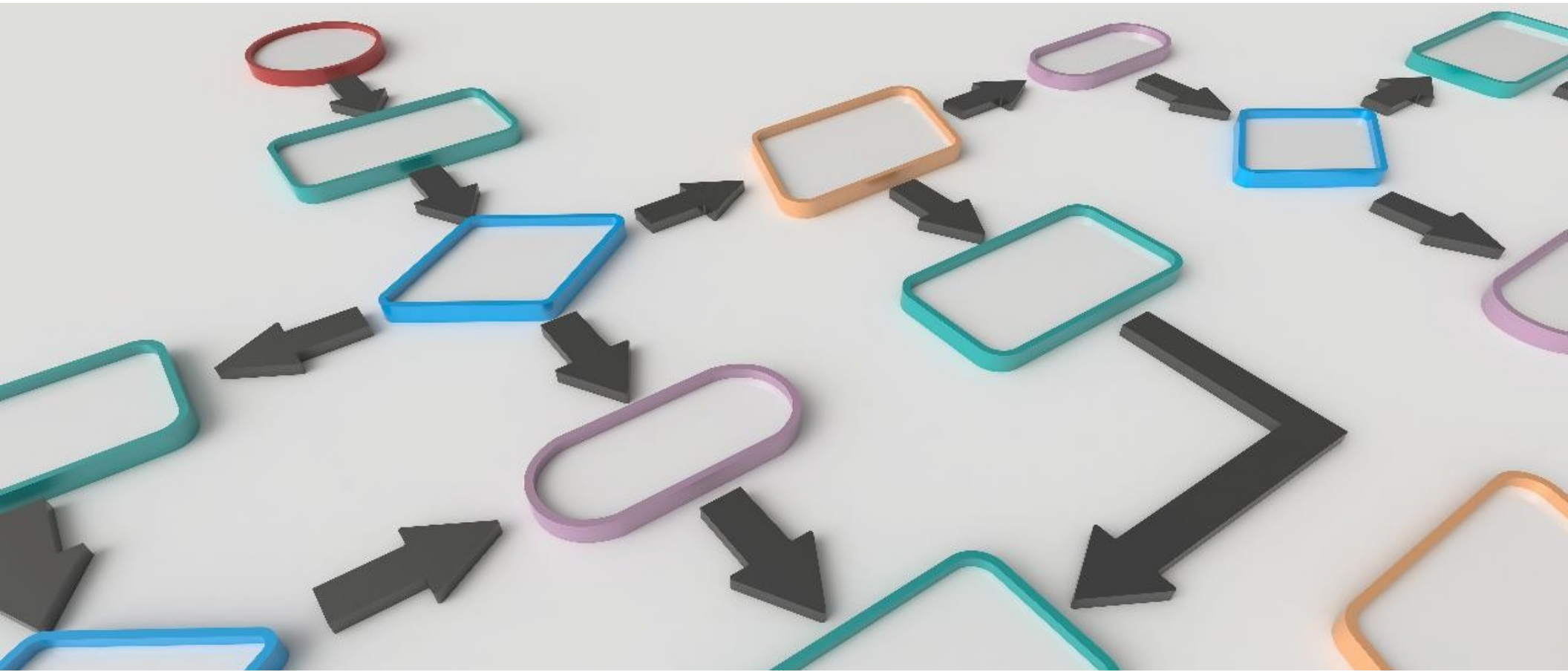
- Differences in:
 - Cultural backgrounds
 - Learned responses
 - Age, gender, race, religion, height/weight, strength
 - Adverse childhood experiences
 - Trauma in the moment or prior to the encounter

Words Have Power

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

Disclaimer

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



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 or Clear and Convincing
 - 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 Code of Conduct prohibiting false statements
 - Notice of any additional allegations that may arise

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

Jurisdiction (1 of 2)

- Under the new regulations, if you do not have jurisdiction you must dismiss the Title IX complaint
- This does not preclude supportive measures or other Code of Conduct violations

No Jurisdiction If: (1 of 2)

- 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

Investigation Process (1 of 2)

- Burden of proof and burden of gathering evidence is on recipient
- Equal opportunity to present witnesses
- May not prohibit parties from discussing allegations or gathering/presenting evidence
- Provide same 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 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

Hearings and Cross Examination

Live Hearings

- Optional for K-12
- 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)

Written Determination of Responsibility

- 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 (1 of 3)

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



Let's take a break!



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

Create Investigative Report

Fairly Summarizes the Relevant Evidence

- Summarize **facts**
- No determination
- Provide to parties and advisors
- Allow 10 days to review



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

Editing Exercises (1 of 3)

- Respondent engaged in sexual intercourse with Complainant from behind.
- Complainant couldn't explain why she was sitting on the couch by herself.
- Respondent visibly winced when Complainant said "no."
- John stated that Alice told him to "knock it off."
- On a scale of 1 to 10, the witness described the Respondent as being a "level 4 kind of drunk."

Editing Exercises (2 of 3)

- There was no evidence to support Complainant's assertion that the activity was without consent.
- During the mediation, Respondent admitted to the misconduct and promised not to do it again.
- Professor Clark indicated that he had never known Respondent to commit sexual misconduct at 2:00 in the morning in the back of a bar before.

Editing Exercises (3 of 3)

- Respondent stated that Complainant was diagnosed with bipolar disorder and that the complaint was “all in his head.”
- When Respondent asked if Complainant wanted oral sex and Complainant said, “That’s OK,” that was indication of the Complainant’s consent.
- Jane insinuated that Respondent changed her grade based on her report.



Just the Facts: Synthesizing Evidence Into an Investigative Report

Disclaimer (4 of 4)

“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 (1 of 2)

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

Basic Information (2 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 (2 of 2)

- Under the new regulations, if you do not have jurisdiction you must dismiss the Title IX complaint
- This does not preclude supportive measures or other Code of Conduct violations

No Jurisdiction If: (2 of 2)

- 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”

(2 of 2)

“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...

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?

Basic Information

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

Applicable Policy Provisions

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

Summary of Information (1 of 3)

- Ways to arrange:
 - Chronologically
 - By witness summary
 - By allegation/topic

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.”

Summary of Information (3 of 3)

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



Role as a Decision-Maker

What is your role as decision-maker?

(1 of 3)

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

What is your role as decision-maker?

(2 of 3)

- Afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions for each party. [34 C.F.R. 106.45(b)(6)(ii)]
- Explain to the party proposing the questions any decision to exclude a question as not relevant [34 C.F.R. 106.45(b)(6)(ii)]

What is your role as decision-maker?

(3 of 3)

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

1) Keep an Open Mind

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

2) Make Sound, Reasoned Decisions

- You must render a sound, reasoned decision on every charge
- You must determine the facts in this case based on the information presented
- You must determine what evidence to believe, the importance of the evidence, and the conclusions to draw from that evidence

3) 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

4) 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

5) Weight of Evidence

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

6) Evaluate Witness Credibility (1 of 3)

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

6) Evaluate Witness Credibility (2 of 3)

- Consider the reasonableness or unreasonableness, or probability or improbability, of the testimony.
- Does the witness have any motive?
- Is there any bias?
- The Regulations' commentary provides consideration of consistency, accuracy, memory, credibility (85 FR 30315), implausibility, inconsistency, unreliability, ulterior motives, lack of credibility (85 FR 30330)

6) Evaluate Witness Credibility (3 of 3)

- 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

7) 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.

8) Standard of Evidence (1 of 2)

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

8) Standard of Evidence (2 of 2)

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

9) 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



The Questioning Phase

A Note About Hearings

- K-12 is not required to hold live hearings
- The regulations provide little structure for live hearings at the K-12 level
- This training presumes that you do **not** elect to offer live hearings prior to making a determination as to whether a policy violation occurred
- This does **not** excuse you from holding subsequent suspension/expulsion hearings as may be applicable

Why No Live Hearing?

Cross examination in a live hearing is “not necessarily effective in elementary and secondary schools where most students tend to be under the age of majority and where.... parents or guardians would likely exercise a party’s rights.” 85 FR 30334

- This applies to cases involving student and staff respondents.
- Consider career center with adult education program

After the Report (1 of 3)

- After the school sends the investigative report to the parties, they have 10 days to provide a written response. [34 CFR 106.45(b)(5)(vii)]

After the Report (2 of 3)

- Before reaching a determination regarding responsibility, the decision maker must:
 - Afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness
 - The decision-maker must explain to the party proposing the question any decision to exclude a question as not relevant. [34 CFR 106.45(b)(6)(ii)]

After the Report (3 of 3)

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



Let's take a break!



The Written Decision

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

(1 of 3)

- 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)

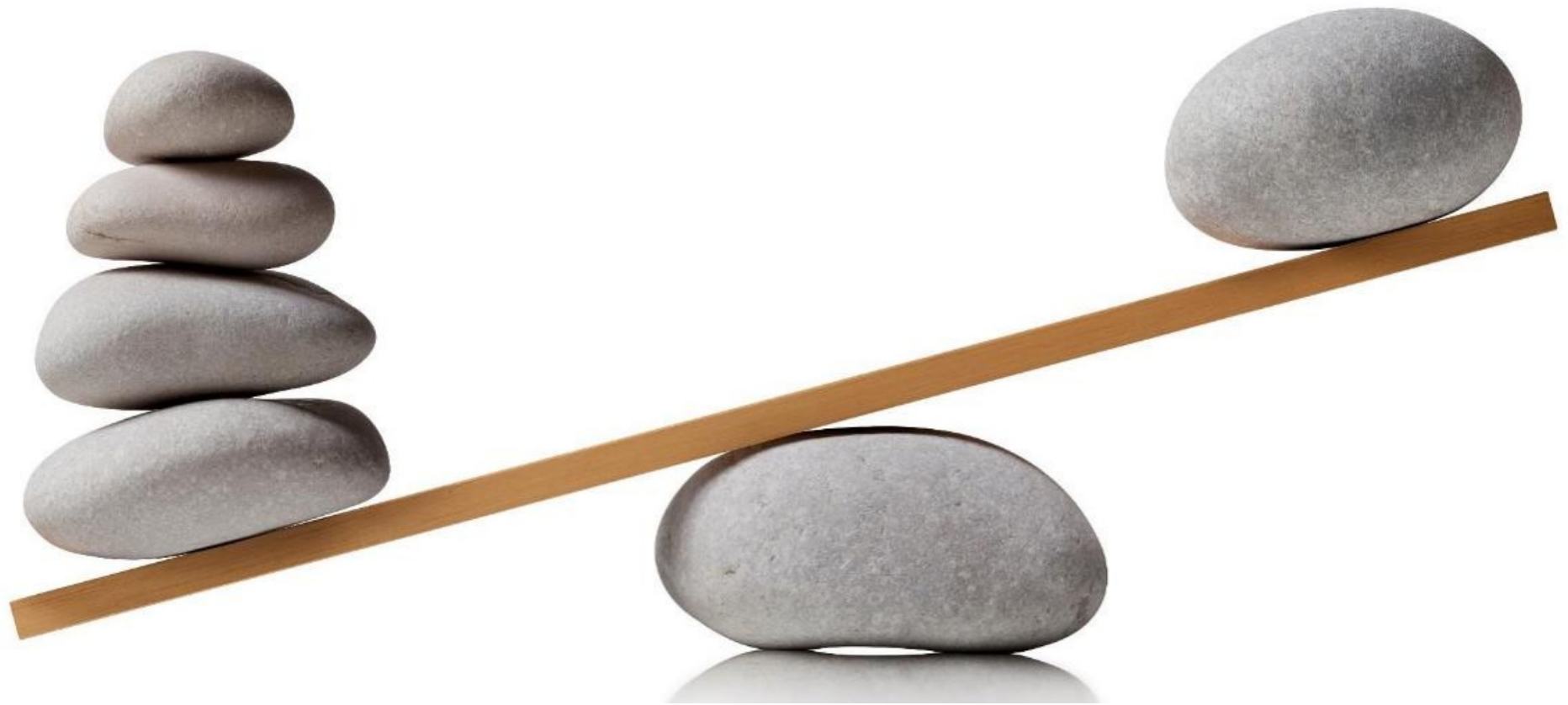
(2 of 3)

- 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)

(3 of 3)

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



Weighing the Evidence

Regulatory Definitions

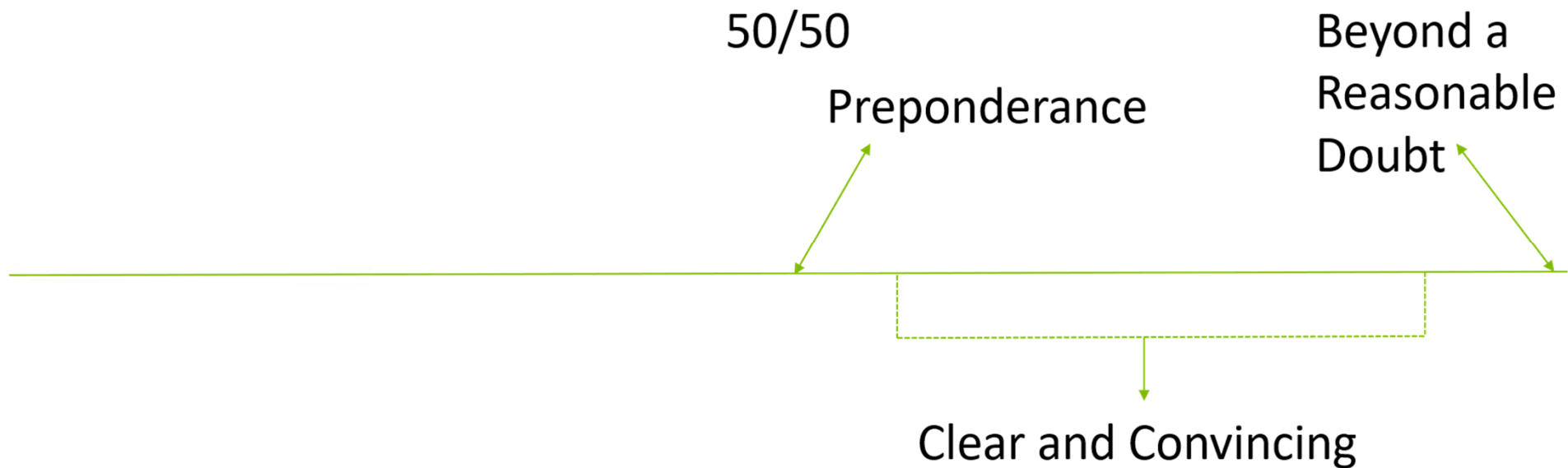
- Preponderance of the Evidence – “Concluding that a fact is more likely than not to be true”
- Clear and convincing – “concluding that a fact is highly probable to be true”

85 FR 30373 at fn 1409

Recipients cannot use “beyond a reasonable doubt” standard, which is used in criminal cases. 85 FR 30373.

Standards of Evidence

What are our Choices?



Applies to *Every Fact* and *Every Decision*

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



Relevancy: What Can You Consider?

Issues of Relevancy (1 of 4)

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

Issues of Relevancy (2 of 4)

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

Issues of Relevancy (3 of 4)

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

Issues of Relevancy (4 of 4)

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

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

Rules of Relevancy

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



Fact-Finding when Facts are Disputed

The Fact Finding Process

1

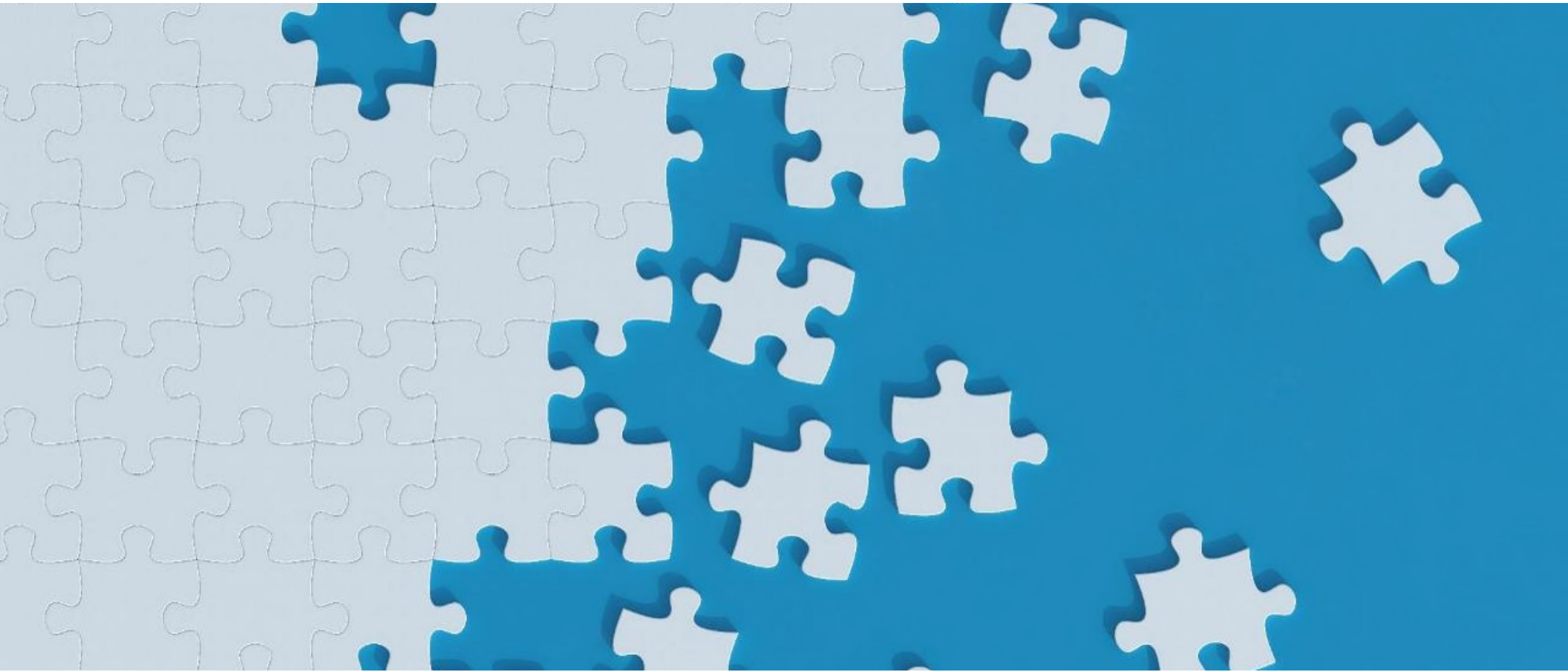
- List undisputed facts – what do parties agree on? = **findings of fact**
- List disputed facts – what do parties disagree on?

2

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

3

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



Credibility Analysis

Objectively Evaluating Relevant Evidence

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

Standard of Proof

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

Recommended Considerations for Resolving Conflicts

(1 of 4)

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

Recommended Considerations for Resolving Conflicts

(2 of 4)

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

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

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?



Analyzing the Elements of Prohibited Conduct

Analyzing the Elements (1 of 3)

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

Analyzing the Elements (2 of 3)

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

Analyzing the Elements (3 of 3)

- 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**

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)]

Example: Hostile Environment

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

[34 C.F.R. 106.30(a)]

Example: Sexual Assault (1 of 2)

- ☐ Conduct on the basis of sex
- ☐ Qualifies as one of the following:
 - ☐ Rape (male on female penetration only)
 - ☐ Sodomy (oral/anal penetration)
 - ☐ Sexual Assault With An Object (other than genitalia)
 - ☐ Fondling
 - ☐ Incest
 - ☐ Statutory Rape

Example: Sexual Assault (2 of 2)

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

[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]

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)]

Example: Domestic Violence

- ☐ Conduct on the basis of sex
- ☐ Felony or misdemeanor crime of violence committed:
 - ☐ By current/former spouse or intimate partner of the victim
 - ☐ By a person with whom the victim shares a child in common
 - ☐ By a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner
 - ☐ By a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction
 - ☐ By any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction

[34 C.F.R. 106.30(a); 34 U.S.C. 12291(a)(8)]

Example: Stalking

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

[34 C.F.R. 106.30(a); 34 U.S.C. 12291(a)(30)]

Scope of Education Program/Activity

Remember that the behavior addressed must occur in the recipient's "education program or activity"

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

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)

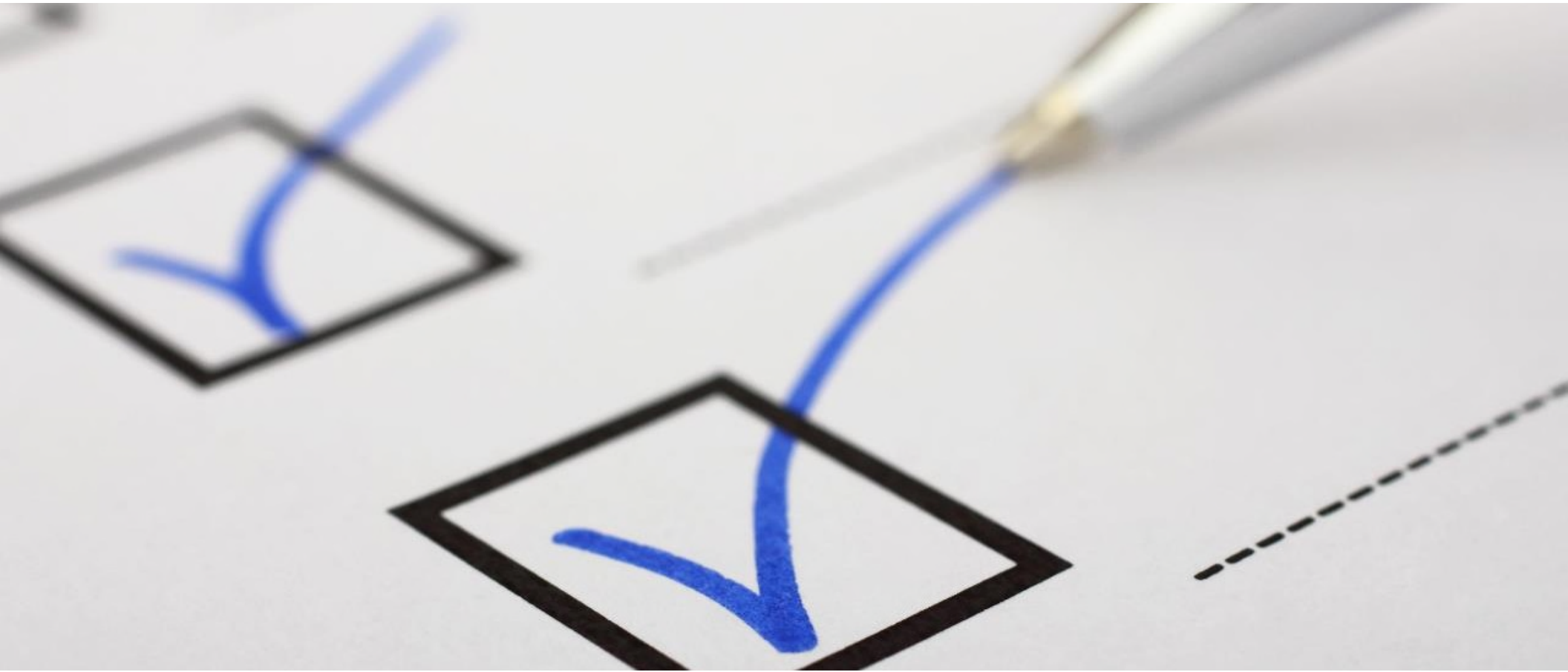
- What words or actions did complainant use to convey consent/non-consent?
 - Must examine sexual contacts, acts in detail
- Was complainant capable of consenting? (Asleep? Passed out? Not understanding what was happening?)

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?



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?



A black and white photograph of a chalkboard. The words "What's" and "NEXT?" are written in white chalk. "What's" is in a cursive script, and "NEXT?" is in a bold, blocky, all-caps font. The chalkboard surface shows some texture and light scratches.

After the Decision

Disciplinary Sanctions (1 of 2)

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

Disciplinary Sanctions (2 of 2)

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



Handling Appeals

Identity of the Appeals Officer

- You cannot hear an appeal of your own decisions
 - The Appeals Officer cannot be the same investigator, Title IX Coordinator, or decision-maker that worked on the case
- The Appeals Officer must be trained in the same manner as the Decision-Maker

Bases for Appeal (1 of 2)

- 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/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
- A recipient may offer an appeal equally to both parties on additional bases

Appeals (2 of 3)

- As to all appeals, the recipient must:
 - Offer the appeal to either party
 - Let both parties know when an appeal has been filed
 - Give both parties a reasonable and equal opportunity to submit a written statement in support of or challenging the appealed decision
 - Issue a written decision describing the result of the appeal and the rationale for the result
 - Provide the written decision simultaneously to both parties.



Questions?