TITLE IX INVESTIGATOR, AND ADVISOR TRAINING

Heidelberg University

JULY 26-27, 2022

Bricker & Eckler ATTORNEYS AT LAW

Agenda

Bricker & Eckler ATTORNEYS AT LAW

Clery Training (9:30 – 12:00)

- Themes
- Issues related to Dating Violence, Domestic Violence, Sexual Assault, and Stalking
- Overview of your Policy/Process
- Intake
- Conducting an Investigation
- Conducting a Hearing
- Appeals
- Informal Resolution

Lunch (12:00 – 12:45)

Investigator/Advisor Training (12:45 – 4:00)

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Agenda

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Investigator/Advisor Training (12:45 – 4:00)

- Ethic of Care (free from bias)
- Scope/Jurisdiction
- Investigative Techniques
- Hypotheticals on Consent, Coercion, Incapacitation
- Preparing for and conducting interview of Complaint and Respondent

Investigator/Advisor Training Day 2 (9:30 – 4:00)

- Continue investigation process and practice
- Report writing exercises
- Title IX definition of Relevant and its practical implications
- Cross examination techniques
- Mock hearing
- Title IX developments

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Posting these Training Materials

- Yes, you may post these slides.
- The University is required by §106.45(b)(10)(i)(D) to post materials used to train Title IX personnel on its website

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Training Requirements 1 of 2

	Def. Sexual Harassment	Scope of Ed. Prog/Activity	Conducting grievance process	Serving impartially	Tech training	Drafting investigative report
Coordinator	X	X	X	x		
Investigator	**X**	**X**	**X**	**X**		**X**
Decision-Maker	**X**	**X**	**X**	**X**	*	
Appeals	X	X	X	X	*	
Informal Res. Facilitator	x	X	x	X		
Advisor						

Training Requirements 2 of 2

Under Clery Act, must receive annual training on:

- Issues related to sexual assault, domestic violence, dating violence, stalking
- How to conduct an investigation and hearing process that protects the safety of victims and promotes accountability

Disclaimer

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.
- Ask general questions and hypotheticals.
- This training is not being recorded, but we will provide you with a packet of the training to post on your websites for Title IX compliance.

Presentation Rules

- Questions are encouraged
- "For the sake of argument…" questions help to challenge the group, consider other perspectives, and move the conversation forward
- Be aware of your own responses and experiences
- Follow-up with someone if you have any questions or concerns
- Take breaks as needed

Themes

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Themes (1 of 2)

- Title IX meant to ensure equitable access, regardless of sex
- We have an obligation to protect our community – including both parties
- Transparency in the process encourages participation, reduces stress, and increases trust in the outcome

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Themes (2 of 2)

- Use language of the policy (complainant, respondent, report), not language of criminal law (victim/survivor, perpetrator, allegation)
- Be incredibly mindful not to prejudge the outcome of the case
- Base decisions on evidence, not your "gut"

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Sexual Harassment - 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 University conditioning the provision of an aid, benefit, or service of the University on an individual's participation in unwelcome sexual conduct;
  - [**Unweclome conduct**] 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 University's education program or activity; or
  - [**Clery crimes**] Sexual assault, dating violence, domestic violence, or stalking

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SH – IX (continued)

- **Sexual Assault**

  Rape (non-consensual penile/vaginal penetration)

  Sodomy (non-consensual oral/anal penetration)

  Sexual Assault with an Object (penetration with object or body part other than genitalia)

  Fondling – Must be done "for the purpose of sexual gratification"

  Incest – Look to state law

  Statutory rape – Look to state law

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Data and Statistics

- Should not influence your decision in any particular Title IX case
- Included in the Preamble, but with caveats
- We didn't do the research ourselves and can't vouch for it
- Okay but really, this SHOULD NOT influence your decision in any particular Title IX case

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Sexual Assault Data

- 43.6% of women and 24.8% of men experienced some form of contact sexual violence in their lifetime, with 4.7% and 3.5% experiencing such violence in the 12 months preceding the survey.

Statistics from the National Intimate Partner and Sexual Violence Survey (NISVS), Centers for Disease Control and Prevention, 2015 Data Brief, available online at https://www.cdc.gov/violenceprevention/datasources/nisvs/2015NISVSdatabrief.html (last visited June 2020).

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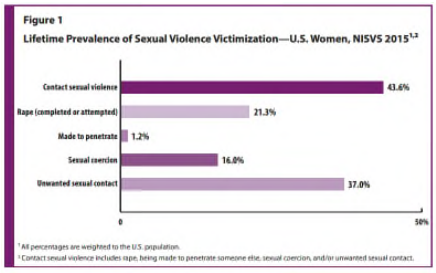
Sexual Assault Data - 1



Statistics from the National Intimate Partner and Sexual Violence Survey (NISVS), Centers for Disease Control and Prevention, 2015 Data Brief, available online at https://www.cdc.gov/violenceprevention/datasources/nisvs/2015NISVSdatabrief.html

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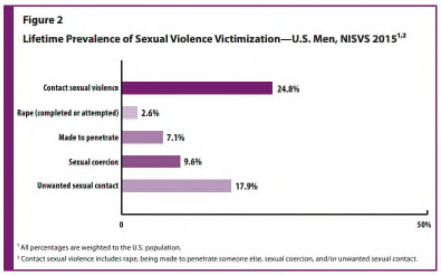
Sexual Assault Data - 2



Statistics from the National Intimate Partner and Sexual Violence Survey (NISVS), Centers for Disease Control and Prevention, 2015 Data Brief, available online at https://www.cdc.gov/violenceprevention/datasources/nisvs/2015NISVSdatabrief.html

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Sexual Assault Data:
Prevalence Data for Postsecondary Institutions

- More than 50 percent of college sexual assaults occur in August, September, October, or November, and students are at an increased risk during the first few months of their first and second semesters in college.

Preamble, p. 30076 (Official) notes that "Commenters cited: Rape, Abuse & Incest National Network (RAINN), *Campus Sexual Violence: Statistics*, https://www.rainn.org/statistics/campus-sexual-violence."

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Sexual Harassment: Dating Violence

"Dating Violence" means an act of violence committed on the basis of sex by a person who is or has been in a romantic or intimate relationship with the complainant. The existence of such a romantic or intimate relationship is determined by the length of the relationship, the type of relationship, and the frequency of interactions between the individuals involved in the relationship.

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Sexual Harassment: Domestic Violence

"Domestic violence" is an act of violence committed on the basis of sex by:

- A current or former spouse or intimate partner of the complainant;
- A person with whom the complainant shares a child in common;
- A person who is cohabitating with, or has cohabitated with, the complainant as a spouse or intimate partner;
- A person similarly situated to a spouse of the victim under the domestic/family violence laws of the jurisdiction;
- Any other person against an adult or youth victim who is protected from that person's acts under the domestic/family violence laws of the jurisdiction

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Data: Intimate Partner Violence

"Nearly 1 in 5 women and about 1 in 7 men report having experienced severe physical violence from an intimate partner in their lifetime."

"41% of female IPV survivors and 14% of male IPV survivors experience some form of physical injury related to IPV."

"1 in 6 homicide victims are killed by a current or former intimate partner."

Source: CDC.gov, "Preventing Intimate Partner Violence" fact sheet, accessed Sept. 20, 2020.

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Sexual Harassment: Stalking

"Stalking" is engaging in a course of conduct directed at a specific person on the basis of sex that would cause a reasonable person with similar characteristics under similar circumstances to:

- Fear for the person's safety or the safety of others; or
- Suffer substantial emotional distress.

As mentioned before, to qualify under Title IX, it must be sex-based stalking. (30172 fn. 772)

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Stalking: Course of Conduct

"Course of Conduct"

- Under VAWA regulations: means **two or more acts**, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.

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Stalking: Reasonable Person

"Reasonable person"

Under VAWA regulations: means a reasonable person under similar circumstances and with similar identities to the victim.

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Stalking: Substantial Emotional Distress

"Substantial emotional distress"

Under VAWA regulations: means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

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Stalking Data - 1

- 4.5 million women and 2.1 million men are stalked in one year in the United States.
- Over 85% of stalking victims are stalked **by someone they know**.
- **61%** of female victims and **44%** of male victims of stalking are stalked by a **current or former intimate partner**.

- First statistic: National Intimate Partner and Sexual Violence Survey: 2015 Data Brief (CDC)
- Second and third statistics: National Intimate Partner and Sexual Violence Survey: 2010-2012 State Report (CDC)

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Stalking Data - 2

- **11%** of stalking victims have been **stalked for 5 years or more**.
- **46%** of stalking victims experience **at least one unwanted contact per week**.

[Matthew J. Breiding et al., "Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization – National Intimate Partner and Sexual Violence Survey, United States, 2011", (referenced in Preamble, p. 30079 fn 366 (Official))

Centers for Disease Control and Prevention Morbidity and Mortality Weekly Report, Vol. 63, No. 8 (2014): 7] (referenced in Preamble, p. 30079 fn 366 (Official))

[Katrina Baum et al., (2009). "Stalking Victimization in the United States," (Washington, DC:BJS, 2009).]

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Impact of Stalking on Victims

- **46%** of stalking victims fear not knowing what will happen next.

[Baum et al., (2009). "Stalking Victimization in the United States." BJS.]

- **29%** of stalking victims fear the stalking will never stop.

[Baum et al.]

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More Impact of Stalking

- **1 in 8** employed stalking victims **lose time from work** as a result of their victimization and **more than half** lose **5 days of work or more**.
- 1 in 7 stalking victims move as a result of their victimization.

[Baum et al.]

- The prevalence of anxiety, insomnia, social dysfunction, and severe depression is much higher among stalking victims.

[Eric Blauuw et al. "The Toll of Stalking," Journal of Interpersonal Violence 17, no. 1(2002):50-63.]

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Overview of Your Policy/Process

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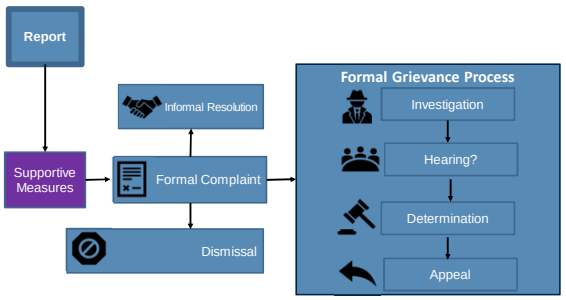
Overview of the Process



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Intake

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Overview of the Process: Supportive Measures (1 of 5)

- Non-disciplinary and non-punitive
- Individualized
- "As reasonably available"
- Without fee or charge to either party
- Available at any time (regardless of whether a formal complaint is filed)

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Overview of the Process: Supportive Measures (2 of 5)

Designed to:

- ***restore or preserve access*** to the University's education program or activity, without unreasonably burdening the other party;
- protect the safety of all parties and the University's educational environment; and
- deter sexual harassment

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Overview of the Process: Supportive Measures (3 of 5)

- Counseling
- Extensions of deadlines (course-related adjustments)
- Modifications of work/class schedules
- Campus escort services
- Mutual contact restrictions
- Changes in work or housing locations
- Leaves of absence
- Increased security and monitoring of certain areas of the campus
- "and other similar measures"

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Overview of the Process: Supportive Measures (4 of 5)

Role of the TIXC upon receiving a report:

- promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30,
- consider the complainant's wishes with respect to supportive measures,
- inform the complainant of the availability of supportive measures with or without the filing of a formal complaint

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Overview of the Process: Supportive Measures (5 of 5)

- Must maintain confidentiality to the greatest extent possible
- Note: Title IX Coordinator may ask you to help with accommodations and may not be able to tell you all the details as to *why*.

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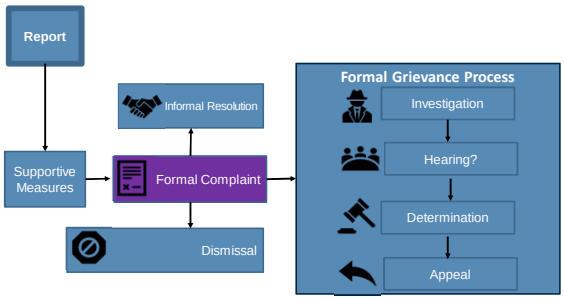
Formal Complaints



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Overview of the Process: Formal Complaint (1 of 2)

A document filed by a complainant or signed by the Tile IX Coordinator alleging Prohibited Conduct against a respondent and requesting the University investigate the allegations

- In response to a formal complaint, University must follow a grievance process (set by 106.45)
- Title IX Coordinator must offer complainant supportive measures (regardless if files formal complaint – if complainant does not want to file a formal complaint)

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Overview of the Process: Formal Complaint (2 of 2)

Once a Formal Complaint is filed, there are four possibilities:

- Informal Resolution
- Formal Grievance Process (Hearing)
- Mandatory Dismissal from Hearing Process and Resolution through Investigative Process
- Formal Complaint is withdrawn

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Conducting an Investigation

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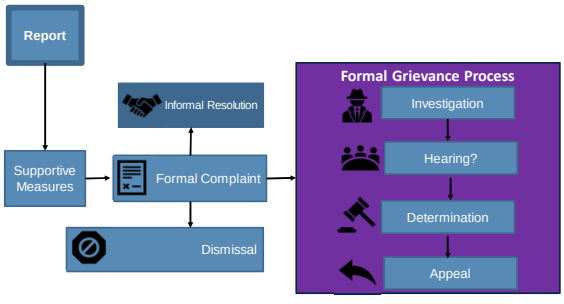
Formal Process



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Overview of the Process: Formal Grievance Process

Basic requirements:

- Treat complainants and respondents equitably
- Follow grievance process
- Only impose any disciplinary sanctions against a respondent after grievance process followed

Includes the presumption that respondent is not responsible for the alleged conduct until a determination regarding responsibility is made through the grievance process

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Overview of the Process: Written Notice

- University's grievance process and informal resolution process
- Allegations with sufficient time for review with sufficient detail, such as date, location if known
- Parties may have an advisor of choice

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Overview of the Process: Investigation (1 of 4)

- Only of a formal complaint
- Burden of proof and evidence gathering rests with University
- Cannot access, require, disclose, or consider treatment records of a party without that party's voluntary, written consent
- Provide equal opportunity for parties to present witnesses (fact and expert)

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Overview of the Process: Investigation (2 of 4)

- Provide **equal opportunity** for parties to present inculpatory and exculpatory evidence
- **Not restrict ability of either party to discuss or gather and present relevant evidence**
- Provide parties **same opportunities** to have others present during the grievance process, **including advisor of choice**

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Overview of the Process: Investigation (3 of 4)

- Provide **written notice** of date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings with **sufficient time to prepare**
- Provide both parties **equal opportunity to inspect and review any evidence** obtained in the investigation – University must send to party and party's advisor with at least 10 days to submit a written response before completion of investigation report

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Overview of the Process: Investigation (4 of 4)

- University must make **all** such evidence subject to inspection and review at any hearing
- Create an investigation report at least 10 days before a hearing that fairly summarizes the relevant evidence and send to each party and party's advisor

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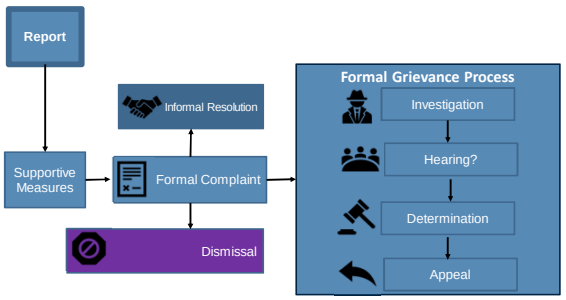
Dismissal



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Dismissal (1 of 3)

- University MUST investigate allegations in a formal complaint
- BUT University MUST dismiss from the hearing process is
  - if conduct alleged would not constitute Sexual Harassment – Title IX, even if proven, OR
  - Conduct did not occur within University's education program or activity or in the United States

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Dismissal (2 of 3)

- University MUST investigate allegations in a formal complaint
- BUT University MUST dismiss from the hearing process is
  - if conduct alleged would not constitute Sexual Harassment – Title IX, even if proven, OR
  - Conduct did not occur within University's education program or activity or in the United States

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Dismissal (3 of 3)

- Cases not eligible for a Title IX hearing go instead to:
  - Investigation
  - Decision (potentially by investigator, without Title IX hearing)
  - Appeal

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Conducting a Hearing

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Overview of the Title IX Process: Hearings

- Must provide a live, cross-examination hearing
- Parties must have an advisor and the University must provide an advisor for a party if the party does not have one
- Advisors ask only relevant cross-examination questions—no party-on-party questioning
- May be virtual, but must be recorded or transcribed

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The Setup

- Can have in one room if a party doesn't request separate rooms and recipient chooses to do so.
- Separate rooms with technology allowing live cross examination at the request of either party
- "At recipient's discretion, can allow any or all participants to participate in the live hearing virtually" (30332, see also 30333, 30346) explaining 106.45(b)(6)(i)

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Process (1 of 2)

- Discretion to provide opportunity for opening or closing statements
- Discretion to provide direct questioning (open-ended, non-cross questions)
- Cross-examination must to be done by the party's "advisor of choice and never by a party personally."

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Process (2 of 2)

- An advisor of choice may be an attorney or a parent (or witness) (30319)
- Discretion to require advisors to be "potted plants" outside of their roles cross-examining parties and witnesses. (30312)

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Slide 57

MMC15 What is the reference to the official regs here?
Carleton, Melissa, 6/14/2020

Advisors

If a party does not have an advisor present at the live hearing, the recipient **must provide** without fee or charge to that party, an advisor **of the recipient's choice**, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party. (106.45(b)(6)(i) and preamble 30339)

Advisors: But Other Support People?

- Not in the hearing, unless required by law (30339)
- "These confidentiality obligations may affect a recipient's ability to offer parties a recipient-provided advisor to conduct cross-examination in addition to allowing the parties' advisors of choice to appear at the hearing."
- ADA accommodations-required by law
- CBA require advisor and attorney?

Recording the Hearing

- Now required to be audio, audio visual, or in transcript form
- Decision-makers have to know how to use any technology you have

The Hearing

- Order of questioning parties and witnesses – not in regulations
  - Consider time restraints on witnesses
  - Questioning of Complainant
  - Questioning of Respondent

Questioning by the Decision-Maker (1 of 2)

- The neutrality of the decision-maker role is and the role of the advisor to ask adversarial questions, protects the decision-maker from having to be neutral while also taking on an adversarial role (30330)
- "[P]recisely because the recipient must provide a neutral, impartial decision-maker, the function of adversarial questioning must be undertaken by persons who owe no duty of impartiality to the parties" (30330)

Questioning by the Decision-Maker (2 of 2)

- BUT "the decision-maker has the right and responsibility to ask questions and elicit information from parties and witnesses on the decision-makers own initiative to aid the decision-maker in obtaining relevant evidence both inculpatory and exculpatory, and the parties also have equal rights to present evidence in front of the decision-maker so the decision-maker has the benefit of perceiving each party's unique perspective about the evidence." (30331)

The Hearing (1 of 2)

- Ruling on relevancy between every question and answer by a witness or party
  - Set expectation that party or witness cannot answer question before decision-maker decides if relevant.

The Hearing (2 of 2)

- Confidentiality appears to preclude support persons other than the advisor from participating in the live-cross examination hearing
  - Perhaps allow support person to meet in waiting rooms or before and after hearing
  - Consistent with providing supportive services to both parties – hearings can be very stressful for both parties

Live Cross-Examination: Theory

According to the Department, the process in 106.45 best achieves the purposes of:

(1) effectuating Title IX's non-discrimination mandate by ensuring **fair, reliable outcomes** viewed as **legitimate** in resolution of formal complaints of sexual harassment so that victims receive remedies

(2) **reducing and preventing sex bias** from affecting outcomes; and

(3) ensuring that Title IX regulations are consistent with **constitutional due process and fundamental fairness** (30327)

Live Cross-Examination: How it should look

"[C]onducting cross-examination consists simply of posing questions intended to advance the asking party's perspective with respect to the specific allegation at issue." (30319)

Live Cross-Examination: Regulations (1 of 2)

In this process:

- Decision-maker must permit each party's advisor to ask the other party and any witnesses **all relevant** questions and follow-up questions, including those challenging **credibility**
- Must be conducted directly, orally, and in real time by the party's advisor, but never party personally
- Only relevant cross-examination and other questions may be asked of a party or witness

Live Cross-Examination: Regulations (2 of 2)

- Before a party or witness may answer a question, the decision-maker must first determine whether the question is relevant and explain the reason if not relevant
- Must audio record, audio-video record or provide a transcript of the hearing

More Reminders

- Individual cases are not about statistics
- Decision in every case must be based on preponderance of evidence or clear and convincing evidence presented
- Cannot fill in evidentiary gaps with statistics, personal beliefs or information about trauma
- Process must be fair and impartial to each party
- Institution may proceed without active involvement of one or both parties; base conclusions on impartial view of evidence presented

Reminders

- Withhold pre-judgment: The parties may not act as you expect them to
- Be aware of your own biases as well as those of the complainant, respondent, and witnesses
- Let the available facts and standard of proof guide your role in overseeing the live cross-examination hearing, not unfair victim-blaming or societal/personal biases

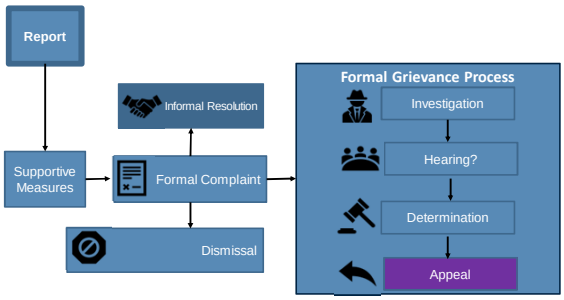
Overview of the Process: Determinations (2 of 3)

- Findings of fact
- Conclusions
- Statement of and rationale for each result of each allegation, including determination of responsibility and any disciplinary imposition and whether remedies designed to restore or preserve access to educational program or activity will provided to complainant

Overview of the Process: Determinations (3 of 3)

- Procedures and bases for appeal by both parties
- Provide written determination to parties simultaneously

Appeal Decisions



Overview of the Process: Appeals (1 of 2)

- University must offer to both parties the following bases of appeal:
  - Procedural irregularity that affected outcome
  - New evidence not reasonably available at the time regarding responsibility or dismissal that could affect outcome
  - Conflict of interest or bias by the Title IX Coordinator, investigator, and/or decision-maker that affected the outcome

Overview of the Process: Appeals (2 of 2)

- The decision-maker for the appeal cannot be the same decision-maker from the hearing, or the Title IX Coordinator or investigator
- Must provide both parties a reasonable, equal opportunity to submit a written statement in support of or challenging the determination
- Must issue a written decision describing the result of the appeal and rationale and provide the decision simultaneously to the parties

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Informal Resolution

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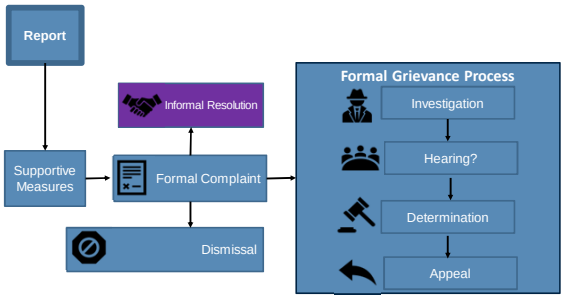
Informal Resolutions



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Overview of the Process: Informal Resolution (1 of 2)

- At any time prior to the determination regarding responsibility, the University may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication
- University cannot require this and also cannot offer unless a formal complaint is filed

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Overview of the Process: Informal Resolution (2 of 2)

- University can offer informal resolution if:
  - Provides written notice to the parties
  - Obtains the parties' voluntary, written consent to the informal process

University cannot offer this option in certain cases of employee sexual harassment of a student

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Questions?

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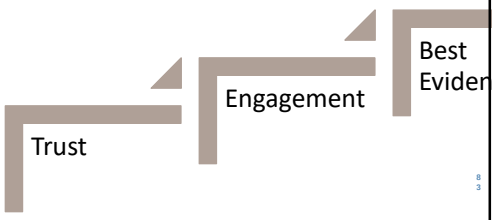
Fundamental Values in the Title IX Process

Remember your Institutional Ethic of Care

What is our goal?

Compliance, yes, but also…



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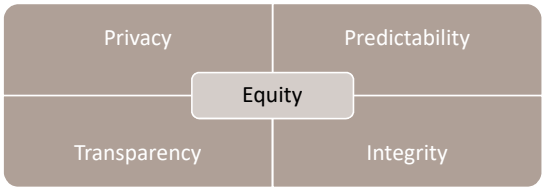
How Do You Build Trust?

Through infusing your process with values



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Value: Equity

"What we do for one, we do for the other" (as appropriate)

- Until we have reached the end of the process, we don't know whether anyone did anything wrong.
- Treat both parties equitably with regard to access to supportive measures, evidence, opportunities to provide information, and in every other respect that is appropriate.

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Value: Privacy

No one will tell you anything if they don't trust you

- Explain privacy versus confidentiality
- Explain how information is shared
  - Within the investigation
  - With other school officials
  - With advisors
- Connect individuals with confidential resources as necessary
- Remember to collect FERPA forms for advisors when necessary

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Value: Predictability

Knowing what happens next builds trust in the process.

- Give a copy of the policy at the outset.
- Constantly refer back to policy language to explain:
  - Where we are in the process;
  - What happens next;
  - What the expectations will be for the person.
- Follow your policy and follow your process.
- When you must deviate, fill in the gaps with your institutional ethic of care.

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Value: Transparency

If they hear nothing, they'll assume you're doing nothing or actively working against them.

- Give regular updates to the parties and their advisors.
- Answer questions truthfully, to the extent permitted considering privacy.
- Be cautious before deciding to withhold anything that may be relevant. What is the concern? Does it serve the parties and the process?

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Value: Integrity

Personal integrity – and integrity within the process

- Watch for conflicts of interest and bias so as to be fair and maintain confidence in the process.
- Don't use or share information outside the process. All evidence should be "on the table" for all parties and advisors to see.

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HIGHWAY TO THE HEARING ZONE

Highway to a Hearing?

- You **must** provide a hearing under 34 CFR 106.45 **only if** the circumstances require it
- Not all sexual misconduct triggers the hearing requirement
- So, think of your highway to a hearing as having checkpoints to get on and off

Checkpoint one: All of these

- Complainant: Complainant was participating or attempting to participate in your education program or activity when formal complaint was filed
- Definition: Reported conduct in formal complaint could constitute "sexual harassment" under Title IX definition if proved
- Setting: Reported conduct occurred in your education program or activity
- U.S.A.: Reported conduct occurred against a person in the United States

What if you lack a factor?

- Use your policy as a roadmap to the off-ramps.
  - Some will tell you it's OK to keep going through the same process.
  - Some will tell you that you should send the case to HR or student conduct or through some other process

Off-Roading

- If you aren't using the Title IX process:
  - Evidentiary rules may be different
  - Use of advisors may be different
  - Identity of decision-maker(s) may be different
  - Whether there is a hearing at all may be different
- Remember that certain procedural rights are guaranteed in sexual assault, dating violence, domestic violence, and stalking cases – even if they don't go to a Title IX hearing

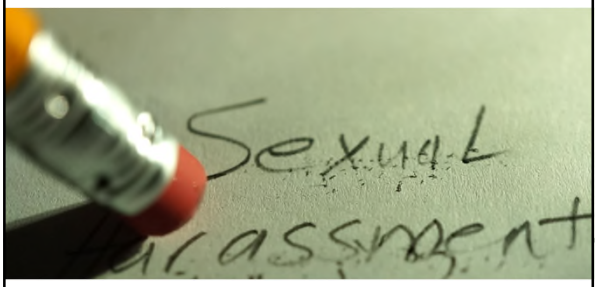
SCOPE OF YOUR EDUCATION PROGRAM AND ACTIVITY

Education Program/Activity

- 106.2(h) – All the operations of a college or university
- 106.44(a) – 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, and also includes any building owned or controlled by an officially recognized student org

Within the Scope?

- Co-curricular trip to Cuba – ?
- Fraternity party in recognized house – ?
- Holiday party for students at prof's house – ?
- Athletes traveling to game, but not with team – ?
- Holiday party at employee's house, invites co-workers and others – ?
- Off-campus apartment – ?



A quick discussion on "Sexual Harassment"

Sexual Harassment

- **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;
  - [**Unwelcome conduct**] Unwelcome conduct **[on the basis of sex]** 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

Sexual Harassment: *Quid Pro Quo*

- Only applies to employee respondents (can be any complainant)
- DOE interprets this broadly to encompass implied *quid pro quo*
- No intent or severe or pervasive requirements, but must be unwelcome
- "[A]buse of authority is the form of even a single instance…is inherently offensive and serious enough to jeopardize educational access."

Sexual Harassment: Unwelcome Conduct

- The second prong: severe, persistent, and objectively offensive and deny equal access (which is not the same as under Title VII)
- Does not require bad intent
- Reasonable person standard – means a reasonable person in the shoes of the complainant (30159)

Severe?

- Takes into account the circumstances facing a particular complainant
- Examples: age, disability status, sex, and other characteristics
- Preamble discussion states that this removes the burden on a complainant to prove severity (30165)

Pervasive?

- Preamble indicates pervasive must be **more than once** if it does not fall into the above (30165-66)
- Preamble reminds us that quid pro quo and Clery/VAWA (domestic violence, dating violence, stalking) terms do not require pervasiveness

Objectively Offensive?

Reasonable person is very fact-specific (30167)

- Because so fact-specific, different people could reach different outcomes on similar conduct, but it would not be unreasonable to have these different outcomes
- Preamble notes that nothing in the Regulations prevents institutions from implicit bias training

Applies to Employees 1 of 5

- This was unsettled in most Circuits
- Enter Title VII
  - Commentary notes that "severe or pervasive" definition (Title VII) shouldn't apply because elementary, secondary, and postsecondary schools are unlike the adult workplace. (Pages 43-44)
    - Davis – 5th grade students
    - Instead - "severe, pervasive, and objectively offensive"

Applies to Employees 2 of 5

Near the beginning of the preamble, the Department noted:

> "The Department does not wish to apply the same definition of actionable sexual harassment under Title VII to Title IX because such an application **would equate workplaces with educational environments**, whereas both the Supreme Court and Congress have noted the unique differences of educational environments from workplaces and the importance of respecting the unique nature and purpose of educational environments." (30037 of preamble).

Applies to Employees 3 of 5

But towards the end of the preamble, the Department clarified:

- "The Department appreciates support for its final regulations, which apply to employees." (30439)
- No "inherent conflict" between Title VII and Title IX (30439)
- Due Process protections found in § 106.45 (live hearing, advisors, cross-examination) apply to employees, not just students (30440)

Applies to Employees 4 of 5

The preamble clarified:

- Recipients that are subject to both Title VII and Title IX must comply with both (30440)
- "Deliberate Indifference" standard "most appropriate" for both Title VII and Title IX (30440)
- Because Title IX recipients are "in the business of education"
- "Marketplace of ideas" makes postsecondary institutions special

Applies to Employees 5 of 5

- Conflicts between Title VII and Title IX noted by Commenters:
  - Formal complaint requirement
  - Notice requirement
  - Deliberate Indifference Standard (noted above)
  - Definition of Sexual Harassment
  - Live hearing (as opposed to notice and opportunity to respond)

Hypotheticals – Sexual Harassment

Let's put these definitions to the test…see your hypo packet

- Chuck and Mary Sue
- Baldwin Hall

110

Reviewing our Hypothetical:

Meet Tessa and Michael

Formal Complaint

Filed by Danielle on May 1, 2021 – the incident was April 3, 2021

"On April 3, 2021, my then-boyfriend, Michael, sexually assaulted me in my apartment. We were in my bedroom and I was trying to sleep after a long night of going out with Michael and some friends. Michael knows I'm against premarital sex, but that night I was very intoxicated and he had sex with me, even though I was too incapacitated to consent and can't remember everything."

112

Notice of Allegations

Charge #1

✓ Sexual Assault (Title IX):

Sexual Assault is engaging or attempting to engage in one of the following activities with another individual without consent or where the individual cannot consent because of age or temporary or permanent mental or physical incapacity:

(1) Sexual intercourse (anal, oral, or vaginal), including penetration with a body part (e.g., penis, finger, hand, or tongue) or an object, however slight;

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Email to Tessa (1 of 4)

Contact the Complainant

Dear Tessa,

My name is Rob Kent and the Title IX Coordinator has assigned me to investigate your case. I would like to meet with you to discuss what you remember about your encounter. Do you have time to meet with me on May 14th at 12:30 in the conference room? You may bring an advisor of choice with you, so if that date and time is not convenient for both of you, please let me know a few times that would work better.

114

Email to Tessa (2 of 4)

Preparations for Interview?

There is nothing you need to do to prepare for our interview, but if you wish, you may want to begin gathering any evidence you may have, such as text messages or videos from the night in question. You may also want to think about potential witnesses that may be helpful for me to talk to. However, this isn't required to complete before we meet.

115

Email to Tessa (3 of 4)

Accommodations/Interpreters

If you are disabled and need reasonable accommodations to participate, or if you speak another language and would like an interpreter to be present, please let the Title IX Coordinator know and we can make those arrangements.

116

Email to Tessa (4 of 4)

Questions?

When we meet, we can talk through any questions you may have for me about the process, and we will discuss the prohibition against retaliation against anyone that participates in the process. I am also happy to address any questions beforehand if you'd like. In the meantime, if you need any supportive measures, please contact the Title IX Coordinator.

117

What About Michael?

"What we do for one, we do for the other"

- Don't leave Michael hanging. Make contact with him when you make contact with Tessa!

118

Email to Michael

Echoing what we have told Tessa

Dear Michael,
My name is Reb Kent and the Title IX Coordinator has assigned me to investigate your case. My first step will be to meet with the other person to get more information about the formal complaint. I am in the process of setting that meeting up.
Once I have conducted that interview, I will reach back out to you to set up a time to interview you. You will be permitted to bring an advisor of choice to that interview.

119

Email to Michael (2 of 4)

Preparations for Interview?

There is nothing you need to do to prepare for our interview, but if you wish, you may want to begin gathering any evidence you may have, such as text messages or videos from the night in question. You may also want to think about potential witnesses that may be helpful for me to talk to. However, this isn't required to complete before we meet.

120

Email to Michael (3 of 4)

Accommodations/Interpreters

If you are disabled and need reasonable accommodations to participate, or if you speak another language and would like an interpreter to be present, please let the Title IX Coordinator know and we can make those arrangements.

121

Email to Michael (4 of 4)

Questions?

When we meet, we can talk through any questions you may have for me about the process, and we will discuss the prohibition against retaliation against anyone that participates in the process. I am also happy to address any questions beforehand if you'd like. In the meantime, if you need any supportive measures, please contact the Title IX Coordinator.

122

Interviewing Skills

Preparation, Attention to Detail, and Being Human

Start with your Scope

What are you investigating?

- This should be documented in the Notice of Investigation
- The NOA should also include information about which policies are at issue
  - Double-check – is the correct policy cited?
- Break down the provisions to elements.

124

Elementary, My Dear Watson

What are you investigating?

- For example:
  - ✓ Unwelcome conduct
  - ✓ On the basis of sex
  - ✓ That a reasonable person would determine to be:
    - ✓ So severe, pervasive, and objectively offensive that
    - ✓ It effectively denies a person equal access to the recipient's education program or activity.

125

Elements as Questions: Brainstorm

What types of questions do you ask for each of these?

- For example:
  - ✓ Unwelcome conduct
  - ✓ On the basis of sex
  - ✓ That a reasonable person would determine to be:
    - ✓ So severe, pervasive, and objectively offensive that
    - ✓ It effectively denies a person equal access to the recipient's education program or activity.

126

Outline your thoughts

Get your plan on paper

- Prepare a bullet point list of things you want to explain at the outset
- Have your policy language at the ready
- Bring any evidence that you may want them to review and comment on
- Prepare an outline of questions
  - Don't forget to ask the complainant about impact if it's an element of your policy language!

127

Setting the Stage

Where are you interviewing?

- Private location – be cautious of windows, traffic in the area
- Distraction-free – Ringer off, noise outside
- Comfortable seating that provides equal positioning for interviewee, interviewer, and advisor (if any)
- Zoom → sometimes preferred by parties and witnesses. Concerns?

128

The Investigator Spiel

What do you say at the outset?

- Explain your role
- Explain how information will be shared in the process
- Explain the prohibition against retaliation
- Explain amnesty provision

129

Explain Your Role (1 of 2)

How do you explain it?

"As the investigator, my job is to gather evidence, interview witnesses, and prepare summaries of those interviews."

"Today, I'll be taking notes so that I can prepare a good summary of our conversation, but I want to make sure it's accurate, so I'll send you a copy for your review. You'll get the opportunity to suggest changes to make sure that it's complete and truthful, and that I've properly captured your side of the story."

130

Explain Your Role (2 of 2)

How do you explain it?

"I'll also draft a report that summarizes what I've done to investigate, and the information I've collected. I do not make decisions about what happened or whether the policy was violated. A hearing officer has that job."

"The goal is for me to collect information to help the hearing officer understand what happened so that they can make a good decision in this case, which is why I'm very thankful that we're speaking today."

131

Retaliation Prohibition

How do you explain it?

"Our policy prohibits retaliation, and there's a technical definition for that. But listen – if anyone makes you uncomfortable because you've spoken with me or participated in this process, please tell me right away. It may not rise to the level of retaliation under the policy, but there are still things we can do to address it. And if you're feeling uncomfortable, chances are good that other folks are, too, so you'll be doing them a favor by reporting it."

132

Retaliation – More Oomph

How do you explain it?

"Please don't do one of these two things:

1) Re-read the policy and decide you don't need to tell me because you don't think it rises to the level of a policy violation; or
2) Decide that you are strong enough to handle it and don't tell me.

You might be strong, but maybe other witnesses are experiencing the same thing and they might not be strong enough. I'd rather help address things before they get too complicated, so please let me know."

133

Amnesty

How do you explain it? Check your policy, but here is a sample.

"Our policy gives you amnesty for personal drug and alcohol use, and it gives amnesty for other witnesses and the parties also. So, if any part of your story involves people using drugs or alcohol, please know that we're not going to bring student conduct charges in this situation. We want you to feel comfortable telling us the whole truth about the evening, and this is more important than underage drinking or drug use."

134

To Record Or Not?

Should you record interviews?

- Ohio is a "one party" state, which means as long as one party to the conversation is aware of the recording, you can record.
  - But failure to disclose this recording is likely not consistent with your institutional ethic of care.
- If you ask for consent and some witnesses refuse, what then?
- Your hearing officer will need either transcripts of the recordings, or they will need to review all of the videos. If you have a panel, they all will need to review this information.
- Recordings can be incredibly useful when a party or witness changes their story, and they can be helpful in lawsuits/OCR complaints.

135

Advisors

An Advisor can be anyone – including an attorney, a parent, a witness…

- Must have FERPA release if students are involved and the advisor is not an employee
- Title IX Coordinator can help set expectations for advisors up front
- Communicate with the party and copy the advisor: "Your advisor asked ____, so I wanted to share my response directly with you."
- If the advisor submits the party's written statement, make sure the party adopts that statement as their own.

136

Start with Relationships

This helps to get context

- Student: What year are you? Where are you from originally? What is your major? Where do you live on campus?
- Employee: What is your title/position here? How long have you worked here?
- Who did you meet first, C or R? How? When?
- Relationships with other key people in the case (to help assess potential bias)

137

Get a Timeline

This helps to get context

- "What do you remember regarding this situation?"
  - Give them a starting point or let them choose
  - "And then what happened? And what happened next?"
  - Let them deliver a monologue
- Think in terms of a timeline for your report
  - What section headings will help you tell the story chronologically?
  - Are you clear as to which parts of their monologue fit under which section?

138

Ask Follow-Up Questions

Acknowledge that the individual may not remember every detail.

- Go back to each incident on your timeline and flesh out the details.
- If the witness was alleged to have done or said something in particular, check to see if that's accurate
- Cover every element that the individual could have information about
  - Remember: is impact an element in my case?

139

Consent – Explicit?

These may be worded slightly differently depending on the party.

- "They gave consent" → "What did you say to them, and what did they say to you?"
- Did you have any conversation about sexual activity?
- Did the other person say anything to you that suggested they were consenting?
- Did the other person do anything that suggested they were consenting?
- Who initiated the sexual activity?

140

Consent – Implicit?

These may be worded slightly differently depending on the party.

- Who took off your clothes? Who took off the other person's clothes?
- Was there a condom? Who provided it? Was there any conversation about using protection?
- Did you touch the other person? If so, where?
- Did they touch you? If so, where?

141

Questions for Respondent

If they say there was consent, these can help get more details.

- What did the other person say to you to show consent?
- What actions did the other person do to show consent?
- Were they making any noises during the encounter?
- Did they help position their body during the encounter?
- Did they move your hands during the encounter?

142

Hypotheticals - Consent

Check your policy for your own definition, but here's what we'll use.

Words or actions that show ***a knowing and voluntary*** agreement to engage in ***mutually agreed-upon sexual activity***.

Effective consent **cannot** be gained by taking advantage of the incapacitation of another, where the respondent knows or reasonably should have known of such incapacitation.

143

Incapacitation

First, explain why you need information on alcohol/drug use.

- Remember: Does your Policy permit amnesty?
- "I want to understand the role that drugs or alcohol may have played in this situation."
- "I want to understand whether you were capable of giving consent, or whether you were incapacitated due to drugs or alcohol."
- "I want to understand whether the other person was sober enough to understand and consent."
- "I am trying to get a sense of how intoxicated the person may have been when you saw them."

144

Incapacitation Questions (1 of 2)

You need a good physical description of relevant symptoms

- How much alcohol? Any drugs?
- Any medications that may have affected your ability to stay awake, or that might have interacted with alcohol?
- "They were drunk" → What did "drunk" look like?
  - Slurring? Clumsy? Uncoordinated?
  - Able to walk on their own? Need assistance to navigate or complete tasks?
  - Vomiting?
  - Able to carry on a conversation?
  - Oriented to who/what/where/when/why?

145

Incapacitation Questions (2 of 2)

You need a good physical description of relevant symptoms

- Was it a cup or a CUP?
- How many "fingers" of alcohol on the solo cup?
- What type of alcohol was consumed?
- What did they eat? When?

146

Respondent's Awareness

Did Respondent know or should have known of incapacitation?

- Was Respondent there?
- Did Respondent see when Complainant was [fill in symptom]?
- Did Respondent bring Complainant any alcohol/drugs?
- Did Respondent say anything about Complainant's level of intoxication?
- Was any planning done to take care of Complainant? Was Respondent part of that conversation or plan?

147

Incapacitation: Timeline

This will be critical

- Drinks
- Drugs
- Food
- Complainant's own recall
- Behavioral observations from other
- Electronic information – texts, videos, audio files
- Security footage
- Cards swipes

148

Hypotheticals - Incapacitation

Check your policy for your own definition – The definition is provided

- Occurs when the complainant **lacks the ability to make informed, rational judgments regarding the participation in sexual activity**.
- Defined is the inability to give consent because the complainant is **mentally and/or physically helpless, asleep, unconscious, or unaware that sexual activity is occurring.**
- A person may be considered incapacitated if the person cannot appreciate the who, what, where, when, why, or how of a sexual interaction.
- To be responsible where a complainant is incapacitated, policies typically require that the **respondent knew or reasonably should have known about the incapacitation**

149

Coercion: Left to Institution to Define

- Is this in your policy?
  - Does your TIX team, your preventive education team, and your local rape crisis center agree on a definition when working with your community?
- Often defined as unreasonable pressure for sexual activity
- Compare: "I will break up with you" versus "I will kill myself"

Hypotheticals - Coercion

Check your policy for your own definition – The definitions are provided

- In small groups of 3-4, please review the hypotheticals on pages 15-16.
- Focus on the elements of coercion. What is needed in each definition?

151

Sensory Questions

These may help with memories that are hard to access.

- What do you remember hearing, smelling, tasting, feeling?
- Where was the other person's hand, leg, body weight, etc.?

Focusing on sensations can help to recall memories that may not have been mentioned when asked to give an overview of what happened.

152

Paraphrase Questions

Make sure you understand

- "So, what I heard you saying is…"
- "Let me make sure I understand…"
- "It sounds like… do I have that right?"

153

Strategic Questions

Be thoughtful about when these are appropriate.

- "Would it surprise you to learn…"
- "Witness X said…. Do you agree?"
- "Here you said X, but today, you said Not X. Can you help me reconcile those things?"
- "Witness X said this and Witness Y said that. Can you help me understand why they might have different information?"
- "Let's look at this [evidence] together so I can get a better understanding…"

154

Final Questions

Catch-alls at the end

- Is there anything you thought I would ask you about that we haven't discussed?
- Is there anything else you'd like to tell me?
- Is there anything else you think I should know?

155

Drafting Interview Summaries

This isn't literature, folks. The key is clarity, not eloquence.

- Virtually every sentence should start with, "Witness stated…" or "Witness recalled…"
- Use direct quotes whenever possible and appropriate.
- Don't use adjectives or adverbs unless they are direct quotes from the witness.
- Avoid pronouns, as they can make a sentence ambiguous.

156

Thoughts About Summaries

There is no perfect way to write a summary.

- Include procedural review at the outset (your "spiel")?
- Complete sentences vs. bullet points?
- Anonymize witness names?
- Use "Complainant" or "Respondent," or use the names as they are used by the witness?

157

Create Investigative Report

- "Fairly summarize relevant evidence" – usually include appendix with evidence copies to create a packet for hearing
- No determination of responsibility, no credibility findings, no findings of fact!
- Many ways to organize
- Be transparent – what did you try that didn't work? (Security footage gone, witness refused to participate, etc.)
- Provide to parties and advisors
- Allow 10 days to review prior to hearing

Hypotheticals - IPV

Check your policy for your own definition

- In small groups of 3-4, please review the IPV hypotheticals on pages 18-20.
- For Investigators: What questions would I ask to include more information in the report?
- For Advisors: What types of questions/comments do you have if you're working with the Complainant? Respondent?

159

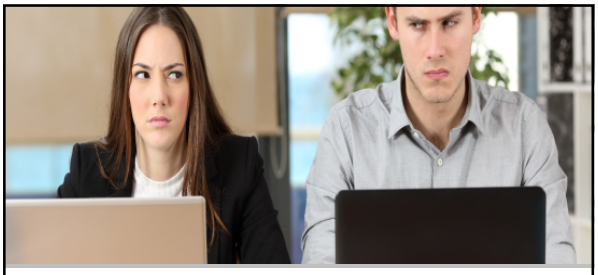
Back to our Hypothetical

Your task: plan interview questions for Tessa

Formal Complaint

Filed by Danielle on May 1, 2021 – the incident was April 3, 2021

"On April 3, 2021, my then-boyfriend, Michael, sexually assaulted me in my apartment. We were in my bedroom and I was trying to sleep after a long night of going out with Michael and some friends. Michael knows I'm against premarital sex, but that night I was very intoxicated and he had sex with me, even though I was too incapacitated to consent and can't remember everything."



Michael's Turn

Time to ask questions of Michael!

Preparing the Case File

Parties review and respond

Redactions

Is it relevant?

- Sexual predisposition or prior sexual behavior of complainant
- Privileged information where privilege has not been waived
- Medical records where no consent has been granted

164

What do you include?

Pretty much everything

- Interview summaries
- Evidence gathered
- Do you prepare a draft report to go with the evidence for review?

165

How do you share it?

Technology or not?

- Privacy is important.
- Technology – can limit ability to print, share, download, screenshot?
- Use watermarks for Complainant/Respondent file?
- In-person review?
- Non-disclosure agreements for technological access?
- How can advisors access it?

166

Draft Report

Can't finalize it until you give the opportunity to review and respond (10 days)

- "Fairly summarizes relevant evidence"
  - What you summarize is likely narrower than what you include in the file for review

167

Report Includes?

Can't finalize it until you give the opportunity to review and respond (10 days)

- Procedural History
- Summary of Allegations
- Relevant Policy Language
- Investigation Overview
  - Witnesses – Who you spoke with, who declined to participate, who never responded, who was requested wasn't relevant (and why)
  - Evidence – What you gathered, what you tried to gather but couldn't, what you were asked to gather but didn't (and why)

168

Synthesis of Information

How can you make heads or tails of what is in the full file?

- Do you want to detail what each witness said?
- Do you want to synthesize and summarize undisputed facts?
- Do you want to do a combination, depending on whether a particular issue is disputed or undisputed?
- Do you want to intersperse evidence, or make it a separate section?

169

Report Attachment

All relevant evidence should be attached – and relevant is a broad term.

- Put it in a single PDF.
- Make a table of contents.
- Bonus: Make the table of contents clickable.
- Refer to relevant documents when you write your summary.
  - My ideal world: Every sentence has a citation to the attachments.

170

Party Responses

What do you do with them?

- Do you need to conduct follow up interviews or request additional evidence?
- (Do you need to then circle back and do another round of evidence review/response?)
- Integrate relevant portions of the responses into your summaries.
- Attach the responses.

171

Report Editing Exercises

See the packet of fun.

- Individually, please take 5-10 minutes and review the editing samples on pages 20-23. Identify issues and suggest corrections in writing.
- When you're done, please get together in small groups at your table and review the exercise.

172

What is Relevant?

Review of Relevance (1 of 9)

- Regulations do not define "relevant," but tells us what is not relevant
- Per *Regulations* 34 C.F.R. 106. 45(b)(6)(i):
  - "Only relevant cross-examination and other questions may be asked of a party or witness."
  - "**Before a complainant, respondent, or witness answers** a cross-examination or other question, **the decision-maker must first determine whether the question is relevant** and explain any decision to exclude a question as not relevant."

Review of Relevance (2 of 9)

Under the **preponderance of the evidence/clear and convincing** standard:

- Does this help me in deciding if there was more likely than not a violation/highly probable to be a violation?
- Does it make it more or less likely/does it make it highly probable?
- Why or why not?

If it doesn't move this dial: likely not relevant.

Review of Relevance (3 of 9)

- **Recipient** must ensure that "all *relevant* questions and evidence are admitted and considered (though varying weight or credibility may of course be given to particular evidence by the decision-maker)." (Preamble, p. 30331)
- A recipient may not adopt rules excluding certain types of relevant evidence (Preamble, p. 30294)
- May not adopt Rules of Evidence.

Review of Relevance (4 of 9)

What is NOT relevant:

Questions and evidence about the **complainant's sexual predisposition or prior sexual behavior are not relevant, UNLESS**

1) Such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
2) If the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

[34 C.F.R. 106.45(b)(6)(i)]

Review of Relevance (5 of 9)

What is NOT relevant:

Information **protected by a legal privilege**

[34 C.F.R. 106.45(b)(1)(x)]

This will vary state-by-state, so check with your legal counsel. Most common in this context are:

a) Attorney-client privilege
b) Doctor-patient/counselor-patient
c) Fifth Amendment/right not to incriminate self (not really applicable in this venue, but sometimes raised and cannot force to answer questions)

Review of Relevance (6 of 9)

What is NOT relevant:

A party's **treatment records** (absent voluntary written wavier by the party)

[34 C.F.R. 106.45(b)(5)(i)]

- PRACTICE TIP – LOOK for that written waiver in the materials provided to you

Review of Relevance (7 of 9)

What is NOT relevant:

No improper inference from a party or witness **declining to participate** in cross-examination.

[34 C.F.R. 106.45(b)(6)(i)]

Review of Relevance (8 of 9)

- Consideration of past statements of a party or witness that does not answer questions on cross-examination.
  - Preamble
  - Open Source and September 4, 2020 Q&A
  - *VRLC* and August 24, 2021 OCR guidance letter

Discuss with your legal counsel and Title IX Coordinator.

Review of Relevance (9 of 9)

If you maintain the prohibition AND the statement IS the sexual harassment…

When it constitutes the sexual harassment, it is not the Respondent's "statement" as used in 34 C.F.R. 106.45(b)(6)(i), because the verbal conduct constitutes part or all of the allegations of sexual harassment itself.

https://www2.ed.gov/about/offices/list/ocr/blog/index.html (May 22, 2020 blog post)

VRLC v. Cardona (1 of 3)

Submission to Cross-Examination

- Aug. 2020 regs prohibited consideration of statements from parties/witnesses if not subjected to cross-examination (34 CFR 106.45(b)(6)(i))
- Sept. 4, 2020 Q&A clarified that failure to answer one question was a failure to submit to cross-examination

VRLC v. Cardona (2 of 3)

"Arbitrary & Capricious"

- Mass. Federal decision vacated regulation requiring submission to cross-examination for consideration of statements (*VRLC v. Cardona,* June 28, 2021)
- August 24, 2021 letter providing guidance that, pursuant to *VRLC* decision, OCR will "immediately cease enforcement" of this specific provision in 34 CFR 106.45(b)(b)(i)

VRLC v. Cardona (3 of 3)

*****Work with legal counsel to assess risk*****

- Pending cases
- Breach of contract concerns

- On appeal
  - Texas has been permitted to appeal this decision, along with several individuals who have an interest in the outcome

Decorum During Hearings

- Relevant questions must not be abusive
- Enforcement of decorum must be applied evenhandedly
- "…where the substance of a question is relevant, but the manner in which an advisor attempts to ask the question is harassing, intimidating, or abusive (for example, the advisor yells, screams, or physically 'leans in' to the witness's personal space), the recipient may appropriately, evenhandedly enforce rules of decorum that require relevant questions to be asked in a respectful, non-abusive manner." (Preamble, 30331)
- The decision maker may remove any advisor, party, or witness who does not comply with expectations of decorum. (Preamble 30320)

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Practice Making Relevance Determination

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Relevance Determination Hypotheticals (1 of 2)

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Okay, decision-maker, is this question relevant?

For practice, we will pose these in cross-examination format. As discussed before, the traditional cross-examination style is aimed at eliciting a short response, or a "yes" or "no," as opposed to open-ended question which could seek a narrative (longer) response.

For example, instead of, "How old are you?" the question would be, "You're 21 years old, aren't you?"

Relevance Determination Hypotheticals (2 of 2)

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For each practice hypothetical, ask yourself:

Is this question relevant or seeking relevant information?

- Why or why not?
- Does the answer to this depend on additional information?
- If it is so, what types of additional information would you need to make a relevance determination?

Relevance Determination Hypotheticals Disclaimer

Disclaimer: The following hypotheticals are not based on any actual cases we have handled or of which we are aware. Any similarities to actual cases are coincidental.

Practice Hypothetical #1

Question from Respondent's Advisor to Complainant:

Since you can't remember your conversations with Michael that night, it is possible that you asked him to make love to you, right?

Practice Hypothetical #2

Question from Complainant's Advisor to Respondent:

Since you acknowledged that you "pushed too hard before," it makes sense that you pushed too hard on April 3rd, doesn't it?*

*Referring to March 4, 2021 text message

Practice Hypothetical #3

Question from Respondent's Advisor to Complainant:

You never went to the hospital for a SANE exam, did you?

Practice Hypothetical #4

Question from Complainant's Advisor to Respondent:

Prior girlfriends have told you that you pushed too hard sexually, haven't they?

Practice Hypothetical #5

Question from Respondent's Advisor to Complainant:

Tessa, I understand that now you want to wait until you are married to have sex, but you're aren't a virgin, are you?

Practice Hypothetical #6

Question from Complainant's Advisor to Respondent:

Michael, you're not a virgin, are you?

Practice Hypothetical #7

Question from Complainant's Advisor to Complainant:*

Tessa, you brought your counseling records today, correct?

*Questioning of a party by their own advisor is not required by the regulations, and may not be part of your process.

Practice Hypothetical #8

Question from Respondent's Advisor to Complainant:

Tessa, did you tell your advisor (who is not an attorney) during break that you thought today was not going well for you?

Practice Hypothetical #9

Question from Complainant's Advisor to Respondent:

Michael, did you tell your attorney during break that you thought today was not going well for you?

Review of Tasker/Murphy Investigation Report

Things to Note

- Reported that Respondent engaged in Title IX Sexual Assault on April 3, 2021
- Incapacitation
  - What information does the decision-maker need?
  - What questions are the advisors likely to ask?

Opportunities to Practice

Questioning of Tessa

- DM questioning of Tessa
- Relevance determinations for cross-exam of Tessa by Michael's advisor

Questioning of Michael

- DM questioning of Michael
- Relevance determination for cross-exam of Michael by Tessa's advisor

LIVE CROSS-EXAMINATION: Theory and Practice

Cross Tools: What are the goals of cross-examination?

- Obtain **factual admissions** helpful to your party's case.
- **Corroborate the testimony** of your party's witnesses.
- Minimize the other party's case by ***impeachment*** *of witness* being questioned.
- Minimize the other party's case by ***impeachment*** *of other witnesses* through the witnesses being questioned.
- Reduce **confusion and seek truth**.

Cross Tools: Impeachment 1 of 5

- What bias might a witness have?
- Do you understand the relationship between the witness and the parties?
- Experts: getting paid for testimony
  - You charge fees based on an hourly rate?
  - You were paid to produce a written report?
  - Based on this report, you're testifying today?
  - You're charging money for each hour you're here?

Cross Tools: Impeachment 2 of 5

- Perception and Recall
  - What is the witness's perception of the facts?
    - Has time impacted recall or ability to remember clearly?
    - How many times has the witness talked to a party about this case?
    - Was there anything that impacts the person's physical or mental ability to perceive or recall facts accurately?
  - Does the witness form a conclusion without knowing certain information?

Cross Tools: Impeachment 3 of 5

- Example: Intoxication level information from witness.
  - You did not see the consumption, or keep track of how long the party was consuming alcohol?
  - You did not measure the alcohol poured by ____ at the party?
  - Your statements are based on information provided by others? the other party?
  - Party's statements were made after they had been drinking alcohol (consuming other drugs, etc)?

Remember: Determine whether the person is not speaking from personal knowledge.

Cross Tools: Impeachment 4 of 5

- Inconsistency in statements
  - If a fact was very important, why is the hearing the first time it has come up?
  - What possible reasons might the witness have for changing their testimony?
  - Did a witness receive coaching from the party or others between making one statement and another?
  - Has the witness's perspective or motive changed between statements?
  - Does changing this fact help the other party's case?

Cross Tools: Impeachment 5 of 5

- Lack of Corroborating Evidence
  - Example: Card swipes
    - o You said that you entered the building by yourself at 1:00 a.m.
    - o Security footage doesn't show you entering.
    - o Your card swipe record doesn't show you entering.
    - o Can you help me understand why there is a discrepancy?

Advisors: Thought Process

Advocating for your party in the Hearing 1 of 7

Preparation

- Review the entire investigation hearing report
- Review all evidence (some may have non-relevant evidence also—know if you disagree with any relevancy determinations made by the investigator)
- Meet with your party to review what your party thinks and wants
- Discuss strategy

Advocating for your party in the Hearing 2 of 7

Preparation

- Realize that your party may want to take a more aggressive approach – If you are not comfortable with the approach, discuss it with the party and check to see if you can advise your party
- Discuss the expectations of decorum vs. the expectations of questioning the other party and witness

Advocating for your party in the Hearing 3 of 7

Preparation

- Determine who your witnesses are and whether your party thinks they will show up to the hearing
- Be careful of the line between asking a party to participate and explain the importance of their statements vs. coercing a party to participate who has the right not to participate

Advocating for your party in the Hearing 4 of 7

Preparation

- Consider a script
  - List each allegation and policy definition/elements for the policy violation (e.g., sexual assault—know which definition and what must be met to show sexual assault under the policy)
  - Standard of review: this can be helpful to have written out so that you can support relevancy determinations for your questions to show why relevant

Advocating for your party in the Hearing 5 of 7

The Hearing

- Ask one question at a time and wait for the Decision-Maker to determine if it is relevant
- If the Decision-Maker has a question about why the question is relevant, be prepared to answer that question (see preparation)
- Be respectful of the process so that you can effectively ask your party's questions – if you think you or someone else is becoming too heated, ask for a break to regroup

Advocating for your party in the Hearing 6 of 7

The Hearing

- Be aware that the other advisor may not be as prepared as you are and the decision-maker has a duty to ask questions the advisor does not—this doesn't mean the decision-maker is biased or trying to help the other side – you may not like it, but it's a requirement for the decision-maker

Advocating for your party in the Hearing 7 of 7

Post-hearing

- The decision-maker will issue a decision to both parties at the same time.
- Under the regulations, the advisor is not required to have any further role in the process (this may be especially true if the advisor is appointed by the institution)
- Other advisors (attorney or parent), may choose to work with the party to appeal on the bases listed in the decision

How Do You Choose Questions?

What Don't You Know?

Decision-makers: If you need to know it to make a determination, you have the obligation to ask the question.

Advisors: If you don't know the answer to the question before you ask it, it may harm your party. Weigh the benefits of asking carefully before proceeding.

What Do You Know?

Decision-makers: It can be helpful to ask questions when you think you already know the answer, to ensure that you are able to sequence events correctly and that you understand nuances in the testimony.

Advisors: If the testimony is going to help tell your party's story, it can be helpful to bring it to the forefront of the decision-maker's mind.

Disputed Facts?

Decision-makers: Question on disputed facts so that you can weigh credibility, make a determination, and explain your rationale.

Advisors: Highlight areas for the decision-maker where the other party's story doesn't make sense, by asking questions to discredit the witness, or to provide corroborating evidence for your party's story.

Make Your Plans

- Decision-makers:
  - What themes do you wish to draw out?
  - What disputed points do you need information on?
  - Who will cover which topics?
  - Which questions will be asked?
- Advisors:
  - Use this discussion to help frame your questions. What key points do you think need to be addressed with each witness to highlight your party's story?
  - What information is most critical of your party's story, and what can help highlight the weaknesses in that information as compared to the strengths in your information?

Pick a Goal

- Consider choosing a goal for yourself to try to reach through questioning:
  - Advisor: “By questioning Sarah, I will try to show that Respondent was more aware of Complainant’s intoxication level than the report suggests.”
  - Decision-maker: “In questioning Complainant, I will try to better understand what effects she felt from her head injury versus intoxication.”
  - Etc.

Break & Preparation for Practice Session

Decision-Maker Hearing Practice and Debrief

Recent Title IX Updates

Summer 2021 Title IX Updates

Two Major Updates:

- **Q&A:** July 20, 2021 Q & A on the Title IX Regulations on Sexual Harassment
  - https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf
- ***VRLC v. Cardona*** and August 24, 2021 Letter to Students, Educators, and other Stakeholders re: VLRC v. Cardona (see prior slides on this subject)
  - Decisions issued on July 28, 2021 and Aug. 10, 2021
  - www2.ed.gov/about/offices/list/ocr/docs/202108-titleix-VRLC.pdf

Q&A #13 – Appropriate Standard

Question 13:

What is the appropriate standard for evaluating alleged sexual harassment that occurred before the 2020 amendments took effect?

Q.13 Background

- August 5, 2020 Blog Post – "The Rule does not apply to schools' responses to sexual harassment that allegedly occurred prior to August 14, 2020. The Department will only enforce the Rule as to sexual harassment that allegedly occurred on or after August 14, 2020. With respect to sexual harassment that allegedly occurred prior to August 14, 2020, OCR will judge the school's Title IX compliance against the Title IX statute and the Title IX regulations in place at the time that the alleged sexual harassment occurred."

Doe v. Rensselaer Polytechnic

- 2020 WL 6118492 (Oct. 16, 2020)
- Not retroactive enforcement to require regs to be used for hearings occurring after August 14, 2020
- Blog post is not an "authoritative statement" entitled to deference
- Court not willing to let disciplinary proceedings continue unless parties agree to use new procedure

Back to Q.13 (9 mos. after ***RPI***)

- "[A] school must follow the requirements of the Title IX statute and the regulations that were in place at the time of the alleged incident."
- 2020 amendments do not apply to SH occurring before August 14, 2020, even where the complaint is filed after that date
- Our question: is this meant to include *procedures* as well as *substance*?

Q&A #24 – Formal Complaints

Question 24:

If a complainant has not filed a formal complaint and is not participating in or attempting to participate in the school's education program or activity, may the school's Title IX Coordinator file a formal complaint?

- YES – it may be a violation if the Title IX Coordinator *does not do so*
- Example in the Answer:
  - Actual knowledge of a pattern of alleged SH by a perpetrator in a position of authority

Q&A – "Put simply…"

Per the most recent guidance:

> "Put simply, there are circumstances when a Title IX Coordinator may need to sign a formal complaint that obligates the school to initiate an investigation regardless of the complainant's relationship with the school or interest in participating in the Title IX grievance process."

Q&A – Support Persons? (1 of 2)

In previous trainings…

- Advised that support persons were not permitted in hearings based on Preamble
  - "The sensitivity and high stakes of a Title IX sexual harassment grievance process weigh in favor of protecting the confidentiality of the identity and parties to the extent feasible (unless otherwise required by law), and the Department thus declines to authorize that parties may be accompanied to a live hearing by persons other than the parties' advisors, or other persons for reasons 'required by law'…" (Preamble, p. 30339)

Q&A – Support Persons? (2 of 2)

Example Language in July 20, 221 Q&A (p. 46)

- Example Policy 2: The decision-maker will discuss measures available to protect the well-being of parties and witnesses at the hearing. These may include, for example, use of lived names and pronouns during the hearing, including names appearing on a screen; **a party's right to have their support person available to them at all times during the hearing (in addition to their advisor);** and a hearing participant's ability to request a break during the hearing, except when a question is pending. (Emphasis added).

VRLC Reminder

Submission to Cross-Examination

- Aug. 2020 regs prohibited consideration of statements from parties/witnesses if not subjected to cross-examination (34 CFR 106.45(b)(6)(i))
- Sept. 4, 2020 Q&A clarified that failure to answer one question was a failure to submit to cross-examination
- August 24, 2021 letter providing guidance that, pursuant to *VRLC* decision, OCR will "immediately cease enforcement" of this specific provision in 34 CFR 106.45(b)(b)(i)

Questions?

Additional information available at:

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

Free upcoming webinars at www.bricker.com/events

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